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Editorial Informations

Publisher:

European Audiovisual Observatory
76, allée de la Robertsau F-67000 STRASBOURG
Tél. : +33 (0) 3 90 21 60 00 Fax : +33 (0) 3 90 21 60 19
E-mail: obs@obs.coe.int www.obs.coe.int

Comments and Contributions to:

iris@obs.coe.int

Executive Director:

Wolfgang Closs

Editorial Board:

Susanne Nikoltchev, Editor • Francisco Javier Cabrera Blázquez, Deputy Editor (European Audiovisual Observatory) • Michael Botein, The Media Center at the New York Law School (USA) • Jan Malinowski, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) • Andrei Richter, Moscow Media Law and Policy Center (MMLPC) (Russian Federation) • Alexander Scheuer, Institute of European Media Law (EMR), Saarbrücken (Germany) • Harald Trettenbrein, Directorate General EAC-C-1 (Audiovisual Policy Unit) of the European Commission, Brussels (Belgium) • Tarlach McGonagle, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands)

Council to the Editorial Board:

Amélie Blocman, Victoires Éditions

Documentation/Press Contact:

Alison Hindhaugh
Tel.: +33 (0)3 90 21 60 10;
E-mail: alison.hindhaugh@coe.int

Translations:

Michelle Ganter, European Audiovisual Observatory (co-

ordination) • Katharina Burger • Véronique Campillo • France Courrèges • Paul Green • Bernard Ludewig • Marco Polo Sarà • Manuella Martins • Diane Müller-Tanquerey • Katherine Parsons • Stefan Pooth • Erwin Rohwer • Nathalie-Anne Sturlèse

Corrections:

Michelle Ganter, European Audiovisual Observatory (co-ordination) • Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory • Christina Angelopoulos, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) • Caroline Bletterer, post graduate diploma in Intellectual Property, Centre d'Études Internationales de la Propriété Intellectuelle, Strasbourg (France) • Johanna Fell, European Representative BLM, Munich (Germany) • Amélie Lépinard, Master - International and European Affairs, Université de Pau (France) • Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland) • Anne Yliniva-Hoffmann, Institute of European Media Law (EMR), Saarbrücken (Germany)

Distribution:

Markus Booms, European Audiovisual Observatory

Tel.:

+33 (0)3 90 21 60 06;
E-mail: markus.booms@coe.int

Web Design:

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: **Gillberg v. Sweden**

The European Court of Human Rights has delivered a judgment in an interesting case with a peculiar mix of issues related to freedom of expression, academic research, medical data, privacy protection and access to official documents. The defendant state is Sweden, a country very familiar with the principle and practice of access to official documents. The right of access to official documents has a history of more than two hundred years in Sweden and is considered one of the cornerstones of Swedish democracy. The case shows how access to official documents, including research documents containing sensitive personal data, can be granted to researchers, albeit under strict conditions. It furthermore demonstrates that Sweden applies effective procedures to implement orders granting access to official documents: those who refuse to grant access to official documents after a court decision has so ordered can be convicted on the basis of criminal law. The case reflects the idea that progress in scientific knowledge would be hindered unduly if the research methodology of a study or scientific data analysis and the conclusions build on the data were not open to scrutiny, discussion and debate, albeit under strict conditions of privacy protection regarding medical data.

In this case, a Swedish professor at the University of Gothenburg, Mr. Gillberg, has been responsible for a long-term research project on hyperactivity of children and attention-deficit disorders. Certain assurances were made to the children's parents and later to the young people themselves concerning the confidentiality of the collected data. According to Mr. Gillberg, the university's ethics committee had made it a precondition for the project that sensitive information about the participants would be accessible only to himself and his staff and he had therefore promised absolute confidentiality to the patients and their parents. The research papers, called the Gothenburg study, were voluminous and consisted of a large number of records, test results, interview replies, questionnaires and video and audio tapes. They contained a very large amount of privacy-sensitive data about the children and their relatives.

Some years later, two other researchers not connected to the University of Gothenburg requested access to the research material. One had no interest in the personal data as such but in the method used and the evidence the researchers had for their con-

clusions, the other wanted access to the material to keep up with current research. Both requests were refused by the University of Gothenburg, but the two researchers appealed against the decisions. The Administrative Court of Appeal found that the researchers should be granted access to the material, as they had shown a legitimate interest and could be assumed to be well acquainted with the appropriate ways of handling confidential data. It was also considered to be important to the neuropsychiatric debate that the material in question be exposed to independent and critical examination. A list of conditions was set for each of the two researchers, which included restrictions on the use of the material and the prohibition of removing copies from the university premises. Notified by the university's vice-chancellor that the two researchers were entitled to access by virtue of the judgments, first Mr. Gillberg and later the university refused to give access to the researchers. The university decisions were annulled however by two judgments of the Administrative Court of Appeal. A few days later, the research material was destroyed by a few colleagues of Mr. Gillberg.

The Swedish Parliamentary Ombudsman brought criminal proceedings against Mr. Gillberg, who a short time later was convicted of misuse of office. Mr. Gillberg was given a suspended sentence and a fine of the equivalent of EUR 4,000. The university's vice president and the officials who had destroyed the research material were also convicted. Mr. Gillberg's conviction was upheld by the Court of Appeal and leave to appeal to the Supreme Court was refused. A short time later, Mr. Gillberg lodged an application with the Strasbourg Court of Human Rights. He complained in particular that his criminal conviction breached his rights under Articles 8 (right of privacy, including personal reputation) and 10 (freedom of expression) of the Convention. Mr. Gillberg also complained under Articles 6 (fair trial) and 13 (effective remedy) of the Convention that in the civil proceedings concerning access to the research material he did not have a standing before the Administrative Courts. Several times Mr. Gillberg's requests for relief for substantive defects to the Supreme Administrative Court were refused because he could not be considered a party to the case. As Mr. Gillberg lodged his application before the Court more than six months after these judgments, this part of the application had been submitted too late and was rejected pursuant to Article 35 §§1 and 4 of the Convention. While on the face of it the case raised important ethical issues involving the interests of the children participating in the research, medical research in general and public access to information, the Court considered itself to only be in a position to examine whether Mr. Gillberg's criminal conviction for refusing to execute a court order granting access to official documents was compatible with the Convention. The Court found that the conviction of Mr. Gillberg did not as such concern the university's or the applicant's interest in protecting professional secrecy with clients or the participants in the research. That part was settled by the Administra-

tive Court of Appeal's judgments. For reasons of inadmissibility of the application regarding the judgments of the Administrative Courts, the European Court was prevented from examining any alleged violation of the Convention by these judgments.

Regarding the remaining and hence crucial complaints under Article 8 and 10, Mr. Gillberg emphasised that there had been a promise of confidentiality to the participants in the research, as a precondition for carrying out his research and that the order to grant access to the research material and his conviction for refusing to do so amounted to a violation of his right to private life and his right to negative freedom of expression (the right to refuse to communicate).

The European Court left the question whether there had been an interference with Mr. Gillberg's right to respect for his private life for the purpose of Article 8 open, because even assuming that there had been such an interference, it found that there had been no violation of that provision. According to the Court, Convention States have to ensure in their domestic legal systems that a final binding judicial decision did not remain inoperative to the detriment of one party; the execution of a judgment is an integral part of a trial. The Swedish State therefore had to react to Mr. Gillberg's refusal to execute the judgments granting the two external researchers access to the material. The Court noted Mr. Gillberg's argument that the conviction and sentence were disproportionate to the aim of ensuring the protection of the rights and freedoms of others, because the university's ethics committee had required an absolute promise of confidentiality as a precondition for carrying out his research. However, the two permits by the committee he had submitted to the Court did not constitute evidence of such a requirement. The Swedish courts had moreover found that the assurances of confidentiality given to the participants in the study went further than permitted by the Secrecy Act. As regards Mr. Gillberg's argument that the Swedish courts should have taken into account as a mitigating circumstance the fact that he had attempted to protect the privacy and integrity of the participants in the research, the European Court agreed with the Swedish criminal courts that the question of whether the documents were to be released had been settled in the proceedings before the administrative courts. Whether or not the university considered that they were based on erroneous or insufficient grounds had no significance for the validity of the administrative courts' judgments. It had thus been incumbent on the university administration to release the documents and Mr. Gillberg had intentionally failed to comply with his obligations as a public official arising from the judgments. The Court therefore did not find that his conviction or sentence was arbitrary or disproportionate to the legitimate aims pursued. It concluded, by five votes to two, that there had been no violation of Article 8 of the Convention.

With regard to the alleged violation of the right to

freedom of expression under Article 10 of the Convention, Mr. Gillberg invoked his "negative right" to remain silent. The Court accepted that some professional groups indeed might have a legitimate interest in protecting professional secrecy as regards clients or sources and it even observed that doctors, psychiatrists and researchers may have a similar interest to that of journalists in protecting their sources. However, Mr. Gillberg had been convicted for misuse of office for refusing to make documents available in accordance with the instructions he received from the university administration after a Court decision; he was thus part of the university that had to comply with the judgments of the administrative courts. Moreover, his conviction did not as such concern his own or the university's interest in protecting professional secrecy with clients or the participants in the research. The Court unanimously concluded that there had been no violation of Article 10 of the Convention.

The judgment of the European Court is certainly an eye-opener for many actors in countries of the Council of Europe working in the domain of access to official or administrative documents, academic research, the processing of sensitive personal data and data protection authorities. The jurisprudence of the Swedish courts and of the European Court of Human Rights demonstrates that confidentiality of data used for scientific research and protection of sensitive personal data is to be balanced against the interests and guarantees related to transparency and access to documents of interest for the research society or society as a whole. The concurring opinion of Judge Ann Power, which is annexed to the judgment in the case of *Gillberg v. Sweden*, elaborates the importance of this approach by emphasising that "the public has an obvious interest in the findings and implications of research. Progress in scientific knowledge would be hampered unduly if the methods and evidence used in research were not open to scrutiny, discussion and debate. Thus, the requests for access, in my view, represented important matters of public interest", without however disregarding the principles and values of protection of personal data.

• Judgment by the European Court of Human Rights (Third Section), case of *Gillberg v. Sweden*, No. 41723/06 of 2 November 2010
<http://merlin.obs.coe.int/redirect.php?id=12820>

EN

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

Eurimages: New Rules for Co-production Funding

From January 2011, Eurimages has made a number of changes to its regulations for calls for projects for

co-production support. These modifications are far-reaching and will necessitate a new approach on the part of producers applying to Eurimages. The changes impact on confirmed financing, start of shooting, re-submissions and digital copies and the main rationale behind them is to ensure that Eurimages maintains its pivotal role as a top financier, while at the same time keeping abreast of a changing market.

The rules that have been amended are the following:

- Confirmed financing: In 2011, evidence proving that at least 50% of financing is confirmed in each territory of the co-production must be provided at the latest by the date of submission of the project (see Articles 2.1.2 and 1.9.2) and failure to comply with this requirement will entail the automatic exclusion of the project from the selection process. The Eurimages website includes some helpful notes for producers, which provide clear indications of how financing can be confirmed.

Previous Eurimages practice was to allow producers approximately 6 weeks, after submitting their applications, to provide proof of 50% confirmed financing in each of the co-producing countries. The lengthy delay between the application and the final Board of Management decision (up to 3 months) meant that the initial financing plan was not always in line with the financing plan as it appeared 6 weeks later. This practice also led to a marked tendency not to regard Eurimages support as top financing.

- Shooting: Increasingly producers are starting shooting before their film is fully financed. In order to take this new market trend into account and to ensure that Eurimages sees projects that are in the final stages of financing, projects will now be permitted to begin principal photography before the Board of Management has decided whether to fund a project or not (see Article 1.7.2). It will be essential, however, that a written request (including the shooting schedule) be sent to the Executive Director prior to the deadline for the relevant call for projects.

- Resubmissions: From 2005 until 2010 the number of resubmissions increased from one in every five projects to one in every three projects; at the same time the fact of being able to submit projects up to three times was leading to an increasing tendency for incomplete projects to be submitted to Eurimages. To stem this tide, the new regulations will provide that projects submitted but withdrawn before the Board of Management meeting can be resubmitted only once (see Article 2.4.1).

A knock-on effect of the three above-mentioned changes is that the time between the date of application and the Board of Management's decision will be reduced from approximately 3 months to 7 weeks, thus providing a quicker turnaround time for producers.

- Digital copy: In order to ensure that European co-productions keep up with new technological advances

and are competitive, projects must now include a digital master copy for cinema release; thus, the production budget should include the relevant costs necessary for the completion of the digital master copy (see Articles 1.1.6 and 1.9.4). Producers can, if they wish, additionally include costs for a 35 mm copy.

• Regulations concerning Co-Production Support for full-length Feature Films, Animations and Documentaries
<http://merlin.obs.coe.int/redirect.php?id=12798>

EN FR

Francine Raveney
Eurimages

EUROPEAN UNION

Court of Justice of the European Union: Idrima Tipou AE v. Ipourgos Tipou kai Meson Mazikis Enimerosis

On 21 October 2010 the Second Chamber of the Court of Justice of the European Union issued a preliminary ruling on request of the Greek *Simvoulio tis Epikratias* (Council of State). The preliminary question was whether penalties imposed on shareholders of public limited companies operating television stations are contrary to the principles of freedom of establishment and of the free movement of capital.

The action was brought by Idrima Tipou AE, a shareholder of the public limited company Nea Tileorasi AE. Nea Tileorasi AE is the owner of the television station Star Channel. Idrima Tipou AE, Nea Tileorasi AE and other shareholders were jointly and severally fined approximately EUR 30,000 by the Minister for the Press and the Mass Media due to the infringement of their obligation to respect the honour and reputation of various personalities in a broadcast.

Relevant national legislation limits the maximum holding that a natural or legal person can have in the share capital of a company operating a television station to 25%. Furthermore, it imposes penalties not only on the company, but also on shareholders with a holding of over 2.5% when rules of national legislation or of good conduct are infringed in a broadcast.

The Court reiterated, in accordance with its settled case-law, that "measures which prohibit or impede the exercise of freedom of establishment or render it less attractive, or which are liable to prevent or limit the acquisition of shares in undertakings or to deter investors of other Member States from investing in their capital, entail 'restrictions' on freedom of establishment or on the free movement of capital".

According to the Court these measures have a deterrent effect on shareholders because they are responsible for ensuring the compliance of the company

with national legislation, even though they cannot influence compliance due to the limitations set on the amount of shares one is allowed to hold. Moreover, the Court observed that Greek law provides for other possible penalties in respect of television operations that are more appropriate to the legitimate objective pursued of compliance with national legislation.

As a result, according to the preliminary ruling of the Court, the principles of freedom of establishment and free movement of capital preclude the abovementioned measures.

• Case C-81/09, Idrima Tipou AE v. Ipourgos Tipou kai Meson Mazikis Enimerosis, 21 October 2010

<http://merlin.obs.coe.int/redirect.php?id=15336>

DE EN FR

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MT	NL	PL	PT	RO	SK	SL	SV			

Emre Yildirim

Institute for Information Law (IViR), University of Amsterdam

European Parliament: ACTA Resolution

On 15 November 2010 the participants in the Anti-Counterfeiting Trade Agreement (ACTA) negotiations announced that they had resolved the few issues that remained outstanding after the final round of negotiations in Tokyo and had finalised the text of the Agreement. A “legal scrub” of the text is planned for a technical meeting held in Sydney from 30 November to the 3 or 4 December 2010. Following this, the proposed Agreement will be ready for submission to the participants’ respective authorities to undergo the necessary domestic processes.

In the meantime, the European Parliament has reversed its initial course, giving, with a few reservations, in a recent resolution its seal of approval to the draft text of 2 October 2010. The Parliament voted against a resolution that was highly critical of ACTA, instead welcoming the changes made to address its previous concerns (see IRIS 2010-9/5). The Parliament noted that the negotiated Agreement cannot entirely solve the complex problem of counterfeiting, but considered it to be “a step in the right direction”, likely to benefit EU exports and protect rightsholders operating in the global market. The Parliament moreover observed that ACTA will not change the EU’s *acquis communautaire* as concerns IPR enforcement, as EU law is already considerably advanced by international standards. Any decision taken by the Commission as part of the ACTA Committee must lie within the scope of the *acquis* and may not unilaterally change the content of ACTA, while any proposed change to ACTA would need to be adopted by Parliament and the Council in accordance with Articles 207 and 218, TFEU. The Parliament called on the Commission to

confirm that ACTA’s implementation will have no impact on fundamental rights and data protection, on the ongoing EU efforts to harmonise IPR enforcement measures or on e-commerce.

The EP also made sure to note that, in compliance with the Lisbon Treaty, it will have to give consent to the ACTA text prior to the Agreement’s entry into force in the EU.

The Agreement has been highly controversial primarily because of secrecy surrounding its negotiation, its operation outside of the World Trade Organisation (WTO) and World Intellectual Property Organisation (WIPO) and because earlier drafts reportedly sought to impose measures that could interfere with fundamental rights and freedoms.

• Joint statement on the Anti-Counterfeiting Trade Agreement (ACTA) from all the negotiating partners of the agreement, IP/10/1504, Brussels, 15 November 2010

<http://merlin.obs.coe.int/redirect.php?id=12821>

DE EN FR

• European Parliament resolution on the Anti-Counterfeiting Trade Agreement (ACTA)

<http://merlin.obs.coe.int/redirect.php?id=12822>

DE EN FR

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MT	NL	PL	PT	RO	SK	SL	SV			

Christina Angelopoulos

Institute for Information Law (IViR), University of Amsterdam

NATIONAL

AT-Austria

ORF Guilty of Breaking Advertising Rules

In a decision published on 18 October 2010, the Austrian broadcasting authority, the *Bundeskommunikationssenat* (Federal Communications Senate - BKS), declared its position on the difference between an advertising spot and a public information broadcast.

The procedure followed a complaint about the broadcast of a 20-second spot by the Austrian workers’ association on *Österreichische Rundfunk* (Austrian public broadcaster - ORF), which labelled it as a “public information broadcast”. In the spot, the workers’ association dealt with some topical political themes and criticised possible tax reforms and savings schemes. The complainant thought the spot represented political or ideological advertising which, through the message it contained, was clearly designed to express a particular viewpoint and was more or less identical to a key proposal made at a national political party conference. It argued that the spot should not, therefore,

have been labelled as a “public information broadcast”.

ORF argued that the spot did not represent political advertising. It said that the workers’ association had acted within its remit as a representative of workers’ interests and had called on workers to consider tax-related issues. This had been an admissible attempt by the workers’ association to start and sustain a debate, and to inform workers about current political plans.

The BKS held that the “public information broadcast” label only applied to broadcasts that conveyed factual information from which the general public could derive a specific personal benefit, such as a reference to a public service or behavioural guidelines which, if complied with, were somehow, either directly or indirectly, advantageous to the general public. The concept should therefore be interpreted as including only messages that, in the full sense of the term, “served” the general public in some way. For example, they might promote road safety, environmental protection, public health or civic duties.

In the opinion of the BKS, a spot did not, in any case, represent a “public information broadcast” if - as in this case - it merely started and sustained a general political debate on possible tax reforms and savings schemes. Furthermore, the BKS could not identify any obvious benefit to the public.

On these grounds, the disputed spot should be considered as ideological advertising and should have been labelled as such and clearly separated from other programme material in accordance with the advertising rules set out in the *ORF-Gesetz* (ORF Act). By failing to label it in this way, ORF had therefore violated the rule on the separation of content, enshrined in Article 13(3) of the *ORF-Gesetz* (old version).

• *Beschluss des BKS vom 18. Oktober 2010 (GZ 611.919/0005-BKS/2010)* (BKS ruling of 18 October 2010 (GZ 611.919/0005-BKS/2010))

<http://merlin.obs.coe.int/redirect.php?id=12836>

DE

Peter Matzneller

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

BA-Bosnia And Herzegovina

Controversies around the Kinoteka BiH

The *Kinoteka Bosne i Hercegovine* (National Film Archive of Bosnia Herzegovina - Kinoteka BiH), could be seriously endangered due to legal controversies stemming from the complicated structure of governance of the post-Dayton BiH. On 28 September 2010

the Constitutional Court of the Federation of BiH confirmed an appeal lodged by the President of the Federation of BiH, about returning authorities originally vested in the cantons according to the Constitution of the Federation of BiH. Unlike the Republika Srpska, which is a highly centralised entity within BiH, the Federation of BiH is highly decentralised, composed of ten cantons having their own constitutions, including legislative, judicial and executive powers. However, over the time, two Ministries - the Ministry of Culture and Sport and the Ministry of Education and Science have been created on the entity level, which was not prescribed by the Federal Constitution.

In its ruling (No. U-29/09) the Constitutional Court of the Federation of BiH ordered a six-month deadline to harmonise competencies between the Federation of BiH and the cantons or otherwise the two federal Ministries will be abolished. If so, it could be detrimental for science, education, culture and arts, and in particular for the film industry, including the preserving of the cinematographic heritage, largely financed via the *Fondacija za kinematografiju* (Cinematography Fund), established by the Ministry of Culture and Sport.

The rather small institution, Kinoteka BiH, possesses and stores film material and databases of historical, artistic, cultural, educational and scientific significance. A digitisation process is under way supported by foreign aids. Before the 1992-1995 war, this institution was part of Jugoslovenska kinoteka. In 1994, the then Parliament of the Republic of BiH issued the law that established Kinoteka BiH. But the Dayton Peace Agreement created a highly decentralised power-sharing arrangement comprised of the Federation of BiH (FBiH) and the Republika Srpska (RS), which changed fundamentally the decision-making processes. In brief, all laws issued by the then Parliament of BiH were proclaimed void. Despite this legal vacuum Kinoteka BiH preserved its name and continued to exist. The legal controversies led to some paradoxes, e.g., concerning overlapping legislative competencies. All staff, including the executives, are in an acting capacity until reaching a final legal setting for the Kinoteka BiH.

• *Presudu U-29/09, 28.10.2010* (Ruling of the Constitutional Court of the Federation of BiH No. U-29/09 of 28 September 2010)

<http://merlin.obs.coe.int/redirect.php?id=12856>

BS

Dusan Babic

Media Researcher and Analyst, Sarajevo

Recent Initiatives in Promoting Internet Safety and Media Literacy

Several initiatives have been launched recently in Bosnia and Herzegovina (BiH) in order to promote awareness of responsible and safe use of the Internet, with a special focus on the protection of minors

and the risks that young people may be taking in the online environment.

In December 2010, as a part of the wider media literacy campaign, the Regulatorna agencija za komunikacije (Communications Regulatory Agency - RAK) launched the TV spot "Where is Klaus" adapted for broadcasting in BiH, as well as a newly-produced radio version. The TV spot has been made available by the EU-supported initiative for Internet safety Klicksafe from Germany, and it aims at raising parental awareness of the importance of safe Internet use for children and adolescents. The spot makes reference to the website www.sigurnodijete.ba, which has been designed as a national information hub on different aspects of Internet safety, serving parents and children alike and fostering ongoing Internet safety awareness and education. The site was launched in March 2010 by the *Ministarstvo sigurnosti BiH* (Ministry of Security of BiH) along with partner-NGOs: the International Solidarity Forum EMMAUS, the OAK Foundation and Save the Children Norway. It was created as a part of the *Sigurno dijete* (Safe Child) Project in relation to the National Action Plan on preventing child pornography and sexual abuse of children through the use of ICTs for 2010-2012. One of the most important activities in connection to this Project is the establishment of a hotline for receiving reports about allegedly illegal content and use of the Internet, which became a part of the International Association of Internet Hotlines - INHOPE-network.

The launch of TV and radio spots by the RAK represents a follow-up activity within the wider campaign on the promotion of media literacy and public awareness of media influence on children initiated in late 2009. The first step was a conference on the protection of children from unsuitable television content held in November 2009, backed by a short study covering aspects such as children's ability to interpret audiovisual content, their susceptibility to manipulation and the impact of violence and explicit sexuality and pornography.

An important part of these activities is the discussion on audiovisual content classification and rating. The *Kodeks o emitovanju radiotelevizijskog programa* (Broadcasting Code of Practice) stipulates the obligation of broadcasters to appropriately warn viewers of a particular content, and although most broadcasters use certain ratings, a uniform rating system does not exist. Under the auspices of UNICEF BiH and the RAK, a set of written guidelines for the classification of potentially harmful audiovisual content is currently being developed, which will hopefully help to define a common rating standard.

The above activities in promoting Internet safety and media literacy are a work in progress; however, they are calling for the involvement of the broader community - educational institutions and parents in particular.

- *Sigurno dijete* (Safe Child Project)
<http://merlin.obs.coe.int/redirect.php?id=12800>
- Media Literacy and Protection of Children and Minors in BiH
<http://merlin.obs.coe.int/redirect.php?id=12801>

BS

EN

Maida Čulahović

Communications Regulatory Agency

BE-Belgium

Broadcasters Fined For Transmitting Sexually Explicit Teletext Messages

On 28 September 2010, the *Kamer voor Onpartijdigheid en Bescherming van Minderjarigen* (Chamber for Impartiality and the Protection of Minors) of the *Vlaamse Regulator voor de Media* (Flemish Regulator for the Media) considered sexually explicit teletext messages transmitted by the commercial broadcasters VMMa, SBS Belgium and MTV Networks Belgium. The Flemish Media Decree prohibits the broadcasting of any programmes that could cause serious detriment to the physical, mental or moral development of minors. However, broadcasting of such programmes is allowed where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area covered by the service will not normally hear or see such broadcasts (Article 42). The Decree explicitly adds that this provision is also applicable to teletext (Article 41). In the Flemish Regulator's view the messages in question are capable of influencing the development of emotional relationships in a negative way by showing a biased and trivialised picture of (experiencing) sexuality and therefore they were considered inappropriate for minors. The messages were transmitted without filter and all day and could accordingly have been accessed by minors: the broadcasters had taken no technical measures whatsoever to shield minors from the messages. The Regulator added that mentioning the "18+" symbol was insufficient to guarantee that minors would not see the transmissions and judged in the end that the three broadcasters had violated Article 42 of the Media Decree. The fact that comparable messages are spread through other media was considered irrelevant in this respect and did not influence the nature of the infringement. Given that VMMa and SBS Belgium had already received an admonition because of identical facts in 2008, they were given a fine of EUR 12,500. In addition, the Regulator's decision is to be published on their teletext home pages. By contrast, as it was the first finding of MTV Networks Belgium committing such offences, this broadcaster only received an admonition.

- *VRM v. NV SBS Belgium, 28.09.2010 (Nr. 2010/040)* (VRM v. NV SBS Belgium, 28 September 2010 (No 2010/040))
<http://merlin.obs.coe.int/redirect.php?id=12815>

NL

- *VRM v. NV VMMa, 28.09.2010 (No 2010/041)* (VRM v. NV VMMa, 28 September 2010 (No 2010/041))

<http://merlin.obs.coe.int/redirect.php?id=12816>

NL

- *VRM v. BVBA MTV Networks Belgium, 28.09.2010 (No 2010/042)* (VRM v. BVBA MTV Networks Belgium, 28 September 2010 (No 2010/042))

<http://merlin.obs.coe.int/redirect.php?id=12817>

NL

Hannes Cannie

*Department of Communication Sciences / Center for
Journalism Studies, Ghent University*

Logo for Product Placement

On 10 September 2010, the Flemish Government issued a decision on the use of a logo for the indication of product placement, which was made public on 6 October 2010. The decision obliges broadcasters to display the logo in a clear and contrastive way for at least five seconds at the beginning and at the end of programmes containing product placement and after every break. The decision further stipulates some requirements as to place (top or bottom, at the right side of the screen), size, colour, and transparency of the logo. The logo should be displayed in a neutral way, which means that the products or services in question can receive no attention whatsoever while indicating the presence of product placement. In addition, during a period of three months starting on 1 November 2010 the broadcasters must simultaneously display a message to inform the viewers about the product placement for at least five seconds at the beginning of the programme ("More information: teletext page ...", or "This programme contains commercial communications in the form of product placement" (translation by the author)). Finally, the broadcasters have to provide viewers in an easy, direct and permanent way with an explanation of the logo's meaning through teletext (if they offer this service) and through their websites.

- *Besluit van de Vlaamse Regering van 10 september 2010 betreffende het gebruik van een logo voor de aanduiding van productplaatsing* (Decision of the Flemish Government of 10 September 2010 on the use of a logo for the indication of product placement)

<http://merlin.obs.coe.int/redirect.php?id=12861>

NL

Hannes Cannie

*Department of Communication Sciences / Center for
Journalism Studies, Ghent University*

New Flemish Code on Journalism Ethics

The *Vlaamse Raad voor de Journalistiek* (Flemish Council for Journalism Ethics) has created a new code

on journalism ethics that was made public on 6 October 2010. This Council is an independent self-regulating institution that supervises journalistic work in all Flemish media upon the filing of a complaint by a member of the public, thereby guaranteeing that journalistic ethics are upheld. It can also issue ethical directives and recommendations on its own initiative. The new ethical code is all-integrating, as it contains 27 provisions inspired by two classic texts that are very often referred to in the Council's practice (the Declaration of Munich (1971) and the Belgian Code of journalistic principles (1982)), supplemented by the Council's own directives which clarify these provisions. The code formulates provisions concerning four categories of deontological duties. Firstly there is the category related to truthful coverage (Articles 1-6), amongst others encouraging journalists to check and expose their sources (if this is possible and relevant) and obliging them to rectify wrongly covered information. Secondly, the category of independent coverage (Articles 7-14) provides some rights to journalists related to their freedom and autonomy when practising their job, but also prevents them from engaging in advertising, conflicts of interest or reception of presents or other advantages, in order to guard their independence. Thirdly, the category of fair play (Articles 15-21) focuses mainly on methods of news gathering, containing the principled prohibitions of paying for information and concealing the professional capacity and the obligation not to disclose the identity of sources to which confidentiality was promised. The last category of respect for privacy and human dignity (Articles 22-27) amongst others obliges journalists to balance the rights of all persons involved against the societal interest in disclosing information before covering news facts and to act very carefully when vulnerable persons, such as minors and victims of crimes, disasters or accidents, are concerned. This code functions as a practical guide and the Council for Journalism Ethics will apply its provisions to concrete cases.

- *Code van de Raad voor de Journalistiek* (Code on Journalism Ethics)

<http://merlin.obs.coe.int/redirect.php?id=12818>

NL

Hannes Cannie

*Department of Communication Sciences / Center for
Journalism Studies, Ghent University*

BG-Bulgaria

Draft Election Code

On 4 November 2010 the members of Parliament from the ruling GERB party submitted to the National Assembly the Draft Election Code ("Draft"). There is a

special section in the Draft regulating the media coverage of election campaigns, including the start of the election campaign, the election promotion, etc.

The Draft sets out that the control over the election campaigns shall cover newspapers, magazines (and their online editions), information bulletins, radio, television and other audio-visual services. However, the scope of control over the election campaigns excludes social networks and blogs.

The Draft introduces a new way of coverage of election campaigns by the public broadcasters - the Bulgarian National Television and the Bulgarian National Radio, in the form of videos, chronicles, disputes and others.

Paragraph 1 of the Additional Provisions of the Draft contains the following definitions:

18. "Media Service" means the creation and broadcasting of information and content, which are selected for a significant part of the public and provide clear messages to the public, irrespective of the means and technology used for their transmission. The media services include the following:

a) print media (newspapers, magazines and other periodicals);

b) media transmitted through electronic communications networks such as:

- Electronic media (radio, television and other linear audio-visual services);

- Online news services (online editions of newspapers and magazines, information bulletins).

Social networks (such as Facebook, Twitter and others) and blogs are not considered as media services.

19. "Media services provider" shall mean an individual - sole trader, or legal entity - which bears editorial responsibility for the content of the media service and is responsible for selecting the manner of the organisation. The editorial responsibility means exercising effective control over the content, programme schemes and catalogue of the services provided. The editorial responsibility excludes forums without a moderator and platforms for content created by their developers.

• Изборен кодекс (Election Code)
<http://merlin.obs.coe.int/redirect.php?id=12803>

BG

Rayna Nikolova
New Bulgarian University

Copyright Protection in Media Regulation

According to the Закон за радиото и телевизията (Bulgarian Radio and Television Act - RTA) one of the general principles of broadcasting activity is the consideration of copyrights and related rights within programmes. This is regulated in the provision of Art. 10, para. 1, point 8 of the RTA.

According to Art. 9, para. 1 RTA the providers of media services distribute programmes only in the circumstances of preliminarily settled copyrights and related rights. This is the reason why one of the requirements for the registration or licensing of a new radio or television programme is for the candidate to present to the Council for Electronic Media the respective contracts for the licensing of copyrights.

However, the wording of the provision in which this requirement is laid down is ambiguous and opens a big door for those broadcasters that prefer to reduce the costs for their programmes. The exact phrase of Art. 111, para. 1, point 9 RTA is "preliminarily contracts for licensed copyrights for protected works in the programmes and for licensed related rights for the distribution of someone else's programmes."

Based on this, some candidates state that the law does not oblige them to present preliminarily licensing contracts for related producers and performance rights. The Council for Electronic Media accepts such an interpretation of the law and allows registration and licensing of programmes without preliminarily settled related rights with the producers and artists, respectively with their collecting societies. In this way the Council allows the broadcasters to begin the distribution of a programme in breach of Art. 9, para. 1 and the principle of Art. 10, para.1, point 8 RTA.

Subsequently, the Council has to check if the broadcaster has concluded all necessary contracts for licensing the content of its programme, and if it establishes that the broadcaster distributes a programme without settled copyrights and related rights the Council has to impose a financial sanction. The Ministry of Culture is also empowered to penalise broadcasters for the distribution of a programme in violation of the Copyright and Related Rights Act. However, both administrative bodies state that the number of their staff is insufficient to exercise effective control over the huge number of broadcasters that break the law. This situation makes some categories of rightsholders as producers and artists feel discriminated by the law because their rights are not equally treated as the rights of authors and broadcasters.

Recently, the Council of Ministers appointed a special working group with the purpose of preparing a draft of a new electronic media act. Principally its work is focused on some other problems concerning the media

sector but it could be a good opportunity for more adequate rules on the preliminary control for copyright and related rights settlements.

• Публичен дебат за нов закон, регламентиращ дейността на електронните медии, ще се проведе в Министерския съвет (Further information about the public discussion and the minutes of the meetings of the working group from the summer 2010)
<http://merlin.obs.coe.int/redirect.php?id=12857>

BG

Ofelia Kirkorian-Tsonkova
Sofia University St. Kliment Ohridsky

CH-Switzerland

Relaxation of Rules on Advertising during SSR Television Programmes

A number of amendments have been made to the Swiss Radio and Television Decree (ORTV) with a view to relaxing the rules on advertising and sponsorship, although the modifications, in force since 1 April 2010, concern private-sector broadcasters only. The Federal Council has deferred its decision on a possible relaxation of the provisions governing the public-sector broadcasting company SSR after examining the amount of the licence fee for receiving radio and television broadcasts (see IRIS 2010-5/12). In June 2010, the Federal Council decided not to increase the fee for the years 2011 to 2014, although it acknowledged that SSR needed more resources in order to be able to finance the services it offered. These requirements will have to be covered by savings made within the company, more liberal advertising, greater efficiency in collecting the reception fee, and an increase in income by increasing the number of persons required to pay the fee.

As a result, the Federal Council has made a number of further amendments to the ORTV in order to relax somewhat the regulations on advertising during television programmes broadcast by SSR. These new arrangements, which will come into force on 1 January 2011, will allow SSR to receive additional income. The Federal Council's revision does not however alter the scheme that applies to news broadcasts and political current affairs magazines, which may only include a commercial break if the programme is longer than 90 minutes. On the other hand, all other programmes broadcast outside peak viewing times may now be interrupted by commercial breaks every 30 minutes; during peak viewing times (between 6 and 11 p.m.), these broadcasts remain subject to the scheme that applied before the new provisions came into force, i.e., a single commercial break is allowed every 90 minutes. Lastly, the maximum duration of authorised advertising each day is to be increased from 8% to 15%.

These relatively restrictive regulations take account of the public-service mission incumbent on SSR's programmes. The Federal Council maintains that, in the interests of viewers, SSR's television offer should look less commercial than its private-sector competitors, particularly at peak viewing times.

For greater efficiency in collecting the reception fee, radio and television licences are henceforth to be billed annually rather than quarterly, achieving savings of between 9 and 10 million Swiss francs each year on printing and postage costs. Anyone wishing to continue with quarterly billing will have to pay the extra cost involved.

• *Ordonnance sur la radio et la télévision, modification du 13 octobre 2010* (Radio and Television Decree (ORTV), amended on 13 October 2010)

<http://merlin.obs.coe.int/redirect.php?id=12832>

DE FR IT

Patrice Aubry

RTS Radio Télévision Suisse, Geneva

CZ-Czech Republic

Constitutional Court Rules on Reality Show Fine

The Czech Constitutional Court has heard a complaint from a broadcaster about a fine imposed on it for broadcasting a "Big Brother"-type reality show.

The Broadcasting Council had decided that the broadcaster should pay a fine of CZK 200,000 for violating Article 32 of Law no. 231/2001, which prohibits broadcasters from broadcasting TV programmes that endanger the physical, spiritual or moral development of children, between 6 a.m. and 10 p.m. Some parts of the programme had contained scenes that harmed human dignity and interpersonal relations, as well as vulgar and bad language (see IRIS 2005-10/13, IRIS 2008-8/21 and IRIS 2009-3/8).

After appeals against the Broadcasting Council's decision had been rejected by the Prague Municipal Court and the Supreme Administrative Court, the broadcaster lodged an appeal with the Constitutional Court because it thought the decisions of the Broadcasting Council and the courts had infringed its fundamental rights.

The Constitutional Court agreed with the administrative courts' interpretation of the law. It also explained that the appellant had not been prosecuted for broadcasting the show, but because of the timing of the broadcast. The fact that the appellant disagreed with the courts' conclusions did not mean that the complaint about infringement of the Constitution was well-founded and, in any case, did not represent a violation

of its fundamental rights. Since the decisions of the law courts could not be described as arbitrary, they did not infringe the appellant's fundamental rights. The Constitutional Court therefore rejected the complaint that the Constitution had been infringed.

• Usnesení Ústavního soudu České republiky č.j. I.US 1110/2009 ze dne 23. září 2010 (Decision of the Czech Constitutional Court, 23 September 2010)

<http://merlin.obs.coe.int/redirect.php?id=12837>

CS

Jan Fučík

Ministry of Culture, Prague

DE-Germany

BGH Rules on Deep Links Copyright Violation

In a recently published decision, the *Bundesgerichtshof* (Federal Supreme Court - BGH) ruled that links to third-party content can breach copyright in some cases.

The plaintiff in the procedure concerned operates a website from which street maps can be downloaded. After filling in a search form on the home page, the user is taken to the requested map on a different page. The plaintiff charges a fee for commercial or long-term use of the service. When they visit the home page, private users are given a session ID that is valid for a limited period of time, enabling them to use the service free of charge. The defendant, a letting agency, enabled visitors to its website to access maps showing the location of homes available for rent using a hyperlink direct to the plaintiff's relevant web page, therefore bypassing the home page. The plaintiff considered this to represent a breach of its exclusive right to make copyright-protected works available to the public (Art. 19a of the *Urheberrechtsgesetz* - Copyright Act, UrhG) and instituted legal proceedings.

Unlike the courts of lower instance, the BGH upheld the complaint. In principle, the creation of a hyperlink to protected third-party works - including by means of a so-called "deep link", i.e., one that bypasses the home page - did not infringe copyright, since the work was made accessible to the public not by means of the link, but through the fact that it was published on the Internet (see IRIS 2003-8/32 concerning the "Paperboy" decision). However, it was a different matter if a deep link bypassed technical measures taken by the copyright holder to ensure that its protected works could only be accessed by certain users or through certain channels. In this connection, the courts of lower instance had wrongly assumed that the measures had to be effective technical measures in the sense of Article 95a(1) UrhG. Rather, in this case, the

crucial element was the scope of the protection provided by Article 2 UrhG, which should not be confused with the much higher demands of Article 95a UrhG, which dealt with the protection measures themselves. The decisive factor was that the copyright holder had taken protection measures that could be recognised as such by third parties. By using the session ID, the plaintiff had taken a security measure, ensuring that users could only access the service after visiting the home page. The defendant had therefore made the plaintiff's street maps available to the public against the plaintiff's will. The defendant should have recognised this.

The BGH overturned the lower instance decisions, but referred the case back to the *Oberlandesgericht* (regional appeal court), which had not yet verified whether the maps were copyright protected.

• *Urteil des BGH vom 29. April 2010 (Az. I ZR 39/08)* (BGH ruling of 29 April 2010 (case no. I ZR 39/08))

<http://merlin.obs.coe.int/redirect.php?id=12838>

DE

Anne Yliniva-Hoffmann

Institute of European Media Law (EMR), Saarbrücken/
Brussels

BGH Refuses Injunction against *Hartplatzhelden*

In a ruling of 28 October 2010, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that film footage of amateur football matches was not protected under competition law and therefore overturned the lower instance decisions of the *Landgericht Stuttgart* (Stuttgart regional court - see IRIS 2008-7/12) and *Oberlandesgericht Stuttgart* (Stuttgart regional court of appeal - see IRIS 2009-5/18).

In the proceedings, the *Fußballverband Württemberg* (Württemberg Football Association - WFV) had asked the operator of the Internet portal, "www.hartplatzhelden.de", to refrain from publishing film footage of amateur football matches. On the portal, which is funded through advertising, members can upload privately filmed footage of amateur football matches and make it accessible to the public free of charge. The footage comprises clips of match action lasting between 60 and 90 seconds. The WFV claimed that this service breached its exclusive rights to commercially exploit matches organised under its jurisdiction, since the defendant had illegally adopted its product as organiser.

The BGH rejected this argument on the grounds that the WFV did not have the aforementioned exclusive exploitation right. The defendant's service did not represent unfair imitation of a protected product in the sense of Article 4(9)(b) of the *Gesetz*

gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG). There was no need to protect the WFV as a football match organiser in this way. If the WFV wanted to prevent the economic exploitation of matches played under its jurisdiction, it could ban private filming during matches, for example. Individual clubs could impose such a ban as part of their stadium regulations. The complaint should therefore be dismissed.

• *Pressemitteilung des BGH zum Urteil vom 28. Oktober 2010 (I ZR 60/09)* (BGH press release on the ruling of 28 October 2010 (I ZR 60/09))

<http://merlin.obs.coe.int/redirect.php?id=12839>

DE

Anne Yliniva-Hoffmann

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

Court Rulings on Illegal Online Music File-Sharing Networks

On 8 October 2010, the *Landgericht Hamburg* (Hamburg regional court - LG), in a legal dispute over the distribution of two music tracks via an Internet file-sharing network, ordered the defendant to pay two music publishers EUR 15 per track in compensation.

The court decided that the defendant had culpably and illegally infringed the music publishers' copyright (reproduction right and right to make available to the public) by copying the music tracks without permission and uploading them to a file-sharing network. The court's assessment of the level of compensation due is particularly significant. Whereas the plaintiffs had each asked for EUR 300 per track, the court decided that EUR 15 per track was adequate. It was important to consider what reasonable parties concluding a hypothetical licensing agreement would have agreed was an appropriate licence fee for the use of the music recordings. Since the tracks in question had been released many years previously, it could be assumed that demand for them was limited. It should also be borne in mind that the tracks were only available on the file-sharing network for a very short time, during which neither track could have been downloaded more than 100 times. The LG took into account the fees normally applied by the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (music copyright collecting society - GEMA) for the private use of works obtained through music-on-demand services.

On 5 October, the *Oberlandesgericht Köln* (Cologne regional court of appeal - OLG), in a procedure relating to the use of an illegal file-sharing network, granted the owner of an Internet connection the right to appeal against a court order requiring the provider to pass his personal details on to a copyright holder.

According to the OLG, the copyright holder was entitled, under Article 101(9) of the *Urheberrechtsgesetz* (Copyright Act), to require the provider to disclose the information (user's name and address) if the act of making the work available to the public was a clear breach of the law committed on a commercial scale. The *Landgericht Köln* (Cologne regional court - LG) had previously granted copyright holders' requests for information in several cases. It considered that the legal requirements were met if a whole album was uploaded for sharing purposes.

The OLG granted the user of the file-sharing network the right to appeal in the original procedure. Although the owner of the Internet connection had certain rights vis-à-vis the copyright holder, which did not include the right to appeal against the court order, his defence was "seriously impeded" if what he considered to be incorrect conclusions reached by the court could not be verified until a subsequent procedure. The appeal should only relate to the examination of whether the legal requirements were met for the copyright holder's request for information to be granted. In this case, the OLG found that the LG's decision to grant the information request infringed the user's rights because the "commercial scale" criterion had not been met. The album uploaded by the appellant had already been published and on sale for a year and a half. Only in particular circumstances could there be considered to be a "commercial scale" to the operation. It had a "commercial scale" if "a sufficiently large file was made available to the public during its relevant sale and exploitation phase".

The court stressed the need for the law to be developed further and for consistent case-law in this field, and granted leave to appeal.

• *Urteil des LG Hamburg vom 8. Oktober 2010 (Az. 308 O 710/09)* (Ruling of the Hamburg regional court, 8 October 2010 (case no. 308 O 710/09))

<http://merlin.obs.coe.int/redirect.php?id=12842>

DE

• *Beschluss des OLG Köln vom 5. Oktober 2010 (Az. 6 W 82/10)* (Ruling of the Cologne regional court of appeal, 5 October 2010 (case no. 6 W 82/10))

<http://merlin.obs.coe.int/redirect.php?id=12843>

DE

Peter Matzneller and Martin Lengyel

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

BVerwG Confirms Licence Fee Obligation for PCs

In a decision of 27 October 2010, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) ruled that broadcasting licence fees should be paid for Internet-capable PCs.

The case concerned the obligation of the plaintiffs, two lawyers and a student, to pay the fees as owners of Internet-capable PCs. The three defendants,

the broadcasters BR, SWR and WDR, claimed that the plaintiffs should pay the fees because their PCs could be used to watch programmes via a so-called live stream on the Internet. The plaintiffs, who had been asked to pay the fees for their Internet-capable PCs, which they used for their work, because they did not own any other registered reception device and were therefore not exempt under the “second device rule”, argued that, since they did not use their PCs to receive broadcasts, but exclusively for professional research and activities, they should not have to pay the licence fees (see IRIS 2009-7/14).

The BVerwG rejected the three plaintiffs’ appeals against the lower instance courts’ decisions to reject their claim. It ruled that an Internet-capable PC was a broadcast reception device in the sense of the *Rundfunkgebührenstaatsvertrag* (Inter-State Agreement on Broadcasting Licence Fees - RGebStV). The licence fees applied to all reception device owners, regardless of whether they actually used the device to receive radio or television programmes. It did not matter whether the PC was connected to the Internet or not, but only whether it was technically capable of being connected.

Neither did the obligation infringe more fundamental rights, such as the right to freedom of information (Art. 5(1) of the *Grundgesetz* - Basic Law, GG) and the freedom to pursue a profession (Art. 12(1) GG). Public service broadcasters were permitted to intrude on these fundamental rights by charging licence fees for Internet PCs on account of the financing function of the licence fees, which was enshrined in constitutional law. Finally, the equal treatment principle (Art. 3(1) GG) had not been breached, since both monofunctional broadcast reception devices and multifunctional Internet-capable PCs were similarly capable of receiving broadcast signals.

• *Beschluss des BVerwG vom 27. Oktober 2010 (Az. 6 C 12.09, 17.09 und 21.09)* (Decision of the BVerwG of 27 October 2010 (case no. 6 C 12.09, 17.09 und 21.09))
<http://merlin.obs.coe.int/redirect.php?id=12864>

DE

Christian M. Bron

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

Court Decision on Video Portal’s Liability

On 29 September 2010, the *Hanseatische Oberlandesgericht* (Hanseatic regional court of appeal - OLG) decided that the Sevenload video portal did not adopt user-generated content as its own and was not, therefore, liable for copyright infringements committed by users, either as a perpetrator, participant or aider and abettor.

The video portal concerned (“the defendant”) offers, on its Internet site, both professionally edited content (e.g., films, shows and music), for which it acquires the necessary licences, and content uploaded by registered users - particularly music videos. The content is found under separate headings and, in the section for user-generated content, the defendant has introduced a “notice and take down” system. In the case before the OLG, a music publisher (“the plaintiff”) complained that the videos uploaded by users infringed its exclusive rights to reproduce copyright-protected works and make them available to the public (Articles 16 and 19a of the *Urheberrechtsgesetz* - Copyright Act, UrhG) and sought an injunction against the defendant (Article 97(1) UrhG). The court of lower instance partially upheld the request, but both parties appealed.

The defendant’s appeal was upheld by the OLG. Referring to the “Chefkoch” case (see IRIS 2010-1/13), which it thought was a different matter altogether, the OLG accepted that the content uploaded by users onto the portal in question was thematically and visually incorporated into the defendant’s service and, to an extent, “mixed up” with licensed content. However, in this case, the user-generated content was neither “checked for completeness and correctness” by the defendant in advance, nor marked with the defendant’s logo to the same degree as in the “Chefkoch” case. Furthermore, the user-generated section only represented an additional service offered by the defendant, whose “core activity” was to offer licensed content; in addition, users could at any time remove content they had uploaded. Overall, therefore, a “sensible Internet user” would not be given the impression that the user-generated content belonged to the defendant. Secondary liability linked to the defendant’s failure to meet its duty of care was also ruled out because, in compliance with guidelines issued by the BGH (Federal Supreme Court), it had deleted the disputed videos immediately after the plaintiff had brought them to its attention.

• *Urteil des Hanseatischen OLG vom 29. September 2010 (Az.: 5 U 9/09)* (Decision of the Hanseatic regional court of appeal, 29 September 2010 (case no. 5 U 9/09))

<http://merlin.obs.coe.int/redirect.php?id=12840>

DE

Anne Yliniva-Hoffmann

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

Desire for HDTV No Justification for Satellite Dish

The *Bundesgerichtshof* (Federal Supreme Court - BGH) has decided that a tenant who wants to receive HDTV is not, in principle, entitled to install a satellite dish.

The defendant in this case was a tenant who had installed a satellite dish on his balcony so that he could receive high definition television (HDTV) programmes, which were not available via the cable network. His landlord objected and demanded that he remove the dish. The appeal court found in the landlord's favour, but allowed an appeal to the BGH.

The BGH ruled that the appeal was inadmissible because the appeal court's ruling did not mention any of the possible grounds of appeal listed in the law (Articles 552a(1) and 543(2)(1) of the *Zivilprozessordnung* - Code of Civil Procedure). The BGH also pointed out that the question of when the tenant of a house with a broadband cable connection was entitled to install a satellite dish against his landlord's wishes had already been clarified in relevant case-law of the BGH and *Bundesverfassungsgericht* (Federal Constitutional Court).

The BGH also ruled that the tenant's request was, in any case, ill-founded. It held that the tenant's fundamental right, under Article 5(1)(1) of the *Grundgesetz* (Basic Law - GG), to inform himself without hindrance from generally accessible sources must be protected, even in cases such as this. However, this should be weighed against the landlord's equally important property right, enshrined in Article 14(1)(1) GG, since the landlord must, if necessary, allow a receiving device to be installed on his property. However, this weighing up process could not be fully examined by the appeal court because this was the original task of the trial judge. There were no obvious errors in the appeal court's application of the law. Indeed, the court of lower instance had correctly based its decision on the fact that a tenant's right to information, protected in Article 5 GG, was generally protected sufficiently if the landlord provided a broadband cable connection with access to a sufficient number and quality of channels.

Finally, the BGH stressed that tenants were, in principle, allowed to receive satellite channels, even when a cable connection was provided. Under current legislation, it was only necessary to obtain permission to install the required satellite dish if it was necessary to interfere with the structure of the building or if its outward appearance would be permanently damaged. This is not normally the case when a visually inconspicuous parabolic reflector is installed on a stand.

• *Beschluss des BGH vom 21. September 2010 (Az. VIII ZR 275/09)* (BGH decision of 21 September 2010 (case no. VIII ZR 275/09))
<http://merlin.obs.coe.int/redirect.php?id=12841>

DE

Katharina Grenz

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

No Right to Exploit Programme Information in EPGs

In a second instance ruling, the *Oberlandesgericht Düsseldorf* (Düsseldorf regional court of appeal - OLG) has rejected a complaint by the *Verband Deutscher Zeitschriftenverleger* (association of German magazine publishers - VDZ) against *Verwertungsgesellschaft Media* (media collecting society - VG Media) concerning the use of programme information.

The VDZ had originally asked the *Landgericht Köln* (Cologne regional court - LG) to issue a negative declaratory judgment, explaining that the magazine publishers it represented were entitled to use the programme information published by the broadcasters affiliated to VG Media for their electronic programme guides (EPGs) free of charge. On 23 December 2009, the LG decided that VG Media was not entitled to exercise its members' rights in this way, since the merger had not been authorised under the EC Merger Regulation for this purpose. However, as regards the fundamental question of whether programme information could be protected, the court had no doubt that it could (see IRIS 2010-2/12).

In the appeal, the OLG Düsseldorf found against the plaintiff and ruled that the original action should be dismissed on the grounds of inadmissibility. The court explained that the VDZ, for its part, was not authorised to represent its members in the pending legal proceedings, since it had no legitimate interest in asserting these rights. The question of in what circumstances broadcasters' programme information could be used in EPGs went beyond the VDZ's statutory purpose, which was to protect and promote the common interests of its members. Representing them in relation to this particular issue was not covered by this purpose, since this would depend on (virtually) all members needing to offer an EPG in the near future in order to remain competitive. The plaintiff had failed to prove that this was the case.

Neither could it be argued that a common interest resulted from the fact that the procedure concerned basic issues that were also relevant to members in other contexts. There was no evidence that answering these copyright-related questions could, at the same time, clarify the legal situation in relation to other copyright-protected works owned by the publishers. The same applied to clarification of the question of what cartel law provisions applied to a media company with a dominant market position.

Finally, the court also ruled that the plaintiff did not have a legitimate interest because it was not authorised under Article 12 of the *Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten* (Act on the exercise of copyright and

related rights - UrhWahrnG) to conclude a general agreement for the “small number of members affected”. To conclude such an agreement on behalf of only the nine companies concerned would not be in the members’ common interest and therefore exceeded the organisation’s statutory purpose. The LG Köln had ruled otherwise on this point.

• *Urteil des OLG Düsseldorf (Az. VI-U (Kart) 15/10) vom 3. November 2010* (Ruling of the Düsseldorf regional court of appeal (case no. VI-U (Kart) 15/10), 3 November 2010)

<http://merlin.obs.coe.int/redirect.php?id=12846>

DE

Sebastian Schweda

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

DPMA Decides that VG Media Does Not Need to Grant Rights to Operate an Online Video Recorder

According to reports, the *Deutsche Patent- und Markenamt* (German Patent and Trade Mark Office - DPMA), in its function as the regulator of collecting societies, published a press release on 10 September 2010, in which it considered the extent to which the rights exercised by the *Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen* (media collecting society - VG Media) covered the use of online video recorders (OVR).

In this context, it should be mentioned that the nature of the rights connected with the use of an OVR does not appear to be clearly defined. In its judgments of 22 April 2009 in the cases *ProSiebenSat.1 v. Shift.TV* (case no. I ZR 215/06), *RTL v. save.tv* (case no. I ZR 175/07) and *RTL v. Shift.TV* (case no. I ZR 216/06), the *Bundesgerichtshof* (Federal Supreme Court) made it clear that the retransmission right enshrined in Article 20 of the *Urheberrechtsgesetz* (Copyright Act - UrhG) was more relevant in such cases than the right to make works available to the public enshrined in Article 19a UrhG. However, this should be examined on a case-by-case basis, taking into account the technical characteristics of the service concerned (see IRIS 2010-9/17 and IRIS 2009-7/9).

The DPMA’s decision followed a complaint by an OVR operator, which had accused VG Media of failing to meet its obligation to contract, set out in Article 11(1) of the *Urheberwahrnehmungsgesetz* (Act regulating collecting societies), by refusing to grant it the necessary rights to operate an OVR. VG Media had argued that the retransmission right linked to the operation of an OVR was not covered by the collection agreement that had been concluded with the broadcasters.

In the DPMA’s opinion, the “purpose of grant” rule contained in Article 31(5) UrhG applies in this case. According to this provision, the scope of granted

rights, if the types of use are not individually specified when they are granted, should be limited to the types of use necessary for the fulfilment of the purpose of the agreement. In this connection, the DPMA held that the retransmission of programme signals by the OVR operator to a server storage area allocated to an individual user represented a separate type of use that was not specifically listed in the collection agreement. This type of use was not covered by the purpose of the agreement. The purpose of a collection agreement was to exercise rights that the rightsholders could not exercise themselves. However, it could be assumed that the broadcasters were able to exercise the corresponding retransmission rights themselves. Also, since some broadcasters wanted to operate OVR-type services themselves, it should be assumed that they would not have signed the collection agreement with VG Media if it had specifically referred to OVR retransmission and a related obligation to contract. It could therefore not be assumed that the rights in question had been transferred to VG Media.

On these grounds, the DPMA thought that VG Media’s refusal to grant the complainant the rights to operate an OVR was legitimate and ruled out the possibility of intervention under regulatory law.

Peter Matzneller

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

State Media Authorities and ProSiebenSat.1 Group Settle Dispute over Competition Rules

The *Kommission für Zulassung und Aufsicht* (Licensing and Monitoring Commission - ZAK) announced on 24 November 2010 that the TV broadcasters of the ProSiebenSat.1 group and the responsible *Landesmedienanstalten* (State media authorities - LMA) had settled their dispute over consumer protection in TV competitions and game shows.

The disagreements concerned the competition rules adopted by the *Landesmedienanstalten* in 2009, which include rules on phone-in competitions designed to protect competition participants, such as a ban on misleading the public and certain transparency obligations (see IRIS 2009-3/12). The ZAK has issued sanctions against several private broadcasters (see IRIS 2009-10/9) and the LMA have instigated legal proceedings on the basis of these rules. The broadcasters defended themselves against these measures.

According to the ZAK, an analysis of the game show sector conducted in the summer showed that the broadcasters were complying with the main provisions of the competition rules. This finding led to the dispute being settled. Under the settlement, the broadcasters concerned have withdrawn their

complaints and appeals against sanctions already imposed. Consequently, nine fines totalling EUR 100,000 will now be paid. In addition, the broadcaster 9Live will withdraw its appeal against the decision of the *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court) on the validity of the competition rules (see IRIS 2009-9/13). In return, the LMA have agreed to cancel ten fines and abandon pending procedures in previous cases.

However, the ZAK announced that it would continue to monitor compliance with the competition rules on a regular basis.

• *Pressemitteilung der ZAK vom 24. November 2010* (ZAK press release of 24 November 2010)

<http://merlin.obs.coe.int/redirect.php?id=12847>

DE

Anne Yliniva-Hoffmann

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

Bundesrat Criticises EU Commission's Broadband Plans

The *Bundesrat* (upper house of parliament) has issued a statement criticising parts of the Digital Agenda published by the European Commission. The Digital Agenda includes proposals to build a European high-speed network, with the objective of equipping all European households with Internet speeds of at least 30 Mbit/s, and at least half of European households with more than 100 Mbit/s by 2020 (see IRIS 2010-7/4).

Although, in principle, the *Bundesrat* welcomed the Commission's proposals to develop suitable funding instruments for the broadband sector and reduce investment costs, it criticised the Commission for failing to offer sufficient practical support. It disapproved of the Commission's plan to play only a planning, coordinating and monitoring role in relation to the member states' activities. The lack of concrete information about the "role of the market and the importance of private investments in the expansion of broadband" was also criticised.

In principle, state aid should always be a last resort and remain limited to market failures. However, particularly in rural areas, aid might now be necessary, although EU state aid rules might prevent it. The use of such aid would increase the administrative burden and there was insufficient scope for the promotion of next generation access networks in regions with weak markets. There was therefore an urgent need for the proposals to be simplified and, if necessary, for a special NGA aid programme.

Although there was currently a sufficient number of terrestrial wireless and satellite services, the *Bundesrat* doubted that these would be able to achieve

the target of 30 Mbit/s. These technologies should therefore only be supported if they could prove their ability to deliver the required bandwidth to end users.

The *Bundesrat* firmly rejected the Commission's suggestion that in-building wiring could be made a condition for the granting of building permission. On the one hand, the costs of implementing this measure would not reduce the cost of new infrastructure. On the other, the cost would generally be paid by the owners of buildings rather than the operators of the new infrastructure. Furthermore, building regulations in the *Länder* did not include any requirements in terms of the technical equipment of homes. Rather, public law provisions merely contained a set of minimum requirements for a building, which did not include a particular "quality standard" (compulsory provision of telephone, radio or television).

• *Stellungnahme des Bundesrates vom 5. November 2010* (BR-Drs. 566/10) (*Bundesrat* statement of 5 November 2010 (BR-Drs. 566/10))

<http://merlin.obs.coe.int/redirect.php?id=12844>

DE

Martin Lengyel

*Institute of European Media Law (EMR), Saarbrücken/
Brussels*

ES-Spain

Telecinco and Cuatro's Merger Approved

At its meeting on 28 October 2010, the Spanish National Competition Commission (CNC) approved the merger between TV channels Telecinco and Cuatro subject to the commitments given by Mediaset's channel last 19 October 2010 by stating that they have addressed the competition concerns identified.

On 28 April 2010 Telecinco had reported to the CNC its planned acquisition of Cuatro. This concentration had been previously subject to a referral by the European Commission, which considered that the CNC was the authority best placed to carry out the analysis.

The CNC Council decided on 30 June 2010 to move the operation to the so-called second stage of the procedure, after finding that taking control of Cuatro by Telecinco brought forth the following problems for competition:

- In the television advertising market, given the total audience which Telecinco will manage after the merger, if the advertising on these channels were to be jointly marketed, such advertising could become essential for advertisers;

- The acquisition of audiovisual content will strengthen the bargaining power of the merged

entity as concerns the purchase of such content, which affects both Telecinco's competitors in the market for free TV and smaller content providers.

On 24 September 2010, Telecinco submitted an initial proposal of commitments to address the competition concerns identified, which was considered insufficient. Telecinco subsequently submitted new undertakings on 19 October 2010. These have been deemed appropriate by the CNC. As usual in this procedure, the CNC has consulted with competitors and stakeholders in order to obtain their views about the adequacy of the commitments laid out in the first instance by Telecinco. All these contributions have been evaluated, while others were also taken into account by the CNC.

The board of the CNC amended these conditions after consultation with and with regard to the opinion of competitors and stakeholders. The initial term of commitment is three years, extendable for another two.

As concerns the advertising market, Telecinco agrees not to sell in the same commercial package of the two open channels with a wider audience, with the additional condition that the joint audience of the channels included in a commercial package will not exceed 22%. Nor can it develop policies tying the various packages.

Furthermore, Telecinco did not extend its offer of free TV channels by leasing third DTT operators. Telecinco has also agreed not to block the quality improvements that its competitors may want to launch, especially La Sexta, with which it will share many DTT channels until 2015.

Telecinco accepts the conditions to counter its power as an audiovisual content consumer limiting to three years the duration of contracts for the purchase of exclusive content, such as films and series, ensuring that these will periodically be on the market. It has also limited to five years the period of exclusive exploitation of a film. The channel is also committed to restricting its ability to exclude national television producers as suppliers of programmes to open competitors.

• CNC Press Release
<http://merlin.obs.coe.int/redirect.php?id=12829>

EN

Pedro Letai
Lawyer / Universidad Autónoma de Madrid

FR-France

Publication of Audiovisual Media Services Decree

It has taken the Government a few weeks to revise its text after receiving a negative opinion from the CSA on 27 September on its draft decree on audiovisual media services (AVMSD) (see IRIS 2010-10/31). The Decree, incorporating a number of the suggestions made by the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA), was published in the Journal Officiel on 14 November 2010. Adopted in application of the Act of 5 March 2009 transposing the AVMS Directive into French law, the Decree lays down three sets of rules: the arrangements for the scheme for AVMS contributing to the production of cinematographic and audiovisual works; the arrangements making it possible to guarantee the offer of cinematographic and audiovisual works of European origin or made originally in the French language and to ensure their effective exploitation; and the arrangements covering advertising, sponsorship, and tele-shopping.

Regarding the arrangements concerning the contribution to production, the Decree draws a distinction between two categories of services - video on demand (VOD) services, whether on an individual basis (Art. 5) or by subscription (Art. 4), and catch-up television services (Art. 3). For all services, the provisions covering the contribution to production only apply to those services offering at least ten full-length cinema films or ten audiovisual works. Similarly, in line with the CSA's recommendations, the arrangements will only apply to services with a turnover of at least EUR 10 million (excluding catch-up TV), so as not to hinder their development. Article 7 of the Decree takes into account, as the CSA wished, the purchase of rights as an eligible expense for avoiding the development of exclusivity practices in this market. The contribution scheme to be applied to VOD services by subscription (Art. 4) will vary according to the media chronology (contribution rate of between 15% and 25%) for European works or works made originally in the French language. The contribution scheme for catch-up television services (Art. 3) only applies to cinematographic production, since for audiovisual production the contribution made by these services is pooled with that of the television services from which they are derived. Article 6 of the Decree lays down a scheme for a gradual increase in the production obligations of VOD services on an individual basis and by subscription. Articles 9 and 10 determine the proportions and criteria for independent production.

As for the arrangements intended to guarantee the offer and effective exploitation of European works and

works made originally in the French language, Articles 12 and 13 of the Decree provide for the application of the same quotas as those applicable to television services, which is 60% for European works and 40% for works made originally in the French language. These quotas are however set initially at 50% for European works and 35% for works made originally in the French language for a three-year period, as recommended by the CSA. Lastly, Articles 14 to 18 of the Decree extend to AVMS the rules of ethics resulting from the Decree of 27 March that apply to advertising on television, television sponsorship, and tele-shopping, namely truthfulness, respect for human dignity, non-discrimination, a ban on surreptitious publicity, and use of the French language, etc.

In line with the publication of the Decree, the CSA began on 1 December to call for applications from broadcasters of on-demand audiovisual media services on digital television.

• *Décret n°2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande, JO du 14 novembre 2010, (Decree No. 2010-1379 of 12 November 2010 on on-demand audiovisual media services, published in the Journal Officiel of 14 November 2010)*
<http://merlin.obs.coe.int/redirect.php?id=12833> FR

Amélie Blocman
Légipresse

Advertising to Be Abolished on France Télévisions Channels, but not before 2016!

The Act of 5 March 2009 provides for the total abolition of advertising on public-sector television channels starting on 30 November 2011, the final date for switching from analog to digital television. And yet the Government announced in September 2010 that it was setting up a two-year moratorium, until January 2014, before abolition (see IRIS 2010-9/25). This was incorporated in the draft national budget for 2011, which was only adopted after a number of twists and turns. On 17 November 2010 the National Assembly voted in favour of the definitive maintenance of daytime advertising on France Télévisions' channels, thereby adopting - contrary to the Budget Minister's opinion - an amendment tabled by Michèle Tabarot, a parliamentary majority MP and chair of the Cultural Affairs Committee. The grounds for the amendment, which went further than a simple two-year moratorium, was the budget impact of abolishing advertising, as this was deemed incompatible with the current state of public finances. The bill then went to the Senate. On 4 December, with the Government's approval, the Senate adopted a new amendment totally abolishing advertising on France TV starting in January 2016! It was not until a meeting of the Joint Commission (Commission Mixte Paritaire - CMP), comprising 7 members of the Senate and 7 MPs, that a joint version

for both chambers of Parliament was reached. Meeting on 14 December, the CMP eventually validated the Senate's vote and the total abolition of advertising on France Télévisions' channels in 2016. Although among the Prime Minister's entourage this was said to be "a good compromise", a number of MPs were more ironic - as one of them said, "Given the state of our public finances, daytime advertising on France Télévisions is likely to be with us for a long time yet, even beyond 2016!"

• *Loi n°2010-1657 du 29 décembre 2010 de finances pour 2011 (Budget Act 2011 n. 2010-1657 of 29 December 2010)*
<http://merlin.obs.coe.int/redirect.php?id=12863> FR

Amélie Blocman
Légipresse

Signature of a Charter Laying Down a Framework for Editorial Responsibility on Connected Television

The arrival of the Internet on the television screen has been a source of much debate for some months already. In the United States, Google has launched a Google TV box and has joined forces with Sony for connecting it directly to television sets. Similarly, Apple TV - hosted in the Grand Duchy of Luxembourg - offers exclusive access to films and series distributed on iTunes, while Eurosport is working with Panasonic to broadcast sports events on catch-up TV. At present the television channels obtain authorisation to broadcast from the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) in exchange for observing a number of obligations (on advertising, protection of minors, respect for copyright, etc.) in respect of their "editorial responsibility". Such obligations do not exist on the Internet, and if the Internet and television are to live together, it is necessary to define a number of rules on the subject. After several months of discussion, the chairmen of the 18 main television channels in France have announced that they have signed an "editors' charter on how to display on-line content and services and other related video material on television screens". The television channels' aim is to retain control over content. The signatories want to exercise total, exclusive control over the content and services displayed at the same time as, or on either side of, the programmes they broadcast. This means that web players that wish to include web content on either side of these programmes will be limited in what they can do. The text states that the TV editors are the only players authorised to guarantee the compliance of the content displayed with the regulatory constraints in force, their agreement with the CSA or their contractual specifications, and the arrangements between them and beneficiaries whose programmes are broadcast on the channels. The television channels are also opposed

to anything that could take advantage of their programmes or their audience by directing viewers to other content and services. They undertake to promote a common technological solution making it possible to associate the use of data broadcast as part of the signal and on-line services. They would also like to see the adoption of a harmonised technical norm for television sets and other connected video equipment, so as to avoid each manufacturer coming up with separate developments. If such a solution were to be implemented, the signatory editors want the industrialists to make every effort to adopt the technology decided on.

• *Charte des éditeurs sur les modalités d'affichage des contenus et services en ligne sur les téléviseurs et autres matériels vidéo connectés, signée le 19 octobre 2010* (Editors' Charter on how to display on-line content and services on television screens and other connected video equipment, signed on 19 October 2010)

<http://merlin.obs.coe.int/redirect.php?id=12835>

FR

Amélie Blocman
Légipresse

New Agreements between YouTube and Collective Management Societies

A month after signing an agreement with SACEM (see IRIS 2010-10/32), YouTube has now done the same with three other collective management societies - SACD (Société des Auteurs et Compositeurs Dramatiques), SCAM (Société Civile des Auteurs Multimedia), and ADAGP (Société des Auteurs dans les Arts Graphiques et Plastiques). These societies represent a wide range of authors, creators, screenwriters and directors of fiction works and documentaries, visual artists, architects, writers, playwrights, etc., to whom YouTube will pay a fee when distributors and producers use their work on the platform. Google's subsidiary has no desire to be restricted to amateur videos, and needs short films, music clips and TV series in order to attract more advertising. As a result, YouTube has signed a partnership agreement with ARTE covering the showing of full-length cinema films and documentaries, and has to observe the rules governing copyright and royalties in doing so. The agreements apply for all the works used on YouTube since it was launched in France in 2007 and will continue to apply until 2013. The financial aspects are confidential, but Pascal Rogard, SACD's Chairman, has said that they involve YouTube paying a percentage of its turnover, the actual figure to be negotiated, to the collective management companies, which will then be required to pay royalties to their members, in a more or less equal fashion initially. At the same time, the collective management companies are looking for new models for the customised remuneration of royalties, so that everyone receives "a fair share", he added. YouTube is also constantly innovative in helping artistes to protect and manage their rights on

the platform. ID Content technology has been developed to enable artistes and the beneficiaries of audiovisual works to identify and manage their creations on the platform. Using this technology, beneficiaries are able to tell YouTube how to recognise their content automatically so that it can be blocked, broadcast or monetised. As a result, the vast majority of artistes now authorise YouTube to keep their creations on-line and to sell advertising around their videos, the revenue being shared with the beneficiaries. These agreements should put a stop to the legal battles that have been raging between the beneficiaries and the platform.

• *Communiqué de presse de la SACD du 25 novembre 2010* (SACD press release on 25 November 2010)

<http://merlin.obs.coe.int/redirect.php?id=12834>

FR

Amélie Blocman
Légipresse

GB-United Kingdom

Five of Broadcaster's Programmes Held in Breach

Ofcom has found that five programmes broadcast by the Islam Channel, originally shown in 2008 and 2009, were in breach of the Broadcast Code, Sections 2.3 (Harm and Offence) and 5.5 (Due Impartiality). The Channel had previously been found to have breached provisions of the Code relating to due impartiality in 2007 and was fined GBP 30,000.

Four other programmes investigated were found to be Code compliant. Ofcom launched the investigation into the channel following a report monitoring its output, *Re-Programming British Muslims*, published by the Quilliam Foundation.

Three of the programmes (two issues of *IslamiQa* and *Muslimah Dilemma*) broadcast material which were found to have condoned marital rape and domestic violence and labelled women who wore perfume outside their homes "prostitutes"; separately, two programmes (*Ummah Talk* and *Politics and Beyond*) were found to have breached impartiality guidelines in relation to coverage of the Israeli-Palestinian conflict.

The finding concludes that "We consider that the breaches...are not so serious or repeated to merit being considered for imposition of a statutory sanction....However, Ofcom remains concerned about Islam Channel's understanding and compliance processes in relation to the Code...Therefore, the Islam Channel is being requested to attend a meeting with the regulator to explain and discuss its compliance

processes further in relation to Sections Two and Five of the Code.

The Islam Channel is reported to be planning to appeal against the rulings.

- Broadcast Bulletin, Issue number 169, 8 November 2010

<http://merlin.obs.coe.int/redirect.php?id=12824>

EN

- Quilliam Foundation Report, "Re-programming British Muslims - A Study of the Islam Channel"

<http://merlin.obs.coe.int/redirect.php?id=12825>

EN

David Goldberg

deejee Research/ Consultancy

Guidance on Licensing of TV Services Broadcast into Multiple Territories

Ofcom, the UK Communications Regulator, has issued guidance on whether the holders of broadcasting licences need separate licences for different feeds (versions) of a service, for example feeds broadcast in different territories. In particular, the document concerns feeds where the programmes are almost identical but in different languages, feeds where the editorial content is almost identical but advertisements are different or differently scheduled or where editorial content of each feed is different.

The Communications Act 2003 defines 'programmes' in a way which includes advertisements (s. 405(1)). It also provides that licences are granted in relation to a particular licensable service rather than to a particular service provider (s. 235(4)). There is no limit to the number of licences that can be held by a single person or company.

In Ofcom's view, this means that any service that can be regarded as separate needs a separate licence and an important factor in identifying separate services is the editorial content, advertisements and scheduling. Thus, for more than one feed to count as a single service, the public must be able to view the same programmes and advertisements on all of them at the same time; they must have the same programme schedule. Services where there are different programmes or where the programmes are shown at different times or where the same programmes are shown at the same time for only part of the day will require separate licences. "Time shifted" schedules, where the only difference is that the same schedule is broadcast an hour or so later, will count as a single service. Where there are only minor differences between feeds, for example very occasional regional variations of the same programme, this will also count as a single service. The same applies to services which differ only in language. However, feeds with different editorial content or different advertisements or which are broadcast at different times will require separate licences.

- Ofcom, "Guidance regarding the licensing position of television licensable content services broadcast into multiple territories", 19 October 2010

<http://merlin.obs.coe.int/redirect.php?id=12826>

EN

Tony Prosser

School of Law, University of Bristol

No Investigation into Project Canvas

Ofcom, the UK communications regulator, has announced that it will not open an investigation into 'Project Canvas' following complaints on competition grounds by Virgin Media and IPVision. 'Project Canvas' (see IRIS 2010-2/22 and IRIS 2010-7/23) is a joint venture between the BBC, ITV, Channel 4, Five, BT and Arqiva to offer digital terrestrial channels and internet-delivered TV services via a set-top box connected to TV sets. It involves creating technical standards which can be used to deliver content via a single box using a branded user interface to be known as YouView.

Competitors had claimed that the Project would incentivise its partners to withhold content from competing platforms; that the technical standards had not been developed openly and were not available for use by those outside the venture; that use of the YouView brand was tied to the specified user interface and electronic programme guide; and that the venture is likely to restrict competition between TV platforms. However, Ofcom decided that it is premature to undertake an investigation at this stage because YouView will bring benefits to views and consumers which will need to be balanced against any harm to competition and any such harm would depend on how the market develops. There was little evidence at this stage that the partners would withhold content and a number of technical standards had already been made available to the industry. Any limitation on the choice of user interfaces must be balanced against existing choice in the market, the possibility of new entry and the potential benefits to consumers of a common "look and feel".

Ofcom will, however, continue to monitor developments, particularly on YouView's approach to sharing standards and its effects on content syndication and may reconsider later whether to open an investigation.

- Ofcom, "No investigation into Project Canvas", News Release, 19 October 2010

<http://merlin.obs.coe.int/redirect.php?id=12827>

EN

Tony Prosser

School of Law, University of Bristol

BBC Licence Fee Frozen for Next Six Years

As part of the fundamental review of public expenditure in the UK, the BBC licence fee has been frozen for the next six years at GBP 145.50. This is the result of agreement between the Corporation and the Government. It had been originally proposed that the BBC would be expected for the first time to meet the cost of free television licences for the over-75s, but this was bitterly opposed by the BBC Trust. Instead, the BBC has agreed to take over the funding of its World Service, currently directly funded by the UK Foreign Office. It will also assume the costs of BBC Monitoring (an open source news and information publisher) and some of the costs of the Welsh language TV channel S4C, currently funded by the Department for Culture, Media and Sport. Funds ring-fenced by the BBC for the switchover to digital TV will now contribute to the rollout of broadband.

The overall effect is to impose a 16% real terms cut in BBC funds over six years, resulting in annual savings of £340 million per year to government funds. This has however to be seen in the context of a cut of 25% in the overall budget of the Department for Culture, Media and Sport over the next five years and the BBC director-general considered it “a realistic deal”. The process proved controversial; normally the licence fee review is a lengthy process involving extensive consultation, but in this case agreement was reached in three days of private negotiations between the Government and the BBC as part of the overall review of government spending. The change to the funding of S4C has proved particularly controversial, with S4C threatening to seek judicial review of the decision, as it had not been consulted about it in advance.

• “Television licence fee to be frozen for next six years”, BBC News: Entertainment and Arts, 20 October 2010
<http://merlin.obs.coe.int/redirect.php?id=12823>

EN

Tony Prosser

School of Law, University of Bristol

GR-Greece

Supreme Court Imposes New Tenders for Television Licenses

The Plenary Session of the Συμβούλιο της Επικρατείας (the Council of State - Supreme Administrative Court of Greece) has declared unconstitutional two legislative provisions permitting all regional television stations which participated in the 1998 tender to function even after a “reasonable” time after this tender was

published, confirming a decision of the 4th Section of the same Court (see IRIS 2008-1/19). According to decision 3578/2010 (issued on 1 November 2010), these provisions are contrary to the principle of the rule of law and the subsequent obligation of the State to vouch for the enforcement of the law (especially in relation to providing for licensing tenders). They are also contrary to the principle of equality, because they penalise those who, although having submitted an application for a permit, have not established a television channel, as opposed to those who have arbitrarily seized a frequency and illegally set up a television station.

In its reasoning the Supreme Court decision indicates to the government under which conditions a similar provision will be deemed compliant with the Constitution, i.e., if there is a definitely determinable schedule for the licensing operation.

Following from the above and given that Greece has recently entered a digital transition period (IRIS 2010-1/27), the government must elaborate as soon as possible on the new legal framework for digital terrestrial television, without omitting to include a concrete schedule covering all stages up to the issue of the digital licences.

• Συμβούλιο της 325300371372301361304365'371361302, Απόφαση 321301371370μ. 3578/2010 (Decision of the Administrative Court of Justice Nr. 3578/2010)

EL

Alexandros Economou

National Council for Radio and Television

Rule for the Pre-Election Radio and Television Coverage

The competent authorities will have to amend the legislative framework for the radio and TV transmissions of political parties during the pre-election period. This is a consequence of the annulment by the Plenary Session of the Συμβούλιο της Επικρατείας (the Council of State - Supreme Administrative Court of Greece) of ministerial decisions related to the European elections of June 2009, following the submission of a request for annulment on the part of the political party Δράση (“Action”). According to the decision of the Court, the ministerial decision which established different starting points for the transmission of the messages of Greek political parties on radio and television on the basis of their previous representation in the European Parliament is contrary to the constitutional principle of equality. The principle of equality would require at least a common starting time for all political parties, in view of the fact that parties participating for the first time in the electoral race would have greater need of the coverage of their programme and positions.

The future provisions (which are usually published a month before the elections) will include the regulation of issues concerning the allocation of a reasonable amount of time to political parties (particularly by means of radio and television), while the further elaboration of Article 10 of Law 3032/2002, with which the power is given to the Minister of Internal Affairs to adopt relevant ministerial decisions upon the advice of the National Council for Radio and Television, is likely to take the form of new legislative provisions.

• Συμβούλιο της 325300371372301361304365'371361302, Απόφαση 321301371370μ. 3427/2010, 21.10.2010 (Decision of the Administrative Court of Justice Nr. 3427/2010, 21 October 2010) **EL**

Alexandros Economou
National Council for Radio and Television

Transposition of the AMSD Directive

Through the recent adoption of Presidential Decree 109/05.11.2010, Directive 2007/65/EC (currently the codifying Directive 2010/13/EC) was incorporated into the Greek legal order. The provisions of the Decree generally follow the flexible EU framework concerning both television broadcasts and on-demand services. However, the Greek legislator has established stricter rules on several issues relating to the protection of viewers, especially minors.

First of all, a general rule applicable to all media, linear or not, is established, dictating respect for the personality, in the broader sense, of the persons appearing in or referred to during television programmes or audiovisual commercial communications.

Special provisions are dedicated to the protection of minors. Consequently, it is expressly prohibited to transmit any kind of audiovisual commercial communication encouraging the excessive consumption of unhealthy foods or promoting alcoholic beverages during children programmes or the children time zone. Additionally, the abuse of the regime governing sponsorships is checked, as from now on their transmission during a programme is only allowed once. Moreover, the sponsorship of alcoholic beverage sellers is not allowed in programmes targeted at minors, nor the appearance of sponsor logos during children shows. A similar vein runs through the provisions regarding product placement. Product placement is not allowed in cases where television advertisements are not, such as during religious services. Moreover, product placement is prohibited in programmes targeted at minors.

It must also be noted that, for the first time, rules concerning the access of disabled persons to all media are established.

The general principle of the protection of television viewers, who are regarded as consumers, and of minors similarly shapes the regime for television broadcasts. Having in mind the particularities of the Greek television industry, the legislator introduces an express prohibition of the transmission between 6 p.m. and 1 a.m. of advertisements which promote, directly or indirectly, services of a sexual character. Teleshopping transmissions must be structured in such way so as not to induce minors to enter into contracts of purchase or lease of products or services. Special provisions on the protection of minors regulate their presentation or participation in information or entertainment programmes, as well as possibly harmful content and proper labelling. In application of the Directive's provisions, the regulatory framework regarding the right to answer of persons offended by the content of a television broadcast is established.

European works are promoted with a high required percentage (51%) of the total time of programmes transmitted on an annual basis, as are independent productions (10%).

Finally, for the first time a clear regulatory framework is put in place concerning the broadcast of events of major significance, as well as of short news reports. Product placement is not allowed in cases where television advertisements are not, such as during religious services.

• Προεδρικό Διάταγμα 109/05.11.2010 (Presidential Decree No. 109 of 5 November 2010) **EL**

Charis Tsigou
National Council for Radio and Television, Athens

HU-Hungary

"Media Constitution" Adopted

On 2 November 2010 the Hungarian Parliament adopted Act CIV of 2010 on Freedom of Expression and on the Basic Rules of Media Content. This new piece of legislation is also dubbed as "Media Constitution" by its introducers, reflecting its fundamental nature.

The promulgation of the Act was preceded earlier in the summer by an amendment of the Constitution relevant to the media and by the creation of the *Nemzeti Média- és Hírközlési Hatóság* (National Media and Communications Authority - NMHH) as a new "converged" regulatory authority (see IRIS 2010-8/34).

The scope of the new Act covers a variety of media content ranging from the print press across traditional

radio and television, to non-linear services and to certain types of Internet content. The scope also includes content aimed at Hungarian audiences from abroad, provided that its provider has established itself outside Hungary with the purpose of evading Hungarian jurisdiction.

The “Media Constitution” lays down a number of provisions related to journalistic freedoms:

- it establishes legal protection for journalistic sources;
- defines rules for the protection of the professional conduct of journalists against undue interference from media owners or advertisers, and
- creates immunity for journalists committing minor offences, if unavoidable, in the course of their investigations for the benefit of the public.

The new Act also highlights the right of the public to receive information in general. On these grounds it lays down the basic obligations of the press such as the right of reply (in cases of factual misrepresentation) or the respect of human dignity. Beyond these the Act defines the basic considerations related to the protection of minors and of consumers, too.

The following element of the ongoing reform of the Hungarian media regulation is expected to be the approval of the Bill on Media Services and Mass Media. This piece of proposed legislation, as submitted to the Parliament on 22 November 2010, outlines a detailed legal background for media services. The bill, when adopted, will change Act I of 1996, the current Broadcasting Act, completely.

- 2010. évi CIV. Törvény a sajtószabadságról és a médiatartalmak alapvető szabályairól (Act CIV of 2010 on Freedom of Expression and on the Basic Rules of Media Content)

<http://merlin.obs.coe.int/redirect.php?id=15397>

HU

Mark Lengyel
Attorney at law

IE-Ireland

No Basis for Three Strike Copyright Rule

The Irish High Court on 11 October 2010 ruled that remedies to block or disable access to Internet sites, to interrupt a transmission over a network or to cut off Internet access are not permitted by Irish law. This case was the latest of several taken by record companies against Internet service providers seeking to address the issue of copyright infringement over the Internet (see: IRIS 2005-10/28, IRIS 2006-4/26 and IRIS 2010-6/34).

The record companies (EMI, Sony, Universal, Warner and WEA) sought relief against Internet service provider UPC, requiring it to stop unauthorised copying and file-sharing from taking place over its network. Two separate reliefs were sought under the Copyright and Related Rights Act 2000.

The first was an injunction restraining UPC from making available copyright material to the public over its Internet service. No specific form of relief was sought and various technical solutions were put forward in argument before the court; however, the recording companies' preference was for a three strike solution similar to that agreed with another Internet service provider, Eircom (see IRIS 2010-6/34). The second relief sought was an order requiring UPC to block or disable access to thePirateBay.org and related domain names, IP addresses and URLs. Access to the Pirate Bay website had been blocked through Eircom's Internet service by a court order in 2009.

While the judge was critical of the attitude of UPC towards copyright infringement, he accepted it was not UPC that was making available the copyright material; UPC was a mere conduit. The crucial issue for the court was whether Irish law allowed it to interfere with the transit through the UPC network of unauthorised copyright material. Following a review of the wording of s.40 of the Copyright and Related Rights Act 2000, the judge concluded that the only relevant power available to him was to require the removal of copyright material by an Internet hosting service. There is no provision for the blocking, diverting or interrupting of transient communications in Irish law.

The judge also confirmed that, while the Electronic Commerce Directive 2000/31/EC provides for relief for the infringement of copyright through injunctions and the Copyright Directive 2001/29/EC allows copyright holders to apply for such injunctions against Internet service providers, it is left to the national law of member states to set out the conditions and modalities of such injunctions. The judge contrasted the limited remedies available in Irish law dating from the year 2000 with those currently available in the United Kingdom, France and the United States, and those proposed in legislation in Belgium and New Zealand. He concluded that by failing to provide similar remedies, the reliefs sought by the record companies could not be granted in this case and that Ireland is not yet fully in compliance with its obligations under European law.

The judge also considered two of his own previous judgments. A similar action was taken by record companies against Eircom (see IRIS 2010-6/34). The parties settled by way of a three strikes policy for infringing subscribers. The court was later asked to assess the compatibility of the settlement with the Data Protection Acts 1998-2003 and found that the settlement was lawful and could be implemented. That judgment remains unaffected by the UPC one. However, the judge found that his earlier judgment blocking the Pirate Bay website through Eircom (arrived at

without hearing any evidence from Eircom because of the terms of a settlement between the parties) was wrong. The legislative basis to block a website does not exist in Irish law. It is open to the parties to that case, therefore, to reapply to the court if they wish.

- EMI Records (Ireland) Ltd & Others. v. UPC Communications Ireland Ltd [2010] IEHC 377, judgment of 11 October 2010
<http://merlin.obs.coe.int/redirect.php?id=12828> EN
- Blocking of Pirate Bay Case EMI Records (Ireland) Ltd & Others v. Eircom Ltd [2009] IEHC 411, judgment of 24 July 2009
<http://merlin.obs.coe.int/redirect.php?id=12455> EN

Damien McCallig

School of Law, National University of Ireland, Galway

LT-Lithuania

The Audiovisual Media Service Directive Transposed in Lithuania

On 18 October 2010 the amendments of the Law on the Provision of Information to the Public came into force. These are mainly related to the transposition and implementation of the Audiovisual Media Service Directive.

The adopted amendments stipulate some changes in the scope of the activities of the Radio and Television Commission of Lithuania. The amended Law envisages that, as before, it will be the Radio and Television Commission's prerogative to grant licences for broadcasting and re-broadcasting activities as well as to control the licensed activities. However, the Licensing Rules, which determine the terms of licence issuing shall have to be approved by the Ministry of Culture upon the Radio and Television Commission's proposal. In addition, the Ministry of Culture shall approve the Rules for Setting the Licence Fee, proposed by the Radio and Television Commission, and shall determine the licence fee for each individual broadcaster or re-broadcaster. According to the former Law these two issues were dealt with by the Radio and Television Commission only.

On the other hand the scope of the Commission's activities was expanded by adding the functions for it to register video-on-demand (VOD) service providers, to control their activities and to consider complaints regarding their activities in case such should occur, in conformity with the Law to suspend the broadcasting of foreign programmes targeted at the territory of Lithuania, to prepare the list of events of major importance and to submit it to the Ministry of Culture for further approval by the Government.

In compliance with the AVMSD the amended Law envisages different regulation for linear and non-linear

audiovisual services. Before the transposition of the AVMSD VOD-services were not subject to regulation in Lithuania. From now on, VOD-service providers shall be obliged to register their services at the Commission prior to the start of their activities in accordance with the Rules set by the Radio and Television Commission. Such registration does not in any way mean getting the permit for the activities, but rather declaring the activities and providing a short amount of information about the service provider, i.e., name, address, contacts, etc.

The amended Law obliges the VOD-service providers to ensure that not less than half of their programme catalogue should consist of European productions. Furthermore, they have to ensure that programmes that might impair the physical, mental or moral development of minors shall be provided in a way that these could be listened or viewed only under the control of persons who are responsible for the supervision and upbringing of minors. The amended Law does not envisage specific technical means to ensure this requirement; this shall be done at the service provider's choice.

Having regard to the provisions of the AVMSD, the requirements for advertising on television were revised. A new notion "audiovisual commercial communication" was introduced. It encompasses TV advertising, sponsoring, teleshopping and product placement. The amended Law provides for the identical rules on product placement as the Directive, with the exception that it shall be forbidden not only in children's programmes, but in news programmes also.

The amended Law for the first time obliges audiovisual service providers to ensure the possibility for their users to obtain information on the provider's name, address of establishment, e-mail and internet address as well as the name, address and telephone number of their Regulatory Authority in a very simple, direct and constant manner. The way of providing this information shall be determined by the Radio and Television Commission of Lithuania.

Besides that, the amended Law provides for a new provision, according to which the audiovisual service providers shall prepare Codes of Conduct regarding inappropriate audiovisual commercial communication insertions in children's programmes.

- Lietuvos Respublikos viusomenės informavimo įstatymo 2, 5, 19, 22, 25, 26, 28, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 44, 47, 48, 49, 50, 52, 54 straipsnių ir priedo pakeitimo, įstatymo papildymo 341, 342, 401 straipsniais ir nauju trečiuoju skirsniu įstatymas (Law on the Amendment of the Law on the Provision of Information to the Public)

<http://merlin.obs.coe.int/redirect.php?id=12858>

LT

Jurgita Iešmantaitė

Radio and Television Commission of Lithuania

New Rules for the Protection of Minors

Recently the Lithuanian Government adopted a Resolution on new Rules for the categorisation and dissemination of information, which might have a negative effect on minors. The new Rules were prepared to facilitate the implementation of the Law on the Protection of Minors against the Detrimental Effect of Public Information (“Law on Minors”) and came into force on 1 November 2010.

According to the new Rules broadcasters themselves are obliged to assess and determine if the to-be-published information might have a negative effect on minors. In doing so they have to follow the criteria provided for in the Law on Minors and to consider the content, the aim of its publishing and its possible effect. The effect of the published information depends on the particularity, duration, frequency and suggestibility of the images. In case broadcasters should doubt if they can do this themselves, they can apply to the Inspector of Journalists Ethics in order to assess and index the to-be-published information.

The Rules provide three TV programme categories, i.e., programmes for viewers under 7 (N-7), under 14 (N-14) and under 18 (S) years old. The age classification of the programme is to be shown on screen during the whole broadcasting time and the programmes are to be categorised in the Electronic Programme Guide and TV programme grid as well.

Accordingly, broadcasters are obliged to categorise announcements, too. Any announcement must carry a note saying “appropriate for N-7”, “appropriate for N-14” or “appropriate for S”. The latter could only be published from 11 p.m. to 6 a.m. Previously, such requirements did not exist.

The Rules set one more new requirement: to visually or orally warn the viewers with a note that the “Information might have a negative effect on minors” prior to the beginning of the programme in case the respective programme might contain such information, but is allowed to be published by law.

The Radio and Television Commission of Lithuania is obliged to control the implementation of the above-mentioned Rules. According to the LR Code of Administrative Offences, violation of the Rules incurs penalties from LTL 1,000 (approx. EUR 286) to LTL 10,000 (approx. EUR 2,860).

• Neigiamą poveikį nepilnamečių vystymuisi darančios viešosios informacijos žymėjimo ir sklaidimo tvarka (Rules for the categorisation and dissemination of information, which might have a negative effect on minors)

<http://merlin.obs.coe.int/redirect.php?id=12859>

LT

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

NL-Netherlands

Court of Appeals Declares Downloading from Illegal Sources Legal for Private Use No.1

On 15 November 2010 the Court of Appeals of the district of The Hague (Court of Appeals) issued judgments in two separate cases regarding the private use exception under Dutch Copyright law (see also IRIS 2011-1/42). In FTD BV v. Eyeworks Film & TV Drama BV, the Court of Appeals ruled on the appeal by FTD BV against a judgment in preliminary proceedings (see IRIS 2010-7/30).

The Court of Appeals ruled that FTD did not infringe the copyright of Eyeworks because their platform does not make copyrighted material available to the public. The FTD application did not contain any signal that referred to the films of Eyeworks; it merely contained indirect indications as to where the film could be found on Usenet. The film could therefore not be downloaded by merely using the FTD application. Additional steps and applications were needed to achieve that result. This argument was strengthened by the fact that the original application as provided by FTD (without any modifications by third parties) does not provide any NZB-files, which would make the process much easier for the end-user.

The Court of Appeals then ruled as to whether downloading from an illegal source is allowed under the private use exception of Article 16c of the Dutch Copyright Act (DCA). The Court of Appeals answered this question in the affirmative. It stated that article 16c DCA is either in compliance with the three-step test of Article 5 section 5 of the Copyright Directive or it is not. If it is not, according to the Court of Appeals, it is so contrary to the Copyright Directive that an interpretation in compliance with the Directive is not possible because it would be *contra legem*. In either case therefore the explanation of the Court of Appeals should prevail.

Despite the above-mentioned outcome, the Court of Appeals did find that FTD committed a tort. Deliberately, structurally and/or systematically providing an application that stimulates illegal uploading constitutes a tortious act, especially since FTD is gaining profit by advertisements featured in the application, while the copyright of Eyeworks is being breached. The Court of Appeals reversed the judgment in the preliminary proceedings and annulled the *ex-parte* injunction.

• Gerechtshof 's-Gravenhage, 15 november 2010, FTD BV v. Eye-works Film & TV Drama BV, LjN BO3980, 200.069.970/01, 0-639 (Court of Appeals of The Hague, 15 November 2010, FTD BV v. Eye-works Film & TV Drama BV, LjN BO3980, 200.069.970/01, 0-639)
<http://merlin.obs.coe.int/redirect.php?id=12862>

NL

Emre Yildirim

Institute for Information Law (IViR), University of Amsterdam

• Gerechtshof 's-Gravenhage, 15 november 2010, ACI c.s. v. Stichting De ThuisKopie & SONT, LjN BO3982, 200.018.226/01, 05-2233 (Court of Appeals of The Hague, 15 November 2010, ACI c.s. v. Stichting De ThuisKopie & SONT, LjN BO3982, 200.018.226/01, 05-2233)

NL

Emre Yildirim

Institute for Information Law (IViR), University of Amsterdam

Court of Appeals Declares Downloading from Illegal Sources Legal for Private Use No.2

In ACI c.s. v. Stichting de ThuisKopie & SONT, the second judgment issued by the Court of Appeals of The Hague district (Court of Appeals) regarding the private use exception under Dutch Copyright law, on 15 November 2010 (see IRIS 2011-1/41), the Court ruled on the appeal by ACI c.s. on the judgment of the District Court of The Hague. This is another judgment in a series of cases involving the *Stichting de ThuisKopie* (Foundation for the Private Copy) (e.g., see IRIS 2005-9/30).

The action was brought by ACI c.s. and questions the preconditions and criteria that are applicable in calculating the amount of private copying levies. These levies are collected by the *Stichting de ThuisKopie* and are set by the *Stichting Onderhandelingen ThuisKopievergoeding* (Foundation for the Negotiations of Private Copy Levies).

The Court of Appeals - contrary to ACI c.s. - did not find it necessary to refer questions for a preliminary ruling to the Court of Justice of the European Union due to *acte clair*. The Court of Appeals first clarified what losses are applicable for fair compensation. Rightsholders are only eligible for a fair compensation in the case of loss of income by private copies under Article 16c of the Dutch Copyright Act. This includes loss of licence fees and is the only criterion for a fair compensation.

The argument of ACI c.s. to not take into account copies for time-shifting purposes (e.g., recording a TV show for later viewing) and porting (copying for use with multiple personal devices) due to the minimal effect on losses, was not followed by the court. The claim of ACI c.s. that the existence of DRM technologies should be taken into account for the calculation of the private copying levies is already being done according to the Court of Appeals and SONT.

Reiterating that uploading is illegal, the Court of Appeals held - similarly to the FTD v. Eyeworks case - that downloading from an illegal source for private use is not forbidden. It furthermore ruled that this fact should be taken into account for the calculation of the amount of private copy levies as well.

NO-Norway

Media Authority Gets More Independence

A proposal to amend the Broadcasting Act with provisions intended to grant the Media Authority a more independent role in the broadcasting area was sent to *Stortinget* (the Norwegian Parliament) on 22 October 2010. The proposal includes the establishment of an independent complaints board with a mandate to handle complaints on decisions made by the authority.

The Media Authority is an administrative body placed under the Ministry of Cultural Affairs and is responsible for handling cases relating to the Broadcasting Act, the Media Ownership Act and the Act on Film and Videograms. The Authority is in addition, among other things, responsible for allocating grants to press and local broadcasters. Decisions in single cases are taken administratively and not by an appointed board.

Today the issue of independence is solved in a different fashion with respect to each of three Acts: in the field of broadcasting, no formal independence exists. Due to the general governmental legal system in Norway, the Ministry may instruct the Authority both in general matters and in single cases, although such instructions are rare. The Ministry also handles complaints against the Authority's decisions and the Ministry may in theory also make reversals of the Authority's decisions in the absence of an appeal. The situation is quite the opposite due to the Media Ownership Act, where the Authority is granted full independence in its handling of cases and where complaints are handled by an independent board. The Act on Film and Videograms has a system somewhere in between: the Ministry does not handle complaints on age classification - this is also done by an independent board - but the Act does not restrict the Ministry's right to instruct, although this possibility has never been used.

The proposed model for independence in the field of broadcasting is rather complex and, although a major step forward, it will not give the Media Authority full independence. The first change to be brought about concerns the establishment of a new independent complaints board. According to the proposed §2-14 in the Broadcasting Act the complaints board

will handle complaints on decisions made by the Authority based on the Act. One important exception is made for the Authority's decisions concerning the assessment of public service broadcasters' content conditions. In these cases, the provision states that complaints should still be handled by the Ministry of Cultural Affairs. The reason for this is that the Government considers such conditions as important media policy tools in society and consequently wants to keep control over how such conditions are interpreted. The Government suggests that the existing media ownership complaints board be converged into a new media complaints board with a mandate to handle complaints both related to broadcasting and to media ownerships issues.

The second change concerns the Ministry's right to instruct the Authority and to revise decisions in the absence of an appeal. The proposed §2-15 makes it clear that the Ministry as a general rule may no longer instruct the Authority in single cases or reverse its decisions, except for cases concerning the assessment of public service conditions. The Ministry may, however, still direct the Authority to take on a specific case and, when it comes to general instructions, no limitations are proposed. The Ministry has also opted for a safety valve in the provision to ensure the need for political governance in particular cases of principle or major social interest. In such cases, the King in Council may reverse the Media Authority's or the complaint board's decision.

The proposal is scheduled to be handled by *Stortinget* in February. Since the Government has the majority of the seats, the amendments are likely to be adopted.

• Prop. 7 L (2010-2011) Endringer i kringkastingsloven og medieeierskapsloven (Proposition to amend the Broadcasting Act and the Media Ownership Act)

<http://merlin.obs.coe.int/redirect.php?id=12819>

NO

Ingvil Conradi Andersen
Norwegian Media Authority

RO-Romania

Electronic Media Sanctions for Sensitive Cases

The *Consiliul Național al Audiovizualului* (National Council for Electronic Media - CNA) fined on 4 and 9 November 2010 several Romanian commercial TV stations and issued public warnings for others due to the violation of audiovisual laws with regard to the media coverage of sensitive cases and to the observance of advertising rules (see inter alia IRIS 2010-10/38, IRIS 2010-8/42, IRIS 2010-7/33, IRIS 2010-1/38).

Pro TV and Antena 1 were imposed a fine of RON 20,000 (EUR 4,650) each, Kanal D of RON 5,000 (EUR 1,165), Antena 2 and OTV received public warnings because of breaches of the Audiovisual Law and the Audiovisual Code when covering the subject of sensitive photos of two Romanian actors issued by print media. The sanctions were issued for violations of audiovisual laws and regulations concerning the protection of children and minors and the classification criteria of audiovisual productions. Two well-known retired Romanian actors had decided to make almost nude photos, issued by several print media in Romania, in order to protest against the Government's measures to dramatically diminish the wages, pensions and income in the budgetary sector, including the arts and culture institutions.

Furthermore, the commercial station Realitatea TV was fined RON 10,000 (EUR 2,330) because of breaches of the Audiovisual Law and the Audiovisual Code when covering the issue of alleged accusations of high level corruption and exertion of influence in the so called „ALRO File”. The TV station was accused of infringing the rules regarding an objective information of the public, through a correct presentation of facts and events, the freedom to form one's own opinion, the right to one's own picture, the observance of the fundamental human rights and freedoms, the interdiction to profit from someone's ignorance or good faith. The „ALRO File” is linked to an alleged incorrect privatisation, a few years ago, of an important aluminium producer in the Southern part of Romania. There are allegations the Romanian President and some former high level dignitaries favoured one of the competitors.

The CNA also issued sanctions for repeated breaches of the advertising limits on several commercial TV stations. Antena 3, B1 TV and Național TV were imposed fines of RON 20,000 (EUR 4,650) each; OTV, Prima TV, Antena 1 and Realitatea TV received fines of RON 10,000 (EUR 2,330) each. According to the Romanian Audiovisual Law, commercial TV stations are allowed to broadcast an hourly maximum of 12 minutes of advertising and teleshopping.

• C.N.A - Comunicat de presă 04.11.2010 (CNA Press release of 4 November 2010)

<http://merlin.obs.coe.int/redirect.php?id=12718>

RO

• C.N.A - Comunicat de presă 09.11.2010 (CNA Press release of 9 November 2010)

<http://merlin.obs.coe.int/redirect.php?id=12718>

RO

Eugen Cojocariu
Radio Romania International

ANCOM 2011 Action Plan Published

In November 2010 the *Autoritatea Națională pentru Administrare și Reglementare în Comunicații* (National Authority for Administration and Regulation

in Communications - ANCOM) made public its proposed 2011 Action Plan for consultation (see inter alia IRIS 2010-10/37 and IRIS 2010-9/35).

In the frequency spectrum field ANCOM will finalise a study with regard to the impact of the use of the 900 MHz frequency band for the supply of third generation electronic communications services using UMTS systems on the competition within the mobile communications markets. At the same time ANCOM will assess the importance of distortions of competition due to an uneven allocation of the 900 MHz band in consideration of the liberalisation of its use, and will identify solutions for these distortions.

On the other hand ANCOM will amend the second legislation in the radio spectrum field, by reviewing the procedure for the request and award of licences for the use of radio frequencies, and - depending on the Government's strategy - will implement the measures required for the digital television switchover.

When the Law on the infrastructure of electronic communications networks will be adopted, ANCOM will exercise its new duties according to that document.

In order to protect users ANCOM intends to define quality parameters for the retransmission of audiovisual media programmes, applicable in the relationship with end-users, as well as to elaborate a guide on the minimum provisions to be included in the contracts concluded between electronic communications providers and end-users. ANCOM will also monitor the providers' compliance with the obligation to adequately inform their users on the communications services they provide.

The 2011 Action Plan includes seven objectives, divided in 14 programmes and 47 actions.

• Proiectul planului de acțiuni al ANCOM pentru anul 2011; Comunicat de presă 04.11.2010 (ANCOM Action Plan Draft for 2011; Press release of 4 November 2010)

<http://merlin.obs.coe.int/redirect.php?id=12853>

RO

Eugen Cojocariu
Radio Romania International

RU-Russian Federation

Rules to Edit Readers' Comments Online

The recent Resolution of the Plenary of the Supreme Court of the Russian Federation "On Judicial Practice Related to the Statute of the Russian Federation 'On the Mass Media'" of 15 June 2010, No. 16 (see IRIS 2010-6/40) refers to the issue of liability for statements of the readers/viewers made on the fora and chat pages of an Internet site registered as a mass

media outlet. If this section of the web-site is not pre-moderated such an outlet can become liable only if it received a complaint from *Roskomnadzor* (Federal Service for Supervision of Communications, Information Technology and Mass Media) or from a public prosecutor that the communication in its content presents an abuse of freedom of the mass media and fails to correct (or delete) the communication, and the communication subsequently is determined by a court to be illegal.

Soon after the adoption of the Resolution, on 6 July 2010 the head of *Roskomnadzor* issued Order No. 420 which approved "Rules for addressing appeals on inadmissibility of abuse of the freedom of mass media sent to the mass media disseminated in information telecommunication networks, Internet included". *Roskomnadzor* is in essence a governmental watchdog in the sphere of the media and telecommunications under the Ministry of Communications and Mass Communications.

According to the Rules, in cases where the comments that appeared on the web-sites registered as mass media seem to violate freedom of mass media a *Roskomnadzor* official makes a screenshot with the questionable material. A copy of it is added to a report prepared by the official. Immediately after that the *Roskomnadzor* sends to the mass media outlet an appeal in which it suggests that the material should be removed or edited the material. The appeal is signed by the head of a *Roskomnadzor* department and is drawn according to all rules of the office.

The scanned appeal is sent to the editorial office of the online media via the e-mail address referred to on its web-site with a marker of notification of delivery as well as via fax. The fact and time of the dispatch of the appeal are documented. The fulfillment of the suggested action is checked one working day after the dispatch.

In case the demand to remove the comments is not met or editing does not remove the signs of abuse of the freedom of mass media, an official warning to the editorial office is issued. The warnings issued by *Roskomnadzor* may lead to a forced closure of a mass media outlet. These Rules have already been used on a number of occasions.

• Порядок направления обращений о недопустимости злоупотреблений свободой массовой информации к средствам массовой информации, распространение которых осуществляется в информационно-телекоммуникационных сетях, в том числе в сети Интернет (Rules for addressing appeals on inadmissibility of abuse of the freedom of mass media sent to the mass media disseminated in information telecommunication networks, Internet included)

<http://merlin.obs.coe.int/redirect.php?id=12797>

RU

Andrei Richter
Moscow Media Law and Policy Centre

SE-Sweden

Direct Linking to Streamed Broadcasts Is Copyright Infringement

During the autumn of 2007 Swedish television channel Canal+ broadcast ice hockey games on a pay per view basis, inter alia, through live streaming on the Internet. The broadcasts were produced by the company C More Entertainment AB and the rights to the transmissions were owned by the same company.

In October and November 2007, a person published links to the broadcasts of the games on his website, an unofficial fansite of his favourite Swedish ice hockey team. By following hyperlinks visitors were granted direct and free access to the games via their computers.

C More Entertainment AB filed charges and the perpetrator was prosecuted for violating the Swedish Copyright Act (CA). The claims were based on the fact that the broadcasts constituted works of art, as well as being protected by the neighbouring rights granted to producers of recordings of sounds and images.

The defence disputed all charges claiming, amongst others, that the broadcasts were not subject to copyright and that the alleged actions did not amount to any relevant exploitation within the meaning of the CA.

The court established that an ice hockey game per se could not be copyright protected. This was because ice hockey players neither create works of art, nor are they performing artists within the sense of the CA.

However, the court found that, adhering to a legal opinion of a law professor submitted by the plaintiff, if the elements of the broadcasts (sounds and visual effects, commenting etc.) amounted to a work of art, then TV broadcasts could be subject to copyright.

In this respect the court considered that the broadcasts in question consisted of elements such as complex camera work, which were not possible to determine in advance. Moreover, it stated that the broadcasts in their entirety, i.e., the coordination by the technical producer, choice of focus, timing etc., were individual and original performances that rendered copyright to the technical producer (C More Entertainment AB). Furthermore, the court concluded that the commenting on the games was original and of a personal character.

Consequently, the broadcasts were considered to fall within the protective scope of the CA. Additionally, as the producer of the broadcasts, C More Entertainment AB also held neighbouring rights to broadcasts.

The court then went on to consider that, by granting users direct and free access to the games through links on his website (direct linking) the perpetrator had communicated the broadcasts to the public. Since the broadcasts had been made available without C More Entertainment AB's consent, this action constituted an infringement of the company's rights to the broadcasts.

In conclusion the perpetrator was found guilty of violating the CA. Therefore, he was ordered to pay a fine and damages to C More Entertainment AB.

• Hudiksvalls tingsrätts dom den 10 november 2010 i mål nr B 1230-09 (Judgment of the District Court of Hudiksvall of 10 November 2010 in case No. B 1230-09)

SV

Michael Plogell and Erik Ullberg
Wistrand Advokatbyrå, Gothenburg

SI-Slovenia

Radio and Television Slovenia Act Rejected in Referendum

The *Zakon o Radioteleviziji Slovenija* (Radio and Television Slovenia Act - ZRTVS-2) passed the Slovenian Parliament on 20 October 2010. As the leading oppositional parliamentary parties were strongly against it, they initiated a referendum, the final political tool for obstructing the discussed act.

The members of the Social Democratic Party of Slovenia (SDS) and the Slovenian National Party (SNS), and also one member of the Governmental Social Democrats appealed for the referendum. In the referendum campaign the biggest issue was the status of the public broadcaster as regards ownership. As the opposition, parts of the experts and employees of Radio and Television Slovenia (RTVS) argue, the status of the public broadcaster, which had made it a direct receiver of the State budget, was challenged by the new Act. Now, the organisational structure is partly that of a joint stock company. Formally the new status of RTVS is defined as an autonomous legal subject of the public law and of special national and cultural importance (instead of the previous status of RTVS being a public establishment).

There are some further critical stipulations of the Radio and Television Slovenia Act. The opponents claim that there is also the issue of the payments of the subscribers, which becomes problematic if RTVS were to develop into an enterprise. However, on the other hand there is no limit determined by the new Act on the sum of the subscription. Another problem related to the material side of the new status of the RTVS is the possibility of the appropriation of public property.

But there are some more problematic topics, mostly the structure of the supervisory board and the stipulation that the Slovenian citizens, which originate from the former Yugoslav Republics, have the right to be represented in the programming schedule by a certain quota of broadcasting time.

Regarding the structure of the supervisory board of RTVS the number of members is reduced to seven, from which three are elected by the National Council and one by the Government. It is claimed that it might make the majority of votes politically biased.

The public discussion related to the "programme windows" for citizens of ex-Yugoslav nationalities brought into debate two perspectives: the citizens of different ex-Yugoslav origin are not confirmed national minorities by law although they are numerous. The Ombudswoman stated that the solution accepted by the Act is just and that Slovenia should follow the European democratic standards as regards ethnicity. On the other hand the Directorate for Media at the Ministry for Culture claimed that RTVS provides a lot of content dedicated to the social groups in question and that there is no legal or factual condition and need for changes implied by the new Act.

The referendum on the Radio and Television Slovenia Act was held on 12 December 2010 and preceded by an official referendum campaign. Regardless of all the different issues exposed, the referendum question unified the problems by formulating: "Do you support that the Radio and Television Slovenia Act, which was passed by the Parliament on 20 October 2010, is put into force?". The Act was rejected by 73% of voters with a very low participation rate (15%).

- Predlog za tretjo obravnavo Zakona o Radioteleviziji Slovenija, ZRTVS-2 (Proposal (final) of the Radio and Television Slovenia Act) <http://merlin.obs.coe.int/redirect.php?id=12810> SL
- Odlok o razpisu zakonodajnega referendumu o Zakonu o Radioteleviziji Slovenija, ZRTVS-2 (Ordinance on the call for a legislative referendum on the Radio and Television Slovenia Act) <http://merlin.obs.coe.int/redirect.php?id=12811> SL

Renata Šribar

Faculty for Social Sciences at the University of Ljubljana and Centre for Media Politics of the Peace Institute, Ljubljana

SK-Slovakia

Merger of Slovak Television and Slovak Radio

On 3 November 2010 the National Council of the Slovak Republic ("NRSR") received the Draft Bill on Slovak Radio and Slovak Television ("Bill") proposed by the Ministry of Culture according to the Government's

policy statement for 2010-2014, in which the Government has committed itself to create a new frame of funding, organising and functioning of statutory media with the aim to improve the effectiveness of their work and to strengthen their statutory character. According to the relevant policy statement it is culture that can play an important role in the economic, social and environmental development of the Slovak Republic in coming years. On 4 November 2010 the NRSR agreed with the proposal of the Minister of Culture to discuss the respective Bill in a shortened legislative process. The Bill is now in the second reading.

Pursuant to the respective Bill, that shall come into effect on 1 January 2011, the Slovak Television (STV) and Slovak Radio (SRo) will merge into a new single public service institution called Slovak Radio and Television ("RTS") and the assets of STV and SRo shall be transferred to this new institution. According to Sec. 1 of the Bill the RTS shall be a national, independent, informative, cultural and educational public service institution in the area of radio and television broadcasting. The establishment of the RTS will be the first step in introducing a new model of public broadcasting in the Slovak Republic. The main aim of this step is - in accordance with the Explanatory Memorandum of the Bill - to prevent public broadcasting from falling further into debt and to create the conditions for its consolidation. In case of such merger, the expected savings should amount to at least EUR 1.65 million in 2011.

The most important changes introduced by the Bill concern the bodies of RTS. The Bill establishes new bodies, namely the General Director and the Council. The General Director being the statutory body of RTS will be responsible for the development strategy and the fulfilment of the aims and main activities of the RTS, whereas the Council will control the obligation of RTS to respect the law as well as the fulfilment of the goals of this new public service institution. In order for the quality and professional control to be guaranteed the nine-member Council shall, according to Sec. 9 of the Bill, consist of independent experts, namely two experts in the field of radio broadcasting, television broadcasting and in the field of law and three experts in the field of economy. Both bodies shall be elected and recalled by the members of the NRSR. In addition the Council will be entitled to suggest the particular committee of NRSR to submit the proposal to recall the General Director. It is to be noted that currently there are three bodies in both STV (Council, Supervisory Committee and Director General) and in SRo (Radio Council, Supervisory Committee, Director General) and their statutory bodies i.e., general directors are elected and recalled by the Councils.

Pursuant to the Bill the original number of 36 members of the councils and supervisory committees of STV and SRo shall be reduced to 9 members of the Council of the RTS. On the other hand it is to be noted that neither the position, aim and extent of the main activities of the RTS, nor the means of funding shall

be changed under the Bill. However, in this regard it is interesting to mention that in future the payments for public services provided by Slovak Television and Slovak Radio are planned to be abolished and ought to be replaced by a single payment from the State budget.

Although public service institutions covering both television and radio broadcasting are well-known in many countries the respective Bill faced strong critique in Slovakia. It has a lot of opponents not only due to the Bill itself but also due to the short time period within which the Minister of Culture wants the two institutions, which have several hundred employees, to merge. Critics say that the decision to merge STV with SRo is aimed at gaining control over both media organisations and the Director General of STV is convinced that the Bill will restrict and reduce the number of genres in the public service programming. Nevertheless the current Minister of Culture insists that the aim of such a model is to strengthen the status of public service media and to solve the current financial problems of STV.

• Vládný návrh zákona o Rozhlase a televízii Slovenska a o zmene a doplnení niektorých zákonov (Draft Bill on Slovak Radio and Slovak Television)

<http://merlin.obs.coe.int/redirect.php?id=12860>

SK

Jana Markechová
Markechova Law Offices

Agenda

Broadcast Evolution Summit 2011

17 - 19 January 2011
Organiser: Marcus Evans
Venue: Cannes
Information & Registration
Tel: +357 22 849 300
E-mail: WebEnquiries@marcusevanscy.com
<http://www.broadcastevolutionssummit.com/>

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