OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

IRIS 2011-5

INTERNATIONAL

Joint Statement of Three European Institutions against Racism and Related Intolerance ... 3

COUNCIL OF EUROPE

European Court of Human Rights: Otegi Mondragon v. Spain ... 3

EUROPEAN UNION

Court of Justice of the European Union: Advocate General Gives Opinion on the Definition of Advertising ... 4

European Commission: The Commission Finishes the Preliminary Analysis of AVMS Implementation Measures ... 4

OSCE

OSCE: Regular Report of the Representative on Freedom of the Media to the Permanent Council ... 5

NATIONAL

AT-Austria

Federal Communications Board Rules on Surreptitious Advertising ... 6

BE-Belgium

Proposal of Bill for Better Protection of Cultural Creations on the Internet ... 7

BG-Bulgaria

A Provision of the Film Industry Act Declared Unconstitutional ... 7

Amendments to the Copyright and Related Rights Act ... 8

Outcome of the Audit for 2009 Performed by the Bulgarian National Audit Office ... 9

CY-Cyprus

Radio Television Law to turn to AVMS and digital environment ... 9

DE-Germany

Federal Court of Justice Rules on Media Privilege ... 10

Federal Court of Justice Rules on the International Jurisdiction of German Courts in the Case of Internet Publications ... 11

Administrative Court Rules on Filming Public City Council Meetings ... 11

Federal Cartel Office Prohibits Joint Video Platform of RTL and ProSiebenSat.1 ... 12

ZAK Sees no Legal Basis for Televising Parliament ... 12

Cabinet Adopts Government's Draft Amendment to the Telecommunications Act ... 13

Dispute concerning the Allocation of Frequencies for Mobile Telephony Continues ... 13

CDU/CSU and FDP Coalition Overturns Access Obstruction Act ... 14

ES-Spain

Private Copying Levy Order Annulled ... 14

FR-France

Wrongful Imitation of a Reality TV Programme ... 15

"Web COSIP" Decree Published ... 16

Inclusion of Advertising Posters in Audiovisual Fiction Programmes and Product Placement ... 16

GB-United Kingdom

New Classification System for Downloaded Content ... 17

Minister Intends to Accept Undertakings to Permit Merger of News Corporation and BSkyB to Go Ahead ... 17

IE-Ireland

New Broadcasting Code on Election Coverage ... 18

Broadcast Authority to Permit Product Placement ... 18

IT-Italy

AGCOM Launches Public Consultations on Net Neutrality, and on Peer-to-Peer and VoIP ... 19

AGCOM Launches Public Consultation on Digital Television Dividend ... 19

Public Consultation on Spectrum ... 20

LV-Latvia

Revealing Media Ownership May be Required ... 20

MT-Malta

Fresh Amendments to the Broadcasting Act on Media Concentration and General Interest Objective Television Stations ... 21

NL-Netherlands

Dutch Court of Appeals Declares WiFi Hacking Legal ... 21

Downloading04046 soon to Be Illegal in the Netherlands? ... 22

Dutch Media Authority Publishes Special Edition of Mediamonitor on Dutch Media ... 23

PT-Portugal

Consultation on Electronic Communications Area ... 23

Media Regulatory Body: Elections Suspended ... 24

RO-Romania

New Audiovisual Content Regulatory Code ... 24

RU-Russian Federation

Highest Court Rules on Copyright Infringement on Internet ... 25

TR-Turkey

New Turkish Media Law ... 26

HU-Hungary

Parliament Amends Media Acts ... 26

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IRIS
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Editorial Informations

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

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INTERNATIONAL

Joint Statement of Three European Institutions against Racism and Related Intolerance

On 21 March 2011, the International Day for the Elimination of Racial Discrimination, a joint statement was issued by three European institutions. Nils Muiznieks, Chair of the Council of Europe's European Commission against Racism and Intolerance (ECRI); Morten Kjaerum, Director of the European Union Agency for Fundamental Rights (FRA); and Janez Lenarčič, Director of the OSCE Office For Democratic Institutions and Human Rights (ODIHR) expressed their strong disapproval of any manifestation of racism and related intolerance.

With the joint remembrance of the Sharpeville Massacre on 21 March 1960 in South Africa, which led to the adoption of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, the statement's signatories revitalise the call to be alert to racism and xenophobia-driven acts.

Although surveys from several European States indicate that tolerance, and rejection of discrimination are growing, the statement emphasises the need for these positive developments to be strengthened and further developed, as discrimination and victimisation are still too widespread, and reporting by victims of racism and awareness of redress mechanisms are still too low. Also, the signatories stated that they are convinced that racist and xenophobic speech by public figures and in the media can foster prejudice and hate against ethnic minorities and migrants. This, they state, leads to discrimination in many fields and therefore to social exclusion, possibly even open hostility and violence.

Monitoring and research show that the Roma are the ethnic group most discriminated against across Europe. Yet, while the signatories acknowledge that the primary responsibility for protecting the rights of the Roma lies with the States of which they are citizens or long-term residents, they stress the need for an integrated European approach to deal with the border-crossing problems that are experienced by this group.

Furthermore, the statement contains a list of actions that the signatories consider necessary for the States to combat racism and xenophobia proactively. It is stated, inter alia, that barriers to education, health care, housing and employment should be removed. Another example is that of States taking measures to combat discrimination driven by other reasons in addition to ethnicity.

Lastly, the institutions offer their collective support and assistance to the States in finding solutions. This assistance can include the provision of data and specialist advice.

• Joint statement on International Day for the Elimination of Racial Discrimination
http://merlin.obs.coe.int/redirect.php?id=13128 EN

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COUNCIL OF EUROPE

European Court of Human Rights: Otegi Mondragon v. Spain

In a judgment of 15 March the European Court of Human Rights decided that an elected representative's conviction for causing serious insult to the King of Spain was contrary to his freedom of expression. The case concerns the criminal conviction of a politician of a Basque separatist political party, Mr. Arnaldo Otegi Mondragon, following comments made to the press during an official visit by the King to the province of Biscay. During a press conference Otegi Mondragon, as spokesperson for his parliamentary group, Sozialista Abertzaleak, stated in reply to a journalist's question that the visit of the King to Biscay was a "genuine political disgrace". He said that the King, as "supreme head of the Guardia Civil (police) and of the Spanish armed forces" was the person in command of those who had tortured those detained in a recent police operation against a local newspaper, amongst them the main editors of the newspaper. Otegi Mondragon called the King "he who protects torture and imposes his monarchical regime on our people through torture and violence". Otegi Mondragon was convicted for insult of the King on the basis of Article 490 §3 of the Criminal Code and sentenced to one year's imprisonment and suspension of his right to vote during that period. The Spanish courts categorised the impugned comments as value judgments and not statements of fact, affecting the inner core of the King's dignity, independently of the context in which they had been made. The European Court of Human Rights, however, considers this criminal conviction a violation of Article 10 of the Convention, as Otegi Mondragon's remarks had not been a gratuitous personal attack against the King nor did they concern his private life or his personal honour. While the Court acknowledged that Otegi Mondragon's language could be considered provocative, it reiterated that it was permitted, in the context of a public debate of general interest, to have recourse to a degree of exaggeration, or even provocation. The King being the symbol of the State cannot be shielded from legitimate criticism, as

this would amount to an over-protection of Heads of State in a monarchical system. The phrases used by Otegi Mondragon, addressed to journalists during a press conference, concerned solely the King's institutional responsibility as Head of State and a symbol of the State apparatus and of the forces which, according to Otegi Mondragon, had tortured the editors of a local newspaper. The comments in issue had been made in a public and political context that was outside the "essential core of individual dignity" of the King. The European Court further emphasised the particular severity of the sentence. While the determination of sentences was in principle a matter for the national courts, a prison sentence imposed for an offence committed in the area of political discussion was compatible with freedom of expression only in extreme cases, such as hate speech or incitement to violence. Nothing in Otegi Mondragon's case justified such a sentence, which inevitably had a dissuasive effect. Thus, even supposing that the reasons relied upon by the Spanish courts could be accepted as relevant, they were not sufficient to demonstrate that the interference complained of had been "necessary in a democratic society". The applicant's conviction and sentence were thus disproportionate to the aim pursued, in violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights (Third Section), case of Otegi Mondragon v. Spain (no. 2034/07) of 15 March 2011
FR

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EUROPEAN UNION

Court of Justice of the European Union: Advocate General Gives Opinion on the Definition of Advertising

On 7 April 2011 Advocate General Yves Bot delivered his opinion on case C-281/09 of the European Commission v. Spain on the question of the legal definition of television advertising spots and other forms of advertising under the EU's Television without Frontiers (TWF) Directive. The question arose when Spain was accused by the European Commission of failing to comply with the advertising rules of the TWF Directive. Article 18 of the Directive imposes an upper time limit of 12 minutes per clock hour to the transmission of television advertising spots and teleshopping, while other forms of advertising are only affected by the daily ceiling of 15% of the total daily transmission time permitted for all advertising regardless of type. According to the Commission, Spanish law currently defines the concept of "advertising spot" too narrowly. As a result, various common forms of advertising (namely, advertorials, telepromotions, sponsoring spots and micro-slots) are taken as falling outside the 12-minute/hour limit. Instead, under Spanish law, they are subject to a different limit of 17 minutes/hour. The Directive does not define the terms "advertising spots" or "other forms of advertising".

The AG observed that the content of the notion of "other forms of advertising" should be sought within the provisions of the Directive itself. Other forms of advertising that can be identified within the Directive and differentiated from advertising spots would be sponsoring messages in accordance with the definition of Art. 1 (e) of the Directive. Thus, according to the AG, sponsoring spots could be included in the notion of "other forms of advertising".

However, the AG suggests that the interpretation of the terms adopted by Spain in practice negates the efficacy of the adopted time limits, since it would permit advertisers to easily bypass the hourly limit by means of slight adjustments to the form of advertising they adopt. Moreover, the AG concludes that, in order to ensure the goal of limiting the transmission of advertising during peak hours thus protecting viewers against excessive advertising, the two terms should be defined in a single harmonized manner across the EU. Member State authorities cannot be permitted to determine the meaning of advertising, if equal treatment of audiovisual organisations, regardless of the Member States in which they are located, is to be achieved. Accordingly, the AG concludes that the Commission justifiably claims that the four forms of advertising identified should adhere to the 12-minute/hour time limit, including sponsoring, unless such sponsoring does not encourage the purchase of specific products or services of the sponsor.

• Opinion of Advocate General Yves Both, 7 April 2011, Case C-281/09, European Commission v. Kingdom of Spain
http://merlin.obs.coe.int/redirect.php?id=13131
DE FR BG EL ES FI IT LV PT SV

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European Commission: The Commission Finishes the Preliminary Analysis of AVMS Implementation Measures

The European Commission has finished the preliminary analysis of the measures implementing the Audiovisual Media Services (AVMS) Directive into national law notified by 16 Member States: Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Greece, Ireland, Italy, Malta, the Netherlands, Romania, Spain, Sweden, Slovakia and the United Kingdom.

Subsequently, the European Commission has sent fact-finding letters to these states inquiring about these implementing measures. The Commission is thus seeking to ensure that all provisions of the AVMS Directive have been correctly transposed into national legislation across the EU. The receipt of a letter does not in itself imply incorrect implementation of the Directive in a member state, but merely that the Commission has outstanding questions on the matter.

The questions posed to the member states vary from one state to another. Issues raised by the letters include the following:

- The country of origin principle and jurisdiction issues concerning audiovisual services;

- Issues regarding commercial communications (in particular product placement and sponsorship);

- Basic obligations under the Directive (e.g., rules on incitement to hatred, balanced coverage obligations, registration of on-demand services);

- The right of reply of any person whose legitimate interests have been damaged by an incorrect assertion in a television programme;

- The protection of minors;

- The promotion of European works;

- The list of events of major importance;

- Cooperation between regulators.

The 16 member states have been asked to reply to the fact-finding letters within 10 weeks. Three member states, Poland, Portugal and Slovenia, have not yet notified the Commission of implementing measures and are currently undergoing infringement procedures. The Commission is still in the process of analysing the measures notified by the remaining member states (Austria, Cyprus, Estonia, Germany, Hungary, Luxemburg, Lithuania and Latvia).

• "Digital Agenda: Commission seeks information from 16 member states on their implementation of Audiovisual Media Services Directive", Brussels 29 March 2011, IP/11/373
http://merlin.obs.coe.int/redirect.php?id=13110 DE EN FR CS DA EL ES FI IT MT NL RO SK

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OSCE

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

On 17 March 2011, Dunja Mijatovic, the OSCE Representative on Freedom of the Media, presented the regular report to the OSCE Permanent Council, the organisation's main decision-making body. The report consists of overviews of issues raised in the participating countries, activities of the Representative in the last reporting period and planned activities for the next reporting period. A large part of the report consists of the analysis of issues raised in 56 of the OSCE participating States. The report touches upon several issues concerning media freedom, inter alia, media pluralism, editorial independence, the physical safety of journalists and investigative journalism, including the following:

- In Croatia draft amendments of the penal code foresee a re-introduction of imprisonment as a sanction for defamation. The Representative reminded authorities that in 2004 and 2006 Croatia took encouraging steps by liberalizing its defamation law and abolishing prison sentences. The Representative has advised the Government to decriminalise defamation altogether. This advice has been taken into consideration and the Government has given assurances that it remains open to suggestions related to the reform of defamation provisions;

- In the Czech Republic on 11 March 2011 ten armed and masked military police raided the offices of Czech Television and seized computers, documents, notes, phone numbers and other items in the search for a 2007 report that led to the dismissal of a former military intelligence head. The Representative stressed that this was an excessive and undue intrusion into the independence of the media outlet. Hence, she has asked the authorities to investigate the case and to enhance the protection offered to journalists who report on public issues;

- The Representative mentions the alarming movement from a very progressive media legislative and regulatory framework in Bosnia and Herzegovina to a deterioration in media freedom due to the implementation of new laws. She mentions that politicians are increasingly trying to suppress alternative and critical voices. Therefore, the Representative encourages the authorities to continue raising awareness of the situation concerning media freedom. In order to achieve this, the OSCE Office is trying to assist the country in moving forward with its media reform;

- The Representative remains focused on the new media law adopted by the Hungarian Parliament on 7

March 2011. Despite numerous attempts to amend the media law, the adopted media law still runs counter to OSCE commitments on media freedom (see: IRIS 2011-3/24 and IRIS 2010-9/6). The Representative has stressed that the Office remains ready to assist the Hungarian authorities should they decide to further modify the legislation;

- The Representative wrote to Deputy Foreign Minister Aleksandr Grushko in Russia to enquire about the decision to bar The Guardian journalist Luke Harding from entering Russia. The Foreign Ministry replied that the journalist had been temporarily denied entry because of visa and accreditation violations. These problems were quickly resolved, enabling Luke Harding to continue his journalistic work in Russia;

- The Representative states that she is especially concerned about the high number of imprisoned journalists in Turkey. She has addressed this issue to the Turkish Foreign Minister Ahmet Davotoğlu and has urged the Government to carry out a much-needed reform of the legal system to ensure that journalists are able to write and report on issues of importance. The current practice has an enormous chilling effect on editors and journalists in Turkey and harms media pluralism;

- The Representative also informed the Permanent Council about several legal reviews. One of the ongoing reviews is the establishment of a public service broadcaster in Kyrgyzstan. Furthermore, the Representative addresses the legal analysis of the draft amendments to the Law on broadcasting relating to transparency of media ownership in Georgia and the draft law "On television and radio broadcasting" in Kazakhstan. The Representative has also participated in several expert events relating to freedom of expression and the internet, such as the international symposium on freedom of expression organized by UNESCO. Lastly, the Representative is in the final stages of the document on internet legislation, which will include an overview of legal provisions related to freedom of media, the free flow of information and media pluralism on the internet in the OSCE region and aims at embracing the nature of the internet as a truly global and borderless medium.

• Regular Report to the Permanent Council by the OSCE Representative on Freedom of the Media, 17 March 2011
http://merlin.obs.coe.int/redirect.php?id=13121 EN

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NATIONAL

AT-Austria

Federal Communications Board Rules on Surreptitious Advertising

On 26 January 2011 the *Bundeskommunikationssenat* (Federal Communications Board - BKS) decided that the programme "Von Römern, Wein und heißen Quellen" ("About Romans, wine and hot springs" in the "Erlebnis Österreich" ("Experience Austria") series on the Romanisation of Styria, early wine-growing in the region and the use of thermal springs did not constitute surreptitious advertising within the meaning of section14(2) of the *ORF-Gesetz* (Law on the Austrian Broadcasting Corporation - ORF-G) in the version applicable when the programme was transmitted.

In order to explain the change in the use of hot springs, the programme concerned showed and described, among other things, some of the services available at the Bad Waltersdorf medicinal springs. In addition to panned camera shots of the complex showing visitors using a water massage mushroom and a water slide and engaging in water gymnastics, a narrator mentioned some of the services provided by the spa, such as so-called "alpha loungers", a "Roman sweat room" or a "salinarium". In the accompanying narration, the terms "wellness oases" and "wellness temple", "wellness concept" and "well-being" were used. The closing credits referred to the "kind support" of the East Styria Regional Tourism Association and showed its logo.

In contrast to the previous decision taken by the lower authority, the broadcasting regulator KommAustria, the BKS concluded in its examination of the case that the pictures of the springs and the accompanying explanations did not constitute surreptitious advertising within the meaning of the ORF-G. The terms employed in the context of the comparison drawn with the Roman period did not particularly stand out, so there was no evidence of any failure to observe the requirement of impartiality. There was also no indication that the other film sequences were specifically likely to persuade undecided viewers to use the services of that particular spa as it could not be gathered from that footage that the services were being given particular prominence. Furthermore, the narrator's references to some of the spa services did not have any specific effect in terms of sales promotion.

With regard to the likelihood of the description being misleading, the BKS stated that the average consumer would not necessarily assume from the title "About Romans, wine and hot springs" that the pro-

gramme would exclusively deal with historical details or factual information about wine production and the use of thermal waters. He or she would therefore hardly be surprised at also being informed about the individual services available from a spa in a programme dealing with such a general subject.

• *Bescheid des BKS vom 26. Januar 2011 (GZ. 611.009/0021-BKS/2010)* (BKS decision of 26 January 2011 (Ref. 611.009/0021-BKS/2010))
http://merlin.obs.coe.int/redirect.php?id=13137 DE

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BE-Belgium

Proposal of Bill for Better Protection of Cultural Creations on the Internet

On 26 January 2011 a bill intended to achieve better protection of cultural creations on the Internet was formally proposed. The proposers (members of the Mouvement Réformateur (MR), a liberal party from French-speaking Belgium), emphasising the fundamental importance of cultural creations for every society and highlighting the danger represented by the activity of illegal downloading, stress the need for an appropriate balance between protection for cultural creations and respect for individual liberties.

The system proposed is principally built on five pillars. Firstly, the proposal suggests intensifying the fight against so-called hacker-sites (Articles 3 and 4), by imposing additional measures to stem their continuous growth. For example, providers that are aware of the existence of such sites without reporting this to the competent authorities risk more severe sanctions. Secondly, the proposal aims at informing about and encouraging the use of the legal online offer (Articles 5, 6 and 25), in order to bring about a change in attitude within the community of Internet users. The third pillar consists in creating a system of database operators through which creations are made available to the public (Articles 7 and 11). According to the fourth pillar, providers should deliberate on the conditions for and restrictions to exchanging creations that are protected by copyright law (Articles 12 and 13). Fifthly and most importantly, the proposal implements a four-strike policy with regard to internet users who fail to comply with the imposed conditions and restrictions for exchanging protected creations or who illegally download such creations (Articles 14-24). At an early stage they are only cautioned (Article 17, 1°). If a new violation takes place within six months, a fine is imposed (Article 17, 2°). If the user keeps violating the rules his/her file is sent to the public prosecutor, which can take various measures, such as financial settlement or bringing the case before the courts (Article 18). The latter can impose a fine and reduce the user's access to a public online communication service (only broadband Internet is blocked at this stage, making downloading extremely difficult). Finally, in cases of recidivism, the fine is doubled and access to the Internet can be entirely cut off(Article 18, 8°).

This proposal bears a resemblance to the French Création et Internet law, in which so-called Hadopi-measures are imposed, including a similar (three-step) gradual response to violations. The proposal follows the optional bicameral procedure (Article 78 of the Belgian Constitution) and, after having been amended by the Senate, it is now pending before the Kamer van Volksvertegenwoordigers (Chamber of Representatives) of the Belgian Parliament.

• *Proposition de loi favorisant la protection de la création culturelle sur internet* (Proposal of Bill for Better Protection of Cultural Creations on the Internet)
http://merlin.obs.coe.int/redirect.php?id=13130 FR NL

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BG-Bulgaria

A Provision of the Film Industry Act Declared Unconstitutional

On 31 March 2011, the Constitutional Court declared unconstitutional a provision of the Film Industry Act governing the financing of the film industry by the state. The request for constitutional review of para. 83 of the State Budget Act for 2011 which amended Art. 17 of the Film Industry Act was filed by a group of 56 members of the National Assembly. In their request, the claimants stated that para. 83 of the Act on the State Budget for 2011 does not constitute a legal norm, but rather represents a general wish. In addition, the applicability of the said provision is left to the subjective discretion of the state administration, which is completely unacceptable from a legal point of view.

Para 83 of the State Budget Act for 2011 amended Art. 17 of the Film Industry Act in the following manner:

"If possible, the Law on the State Budget of the Republic of Bulgaria shall provide annually for:

1. Subsidy for the National Film Centre, which is based on the amount of the average statistical budgets for the preceding year for up to 7 movies, 14 documentaries and 160 minutes of animation;

2. Financial contributions for membership in international organisations, funds and programs in the field of film industry in which Bulgaria participates;

3. Funds necessary for the support of the National Film Centre."

Prior to its amendment, Art. 17 of the Film Industry Act read that the Law on the State Budget of the Republic of Bulgaria "shall provide annually for" without the mentioning of the term "if possible".

In the view of the Constitutional Court the legal wording of the said provision was inappropriate. The Constitutional Court held that when the state created state agencies (e.g. the National Film Centre) it should have also provided funds for its support. Furthermore, the Constitutional Court stated that it would be inappropriate for the state to refuse the payment of annual subscription fees to international organisation for which the state had already decided to participate in. On the basis of those two main arguments the Constitutional Court confirmed that the current version of Art. 17 of the Film Industry Act is in contradiction to Art. 4 of the Constitution and therefore shall be declared unconstitutional.

The Constitutional Court also held that the term "if possible" used in Art. 17 of the Film Industry Act is in contradiction to the rule laid down in Art. 23 of the Constitution. According to the latter provision the state shall establish conditions conducive to the free development of the arts and shall assist that development. Thus, the Constitutional Court emphasized that the Constitution created an obligation for the state to promote the development of Bulgarian art. The said obligation means that the state shall act accordingly by developing adequate governmental policies in the various types of the arts. The implementation of these policies shall be supported financially by the state.

• Решение № 1 София , 31 март 2011 г . по конституционно дело № 22 от 2010, съдия докладчик Красен Стойчев (Constitutional Court of the Republic of Bulgaria, Judgment No 1 of 31 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13133 BG

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Amendments to the Copyright and Related Rights Act

On 25 March 2011 amendments to the Закон за авторското право и сродните му права (Bulgarian Copyright and Related Rights Act - ЗАПСП) entered into force. These are the result of long and heated discussions between the author of the bill, the Ministry of culture through the Council of Ministers, on the one side, the Members of Parliament on another side and representatives of users and rightholders on the third side (see IRIS 2010-10/15).

In general, the amendments concern many different topics but those presented as being the most important were a new system of remuneration for private copying and a new status for collecting societies.

After some hesitation the MPs decided that the right of natural persons to make a copy of a protected work without the explicit consent of the rightsholder but against payment of levies shall be reserved. However, the circle of persons obliged to pay such levies was significantly reduced. At first, the new Act does not provide for any obligation to pay levies on persons/organisations that produce or import recording equipment and devices. According to the new version of Art. 26 of the Act, such levies shall be paid only by persons/organisations that produce or import from third countries blank CDs, DVDs and other media predominantly used for the recording of works protected by copyright. Secondly, the amount of the due remuneration is reduced from 5 percent of the manufacturing costs to an amount between 1-1.5 percent of the delivery price according to the accounting standards. Additionally, the Law provides that the list of media that shall be paid for and the exact amount of the levy shall be determined annually after a special agreement between the organisations collecting the levies and the associations of those persons obliged to pay them.

Another very important part of the amendments are the new rules for the registration of organisations acting as collecting societies. The new procedure is much more detailed than before and provides for a quasi-monopoly in the administration of one type of copyright or related right. According to Art. 40b, paragraph 4 the Minister shall grant a registration to an applicant to become a collecting society for a certain type of right, which another organisation is already registered for, only if the applicant presents an agreement with the first registered organisation. On the basis of this agreement the later organisation has to authorise the first one to collect the remuneration in its name and in compliance with the tariff of the first one. In fact, according to the new rules only the organisation registered first as a collecting society for the respective type of right will have the right to negotiate with the users on the amount of the remuneration. All the others shall follow its tariff and have to grant to the users the right to use their catalogue in accordance with the price fixed by the first registered organisation. Organisations that have already been registered under the old law shall submit to the Ministry of Culture a request for new registration within three months from the date of the new law entering into force. They have the right to continue their work until a final decision is taken by the Minister.

• ЗАКОН за изменение и допълнение на Закона заавторското право и сродните му права (обн.,424422, бр. 56 от 1993 г.; изм., бр. 63 от 1994 г.,461400. 10 от 1998 г., бр. 28 и 107 от 2000 г., бр. 77476402 2002 г., бр. 28, 43, 74, 99 и 105 от 2005 г.,461400. 29, 30 и 73 от 2006 г., бр. 59 от 2007 г. ибр. 12 и 32 от 2009 г.) (Law on the Amendments to the Copyright and Related Rights Act, State Gazette issue 25 of 25 March 2011)
http://merlin.obs.coe.int/redirect.php?id=12958 BG

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Outcome of the Audit for 2009 Performed by the Bulgarian National Audit Office

The audit performed by the National Audit Office on the 2009 activities of the Bulgarian National Television has confirmed that there were no rules or criteria for the management of and reporting on the amounts collected by the donation initiative called "Bulgarian Christmas".

For the first time in its nine-year existence, the name of the "Bulgarian Christmas" initiative is mentioned in a report of a supervising body. The audit report of the National Audit Office was initiated by the new management of the Bulgarian National Television immediately after it was elected by the Council for Electronic Media last year. The audit covers the period from 2007 to 2010.

The "Bulgarian Christmas" initiative was created in 2003 by the Administration of the President of the Republic of Bulgaria, media partners and a collaboration of the telecommunications operators. Since 2007, all money raised by the initiative has been deposited in a bank account held in the United Bulgarian Bank in the name of the Bulgarian National Television. Any disposal of the funds from this account is carried out on the basis of a trilateral protocol countersigned by representatives of the Administration of the President, of Nova Television - First Private Channel and the Bulgarian National Television. "Bulgarian Christmas" is a non-governmental charity set up for the benefit of the public.

The National Audit Office commented as follows:

- There are no rules or criteria under which people who need medical treatment can apply for financial assistance, there are no documents or templates to be submitted to the organisers of "Bulgarian Christmas".

- There are no priorities for selecting the particular beneficiaries, given the large number of requests filed by individuals and medical institutions.

- There is no effective mechanism for a unanimous resolution of the representatives of the three organisers of the initiative, there exist no rules for regular meetings or internal rules for the procedures of the decision-making body of the initiative.

- Article 6 of the Constituent Act of "Bulgarian Christmas", obligating the Bulgarian National Television to keep copies of agreements and other documents related to the allocation of funds, is breached.

- When selecting the beneficiaries, the trilateral protocols are not accompanied by the relevant supporting documents.

• Доклад за резултатите от извършените одити за заверка на годишните финансови отчети на 04046 Българската национална телевизия за 2009 г. (The Audit Report of the National Audit Office)
http://merlin.obs.coe.int/redirect.php?id=13155 BG

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CY-Cyprus

Radio Television Law to turn to AVMS and digital environment

An amendment to the Ο περί Ραδιοφωνικών και Τηλεοπτικών Σταθμών Νόμος (Law on Radio and Television Stations L. 7(I) /1998) is being studied, in an aim to extend its scope of application to cover audiovisual media services and respond to the new, digital environment. The amendment follows the adoption of an amending law incorporating provisions of the AVMS Directive into Cyprus legislation last December (see IRIS 2011-2/13). It appears also to be a necessary step in view of the digital switchover, set for 1 July 2011. A public consultation on the proposed changes is in progress (see IRIS 2010-3/13).

According to the draft, the Cyprus Radio Television Authority (CRTA) will be renamed "Regulatory Authority of Audiovisual Media Services" and its powers will extend to broadcasting organisations, audiovisual on-demand (AVOD) media services and to providers of "composite paid AVMS" that may offer both broadcasting and non-linear media services. It is proposed that the regulator will have the power to control respect for copyright content, while audience ratings companies will also fall under its authority, concerning both the 'correctness' of the applied rating methodology and the way rating companies treat AVMS providers.

The draft includes, among others, provisions that define the range of licences that can be granted, the obligations of licensees and the services that they should offer in the new environment, as well as the criteria for the assessment of applications and the granting of licences; the amount of fees for each type

of licence is increased for broadcasters, while AVMS providers will have to pay not only higher licence fees but also an extra annual fee per programme offered.

Issues of limitations and constraints on ownership, the powers of the regulator to impose sanctions on broadcasters and AVMS providers and the respective ceilings are set according to the type of licence and service offered; sanctions can be financial (up to EUR 10,000 per breach of the law for broadcasters and up to EUR 25,000 per breach for AVMS providers) but also include the eventual withdrawal of a licence.

A proposed amendment giving the regulator the power to initiate or examine a case of an alleged breach of the Journalists' Code of Ethics gave rise to controversy; the Law in force provides that the CRTA can examine such a case only after a request by the Cyprus Media Complaints Commission, a body set up by the Journalists Union and Media owners. The Commission has so far refused to apply to the CRTA on the grounds that public authorities cannot interfere with issues arising from the Code of Ethics. Thus, a public confrontation emerged between media professionals on the one hand and deputies and others supporting the amendment on the other hand.

The announcement of a public consultation did not specify the scope and rationale of the proposed amendments. Other issues remain also unclear: The draft dates back to January 2010, almost one year prior to the adoption of an amending law that sought to harmonise Cyprus law with the AVMS Directive; there is no indication to what extent an effort was made to tune the draft to the already voted amending law.

On the other hand, the only deadline mentioned was that for interested parties to submit their views, which leaves open the date of the finalisation of the draft before it is submitted to Parliament. It is expected that, after eventually completing the document in the light of the results of the public consultation, the CRTA will send it for legal/technical examination by the Legal Service of the Republic; then the Council of Ministers will have to adopt it before it is submitted as a draft law to the House of Representatives. Considering the time needed for the whole process to be completed and the fact that the present House will be dissolved before mid-April, in view of the parliamentary elections in May 2011, it is unlikely that a new law will be in force before the digital switchover of 1 July 2011.

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DE-Germany

Federal Court of Justice Rules on Media Privilege

In the context of a final appeal of points of law, the *Bundesgerichtshof* (Federal Court of Justice - BGH) recently dealt with the scope of, and limits to, the so-called "media privilege (*Medienprivileg*), which defines the relationship between data protection and freedom of speech. In its judgment of 1 February 2011, the BGH gave media and press freedom priority over the interests claimed by the plaintiff.

The case had been brought by one of the two murderers of the actor Walter Sedlmayr who had been sentenced to life imprisonment (see also IRIS 2010-2/9). He had been released on parole in January 2008 and had complained about an article published by the defendant at its internet news portal on 12 April 2005. That article reported that the *Landgericht Augsburg* (Augsburg Regional Court) was examining the possibility of reopening the criminal proceedings and mentioned the plaintiff's full name. The plaintiff wanted to prevent this as he considered that mentioning his name had an adverse impact on his interest in being reintegrated into society. In his opinion, greater priority should be attached to that interest than to the defendant's interest in publishing the plaintiff's name. The *Landgericht Hamburg* (Hamburg Regional Court) and the *Hanseatisches Oberlandesgericht* (Hamburg Court of Appeal) allowed the claim for injunctive relief against the portal operator.

The BGH set aside the judgments in the final appeal on points of law and made it clear that the public interest in obtaining information and the defendant's right to freedom of speech outweighed the convicted person's interests in the case concerned. The lower courts it said, had not taken sufficient account of the particular circumstances involved. When all the interests were balanced against one another, it became clear that those asserted by the defendant had to be given priority: although the availability of the article constituted interference with the plaintiff's general personality right, it was not unlawful. The convicted individual's interest in becoming reintegrated into society admittedly gained in importance with the passage of time after the event but the harm done by mentioning his name was insignificant: the relevant and objective description of truthful statements about a sensational capital crime committed against a well-known actor was unlikely to "expose (the plaintiff) publicly for all time or to stigmatise him once again". Moreover, the article had been filed in the archive section of the portal and was expressly marked as an old report, so that obtaining knowledge of it presupposed a targeted search. However, the court went on, the

offender had no right to complete "immunisation". A general requirement to remove all earlier descriptions of the offence identifying the perpetrator would "constrict the free flow of information and communication" and improperly limit freedom of speech and the media. Moreover, the court said, "(a) further aspect in the defendant's favour is the fact that the public not only has a legitimate interest in information on current affairs but also in the possibility of researching past events [...]. Accordingly, the media keep publications that have ceased to have topical relevance available for interested media users in order also to discharge their task of informing the public by exercising their freedom of speech and becoming involved in the democratic opinion-forming process".

With regard to the connection with data protection law, the BGH stated that the "media privilege" enshrined in section 57(1) of the *Rundfunkstaatvertrag* (Inter-State Broadcasting Agreement - RStV) was limited in a manner relevant to the instant case, as was, accordingly, the scope of the general provisions of the *Bundesdatenschutzgesetz* (Federal Data Protection Act) (see also section 41 of that Act, which transposes Article 9 of the Data Protection Directive 95/46/EC on the relationship between data protection and freedom of speech). That was because the article had - as required by the Inter-State Broadcasting Agreement - been exclusively made available for its own "journalistic-editorial [...] purposes". That precondition was met when the publication was aimed at an indeterminate group of people with the intention of expressing an opinion. Accordingly, the important factor for deciding who may invoke the media privilege is not the actual form of the publication but only the activity itself, which must be journalistic in nature. Internet portals, too, can therefore invoke this protection.

The BGH very clearly mentions the need for the media privilege, which has its origin in the constitutional guarantee of freedom of speech, in a key sentence of the judgment: "Without the gathering, processing and use of personal data, even without the consent of those concerned, it would not be possible for journalists to do their work, and the press could not discharge the tasks conferred on it in, and guaranteed by, Article(5)(1), 2nd sentence, of the Basic Law, Article 10(1), 2nd sentence, of the European Convention on Human Rights and Article 11(1) 1st sentence, of the European Union's Charter of Fundamental Rights".

• *Urteil des BGH vom 1. Februar 2011 (Az. VI ZR 345/09)* (BGH judgment of 1 February 2011 (Case no. VI ZR 345/09))
http://merlin.obs.coe.int/redirect.php?id=13138 DE

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Federal Court of Justice Rules on the International Jurisdiction of German Courts in the Case of Internet Publications

In a judgment of 29 March 2011, the *Bundesgerichtshof* (Federal Court of Justice - BGH) ruled that the German courts had no international jurisdiction in proceedings concerning a violation of personality rights resulting from an internet publication.

The plaintiff is a Russian national with residences in Germany and Russia. The defendant, a former fellow pupil of the plaintiff, lives in the United States. After a class reunion in Moscow, at which the two parties were present, the defendant wrote an article in which, among other things, she described the plaintiff's appearance and lifestyle. The text was in Russian in Cyrillic script and was published via the internet portal of a provider based in Germany. The plaintiff considered that his personality rights had been violated and applied for an injunction, calling for information and financial compensation. The lower courts had ruled that the German courts had no jurisdiction.

The BGH endorsed this view in its decision and accordingly dismissed the plaintiff's appeal on points of law, stating that the publication concerned needed to have a clear connection to domestic affairs if international jurisdiction were to be assumed. That meant it would be necessary for "a clash of interests - on the one hand, the plaintiff's interest in respect for his personality right and on the other hand the defendant's interest in being able to organise her website and publish reports - to have actually occurred or to potentially occur in Germany given the particular circumstances of the case and, especially, the content of the report". That was not the case here since both the choice of language and script and the private character of the content, which was - at the very most - relevant for the participants in the class reunion, who, with the exception of the two parties, were all living in Russia, militated against the assumption of a domestic connection. Nor did the location of the server in Germany create such a connection.

• *Pressemitteilung des BGH zum Urteil vom 29. März 2011 (Az. VI ZR 111/10)* (BGH press release on the judgment of 29 March 2011 (Case no. VI ZR 111/10))
http://merlin.obs.coe.int/redirect.php?id=13139 DE

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Administrative Court Rules on Filming Public City Council Meetings

On 25 March 2011, the *Verwaltungsgericht des Saar-*

landes ((Saarland Administrative Court) ruled that broadcasters must normally be allowed to film public city council meetings and may only be prohibited from doing so in exceptional circumstances.

The mayor of the City of Saarbrücken had turned down an application by the private broadcaster Funkhaus Saar GmbH to film the city council's public meetings exclusively for reporting purposes (see IRIS 2010-10/23). She gave as her reason for the ban her fear that the city council's ability to function properly could be adversely affected if its meetings were filmed on video. The council members could "lose their spontaneity" if they were aware of sound and video recordings being made of them and be more restrained in the exercise of their right to speak.

The Administrative Court took a different view, stating that the public nature of city council meetings was not limited to public admission to the chamber but extended to media access. The freedom to broadcast was, it said, protected by Article 5(1) of the Basic Law and played a very important role in a democracy, so that broadcasters could not generally be refused permission to film city council meetings. Rather, an individual decision had to be taken before each such meeting on whether the exclusion of the media was, by way of exception, justified, but the mayor had not provided sufficient grounds for such an exclusion.

An appeal has been lodged against this decision.

• *Verwaltungsgericht des Saarlandes, Urteil vom 25. März 2011 (Az. 3 K 501/10)* (Saarland Administrative Court, Judgment of 25 March 2011 (case no. 3 K 501/10))
http://merlin.obs.coe.int/redirect.php?id=13161 DE

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Federal Cartel Office Prohibits Joint Video Platform of RTL and ProSiebenSat.1

In accordance with its provisional assessment of 22 February 2011 (see IRIS 2011-4/19), the *Bundeskartellamt* (Federal Cartel Office - BKartA) rejected on 17 March 2011 the plan of RTL and ProSiebenSat.1 to set up a joint venture for the establishment and operation of an online video platform.

In the Cartel Office's opinion, such a platform would further strengthen the two broadcasting groups' existing market-dominating duopoly. In particular, the plan would have the effect of preserving the current situation on the television advertising market and transferring it to in-stream advertising in online video content.

In the authority's view, the statements issued in the meantime by the broadcasters on the provisional assessment were unlikely to dispel its doubts on competition grounds. Above all, it said, the companies had shown no willingness to make fundamental changes to their plans and had still not offered to open up the platform further, either technically or for the use of other providers (apart from television broadcasters).

Immediately after the decision to reject the plan was published, the two broadcasting groups announced their intention to appeal.

• *Pressemitteilung des BKartA vom 18. März 2011* (BKartA press release of 18 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13140 DE

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ZAK Sees no Legal Basis for Televising Parliament

The *Kommission für Zulassung und Aufsicht* (*Commission* for Licensing and Supervision - ZAK) of the *Landesmedienanstalten* (regional media authorities) decided on 16 March 2011 that the law does not permit the television broadcasts of the Bundestag proceedings, which have been produced since 1990, in their present form.

The reason why the ZAK has made this ruling is that the programme has been distributed unencrypted via satellite and cable and as a webstream since January 2011. Moreover, the editorial organisation of the programme, which originally consisted to a very large extent of live broadcasts from the chamber and the committees without the use of a commentator, has increased.

In the ZAK's view, the televising of the Bundestag is to be classified as broadcasting within the meaning of section 2(1) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV) and therefore requires a broadcasting licence. However, the programme provider is a constitutional organ and, as a corporate body subject to public law (section 20a(3) RStV) and in view of the requirement that broadcasting be separate from the State, can accordingly not be given a licence.

The chair of the ZAK conceded that the Bundestag, like all other institutions, must be able to inform the public about its work in a manner in keeping with the times, but there is currently no legal basis for the current way in which parliament is televised.

• *Pressemitteilung der ZAK vom 16. März 2011* (ZAK press release of 16 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13143 DE

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Cabinet Adopts Government's Draft Amendment to the Telecommunications Act

On 2 March 2011, the German cabinet adopted and published the government's draft amendment to the *Telekommunikationsgesetz* (Telecommunications Act - TKG). The main purpose of the proposal is the implementation of the changes to the EU's regulatory framework for electronic communications adopted at the end of 2009. Under the conditions established by the Directive, the implementation must be completed by May.

As early as September 2010, the ministry responsible, the *Bundesministerium für Wirtschaft und Technologie* (Federal Ministry for the Economy and Technology) forwarded the ministerial draft to the other government departments for approval (see IRIS 2010-10/24). Amendments to a number of aspects have been incorporated into the draft now adopted by the cabinet.

For example, the rules on holding callers in a queue, which were originally only to be applied to voice-supported premium and customer services, are now to apply irrespective of the service involved. Callers may only be put automatically on hold if the call is free of charge, the call is charged to the provider (with the exception of calls from abroad), a fixed charge is made irrespective of the time of day or a fixed-line number or "normal" mobile telephone number (with the prefix 015, 016 or 017) is used. A queue is now defined as a period in excess of 30 seconds.

The faster expansion of "high-capacity" public next generation networks (NGNs) is to be included as a new regulatory objective. In addition, the draft provides for the current regulatory objective of guaranteeing the range of universal services to be modified to ensure that urban and rural areas have the same basic provision of services. The intention is also to reduce the digital divide.

Changes are also planned with regard to access regulation: when it comes to imposing access obligations, for example, the government's draft states that incentives for efficient infrastructure investment are to be taken into account. It also provides for network operators with considerable market power to be obliged to offer a standard service in the future if they are subject to access obligations as far as their network infrastructure on the wholesale market is concerned.

In the area of consumer protection, a new provision that has been inserted is an explicit obligation to activate the customer's number within one day of a change of provider.

Civil rights activists criticise the new provisions compared with the ministerial draft that involve interference with data protection. For example, *Arbeitskreis Vorratsdatenspeicherung* (Working Group on Data Retention) warns against the planned repeal of section 92 TKG, not least because of the danger of industrial espionage. If this provision were to be deleted, personal data could be sent abroad without any restriction, thus putting confidential communications data "within the reach of foreign authorities and intelligence services". Data may currently only be sent abroad "if this is necessary for the provision of telecommunications services, for the issue or despatch of bills or for combating abuses". The planned creation of "registers of suspicions of abuse" and the possibility granted to service providers of producing call logs for the purpose of remedying faults and combating abuses are also criticised as going too far and being too ill-defined.

The deletion of section 48(4) TKG proposed in the ministerial draft would mean a further watering down of the provisions on the digital switchover as far as radio broadcasts are concerned. According to that section, set manufacturers were to be obliged to equip radios to receive digital broadcasts from 2015, whereas according to the government's draft this obligation would be completely dropped. The ministerial draft itself weakened the obligation laid down in the current TKG to switch off analogue VHF radio transmissions by 2015 by allowing the current frequency licence holders to apply to have their frequency allocation renewed once for a further ten years.

The draft law is now before the Bundesrat and is due to be debated in the Bundestag for the first time on 15 April 2011.

- *Entwurf eines Gesetzes zur Änderung telekommunikationsrechtlicher Regelungen vom 2. März 2011* (Draft of a law amending telecommunications regulations, of 2 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13142 DE

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Dispute concerning the Allocation of Frequencies for Mobile Telephony Continues

As some facts remain to be clarified, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) has referred a dispute concerning the allocation of frequencies below 1GHz for mobile telephony back to the lower court. In particular, the BVerwG criticised the fact that the existence of spectrum scarcity, which is a necessary precondition for the auction procedure, had not been sufficiently established.

The *Bundesnetzagentur* (Federal Network Agency - BNetzA), which is responsible for the allocation of radio frequencies, had ordered the allocation by auction of the frequencies previously used by the military

(sections 55(9) and 61 of the *Telekommunikationsgesetz* [Telecommunications Act - TKG]). E-Plus Mobilfunk GmbH & Co. KG, one of four mobile telephone companies in Germany, brought an action against this order before the *Verwaltungsgericht Köln* (CologneAdministrative Court - VG Köln), claiming that the procedure chosen gave preferential treatment to the two established digital cellular telephone network operators T-Mobile and Vodafone, which for historical reasons had additional frequency allocations below 1GHz. These frequency bands are particularly in demand as they have good propagation characteristics, thus making it possible to operate mobile telephone networks that are wider meshed than in higher frequency bands.

The VG Köln dismissed the complaint in its judgment of 17 March 2010 and the auction, which also covered frequency bands above 1GHz in addition to those in issue, then took place in April and May 2010 in accordance with the rules of procedure laid down by the BNetzA (see also IRIS 2010-6/19). The plaintiff was the only mobile telephone company that failed to acquire frequencies below 1GHz.

In the final appeal on points of law, the BVerwG held that the Cologne court had not sufficiently clarified two issues of fact. Firstly, it had not sufficiently established that at the time of the award decision and with regard to the total number of frequencies available for joint allocation the demand for frequencies exceeded the supply. However, the existence of spectrum scarcity is, according to section 55(9) TKG, a precondition for holding an auction. Secondly, no sufficient examination had been conducted into whether and to what extent frequencies had previously been allocated for use on the same materially and geographically relevant market without such an auction procedure, even though the outcome of such an examination was crucially important for assessing the suitability of the procedure in the instant case.

As the BVerwG could not clarify the facts itself, it referred the dispute back to the VG Köln.

• *Pressemitteilung des BVerwG zum Urteil vom 23. März 2011 (Az. 6 C 6.10)* (BVerwG press release on the judgment of 23 March 2011 (Case no. 6 C 6.10))
http://merlin.obs.coe.int/redirect.php?id=13141 DE

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CDU/CSU and FDP Coalition Overturns Access Obstruction Act

According to media reports, the CDU/CSU and FDP coalition committee decided on 5 April 2011 to overturn the *Gesetz zur Erschwerung des Zugangs zu kinderpornographischen Inhalten in Kommunikationsnetzen* (Act on the obstruction of access to child pornography via communication networks - Zugangserschwerungsgesetz), which was passed by the previous government on 18 June 2009 with the aim of enabling internet sites with child pornography content to be blocked. The law came into force on 17 February 2010 but, in accordance with the coalition agreement of the then newly-formed Federal Government and on the basis of a decree of the Federal Ministry of the Interior of 17 February 2010 (see IRIS 2010-4/19), was never implemented.

The decision now taken by the coalition committee must be seen as a response to the long-running criticism concerning the constitutionality of the Act. Among other things, there was criticism that the federation had no formal legislative powers in that area. With regard to substantive law, critics stressed in particular that the Act led to unjustified interference with basic rights because the planned website blocks were not the right way to achieve the set objectives since many means of circumventing them were available. As additional problems of a technical nature are involved - such as so-called "over-blocking" (unavoidable blocking at the same time of legal content available at the domain or on the server to be blocked - critics also doubted the proportionality of the measures provided for by the Act.

After recent reports by the *Bundeskriminalamt* (Federal Bureau of Criminal Investigation - BKA) had shown that intensive efforts to remove content could produce quite acceptable results, policymakers were seen to be changing their minds in favour of the principle of "removal before blocking" (or even "removal instead of blocking"). For example, the Federal Minister of Justice said that 93% of child pornography content complained about had been removed two weeks after a request had been made by the BKA, and the figure had even risen to 99% after four weeks. Those successes in bringing about the removal of this type of content showed, it was claimed, that the coalition had embarked on the right path with the repeal of the Access Obstruction Act.

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ES-Spain

Private Copying Levy Order Annulled

On 22 March 2011, the Spanish private copying levy received another serious judicial setback, as the National Court (Audiencia Nacional) declared the nullity

of the 2008 Order which set out the fees, the devices and the equipment which are subject to payment of a fair compensation for private copying.

The Court analysed the administrative Order that set the fees in 2008 and concluded that it is incomprehensible that, while the standard fixed fee for analogue devices took the form of an Order, with all the prescribed procedures that this entails, the standard set with regard to the digital levy was a simple administrative act, which does not need to comply with the same procedural requirements.

The levy itself remains in force, but the Order that regulated its application has now been declared null, as the Court concluded that is a mandatory provision that has been developed and launched without meeting several requirements, especially the compulsory report from the State Council (Consejo de Estado) and the financial report. The fees that will be applicable from now on will be those from 2006, which do not specifically address some new devices such as MP3s, MP4s or certain mobile phones with multimedia faculties. Devices and equipment such as CD recorders, DVD, CD-R, CD-RW, DVD-R, DVD-RW, multifunction printers and multifunction inkjet and laser scanners remain taxed by the private copying levy, but in accordance with the old fees.

Regarding the amounts already collected by the collecting entities, although the decision does not contain any provision about an automatic refund to the plaintiffs, it seems logical that individuals will turn to the courts to claim back money paid on equipment or devices not regulated under the 2006 fees.

Meanwhile, the Spanish Government is forced to proceed with the adoption of a new regulatory framework for the private copying levy after a decision of the ECJ which found that the levy may not be applied indiscriminately, but should only be applied in cases where the device is clearly intended for private copying (see IRIS 2010-10/7).

• *Audiencia Nacional, Sala de lo Contencioso-Administrativo, sección tercera, 22 de Marzo de 2011* (Judgment of the Audiencia Nacional, Chamber of Administrative Jurisdiction, Third Section, 22 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13129 ES

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FR-France

Wrongful Imitation of a Reality TV Programme

The commercial court in Paris has delivered an important judgment in a dispute between the famous production company Endemol, the exclusive international distributor for the format of the "Big Brother" broadcast and its various adaptations (in France, the programmes "Loft-Story" and "Secret Story"), and the company ALJ Productions, founded by a former Endemol employee. Endemol claimed that "Dilemme", produced by ALJ and broadcast on the W9 DTV channel, used the features characteristic of its own formats and programmes, and that its broadcasting constituted unfair parasitic competition. The court found that comparative analysis of the broadcasts showed that the company ALJ Productions had taken up the totally new essential characteristics of the Endemol programmes (the continuity script of the kick-off, the continuity script of the weekly and daily broadcasts, the home bases of the competitors and their contents, the typology of the competitors, the mechanics of the broadcasts, and many details of the everyday lives of the competitors). The fundamental elements that had been used included the applicant company's "confinement" format, the characteristic features of the places of "confinement", the mechanics of the programmes, the characteristic elements of the casting of the competitors who had been pre-selected on the basis of their physical or psychological profile (the tattooed muscle-man, the buxom blonde, etc), the characteristic elements of broadcasting the programmes, and a number of technical characteristics (same channels, same frequency and duration of broadcasting and repeat showing of the programmes). Using the essential features of Endemol's audiovisual formats and programmes had necessarily created a degree of confusion in the minds of the public as the concept of the broadcasts at issue was identical, directed at the same audience, and with a form and content displaying broad similarities and insignificant variations that made it difficult to distinguish clearly between the programmes at issue. The court found that this wrongful imitation constituted unfair competition. However, since the applicant party had not provided proof of the specific investment it had made in its key reality TV programmes, whereas the defendant parties had demonstrated the material and human investment it had put into developing the disputed programme, the court found that it had not acted in a parasitic fashion. According to the court, unfair competition necessarily resulted in a commercial change that constituted prejudice, if only of a moral nature. This moral prejudice, involving the confusion arising in the public's mind as to the origin of the programmes at issue, was valued at EUR 900,000, an amount equivalent to Endemol's loss of opportunity to conclude a partnership with W9, which had wanted to acquire a reality TV programme similar to the company's formats and programmes. The court also banned exploitation of the programme at issue on any medium, on pain of a fine. The case is not closed yet, as ALJ Productions has appealed against the judgment.

• *Tribunal de commerce de Paris (15e ch.), 11 mars 2011* - Endemol Productions c. ALJ Productions et a. *(décision non définitive)* (Commercial court of Paris (15th chamber), 11 March 2011 - Endemol Productions v ALJ Productions et al. (judgment not final)) FR

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"Web COSIP" Decree Published

The "Web COSIP" Decree, announced last October by the Minister for Culture who wanted to see it in place by 1 January 2011 and awaited since then by the profession, was finally gazetted on 3 April 2011. The text, which is applicable immediately, extends the benefit of financial support to audiovisual production ("COSIP") other than works intended for television. It supplements the existing CNC support arrangements of selective support in favour of projects for the new media, which has been in existence since 2007, and selective and automatic for audiovisual works using "mixed" financing (TV and Internet), which has been in existence since 2008. This support will therefore now apply for all works made available by an editor of an on-demand service, particularly on the Internet. The Decree also adapts the criteria for qualifying an audiovisual production company as independent for granting selective financial support. According to Eric Garandeau, CNC's Chairman, "These various mechanisms illustrate the desire on the part of the Ministry of Culture and Communication and the CNC to support cinematographic and audiovisual creation on the new digital platforms, the Internet and the mobile media that represent interesting opportunities for broadcasting and exploiting French and European works."

Another Decree, "on financial aid for the new production technologies", was published on the same day; its aim is to update the support arrangements to include the use of new techniques for manufacturing and for image and sound processing. In doing so, it brings together in a single document all the existing arrangements for aid. Thus selective financial aid may be granted in the form of subsidies to production companies established in France that make use of the new techniques for manufacturing and for image and sound processing when producing full-length or short cinematographic works "using stereoscopic techniques for stereoscopic projection in cinema theatres" and "models and media intended to present the initial visual and sound elements of a project for a full-length cinematographic work". Aid is granted on the basis of both the innovative nature of the techniques used and the appropriateness of using these techniques to the artistic nature of the project. The Decree sets up a committee to be consulted for an opinion before the CNC's Chairman decides whether or not to grant the aid.

• *Décret n°2011-364 du 1er avril 2011 modifiant la réglementation relative au soutien financier de l'industrie audiovisuelle* (Decree No. 2011-364 of 1 April 2011 amending the regulations on financial support for the audiovisual industry)
http://merlin.obs.coe.int/redirect.php?id=13135 FR

• *Décret n°2011-365 du 1er avril 2011 relatif aux aides financières aux nouvelles technologies en production* (Decree No. 2011-365 of 1 April 2011 on financial aid for the new production technologies)
http://merlin.obs.coe.int/redirect.php?id=13136 FR

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Inclusion of Advertising Posters in Audiovisual Fiction Programmes and Product Placement

France Télévisions has asked the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory body - CSA) to look into the regulations on product placement in audiovisual fiction programmes, and more particularly the inclusion of advertising posters (virtual or real) on the sets for series and TV films. Since the decision adopted by the CSA on 16 February 2010 in application of Article 14-1 of the Act of 5 March 2009 transposing the AVMS Directive (see IRIS 2010-4/23) into national legislation, product placement has been authorised in France "in cinematographic works, audiovisual fiction works and musical videos, except those directed at children". It is generally held that this technique of communication generates 17% of the advertising revenue of the major national channels in North America. Since advertising has been banned after 8 p.m. on the public-sector channels since January 2009, it is understandable that the public-service audiovisual sector in France should feel concerned, even though the resulting revenue is shared between the producer (60%) and the channel (40%). More specifically, some companies allow the insertion of advertising posters in a programme at the post-production stage, according to the advertiser's wishes, the target audience, and time of broadcasting. The France Télévisions group wanted more information from the CSA before making more use of this possibility. In its reply, published on 7 April 2011, the CSA said that it could not issue a definitive pronouncement on the matter since each case had to be considered on its own merits, according to the elements contained in the items being viewed. It nevertheless held that if the advertising consisted of the view of a product, a service or a brand name, its insertion could be considered as product placement in accordance with the deliberation of 16 February 2010, and therefore allowed if it observed all the required conditions (including the display of a pictogram indicating product placement for one minute at the start of the programme and after each commercial break, and during the entire credits at the end of the programme). If, however, the advertising comprised elements other than mere presentation of the product or its brand name (such

as, for instance, an advertising slogan, a price, the address of a point of sale, or details of purchasing), the CSA held that this could constitute surreptitious advertising, which was prohibited by Article 9 of the Decree of 27 March 1992.

• *Décision du CSA du 10 mars 2011* (Decision of the CSA of 10 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13134 FR

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GB-United Kingdom

New Classification System for Downloaded Content

The British Board of Film Classification (BBFC) is the body that classifies films and videos/DVDs. Originally established as a self-regulatory body by the film industry, it acquired statutory responsibility for videos and DVDs under the Video Recordings Act 1984. It is financed by fees charged for classification, according to a tariff approved by the Department for Culture, Media and Sport. Classification is carried out through ratings setting out the audience for whom viewing is appropriate (U, PG, 12A, 15, 18, R18).

Since 2008 the BBFC has been working with the video industry to provide a content labelling system for film, video and TV content supplied by internet, wireless or mobile signal and has classified over 200,000 titles available through video-on-demand, digital rental and sale, streaming, mobile platforms and connected TV. Over 200,000 certificates have now been issued for this "back catalogue" of material. All new content classified by the BBFC is given an 'online' certificate for digital distribution.

The BBFC has now developed a new classification services, known as "Watch and Rate", for material issued straight to online. This enables the Board to issue a quick and cheap certificate using the same categories as for film and video/DVD without the need for the release of an equivalent physical version. Certificates will be issued within a maximum of seven days of electronic receipt of the material by the BBFC and an express service is available at extra cost guaranteeing a decision on the day of receipt or the following day. Fees are based on a submission fee and a per minute fee, so that, for example, the fee for a 90 minute clip would be GBP 245.

The creative industries minister has welcomed the new scheme.

• 'Ed Vaizey welcomes new BBFC classification for downloaded content', Department for Culture, Media and Sport, 10 February 2011
http://merlin.obs.coe.int/redirect.php?id=13111 EN

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Minister Intends to Accept Undertakings to Permit Merger of News Corporation and BSkyB to Go Ahead

The Secretary of State for Culture, Olympics, Media and Sport has announced that he intends to accept undertakings from News Corporation on their proposed merger with BSkyB rather than referring the merger to the Competition Commission (see IRIS 2011-2/4; IRIS 2011-3/22). The minister took advice from Ofcom, the communications regulator, and from the Office of Fair Trading, the competition authority, before doing so, and allowed 18 days for consultation on the proposed undertakings. The use of undertakings avoids the delay of six-eight months that referral to the Competition Commission would entail, which might have resulted in BSkyB becoming too expensive for News Corporation to succeed in its bid. The merger was already approved by the European Commission on competition grounds (IRIS 2011-2/4) and the current process only relates to issues of media plurality, in particular in relation to news provision.

The undertakings would involve Sky News being 'spun off' as an independent public limited company. The shares in the new company would be distributed amongst existing BSkyB shareholders in line with their shareholdings, so shareholdings in Sky News would remain as if the merger had never happened and News Corporation would retain a 39.1% stake in the new company. To ensure editorial independence and integrity in news reporting, the company would have a board made up of a majority of independent directors, including an independent chair and a corporate governance and editorial committee made up of independent directors with no other News Corporation interests. At least one board member must have senior editorial and/or journalistic experience. News Corporation would not be allowed to increase its shareholding in the new company without permission from the Secretary of State for ten years. The new company would have a ten-year carriage agreement and a seven-year renewable brand licensing agreement to ensure its financial viability.

• Department for Culture, Media and Sport, 'News Corp-BSkyB merger update', 3 March 2011
http://merlin.obs.coe.int/redirect.php?id=13112 EN

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IE-Ireland

New Broadcasting Code on Election Coverage

The Broadcasting Authority of Ireland (BAI) on 31 January 2011 published the new BAI Broadcasting Code on Election Coverage (Election Code). The new Election Code details a range of rules with which all Irish broadcasters must comply when covering all relevant statutory elections (including Local, European, General and By-elections) held in Ireland.

The Broadcasting Act 2009 s.42 requires the BAI to introduce codes governing standards and practice to be observed by broadcasters. The new Election Code reflects existing practice and codes established by the BAI and its predecessor regulatory bodies, the Independent Radio and Television Commission (IRTC) and Broadcasting Commission of Ireland (BCI) (see IRIS 2002-7/23 and 2004-8/23). The new Election Code gives effect to various general requirements set out in the Broadcasting Act 2009. These include the requirements that broadcasters:

(i) shall ensure that all news and current affairs is reported and presented in an objective and impartial manner without any expression of the broadcaster's own views on election candidates, parties or election issues (Broadcasting Act 2009 s.39(1)(a) and (b)); and

(ii) shall not broadcast an advertisement which is directed towards a political end (Broadcasting Act 2009 s.41(3)); and

(iii) may broadcast Party Political Broadcasts provided that in the allocation of time for such broadcasts no political party is given an unfair preference and no charge is applied for such broadcasts (Broadcasting Act 2009 s.39(2) and s.41(3)).

The new Election Code was introduced following a consultation process and this led to a shortening of the moratorium period on election coverage that operated immediately prior to and including polling day and ran until polling stations closed. During the moratorium period, broadcasters are precluded from broadcasting references to election issues or to the merits or otherwise of candidates or their policies. One Irish broadcaster TV3 had objected to the then existing two-day moratorium through the consultation process.

The new Election Code maintains a moratorium period and restrictions as a mechanism to ensure that fairness, objectivity and impartiality are achieved during this critical period in the election process and to allow voters a period for reflection before going to the polls. The shortened period runs from 2 p.m. on the day before the poll takes place and throughout the day of the poll itself until polling stations close. The moratorium applies to all elections except elections to Seanad Éireann (the Irish Senate). It should be noted that all other elements of the Election Code apply to Seanad Éireann elections.

- BAI Broadcasting Code on Election Coverage, January 2011
http://merlin.obs.coe.int/redirect.php?id=13113 EN
- BAI Broadcasting Code on Election Coverage - Guidance Notes, March 2011
http://merlin.obs.coe.int/redirect.php?id=13114 EN
- BAI Guidelines on the Coverage of the 2010 Donegal South West Bye-election
http://merlin.obs.coe.int/redirect.php?id=13115 EN
- BAI Consultation Broadcasting Code on Coverage of Elections, December 2010
http://merlin.obs.coe.int/redirect.php?id=13116 EN

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Broadcast Authority to Permit Product Placement

The Broadcasting Authority of Ireland (BAI) is to permit paid product placement on Irish television. Authorization of product placement will extend to all television services: community, commercial, and public service broadcasters. The decision follows a public consultation process, which was completed in January this year and carried out by the BAI pursuant to s.44 of the Broadcasting Act 2009 (see IRIS 2009-10/18).

Product placement is to be included in the BAI's revised General and Children's Commercial Communications Codes, which will be published shortly and will take effect from Monday, 2 May 2011.

The BAI has decided to permit paid product placement in films made for cinema and television, sport, drama and light entertainment programmes. However children's programmes, docudramas and chat shows that regularly contain more than 20% of news and current affairs content will be excluded.

Under the BAI's current General Commercial Communications Code, published in 2010, the inclusion in television programmes of products and services in return for payment is prohibited except where there is no payment. Broadcasters are required to display a logo containing the letters PP on television screens before and during such programmes if the provision of products and services free of charge is of significant value, as defined by the BAI. Also, the product placement must not influence the responsibility and editorial independence of the broadcaster and the placement shall be editorially justified. There must be no direct encouragement to purchase or rent products or services, no advertising of them, and undue prominence must not be given to the products or services in question. Also, the names of companies whose

products and services have been included in a programme must be listed at the start of programmes, after breaks and in the end credits.

In the revised codes, broadcasters will also be required to include a written announcement before programmes that contain product placement and to promote to audiences on- and off-air the measures used to notify audiences that a programme contains product placement.

• BAI's decision, March 2011
http://merlin.obs.coe.int/redirect.php?id=13117 EN
• BAI's Code on General Commercial Communications 2010
http://merlin.obs.coe.int/redirect.php?id=13118 EN

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IT-Italy

AGCOM Launches Public Consultations on Net Neutrality, and on Peer-to-Peer and VoIP

Net neutrality, and Peer-to-Peer and VoIP are priorities for the Italian authority, as stated in a recent press release. The first public consultation will be on the results of a survey into consumer protection and competition protection relating to the VOIP and Peer-to-Peer mobile services. After approval of the final version the public consultation was launched.

The study of VOIP and P2P had the aim of analysing the new challenges of the mobile sector from a broad perspective, the changes in the market, the legal and economic aspects, and the technical implications. The purpose was to receive as much input as possible from stakeholders.

Results from this field of study reveal that this discussion is very crucial in Europe and in the USA in relation to Net neutrality.

As a consequence, the Italian authority decided to launch a separate consultation for Net neutrality.

On this occasion many questions will be integral to the discussion, such as the evolution of the sector, the new technical perspective, and the transformation of the market structure. Consumer guarantees and the protection of competition are at the core of the study and the debate.

The public consultation will last for 60 days.

• *Delibera n. 39/11/CONS, recante "Indagine conoscitiva concernente 'Garanzie dei consumatori e tutela della concorrenza con riferimento ai servizi vocali suprotocollo internet (VoIP) ed al traffico peer-to-peer su rete mobile': approvazione dellarelazione finale e avvio della consultazione pubblica", 3 febbraio 2011* (Delibera 39/11/CONS, Public consultation on the results of a survey into consumer protection and competition protection relating to the VOIP and Peer-to-Peer mobile services, 3 February 2011)
http://merlin.obs.coe.int/redirect.php?id=13149 IT
• *Delibera 40/11/CONS, Neutralità della rete: avvio di consultazione pubblica, 3 febbraio 2011* (Delibera 40/11/CONS, Public consultation on Net Neutrality, 3 February 2011)
http://merlin.obs.coe.int/redirect.php?id=13150 IT

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AGCOM Launches Public Consultation on Digital Television Dividend

On 24 March 2011, AGCOM launched a public consultation on the deliberations of the authority that lays down the procedure for assigning the frequencies of the digital television dividend and for the other frequencies available for broadband mobile systems.

This also includes the rules that ensure efficiency and conditions for competition in the use of radio spectrum.

The deliberation proposes rules that are beneficial for the whole mobile electronic communications sector.

It sets out the conditions for the entry of new competitors into the mobile market, including the best conditions possible for selecting the quantity and the type of frequencies necessary to meet the various needs of different business while reaping the benefits from the synergy between the different bands in the auction.

This aims to follow the objectives of the digital agenda.

Several proposals focus on the need for efficient use of the spectrum, with the possibility of leasing the spectrum, wholesale offers and share of frequencies amongst other issues.

Some discounts are possible for those who want to go green.

Those that succeed in the auction will have to follow the principles of Net neutrality in their activities.

The consultation is open for 30 days.

• *Delibera n. 127/11/CONS, Consultazione pubblica sulle procedure e regole per l'assegnazione e l'utilizzo delle frequenze disponibili in banda 800, 1800, 2000 E 2600 MHz per sistemi terrestri di comunicazione elettronica e sulle ulteriori norme per favorire una effettiva concorrenza nell'uso delle altre frequenze mobili a 900, 1800 e 2100 MHz, 24 marzo 2011* (Delibera n. 127/11/CONS, public consultation on the deliberations of the authority that lays down the procedure for assigning the frequencies of the digital television dividend and for the other frequencies available for broadband mobile systems, 24 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13151 IT

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Public Consultation on Spectrum

On 23 March 2011 The Italian telecoms regulator, Agcom, launched a consultation on the allocation of wireless frequencies in the 800, 1800, 2000 and 2600MHz bands, and re-farming of the 900, 1800 and 2100MHz bands.

The aim of the consultation is to verify the need for limitation of access to those bands and to determine the competence of the authority in its regulatory role.

The consultation is open for 30 days.

• Delibera n. 127/11/CONS, Consultazione pubblica sulle procedure e regole per l'assegnazione e l'utilizzo delle frequenze disponibili in banda 800, 1800, 2000 E 2600 MHz per sistemi terrestri di comunicazione elettronica e sulle ulteriori norme per favorire una effettiva concorrenza nell'uso delle altre frequenze mobili a 900, 1800 e 2100 MHz, *24 marzo 2011* (*Delibera n. 127/11/CONS,* public consultation on the allocation of wireless frequencies in the 800, 1800, 2000 and 2600MHz bands, and re-farming of the 900, 1800 and 2100MHz bands)
http://merlin.obs.coe.int/redirect.php?id=13107 IT

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LV-Latvia

Revealing Media Ownership May be Required

The Latvian legislator is considering an amendment to the *Likums Par presi un citiem masu informācijas līdzekļiem* (Act on Press and Other Mass Media), which would require the revealing of the true media owners.

Currently, the Act does not impose any special requirements on printed or electronic media regarding the revealing of their owners. The legal owners of media, similar to owners of other companies, may be discovered at the Companies Register of the Republic of Latvia. However, the Companies Register contains information on the direct shareholders only. Thus, if the direct owner of a media company is a legal entity, another search must be made to find out who are the owners of this legal entity. If this legal entity is registered outside Latvia, this may be difficult or even impossible, as in the case of off-shore companies. Moreover, if the media company is registered in a form of a closed public limited liability company (*akciju sabiedrība*), Latvian law does not require the revealing of its shareholders to the public. This situation has been criticised by Latvian non-governmental organisations (e.g., the Latvian Union of Journalists) and media specialists as several Latvian media, both printed and electronic, are owned by legal entities registered outside Latvia, whose true beneficial owners are unknown. It has been claimed that it is in the public interest to know the true owners of media in order to assess their possible impact on the content and to ensure editorial independence.

These concerns have now been responded to by a legislative initiative to amend the law. On 17 March 2011 the Saeima (Parliament) adopted in the first reading an amendment to the Act on Press and Other Mass Media, which provides that, if the founder of a media company is a legal entity, this entity is obliged to inform the Companies Register about its founders (shareholders) and owners (true beneficiaries) up to the natural entities. The media company also has to inform about any changes concerning these true beneficiaries. The requirement would apply also to the already registered mass media by requiring them to report on this information by 1 July 2011. As explained in the annotation to the draft amendment, the aim is to make the media environment more transparent.

As the amendments have as yet been adopted only in the first reading, it is not clear whether they will be finally approved and in what reading. Already in the Saeima hearing that reviewed the amendment, several speakers indicated problems with the draft. It was pointed out that the draft amendment does not solve all the problems, as it is possible that a media company is a listed public limited liability company and in this case the revealing of all shareholders would be impossible. Also, the law will not be enforceable against media companies registered outside the Latvian jurisdiction whose broadcasts are transmitted to Latvia. It is possible that some of these issues might be addressed in the suggestions regarding the draft amendment during the preparation of it for the second reading.

Suggestions for the second reading of the draft must be submitted by 2 May 2011.

• Grozījumi likumā "Par presi un citiem masu informācijas līdzekļiem" (Proposal for an amendment to the Act on Press and Other Mass Media)
http://merlin.obs.coe.int/redirect.php?id=13156 LV

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MT-Malta

Fresh Amendments to the Broadcasting Act on Media Concentration and General Interest Objective Television Stations

In March 2011 a bill was proposed to amend the Broadcasting Act. The Bill will extend "pluralism in broadcasting" and permit "the licensing of a general interest objective network operator and general interest broadcasting content licensees". It will retain the status quo in so far as the licensing of the public service broadcaster is concerned. The Government will continue to licence public service broadcasting, while private broadcasting will be licensed by the Broadcasting Authority. It further liberalises the media concentration provision. Currently this provision allows the same owner to own, control and be editorially responsible for up to one national television station, one national radio station and one national teleshopping television station. The proposed amendment will allow the same owner to own: one nationwide radio service on the FM frequency and an unlimited number of nationwide radio services on the digital radio network; up to two nationwide general television stations, an unlimited number of nationwide niche television stations and an unlimited number of nationwide teleshopping stations; and only one nationwide radio or nationwide television predominantly transmitting news and current affairs. Interactive gaming content and interactive gambling content is prohibited on community radio and nationwide radio, as well as on nationwide television.

In addition to the list of products that cannot be placed in programmes according to Article 16M(4) of the Broadcasting Act, the bill adds the following: alcoholic drinks of more than 1.2% alcohol during programming that is broadcast between 6.00 a.m. and 9.00 p.m.; gambling products during programming that is broadcast between 6.00 a.m. and 7.00 p.m.; infant formula; and weapons and munitions.

A general interest objective network operator is to be licensed by the Malta Communications Authority in terms of the Electronic Communications (Regulation) Act. On the other hand, the Broadcasting Authority will decide which licensees of general content objective services approved by it will be carried by the network operator. The first call for applications will be open to those free-to-air analogue television services that were in existence on the 1 December 2010. The Authority may issue other calls to assign available channels on the general interest objective network. However, public service television services that were broadcasting on that date are automatically considered to be general interest broadcasting services.

The Prime Minister, after consultation with the Broadcasting Authority, will make regulations to establish criteria for evaluating an application for a general interest nationwide television broadcasting service.

General interest objective service licensees will have to offer free of charge their broadcasting content to those electronic communications networks which the Broadcasting Authority may from time to time direct or approve.

The Authority may make regulations in respect of the determination of disputes between the network operator and the general interest objective service, in respect of the regulation of the general interest objective network in order to ensure that the network operator complies with the broadcasting law, and to ensure that an uninterrupted service is provided by the network operator. Cases involving a dispute between the network operator and a general interest objective service licensee will be referred to a standing arbitral tribunal composed of one person appointed by the Broadcasting Authority who shall preside, one person appointed by the Malta Communications Authority and one person appointed by the Minister responsible for communications. The tribunal's decision is final.

• *ABBOZZ TA' LIĠI imsejja147 ATT biex jemenda l-Att dwar ix-Xandir biex iwessa' l-pluraliżmu fix-xandir u biex jippermetti l-liċenzjar ta' operatur tannetwork tal-oġġettivi ta' interess ġenerali u detenturi talliċenzja b'kontenut ta' xandir ta' interess ġenerali.* (Bill No. 75, entitled the Broadcasting (Amendment) Act, 2011, Government Gazette of Malta No. 18,720 - 18.03.2011)
http://merlin.obs.coe.int/redirect.php?id=13119 EN MT

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NL-Netherlands

Dutch Court of Appeals Declares WiFi Hacking Legal

On 9 March 2011 the Court of Appeals of the district of The Hague (Court of Appeals) issued a judgment in a case regarding the question of whether breaking into an encrypted router and using the Wi-Fi connection is a criminal offence under Article 138ab of the Dutch Criminal Code.

The decision of the Court of Appeals relates to the case of a high school student who posted a threat on the Internet message board 4chan.org in which he declared his intention to begin a shooting spree at his high school, the Maerlant College in The Hague. He posted this threat using a Wi-Fi connection he had hacked into by bypassing an encrypted router. Even

though the student was convicted to twenty hours community service for posting this threat, he was acquitted of the charges relating to bypassing an encrypted router and using the Wi-Fi connection.

The Court of Appeals ruled that the student did not break into a computer, but merely into the encrypted router. Article 138ab (1) of the Dutch Criminal Code states that it is illegal to break into an automated work (hereinafter: computer) or a part of an automated work if access to that work is granted, inter alia, by breaching the security or by using technical measures. According to Article 80sexies of the Dutch Criminal Code, a computer is defined as a machine that is used for data storage, processing and transmission. The Court of Appeals ruled that a router cannot be regarded as a computer, since it is only used for the processing and transmission of data and not for storage of data. Therefore, breaking into an encrypted router - which cannot be regarded as a computer - is legal under Dutch Criminal Law.

The decision also touches upon the topic of piggybacking or free-riding on open Wi-Fi networks. In some countries even piggybacking on open Wi-Fi networks in public places such as bars and hotels is deemed illegal. The ruling of the Court of Appeals, however, confirms that piggybacking is not a criminal offence, since it does not involve breaking into a computer, but merely using the router to gain access to an open Wi-Fi connection.

The case has stirred up a lot of controversy within the Dutch legal community. The Dutch Attorney General has decided to appeal the verdict of the Court of Appeals. Hence, the High Court of the Netherlands will review the case within two years to rule on whether a router can be defined as a computer under Dutch Criminal Law.

• Gerechtshof 's-Gravenhage, 9 maart 2011, LJN BP7080 (Court of Appeals of The Hague, 9 March 2011, LJN Bp7080)
http://merlin.obs.coe.int/redirect.php?id=13154 NL

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Downloading04046 soon to Be Illegal in the Netherlands?

On 11 April 2011 Fred Teeven, the Dutch State Secretary for Public Safety and Justice, published a mission statement titled *"Speerpuntenbrief auteursrecht 20®20"* in which he proposes to modernise the Dutch Copyright Law. In his mission statement Teeven addresses a number of issues, which will be discussed below. The main emphasis of the mission statement is to enhance the public's trust in the copyright system and strengthen the position of authors of copyright protected works.

First and foremost Teeven plans to alter the download system in the Netherlands. At present it is legal to download copyrighted works, such as books, films and music, from an illegal source, as long as the downloader does not also upload the works. The statutory basis for this can found in the private copy exception. The mission statement, by contrast, would provide copyright holders with the ability to protect their rights based on civil law. Unlike France and the United Kingdom, no three strikes provision is proposed. However, copyright will be enforced against intermediaries, such as website owners and hosting providers, but not on individuals who occasionally upload and download copyright-protected files.

Secondly, rightsholders will have the possibility to request that Internet Access Providers block foreign websites and services that provide illegal content. However, some critics argue that this plan is unnecessary, since Art. 26d Dutch Copyright Act already establishes such a regime. Another aspect to consider in this context is the role of search engines. According to Teeven, search engines should prioritise search results that show websites with legal content. It is unclear whether search engines would have to start filtering their search results to prevent the appearance of illegal content.

A further step towards modernising the Dutch Copyright Law is the plan to abolish the private copying levy *inter alia* on blank CDs and DVDs. In order to compensate for the consequent loss of income copyright owners may have to increase the price of their products. Another suggestion is that copyright owners protect their works by using technical measures that prevent copying. Various interest groups have expressed great concerns and criticism in this context. It is argued that the proposal on abolishing the private copying levy is contrary to European Copyright Directive, as well as the recent Case C-467/08 *Padawan v* SGAE, in which the EU Court of Justice ruled that the aim of fair compensation is to "adequately" compensate authors for unauthorised uses made of their works (see IRIS 2010-10/7).

A final point of interest in the mission statement is adherence with European proposals. The State Secretary supports European proposals to abandon territorial limitations on copyright licenses and craft a system addressing the orphan works situation in order to stimulate plans to digitise works that are of importance for the preservation of the European cultural heritage (see IRIS 2011-3/5). Furthermore, Teeven calls for the introduction of a European fair use exception to enhance creative uses or the so-called remixing of existing works.

• Staatssecretaris Teeven biedt de Tweede Kamer, mede namens de Minister van Economische Zaken, Landbouw en Innovatie en de Staatssecretaris van Onderwijs, Cultuur en Wetenschap de speerpuntenbrief Auteursrecht 20®20 aan (Mission Statement by State Secretary for Public Safety and Justice Fred Teeven)
http://merlin.obs.coe.int/redirect.php?id=13132 NL

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Dutch Media Authority Publishes Special Edition of Mediamonitor on Dutch Media

On 1 March 2011, the Dutch Media Authority published a special edition of its annual Mediamonitor on trends and developments in Dutch media markets and companies. The English report is meant for an international audience and has a different structure from the regular annual Monitor. By informing other Member States about the national media system, the Dutch Media Authority wants to foster the safeguarding of important values, such as media diversity and the distribution of opinion power. Moreover, the overview of the facts and actual media concentration is intended to contribute to the development of media policy. Furthermore, the Dutch media management is placed in a European context by addressing the situation in eight other European countries also. The selected countries are Belgium, Germany, Luxembourg, France, the United Kingdom, Italy, Spain and Sweden.

Central topics include the Dutch media landscape, media concentration, continuing trends and incidental issues related to media pluralism. This edition begins with a brief introduction to the geography, social-demographics and make-up of the Netherlands to provide foreign readers with the relevant context. Next comes an explanation of the regulations on media concentration, followed by discussions on the newspaper, television, radio and internet markets. These are considered the most important for public opinion formation. Each of these chapters starts with a comparison of the Netherlands with the selected European countries in order to place the Dutch media landscape in context. Below, each market will be described briefly.

As to the principle of media diversity, the report points out that this concept contains several dimensions. Furthermore, a great variety of rules and regulations exists at national level. A common trend that is noticed in the countries studied is a wave of deregulation in ownership rules. Instead, the focus is shifted to the users' perspective and exposure to diversity, which makes the monitoring of media use more urgent. There is no supranational legislation on media ownership; at the European level general competition law must be relied on.

The newspaper market is the first to be examined. The report focuses on daily papers only. In the Netherlands, the number of titles decreased between 1987 and 2003, but it can still be regarded as a popular medium. This is not the case in all of the other countries studied. Another development in this market is the increased importance of free newspapers.

By contrast, the television market has grown considerably in the Netherlands in the past thirty years. However, the amount of providers keeps fluctuating. The television medium is considered the most important medium for the forming of public opinion and, in general, public broadcasters have the largest market share in the countries studied.

The third market, namely radio, has grown in the Netherlands since 1988 when commercial radio stations were allowed into the system. People spend even more time listening to the radio than watching television.

According to the Mediamonitor, the internet is an important medium for public opinion formation as well. The Dutch top 100 most visited websites contains ten news sites, which is a relatively large number compared to other countries.

The last chapter introduces the idea of a news market which covers all media types. A new model for monitoring opinion power focuses on content markets instead of distribution techniques and suppliers, since technological developments have led to convergence between all sorts of media.

• Mediamonitor 'The Dutch Media in 2010'
http://merlin.obs.coe.int/redirect.php?id=13127 EN

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PT-Portugal

Consultation on Electronic Communications Area

In April 2011, the *Autoridade Nacional de Comunicações* (regulator, supervisor and representative of the communications sector in Portugal - ANACOM) launched two consultations in the area of electronic communications.

ANACOM launched a consultation on the allocation of licenses for wireless frequencies in the 450, 800, 900 and 1800MHz bands, as well as 2.1 and 2.6GHz. The regulation concerned focuses on the granting of rights of frequency use over a massive section of

the spectrum. This is intended for the provision of publicly available terrestrial electronic communication services in a broad consideration.

Practical aspects of the allocation process are also set out. This consultation closes on 2 May 2011.

The second consultation focused on limitations to the number of usage rights of frequencies in the 450, 800, 900 and 1800MHz bands, as well as 2.1 and 2.6GHz. This consultation closes on 14 April 2011.

• *Comunicações electrónicas - Consulta sobre Regulamento do Leilão para atribuição de direito de utilização de frequências nas faixas dos 450, 800, 900 e 1800 MHz e 2,1 e 2,6 GHz* (Electronic communications - Consultation on the draft Auctioning Regulation for allocation of rights of use of frequencies in the 450, 800, 900, 1800 MHz and 2,1 and 2,6 GHz bands, 17 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13102 PT

• *Comunicações electrónicas - Consulta sobre limitação de direitos de utilização de frequências nas faixas dos 450, 800, 900 e 1800 MHz e 2,1 e 2,6 GHz, 17.03.2011* (Electronic communications - Consultation on the limitation of the number of rights of use of frequencies in the 450, 800, 900, 1800 MHz and 2,1 and 2,6 GHz bands, 17 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13103 PT

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Media Regulatory Body: Elections Suspended

On 2 March 2011, the Parliamentary Commission on Ethics, Society and Culture (*13ª Commissão de Ética, Sociedade e Cultura*) approved the Social Democrats' request to conduct several hearings in order to evaluate the experience of media regulation in Portugal. Following the ending of the current Regulatory Council's mandate of the *Entidade Reguladora para a Comunicação Social* (media regulatory authority - ERC), the request seeks to organize hearings of several representatives of the media sector regarding the five years' mandate. This situation further delays the appointment of the members of the next Regulatory Council, whose election was already scheduled in the Assembly of the Portuguese Republic for 11 March 2011.

Among the hearings requested by the Social Democratic Party (Partido Social Democrata - PSD) are those of ERC's President, Azeredo Lopes, of the Portuguese Press Association's President, João Palmeiro, and of the private broadcasters' administrators (SIC and TVI), as well as of those of the television public service broadcaster (Rádio e Televisão de Portugal - RTP). The Socialist Party (Partido Socialista - PS) also proposed the hearing of MEP and author of studies in the public regulation area, Vital Moreira.

Having been appoved by the Commission, the election will have to wait until hearings are conducted and both Socialists and Social Democrats propose a list of names for the collegial body. As stated in Article 15 of Law no. 53/2005 (Lei n.º 53/2005 de 8 de Novembro), which created the ERC, the Portuguese Assembly appoints four members of the Regulatory Council by resolution, the fifth member being decided upon by the others.

Another recent development in the political sphere might further complicate this process. The Portuguese Prime Minister, José Sócrates, submitted his resignation from his position to the President of the Republic on 23 March 2011.

• Agenda da reunião ordinária da 13ª Comissão de Ética, Sociedade e Cultura (Agenda of the ordinary meeting of the Parliamentary Commission on Ethics Society and Culture)
http://merlin.obs.coe.int/redirect.php?id=13108 PT

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RO-Romania

New Audiovisual Content Regulatory Code

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) adopted on 24 February 2011 a new Audiovisual Content Regulatory Code (Audiovisual Code; Decision 220/2011), which replaces the previous one (see inter alia IRIS 2007-4/30).

At the same time, the Romanian Parliament began debating a draft project to change and complete the *Legea Audiovizualului nr. 504/2002* (Audiovisual Law no. 504/2002) proposed by several MPs. The project, severely criticised by the CNA, is intended to merge the Audiovisual Law with most of the provisions of the 2006 Audiovisual Code.

The new Audiovisual Code has 145 articles, divided into nine titles and two appendices (how to indicate content that was filmed with a hidden camera and how to report on the percentage of European works in the programme schedule). The new document implements and clarifies some main concepts of the AVMS Directive 2010/13/EU.

The Code embodies the principle of the presumption of innocence. It is forbidden to broadcast pictures of people detained or arrested without their consent, because every person is presumed innocent until a definitive sentence is given. Broadcasters are not allowed to endanger the right to a fair trial or the legitimate interest of one of the parties involved in a judicial procedure, by the broadcasters' own comments or the comments of their guests. Shows made or moderated by active members of the Bar of Lawyers, in

which legal cases under research or already before court are debated, are forbidden.

The new Code changes the previous rule of 60 percent of broadcasting time for governing authorities and 40 percent for the opposition in the news programmes and asks broadcasters to ensure the equilibrium between majority and opposition, including at local level. As for television voting or polls conducted by broadcasters, the public has to be informed that these are not representative of public opinion and do not have the relevance of a poll conducted by a specialised institution.

The Council defined more precisely the meaning of interactive contests. Contests shall only be broadcast during educational and entertainment programmes, or in „contest-shows" as such. Prizes have to be awarded according to rules made known to the audience.

Gambling can be broadcast in audiovisual programmes only if authorised by the law. According to the new Code audiovisual media service providers have to notify the CNA of the license data of the respective gambling, prior to its airing. The Code also forbids repeated requests to the public to take part in gambling.

The document offers greater flexibility for inserting advertising through new technologies but without altering the main programme. Some definitions from the Audiovisual Law are implemented and explained in the Code, with regard to split-screen advertising, which may not be used in programmes for minors, or during news programmes and political debates, and virtual advertising, which is limited to sports and cultural events. It is forbidden to broadcast advertising within a crawl and to air advertisements simultaneously on two or more split screens.

TV stations have to ensure gradually, up to 1 January 2015, that hearing-impaired persons will have access to their main news programmes. Further, the document includes provisions against subliminal techniques, provisions on product placement, more clear and detailed provisions with regard to political advertising and non-commercial advertising campaigns, the obligations of broadcasters to screen permanently the competitors, score and timing of sports transmission, except the matches organised by UEFA and FIFA.

• Decizia nr. 220 din 24 februarie 2011 privind Codul de reglementare a conţinutului audiovizual (Decision no. 220 of 24 February 2011 with regard to the Audiovisual Content Regulatory Code)
http://merlin.obs.coe.int/redirect.php?id=13125 RO

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Highest Court Rules on Copyright Infringement on Internet

On 11 March 2011 the Supreme Arbitration Court of the Russian Federation (the highest court in commercial disputes) de facto upheld the decisions of lower courts that a popular social networking site was not liable for the actions of its users.

In 2008 VGTRK, or the All-Russian State Television and Radio Company, filed a lawsuit against Vkontakte (InContact) social network demanding RUB 3 million (about EUR 75,000) in compensation for the unlicensed posting by one of its users of the popular feature film "Okhota na piranyu" (Piranha Hunt). Access to the film was apparently free of charge.

Vkontakte did not accept responsibility for the infringement of the rights of VGTRK as rightsholder as it did not post the film and according to the bylaws of Vkontakte was ready to remove the illegal content if there was a complaint. During the session of the arbitration court of the first instance in 2010 the material was not found on the website, and no proof of the continuation of the violation was presented by the plaintiff. Thus the case was dismissed.

The second instance court, while upholding the findings of the lower court, decided that the measures taken by Vkontakte in accordance with its bylaws were not sufficient to counter the copyright violation and awarded the state broadcaster 1 million rubles in compensation.

The third instance court overturned the decision of the second instance court as it was confirmed in court that the uploaders who had violated the copyright law could in fact be found and held accountable despite using a nickname.

The Supreme Arbitration Court (or the fourth instance) refused to take this case as its panel found no lawful grounds for the highest court to intervene and review it. Thus the position of VGTRK that the courts erred in their interpretation of the facts and application of the law has finally failed; this might have a negative effect on the audiovisual industry.

• ОПРЕДЕЛЕНИЕоб отказе в передаче дела в Президиум Высшего Арбитражного Суда Российской Федерации № ВАС *-18116/10,* Москва , *11* марта *2011* г . (Ruling No. VAS-18116/10 of 11 March 2011 of the Supreme Arbitration Court on the refusal to pass the case to the Presidium of the Supreme Arbitration Court of the Russian Federation) RU

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New Turkish Media Law

The Turkish Law on the Establishment of Radio and Television Enterprises and their Broadcasts (Law No. 3984 of 20 April 1994; see IRIS 2008-8/34) has been repealed by a new law that was adopted by the Turkish Parliament on 15 February 2011 and entered into force on 3 March 2011.

The new law was prepared with the intention of solving current problems the Turkish media sector has been facing. It contains completely new provisions alongside articles that repeat related provisions of the repealed law. The most important changes may be summarised under the following four titles:

1. The Turkish Media Sector has been regulated in accordance with EU standards. For example, the Audiovisual Media Services Directive 2010/13/EU has been taken into consideration in terms of the responsibilities of cross-border media service providers. The scope of Art. 3, titled "Definitions", is enlarged to include the new concepts mentioned in the Directive. Namely, new items such as European works, media service provider, editorial responsibility and commercial communication have been added. Furthermore, the definitions of several important concepts have been changed. For example, according to the repealed law, retransmission meant "receiving completely or partly, radio and television programme services in an unchanged form and transmitting simultaneously or with a delay for reception by the general public, irrespective of the technical means employed, by the competent broadcasting enterprise". However, retransmission now covers only complete, unmodified and simultaneous transmissions; time-displaced transmissions have been taken out.

2. The articles relating to advertising have been revised and broadened. The time allowed for commercial breaks is limited to 20 percent per hour while the media service provider decides on the frequency of the breaks. Product placement is permitted in cinema and TV films, TV series, sports and entertainment programmes, provided that it does not infringe the editorial independence and responsibilities of the respective media service providers. The general standards are valid for product placement as well. Therefore, commercial communications for alcoholic or tobacco products are not allowed in advertising or in product placement.

3. The period and date of the transition to digital terrestrial broadcasting have been clarified. The procedures relating to the frequency planning are regulated in detail in Art. 26. A provisional article (Pro.Art. 4) declares that the transition to digital terrestrial broadcasting has to be completed within four years. In addition, Art. 27 extends the term of the broadcasting license from five years to ten.

4. The partnership structure of radio and television enterprises has been revised. One of the most important changes concerns the structure of media companies. According to Art. 29 of the repealed law, the share of foreign capital in a commercial radio or television enterprise could not exceed 25 percent of the paid-up capital (see IRIS 2008-10/31). However, with the new law, the ratio for the share of foreign capital has been raised to 50 percent. The restriction on the number of enterprises in which natural or legal persons may hold shares, has been abolished. According to Art. 19 of the new law, foreign persons are permitted to hold shares directly in two private radio or television enterprises; this restriction is limited to four enterprises in the case of indirect shareholders. Another abolished provision prevented enterprises dealing with investment, import, export, marketing and financial affairs from being partners in radio and television enterprises.

• *6112 Sayılı Radyo ve Televizyonların Kuruluş ve Yayın Hizmetleri Hakkında Kanun* (Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Broadcasts, adopted on 15 February 2011 and entered into force on 3 March 2011)
http://merlin.obs.coe.int/redirect.php?id=13157 TR

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Parliament Amends Media Acts

On 7 March 2011 the Hungarian Parliament adopted some amendments of great significance to the new media acts (Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules on media content as well as Act CLXXXV of 2010 on Media Services and Mass Media). The amendments were put forward by the government following an agreement between the European Commission and the Hungarian Government reached on 16 February 2011 (see IRIS 2011-3/24).

According to the amendments the obligation to provide balanced coverage applies henceforth only to linear media services (i.e., television and radio broadcasting) and not any more to on-demand media services. Furthermore, providing authentic, rapid and accurate information on public affairs at local, national and EU level as well as on any event bearing relevance to the citizens of the Republic of Hungary and

the members of the Hungarian nation is a task for the entirety of the media system and not only for the media content providers as it was foreseen in the previous version of the Act.

Concerning the registration of on-demand and ancillary media services and the products of the printed press as well the amendment clarifies that registration is not a condition for taking up such a new service or activity. However, media service providers and publishers shall be notified to the National Media and Communications Authority for registration within 60 days following the commencement of such a service or activity.

According to the new rules, media service providers established in European Economic Area member states will no longer be fined for breaching the provisions of the Hungarian media law. However, linear media service producers established outside the territory of the Republic of Hungary with a view to avoiding the applicability of more stringent Hungarian rules may face a fine as well as other legal consequences.

Furthermore, the Parliament has rescinded the prohibition of direct or implied offence against persons, nations, communities, national, ethnic, linguistic and other minorities or any majority as well as any church or religious groups. The Hungarian media law prohibits in the future only discrimination and incitement to hatred against them.

The amendments entered into force on 6 April 2011 and they are applicable in the ongoing procedures before the Media Council or the Office of the National Media and Communications Authority.

• *2011. évi XIX. törvény / A sajtószabadságról és a médiatartalmak alapvetõ szabályairól szóló 2010. évi CIV. törvény és a médiaszolgáltatásokról és a tömegkommunikációról szóló 2010. évi CLXXXV. törvény módosításáról* (Act XIX of 2011 on amendment of Act CIV on the freedom of the press and the fundamental rules on media content as well as of Act CLXXXV of 2010 on media services and mass media)
http://merlin.obs.coe.int/redirect.php?id=15586 HU

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Agenda

IViR International Copyright Law Summer Course
4 - 8 July 2010
Organiser: Institute for Information Law (IViR), University of Amsterdam
Venue: Amsterdam
Information and Registration:
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Tel. +31.20.525.3406
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E-Mail: A.G.J.M.Dobbelsteen@uva.nl
http://www.ivir.nl/courses/icl/icl.html

Book List

Telemedicus - Rechtsfragen der Informationsgesellschaft
http://www.telemedicus.info/

Mathien, M., Lenobel-Bart, A.,
Les médias de la diversité culturelle dans les pays latins de l'Europe
2011, Emile Bruylant
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Twiss-Brooks, A.,
Special Topics in Intellectual Property
2011, OUP USA
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http://www.amazon.co.uk/Special-Topics-Intellectual-Property-Symposium/dp/084122594X/ref=sr_1_96?s=books&ie=UTF8&qid=1304935096&sr=1-96