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IRIS

Legal Observations
of the European Audiovisual Observatory

IRIS 2010-10

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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

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### European Court of Human Rights: Aksu v. Turkey

In 2000 the Turkish Ministry of Culture published a book entitled "The Gypsies of Turkey", written by an associate professor. A few months later Mr. Mustafa Aksu, who is of Roma/Gypsy origin, filed a petition with the Ministry of Culture on behalf of the Turkish Gypsy associations. In his petition, he stated that in twenty-four pages of the book Gypsies were presented as being engaged in illegitimate activities, living as "thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers" and being polygamist and aggressive. Gypsy women were presented as being unfaithful to their husbands and several other expressions were humiliating and debasing to Gypsies. Claiming that the expressions constituted criminal offences, Mr. Aksu requested that the sale of the book be stopped and all copies seized. During the same period Mr. Aksu also took an action in regard to a dictionary entitled "Turkish Dictionary for Pupils" which was financed by the Ministry of Culture. According to Mr. Aksu, certain entries in the dictionary were insulting to, and discriminatory against, Gypsies. The Ministry of Culture and later the judicial authorities in Ankara however rejected these complaints and Mr. Aksu lodged two applications with the European Court of Human Rights. He submitted that the remarks in the book and the expressions in the dictionary reflected clear anti-Roma sentiment, that he had been discriminated against on account of his ethnic identity and that his dignity had been harmed because of the numerous passages in the book which used discriminatory and insulting language. He argued that that the refusal of the domestic courts to award compensation demonstrated an obvious bias against the Roma and he therefore invoked Articles 6 (fair trial) and 14 (non-discrimination) of the Convention. The Court considered, however, that it was more appropriate to deal with the complaints under Article 14 of the Convention in conjunction with Article 8 (right of privacy) of the Convention.

In its judgment of 27 July 2010 the Court began by referring to the vulnerable position of Roma/Gypsies, the special needs of minorities and the obligation of the European states to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves, but also to preserve a cultural diversity of value to the whole community. The Court also emphasised that racial discrimination requires that the authorities exert special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat. Regarding the book, the Court accepted that the passages and remarks cited by Mr. Aksu, when read on their own, appear to be discriminatory or insulting. However, when the book is examined as a whole it is not possible to conclude that the author acted with bad faith or had any intention of insulting the Roma community. The conclusion to the book also clarified that it was an academic study that had conducted a comparative analysis and focused on the history and socio-economic living conditions of the Roma people in Turkey. The passages referred to by Mr. Aksu were not the author's own comments, but examples of the perception of Roma people in Turkish society, while the author sought to correct such prejudices and make it clear that the Roma people should be respected. Bearing these considerations in mind and stressing its subsidiary role, which leaves a broad margin of appreciation to the national authorities, the Court was not persuaded that the author of the book had insulted the applicant's integrity or that the domestic authorities had failed to protect the applicant's rights. Regarding the dictionary, the Court observed that the definitions provided therein were prefaced with the comment that the terms were of a metaphorical nature. Therefore it found no reason to depart from the domestic courts' findings that Mr. Aksu's integrity was not harmed and that he had not been subjected to discriminatory treatment because of the expressions described in the dictionary. The Court concluded that in the present cases it cannot be said that Mr. Aksu was discriminated against on account of his ethnic identity as a Roma or that there was a failure on the part of the authorities to take the necessary measures to secure respect for the applicant's private life.

Three dissenting judges, including the president of the second section of the Court, expressed their concern about the approach of the majority, as various passages of the book convey a series of highly discriminatory prejudices and stereotypes that should have given rise to serious explanation by the author and are more forceful in tone than the work's concluding comments. The dissenting judges also found that the dictionary contained seriously discriminatory descriptions and that in a publication financed by the Ministry of Culture and intended for pupils, the Turkish authorities had an obligation to take all measures to ensure respect for Roma identity and to avoid any stigmatisation. They also referred to data and reports collected by the European Union's Fundamental Rights Agency (FRA) showing that more vigilance is needed towards Roma. These arguments and references however could not persuade the (slim) majority of the Court, which accepted that the publication of the book and the dictionary were not to be considered as violating the rights of Mr. Aksu under Articles 14 and 8 of the Convention.

• Judgment by the European Court of Human Rights (Second Section), case of Aksu v. Turkey, No. 4149/04 and 41029/04 of 27 July 2010
http://merlin.obs.coe.int/redirect.php?id=12723 EN

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## European Court of Human Rights: Sanoma Uitgevers B.V. v. the Netherlands

On 31 March 2009 the Chamber of the Third Section of the European Court of Human Rights (ECtHR) delivered a highly controversial judgment in the case of Sanoma Uitgevers B.V. v. the Netherlands. In a 4/3 decision, the Court was of the opinion that the order to hand over a CD-ROM with photographs in the possession of the editor-in-chief of a weekly magazine claiming protection of journalistic sources did not amount to a violation of Article 10 of the European Convention of Human Rights. The finding and motivation of the majority of the Chamber was not only strongly disapproved of in the world of media and journalism, but was also firmly criticised by the dissenting judges. Sanoma Uitgevers B.V. requested a referral to the Grand Chamber, this request being supported by a large portion of the media, NGOs advocating media freedom and professional organisations of journalists. On 14 September 2009, the panel of five Judges decided to refer the case to the Grand Chamber in application of Article 43 of the Convention. By referring the case to the Grand Chamber the panel accepted that the case raised a serious question affecting the interpretation or application of Article 10 of the Convention and/or concerned a serious issue of general importance.

On 14 September 2010, the 17 judges of the Grand Chamber unanimously reached the conclusion that the order to hand over the CD-ROM to the public prosecutor was a violation of the journalists' rights to protect their sources. It noted that orders to disclose sources potentially had a detrimental impact, not only on the source, whose identity might be revealed, but also on the newspaper or publication against which the order was directed, whose reputation might be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who had an interest in receiving information imparted through anonymous sources. Protection of journalists' sources is indeed to be considered "a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected". In essence, the Grand Chamber was of the opinion that the right to protect journalistic sources should be safeguarded by sufficient procedural guarantees, including the guarantee of prior review by a judge or an independent and impartial decision-making body, before the police or the public prosecutor have access to information capable of revealing such sources. Although the public prosecutor, like any other public official, is bound by the requirements of basic integrity, in terms of procedure he or she is a "party" defending interests potentially incompatible with journalistic source protection and can hardly be seen as being objective and impartial so as to make the necessary assessment of the various competing interests. Since in the case of Sanoma Uitgevers B.V. v. the Netherlands an ex ante guarantee of a review by a judge or independent and impartial body was not in existence, the Grand Chamber was of the opinion that "the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources". Emphasizing the importance of the protection of journalistic sources for press freedom in a democratic society, the Grand Chamber of the European Court found a violation of Article 10 of the Convention. The judgment implies that member states of the Convention should build procedural safeguards into their national law in terms of judicial review or other impartial assessment by an independent body based on clear criteria of subsidiarity and proportionality and prior to any disclosure of information capable of revealing the identity or the origin of journalists' sources.

• Judgment by the European Court of Human Rights (Grand Chamber), case of Sanoma Uitgevers B.V. v.The Netherlands, No. 38224/03 of 14 September 2010
http://merlin.obs.coe.int/redirect.php?id=12724 EN FR

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## Committee of Ministers: Declaration on Network Neutrality

On 29 September 2010 the Committee of Ministers of the Council of Europe adopted a Declaration on network neutrality. The Declaration focuses on the protection and promotion of human rights on the Internet and the possible disturbance thereof by the absence of network neutrality.

The Declaration notes the significant reliance of people on the internet as a tool for their everyday activities. It acts as a tool for communication, information, knowledge and commercial transactions and

thus helps to ensure, inter alia, freedom of expression and access to information, pluralism and diversity. These rights might however be adversely affected by non-transparent traffic management, content and services' discrimination or impeding connectivity of devices.

The Declaration stresses that access to infrastructure, irrespective of which device the end-user utilises, is a prerequisite for the greatest possible access to Internet-based content, applications and services. Due to an exponential increase in Internet traffic and the use of bandwidth, operators of electronic communication networks may have to manage Internet traffic. This could possibly affect the quality of service, the development of new services, network stability and resilience or the combating of cybercrime.

In so far as traffic management is necessary in the context set out above, the Declaration notes that it should not be seen as a departure from the principle of network neutrality. Any exceptions to this principle should be considered with great circumspection and need to be justified by overriding public interests. The Committee of Ministers calls for attention to be paid to the provisions of Article 10 of the European Convention on Human Rights and the related case law of the European Court of Human Rights. It thereby also refers to the European Union regulatory framework on electronic communications.

According to the Declaration, the users and providers of services, applications or content should be able to gauge the impact of network management measures on their fundamental rights and freedoms and be notified of their existence. Those measures should be proportionate, appropriate and avoid unjustified discrimination; they should be subject to periodic review and not be maintained longer than strictly necessary. Procedural safeguards, in the form of adequate avenues to challenge network management decisions, should be provided for.

The Committee concludes the Declaration by noting its commitment to the principle of network neutrality and emphasising the need for the compliance of any measure that breaches the aforementioned principle with the requirements set above.

• Declaration of the Committee of Ministers on network neutrality, adopted on 29 September 2010
http://merlin.obs.coe.int/redirect.php?id=12789 EN FR

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## Parliamentary Assembly: Recommendation on Intellectual Property Rights in the Digital Society

On 12 March 2010, the Parliamentary Assembly adopted Recommendation 1906 (2010), which identifies certain consequences of the development of the internet society that need further investigation. These are analysed below.

A solution has not yet been developed that sufficiently covers the issues of protecting copyright and neighbouring rights and combating piracy in the digital environment. The Committee on Culture, Science and Education presented a draft recommendation in order to initiate discussion about a model that harmonises the rights of creators, investors and internet users. The Parliamentary Assembly adopted the text in a slightly revised version after the publication of a report of the Committee on Economic Affairs and Development.

The Recommendation has been formed against the background of the ever-developing digital society. It has never before been so easy to share files on the interactive "Web 2.0". A side-effect of these technological advances is the possible conflict of interests on the internet. In the Report of the Committee on Culture, Science and Education, these interests are described as follows. Copyright holders want to receive fair remuneration for the use of their works, while at the same time access to existing works on which to build is also necessary. In addition, investors want to recover the costs of their productions and, finally, internet users have become used to unrestricted access to - largely - free content, meaning that copyrights are often not respected. As a result, all cultural sectors are facing rapidly declining sales.

This is not the only consequence. The Parliamentary Assembly indicates that, in the absence of European standards, States are developing their own laws to combat piracy. The Recommendation points out that these can seriously infringe important rights of internet users, such as privacy and freedom of information. This in turn has lead to the appearance of counter-movements (the so-called "Pirate Parties"), which combat overly far-reaching State intervention in user rights.

As said above, the Recommendation stresses that the current legal framework does not seem capable of finding a balance between the interests of all the parties concerned. Since democracy, human rights and the rule of law are of the utmost importance for the Council of Europe, it can play a significant role in developing new standards or adapting existing ones. The Parliamentary Assembly has formulated seven points of interest. These concern copyright in the light of technical, economic and social changes.

A flexible framework that takes the interests of the parties concerned into account must be established. According to the Recommendation, the Committee of Ministers should initiate studies to this end. How fair remuneration for the creators can be guaranteed should also be explored. In this respect, new business models for the offer of legal content should be made more attractive.

Furthermore, a debate should be opened between interested groups to reflect on the system of exceptions and limitations. These are intended to guarantee freedom of expression and information. Another point mentioned in the Recommendation is the development of contractual initiatives to provide improved access to works and their content. The feasibility of compulsory collective management systems should also be examined. Such systems make it possible to guarantee access to works even if it is difficult to clear the rights (for example in the case of orphan works, where the necessary permission to use the work cannot be obtained from the untraceable author).

Finally, the legal status of Internet stakeholders (such as search engines) regarding compliance with copyright rules should be evaluated.

• Doc. 12101, report of the Committee on Culture, Science and Education, 7 January 2010, rapporteur: Mr. Arnaut
http://merlin.obs.coe.int/redirect.php?id=12733 EN FR

• Doc. 12141, Opinion of the Committee on Economic Affairs and Development, 10 February 2010, rapporteur: Mr. Lambert
http://merlin.obs.coe.int/redirect.php?id=12734 EN FR

• Recommendation 1906 (2010) of the Parliamentary Assembly, Rethinking creative rights for the Internet age, 12 March 2010
http://merlin.obs.coe.int/redirect.php?id=12735 EN FR

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## Parliamentary Assembly: Potential Role for Media in Protection of Roma

On 22 June 2010, the Parliamentary Assembly of the Council of Europe (PACE) adopted its Resolution 1740 (2010) and Recommendation 1924 (2010), both entitled, "The situation of Roma in Europe and relevant activities of the Council of Europe". The texts were adopted in response to recent surges of discrimination and violence against the Roma throughout Europe. Indeed, "given the urgency of improving the situation of Roma in a wide range of areas", the PACE has decided to revisit the topic "in more depth in due course" (Resolution 1740 (2010), para. 25).

Both texts examine a range of legal, political and other measures, as well as institutional arrangements, at the international and national levels, which share the aim of redressing the situation of the Roma. The Resolution is more expansive and more detailed than the Recommendation; it sets out priority issues and groups them along thematic lines. Its thematic focuses include education, housing, employment and health care.

It also contains provisions that are relevant for the media. For instance, the PACE urges Member States of the Council of Europe to, inter alia, "promote a positive image of diversity and address stereotypes and prejudices, including those linked to gender, using for instance the Dosta! campaign developed by the Council of Europe". It also urges Member States to "react strongly to racist discourse by public officials; [04046] and tackle hate speech vis-à-vis Roma, whether occurring in the media, politics or in civil society" (Resolution, para. 15.8).

The Resolution states that "all action intended to improve the situation of Roma" should be based "at every stage of the process [,] on prior and genuine consultation and co-operation with the Roma themselves" (para. 15.9). Member States are also urged to "promote the use and development of Roma culture, language and lifestyle" (para. 15.11), which - although it is not explicitly stated in the text - could obviously be done via the media.

The Recommendation, for its part, does not contain any provisions focusing specifically on the media.

• The situation of Roma in Europe and relevant activities of the Council of Europe, Resolution 1740 (2010), Parliamentary Assembly of the Council of Europe, 22 June 2010
http://merlin.obs.coe.int/redirect.php?id=12738 EN FR

• The situation of Roma in Europe and relevant activities of the Council of Europe, Recommendation 1924 (2010), Parliamentary Assembly of the Council of Europe, 22 June 2010
http://merlin.obs.coe.int/redirect.php?id=12739 EN FR

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## Parliamentary Assembly: Texts Countering Discrimination on Basis of Sexual Orientation and Gender Identity

Following the lead of the Committee of Ministers of the Council of Europe (CM), the Parliamentary Assembly of the Council of Europe (PACE) recently turned its attention to countering discrimination on the basis of sexual orientation and gender identity. On 29 April 2010, it adopted its Resolution 1728 (2010) and Recommendation 1915 (2010), both entitled, "Discrimination on the basis of sexual orientation and gender identity". Like the CM's Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010 (see IRIS 2010-8: 1/3), the

PACE texts also contain a number of provisions concerning freedom of expression, "hate speech" and the media.

PACE Resolution 1728(2010) regards "physical and verbal violence (hate crimes and hate speech)" and "undue restrictions" on freedom of expression, assembly and association as "major concerns" in the context of discrimination based on sexual orientation and gender identity (para. 3, but see also para. 6). It also identifies "hate speech by certain political, religious and other civil society leaders" and "hate speech" disseminated by the media or the Internet as being of "particular concern" (para. 7). It further "stresses that it is the paramount duty of all public authorities not only to protect the rights enshrined in human rights instruments in a practical and effective manner, but also to refrain from speech likely to legitimise and fuel discrimination or hatred based on intolerance" (ibid.).

These observations form the basis of a number of action lines for Member States of the Council of Europe, e.g. to ensure that the fundamental rights of lesbian, gay, bisexual and transgender (LGBT) people, including freedom of expression, are respected in accordance with international human rights standards (para. 16.1). Another example is that Member States should "condemn hate speech and discriminatory statements and effectively protect LGBT people from such statements while respecting the right to freedom of expression", as guaranteed by the European Convention on Human Rights and the case-law it has engendered (para. 16.4). Finally, in this specific respect, Member States are called upon to "introduce or develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of LGBT persons", especially in targeted professions, including the media (para. 16.12).

PACE Recommendation 1915(2010), for its part, does not engage with substantive issues; instead, it is preoccupied with identifying institutional arrangements and procedural measures which could usefully advance the broader aims of both PACE texts and the CM Recommendation.

• "Discrimination on the basis of sexual orientation and gender identity", Resolution 1728 (2010), Parliamentary Assembly of the Council of Europe, 29 April 2010
http://merlin.obs.coe.int/redirect.php?id=12740 EN FR

• "Discrimination on the basis of sexual orientation and gender identity", Recommendation 1915 (2010), Parliamentary Assembly of the Council of Europe, 29 April 2010
http://merlin.obs.coe.int/redirect.php?id=12741 EN FR

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## EUROPEAN UNION

### Court of Justice of the European Union: Private Copying Levy in the Eye of the Storm

On 21 October 2010 the European Court of Justice rendered its judgement in case C-467/08 Padawan v SGAE, calling the current application of Spanish private copying levy into question.

The judgment maintains that the Spanish private copying levy is abusive and that it does not meet with what Directive 2001/29/EC establishes. The Court ruled that the levy should only be charged on individuals, but not legal entities, companies or national authorities, which should be exempted.

Firstly it should be clarified, as opposed to what has been implied in the media, that the ruling of the European Court of Justice does not prohibit the existence of a private copying levy in Spain, as the application of a fee to compensate the rightsholders for private copying is recognised under Directive 2001/29/EC.

What the ruling of the European Court of Justice actually prohibits is the indiscriminate application of the private copying levy to each and every one of the equipment and devices that can store works protected under copyright, regardless of the intended use that such equipment or devices would eventually receive.

The purpose of the levy is to compensate rightsholders for damage suffered by the private copying of protected works. The indiscriminate application of a levy on all types of equipment and devices, including those that will be used for purposes clearly unrelated to private copying (e.g. when acquired by a company, a professional or a public administration that will not use them for private copying purposes), does not respect the need for a direct correspondence between the fair compensation of rightsholders and the private copying exception.

The ruling will not mean the elimination of the levy in Spain. In fact, it confirms the validity of systems of private copy compensation, including the system under Spanish law, but will probably lead, in the short term, to a modification of the Spanish legislation forbidding the indiscriminate application of the private copying levy to all equipment and devices regardless of the purpose for which they will be used.

Moreover, the decision opens the door to possible claims for repayment of the amounts unduly paid to collecting societies, although it is not clear yet how events will develop in practice.

• Case C-467/08 Padawan v SGAE, 21 October 2010
http://merlin.obs.coe.int/redirect.php?id=12743 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT RO SK SL SV

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## European Commission: Communication on Opportunities and Challenges for European Cinema in the Digital Era

On 24 September 2010 the European Commission published a new Communication on Opportunities and Challenges for European Cinema in the Digital Era. The document outlines the new policy issues for European cinemas raised by the impact of the digital revolution and announces a new action plan intended to encourage digital transition in cinemas across the EU.

The major obstacle to digital take-up in European cinemas is created by the fact that, although the most important investment in digital equipment has to be borne by exhibitors, savings will largely be made on the distribution side. This is compounded by the fact that, as opposed to cinema chains and multiplexes, which can more easily bear the costs of digitisation, small independent (frequently arthouse) cinemas are not always able to foot the bill; yet Europe's linguistic and cultural diversity depends on the survival of Europe's unique network of cinemas. Due to the diversity of approaches taken across Europe towards cinematographic exhibition, no one-size-fits-all solution to the challenges of the digital era can exist.

In this context, areas of importance in which the European Commission has a role to play include the following:

- overseeing the introduction of a flexible and transparent standardisation process, which enables digital cinema projection standards to meet the diverse needs of European cinemas;

- ensuring legal security in the area of State aid for digitisation of cinemas in the form of clear assessment criteria that allow member states to design their schemes accordingly;

- offering EU financial support for digitisation of cinemas showing European films or ones that have an impact on regional development.

The Commission has accordingly set in place a new strategy to be implemented by the end of 2012. In accordance with this action plan, the Commission has commissioned in 2010 a new study on digital equipment costs across the EU. On the basis of the findings of this study, the Commission intends to launch a new MEDIA support scheme for the digitisation of cinemas screening a significant percentage of recent European (non-national) films. The new digitisation scheme will grant support to cinemas and co-finance a clearly identified set of digital equipment costs in the form of flat-rate financing. The Commission also intends to adopt a Recommendation on promoting the digitisation of European cinemas by 2012, while in addition it will develop, by the same year, appropriate criteria to assess State aid support for digital projection in Cinema Communication.

It is worth noting that, also in September 2010, the Commission has launched a public consultation to gather input into the next round of the MEDIA programme after 2013.

• Communication on Opportunities and Challenges for European Cinema in the Digital Era, Brussels, 24 September 2010, COM(2010) 487 final
http://merlin.obs.coe.int/redirect.php?id=12726 NN DE EN
FR BG CS DA EL ES ET FI HU IT LT
LV MT NL PL PT RO SK SL SV
• Public Consultation on a future European Union MEDIA Programme
http://merlin.obs.coe.int/redirect.php?id=12727 EN FR

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## European Commission: Ninth Communication on the Application of Articles 4 and 5 TwF Directive

The European Commission adopted its Ninth Report on the application of the "Television without Frontiers" (TwF) Directive on 23 September 2010. The Commission is required to adopt such biennial reports under Article 26 of the Directive. The period covered by the Ninth Report is that of 2007-2008. It is based on information provided by the member states on the application of Articles 4 and 5 of the Audiovisual Media Services Directive (the revised version of the old "Television without Frontiers" Directive). It is the first time that this Communication includes compulsory reports from all 27 member states.

The Report commences with general remarks regarding the audiovisual landscape. It specifically notes the continuing upward trend registered between 2005 and 2006 in the number of broadcasters. This is due to the switchover to digital technology which is making room for the emergence of new platforms and a large number of specialised 'niche' channels. The total number of channels in the EU-27 rose from 5,151 channels in 2006 to 6,067 channels in 2008, representing an increase of 17.8%.

The EU-wide average broadcasting time devoted to European works in all EU-27 Member States was

62.64% in 2007 and 63.21% in 2008. This denotes a slight increase over the reference period. Compared to the previous reporting period though, there was a slight dip in the registered upward trend in 2007 (see IRIS 2008-9: 3/2). The mid-term evolution of the 2004-2008 periods, however, presents a relatively stable trend. The average transmission time varied according to member state, with the overall trend being positive in 14, negative in 11 and stable in 2 member states. The overall figures are relatively stable and well above the 50%-threshold required by Article 4.

The results achieved at European level with respect to the proportion of European works made by independent producers show a slight decrease from 35.26% in 2007 to 34.90% in 2008. This slight decrease shows the continuance of the upward trend that was registered in 2003. The Commission therefore encourages member states to stimulate broadcasters to increase their transmission time to at least achieve the level attained in the previous reference period. All member states attained the 10% threshold of independent productions. In the previous reference period one had not attained this threshold.

The EU average compliance rate for channels in the EU-25 member states was 70.39% in 2007 and 72.35% in 2008. Compared to the previous reference period of 2005 and 2004, this denotes a respective decrease of -1.06 and -7.06 points. According to the Commission, this may partly be an effect caused by the increase in the number of channels covered during the reference period. Finally, the Commission drew attention to the high level of European works scheduling achieved by the two most recent member states, Bulgaria and Romania.

• Ninth Communication on the application of Articles 4 and 5 of Directive 89/552/EEC, as amended by Directive 97/36/EC and Directive 2007/65/EC for the period 2007-2008 (Promotion of European and independent audiovisual works), Brussels, 23 September 2010, COM(2010) 0450 final

http://merlin.obs.coe.int/redirect.php?id=15339 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT RO SK SL SV

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## European Parliament: Gallo Report Adopted by European Parliament

On 22 September 2010 the Gallo Report was adopted by the European Parliament. It concerns a motion for a European Parliament Resolution on the enforcement of intellectual property rights in the internal market.

The Report was adopted against the background of increasing awareness of and action against the infringement of copyrights on the internet (this is also, for example, the focus of the Anti-Counterfeiting Trade Agreement (ACTA) negotiations). The Report states that infringement of copyrights is a threat to the economy and society, as well as to consumer health and safety in Europe, and that ongoing infringements are likely to result in job losses.

According to the Report, one of the main reasons for the large amounts of unauthorised file-sharing of copyrighted works is the shortage of legally-offered files. Because these practices lead to violations of intellectual property rights, the Report emphasises the need for adequate solutions for the specific sector involved, with due respect for fundamental rights. The Report expresses disagreement with the Commission that an effective and harmonised civil enforcement framework for intellectual property rights already exists in the EU that is capable of making the internal market function adequately. The Report also does not share the Commission's opinion that the main set of laws regarding intellectual property rights enforcement is already in place.

With regard to possible solutions, the Report requests an improved licensing system. It notes a legislative lacuna concerning online intellectual property rights infringement. It also urges the establishment of a European legal framework to make proceedings against violators of copyrights possible. According to the Report, the current Community law forms no obstacle to the creation of multi-territorial licensing systems. Such EU-wide licensing options should be easily available to maintain a strong protection of intellectual property rights, while also enabling the legal use of works.

The Report sees another possible solution for dealing with online infringement in making available a diverse and advanced legal range of goods and services for consumers. The absence of a functioning internal European digital market is one of the main obstacles to the development of a variety of legal online content. To this end, the Commission should adapt the European legislative framework regarding intellectual property rights to current trends in society, as well as to technical developments. The Report also states that there is a need for reviewing the option of adopting criminal sanctions where counterfeit products pose a threat to the life and health of consumers.

In the cultural sphere, the Report notes an exception to intellectual property rights, namely the private copying exception. It calls for specific legislation to ensure that consumers who have legitimately acquired reproductions do not have to prove the legitimacy thereof, but that the burden of proof for violations of rights lies with the interested parties. Further, the Report emphasises the significance of increasing awareness of the need to respect intellectual property rights. It therefore demands that all parties involved take measures for warning and educating consumers on the importance of respect for copyright and the

negative effects of rights infringement. The Report stresses the need for public approval for measures to deal with infringements in order not to risk declining support for intellectual property rights amongst citizens.

• Gallo Report on enforcement of intellectual property rights in the internal market (2009/2178(INI))
http://merlin.obs.coe.int/redirect.php?id=12736 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT RO SK SL SV

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**European Parliament: Resolution on Journalism and New Media - Creating a Public Sphere in Europe**

On 7 September 2010, the European Parliament (EP) adopted its Resolution on journalism and new media - creating a public sphere in Europe. In doing so, the EP is revisiting one of its recurrent, long-standing preoccupations: the question of how to improve the communication of information about the activities of the European institutions to the citizens of Europe. As in the past, possible roles for the media, in light of the latest technological advances and resultant changes in communicative practices, are central to the present enquiry.

The substantive part of the Resolution is structured in sections entitled: 'Member States' (paras. 8-13); 'Media and the EU' (paras. 14-26); 'Public service media' (paras. 27-30); 'EU/local' (paras. 31-33); 'European Parliament' (paras. 34-39), and 'Journalism and new media' (paras. 40-46).

First, the role of Member States in terms of involvement in EU policy-making and of disseminating information about EU affairs is explained. The relationship between the media and the EU is then explored. Attention is drawn to a number of practices and considerations which help to give shape to this relationship, like special training schemes for journalists on EU matters, "the importance of Euronews extending its range of languages to cover all EU Member States" and the ability of "social media" to reach younger audiences.

In respect of public service media, the EP "stresses", inter alia, "that national and regional public service broadcasters have a particular responsibility to inform the public about politics and policy-making at EU level". It also underscores the need for Member States to ensure the independence of public service broadcasters. It emphasises the need for public service media to embrace new media technologies "so as to increase their credibility via open public participation".

The measures envisaged for the European Parliament centre primarily on the publicity strategies of its information offices.

Lastly, in the section, 'Journalism and new media', the EP "stresses that Member States must come up with viable concepts for the EU media that go beyond merely passing on information and enable them to contribute fully to the EU's cultural and linguistic diversity". It recognises the usefulness of social networks as "a relatively good way of disseminating information rapidly", but queries their reliability, amongst other (stated) reasons because "sources cannot always be sufficiently guaranteed and they cannot be considered to be professional media". It "emphasises the importance of drawing up a code of ethics applicable to new media". The EP "highlights the crucial role of journalists in a modern society faced with a barrage of information, since they alone can bring significant added value to information by using their professionalism, ethics, skill and credibility to make sense of the news".

• European Parliament, Resolution on journalism and new media - creating a public sphere in Europe, Doc. No. 2010/2015(INI), 7 September 2010
http://merlin.obs.coe.int/redirect.php?id=12742 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT RO SK SL SV

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## NATIONAL

### AT-Austria

**Court Finds ORF Guilty of Discriminating Against the Deaf**

According to media reports, the *Bezirksgericht für Handelssachen* (District Commercial Court) in Vienna ordered *Österreichischer Rundfunk* (Austrian broadcasting corporation - ORF) to pay compensation after finding it guilty of discriminating against the disabled at the end of September 2010.

The plaintiff in the case concerned, a deaf man, had purchased a DVD produced by ORF in 2009, but had not been able to understand it because it had not contained subtitles. Represented in the proceedings by the Austrian *Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern* (association for

the enforcement of the rights of victims of discrimination), he based his case on the *Behindertengleichstellungsgesetz* (Act on equal opportunities for disabled people - BGStG).

The court upheld the claim, ruling that ORF had an obligation to provide its services without barriers. It was reasonable from a financial point of view to expect the broadcaster to provide subtitles for the product. The lack of subtitles represented discrimination against the disabled.

The ruling is not yet final.

• *Pressemitteilung des Klagsverbands zur Durchsetzung der Rechte von Diskriminierungsopfern* (Press release of the association for the enforcement of the rights of victims of discrimination)
http://merlin.obs.coe.int/redirect.php?id=12750 DE

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## New Austrian Film Aid System Launched

FISA (*Filmstandort Austria*), the new Austrian film aid system (see IRIS 2010-7: 1/5) based on the *Deutsche Filmförderfonds* (German Film Fund - DFFF), has begun to operate. Applications, which can be submitted online, have been accepted since 16 August 2010.

Applications can only cover costs incurred since 1 July 2010. They are processed by the *Bundesministerium für Finanzen* (Ministry of Finance), with the help of the *Austrian Wirtschaftsservice GmbH* (AWS) and *Location Austria*.

The application process comprises two stages. In the first two-week phase, the admissibility of the application, including any corrections, is verified. This is followed by the actual assessment. This particularly covers the plausibility of the information provided by the applicant, whether the proposed film passes the eligibility test, and the film's profitability and eligibility for aid. If the criteria are met in accordance with the aid guidelines, approval is granted by the *Bundesministerium für Wirtschaft, Familie und Jugend* (Ministry for the Economy, Families and Youth) and the decision is announced. This second phase should be completed within seven weeks of the submission of the complete application.

The FISA system is largely the same as the DFFF model in terms of content-related requirements. It is also intended to serve as a form of "gap funding" for projects that have secured the remaining funding, i.e., for which sufficient funding has been promised by other funding bodies or private sources, and for which the budget is known. It is designed to promote Austria as a film-making location, particularly to boost co-productions having Austrian involvement and the related expenditure that is spent in Austria. Supported films must pass a (relatively low-threshold) cultural eligibility test. The content is not checked by a commission, for example. The aid fund has an annual budget of EUR 5 million for 2010 and EUR 7.5 million for 2011 and 2012.

Aid is available to Austrian feature and documentary films, as well as international co-productions and jointly-financed films that are at least 79 minutes long (59 minutes for children's films) and have a budget of at least EUR 1 million for feature films or EUR 200,000 for documentary films. Support will only be offered if at least 25% of the production costs are spent in Austria. This proportion may be reduced to 20% for large productions with a budget of more than EUR 10 million. Production costs that are eligible for aid must, in principle, be spent in Austria. The maximum level of support for an individual project is 25% of the eligible production costs spent in Austria, which may not exceed 80% of the overall production costs. Applicants must be legal entities (producers) with their headquarters in the European Economic Area and at least one office or subsidiary in Austria, and must have an appropriate level of experience. Payments are made in three instalments (40% at the start of filming, 40% when the rough cut is ready and 20% when the final costs are known).

• Further information: DE

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# BE-Belgium

## Television Spot to Promote Youth Radio Programme not Discriminatory against Physically Disabled Persons

On 21 September 2010, the Belgian *Jury voor Ethische Praktijken inzake Reclame* (Jury for Ethical Practices Concerning Advertising) issued a decision on a complaint, lodged by a member of the public, against the Flemish public broadcasting corporation VRT. The Jury is the self-regulatory authority of the advertising and marketing sector in Belgium (for more information, see IRIS 2010-1: 1/9). The VRT had produced and broadcast a television spot promoting the radio programme "All Areas", which reports live from various music festivals for the public broadcaster's youth station "Studio Brussel". The spot displayed two friends attending a music festival, one of them sitting in a wheelchair and the other one doing his utmost to look after his disabled friend and providing him with drinks. At a certain moment, the disabled person stood up from his wheelchair and confessed to his friend that he had been tricking him for five years. According to

the complaint, there is nothing humorous about the spot, as it does not show respect for real wheelchair users. The Jury in a very short decision judged that the spot depicted an unrealistic situation (five years of deceit, during which the friend failed to notice anything) and contained no disdainful elements regarding wheelchair users. On the contrary, the wheelchair user was shown as attending music festivals, was very well cared for and treated with respect. Because of the spot's humorous nature and the fact that the advertisement was intended to promote the youth station "Studio Brussel" (which is known for its funny campaigns), it could not be found to be shocking or pejorative. As the Jury could find no violation of legal or self-regulatory norms, it decided not to formulate any remarks. The decision has not been appealed, hence the case is now closed.

• *Jury voor Ethische Praktijken inzake Reclam, Adverteerder: VRT, Product/dienst: Studio Brussel, 21.09.2010* (Jury for Ethical Practices Concerning Advertising, complaint against VRT, 21 September 2010)
http://merlin.obs.coe.int/redirect.php?id=12722 NL

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## BG-Bulgaria

### Development of the Amendments to the Copyright Act

In September 2010 the draft amendments to the Закон за авторското право и сродните му права (Copyright and Related Rights Act - ЗАПСП ) were successfully passed in two Parliamentary Committees (see IRIS 2010-8: 1/15).

On 16 September 2010 all the members of the Legal Affairs Committee except one voted 'for' the proposed amendments. One week later their colleagues from the Culture, Media and Civil Society Committee also approved the amendments with a majority. However, both committees agreed that the draft should be reviewed because there was a variance between some of the provisions and an obvious discrepancy between the interests of the rightsholders and the end users.

Some international experts in Copyright Law were not that optimistic in their opinion of the bill. A counsellor of the International Federation of Phonographic Industry (IFPI) stated that the European Commission could launch an infringement procedure against Bulgaria if the changes to copyright law were adopted in their current form. He highlighted three main problems: 1) the elimination of Art. 26, which introduces compensation fees (levies) for the copying of protected content for personal use; 2) the extensive administrative obligations that are imposed on collecting societies and 3) the special committee that must pre-approve the charges of these societies. Most of the collective management organisations, which were initiators of the changes but in the opposite direction, are against the amendments. They claimed there was a need for more detailed regulation in order to ensure the collection of levies, because for more than 15 years these had not been paid by the persons obliged to do so, and for better control by the Ministry of Culture of the organisations that act as collecting societies, because there are too many that assign rights to end users but in fact do not have the right to represent any repertoire.

By law, these fees are paid by manufacturers or importers of blank media (disks, memory sticks) and recording devices and serve to compensate rightsholders in the field of music, theatre and cinema for the private copying of their works. According to the law copyright-protected content can not be copied without the permission of the rightsholders.

According to Directive 2001/29/EC in some cases the use of protected content without the consent of the rightsholder is possible, but only against an equitable compensation. At the moment the bill provides that everyone can use protected content for private copying against such compensation, but with the cancellation of Art. 26 it is not clear who will have to pay this compensation, or when and how much it will be. This means that the law will not guarantee fair compensation for the rightsholders and the exception of the exclusive right will not comply with the requirements of the Directive.

Referring to the changes to Art. 40 (see points 2 and 3 above) there is some positive approach in the idea of the bill to strengthen the administrative control on the activities of collecting societies, but at the same time the pre-approval of the tariffs by three ministers and some other measures are inadequate to protect the principle of free economic initiative. The only organisation that backs the proposed amendments to Art. 40 is the Association of Bulgarian Broadcasting Operators, which has refused to pay any charges to the only organisation that represents Bulgarian and foreign phonographic producers and performers, PROPHON, for more than one year.

• Закон за авторското право и сродните му права (Draft amendments to the Copyright and Related Rights Act) BG

**Ofelia Kirkorian-Tsonkova**
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### Notification Regime regarding Providers of non-linear Media Services

On 14 September 2010 the Council for Electronic Me-

dia registered in the Public Register kept by it Trans Telekom AD as a provider of non-linear services, and more specifically video-on-demand services.

The latter enables the end customers to receive at a time fixed by them a particular event (music, movie, etc) as chosen from a catalogue on the territory of the cities of Sofia, Varna, Golden Sands Resort, Albena Resort, St. Constantine and Elena Resort, Sunny Beach Resort, Kamchiya Resort and Alen Mak Resort.

On the same date the Council for Electronic Media has entered on the Public Register Amotera Pictures Limited as a provider of non-linear media services, including video-on-demand services, in particular: (i) premium digital pay-per-view, and (ii) premium digital video-on-demand.

• Решения на СЕМ (Information from the Council for Electronic Media)
http://merlin.obs.coe.int/redirect.php?id=12716 BG

**Rayna Nikolova**
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## Conflict of Interest Case in the Media Sector

The Parliamentary Anti-Corruption, Conflict of Interests and Parliamentary Ethics Committee has submitted a report on the basis of which the Supreme Administrative Court initiated a lawsuit under the Conflict of Interest Prevention and Disclosure Act (promulgated in the State Gazette No 94/31 of October 2008, effective since 1 January 2009; see IRIS 2009-2: 9/10).

The lawsuit is being brought against the chairman of the Council for Electronic Media. It is alleged that he did not observe the seven-day term for filing a declaration as required by the Conflict of Interest Prevention and Disclosure Act.

According to the findings contained in the report of the Parliamentary Committee the accused became chairman of the Council for Electronic Media on 7 April 2010, but deposited his declaration under the Conflict of Interest Prevention and Disclosure Act on 25 May 2010. In his written explanation to the Parliamentary Committee he stated that he had submitted a similar declaration according to the provisions of the Radio and Television Act and he thought that by performing this he had fulfilled the requirements set out by the special piece of legislation (i.e., the Radio and Television Act) and therefore he was not obliged to file an additional declaration under the Conflict of Interest Prevention and Disclosure Act, which in his opinion is a general piece of legislation.

The open court session was scheduled for 11 October 2010.

• СПИСЪК на лицата , призовани по административно Дело № *11844/2010* г . насрочено за *11.10.2010 09:00* зала № *3* (Information from the Supreme Administrative Court)
http://merlin.obs.coe.int/redirect.php?id=12715 BG

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# CH-Switzerland

## Admissible TV Reports on Controversial Referendum Poster for Minaret Initiative

In October 2009, *Schweizer Fernsehen SF 1*, a German-language channel operated by the *Schweizerische Radio- und Fernsehgesellschaft* (Swiss radio and television corporation - SRG) reported on the controversial referendum poster used by supporters of the petition for a referendum concerning a ban on the construction of minarets. A two-minute report in the "*Tagesschau*" news programme sought the views of municipal authorities and the *Eidgenössische Kommission gegen Rassismus* (Swiss anti-racism commission - EKR) on the controversial poster. A report lasting more than four minutes in the "*10vor10*" current affairs programme focused on the reaction of Muslims.

In both reports, the controversial poster was shown for a significant period of time (45 and 62 seconds respectively), including some time in close-up. A joint complaint was filed by 25 people, arguing that the detailed screening of the poster had breached various programming rules enshrined in the *Radio- und Fernsehgesetz* (Radio and Television Act - RTVG). The body responsible for ruling on complaints about the content of news programmes in Switzerland is the *Unabhängige Beschwerdeinstanz für Radio und Fernsehen* (independent radio and television complaints authority - UBI), which has powers similar to those of a court. The nine UBI members unanimously dismissed the complaint at a public session in April 2010.

In written grounds for its decision, published at the beginning of October, the UBI stressed that it had not been necessary to assess individual images, but only the overall context of the two television reports. It did not need to examine whether the disputed poster was discriminatory, offended religious sentiments, ignored basic human rights or incited racial hatred. In the light of Article 4(1) RTVG (respect for basic rights), the most important factor to consider was the message conveyed by the broadcasts. Neither report showed the poster without commentary or criticism. Rather, they provided the opportunity for extremely critical, outraged and mostly negative reactions to the content of the poster. The depiction of minarets reminiscent of long-range missiles was described by many

interviewees as defamatory, disgusting, shocking and discriminatory. It was also mentioned that three cities had banned the poster. *Schweizer Fernsehen* had only shown the posters, which few people had been aware of when the broadcast took place, in order to illustrate the reason for the controversy. The UBI mentioned the ruling of the European Court of Human Rights in Strasbourg, which had authorised the broadcast of extremist statements if the programme was designed to contribute to the public debate on racism (ECHR ruling of 23 September 1994 in the case Jersild v Denmark, see IRIS 1995-1: 3/2).

The UBI held that the depiction of the posters had not been an end in itself, but had been sufficiently placed in the context of the debate over their content. For this reason, the UBI also dismissed the claim that the broadcasts had constituted unlawful, manipulative, surreptitious advertising. It was true that the lengthy, close-up shot of the posters had had a significant indirect advertising effect. However, this had to be accepted because the posters had been shown for information purposes and the advertising effect had been offset by the highly critical reporting. The freedom to form public opinion before the forthcoming referendum on the minaret initiative had not been harmed and the legal requirement for proper representation (Article 4(2) RTVG) had been met.

The UBI had already had to examine television reporting on the minaret initiative in March 2008, when it had rejected a complaint about discriminatory statements by the initiative's supporters in the "*Infrarouge*" discussion programme on the west Swiss television channel TSR. The UBI had ruled that aberrations could not be ruled out in live broadcasts. However, the presenter had responded to unacceptable statements, acted as a mediator and given the other side the opportunity to reply.

• *Entscheid der Unabhängigen Beschwerdeinstanz für Radio und Fernsehen (Beiträge über das Plakat zur Minarettinitiative) b. 612 vom 23. April 2010* (Decision of the Independent Radio and Television Complaints Authority (reports on the minaret initiative poster), b. 612, 23 April 2010)
http://merlin.obs.coe.int/redirect.php?id=12758 DE

• *Décision de l'Autorité indépendante des plaintes pour la radio et la télévision ("*Infrarouge: Les minarets de la discorde*"), b. 565, 10 mars 2008* (Decision of the Independent Radio and Television Complaints Authority (programme "*Infrarouge: Les minarets de la discorde*"), b. 565, 10 March 2008)
http://merlin.obs.coe.int/redirect.php?id=12759 FR

• *Stellungnahme der Eidgenössischen Kommission gegen Rassismus (EKR) zum Aushang von Plakaten der Initiative „Gegen den Bau von Minaretten" im öffentlichen Raum* (Statement of the Swiss anti-racism commission on the public display of posters for the "*Gegen den Bau von Minaretten*" initiative)
http://merlin.obs.coe.int/redirect.php?id=12762 DE

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## Federal Council in Favour of Free Choice of Decoder for Receiving Digital TV

Watching digital TV programmes requires having a receiver capable of transforming the signal into images that can be viewed on the screen. The receiver is usually incorporated into latest-generation television sets (digital tuner), but a separate decoder is necessary for older sets. However, consumers are often obliged to rent or buy receivers approved by their telecommunication service provider (proprietary decoders). This obligation restricts users' freedom of choice and hinders competition on the market for receivers of digital television broadcast by cable. The Federal Council is therefore proposing to amend the national Radio and Television Act (LRTV) in order to guarantee consumers free choice of their receiver. Accordingly, users will no longer be forced to acquire the proprietary decoder of a particular telecommunication service provider to be able to receive certain digital offers.

The draft wording for the new Article 65a of the LRTV provides that the Federal Council may lay down provisions authorising the free choice of appliance for receiving digital television. It will thus have to take account of the situation of the market and of the state of technology. The statutory arrangement for delegation in favour of the Federal Council is formulated in an open fashion. The Federal Council will therefore be able to regulate access to digital television, whatever the mode of broadcasting, wherever this is required by consumer protection, competition issues, or technical progress. The details and the technical and commercial conditions governing access to digital television programmes are set out in a Federal Council order, which will make it possible to react rapidly to technical and economic developments.

The Federal Council has decided not to propose a blanket ban on encryption on freely accessible television channels that are part of the basic offer proposed in digital mode on cable networks. This is because, apart from protecting young people and restricting access to only those users authorised by subscription, encryption makes it possible to protect high-value content from unauthorised broadcasting or reproduction. The Federal Council therefore feels that a blanket ban on encrypting would constitute serious infringement of the commercial freedom of the telecommunication service providers. Moreover, such a ban is not absolutely essential since there are less restrictive ways of ensuring freedom of choice of receiver.

Suppliers of telecommunication services will still be free to determine, within the statutory limits, how they intend to ensure that users have a free choice of receiver. The basic offer must be accessible under suitable conditions using an access authorisation system compatible with readily available decoders fitted with a standard interface. Suppliers will be able

to continue offering proprietary decoders, but if they broadcast encrypted programmes on-line, they will have to ensure that the programmes can also be received by other reception equipment by providing the public with an access authorisation system in the form of a conditional access module and a corresponding smart card.

Suppliers of Internet Protocol television (IPTV) services will however need to be exempted temporarily from the obligation to ensure free choice of receiver, mainly because, for technical reasons, decrypting is only possible using proprietary decoders. In addition, present-day decoders do not have a standard interface that would allow the use of an external access authorisation system. Lastly, abolishing encryption would endanger the commercial model of IPTV.

The message from the Federal Council will be examined by the Federal Assembly. The new statutory provision will not however come into force before 2012.

• Message from the Federal Council on amendment of the Radio and Television Act DE FR

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## DE-Germany

### BGH Rules on Broadcasters' Claim against State

In a recently announced decision, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that Article 87(4) of the *Urheberrechtsgesetz* (Copyright Act - UrhG), which prevents broadcasting companies from receiving a share of the appliance and phonogram tax provided for in Article 54(1) UrhG, does not represent a serious breach of Article 5(2)(b) of Directive 2001/29/EC and cannot therefore justify a claim against a state under EU law.

In the case concerned, the plaintiff, *VG Media* (collecting society for copyright and related rights of media companies) demanded compensation from the Federal Republic of Germany on behalf of the private broadcasting companies that it represents. It claimed that the exclusion of broadcasters from the group of beneficiaries of the appliance and phonogram tax put them at a disadvantage compared to the holders of other copyright-related rights and was incompatible with Directive 2001/29/EC. Article 2(e) of the Directive states that broadcasting organisations, in principle, held the reproduction right for fixations of their broadcasts. Article 5(2)(b) provided that rightsholders should receive "fair compensation" in respect of reproductions made for private use, which were exempt from the reproduction right. After both lower instance courts (LG and KG Berlin) had rejected the claim (see IRIS *plus* 2010-5), *VG Media* sought permission to appeal.

The BGH rejected this application. It agreed with the lower instance court that it could not be inferred from the wording of Article 5(2)(b) of the Directive that "fair compensation" should necessarily take the form of a financial payment. In particular with reference to recitals 31, 35 and 38, it was clear that the Directive, in principle, authorised different treatment of the rightsholders concerned. Member states enjoyed considerable freedom in this respect. Unlike the holders of copyright-related rights in the phonographic and film industries, for example, whose activities were directly affected by the right to make private copies, broadcasting organisations - in their function as such - were not affected in terms of their primary copyright-related right, i.e., the right to retransmit and make their programmes available to the public. At most, private copying therefore created only slight disadvantages for broadcasting organisations. In deciding how to distribute the revenue from the appliance and phonogram tax, the legislator had needed to achieve a fair balance between the rightsholders. As producers of films and phonograms, broadcasting organisations would receive a share of the tax revenue for private recordings. Any additional payment would be to the disadvantage of the other rightsholders. Accordingly, there had therefore been no obvious, significant, and therefore serious breach of EU law.

• *Beschluss des BGH vom 23. Juni 2010 (Az. III ZR 140/09)* (BGH decision of 23 June 2010 (case no. III ZR 140/09))
http://merlin.obs.coe.int/redirect.php?id=12751 DE

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### BVerfG Finds Breach of Right to a Lawful Judge in Appliance Tax Dispute

In a recently published decision, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) quashed a ruling of the *Bundesgerichtshof* (Federal Supreme Court - BGH) concerning the so-called appliance tax for printers and plotters and referred the case back to the BGH.

The related procedure concerned whether printers and plotters constitute duplication machines, which are subject to the tax, under Article 54a(1) of the old version of the *Urheberrechtsgesetz* (Copyright Act - UrhG), which was valid until 31 December 2007. The *VG Wort* (Wort collecting society), which collects copyright fees on behalf of authors and publishers of literary works, wanted an importer of such devices to

provide it with information about the type and number of devices it sold, together with recognition that it should pay the corresponding tax. The arbitration service of the *Deutsches Patent- und Markenamt* (German patent and trade mark office) and the lower instance courts had granted the claims. However, the BGH rejected the *VG Wort's* claims and quashed the lower instance decision. It did not consider printers and plotters to be devices designed to be used to duplicate works by photocopying or a similar process in the sense of Article 54a(1) of the old version of the Copyright Act (see IRIS 2008-8: 9/13). The *VG Wort* complained that this ruling was unconstitutional, claiming that it breached Articles 3(1), 14(1), 101(1)(2) and 103(1) of the *Grundgesetz* (Basic Law - GG).

The BVerfG agreed that Article 101(1)(2) GG, establishing the basic right to a lawful judge, had been breached. The BGH had wrongly failed to consider whether it should refer the matter to the ECJ under Article 267(3) of the Treaty on the Functioning of the European Union (TFEU), even though certain aspects of Directive 2001/29/EC suggested it might be necessary in this case. For example, Article 5(2) of the Directive did not distinguish between analogue and digital originals, but only took into account the results of the reproduction process. It was therefore open to question whether the concept of a "process having similar effects" (letter a) could be interpreted as including only reproductions of analogue, but not digital originals, and therefore did not require compensation to be paid in the case of digital originals. If the BGH's ruling were followed, in which reproduction using printers/plotters was not considered as being such a process, it remained to be seen whether Article 5(2)(b) of the Directive ("reproductions on any medium") should apply. Despite the broad freedom given to member states to implement the Directive, these questions had an important bearing on the decision; there were no obvious exceptions to the obligation to refer matters to the ECJ, and the BGH had not considered such a step. By failing to check whether it should refer the case to the ECJ, the BGH had denied the plaintiff its right to a lawful judge. The BVerfG also indicated that the BGH should now examine the extent to which, under Article 14(1) GG (basic right to property), Article 54a of the old version of the UrhG should be interpreted in such a way that the right to compensation should be granted, thus potentially rendering the referral of the matter to the ECJ unnecessary in this case.

• *Beschluss des BVerfG vom 30. August 2010 (1 BvR 1631/08)*
(BVerfG decision of 30 August 2010 (1 BvR 1631/08))
http://merlin.obs.coe.int/redirect.php?id=12752 DE

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## Court Orders YouTube to Block Individual Music Videos

On 3 September 2010, the *Landgericht Hamburg* (Hamburg district court - LG) ordered the YouTube video portal to block access to three disputed music videos and, since they had already been published, to provide information about the extent to which they had been used and pay a corresponding amount of compensation.

The producer of the pieces of music had complained that his copyright and related rights, protected by the *Urheberrechtsgesetz* (Copyright Act - UrhG), had been infringed by the unauthorised use of the music in numerous videos available on YouTube.

The LG Hamburg only took a decision on three of the videos that were complained about, since it found the complaint largely inadmissible, partly because the object of the complaint was not sufficiently well defined. The court upheld the claims regarding a breach of the right to make works available to the public, enshrined in Article 97(1) in connection with Articles 15, 19a, 73 ff. and 85 UrhG. The works had illegally been made publicly accessible by users of the platform. However, YouTube should be held accountable for these actions. YouTube had "made the third-party content its own" and "as an exception, service providers [can be] considered liable if, in the opinion of the third party, the information appears as if it were owned by the operator". This should be assessed by objectively examining the overall circumstances from the perspective of a sensible average user. As well as indicating the name of the user who uploads the content concerned, it must be made clear that the content provider does not wish to adopt it as its own. However, the inclusion of the uploaded videos on the platform, where the YouTube logo was clearly dominant in comparison to the name of the user concerned, gave the impression that YouTube had adopted the content as its own. This impression was strengthened even further by the inclusion of third-party content (advertising), which brought with it a greater obligation for the provider to verify the content. However, YouTube had no control mechanism in place through which, for example, it could prevent illegal content being uploaded. The requirement for users to complete a form declaring that they owned the rights to the uploaded works, without demanding that they provide concrete, comprehensible information on the origin of the works, was insufficient. Contrary to the defendant's opinion, such an obligation for users would not fundamentally call the YouTube business model into question.

In a similar case at the end of August, the LG Hamburg had rejected an application by the GEMA for a temporary injunction against YouTube on the grounds that there was insufficient urgency, although it did suggest

that such an injunction could, in principle, be granted (see IRIS 2010-9: 1/19).

• *Urteil des LG Hamburg vom 3. September 2010 (Az. 308 O 27/09)* (Ruling of the LG Hamburg, 3 September 2010 (case no. 308 O 27/09))
http://merlin.obs.coe.int/redirect.php?id=12754 DE

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## OVG Saarlouis Upholds Appeal against VG Saarland Ruling

The *Oberverwaltungsgericht Saarlouis* (Saarlouis Higher Administrative Court - OVG) has upheld an appeal by the mayor of Saarbrücken against a decision of the *Verwaltungsgericht Saarland* (Saarland Administrative Court - VG), with the proviso that the mayor, in accordance with the OVG's interpretation of the law, should issue a new decision concerning the disputed application of the private broadcaster *Funkhaus Saar GmbH*.

*Funkhaus Saar GmbH* had asked for permission to film the mayor's public meetings for television reporting purposes. After the mayor had refused to permit such filming, the broadcaster successfully applied to the VG, via an urgent procedure under Article 123 of the *Verwaltungsgerichtsordnung* (Administrative Courts Code of Procedure), for permission to film for reporting purposes only.

In its summary examination of the urgent application, the OVG concluded that the broadcaster had no automatic right to film the mayor's public meetings. It only had the right to an unbiased and rational decision.

The OVG believes that, under the reporting right protected by the freedom of broadcasting under Article 5(1)(2) of the *Grundgesetz* (Basic Law - GG), it should be possible to use recording and transmission equipment to broadcast, either in full or in part, live or delayed, sound and images of an event to viewers and listeners. However, the freedom of broadcasting did not include the right to demand access to an information source. The protection provided under Article 5(1)(1) GG only applied once information was made accessible to the public, and only covered the information itself. The fact that a meeting had to be open to the public did not mean that broadcasters had the right to film it. Such a right depended not only on whether the meeting was open to the public, but also on the type of access granted. From a constitutional law point of view, there was no fundamental reason why public meetings of a city or municipal council should only be open to the public (and not to the media). Article 43(1) of the *Saarländisches Kommunalselbstverwaltungsgesetz* (Saarland municipal self-administration act - SLKSVG), which gave certain procedural powers to the council chairman, could be considered an admissible restriction of the broadcasting freedom enshrined in Article 5(1)(2) GG. Article 43 SLKSVG should be interpreted as authorising the council chairman, in view of the basic freedom of broadcasting and respecting the proportionality principle, to exercise his powers by prohibiting the type of media access requested by *Funkhaus Saar GmbH*. This particularly applied if it could be assumed that this was the only way of ensuring that the city or municipal council could function without interference. This was a discretionary decision.

According to reports, *Funkhaus Saar GmbH* has lodged a complaint with the Constitutional Court about the OVG's decision.

• *Beschluss des OVG vom 30. August 2010 (Az. 3 B 203/10)* (OVG ruling of 30 August 2010 (case no. 3 B 203/10))
http://merlin.obs.coe.int/redirect.php?id=12755 DE

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## BMWi Tables Draft New Telecoms Act

On 23 September 2010, the *Bundesministerium für Wirtschaft und Technologie* (Federal Ministry of Economics and Technology - BMWi) submitted the draft amendment to the *Telekommunikationsgesetz* (Telecommunications Act - TKG) to the other government departments for approval. This represents the first step in the transposition of the Directive amending the European telecommunications legal framework, which must be completed by next May (see IRIS 2010-1: 1/7).

The draft in particular contains important changes to competition rules and consumer protection. With its proposed regulatory principles, the BMWi hopes to create competition- and investment-friendly conditions, particularly for the further development of high-speed broadband networks. In future, the *Bundesnetzagentur* (Federal Network Agency - BNetzA) will also be able to submit long-term regulatory concepts. The particular risks of investments in new, fast infrastructure will be taken into account in the regulations, which are designed to adhere to the new EU provisions. In the so-called "Lex Telekom" procedure, the ECJ had ruled in December 2009 that the exemption of new markets from regulation ("regulation holidays" under Article 9 TKG, see IRIS 2007-1: 6/8) was incompatible with EU law (C-424/07). As part of the reforms, the EU legislator has now opted for a rule under which competitors must be given access to new infrastructure - although only in return for a reasonable share of the investment costs.

It will also be possible to use existing infrastructures more efficiently in future. At the same time, the BMWi hopes to extend access rights to passive infrastructures such as supply pipes and masts. The BNetzA will be able to decree that certain infrastructure should be used jointly. The need for such a rule can mainly arise within buildings for financial reasons, in order to avoid inefficient dual structures. Such conditions can also be laid down regardless of whether a dominant market position is held.

Improvements to consumer protection are also proposed. For example, switching providers should, in future, be a smoother, faster process. It will also be possible to transfer a mobile telephone number to a different network at any time, regardless of the term of the contract. In addition, all telecommunications companies should offer at least one contract with a term of no more than 12 months. For pay-as-you-go calls and mobile data services, the BNetzA will be able to issue rules obliging providers to publish information about prices and service quality. The BMWi hopes to increase transparency in this way. The most important innovation in terms of consumer protection is the rule that the cost of being held in a queue on customer service and premium rate numbers should be charged to the call recipient.

The TKG is also being brought into line with amendments to the EU legal framework in the field of spectrum regulation. The greater emphasis on technology and service neutrality and general authorisations, as well as rules on spectrum trading, should achieve the desired flexibility and contribute to more efficient spectrum use.

In the broadcasting field, the draft - independently of the demands from Brussels - makes provision for three new regulations that have been debated for a long time. Firstly, plans to switch off analogue VHF radio by 2015 have been amended insofar as existing frequency holders will be given the chance to keep their frequency for one further 10-year period. At the same time, it is proposed that new radio sets should be capable of receiving only digital signals from 2015. Through an amendment to Article 57 TKG, the BMWi hopes to ensure that content providers that own a frequency allocation for analogue broadcasting under media law are able to choose their broadcasting network operator. The corresponding frequency will then only be allocated to that operator under telecommunications law. This is designed to promote competition in the network operation sector, which so far has been dominated more or less exclusively by the former *Telekom* subsidiary, *Media Broadcast*.

The BMWi has announced that it will discuss the draft with relevant interest groups in the next few weeks; it is hoped that the cabinet will examine it before the end of the year.

• *Pressemitteilung des BMWi* (BMWi press release)
http://merlin.obs.coe.int/redirect.php?id=12756 DE

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## ZDF and Producers' Alliance Agree Cooperation Guidelines

In September 2010, *Zweites Deutsches Fernsehen* (ZDF) and the *Allianz Deutscher Produzenten Film & Fernsehen e. V.* (alliance of German film and television producers) agreed a set of guidelines for cooperation in relation to commissioned television productions.

The aim of these guidelines is to bring the rules on cooperation between the parties into line with the digital age, taking into account the distribution of exploitation rights set out in the protocol to the *12. Rundfunkänderungsstaatsvertrag* (12th Inter-State Broadcasting Agreement). The agreement applies to fully-financed commissioned ZDF productions (fiction and docu-drama) and fully-financed animation films and shows (game shows, quizzes and event broadcasts). For co-financed productions, the distribution of rights between ZDF and the producer will be negotiated on a case-by-case basis in accordance with the respective amount invested by each party.

Under the guidelines, which continue and extend existing regulations, producers will receive a 16% share of the gross revenue (minus any synchronisation costs). If, in individual cases, the producer shows that it can exploit the production itself, the corresponding exploitation rights can be transferred back to it. In such cases, the rules on the distribution of revenue apply reciprocally, unless otherwise agreed.

The guidelines also make provision for ZDF and the producers' alliance - subject to the agreement of the relevant bodies - to create and operate a platform for the commercial on-demand exploitation of commissioned productions.

ZDF also recognises - for the purposes of adapting the calculation principles - some new occupational profiles, such as that of data wrangler for HD productions. Payment conditions are also amended in the producers' favour through the agreement of earlier settlement deadlines.

The guidelines will initially apply for a four-year period, backdated to 1 March 2010 and expiring on 31 March 2014.

The *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten Deutschlands* (association of German public service broadcasters - ARD) and the pro-

ducers' alliance had agreed cooperation guidelines in December 2009 (see IRIS 2010-2: 1/14).

• *Eckpunkte der vertraglichen Zusammenarbeit bei ZDF-Auftragsproduktionen zwischen Zweites Deutsches Fernsehen und Allianz Deutscher Produzenten - Film & Fernsehen in der Fassung vom 27. September 2010* (Guidelines for contractual cooperation regarding ZDF commissioned productions between *Zweites Deutsches Fernsehen* and the *Allianz Deutscher Produzenten Film & Fernsehen e. V.* (alliance of German film and television producers), version of 27 September 2010)
http://merlin.obs.coe.int/redirect.php?id=12757 DE

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## ES-Spain

### Telecinco v. YouTube

In June 2008, the private Spanish television broadcaster, Telecinco, filed a lawsuit before the courts in Madrid against YouTube for illegally and without authorisation communicating to the public content produced by Telecinco.

YouTube retorted that it merely acts as an intermediary between users uploading videos and users receiving them and does not control the content.

On 20 September 2010, Madrid's Mercantile Court number 7 rejected the lawsuit filed by Telecinco against the Internet video service provider YouTube, in which it was held that the content included on the latter's website did not infringe any third party copyrights.

In this way, the court decision recognised that, legally speaking, YouTube is a content hosting intermediary and, therefore, cannot be forced to exert ex ante control over videos uploaded by users. In practice, the court decision presumes that the rightsholders are the ones who must identify their content on the site and individually notify YouTube about videos that infringe their copyrights, in order to allow YouTube to withdraw such material.

In addition, YouTube pointed out during the proceedings that it offers copyright holders "Content ID", a tool that allows them to protect their content automatically by blocking videos from being uploaded to the platform, if they so wish. It is worth highlighting that more than a thousand communications groups around the world use this tool in an effective way, including major television broadcasters on a global level.

The decision states that from now on it will be Telecinco's responsibility to track the content uploaded onto YouTube. This procedure/selection, shall not be "massive or unconditioned", but will occur on a case by case basis as it is possible that many videos may be just "fragments of information not protected by copyright law or mere parodies of Telecinco's programmes, which are not protected either".

This is not the first victory for YouTube against television broadcasters trying to protect their content. In June 2010 YouTube emerged unscathed from another claim by Viacom-Paramount and MTV for infringement of copyright (see IRIS 2010-8: 1/46).

• Juzgado de lo Mercantil no. 7 de Madrid, Sentencia 289/2010 de 20 de septiembre (Decision 289/2010 of Mercantile Court of Madrid no. 7, 20 September 2010)
http://merlin.obs.coe.int/redirect.php?id=12725 ES

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## FI-Finland

### Open WiFis and Criminal Liability

The Ministry of Justice is assessing the possibility of decriminalizing the use of open WiFi networks. According to a draft memorandum published last year, using a wireless internet connection without its owner's permission would be allowed in such cases where the access point is not protected by password or the like. In particular, the memorandum assesses whether it is appropriate to deem unauthorised use a criminal offence.

In compliance with Chapter 28, section 7 of the Penal Code of Finland, "[a] person who without authorisation uses the movable property or the non-movable machine or equipment of another shall be sentenced for unauthorised use to a fine or to imprisonment for at most one year." The provision can be interpreted as covering the unauthorised use of an open WiFi.

The memorandum includes three options to amend the current legislation. In accordance with the first option, it would be punishable to use the wireless connection unless the user has a good reason to assume that the network is intended for public use and no specific permission is required. According to the second option, it would not be punishable to use the connection unless the act is likely to cause significant harm to the owner. Finally, complete decriminalisation was considered as a third option.

The Ministry of Justice requested opinions from 23 different authorities, organisations, and individuals. In total, 15 issued statements. On 11 June 2010 all opinions delivered were published as a summary. From among the respondents, the Ministry of Transport and

Communications pointed out that it would be impossible to implement the second option. In general, many of the respondents called the first and the second option into question. Professor Kimmo Nuotio noted that a specific provision on decriminalisation is not necessary, as the same conclusion can be achieved by interpreting the law in an appropriate and reasonable manner. Consequently, Chapter 28, sections 7-9 of the Penal Code would not cover the unauthorised use of open WiFis. In his opinion the legal jurisprudence should specifically address the fact and clarify the situation.

It was argued in the memorandum that it is relatively easy to protect a WiFi connection by password. Some of the respondents disagreed with this statement. The Ministry of Transport and Communication stated that it should be clarified what measures are needed so that an ordinary person would be able to protect his or her WiFi. The Central Bureau of Investigation paid attention to situations where sexually offensive material is spread by using another person's base station, for example. In such cases the owner of the network would have an interest in seeking sanctions.

Nevertheless, most of the respondents were in favour of abolishing criminal liability. Civil liability should prevail when significant harm is caused. Only two respondents were against the amendments suggested in the memorandum. The memorandum is a preliminary assessment of the situation. It remains to be seen whether any legislative measures will be taken.

• Suojaamattoman langattoman Internet-lähiverkon (WLAN) käytön rikosoikeudellisia kysymyksiä. Oikeusministeriö. Muistio 14.10.2009 (Criminal Law Questions Related to the Use of Unprotected WiFis, The Ministry of Justice, Memorandum 14 October 2009)
http://merlin.obs.coe.int/redirect.php?id=12785 FI

• WLAN:in käytön rangaistavuus - Lausuntotiivistelmä 11.6.2010 (The Use of WiFis and Criminal Liability - Summary of responses, 11 June 2010)
http://merlin.obs.coe.int/redirect.php?id=12786 FI

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## FR-France

### Legislation on Financing the Digitisation of Cinema Theatres

In February 2010, the French competition authority (Autorité de la Concurrence) did not validate the pooling fund proposed by the national cinematographic centre (Centre National de la Cinématographie - CNC) for financing the digital equipping of cinema theatres (see IRIS 2010-3: 1/23), but proposed the setting up of a new tax to achieve this. The CNC then appealed to the legislator (see IRIS 2010-4: 1/25), announcing that a draft text would soon be submitted to the concertation procedure; this would include the principle of a contribution from distributors as the prime source of financing for the switch to digital.

The aim is to ensure both the transparency of relations between distributors and operators (directly or through a third party) and the neutrality and equity of the conditions for financing the switch to digital for films to have access to cinemas and for cinemas to have access to films.

Things have moved fast, as the Act on the digital equipping of cinema theatres was adopted and gazetted on 1 October 2010. The text provides for a compulsory contribution on the part of film distributors to the cost of equipping cinemas. This is because it is the operators that have to bear the cost of investing in the equipment whereas it is the distributors that receive most of the benefits resulting from digitisation. The payment will fall due when the work comes out and during the first two weeks of showing. The contribution will only be required for the initial installation (it will cease to be due no later than ten years thereafter) and not for its renewal. The amount will be negotiated by the parties concerned. A system for pooling funding among a number of cinema operators and owners is also set up, intended to work in favour of small cinemas and those run by associations. The Act requires a professional concertation committee to ensure the implementation and operation of the financing mechanism. The cinema mediator will be competent to settle any disputes concerning the contribution. It goes without saying that the Act maintains the operators' freedom of programming and the distributors' control over their schedules for circulating films.

• *Loi n°2010-1149 du 30 septembre 2010 relative à l'équipement numérique des établissements de spectacles cinématographiques, JORF du 1er octobre 2010* (Act No. 2010-1149 of 30 September 2010 on the fitting of cinema theatres with digital equipment, published in the *Journal Officiel* on 1 October 2010)
http://merlin.obs.coe.int/redirect.php?id=12746 FR

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### HADOPI Sends Out the First Warning E-Mails

On 4 October 2010, following the rejection by the Conseil d'État on 14 September of the appeal brought by the access provider FDN against the Decree on HADOPI's sanctions procedure (see IRIS 2010-9: 1/24), the HADOPI sent out its first warning e-mails to people who had downloaded works from the Internet illegally.

The e-mails inform their addressees that they have "failed in their obligation of supervision" (Article 336-

3 of the Intellectual Property Code introduced by the HADOPI Act) and remind them of their obligation to ensure that their access to Internet is secure so that it cannot be used fraudulently. The HADOPI has taken the opportunity to divulge a number of elements for recognising an authentic message sent out in the framework of the graduated response: it contains the address details of the Internet user and does not include any link to click on, invitation to purchase software, request for a sum of money, or invitation to connect to a personal space on an Internet site. If the Internet user repeats the offence within six months, this first message is followed by a second, sent by registered letter. If there is a further failure in the obligation of supervision, the fine for "gross negligence" (EUR 1,500) may then be imposed. The HADOPI then refers the matter to the courts, which may then order the user's Internet subscription to be suspended for up to one year. Although the main Internet access providers have had no difficulty in passing on the HADOPI's warning e-mails, the operator Free has refused to do so, pending "receipt of guarantees on the method for applying the arrangements, particularly as regards data confidentiality". In doing do, Free has taken advantage of a loophole in the Act, which does not provide for any obligation on the part of operators to send on the HADOPI's warning e-mails, or for any sanctions against them if they fail to do so.

However, the Government has been quick to respond - a decree gazetted on 13 October 2010 has amended the Intellectual Property Code (Art. R. 331-37), which now requires operators to send HADOPI's warning e-mails on to subscribers by electronic means within twenty-four hours, on pain of a fine of EUR 1,500. The IAPs are currently in discussion with the Government regarding compensation for the cost of identifying the IP addresses of Internet users who are at fault. To be continued 04046

• *Décret n°2010-1202 du 12 octobre 2010 modifiant l'article R. 331-37 du Code de la propriété intellectuelle, JO du 13 octobre* (Decree No. 2010-1202 of 12 October 2010 amending Article R. 331-37 of the Intellectual Property Code, published in the *Journal Officiel* on 13 October)
http://merlin.obs.coe.int/redirect.php?id=12747 FR

• *Recommandation de la Commission de la Protection des Droits de la Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet (Hadopi)* (Recommendation by 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))
http://merlin.obs.coe.int/redirect.php?id=12748 FR

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## Negative Opinion from CSA on Draft Decree on On-demand Audiovisual Media Services

The Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) was asked by the Government for its opinion on the draft Decree on on-demand audiovisual media services (AVMSs); it has now delivered a negative opinion, something it has not done since the beginning of the 1990s. Adopted in application of the Act of 5 March 2009 transposing the AVSM Directive into French law, the aim of the draft decree is to create a specific scheme for on-demand AVMSs (catch-up TV, VoD accessible by subscription or for individual videos), supporting production and promoting European works and works originally made in the French language. It also defines the framework for regulations for advertising on these new services and amends the framework applicable to television services.

In its opinion, published on 7 October, the CSA, moved by "a desire for economic realism", expresses its opinion that the text submitted to it makes excessive demands on on-demand AVMSs, particularly the high level of the rate of financial contribution. The lack of progressiveness is likely to seriously hamper the development of these services in France, and to encourage delocalisation. On-demand AVMS platforms are not economically viable these days and only three of them (Orange, SFR and Canal Play) have turnovers of more than EUR 10 million. The CSA therefore emphasises the need to take account of the economic constraints that apply to their activity (head-on competition with trans-national services, higher rate of VAT than that applicable to television services, low level of aid and access to support funds, difficulty in accessing royalties, etc) so that the national players are able to meet their foreign competitors on an equal footing. Having made this criticism, the CSA goes on to make a number of proposals in its opinion.

Firstly, it advocates a principle of re-examination in 18 months' time (or no more than 24 months) of the threshold adopted, of the levels of financial contribution, and of the distinction drawn between on-demand AVMSs by subscription and in other forms. The CSA would like to see the conclusion, during this period, of professional agreements establishing how works are to be made available on on-demand AVMSs, and more specifically the duration of exploitation rights, the remuneration of beneficiaries, measures for reconciling respect for the moral rights of authors and the interruption of works for advertising.

It goes on to recommend the setting up of an annual progression in contribution obligations for production and the proportion of European works and works originally made in the French language in the catalogues. The CSA advocates a progression, dependent on the service's turnover, ranging from 50% of European works and 35% of works originally made in the French language for services with a turnover of less than EUR 10 million to a 60:40 ratio for services with a higher turnover. The CSA also considers that setting up exclusivities is likely to lead to fragmentation of the statutory offer and to a reduction in its power of attraction. Contrary to the provisions of the draft decree, it therefore recommends not privi-

leging the acquisition of exclusive rights through the pre-financing of works, in order to promote wider exposure and circulation.

Lastly, the CSA makes a number of comments on advertising. It says it is in favour of the greater flexibility provided for on-demand AVMSs (particularly the absence of rules on the amount of advertising and the abolition of most of the rules on the inclusion of advertising), on condition that consumer interests are protected by the identification of commercial communications and the maintenance of a clear separation between advertising and programmes.

• *Avis du CSA sur un projet de décret relatif aux services de médias audiovisuels à la demande, 27 septembre 2010* (CSA opinion on a draft decree on on-demand audiovisual media services, 27 September 2010)
http://merlin.obs.coe.int/redirect.php?id=12745 FR

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## Agreement between YouTube and SACEM on Royalties

After four years of discussion, the SACEM and the on-line video site YouTube have announced the signature of an agreement, made public on 30 September 2010. This is the first agreement the site has reached with a French royalties society.

The SACEM is a collective management society whose purpose is to represent and defend the interests of writers, writer-producers, comedians, composers and editors of music with a view to promoting musical creation. Its main task is to collect royalties and to redistribute them to the beneficiaries of the works that have been played or reproduced. Under this agreement, all artistes whose work is managed by the SACEM will receive remuneration for their work shown on YouTube, i.e., for every video containing music. The agreement covers the broadcasting on the on-line video platform of the global musical repertoire, particularly Anglo-American repertoires, of multinational editors, and of other works managed by the SACEM since the launch of YouTube.

The sums of money due to creators for the period from 2006 up to signature of the agreement are to be calculated on the basis of YouTube's market share and the amounts paid by its competitors. For the period 2011-2012, remuneration for artistes registered with the SACEM will be paid on the basis of the amount of advertising revenue generated by the YouTube page on which the video is posted. The agreement, which is in line with YouTube's desire to foster the creation of content and reward artistes whose work is available on-line, is valid until 2012.

According to SACEM's CEO, "This agreement demonstrates once more the willingness of SACEM to promote the legal use of works online, especially on video-sharing platforms. Indeed, it is important and symbolic that YouTube, the largest video-sharing site, pay French creators when their content is discovered and viewed on the site." However, the agreement only covers music; YouTube also needs to negotiate in France with the society of drama authors and composers (Société des Auteurs et Compositeurs Dramatiques - SACD) and the civil society of multimedia authors (Société Civile des Auteurs Multimédias - SCAM) for the videos to be fully covered.

• *Communiqué de presse de la Sacem, 30 septembre 2010* (SACEM press release, 30 September 2010)
http://merlin.obs.coe.int/redirect.php?id=12749 FR

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# GB-United Kingdom

## ATVOD Begins its Work

As reported in IRIS 2010-5:1/27, the Association for Television On-Demand (ATVOD) was formally "designated" as the co-regulator for UK Video on Demand (VOD) services. This status came formally into effect on 20 September 2010. ATVOD was an industry trade association prior to the designation.

ATVOD has now published its Procedure for Complaints about Editorial Content on VOD Services. The document outlines the procedures ATVOD will normally follow in the handling of complaints concerning editorial content on video on demand ("VOD") programme services ("VOD Services"). The Procedure also came into effect on 20 September 2010. The Procedure does not cover all video-on-demand services. According to the document, the key criteria are, to quote, as follows:

- that the principal purpose of the VOD service is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services;

- that access to the VOD service is on-demand;

- that there is a person who has editorial responsibility for the VOD service;

- that the VOD service is made available for use by members of the public;

- and that the service provider be based in the UK.

Editorial matters about which a complaint may be made comprise: harmful material likely to incite hatred; protection of under-18s from content likely to seriously impair their physical, mental or moral development; sponsorship; product placement; and information to be provided to users of VOD services.

ATVOD cannot consider complaints about the following: VOD services which are subject to any other jurisdiction throughout the world other than the UK; matters already being dealt with by the courts; internet access, telephone or television services that are not supplied on demand or are otherwise outside ATVOD's remit; any decision by a service provider whether or not to supply any product or service and the terms under which any product or service is supplied; or hardware (such as the set-top box) or software supplied by a service provider to a user to enable use of a VOD service.

ATVOD may also decline to consider complaints which, in the opinion of ATVOD, are frivolous, vexatious or which have been made persistently in the past without reasonable grounds or that contain language that is unnecessarily offensive, obscene or profane; where insufficient information about the complaint is provided; which are made outside the time limits set out in these procedures; or if the complaint concerns matters that ATVOD considers would be more properly dealt with by the courts or another complaints procedure.

• ATVOD, Procedure for Complaints about Editorial Content on VOD Services
http://merlin.obs.coe.int/redirect.php?id=12729 EN

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## KG-Kyrgyzstan

### New Constitution Adopted

On 27 June 2010 a new Constitution of the Kyrgyz Republic was adopted via a national referendum. It replaces the previous edition of the act that was adopted on 21 October 2007. The 2007 Constitution replaced in its turn the 2006 edition (see IRIS 2007-2: 15/25).

Unlike the earlier 1993 Constitution all later editions including the new one did not forbid censorship (although such a ban still exists in the 1992 mass media law). The new edition no longer forbids parliament to adopt a statute which would limit freedom of speech and of the press. Other guarantees of freedom of expression and of the press remain in place.

The new Constitution expands the notion of freedom of information and adds the right to seek information to the existing right of everyone to freely receive, obtain, keep and use information, and to disseminate it in oral, written or any other form (para. 1 Art. 33). It also guarantees everyone access to information on the activity of governmental and local bodies, their officials, entities with governmental participation, as well as any entity funded from the national or local budget (para. 3 Art. 33). Para. 4 of Art. 33 stipulates that everyone is guaranteed access to information kept by governmental and local bodies and their officials in the order stipulated by a statute (such a statute was indeed adopted in 2006).

The Constitution outlaws criminal defamation by stipulating that no one shall be prosecuted under criminal law for disseminating information that is defamatory or denigrating to one's honour and dignity (para. 4 Art. 34). Thus Kyrgyzstan becomes the first country in Central Asia to ban criminal prrosecution for defamation.

• Конституция Кыргызской Республики (Constitution of the Kyrgyz Republic)
http://merlin.obs.coe.int/redirect.php?id=12784 KY

**Andrei Richter**
*Moscow Media Law and Policy Centre*

## MK-"the Former Yugoslav Republic Of Macedonia"

### Legal Amendments Concerning the Macedonian Public Broadcasting Service

On 28 October 2010, the Macedonian Broadcasting Law was amended. After years of underfunding and dependence on grants from the Government to cover its running costs, the latest amendments to the Broadcasting Law should ensure independent and stable financing of the Macedonian Public Broadcasting Service (Macedonian Radio and Television - MRT).

The financing model of the PBS, defined in the Broadcasting Law adopted in 2005 (see IRIS 2006-4: 17/30) included an obligation on MRT to generate a list of households and legal entities that are obliged to pay the broadcasting fee, and to collect this 'public tax'. However, MRT could not establish an effective mechanism for self-funding. Dozens of roundtables, conferences and public discussions, some of them also supported by international organisations like OSCE, were held in order to find a proper solution to this problem. Not having a clear idea of how to reform MRT and due to the trade union of MRT strongly opposing the downsizing of staff and reducing of running costs, a couple of years ago the Government amended the

Broadcasting Law, allowing MRT to start insolvency proceedings (see IRIS 2008-9: 16/26). This would have meant a complete shutdown of the PBS. Due to pressure coming from the EU and the opposition these amendments were never enforced. However, the problem with the funding of MRT remained and it was noted in the latest EU Country Progress Report, which criticised the country for not having an effective funding mechanism for its PSB that would ensure non-biased reporting.

Since the broadcasting fee is a public tax, the recent amendments to the Broadcasting Law envisage that the Public Revenue Office will collect the fee, because it has the means and the legal authority to perform such an activity, while MRT as a public enterprise did not have means to force the citizens to pay the fee.

• *Zakon za izmenuvanje i dopolnuvanje na Zakonot za Radiodifuznata dejnost 2010* (Amendment to the Broadcasting Law, 28 October 2010)
http://merlin.obs.coe.int/redirect.php?id=12792 MK

**Borce Manevski**
*Broadcasting Council of the Republic of Macedonia*

## NO-Norway

### Public Consultation on the Evaluation of NRK's Existing Public Services

On 25 August the Ministry of Cultural Affairs circulated for public consultation a report assessing whether the current activities on the new media platforms of Norsk rikskringkasting AS (Norwegian public service broadcaster - NRK) qualify as public service. The examination, carried out by the Norwegian Media Authority has been undertaken as a preparatory step towards a new ex ante regime requiring a public value test for any significant new service NRK wants to launch (see IRIS 2010-1: 1/126).

The main conclusion in the report is that most of NRKs existing services are in compliance with the public service remit as stated in the Charter and consequently may be funded by license fees. However, the Media Authority has expressed concern that some specific services may be problematic when it comes to requirements in the Charter guaranteeing NRK's editorial independence and that NRKs public services shall be non-commercial. In particular, this concerns a website, called ut.no, offered by NRK in collaboration with Den Norske turistforening (The Norwegian Trekking Association) containing travel advice and tools for planning outdoor activities in Norway. The Media Authority is also critical of NRK for generating revenue through the use of mobile services in programmes, for example the use of SMS voting in programmes like the Eurovision Song Contest.

The report is based on information from NRK about its existing services, and serves only as an advisory opinion to the Ministry. The report caused a heated debate over the summer, leading the Ministry to decide to launch a public consultation on it, stressing that it was vital to hear all stakeholders and other interest groups before coming to its final conclusions about the services.

In May this year the necessary amendments to the Broadcasting Regulations entered into force, setting up assessment criteria and procedural rules on the required public value test that from now on must be undertaken whenever NRK applies for pre-consent to add a new significant service to the public service remit. The Media Authority will be in charge of conducting the evaluation in close cooperation with the Competition Authority. However, it is the King in Council (the Government) who has the final say as to whether a service should be included in the remit.

• Høring - Medietilsynets gjennomgang av NRKs tjenester på nye medieplattformer (Public consultation - The Media Authority's evaluation of NRK's services on new media platforms)
http://merlin.obs.coe.int/redirect.php?id=12720 NO
• Kringkastingsforskriften kapittel 6, tilføyd ved forskrift 23. april 2010 (i kraft 1. mai 2010) (Broadcasting Regulations, Chapter 6)
http://merlin.obs.coe.int/redirect.php?id=12721 NO

**Ingvil Conradi Andersen**
*Norwegian Media Authority*

## RO-Romania

### Developments in the Electronic Communications and Postal Services Markets

Due to the economic crisis and its effects on the Romanian markets, the *Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (National Authority for Administration and Regulation in Communications - ANCOM) decided not to charge the monitoring tariff owed by the operators of electronic communications and postal services for 2010.

According to ANCOM the Romanian electronic communications and postal services markets reached at the end of 2009 an estimated value of EUR 4,425 billion. ANCOM stated on 20 September 2010 that the aggregate value of the two markets was around 12.5 percent less than in 2008, based on the annual financial statements submitted by the operators. In 2009, the first year directly affected by the global financial crisis, the electronic communications market accounted for EUR 4,01 billion, whereas the postal services market accounted for EUR 414 million.

Despite the general 12.5 percent decrease, the electronic communications market registered in 2009 a series of significant growths in certain segments. For instance, as of 31 December 2009, there were 2.8 million fixed broadband internet access connections, which is up 12 percent compared to the same period in 2008; the number of mobile broadband internet access connections reached 2.5 million, which is up 66 percent compared to the period to the end of 2008.

The President of ANCOM declared he hoped the waiver of the payment of the monitoring tariff would be an incentive for the communications market to resume growth in 2010.

• Piața de comunicații electronice și servicii postale a scăzut în 2009; Comunicat de presă 20.09.2010 (ANCOM press release of 20 September 2010)
http://merlin.obs.coe.int/redirect.php?id=12717 RO

**Eugen Cojocariu**
*Radio Romania International*

## Sanctions for the "Vîntu Case"

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) on 16 and 21 September 2010 fined two commercial Romanian TV stations and issued a public warning to a third one due to breaches of the audiovisual law when covering the preventive arrest of the Romanian tycoon Sorin Ovidiu Vîntu, who was accused of several illegal financial operations and who was arrested in September 2010.

A fine of RON 10,000 (EUR 2,350) was imposed on Realitatea TV, a fine of RON 5,000 (EUR 1,175) on Antena 3, and B1 TV received a public warning because the broadcasters did not ensure impartiality and balance when reporting on the main opposing points of view in the "Vîntu Case"; the broadcasters confused facts and opinions and did not observe the accused person's right to his own image, through scurrilous reporting and by not requesting evidence regarding serious allegations.

The CNA recommended the stations to consider judiciously whether or not to use leaked information about trials in progress, as well as accusations without evidence against parties involved in judicial proceedings. These obligations are imposed by law on the parties involved in a trial. On the other hand, the obligations are imposed by the "deontological codes" (ethical rules), which concern the activities of broadcasters who discuss/debate publicly such legal cases.

According to Art. 12 of the *Legea privind liberul acces la informaţiile de interes public* (Law 54/2001 on the free access to information of public interest, see IRIS 2001-5: 15/22) information with regard to legal proceedings are excepted from free access if the publication of such information could affect a fair trial or the legitimate interest of any party involved in the trial.

The Deontological Code of judges and prosecutors (*Hotărârea Consiliului Superior al Magistraturii nr. 328/2005*, Decree no. 328/2005 of the Superior Council of Magistrates) envisages in Art. 15 that when hearings are designated as being confidential, judges and prosecutors are obliged to keep information and evidence "within the court" and to allow the documents to be read only if the law expressly permits it.

At the same time, Art. 5 of the Journalists' Deontological Code, adopted by the Clubul Român de Presă (Romanian Press Club), one of the main professional bodies, envisages that journalists have to avoid the publication of commentaries and opinions about current proceedings. This does not exclude objective reports on the facts, but the journalists should not take the place of the institutions and public powers.

The CNA reminded the broadcasters of the importance of observing the presumption of innocence and that, in order to ensure a fair trial, they must not allow anything to happen that could be interpreted as an attempt to influence the course of justice.

• CNA Comunicat de presă 23.09.2010 (CNA Press release of 23 September 2010)
http://merlin.obs.coe.int/redirect.php?id=12718 RO

**Eugen Cojocariu**
*Radio Romania International*

# SI-Slovenia

## Draft Media Law

The Slovenian Ministry of Culture has prepared the new *Zakon o medijih* (Media Law) and released it for public discussion on 28 July 2010. The discussion, which ended on 20 September 2010, was quite challenging and caused a mass movement of Slovenian musicians and journalists.

Slovenian journalists raised their voices in spring this year because they were not satisfied with the current regulation of Slovenian media because, in their view, it does not protect the freedom and autonomy of journalists to a satisfactory extent. They noticed that the interests of profit and the market would no longer be balanced by the rights to information and freedom of expression.

The reactions of journalists to the proposed *Zakon o medijih* were very diverse. While the *Sindikat novinarjev Slovenije* (Journalist Trade Union - SNS) and *Društvo novinarjev Slovenije* (Association of Slovenian

Journalists - DNS) stated that the draft provided good grounds for further discussion, the *Združenje novinarjev in publicistov* (Association of Journalists and Publicists - ZNP) requested the Ministry of Culture to withdraw it. They said that the draft brings back the old totalitarian mentality and restrictions to freedom of expression.

The Draft introduces a new definition of corrigendum that should prevent its abuse. According to the Draft it will be possible to correct only untrue or false statements in published content that infringe the rights of the relevant person and it envisages the possibility of suspending media in the case of hate speech.

The Law envisages besides actual project financing the possibility of financing programmes in the public interest over several years as well as providing financial support to media in economic difficulties. It introduces more strict criteria for the registration of freelance journalists, a right of pre-emption for journalists in the case of the sale of a media company and the prevention of concentration of ownership that will be under the jurisdiction of the *Urad za varstvo konkurence* (Competition Protection Office - UVK). The transparency of media will be ensured with a Register of media and procedures led by the UVK. According to the Ministry of Culture the Law brings more autonomy to journalists as it envisages an obligation to consider the opinion of the editorial board in the case of changes, supplementation or adoption of editorial policy.

The Draft keeps quotas for Slovenian music. Instead of the current forty percent of the daily programme time it introduces a quota of fifteen percent from 6 a.m. to 8 p.m., which should reach the relevant audience more effectively. Musicians were very concerned about lowering the quota and a wide debate arose. The Ministry stated that they were following statistics, which show that the actual quotas were misused and the most Slovenian music was broadcast during the night-time. The proposed regulation should also improve the quality of the Slovenian music produced.

The proposed Law also regulates advertising: product placement will be forbidden for the national broadcaster; advertising time will be restricted during prime time to seven minutes per hour (ten minutes for commercial broadcasters), while the intervals between the commercial breaks should be at least thirty minutes. Instead of the Broadcasting Council, the Media Council will be set up as an independent professional body in the media sector.

• Predlog osnutka Zakona o medijih (Draft Media Act)
http://merlin.obs.coe.int/redirect.php?id=12719 SL

**Denis Miklavcic**
*Union Conference of Freelance Workers in Culture and Media (SUKI)*

## US-United States

### Federal Communications Commission Paves the Way for Super Wi-Fi

On 23 September 2010, the Federal Communications Commission ("FCC" or "Commission") finalised its provisions for unlicensed wireless devices to operate in the unused part of the broadcast spectrum. Known as "white spaces," these bands of spectrum are the gaps between the now defunct analog television channels that were vacated as part of the nationwide switch to digital television spectrum in June of 2009. This is a major step towards a technology dubbed "Super Wi-Fi" by the Chairman, Julius Genachowski.

By reclassifying this spectrum for unlicensed use, the Commission is allowing companies to develop products that can use this spectrum for a wide variety of functions, as long as those uses do not interfere with licensed frequencies. When the Commission allocated unused bands for general use in 1985, the result was a wide variety of wireless technologies, including remote garage door openers, cordless telephones and "Wi-Fi." In an interview before the vote, Chairman Genachowski stated that the FCC "believe[s] that history can repeat itself, and unlicensed spectrum will catalyse private investment - it will create a new platform for innovators and entrepreneurs to develop new and exciting products for the public."

According to Chairman Genachowski, this new spectrum will allow signals to travel further, go through walls, and transfer more information than the current generation Wi-Fi systems. While some technical issues remain to be worked out, companies like Microsoft and Google - part of the "White Spaces Coalition," which advocates use of the unlicensed spectrum - are already devoting research teams to, and testing, this next generation of wireless networks.

In fact Microsoft's experimental "White-Fi" network covers most of its 202 hectacre campus with just two transmitters. According to Microsoft, signals over white-space airwaves travel at least three times the distance of Wi-Fi, covering an area nine times as large with superior penetration of buildings. The FCC hopes that this action will create new opportunities for business and municipalities, which, due to the greater range of the frequencies - and therefore the lower cost of transmitters - can provide a faster, better and perhaps cheaper service than the current generation of wireless technology to the consumers.

Chairman Genachowski also stated that the United States will be the first nation to deploy the technology, although nations such as the U.K., France and Brazil are currently examining it.

• Second Memorandum Opinion and Order - in the Matter of Unlicensed Operation in the TV Broadcast Bands - Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, adopted on 23 September 2010
http://merlin.obs.coe.int/redirect.php?id=12791 EN

**Alexander Malyshev**
*Stern & Kilcullen*

## Agenda

### ECTA Regulatory Conference 2010

29 November - 1 December 2010
Organiser: European Competitive Telecommunications Association (ECTA)
Venue: Brussels
Information & Registration
Tel.: +44 (0)118 979 3338
E-mail: srussell@ectaportal.com
http://www.ectaportal.com/regulatory10/

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