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IRIS

Legal Observations
of the European Audiovisual Observatory

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INTERNATIONAL

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Publisher:
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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) • Brigitte Auel • Paul Green • Marco Polo Sàrl • Manuella Martins • Diane Müller-Tanquerey • Katherine Parsons • Stefan Pooth • Erwin Rohwer • Sonja Schmidt • 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'Etudes 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
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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: MGN Limited v. United Kingdom

Ten years ago, in 2001, the newspaper Daily Mirror published an article on its front page under the title: "Naomi: I am a drug addict". Another longer article inside the newspaper elaborated on top model Naomi Campbell's addiction treatment, illustrated by photos taken secretly near the Narcotics Anonymous centre she was attending at the time. As the newspaper continued to publish more articles and new pictures related to her attendance at Narcotics Anonymous, Ms. Campbell sued the Daily Mirror for breach of her privacy. At a final stage of the domestic proceedings, the House of Lords found that the publication of the articles could have been justified as a matter of public interest, as Ms Campbell had previously publicly denied drug use. The publication of the pictures however, in combination with the articles, had breached her right to the respect for her private life. Apart from a modest award of damages of 3500 GBP, the Daily Mirror's publishing group, MGN, was ordered to pay Ms. Campbell's legal costs, including the "success fees" agreed between Ms Campbell and her lawyers. The total amount of the legal costs was more than 1 million GBP.

Relying on Article 10 of the European Convention MGN lodged an application with the European Court of Human Rights, complaining that the finding by the British courts that it had breached Ms Campbell's privacy disregarded the right to freedom of expression. MGN also argued that the requirement to pay disproportionately high success fees amounted to a violation of Article 10 of the Convention. This part of the application was supported by third parties, such as the Open Society Justice Initiative, the Media Legal Defence Initiative, Index on Censorship and Human Rights Watch, all referring to the chilling effect of high costs in defamation proceedings in the United Kingdom on NGOs and small media organisations.

Regarding the breach of privacy, the European Court recalled that a balance had to be struck between the public interest in the publication of the articles and the photographs of Ms Campbell and the need to protect her private life. By six votes to one the Court held that there was no breach of Article 10. The Court agreed with the reasoning of the House of Lords that the public interest had already been satisfied by the publication of the articles, while adding that the photographs was a disproportionate breach of her right to respect for her private life. Therefore, the interference in the right to freedom of expression of the Daily Mirror was considered necessary in a democratic society in order to protect the rights of Ms Campbell.

However, the order to pay the success fees of up to more than 365.000 GBP was considered by the European Court as a disproportionate interference in the right to freedom of expression, having regard to the legitimate aims sought to be achieved. The Court took into consideration that the system of recoverable success fees may have a chilling effect on media reporting and hence on freedom of expression. The Court unanimously found a violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights (Fourth Section), case of MGN Limited v. United Kingdom, No. 39401/04 of 18 January 2011
http://merlin.obs.coe.int/redirect.php?id=12968 EN

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

EUROPEAN UNION

Court of Justice of the European Union: Advocate General Kokott on Territorial Exclusivity in the Transmission of Football Matches

On 3 February 2011 Advocate General Juliane Kokott delivered her opinion in cases C- 403/08 and C-429/08. Both cases involve the import of decoder cards from Greece into the United Kingdom in attempts to circumvent the exclusivity agreements concluded between the UK's Football Association Premier League (FAPL) and the broadcasters to whom the FAPL grants the right to broadcast matches. By using a Greek decoder card, pubs in the UK are able to show the live transmission of Premier League football matches at more favourable rates then those offered by broadcasters in the UK.

In an attempt to squash the practice, the FAPL has initiated judicial proceedings. Case C-403/08 concerns civil law actions brought by the FAPL against the use of foreign decoder cards. Case C-429/08 concerns criminal proceedings brought against the landlady of a pub that used a Greek decoder card to show Premier League football matches. The High Court of England and Wales has referred several questions concerning both sets of proceedings to the Court of Justice on the interpretation of EU law.

In her opinion Advocate General Kokott held that the imposition of exclusivity has the effect of segmenting the internal market into national markets, something which constitutes an impairment of the freedom to

provide services. The Advocate General further noted that the economic exploitation of the rights in question does not require a partitioning of the internal market, as the charges corresponding to the foreign decoder cards, although not as high as the charges imposed in the United Kingdom, have nonetheless been paid. No specific right to charge different prices in different Member States exists; on the contrary, it forms part of the logic of the internal market that price differences between the Member States should be offset by trade.

As far as concerns the question whether the showing of live transmissions of football matches in pubs infringes the right of communication to the public of protected works, as guaranteed by the InfoSoc Directive, the AG stated that, as EU law stands at present, no right protecting the communication to the public of a broadcast where no entrance fee is charged exists.

• Advocate General's Opinion in Cases C-403/08 and C-429/08, Football Association Premier League Ltd & Others v QC Leisure & Others and Karen Murphy v Media Protection Services Ltd, 3 February 2011
http://merlin.obs.coe.int/redirect.php?id=12974 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV

Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam

General Court: FIFA and UEFA v Commission

On 17 February 2011 the General Court of the European Union issued its ruling in cases T-385/07 and T-68/08 (FIFA v Commission) and case T-55/08 (UEFA v Commission). The cases involved the list of events of major importance for society submitted by the United Kingdom and Belgium to the Commission. The two organisations sought to annul the approving decision of the Commission.

Article 3a(1) of the Television without Frontiers Directive (now replaced by Article 14 of the Audiovisual Media Services Directive) allows Member States to prohibit the exclusive broadcasting of events they judge to be of major importance for society where such broadcasting would deprive a substantial proportion of the public of the possibility of following those events on free television. The list drawn up and sent to the Commission by Belgium included all match of the football World Cup finals, while that of the UK all matches of the World Cup and the European Football Championship finals.

FIFA and UEFA argued before the Court that the entire final tournament cannot be considered to be of major importance. The Commission, conversely, pointed out that the football World Cup is quoted in the Recitals to the Directive as an example of such an event and that a wide margin of discretion is afforded to the Member States to determine which events are to be considered of major importance in their own society.

The Court found that the Commission acted correctly in approving the lists of events of the UK and Belgium. The Court found that "prime" and "gala" matches and matches involving a Member State's national team must be accepted as being events of major importance for the public of that Member State and may be added to the corresponding list. As regards other matches, the Court observed that it is impossible to predict in advance which will prove to be decisive for the outcome of the competition or the fate of the national team. Consequently, a decision of a Member State declaring all matches to be of major importance for society is justifiable. In fact, the Court noted that viewing figures for such matches in the most recent World Cup and European Championship tournaments drew in large numbers of viewers. Finally, the Court held that, although the categorisation of the full competitions as events of major interest for society are likely to affect the price which FIFA and UEFA will obtain for the grant of broadcasting rights, FIFA and UEFA are not obliged to sell these on whatever conditions may be obtained. Accordingly, the tournaments retain significant commercial value. Restrictions on the freedom to provide services and the freedom of establishment may be justified when counterbalanced by the right to information.

• Judgement of the General Court, Case T-385/07, 17 February 2011
http://merlin.obs.coe.int/redirect.php?id=13009 NN DE EN
FR CS DA EL ES ET FI HU IT LT LV
MT NL PL PT SK SL SV
• Judgement of the General Court, Case T-68/08, 17 February 2011
http://merlin.obs.coe.int/redirect.php?id=13012 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV
• Judgement of the General Court, Case T-55/08, 17 February 2011 DE EN FR CS DA EL ES ET FI HU
IT LT LV MT NL PL PT SK SL SV

Christina Angelopoulos
Institute for Information Law (IViR), University of Amsterdam

European Commission: Report on the Application of Directive 2004/48/EC

On 22 December 2010 the Commission published its report on the first assessment of the Directive on the enforcement of intellectual property rights.

The Directive was designed with the necessity of finding effective means for enforcing intellectual property rights in mind. The Report serves as a first evaluation on the implementation and impact of the Directive. It

addresses certain issues on which further clarification is needed.

Effective possibilities for enforcement are essential for the functioning of the internal market. Otherwise barriers to cross-border activities will occur. Also confidence in the internal market and investment in innovation and creation will decrease. The Directive contains minimum yet flexible harmonisation. Its provisions were drawn up through the "best practices approach". This means that national practices that were most effective before the Directive was adopted served as an inspiration. Member States may apply stricter rules, hence the flexibility.

The first issue the Report addresses is the fact that the Internet creates circumstances that make it easy to infringe intellectual property rights. In this connection the Report notices that the existing legal framework has certain limitations that need to be assessed explicitly.

Next, the Report states that the Directive applies to all infringements of intellectual property rights. Due to uncertainty about this flexible approach, the Commission has published a minimum list of rights that are covered by the Directive. However, not all uncertainties are solved, especially regarding domain names and acts of unfair competition. The Report remarks that the latter seem to be increasing and damage rightsholders. This is why the Report finds it necessary to assess this problem and include in the Directive a minimum list of covered intellectual property rights.

The Report also mentions the broad interpretation of the concept of "intermediaries" in the Directive. Even intermediaries with no direct contractual relationship or connection are subject to the measures of the Directive, including the right of information, provisional and precautionary measures or permanent injunctions. According to the Staff Working Paper that accompanies the Report, the existing instruments are not powerful enough to fight online infringements effectively. Therefore, it states, the Commission could research the possibility of involving intermediaries more closely. In particular their position is suitable for contribution to the prevention and termination of online infringements.

Another issue the Report puts forward is the need for Member States to strike a fair balance between the right to information and privacy laws. The Report notes that in some Member States the right to information mentioned in the Directive is granted very restrictively. It accordingly concludes that this issue requires special attention. Both data protection and privacy and the protection of intellectual property are established as fundamental rights in the Charter of Fundamental Rights of the European Union. Since the European legal framework on these fundamental rights is neutral, national laws must also be construed in a balanced way. The Report calls for further evaluation of national laws in light of these requirements.

According to the Directive, applied measures, procedures and remedies must be effective, proportionate and dissuasive. However, the damages that are currently awarded are still rather low. Rightsholders state that current damages fall short of effectively deterring infringers from performing illegal activities. This is mainly because the profits from these activities are considerably higher than the damages. The Report formulates possible solutions for this disparity. One possibility is to consider whether courts should have the power to grant damages corresponding to the infringer's unjust enrichment. The other regards the possibility of awarding damages for other economic consequences and moral damages.

Issues that also need clarification according to the Report are the definition of "corrective measures", including how to apply such measures if the infringing goods are no longer in the infringer's ownership and how to ensure that the court can inflict costs for the destruction of infringing goods directly on the infringer.

Lastly, the Report mentions "other issues", amongst which the fact that Member States hardly make use of the optional provisions of the Directive. Even fewer Member States apply stricter rules, for which Article 2 (1) of the Directive forms the base.

The Report concludes emphasising again that widespread economic harm is caused by infringements of intellectual property rights. Not only the functioning of the internal market, but also consumer health and safety are threatened by infringing products. Therefore proper protection is required. The Commission states that it will continue to engage with all stakeholders to balance the interests involved. The main conclusion of the Report is that the Directive has had a substantial and positive effect on the protection of intellectual property rights. However, since the Directive was not designed with the challenges of the modern day Internet society in mind, the Report states that a number of issues need to be clarified.

• Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights, SEC(2010) 1589 final, 22 December 2010
http://merlin.obs.coe.int/redirect.php?id=12973 NN DE EN
FR CS DA EL ES ET FI HU IT LT LV
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Kelly Breemen
Institute for Information Law (IViR), University of Amsterdam

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European Commission: Final Report of the *Comité des Sages* on Digitisation of European Cultural Heritage

On 10 January 2011 the *Comité des Sages*, a reflection group on bringing Europe's culture online, published its report entitled "The New Renaissance". The research, which started in April 2010, was carried out by order of Neelie Kroes (Vice President of the European Commission for the Digital Agenda) and Androulla Vassiliou (European Commissioner for Education, Culture, Multilingualism and Youth).

A focus point was to make recommendations for the digitisation, online accessibility and preservation of Europe's cultural heritage in the digital age, with special attention to the question of public-private partnerships for digitisation in Europe. The report aims to help the European Union and Member States to develop policy in these fields.

The Comité points at the new information technologies that have created incredible opportunities for bringing the European cultural heritage to the general public. Accessibility is a central aspect of the vision of the Comité. Consequently, one of its core missions is to ensure full access to the cultural expressions and knowledge of the past, the present and the future for the largest possible audience. With regard to recommendations concerning accessibility and use models, a distinction is made between public domain material and in-copyright material.

Many digitised works are not protected by copyright anymore and thus fall into the public domain. When their digitisation is funded with public money, the Comité feels that everyone should have free access to them for non-commercial purposes. Commercial reuse could be charged. The Comité also points at the EU Directive on the re-use of public sector information. Public institutions should comply with this when they make their information available for re-use, although the Directive does not currently apply to cultural institutions.

Since users are used to finding everything they want on the internet, they expect the same from cultural institutions. It is therefore important that these institutions digitise their collections. As concerns in-copyright material, rights have to be cleared. This costs much time and money given the size of the collections, which makes individual negotiations impracticable. Furthermore, the Comité points to the issues of out-of-distribution works and orphan works. The rightsholders of orphan works cannot be identified or located, as a result of which they form a barrier to mass digitisation projects.

Europeana is referred to as the platform for Europe's cultural heritage. It would be a problem if this digital library, archive and museum would lack 20th century works. The Comité recommends that a European legal instrument be adopted regarding the issue of orphan works. Such an instrument is in preparation by the Commission. The Comité sets out an 8-step test, which requires for example that the instrument cover all different sectors (audiovisual, text, visual arts, sound) and that it be in place in all the Member States. In addition, future orphan works should be avoided. In order to achieve this some form of registration could be considered; this would mean that the Berne Convention would have to be changed. Regarding out of distribution works, the Comité states that rightsholders should be the first to exploit them. However, when they do not do so, cultural institutions should be able to digitise these works. In this regard the Comité suggests collective licensing systems and a window of opportunity backed by legislation.

The Comité stresses the central role of Europeana in the strategy of bringing Europe's cultural heritage online. This requires its development from a portal into an application platform to which digitisation activities in the Member States are linked. In-copyright materials that private providers offer against payment should complement free offer. The Comité recommends that Europeana keep a digital copy of all digitised or born digital material with the aim of preservation. Furthermore, all Member States should ensure that their public domain masterpieces are made available by 2016. Finally, Europeana must actively be promoted among the general public and in schools.

The digitisation process demands large investments. Therefore, an important aspect of the report is the examination of sustainable financing for digitisation and Europeana. According to the Comité, this is primarily the responsibility of the public sector. Making digitised material available through Europeana should be a condition for all public funding for digitisation. Since public funding is scarce, cooperation with private partners should be encouraged as a complement. The Comité suggests basic conditions for these partnerships, such as respect for rightsholders, transparency and encouragement of free access for end users. Member States should also create favourable conditions for involving European players, for example by encouraging digitisation in new areas such as audiovisual material.

• Report of the Comité des Sages, "The New Renaissance"
http://merlin.obs.coe.int/redirect.php?id=15332 EN

Vicky Breemen
Institute for Information Law (IViR), University of Amsterdam

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NATIONAL

AT-Austria

OGH Ruling on Scope of Editorial Confidentiality

In a ruling handed down on 16 December 2010, the Austrian *Oberste Gerichtshof* (Supreme Court - OGH) dealt in detail with the protection of editorial confidentiality and its importance in relation to the freedom of expression and of the press.

The case concerned a report by *Österreichische Rundfunk* (the Austrian public broadcaster - ORF) about three young members of the extreme right, who had been accompanied by a journalist. On the basis of the report, the Wiener Neustadt public prosecutor's office investigated the youngsters for reviving national socialism (Art. 3g of the *Verbotsgesetz* - Prohibition Act) and other punishable offences. The public prosecutor's office ordered the confiscation of all the related video and audio material. This order was refused in the first instance, but granted in the second by the *Oberlandesgericht Wien* (Vienna Appeal Court - OLG). The OGH decision concerns this second-instance ruling.

In its judgment, the OGH found that ORF's basic right to freedom of expression as a media owner, protected under Article 10 of the European Convention on Human Rights (ECHR), had been violated by the confiscation of the video and audio material. Freedom of expression covered not only "information" or "ideas" that were well received or viewed as harmless or indifferent, but also those that were harmful, shocking or disturbing. It was not only the content of the information, but also the form in which it was conveyed that was protected. Without such protection, sources could be deterred from helping the media to inform the public about matters of public interest (chilling effect). This could interfere with the media's important function as a public watchdog. Article 10(2) of the ECHR authorised only certain restrictions prescribed by law, insofar as they were necessary in a democratic society to protect certain interests (in this case, the prevention of disorder or crime).

Such a restriction was authorised in the provisions on confiscation of evidence contained in Article 110 of the *Strafprozessordnung* (Code of Criminal Procedure - StPO). However, this was limited by the "protection of editorial confidentiality" guaranteed in Article 31 of the *Mediengesetz* (Media Act). Under this provision, media owners, editors and employees of a media company or service, who appear as witnesses in a criminal procedure or another procedure before a court or administrative authority, may refuse to answer questions about the identity of the author, sender or source of articles and documents or any information obtained for their profession. This right may not be bypassed by requesting the person concerned to hand over papers, printed matter, image, sound or data carriers, illustrations or other representations of such content, or by confiscating them.

Since this provision did not make any reference to the need to weigh up these interests against those of "the prevention of disorder or crime", the OGH decided that the confiscation of such protected material would infringe the basic right to freedom of expression, even if the video or audio material could provide information about a crime (although the protection of editorial confidentiality does not apply to individuals who themselves are strongly suspected of committing a crime).

The OLG Wien, however, held that only confidential information was covered by the protection of editorial confidentiality. Video and audio recordings meant for public broadcast and behaviour that could be seen by the public were therefore not protected.

The OGH nevertheless explained that all information was included, even though the heading of Article 31 of the Media Act contained the word "Geheimnis" (confidentiality), which could lead to the protection being limited to information that was "actually confidential".

The only type of information that was not protected was that which had been obtained after being made accessible by someone not in connection with media activities. However, all the courts involved assumed that the young people had always acted in the knowledge that they were providing information for a television report, which was why the recordings were covered by the protection of editorial confidentiality.

• *Entscheidung des OGH vom 16. Dezember 2010 (13 Os 130/10g, 13 Os 136/10i)* (Supreme Court ruling of 16 December 2010 (13 Os 130/10g, 13 Os 136/10i))
http://merlin.obs.coe.int/redirect.php?id=12982 DE

Harald Karl
Pepelnik & Karl Sollicitors, Vienna

Revised Film/TV Agreement Between ORF and Austrian Film Institute

Since 1981, the financial involvement of public service broadcaster ORF in the Austrian film industry has been regulated by the *Film/Fernseh-Abkommen* (Film/TV Agreement), a private law agreement between ORF and the *Österreichisches Filminstitut* (Austrian Film Institute), previously known as the *Österreichischer Filmfonds* (Austrian Film Fund). Under this agreement, which is regularly updated (most recently

in 2006), ORF is obliged to support films that are not primarily made for television. The funds are meant to support film production and are distributed by a committee comprising representatives of the Austrian Film Institute and ORF. Recipients must already have been promised funding by the Austrian Film Institute.

The most important change concerns an increase in the funds made available by ORF, which must contribute EUR 8 million per year for the calendar years 2010 to 2013 at least (previously EUR 5.9 million). Although ORF's contribution to the film industry is primarily designed to promote film-making and is conditional on support being offered by the Austrian Film Institute, it should be treated as repayable funding. ORF also acquires the Austrian free-to-air television broadcasting rights for a seven-year licence period for the films it supports, including unlimited repeats; the rights then revert to the producer. In a loose declaration of intent, the new agreement also states that ORF is prepared to adapt the licence period to international conditions in individual cases. The licence period begins at the end of the period during which the film may only be shown in cinemas. Although the producer retains the pay-TV rights, ORF has the right of first broadcast in Austria, which expires 12 months after the end of the period during which the film may only be shown in cinemas. In addition, this now includes the catch-up TV rights for a seven-day period following the broadcast, although the signal is encrypted for viewers outside Austria.

Another amendment concerns ORF's share in the profits generated by co-financed films. ORF and the Austrian Film Institute have agreed that all the proceeds should be paid back into the Film/TV Agreement budget.

Further amendments and additions concern measures to improve the scale of payments for producers; the promotion of Austrian films through reporting; free cooperation in relation to premieres; the broadcast of film trailers and quicker, more efficient implementation of contracts. Film exploitation rights that were previously held by ORF indefinitely (films co-financed by ORF before 2005) can now, for the first time, be transferred back to the producers for further exploitation in Austria and South Tyrol, in return for a reasonable share of the profits.

For the time being, the amount of funding has been fixed until 2013. If the funds are not used up by the end of the year, they are carried over to the following year. Profit shares are not included, but are added to the funds available. The agreement has no expiry date and cannot be cancelled by the parties before 31 December 2013. It is likely that efforts will be made to renegotiate the Film/TV Agreement before that date anyway.

• *Film/Fernseh-Abkommen 2011, 14. Januar 2011* (2011 Film/TV Agreement, 14 January 2011)
http://merlin.obs.coe.int/redirect.php?id=12981 DE

Harald Karl
Pepelnik & Karl Sollicitors, Vienna

BE-Belgium

Undercover Report on Public Broadcaster Violates Privacy

As part of the television information programme "Panorama", a report covering the illegal trade of antiques from Afghanistan, as well as how this trade is indirectly funding the Taliban, was transmitted on 6 September 2009 by the Flemish public broadcaster (VRT). For the report, a collector was videotaped with a hidden camera in his private home. This man owns a large collection of works of art, from Afghanistan and other places, and, while answering their questions, he revealed some of these to the journalists, who were impersonating interested students. The collector's face had been blurred, but his voice had not been changed. Subsequent to the transmission, the collector lodged a complaint with the *Vlaamse Raad voor de Journalistiek* (Flemish Council for Journalism Ethics).

First of all, the collector complained that the report was not in conformity with the regulation on undercover journalism. According to the Ethical Directive on Undercover Journalism, which is now integrated into the new Flemish code on journalism ethics (see IRIS 2011-1/10), the conditions under which this type of journalism is allowed are fourfold: first, the information to be obtained should reflect a great societal importance. Second, it should not be possible to obtain the information via conventional journalistic methods. Third, the risks related to this method should be acceptable with a view to the results in mind. And fourth, the decision to use the undercover method and the realisation of the report should only occur after deliberation with and under the responsibility of the chief editors. In this case, the collector argued that the fact that antiques are smuggled from Afghanistan and that antiquaries might play a role in this could have a certain societal importance, but that the same is not true for the fact that collectors may purchase a certain smuggled antique. Moreover, he held that the information that these antiquities are purchased could easily be obtained from the police or experts, as also happened in the report, so there was simply no need to bring a hidden camera into his house. Hence in the complainant's view, the conventional methods were sufficient to get the required result. The Council for Journalism Ethics did not however

agree with this. It considered that the illegal export of antiques from Afghanistan and the fact that terrorist organisations are financed through this trade is undeniably a matter of great societal importance. The VRT wanted to show the integral chain starting from the excavations in Afghanistan up to the eventual sale to Belgian collectors. If the antiquaries and collectors would have been interviewed with a visible camera, their reactions would not have been the same, hence the use of the undercover method was justified. It was also necessary, in order to firmly support the report's theme, to interview the complainant at his home in front of his art collection. Consequently, the Council did not find a breach of the ethical rules concerning undercover journalism.

The collector further held that the facts had not been covered in a correct way, as he had unjustly been displayed as a person who consciously purchases stolen antiques, and that his privacy was severely violated. The Council on the contrary found that the coverage was correct and that the complainant's words had not been taken out of their context. However, the Council agreed that the VRT should have taken additional precautions to hide the complainant's identity. The front of his house was shown twice, which provided no added value to the quality of the report, and the Council could see no valuable argument that would justify not camouflaging the complainant's voice. As a consequence, the Council found a violation of the ethical principle that sufficient precautions should be taken in order to prevent that persons involved in a report that is created by way of a hidden camera can be identified (for a similar case, see IRIS 2009-10/5).

• *Beslissing 2011-01 van de Raad voor de Journalistiekover de klacht van de heer Thierry V. tegen de VRT* (Flemish Council for Journalism Ethics, Thierry V. v. NV VRT, 13 January 2011)
http://merlin.obs.coe.int/redirect.php?id=12969 NL

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

BG-Bulgaria

Public Financing of the Bulgarian National Television in 2011

Pursuant to Art. 70, para. 1 of the Закон за радиото и телевизията (Radio and Television Act) the Bulgarian National Television shall prepare, perform and report on a separate budget. In addition, according to Art. 70, para. 3, item 3 of the Radio and Television Act, part of the budget of the Bulgarian National Television comes as a State subsidy.

The subsidy from the State budget shall be used for the preparation, creation and broadcasting of national and regional programmes. According to Art. 8 of the Закон за държавния бюджет на Република България за *2011* г. (State Budget Act for 2011) the National Assembly approved a subsidy from the State budget for the Bulgarian National Television of the amount of BGN 60,100,000 (approx. EUR 30,730,000).

The subsidy is based on an estimate of one programme hour as adopted by the Council of Ministers (State Gazette No 2, dated 7 January 2011). According to the estimates of the Government for 2011 one programme hour shall amount to BGN 1,978 (approx. EUR 1,000).

The Director General of the Bulgarian National Television shall, within one month after the promulgation of the budget, present to the Minister of Finance a monthly estimate of expenses.

Pursuant to Art. 28, para. 1 of the Постановление № *323* от *28* декември *2010* г. за предоставяне на допълнителна субсидия на Българската национална телевизия за *2010* г., (State Budget Structure Act) the Council of Ministers adopted a special regulation providing an additional subsidy to the Bulgarian National Television for 2010 of the amount of BGN 10,098,227 (approx. EUR 5,130,000) for the payment of some broadcasting television programme fees.

The said fees are due to be paid by the Bulgarian National Television to the telecommunications operator Vivacom. The latter had filed a court claim against the Bulgarian National Television on 9 April 2010 on the grounds of unpaid amounts.

• Закон за държавния бюджет на Република България за 2011 г. (State Budget Act for 2011, promulgated in the State Gazette No 99, dated 17 December 2010)
http://merlin.obs.coe.int/redirect.php?id=12999 BG

• Постановление № 323 от 28 декември 2010 г. за предоставяне на допълнителна субсидия на Българската национална телевизия за 2010 г. (State Budget Structure Act, promulgated in the State Gazette No 1, dated 4 January 2011)
http://merlin.obs.coe.int/redirect.php?id=13000 BG

Rayna Nikolova
New Bulgarian University

CH-Switzerland

Collecting IP Addresses to Hunt down Internet Pirates is Illegal

IP addresses are protected personal data: they cannot be collected or used by a private undertaking without the consent of the persons concerned. This was the opinion of the Swiss Federal Tribunal (TF), upholding the opinion of the Federal Data Protection and Transparency Commissioner (Préposé fédéral à la protection des données et à la transparence - PFPDT). The

PFPDT had ordered the Swiss company Logistep to stop its search for IP addresses on peer-to-peer networks until such time as a suitable legal basis had been adopted by the legislator.

Under commission from copyright holders, Logistep was hunting down musical and audiovisual works offered illegally by Internet users over peer-to-peer networks. Using specific software, Logistep collected transmission data on content exchanges, and more particularly the IP addresses of the users involved. It then passed this information on to the copyright holders to enable them to identify the Internet users concerned and have them prosecuted.

By considering the IP address as protected personal data within the meaning of the Federal Act on Data Protection (Loi fédérale sur la protection des données - LPD), the PFPDT held that such a practice was unlawful, as it infringed the personality rights of the Internet users concerned. Since Logistep refused to stop its activities, the PFPDT referred the matter to the Federal Administrative Tribunal (Tribunal administratif fédéral - TAF), but it refused to accept the application. Although it confirmed that IP addresses were indeed protected personal data, the TAF held that the interests of the copyright holders took precedence over those of Internet users in having information about them protected. According to the TAF, the collection and transmission of this personal data was therefore not subject to the consent of the persons concerned.

In a decision delivered on 8 September 2010 and published in January 2011, the TF cancelled the judgment delivered by the TAF and found in favour of the PFPDT. According to the TF, collecting IP addresses without the users' knowledge and in a way that they were not able to recognise constituted a serious infringement of privacy and contravened the provisions of the LPD. Furthermore, there was no overwhelming public or private reason (the existence of which could only be admitted in very limited circumstances) to justify such an activity. Thus the judgment delivered by the TF forbids Logistep from collecting IP addresses and passing them on to copyright holders. The TF emphasised however that its decision referred solely to Logistep's processing of personal data and did not constitute the establishment of a general right of precedence to the protection of data over the protection of copyright. In the absence of a relevant legal foundation, it was for the legislator to take the necessary steps to guarantee protection of copyright, taking the new technologies into account.

• *Urteil Nr. 1C_285/2009 des Bundesgerichts vom 8. September 2010* (Decision no. 1C_285/2009 of the Federal Tribunal, delivered on 8 September 2010)
http://merlin.obs.coe.int/redirect.php?id=13014 DE

Patrice Aubry
RTS Radio Télévision Suisse, Geneva

Federal Appeal Court Protects Editorial Confidentiality in Schweizer Fernsehen Weblog

In a landmark decision issued on 10 November 2010, the *Schweizerische Bundesgericht* (Swiss Federal Tribunal) ruled that information sources in the weblogs (blogs) of media companies were protected. Under the Swiss *Strafgesetzbuch* (Criminal Code - StGB), periodical media are entitled to withhold the identity of the author, as well as the content and sources of information. According to the court, this editorial confidentiality also applies to comments by private contributors to media blogs and is not limited to traditional media such as newspapers, radio or television. It therefore covers, for example, blogs that Schweizer Fernsehen (SF) publishes on its website. These blogs not only contain contributions from SF employees, but also give members of the public the chance, under certain conditions, to add their own entries by clicking on the "Comments" link.

The *Bundesgericht* had to consider whether Schweizer Fernsehen was entitled to withhold the identity of the author of a particular comment from the criminal investigation authorities. After deliberating in public, it decided, by 3 votes to 2, that Schweizer Fernsehen was not obliged to disclose documents concerning a possibly defamatory blog entry. In a libel procedure; the public prosecutor's office of the Zug canton had demanded that SF disclose the IP address of the person responsible and the time the comment had been posted, so that the unknown author could be tracked down.

Under Article 28a of the Swiss Criminal Code, editorial confidentiality is limited to "persons who are professionally involved in the publication of information in the editorial section of a periodical medium". The court unanimously held that the SF blog represented a periodical medium, since contributions were regularly added to it. It was also agreed that the editorial section was concerned, since neither the blog entries nor the associated comments were in the advertising section. The criterion of professional activity was also met, since SF was basing its argument on editorial confidentiality. Whether the author of the comment was also professionally involved in the publication of information was irrelevant, under Swiss law, to the right of media representatives to protect their information.

In addition, the editorial confidentiality described in Article 28a(1) StGB is limited to the publication of information, since the Swiss legislator wanted to exclude pure conversation. A minority of the court judges thought the comment in question had no information value whatsoever. The majority, however, decided that the concept of conversation should be interpreted narrowly and that of information more broadly. This was based on the importance of media

freedom (Art. 17 of the *Bundesverfassung* - Federal Constitution) and editorial confidentiality in a democratic society. A broad interpretation of information created greater legal certainty. It enabled the medium to hold a clear position and to adopt a practice that third parties could understand. Therefore, editorial confidentiality also applied to personal statements, conversations, gossip, trivial comments and articles that were not in the public interest. The court ruled that, in the present case, the disputed comment was associated with the blog entry of the SF employee and represented more than "just pure conversation that bore no relation to any particular message from the outset". It therefore fell within the broad concept of information in the Criminal Code.

The *Bundesgericht* points out in its ruling that Schweizer Fernsehen was legally entitled to either withhold the information requested by the public prosecutor's office or waive its right to editorial confidentiality. The protection of sources did not give everyone involved in a publication exemption from criminal prosecution. It merely shifted responsibility: instead of the author, who was being pursued for libel (but shielded by the medium), Swiss law provides that the editor responsible may be prosecuted for wilfully or negligently failing to prevent an illegal publication (Arts. 28 and 322bis StGB).

Schweizer Fernsehen (from 2011 known as Schweizer Radio und Fernsehen SRF) is part of the Swiss public broadcaster Schweizerische Radio- und Fernsehgesellschaft (SRG). Under its licence, granted by the *Bundesrat* (government) on 28 November 2007, SRG is allowed to offer certain online services as well as radio and television channels. Multimedia online services must be programme-related and have a direct connection to programmes in terms of both time and subject-matter. Public forums must also be linked to programmes. The SRG licence does not mention the admissibility of or the need for comments in SRG-weblogs.

• Ruling of the *Bundesgericht* (Federal Tribunal) ("*SF Schweizer Fernsehen v. Stadtrichteramt Zürich*") 1B_44/2010 of 10 November 2010
http://merlin.obs.coe.int/redirect.php?id=12989 DE

Franz Zeller
Federal Communications Office / Universities of Bern and Basel

CZ-Czech Republic

Support and Development of Czech Film Industry 2011-2016

On 1 December 2010, the Government of the Czech Republic adopted a new concept for the support and development of the Czech film industry for the period 2011-2016. The concept's objectives are:

- to strengthen and uphold the values of Czech film culture;

- to develop the Czech film industry in order to make it internationally competitive;

- to increase the economic potential of the film industry and to create jobs;

- to establish a functioning system for the financial support of the Czech film industry;

- to create a legal basis for these objectives, in conformity with EU law;

- to promote the role of cinematography as an indispensable component of the Czech cultural heritage.

In 2011, the Ministry of Culture is expected to prepare a new Cinematography Act, which will particularly include measures to secure sources of funding for the support and development of the Czech film industry. TV providers will, in future, contribute approximately 1% of their advertising income to the financing of the film industry. In addition, certain terms in the field of cinematography will be redefined. The visibility of companies and works in the audiovisual field will be newly regulated. The Act will also support international cooperation and the implementation of the European Convention on Cinematographic Co-production. A system for the standard labelling of audiovisual works will also be introduced in relation to their accessibility for children and young people. This system will, in future, also apply to television programmes.

• *Usnesení vlády ze dne 1. prosince 2010 č. 871, o Koncepci podpory a rozvoje české kinematografie a filmového průmyslu v letech 2011 až 2016* (Government resolution no. 871 of 1 December 2010, Concept for the support and development of the Czech film industry for the period 2011-2016)
http://merlin.obs.coe.int/redirect.php?id=12983 CS

Jan Fučík
Ministry of Culture, Prague

DE-Germany

Broadcasting Freedom Breached by Broadcaster Search and Seizure of Editorial Documents

On 10 December 2010, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) decided to uphold the appeal by the Hamburg-based local broadcaster "*Freies Sender Kombinat*" (FSK) against an order to search its business premises and confiscate

its editorial documents, and to overturn the lower instance rulings.

In October 2003, FSK had broadcast a report on alleged infringements by police officers at a demonstration. During the programme, an unknown presenter had played recordings of two telephone calls between a police press officer and somebody who had introduced him/herself in the telephone calls as an employee of the broadcaster and had given his/her name. As a result, the *Landeskriminalamt* (State criminal investigation department) in Hamburg brought a charge for a suspected violation of the confidentiality of the spoken word, protected under Article 201(1) of the *Strafgesetzbuch* (Criminal Code), since no agreement had been made for the telephone calls to be recorded. The public prosecutor's office ordered a search, during which an employee was held responsible and cautioned, subject to the court's ruling.

The BVerfG stressed that the basic right of broadcasting freedom, enshrined in Article 5(1)(2) of the *Grundgesetz* (Basic Law), protected the institutional independence of broadcasters from the obtaining of information to its dissemination. This included the confidentiality of editorial work, which prohibited State bodies from gaining insight into the work processes involved in producing reports. Organisational documents containing details of work routines or the identity of editorial staff were also covered by editorial confidentiality.

It was true that the order to search the FSK premises for the audio recording and related documents did not infringe the ban on seizure enshrined in Article 97(5) of the *Strafprozessordnung* (Code of Criminal Procedure). However, the proportionality of the measure was not entirely convincing. It was necessary to weigh the actual interest of a criminal investigation against the interference with broadcasting freedom that such a search would create. The effects of such an investigation on the media organisation should be taken into account, since the search of a broadcaster's premises often disrupted the relationship of trust between the broadcaster and its sources and an unlimited search order had an extremely intimidating effect on the press organisation concerned. The BVerfG also ruled that the taking of photographs and drawings of the premises and the seizure of editorial documents and the copying of those documents breached broadcasting freedom, since there was no obvious need for such measures. There were also insufficient grounds for documenting where the confiscated files were found; rather, this had not even been recorded in the drawings that had been made.

• *BVerfG, 1 BvR 1739/04 vom 10.12.2010, Absatz-Nr. (1 - 32)* (BVerfG, 1 BvR 1739/04 of 10.12.2010, paragraphs 1-32)
http://merlin.obs.coe.int/redirect.php?id=12984 DE

• *BVerfG, 1 BvR 2020/04 vom 10.12.2010, Absatz-Nr. (1 - 41),* (BVerfG, 1 BvR 2020/04 of 10.12.2010, paragraphs 1-41,)
http://merlin.obs.coe.int/redirect.php?id=12985 DE

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

Administrative Court Rules on Film Tax Obligation

In a ruling of 18 January 2011, the *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG) rejected a claim by the *Filmförderungsanstalt* (Film Support Office - FFA) to payment of the film tax.

The case concerned DVDs produced and sold by the video marketing company of the Berlin-Brandenburg public service broadcaster (RBB), each containing several episodes of various television series produced by the broadcaster. The FFA wanted the video marketing company to pay a film tax on these DVDs on the basis of Article 66a of the *Filmförderungsgesetz* (Film Support Act - FFG). Under this provision, the video industry has to pay the film tax on the sale of video media containing films with a running time of more than 58 minutes. The total running time of the DVDs was between 180 and 900 minutes. The video marketing company appealed against the FFA's claim.

The VG Berlin upheld the appeal. It ruled that the minimum running time mentioned in Article 66a FFG was the duration of the individual film on the DVD concerned, whereas the overall length of the material was irrelevant. The obligation for video companies to pay the tax to the film industry applied only to feature-length films and not to series produced originally for TV broadcast only, which were less than 58 minutes long. The individual episodes in this case were between 18 and 50 minutes in duration and were therefore shorter than the minimum threshold.

The court's decision is open to appeal.

• *Pressemitteilung des VG Berlin zum Urteil vom 18. Januar 2011 (Az. VG 21 K 146.10)* (Press release of the Berlin Administrative Court on its ruling of 18 January 2011 (case no. VG 21 K 146.10))
http://merlin.obs.coe.int/redirect.php?id=12988 DE

Anne Yliniva-Hoffmann
Institute of European Media Law (EMR), Saarbrücken/ Brussels

Cologne Appeal Court Rules on Evaluation of "Relevant Exploitation Phase" for Works in Determining Commercial Scale

In a recently published decision of 27 December 2010, the *Oberlandesgericht Köln* (Cologne regional court of appeal - OLG) considered the concept of "commercial scale" of file-sharing in relation to the right to information enshrined in Article 101 of the *Urheberrechtsgesetz* (Copyright Act - UrhG) (see IRIS 2011-1/17).

Taking previous case-law into account, the OLG Köln repeated that, on the one hand, a commercial scale was present if the work being offered was particularly valuable, before looking more closely at a second scenario, whereby a sufficiently large file was made available to the public during its relevant exploitation phase. In this phase, copyright holders were particularly affected by the publication of their works by third parties.

In the opinion of the OLG Köln, the relevant exploitation phase for musical and cinematographic works lasted six months from first release. For films, this period should be calculated not only from the date of their release in cinemas, but also from when DVD sales began, since this represented a totally different type of use from cinema distribution.

In the court's view, special circumstances, such as the long-lasting, particularly high level of commercial success of a work, could lead to a longer relevant exploitation phase. For music albums, for example, this was conceivable if the album was in the Top 50 of the music industry's sales charts when the copyright was infringed. The same situation applied if one track from the album concerned was particularly well placed in the charts at the time. For audio books, the size of the work or the success of the printed version could also be significant.

One reason to oppose the lengthening of the relevant exploitation phase would be if the work was available at sale price, unless this was merely as part of a special offer available for a limited period of time.

• *Beschluss des OLG Köln vom 27. Dezember 2010 (Az. 6 W 155/10)* (Decision of the Cologne regional court of appeal, 27 December 2010 (case no. 6 W 155/10))
http://merlin.obs.coe.int/redirect.php?id=12986 DE

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

RLP.TV GbR Denied Broadcasting Licence

In a ruling of 21 December 2010, the *Verwaltungsgericht Neustadt* (Neustadt administrative court - VG) decided that RLP.TV GbR was not entitled to a broadcasting licence.

In May 2009, the *Landeszentrale für Medien und Kommunikation* (regional media and communications authority - LMK) of Rhineland-Palatinate had invited tenders from analogue cable TV channels wishing to provide regional television channels. In November 2009, it awarded Gutenberg.TV the licence to broadcast a TV channel with a regional and local focus in Vorder- and Westpfalz and in Rheinhessen. It rejected the bid by competitor RLP.TV GbR on the grounds that it would have operated "exclusively as an advertising vehicle" and not as the actual broadcaster. A successor company in the form of a partnership or joint-stock company would have been set up for this purpose. The *Landesmediengesetz* (Regional Media Act - LMG) of Rhineland-Palatinate did not allow a broadcasting licence with a frequency allocation to be transferred. Due to the lack of concrete information, the future company's suitability for a licence could not be verified. RLP.TV GbR appealed against the LMK's decision, arguing, *inter alia*, that its company's legal representatives would be identical after the licence and frequency were allocated.

The VG Neustadt rejected the appeal by RLP.TV GbR. According to the LMG, only the individual or legal entity, or the association of legal entities that actually intended to organise broadcasting could apply for a broadcasting licence. Under Article 24(1)(1) LMG, licences could only be awarded to the broadcasters themselves. The LMG was therefore based on the notion that the licence applicant was identical to the actual broadcaster. An application by a "vehicle company" was fundamentally inadmissible. There needed to be an inextricable connection between eligibility for a licence and the subsequent organisation of broadcasting. In this case, the future company could not be awarded a licence because its actual form and internal structure were unknown.

• *Beschluss des VG Neustadt vom 21. Dezember 2010 (Az. 6 K 1371/09.NW)* (Decision of the Neustadt administrative court, 21 December 2010 (case no. 6 K 1371/09.NW))
http://merlin.obs.coe.int/redirect.php?id=12987 DE

Christian M. Bron
Institute of European Media Law (EMR), Saarbrücken/ Brussels

ES-Spain

Parliament Finally Approves Controversial Copyright Provision

On 15 February 2011, the Spanish Parliament finally adopted the Sustainable Economy Act. The new act

includes a series of controversial measures against the illegal downloading of protected works (the so-called *Ley Sinde*), which the Parliament had initially removed from the bill prepared by the Government and which were later reintroduced with slight modifications (see IRIS 2011-2/23). These measures amend three further acts, namely the Act on Information Society Services, the Intellectual Property Act and the Act on Administrative Jurisdiction.

The *Ley Sinde* aims at blocking or closing down in a short space of time websites from which copyrighted content may be downloaded. Upon application to the Second Section of the Commission on Intellectual Property of the Ministry of Culture, two courses of action become available for a claimant: the submission of a request to the courts that the Internet service provider, i.e. in most cases a hosting company, submit identifying data of the site owner (always subject to judicial authorization), and/or requesting the service provider to remove the infringing content.

The *Sala de lo Contencioso-Administrativo de la Audiencia Nacional* (Chamber of Administrative Jurisdiction of the National Court) may authorise the submission of data of the alleged offender according to a quick 24 hour procedure. If authorised, the next step would be to take action against the offender, again before the courts. If the data submission is not authorised, the claimant probably would have no other choice but to re-submit his/her complaint, alleging new evidence of the offense.

If the hosting company has been asked to remove the problematic content, it must decide whether or not to do so within 48 hours. If the service provider chooses to withdraw the content voluntarily, the procedure will come to an end. If it does not and presents arguments and evidence to defend itself, the procedure will be put on hold for two days while the parties submit evidence and allegations. The Second Section of the Intellectual Property Commission will then issue a resolution within three days. According to experts, in total, such a proceeding should last no longer than 15 days.

The enforcement of the above-mentioned resolution can only be pursued after authorisation by the Central Court of Administrative Jurisdiction, returning the proceedings again, as the initial critics of the Bill demanded, to the judicial bodies.

• Ley 2/2011, de 4 de marzo, de Economía Sostenible, *BOE núm. 55, 5 de Marzo de 2011* (Sustainable Economy Act, Act 2/2011 of 4 March 2011, Official Journal no. 55 of 5 March 2011)
http://merlin.obs.coe.int/redirect.php?id=12979 ES

Pedro Letai
IE Law School, Instituto de Empresa, Madrid

FR-France

Liability of Video-sharing Platforms - First Judgement of Court of Cassation

In a judgment of 17 February 2010, the Court of Cassation ruled on the issue of the liability of video-sharing platforms for the first time. The case is well known: the director and producer of the film "Joyeux Noël" had taken legal action against Dailymotion, accusing the platform of allowing the film to be viewed using streaming technology despite having been sent formal notice to withdraw the film. The regional court in Paris had found in favour of the rightsholders on 13 July 2007 and held the company Dailymotion, categorised as a host service provider, guilty of infringement of copyright (see IRIS 2007-8/17). The Paris court of appeal had confirmed the categorisation of the site as a host, which meant it should benefit from the limited liability described in Article 6 of the Act of 21 June 2004, but had overturned the decision on its liability (see IRIS 2009-6/18). The rightsholders therefore took their case to the Court of Cassation.

They began by arguing that only technical providers of data storage services were entitled to claim limited liability and that, contrary to the appeal court's ruling, companies such as Dailymotion, which managed, organised and operated an on-line public communication service and made money by selling advertising space, had no right to such special dispensation. The Court of Cassation rejected this argument, stating that, on the contrary, the operations carried out by Dailymotion (re-encoding videos in order to make them compatible with the viewing interface, and formatting them in order to make optimal use of the server's storage capacity by limiting the size of uploaded files) were technical operations that formed part of the role of a host and in no way enabled the host to select the content that was published online. Furthermore, Dailymotion's setting up of presentation frames and tools for classifying content were justified by the need, also forming part of a host's function, to rationalise the organisation of the service and to facilitate user access to it, without imposing any particular choice in terms of the content to be uploaded. Finally, the Court added that the use of the site to generate income through the sale of advertising space did not mean that the service had any influence on uploaded content. The Court of Cassation therefore held that the appeal court had correctly concluded that Dailymotion had been entitled to claim the status of a technical intermediary within the meaning of Article 6-I-2 of the Act of 21 June 2004. In their second argument, the rightsholders disputed the appeal court's judgment that the formal notice that they had sent to Dailymotion, informing it that their film had been posted on the platform, had not provided

all the information necessary for it to withdraw the film. The Court of Cassation pointed out that the notice should include all the elements described in Article 6.I.5 of the Act of 21 June 2004. The appeal court had noted that the rightsholders had omitted to attach the process-server's reports that they had drawn up and which would have provided Dailymotion with all the elements necessary for identifying the disputed content. The Court of Cassation ruled that the appeal court had therefore been entitled to conclude that Dailymotion could not be accused of failing to meet its obligation to withdraw or block access to the unlawful content immediately, since it had not truly had knowledge of the disputed content until the summons had been served. This ruling appears to have settled the debate on video platform hosts and editors once and for all.

• *Cour de cassation (1re chambre civile), 17 février 2011, Nord-Ouest Production,* C. Carion et UGC Images c. Dailymotion (Court of Cassation (1st civil chamber), 17 February 2011, Nord-Ouest Production, C. Carion and UGC Images v Dailymotion)
http://merlin.obs.coe.int/redirect.php?id=13017 FR

Amélie Blocman
Légipresse

Court of Cassation Upholds Acquittal of Advertisers on Peer-to-peer Sites

In a judgment delivered on 11 January 2011, the court of cassation rejected the appeal brought by the director and producers of the successful film *Les Choristes* ('The Choir') against the judgment of the Paris court of appeal delivered on 25 March 2009. In doing so the court of cassation upheld the acquittal of the advertisers (Free, SFR, Voyages-SNCF, etc.,) on a number of peer-to-peer sites which had been taken to court by the rightsholders on the grounds of complicity in infringement of copyright. The rightsholders accused them of participating in the financing of illegal sites (see IRIS 2006-8/21). In its judgment delivered on 25 March 2009, the court of appeal had noted that the advertisers were not in any way Internet advertising professionals, and indeed had had to call on the services of advertising agencies, which in turn had had to call on the services of sub-contractors (see IRIS 2009-5/22). A media agency that calls on the services of a multimedia advertising agency buys "a volume of space" on dozens and hundreds of sites in a package, although the advertiser is never given a list of the sites on which its advertising appears. The court of appeal had emphasised that the use of adware could not be excluded; this allowed the random, automatic posting of advertising messages according to the profile of the Internet user, with no intervention and more specifically no deliberate human action, regardless of the site on which they appeared. Article 121-7 of the Criminal Code sanctions deliberate complicity and the intentional element has to be proven for the offence of complicity (in infringing copyright in the present case) to be constituted.

The court of cassation therefore found that the court of appeal had "with neither insufficiency nor contradiction (04046) set out the reasons for considering that there was no proof that the accused had committed the alleged offences on the basis of the elements submitted for its examination".

• *Cour de cassation (chambre criminelle), 11 janvier 2011,* Galatée Films et a. c. AOL France et a. (Court of cassation (criminal chamber), 11 January 2011, Galatée Films et al. v. AOL France et al.)
http://merlin.obs.coe.int/redirect.php?id=13015 FR

Amélie Blocman
Légipresse

Changes to Regulations on Financial Support for the Cinematographic Industry

With the publication of the Decree of 4 February 2010 and the four Orders amending the regulations on financial support for the cinematographic industry, the "Club of 13" has seen its efforts rewarded. The group of thirteen celebrities in French cinema circles, formed in 2008 on the initiative of the director Pascale Ferran, had drafted a report entitled *Le Milieu n'est plus un pont mais une faille* ("The middle ground is now a fault line rather than a bridge"), denouncing the increasing difficulties in financing and distributing "middle of the road" films in France, i.e., films occupying a position somewhere between the American blockbusters and very minor films. Specifically, these texts are concerned with the cinematographic production companies that receive financial support for the production of full-length cinematographic works from the national centre for the cinema and animated images (Centre national du cinéma et de l'image animée - CNC). For each film produced, part of the money generated by ticket sales is paid back to the delegated producers, and part to the co-producers. The Decree raises the rate for repaying revenue to French films according to the number of tickets sold or reserved for the delegated production company in the case of a co-production. The amounts paid back are now to be increased up to a limit of 5 million tickets, a level that few French films ever achieve, whereas previously all films received support, regardless of their success in cinema theatres. The delegated producer will now be allocated 100% of the support money if the film generates support of up to 150,000 EUR, compared with 50 000 previously. As a result, the television channels, which are co-producers but never delegated producers, will receive less money. The Decree also increases the allowance paid for expenditure on preparatory work involving the initial idea, adaptation and scriptwriting where this is incurred before production begins. It also sets up specific support measures

in favour of authors in respect of the initial idea for the project.

• *Décret n°2011-155 du 4 février 2011 modifiant le décret n°99-130 du 24 février 1999 relatif au soutien financier de l'industrie cinématographique (et 4 arrêtés), JO du 6 février 2011* (Decrees No. 2011-155 of 4 February 2011 amending Decree No. 99-130 of 24 February 1999 on financial support for the cinematographic industry (and four Orders), Official Journal of 6 February 2011)
http://merlin.obs.coe.int/redirect.php?id=13016 FR

Amélie Blocman
Légipresse

GB-United Kingdom

New Rules on Product Placement

Ofcom, the UK communications regulator, has issued new rules on product placement following the Government's decision to permit it subject to restrictions (see IRIS 2010-8/33). The new rules are contained in the revised Broadcast Code and came into effect on 28 February 2011.

Product placement is allowed in films (including dramas and documentaries), TV series (including soaps), entertainment shows and sports programmes. The new rules clarify that single dramas fall within the genre of 'films made for television' where product placement may take place. But it will be prohibited in all children's and news programmes and in UK-produced current affairs, consumer affairs and religious programmes. A product, service or trade cannot be product placed if it is prohibited from being advertised on television or falls within a category where product placement is prohibited. These include tobacco, alcohol, gambling, foods or drinks that are high in fat, salt or sugar, medicines and baby milk.

The rules state that product placement must not impair broadcasters' editorial independence and must always be editorially justified, seeking to prevent programmes being created or distorted as vehicles for product placement. Ofcom is issuing a universal visual logo which must be used to signal the presence of product placement; this must appear for three seconds at the beginning and end of programmes and after advertising breaks. Ofcom will also formally request broadcasters to undertake an audience awareness campaign about the logo. The product placement rules will be applied to paid-for references to products, services and trademarks that are included in a television programme for a non-commercial purpose. They will also be applied to the placement of products by sponsors in the programmes they are sponsoring and internal credits may be broadcast by sponsors in programmes they are sponsoring, unless they fall within the categories where product placement is prohibited.

Other amendments to the Broadcast Code include introducing a consumer protection principle, prohibiting surreptitious advertising and requiring the cost of premium services to be made clear.

• Ofcom: "Broadcasting Code Review: Commercial References in Television Programmes", 20 December 2010
http://merlin.obs.coe.int/redirect.php?id=12972 EN

Tony Prosser
School of Law, University of Bristol

Regulator Recommends News Corp Bid for BSkyB be Referred to Competition Commission on Plurality Grounds

The major controversy over News Corp's bid for 100% of BSkyB has reached a further stage with the publication by Ofcom of its report on the plurality implications of the bid, recommending that the minister refer it to the Competition Commission for further investigation. The bid has already been cleared on competition grounds by the European Commission (see IRIS 2011-2/4).

Under the Enterprise Act 2002, the Secretary of State for Culture, Media and Sport has the power to specify a "public interest consideration" in a proposed merger relating to the need for a sufficient plurality of persons with control of media enterprises. Ofcom undertakes a preliminary investigation of this issue and the minister may then refer it to the Competition Commission. Ofcom examined both the effects of the proposed transaction on plurality immediately after it is concluded and issues that may arise later. It determined that the relevant audience is that for cross-media news and current affairs, including TV, radio, newspapers and the internet. News Corp already owns 39.1% of BSkyB and is the UK's largest provider of newspapers, with over 35% of national newspaper circulation. According to Ofcom, the proposed acquisition would see News Corp consolidate its second place in audience reach in news consumption (after the BBC), rising from 14% to 24%. It would also reduce the number of providers of news, through BSkyB ceasing to be a distinct media enterprise. In terms of audience share, the proposed transaction would combine the second and fourth largest news providers. Ofcom did not consider that it was established that Sky News would remain as an independent voice alongside News Corp's other outlets. The proposed transaction might also permit integrated products and cross-promotion amongst News Corp products.

Examination by the Competition Commission will take 6-8 months; after that period BSkyB may be too expensive for the acquisition to take place. The minister thus decided that, though he is minded to refer,

he will defer the reference so that he can examine whether undertakings from News Corp may mitigate the problems identified by Ofcom and made a reference unnecessary.

• Department for Culture, Media and Sport, "Culture Secretary Jeremy Hunt Makes Statement on Proposed Merger", Press Release, 25 January 2011
http://merlin.obs.coe.int/redirect.php?id=12971 EN

Tony Prosser
School of Law, University of Bristol

HR-Croatia

New Croatian Radio Television Law

On 3 December 2010 the Croatian Parliament adopted a new Croatian Radio Television Law (HRT Law), which came into effect on 8 December 2010. Art. 13 of the HRT Law prescribes that programme obligations of the HRT (*Hrvatska radiotelevizija*) as well as the amount and source of their funding are to be determined by a Contract between the HRT and the Government of the Republic of Croatia. The Contract, which is to be concluded for a period of five years beginning on a 1st January, must contain details of the type, scope and content of all public services to be provided by the HRT in accordance with the Law.

The amount of the State subsidy for the provision of public services determined by the Contract must not exceed the net costs of performing the activity, taking into consideration any other direct or indirect revenue gained, i.e., the net revenue gained from all commercial activities related to the provision of public services.

The HRT has to draft a proposal of its programme obligations and to open a public consultation on it. The HRT is obliged to submit to the Government a draft of the aforementioned Contract not later than six months before the Contract in force is to expire. A Contract for each subsequent period must be signed by 1 October of the final year of the Contract in force. Should one or both parties fail to sign the Contract by this date, the provisions of the Draft Contract are to be applied as a self-regulatory act of the HRT until the Contract is signed, provided that they are not contrary to the Rules on State Aid and Public Service Broadcasting. The HRT has to draft and adopt an Annual Work Programme and an Annual Financial Plan, determining activities and programme obligations as well as the necessary financial resources for each subsequent year, not later than the end of December of each calendar year. The HRT is obliged to publish the Contract, Annual Work Programme and Annual Financial Plan on its website.

On the basis of the Contract or the Draft Contract, the Council for Electronic Media (CEM) issues a licence to the HRT to launch a new radio or television programme channel or to provide on-demand audio/audiovisual media services or a licence for satellite, internet, cable or other transmission of audiovisual and/or radio programme.

The Contract contains qualitatively defined obligations on public services that must be provided by the HRT. In particular, it regulates the HRT radio and television programme channels with a view to their type, remit and programme basis, the number, type and content of the HRT webpages, as well as the conditions for providing other public services enabled by technological developments of electronic media. It defines online services that may be provided by the HRT and specifies those that may not. It also prescribes programme and additional obligations in relation to different content such as sport events, foreign programme content, content intended for national minorities and special-interest groups, protection and preservation of audio/audiovisual material and the obligation to alert and inform the public in emergency situations. It provides for the mechanism and procedure of a public value test for the services provided.

The Contract regulates the financing of strategic projects and other investments and of HRT public services per year and source. Likewise, it prescribes the powers and obligations of the HRT bodies in relation to the management of the resources earmarked for the implementation of the Contract and the reporting on it.

On the basis of a Contract the HRT may introduce significant new audiovisual services, i.e., services that are significantly different from services already being provided with a view to their content, way of consumption, access and group of intended users, provided that the costs incurred by their provision surpass more than 2 percent of the annual HRT budget earmarked for the provision of public services in accordance with the Law. Significant modifications to existing services shall be subject to the same assessment. If a Contract foresees launching such a significant new audiovisual service, it is necessary to also take into consideration the possible impact on market conditions and competition. Before launching a significant new audiovisual service or significantly modifying an existing one, a public consultation must be launched. When this consultation is concluded, the HRT management must submit the proposal for the new service, all comments received during the consultation and the opinion of the HRT Programme Council, to the public authority responsible for the protection of competition in order to evaluate the possible impact on market conditions and competition. After receiving the evaluation, the HRT must submit it, along with the proposal for the new service, the comments received and the opinion of the HRT Programme Council, to the CEM. The CEM then publishes the findings

of the consultation and the relevant legal basis, and determines whether all conditions for the introduction of the significant new audiovisual service have been fulfilled.

• *Zakon o Hrvatskoj radioteleviziji* (Croatian Radio Television Law (Official Gazette, issue No. 137/10))
http://merlin.obs.coe.int/redirect.php?id=12963 HR

Nives Zvonarić
Agencija za elektroničke medije, Novo Cice

HU-Hungary

Agreement between the European Commission and the Hungarian Government on the Amendment of Media Acts

Following an exchange of letters between the Hungarian Minister of Public Administration and Justice and Commissioner Neelie Kroes and discussions at expert level the Hungarian government and the European Commission have agreed on a set of amendments to the newly adopted Hungarian media Acts (Act CIV. of 2010 on Freedom of Expression and on the Basic rules of media content and Act CLXXXV. of 2010 on Media Services and Mass Media; see IRIS 2010-8/34, IRIS 2010-9/6, IRIS 2011-1/37, IRIS 2011-2/3 and IRIS 2011-2/30).

The agreed amendments comprise four issues. Their most important elements can be summarised as follows:

- The obligation of balanced coverage: The new Hungarian acts have maintained the traditional requirement of balanced coverage of news for radio and television broadcasting and extended this requirement to presentation of news by on-demand audiovisual media services. As a result of the agreement with the European Commission the Hungarian government has expressed its readiness to exclude non-linear audiovisual services from the balanced coverage obligation. The scope of this obligation will therefore be restricted to television and radio broadcasting in accordance with the principle of proportionality.

- The "country of origin" principle: The Commission and the Hungarian Government agreed to delete the imposition of fines from the catalogue of possible measures that the media authority may apply following the procedure defined by Article 3. of the AVMS Directive.

- Registration rules: The registration procedure will be amended to clarify that the notification of non-linear audiovisual media services and press products and their subsequent registration do not constitute an authorisation regime.

- Protection of groups and communities: The Hungarian Media Acts prohibit offending any community by the media in a direct or even in an indirect way. This rule has traditionally been part of Hungarian media regulation; the previous Broadcasting Act of 1996 also included a similar provision. However, the Hungarian Government has agreed to abolish this rule as the Commission raised concerns regarding its compatibility with Article 11 of the Charter of Fundamental Rights.

The corresponding amendment of the Media Acts will be submitted to the Parliament within the shortest possible time.

• Press release of the European Commission: Vice-President Kroes welcomes amendments to Hungarian Media Law (MEMO/11/89), 16 February 2011
http://merlin.obs.coe.int/redirect.php?id=12978 DE EN FR HU

Márk Lengyel
Attorney at law

LT-Lithuania

Implementation of the Requirements for Audiovisual Commercial Communication and Sponsoring of Audiovisual Media Services

On 12 January 2011 the Rules for the Implementation of the Requirements for Audiovisual Commercial Communication and Sponsoring of Audiovisual Media Services were adopted by a decision of the Radio and Television Commission of Lithuania.

The Rules were prepared and adopted following the requirements for the implementation of the amendments to the Law on the Provision of Information to the Public of 30 September 2010, which transposed the provisions of the Audiovisual Media Service Directive (see IRIS 2011-1/39).

Whereas the Law on the Provision of Information to the Public did not clearly specify either the requirements for the broadcasting of audiovisual commercial communication in television programmes or the sponsoring of audiovisual media services, it obliged the Radio and Television Commission to establish the procedure for the implementation of the above-mentioned provisions.

The Rules provide that in order to inform viewers on the presence of product placement in a programme, broadcasters are to place a „P" on the screen at the start and at the end of the programme and when the programme resumes after an advertising break, for not less than five seconds. During the transitional period, for one month after the coming into effect of the

Rules, they also have to publish an explanatory text about the meaning of the letter „P".

In addition, the Rules specify the presentation of a sponsor's name in audiovisual media services in greater detail.

According to the Rules the sponsor's name should be presented in such a way, and for that amount of time, that viewers can easily hear and clearly see the respective name or logo. The duration of the presentation of one sponsor amounts to seven seconds and the total time of the presentation of several sponsors in succession shall not exceed 30 seconds.

It should be noted that these Rules were prepared in close collaboration with broadcasters and the draft Rules were published on the Commission's website for public consultation.

- Reikalavimų komerciniams audiovizualiniams pranešimams, visuomenės informavimo audiovizualinėmis priemonėmis paslaugų rėmimo įgyvendinimo tvarka, patvirtinta 2011-01-12 Komisijos sprendimu Nr. KS-1 (Rules for the Implementation of the Requirements for Audiovisual Commercial Communications and Sponsoring of Audiovisual Media Services, adopted by 12 January 2011 decision No. KS-1 of the Radio and Television Commission of Lithuania)
http://merlin.obs.coe.int/redirect.php?id=12994 LT

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

Rules for the Registration of VoD Service Providers Adopted

On 1 January 2011 the Rules for the Registration of VoD service providers came into force. The Rules were adopted on 29 December 2010 by a decision of the Radio and Television Commission of Lithuania (RTCL).

The Rules were prepared in accordance with the requirements for the implementation of the amendments to the Law on the Provision of Information to the Public, which was adopted on 30 September 2010 by the *Saeima* (Lithuanian Parliament; see IRIS 2011-1/39).

The Law obliges the RTCL to set Rules for the Registration of VoD service providers and to register all such providers that fall under the jurisdiction of the Republic of Lithuania. VoD service providers have to register their services at the RTCL prior to the start of their activities. The Rules determine the data to be provided for registration, i.e., name, code and address of the VoD service company, its type, the coverage of its activities etc.

The Rules also envisage the procedure for cancelling the registration of a VoD service provider in case the company is liquidated or reorganised.

In accordance with the Rules the RTCL is obliged to publish the data and the activities of the VoD service providers that fall under Lithuanian jurisdiction on its website.

It should be noted that such registration of a VoD service provider does not in any way mean the granting of a permit for such activities, but rather is a declaration of the activities and a provision of brief information on the service provider.

- Užsakomųjų visuomenės informavimo audiovizualinėmis priemonėmis paslaugų teikėjų registravimo tvarka, patvirtinta 2010 -12-29 Komisijos sprendimu Nr. KS-120 (Rules for the Registration of VoD-service providers, adopted by 29 December 2010 decision No. KS-120 of the Radio and Television Commission of Lithuania)
http://merlin.obs.coe.int/redirect.php?id=13001 LT

Jurgita Iešmantaitė
Radio and Television Commission of Lithuania

NL-Netherlands

Criminal Case against Suspected File-Sharers Declared Inadmissible

On 22 December 2010, the Court of Appeal of The Hague dismissed a case brought by the public prosecutor against seven suspects charged with intentional copyright infringement.

The case regards two websites on which users exchange material that is protected by copyright. A file composed by the Dutch anti-piracy organisation Stichting BREIN (Bescherming Rechten Entertainment Industrie Nederland - Netherlands Entertainment Industry Rights Protection) served as the motive and the basis for prosecution. In total Stichting BREIN handed three files to the prosecution, the Team Opsporing Piraterij (Team Investigations on Piracy) of the FIOD (the Fiscal Information and Investigation Service, the Dutch anti-fraud agency). In the police report, parts of these files were cited. The seven suspects were charged with the crime of intentional copyright infringement.

On appeal, the defendant stated that the public prosecutor's case should be declared inadmissible as a criminal prosecution was initiated when civil law enforcement was indicated.

The Court of Appeal, assessing this defence, called upon the *Aanwijzing Intellectuele Eigendomsfraude* (Recommendation on Intellectual Property Fraud) of the *College van Procureurs-Generaal* (the board of the Dutch Public Prosecution Service). This Recommendation contains criteria for deciding whether a case requires civil or criminal action. Firstly, it states that the starting point in cases of intellectual property right infringement is that action by the rightsholder should

initiate a case. However, when the general interest is at stake, such as for example when the public health or the safety of society in general are endangered, criminal action may be necessary; civil law is not the only option for enforcement in such cases. Criminal action is also required in the case of large scale infringements on the professional or commercial level that disturb the market and in cases where organised crime is involved.

The Court heard the public prosecutor as a witness at the court session of 24 December 2010. The witness declared that the infringement of copyright on a large scale was the most important criterion in deciding whether the suspect acted on the professional or commercial level. It also stated that prosecution would only take place when this criterion had been met.

Taking the above into account, the Court first pointed out that large scale infringements that harm the general interest are not the only criterion for criminal action. However, neither the file nor the court session provided the Court with evidence that there was a reasonable presumption of guilt as concerns the suspect infringing copyrights on a large scale or acting otherwise in ways mentioned in the Recommendation.

Whereas the witness declared that it was customary for the FIOD to perform further investigation before starting the prosecution, after receiving the files that were composed by Stichting BREIN, the Court observed that it is not apparent from the file that such an investigation had actually taken place. Therefore, the Court noted that only the files provided by Stichting BREIN formed the basis upon which the public prosecutor had decided to proceed with prosecution. The statements of the witness and the position of the Advocate General before the Court of Appeal provided no further information on this point. Also, the Court stated that indications that the suspect acted on a professional or commercial level follow neither from the file nor from the court session in first instance.

On the basis of the above, the Court concluded that by deciding to prosecute, the public prosecutor had infringed the principle of *behoorlijke procesorde* (due process). Therefore, the Court of Appeal declared the case inadmissible.

• Arrest Gerechtshof 's-Gravenhage (hoger beroep), LJN: BO8239, 22-004284-07 (Judgement of the Court of Appeal of The Hague (appeal), 22 December 2010, LJN: BO8239, 22-004284-07)
http://merlin.obs.coe.int/redirect.php?id=12976 NL

• Uitspraak vonnis Rechtbank Rotterdam (eerste aanleg), LJN: BB0268, 10/993183-05 (Decision of the Rotterdam District Court (first instance), 24 July 2007, LJN: BB0268, 10/993183-05)
http://merlin.obs.coe.int/redirect.php?id=12977 NL

Kelly Breemen
Institute for Information Law (IViR), University of Amsterdam

PT-Portugal

New Rules for Portuguese Electronic Program Guides

On 17 January 2011 the rules for the establishment of electronic programme guides (EPGs) were published in the official Portuguese news bulletin, *Diário da República*. EPGs consist of TV screen software applications which allow users to search for present and future programmes and all other TV services offered by operators (e.g., video on demand, pay-per-view, parental control systems).

This initiative is the result of powers attributed to the State media regulatory entity (*Entidade Reguladora para a Comunicação Social* - ERC). According to its Statutes (Article 24, no. 3, paragraph r), approved by Law 53/2005, of 8 November, the regulatory entity shall "define the parameters for the access and ordering of electronic programme guides for radio and television". These rules, now published officially, establish the criteria for the conception, organisation and offering of EPGs for radio and television and follow a previous stage of public consultation, as determined by Article 62 of the ERC's Statutes. It is worth noting that, according to these rules, television operators must provide EPG suppliers with their programmes' grids seven days before broadcasting. Moreover, they must state the programmes' classification (in order to protect vulnerable members of the public), as well as identify any mechanisms for the benefit of people with special needs (Article 6).

• Regulamento nº 36/2011 "Sobre o acesso e ordenação dos guias electrónicos de programas de rádio ou de televisão", publicado no "Diário da República" - 2.ª Série, N.º 11, de 17 de Janeiro de 2011, página 3368 (Set of rules on EPG access and order, Portuguese Official Journal, 2nd Series, no. 11, 17 January 2011, page 3368)
http://merlin.obs.coe.int/redirect.php?id=13003 PT

Mariana Lameiras & Helena Sousa
Communication and Society Research Centre, University of Minho

RO-Romania

The Electoral Code Draft and the Audiovisual Rules

The *Autoritatea Electorală Permanentă* (Permanent Electoral Authority - AEP) finalised the draft of an Electoral Code, which includes provision for all types of elections and referenda taking place in Romania. The

AEP announced on 25 January 2011 that the Draft has been presented to political parties and experts and submitted for public consultation (see IRIS 2005-1/34, IRIS 2008-10/27, IRIS 2009-6/28, and IRIS 2009-10/24).

The AEP intends to harmonise the Romanian electoral legislation and set up a general framework for all types of elections, in order to ensure greater coherence and stability of electoral procedures, to reduce discrepancies among different laws and cover regulatory gaps. The Draft Code, which contains 14 chapters, refers to European, presidential, parliamentary and local elections as well as to referenda.

Chapter 7 of the Draft covers the electoral/referendum campaigns, including provisions concerning: the duration of the campaigns; times of antenna-allocation; campaigns in audiovisual media (types of broadcasts, polls, etc.) under the supervision of the *Consiliul Național al Audiovizualului* (Council for Electronic Media - CNA); right of reply and rectification; electoral posters/banners and campaigns in printed media. According to the Draft, the CNA shall impose fines in the amount of RON 10,000-20,000 (EUR 2,350-4,700) for infringements of the electoral rules.

The public radio and television providers decide on the time allocated to electoral campaigns and communicate it to the CNA. Access to the public radio and television broadcasters (central and regional stations) for all competitors is guaranteed and free of charge. The commercial stations shall charge the same tariff per show and time unit for all candidates. The electoral clips can be broadcast only during electoral programmes.

80 percent of the broadcasting time for electoral competitors is allocated to the parliamentary parties, according to the final number of candidates; 20 percent of the time is allocated to non-parliamentary parties. Before the candidates are approved, the broadcasting time is allocated only to parliamentary forces, according to the number of MPs. Independent candidates shall have five minutes broadcasting time for the entire electoral campaign on the regional public broadcasters covering their constituency. Only those electoral competitors who have declared candidates in at least 50 percent of the constituencies, from at least 15 counties for parliamentary and local elections are entitled to have broadcasting time on the national public radio/television stations. The presidential candidates receive equal broadcasting time.

The political parties receive broadcasting time for national referenda according to the number of parliamentary seats. In the event of a national referendum for the dismissal of the President, 50 percent of the time is allocated to the president whose suspension is called for and the political forces which back him/her, and 50 percent for the political forces backing the dismissal.

The broadcasters have to assure the equity, equilibrium and correctness of electoral/referendum campaigns. The electoral campaigns can only be presented in informative programmes, electoral shows and electoral debates. The public audiovisual services produce for free and broadcast daily after the evening newsreel, content regarding the electoral system and voting technique.

Electoral polls shall not be presented during the last 48 hours before the election/referendum. Exit polls shall not be presented before the close of voting.

The broadcasters have to decide about the right to reply and rectification within 24 hours after receiving a written demand from the offended party. The right to reply/rectification has to be given within 48 hours after receiving the written demand. If the CNA decides in favour of a claim, the broadcaster is obliged to give the right to reply/rectification in the time frame and under the conditions established by the Council.

• Autoritatea Electorală Permanentă a finalizat proiectul de Cod Electoral; Comunicat de presă Serviciul Comunicare şi Relaţii Publice 25.01.2011 (Press release of 25 January 2011: The Permanent Electoral Authority finalised the Draft Electoral Code)
http://merlin.obs.coe.int/redirect.php?id=13002 RO

• Proiect de lege electorală supus atenţiei partidelor politice şi opiniei publice (Draft Electoral Law presented to the political parties and the public)
http://merlin.obs.coe.int/redirect.php?id=12967 RO

Eugen Cojocariu
Radio Romania International

UA-Ukraine

Law on Access to Public Information Adopted

On 13 January 2011 *Verkhovna Rada* (the parliament of Ukraine) adopted two laws on access to information: The Law of Ukraine "On Access to Public Information" and the new wording of the Law of Ukraine "On Information" (1992). Both laws were supported by almost all members of the parliament after an intensive campaign, held by journalists and civic activists. They were signed by the President Yanukovych on 3 February 2011 and will enter into force on 9 May 2011.

The newly-adopted laws are aimed at extending the possibility to obtain information from state bodies and at securing the unobstructed activitivies of journalists. Thus, the Law of Ukraine "On Access to Public Information" regulates access to information held by State power entities as well as to certain categories of publicly important information. This law sets a right to receive public information during a short term (within 5 working days) after receipt of the request. This right belongs to individuals, legal entities and associations

of citizens that do not have the status of a legal entity. The new law also requires public bodies to promote open government and publish certain types of information without any individual request, in particular on their websites. The regime of limitations adequately limits non-disclosure only to cases when the revealing of such information might risk more harm than benefit to the public. Disclosure of information on wrongdoings or information concerning a serious threat to people's health and safety or to the environment is protected, too.

The new edition of the Law of Ukraine "On Information" contains new definitions of many terms in the informational sphere: it specifies the legal status of mass media and guarantees protection of journalists' professional rights. This law also repeals obligatory accreditation of foreign journalists who work in Ukraine.

• Про інформацію (Law No. 2938-VI On Information, Holos Ukrainy official daily of 9 February 2011 (No. 24))
http://merlin.obs.coe.int/redirect.php?id=13266 UK

• Про доступ до публічної інформації (Law No. 2939-VI On Access to Public Information, Holos Ukrainy official daily of 9 February 2011 (No. 24))
http://merlin.obs.coe.int/redirect.php?id=13268 UK

Taras Shevchenko
Media Law Institute, Kiev

Law on Data Protection Enters into Force

On 1 January 2011 the new Law of Ukraine On Protection of Personal Data that was adopted in June 2010 was enacted. Adoption of the Law was a necessary step after ratification of the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. The Law regulates the way personal data are protected during automatic processing and also if it is stored in data banks.

The President of Ukraine in January 2011 created a special office named Data Protection Inspection that would observe compliance with the Law and appointed its Head. Everyone who has a database with personal data has to register it with the Data Protection Inspection. The regulation of how this should be done is still to be defined by the Cabinet of Ministers within the first six months of 2011. Exceptions for such registration are provided for individuals if they create databases for personal use and also for individual journalists. Representatives of Data Protection Inspection will have quite extensive powers under the Law, including the right to enter at any time the premises where data is processed.

The Law provides that consent should be given to include personal data in any database. If the data is taken from an open source there might be only a post factum notification. At the same time the Law does not regulate what a database owner should do with it if the database was created before this Law came into force. Another problem is a prohibition to make any data public without the consent of the person affected, even if the data was taken from an open source. This may have a negative effect if the government tries to stop dissemination of information about a person, especially about officials, even if it was not stored in the form of a database. This Law may also diminish the positive effect of the Law On Access to Public Information as in some cases the government may reject information on the grounds that it is contained in a database.

• ЗАКОН УКРАЇНИ Про захист персональних даних (Law No. 2297-VI On Protection of Personal Data, Holos Ukrainy official daily No. 172 of 16 September 2010)
http://merlin.obs.coe.int/redirect.php?id=13265 UK

Taras Shevchenko
Media Law Institute, Kiev

New Developments in Digital Broadcasting in Ukraine

The National Council on Television and Radio Broadcasting, the Ukrainian audiovisual regulating authority, made several important decisions that change the situation with the introduction of digital television into Ukraine. On 8 December 2010 a license was issued to the Zeonbud company, that would now be a content provider for four national multiplexes MX-1, 2, 3 and 5.

Earlier, in October 2010 the National Council on Television and Radio Broadcasting adopted decisions on introducing a new system of digital multiplexes in Ukraine and invited players at the broadcasting market to forward their proposals to the National Council to introduce digital TV network in DVB-T standard (MPEG-4 encoding).

At the same time the National Council cancelled its earlier decision on multiplexes MX-1, 2, 3 and 5. The decision that was canceled set a clear plan for all existing national TV broadcast channels as to their place in the future digital broadcasting system. Now some stations may not be included in the lists to be approved for spots on the multiplexes. According to the previous plan MX-1 was reserved for encoded channels and MX-5 - for regional broadcasters. In the new system of multiplexes there will be no encoded multiplex and no multiplex for regional broadcasters, that has now given rise to complaints from a number of local TV channels.

There is also an unclear situation with the MX-4 multiplex. In 2008 the National Council announced 10 winners of a contest for broadcasting on MX-4 and issued

the relative licenses. In July 2010 it canceled eight licenses out of ten due to unuse of the allocated spots by the winners. The future of the remaining two companies that broadcast on MX-4 is also quite unstable.

Ukraine still has no strong strategy for digital switchover and no guarantees for current terrestrial broadcasters. This may cause serious problems in the very near future, especially for a PSB company yet to be established. The TV and radio broadcasting law (as amended in 2006) has a norm that guarantees spots in digital broadcasting only for the terrestrial companies that existed at the moment of the amendments, thus the PSB company is entitled to only one spot in the digital multiplex, which it would take from the current State broadcaster.

Igor Rozkladaj
Media Law Institute, Kiev

Agenda

20 Years of Televisions without Frontiers and Beyond
28 - 29 April 2011
Organiser: Institute for European Studies (IES) & Center for Studies on Media Information and Telecommunication (IBBT-SMIT) of the Vrije Universiteit Brussel
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