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## INTERNATIONAL

### COUNCIL OF EUROPE

#### European Court of Human Rights: *Mosley v. the United Kingdom*

In the case *Mosley v. the United Kingdom* the European Court of Human Rights decided that the right of privacy guaranteed by Article 8 of the European Convention on Human Rights does not require the media to give prior notice of intended publications to those who feature in them. The applicant in this case is Max Rufus Mosley, the former president of the International Automobile Federation. In 2008, the Sunday newspaper *News of the World* published on its front page an article entitled “F1 Boss Has Sick Nazi Orgy with 5 Hookers”, while several pages inside the newspaper were also devoted to the story and included still photographs taken from video footage secretly recorded by one of the participants in the sexual activities. An edited extract of the video, in addition to still images, were also published on the newspaper’s website and reproduced elsewhere on the Internet. Mr Mosley brought legal proceedings against the newspaper claiming damages for breach of confidence and invasion of privacy. In addition, he sought an injunction to restrain the *News of the World* from making available on its website the edited video footage. The High Court refused to grant the injunction because the material was no longer private, as it had been published extensively in print and on the Internet. In subsequent privacy proceedings the High Court found that there was no public interest and thus no justification for publishing the litigious article and accompanying images, which had breached Mr. Mosley’s right to privacy. The court ruled that *News of the World* had to pay to Mr. Mosley 60,000 GBP in damages.

Relying on Article 8 (right to private life) and Article 13 (right to an effective remedy) of the European Convention, Mr. Mosley complained that, despite the monetary compensation awarded to him by the courts, he remained a victim of a breach of his privacy as a result of the absence of a legal duty on the part of the *News of the World* to notify him in advance of their intention to publish material concerning him, thus giving him the opportunity to ask a court for an interim injunction and prevent the material’s publication. The European Court found indeed that the publications in question had resulted in a flagrant and unjustified invasion of Mr. Mosley’s private life. The question which remained to be answered was whether a legally binding pre-notification rule was required. The Court recalled that states enjoy a certain margin of appreciation in respect of the measures they put in place to protect people’s right to private life.

In the United Kingdom, the right to private life is protected with a number of measures: there is a system of self-regulation of the press; people can claim damages in civil court proceedings; and, if individuals become aware of an intended publication touching upon their private life, they can seek an interim injunction preventing publication of the material. As a pre-notification requirement would inevitably also affect political reporting and serious journalism, the Court stressed that such a measure would require careful scrutiny. In addition, a parliamentary inquiry on privacy issues had been recently held in the UK and the ensuing report had rejected the need for a pre-notification requirement. The Court further noted that Mr. Mosley had not referred to a single jurisdiction in which a pre-notification requirement as such existed nor had he indicated any international legal texts requiring states to adopt such a requirement. Furthermore, as any pre-notification obligation would have to allow for an exception if the public interest were at stake, a newspaper would have to be able to opt not to notify an individual if it believed that it could subsequently defend its decision on the basis of the public interest in the information published. The Court observed in that regard that a narrowly defined public interest exception would increase the chilling effect of any pre-notification duty. Anyway, a newspaper could choose, under a system in which a pre-notification requirement was applied, to run the risk of declining to notify, preferring instead to pay a subsequent fine. The Court emphasised that any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it. But at the same time the Court emphasised that particular care had to be taken when examining constraints which might operate as a form of censorship prior to publication. Although punitive fines and criminal sanctions could be effective in encouraging pre-notification, they would have a chilling effect on journalism, including political and investigative reporting, both of which attract a high level of protection under the Convention. Such a scheme would therefore run the risk of being incompatible with the Convention’s requirements of freedom of expression, guaranteed by Article 10 of the Convention. Having regard to the chilling effect to which a pre-notification requirement risked giving rise, to the doubts about its effectiveness and to the wide margin of appreciation afforded to the UK in this area, the Court concluded that Article 8 did not require a legally binding pre-notification requirement.

• Judgment by the European Court of Human Rights (Fourth Section), case of *Mosley v. United Kingdom*, No. 48009/08 of 10 May 2011  
<http://merlin.obs.coe.int/redirect.php?id=13310>

EN

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## EUROPEAN UNION

### Court of Justice of the European Union: Preliminary Ruling in Dutch 'ThuisKopie'-Case

On 16 June 2011, the European Court of Justice delivered its preliminary ruling concerning the interpretation of Art. 5(2)(b) and Art. 5(5) of Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society. Art. 5(2)(b) allows a private copy exception on the reproduction right of copyright owners, provided that the rightholders receive a fair compensation. According to Art. 5(5), such an exception may not conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the rightholder.

Questions arose in the case of Stichting de ThuisKopie ('the Stichting') versus Opus Supplies Deutschland GmbH ('Opus') and were referred to the European Court by the Hoge Raad (Dutch Supreme Court) on 20 November 2009. The Stichting is responsible for collecting private copying levies from importers and distributing these to rightholder organisations. In the Netherlands, such levies are based on Article 16c of the *Auteurswet* (law on copyright) and they are intended to finance the fair compensation paid to copyright holders on the basis of the exception for copying for private use. Opus is a Germany-based company that sells blank media via the internet. While its business focuses on the Netherlands, it does not pay private copying levies. Therefore, the Stichting brought an action against Opus before Dutch courts. Opus argued that it is not an importer; rather, that individual consumers must be classified as such since the goods are delivered from Germany on behalf of and in the name of the customer. This defence was accepted by the Dutch courts at first instance and on appeal. Thereupon, the Stichting lodged an appeal with the *Hoge Raad* (the Dutch Supreme Court).

The Hoge Raad questioned whether the abovementioned construction could be regarded as compatible with Directive 2001/29, as it has the effect that the levy cannot in fact be recovered. After all, in practice it is difficult to identify the individual purchaser. The first question in this regard was whether Art. 5(2)(b) and Art. 5(5) of the Directive provide any assistance in determining who owes the fair compensation under national law. The European Court notes that the provisions of the Directive do not expressly address the issue of who is to pay that compensation, leaving the Member State with broad discretionary powers. Finally, the European Court concluded that it is in principle the private user that has caused the harm to the rightholder and should therefore compensate this. However, given the practical difficulties in identifying the user, Member States may establish a private

copying levy chargeable to the persons who make reproduction equipment, devices and media available to the final user. The amount of that levy can consequently be passed on to the final user in the price paid for that service.

The second question concerned the issue of distance selling in which the buyer and the seller are established in different Member States. The *Hoge Raad* asked whether in such a case national law should be interpreted in such a way that fair compensation can be recovered from the person responsible for payment who is acting on a commercial basis. The European Court stated that Member States that have introduced a private copying exception must guarantee the effective recovery of the fair compensation for the harm suffered by the rightholders in the territory of that State. The fact that the seller is established in another Member State does not affect the obligation to achieve this result. Consequently, when the fair compensation cannot be collected from the final user, the national court may interpret national law in a way that allows for recovery of that compensation from the person responsible for payment who is acting on a commercial basis.

• Judgment of the Court (Third Chamber), 16 June 2011

<http://merlin.obs.coe.int/redirect.php?id=13382> DE EN FR

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### Court of Justice of the European Union: Opinion in RojTV/FRG Preliminary Ruling Procedure

On 5 May 2011, Advocate General (AG) Bot gave his opinion to the Court of Justice of the European Union (ECJ) in the joined cases C-244/10 and C-245/10. It concerned a reference for a preliminary ruling submitted by the German *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) on the interpretation of the ban on the broadcast of programmes that incite to hatred, enshrined in Article 22a of the "Television Without Frontiers" Directive 89/552/EEC (TWF, now: Article 6 of the Audiovisual Media Services Directive 2010/13/EU, AVMSD).

The related national procedure concerned an order issued by the *Bundesministerium des Innern* (Federal Ministry for Home Affairs), prohibiting the operator of Danish television channel RojTV from operating the channel under the scope of the German *Vereinsgesetz* (Associations Act) (see IRIS 2008-8/16). In its initial ruling, the BVerwG held that the programmes broadcast on RojTV glorified the armed conflict being



waged by the PKK against the Turkish Republic and therefore violated the ban on harming international understanding, set out in the German *Vereinsgesetz*. The BVerwG therefore asked whether the EU ban on the broadcast of programmes that incite to hatred included programmes that were likely to damage relations between Turkish and Kurdish groups living in Germany by glorifying the PKK (see IRIS 2010-4/16).

The AG explained that he could see no reason why the concept of incitement to hatred should be interpreted much differently to that of harming international understanding. In the AG's opinion, incitement to hatred meant an attempt to create a hostile or negative feeling towards another person who, as a result, was no longer able to live in harmony with the person attempting to create such a feeling. The terms "incitement to hatred" and "harming international understanding" referred to the same behaviour, since the concept of violation of international understanding could not, taking into account the basic right to freedom of expression, be interpreted so broadly as to include messages that were not likely to create a feeling of intolerance. On the other hand, the AG considered that, since the aim pursued by the Directive justified a broad interpretation of the concept of incitement to hatred on grounds of race and nationality, this should include programmes that could harm understanding between different ethnic or cultural communities, such as the Kurdish and Turkish communities living in Germany.

However, the AG admitted that, in its current form, the ban imposed by the German authorities could only prohibit the retransmission of the RojTV television signal to public locations and not to private households. A ban on any form of distribution could, if necessary, be imposed by implementing the procedure provided for in Article 2a TWF (Article 3 AVMSD), which enabled a member state, under the conditions laid down (including notification to the broadcaster and the European Commission, and consultation with the transmitting member state), to take restrictive measures against such programmes.

• Advocate General's opinion (C-244/10, C-245/10) of 5 May 2011

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**European Commission: Communication on a Single Market for Intellectual Property Rights**

On 24 May 2011, the European Commission adopted a Communication entitled "A Single Market for Intel-

lectual Property Rights". The Communication's overall objective is to encapsulate its strategic vision for creating a true European IPR regime capable of releasing the full potential of European inventors and creators, thus fuelling economic growth. According to the Communication, a Single European Market for IPRs, by doing away with the current fragmentation of the EU's IPR landscape, would contribute significantly towards creating and maintaining the momentum of a virtuous IPR circle. Alongside sections on modernising the patent and trademark systems in Europe and the complimentary protection of intangible assets, the Communication also included an examination of current copyright-related issues.

The Communication heralds the submission by the Commission in 2011 of proposals for the creation of a legal framework for the collective management of copyright to enable multi-territorial, pan-European licensing, as well as the revisiting in 2012 of the 2001 Copyright Directive as part of the programme set out in the Digital Agenda for Europe. Along this vein, the Communication also discusses the possibility of a more far-reaching overhaul of copyright in the EU through the creation of a European Copyright Code consolidating the present body of EU directives on copyright and related rights, though for the time-being it stops short of proposing concrete steps in this direction.

The Communication announces the Commission's intention of further examining the question of User-Generated Content, noting the growing realisation of the necessity of instituting efficient and affordable permission systems through which end-users can lawfully re-use third-party copyright-protected content, in particular for non-commercial purposes. Similarly, the Communication promises the redoubling of efforts to kick-start, on the basis of the draft Memorandum of Understanding brokered in 2009, a stakeholder agreement on the conciliation of private copyright levies and the smooth cross-border trade in goods subject to such levies. Also on the Commission's agenda for 2011 is the implementation of a two-pronged approach to the promotion of the digitisation and making available of the collections in Europe's cultural institutions, consisting of (a) the institution of collective licensing schemes for out-of-commerce works and (b) the adoption of a European legislative framework to identify and release orphan works to the public (see IRIS 2011-7/5).

Specifically with regard to audiovisual works, the Commission declares its intention of launching in 2011, with a view to reporting in 2012, a consultation on the online distribution of audiovisual works, addressing copyright issues, video-on-demand services, their introduction into the media chronology, the cross-border licensing of broadcasting services, licensing efficiency and the promotion of European works. An audiovisual Green Paper will also address the status of audiovisual authors and their participation in the benefits of online revenue streams.

Finally, the Communication also makes mention of its plans to extend the term of protection of performers' and producers' rights in the music field. The adoption of the relevant proposal for a directive is expected in the very near future.

It should be noted that, according to the Communication, the development of a fair and unified IPR regime should be undertaken in such a way as to ensure the promotion and preservation of cultural and linguistic diversity, while the protection of rights over intellectual assets should go hand in hand with the promotion of access and the circulation and dissemination of goods and services.

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe"

<http://merlin.obs.coe.int/redirect.php?id=13312>

DE EN FR

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### European Commission: European Commission Proposes a Directive on Orphan Works

On 24 May 2011, the European Commission adopted a proposal for a directive on certain permitted uses of orphan works, which is accompanied by an Impact Assessment and a summary. The objective of the proposal is to create a legal framework to ensure the lawful cross-border online access to orphan works contained in online digital libraries or archives and used in the pursuit of the public interest mission of specific cultural institutions.

Hence, the Commission does not adopt a generic approach to deal with the problem of orphan works in the proposal, but proposes a set of measures designed for specific situations in which the problem is considered to be particularly urgent, namely, in relation to mass digitisation projects. The proposal accordingly has a limited scope. It applies only to specific works contained in the collections of publicly accessible libraries, educational establishments, museums, archives (i.e., works published in the form of books, journals, newspapers, magazines or other writings) or film heritage institutions (i.e., cinematographic or audiovisual works) or produced by public service broadcasting organisations before 31 December 2002 and contained in their archives (i.e., cinematographic, audio or audiovisual works). Furthermore, the scope of the proposal is explicitly limited to works first published or broadcast in a member state.

Pursuant to the proposal, member states must ensure that, once such works qualify as orphan works, cul-

tural institutions are permitted to make them available to the public and to reproduce them. The works may not be used for purposes other than the public interest missions of preservation, restoration and the provision of cultural and educational access to works contained in the collections of the cultural heritage institutions. Member states may permit the use of orphan works for other purposes, but only on specific conditions. This includes the requirement of indicating, where possible, the rightsholder's name in any use of the work and of remunerating rightsholders that come forward claiming for the usage made. Claims for remuneration must be made within a fixed period not less than five years from the date of the act giving rise to the claim. In any case, cultural institutions must maintain records of their diligent search and publicly accessible records of their use of orphan works.

An "orphan work" is defined as a work the rightsholder of which is not identified or, if identified, has not been located after a diligent search has been carried out and recorded. A work shall not be considered to be an orphan work where it has multiple rightsholders and one of them has been identified and located. Rightsholders should be able to put an end to the orphan status of a work at any time.

The required "diligent search" is outlined in detail in the proposal and includes consultation of the appropriate sources for the category of works in question. What these are shall be determined by each member state, in consultation with rightsholders and users. They must include, as a minimum, the sources listed in the Annex to the proposal. The diligent search must be carried out in the member state of first publication or broadcast and the results of the executed search are to be recorded in a publicly accessible database in that member state.

Once a work, in accordance with these provisions, is considered an orphan work in one member state, it shall be recognized as an orphan work in the other member states. This means that a cultural institution that failed to identify or locate the rightsholder(s) of a work after a diligent search can use the work across the EU without the need to validate the orphan status of the work in each and every member state.

- Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final, Brussels, 24 May 2011

<http://merlin.obs.coe.int/redirect.php?id=15326>

DE EN FR

- Commission staff working paper, "Impact Assessment on the cross-border online access to orphan works accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works", SEC(2011) 615 final, Brussels, 24 May 2011

<http://merlin.obs.coe.int/redirect.php?id=13371>

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- Commission staff working paper, Summary of the Impact Assessment on the cross-border online access to orphan works accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, SEC(2011) 616 final, Brussels, 24 May 2011

<http://merlin.obs.coe.int/redirect.php?id=13372>

DE EN FR

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## Committee of the Regions: Opinion of the Committee of the Regions on 'European Cinema in the Digital Era'

On 27 January 2011 the Committee of the Regions (CoR) published an Opinion titled "European cinema in the digital era". The opinion addresses the important social and cultural role of European cinema, especially for local and rural areas where cinemas often provide the only access to culture for the community. The opinion focuses on a number of aspects of European cinema, such as the protection of cultural heritage, recognition of cultural industries, protection of the cinema industry, the need for public intervention at EU, national and LRA level and the encouragement of the European Commission's new MEDIA programme to support the digital transition of European cinemas.

One of the elements the Opinion emphasises is the positive effect that cultural industries have. They contribute to local and regional developments and make European regions more attractive. Furthermore, they help develop tourism, as well as stimulate employment. However, a number of small cinemas are on the brink of disappearing due to high financial costs. Hence, the Opinion advocates collaboration between smaller cinemas in order to preserve European cultural heritage and protect a pluralistic cinema industry. It is stressed that cinemas play a pivotal role in safeguarding and promoting local and regional cultural identities and diversity.

The Opinion presents a number of solutions designed to protect the cinema industry. Accordingly, local and regional authorities first need to acknowledge its economic and cultural importance and effectively intervene to protect the cinema industry. One way in which cinema may be protected is by digitisation. This offers new opportunities for small regional cinemas in Europe to exchange audiovisual works and content with each other. This can also create an opportunity to attract new audiences, take advantage of alternative content, provide new services and give more visibility to content from a variety of regions. The European Commission's new MEDIA scheme encourages cinemas to modernise and reduce the digital divide between member states. In order to increase the

success rate it is vital that information on best practices is shared between stakeholders, such as the European Commission, local and regional governments, film commissions and agencies and producers.

- Opinion of the Committee of the Regions on 'European Cinema in the Digital Era' (2011/C 104/07), 2 April 2011, OJ C104/31

<http://merlin.obs.coe.int/redirect.php?id=13311>

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## NATIONAL

### AT-Austria

#### OGH Confirms Obligation to Provide Information on Dynamic IP Address Users in Criminal Procedures

In Austria, Internet service providers are required to inform the public prosecutor's office, at its request, about the master data of the user to whom a particular IP address was assigned at a particular point in time. In a ruling of 13 April 2011, the Austrian *Oberste Gerichtshof* (Supreme Court - OGH) confirmed this on the basis of the legal situation before the introduction of data retention. It therefore rejected a nullity appeal lodged by the *Generalprokuratur* (Procurator General's Office).

The initial case concerned the identification of a suspect who was accused by the Steyr public prosecutor's office of using false account numbers to buy online tickets from the website of the state railway company, ÖBB (*Österreichische Bundesbahnen*), between 4 May and 1 June 2009. The public prosecutor's office ordered that the relevant "master data documentation" should be obtained. The Internet provider concerned opposed this order, but its objection was rejected by the *Landesgericht Steyr* (Steyr district court).

The *Generalprokuratur*, a special public prosecution office that acts as custodian of the law within the Austrian legal system, then lodged a nullity appeal. It argued, *inter alia*, that the secrecy of telecommunications, protected under Article 10a of the *Staatsgrundgesetz* (Basic Law - StGG), covered, according to an accurate interpretation, not only the content, but also the traffic data that "often refers to the content of the communication". It argued that, if the provider had to access traffic data in order to obtain requested



master data, it would be processing traffic data, which was protected by Article 10a StGG. An infringement was therefore committed even if the data was processed not by a State authority, but by a private entity acting “on behalf of the State and exclusively for State purposes”. According to Article 10a(2) StGG, this was only admissible on the basis of a judicial warrant.

The *Generalprokuratur* also considered that the obligation to disclose master data only applied if the traffic data that needed to be processed for this purpose had been legitimately stored. However, under the flat-rate tariffs for Internet access that were now in common use, storage for billing purposes was no longer necessary. Therefore, this data should, as a rule, be erased after disconnection from the Internet.

The OGH disagreed. It thought it was irrelevant whether the provider needed to process traffic data internally in order to issue information about master data. Confirming a decision it took in 2005, it ruled that telecommunications secrecy was not infringed if the “secret is not leaked”. Since data processing by a party in possession of confidential information was not the same as that carried out by State bodies, a judicial warrant was not required for the disclosure of master data.

Furthermore, operators were required under Article 103(4) of the *Telekommunikationsgesetz* (Telecommunications Act - TKG) to make “technical and organisational arrangements” to ensure that such requests for information could be complied with. This was a sufficient basis for processing traffic data even after disconnection. Otherwise, the OGH ruled, “the storage of traffic data would be totally prohibited” and “any investigation and prosecution of criminal offences would be de facto impossible”. It was “obvious” that this was not the legislature’s intention.

The first civil court of appeal of the OGH ruled differently last year: with reference to the relationship between data protection and copyright law, it concluded that the obligation to erase traffic data that was no longer needed for the purpose for which it had been stored, meant that it could not be used to identify people who had used file-sharing networks to commit offences (see IRIS 2009-9/7).

• *Urteil des OGH vom 13. April 2011 (Az. 15 Os 172/10y)* (OGH ruling of 13 April 2011 (case no. 15 Os 172/10y))  
<http://merlin.obs.coe.int/redirect.php?id=13379>

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**Film Producers Granted Injunction Against  
Provider of Streaming Platform [www.kino.to](http://www.kino.to)**

An Austrian and a German film producer have, with

the support of the *Verein für Antipiraterie* (Anti-Piracy Association - VAP), been granted an injunction against one of the largest Austrian Internet access providers by the *Handelsgericht Wien* (Vienna Commercial Court).

The operators of the Internet platform *kino.to*, which was the subject of the dispute and provides links to streams of copyrighted films, are thought to be based in Russia and were therefore beyond the plaintiffs’ reach.

The Internet access provider, which provides access to the portal *kino.to* (as do virtually all other providers in Europe), had previously been cautioned and informed that films such as the award-winning Austrian title “The White Ribbon” were illegally available on the site. It had ignored a request to block customer access to this site. The two producers therefore took legal action to prevent it from allowing its customers to access *kino.to* if films that they had produced were being made available to the provider’s customers on the website. This was to be achieved by blocking the relevant domain and IP addresses. At the same time, the plaintiffs filed for a temporary injunction until the matter could be resolved in ordinary civil proceedings.

The Vienna Commercial Court has now taken the first step by granting the temporary injunction. It ruled that the portal *kino.to* was being used to infringe the film producers’ right to make their films available, enshrined in Article 18a of the *Urheberrechtsgesetz* (Copyright Act - UrhG), even though the portal did not produce pirate copies itself but used copies illegally made available by third parties. *Kino.to* had to take responsibility for these copies. According to Article 81(1a) UrhG, it is possible to apply for an injunction against intermediaries whose services are used by a third party to commit an infringement, in application of Article 8(3) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. If the intermediary is a provider in the sense of the *eCommerce-Gesetz* (E-Commerce Act), it must be warned in advance, as was the case here.

The defendant particularly disputed the claim that, as a mere access provider, it was an intermediary in this sense. However, this was rejected by the first instance court. It was true that access providers were not under a general obligation to monitor all content. However, this did not mean that copyright infringements on the Internet should never lead to the access provider being issued with an injunction or special monitoring obligation. The plaintiffs had correctly pointed out that end users had no legitimate right to use the illegally provided content and that providers were not entitled to distribute it.

However, there seems to be a problem with this decision, since it is not only access to illegal content that will be blocked, but also access to legally available content. The access provider will therefore be obliged



to check which content may be distributed to its customers. An appeal has been lodged against the decision; meanwhile, access to the platform is blocked.

• *Pressemitteilung der VAP vom 17. Mai 2011* (VAP press release of 17 May 2011)  
<http://merlin.obs.coe.int/redirect.php?id=13352>

DE

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## Data Protection Commission Approves Google Street View

The Austrian *Datenschutzkommission* (Data Protection Commission - DSK) has approved the Google Street View service for Austria under certain conditions.

Google Street View was first registered with the DSK in January 2010. After it was revealed in spring 2010 that Google collected and, in some cases, recorded, WLAN data when gathering images for the Street View service, the DSK instigated a test procedure in accordance with Article 30 of the 2000 Data Protection Act (DSG 2000). Google subsequently erased the data it had collected and promised that no more WLAN data would be gathered by Street View vehicles.

The DSK has now approved the registration of Google Street View, subject to three conditions. Firstly, where pictures of people are taken in particularly sensitive areas, their whole body must be disguised, rather than just their faces. Particularly sensitive areas include entrances to churches and other places of worship, hospitals, prisons and women's refuges. Secondly, images of private properties that cannot be seen by passersby, such as private gardens and courtyards, must also be disguised. Finally, affected parties must, according to Article 28(2) DSG 2000, be granted the right of appeal from the time the data is collected. It should be possible to launch the appeal process, which must be simple and effective, before the images are published. In particular, information about the right of appeal and how to exercise it must be made available before images are published on the Google website. The first two conditions must be met before the data is published on the Internet, and the third at least 12 weeks before publication.

If these conditions are not met, Article 30(6) DSG 2000 states, *inter alia*, that the registration may be reviewed or a charge may be brought under Article 52 DSG 2000.

• *Informationen der DSK zur neuesten Entwicklung betreffend Google Street View* (DSK information about the latest development concerning Google Street View)

<http://merlin.obs.coe.int/redirect.php?id=13351>

DE EN

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## BA-Bosnia And Herzegovina

### Amendments to the BHRT Statute Adopted

On 26 April 2011 the BHRT's (Radio and Television of Bosnia and Herzegovina) Governing Board - composed of four appointed members - adopted amendments to the BHRT Statute.

The Statute now entrusts the Board with full editorial and managerial control over the broadcaster, including the prior approval of programmes and the recruitment of editors, which actually should be the role of the Director General.

The OSCE Representative for the Media criticised these developments as "a further indication of the crisis and stalled reform process of the public service broadcasting system in Bosnia and Herzegovina, [which] also highlights the urgent need for the Parliament to appoint two members of the BHRT Governing Board, to replace those whose mandates expired one and two years ago. [...] Public service broadcasting is one of the basic tools of democracies. The objective and pluralistic news it can offer is indispensable in ensuring the freedom and transparency of elections, in fighting against corruption and in informing the people about all issues of public importance. Public broadcasters can only do so if their infrastructure is legally protected, including a guaranteed editorial autonomy."

• *Izmjene i dopune Statuta BHRT-a 28.04.2011 (koji je dostavljen poslovodstvu BHRT-a 18.05.2011)* (Amendments to the BHRT Statute)  
<http://merlin.obs.coe.int/redirect.php?id=13298>

BS

• OSCE Representative on Freedom of the Media, Regular Report to the Permanent Council, 23 June 2011

<http://merlin.obs.coe.int/redirect.php?id=13362>

EN

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## BG-Bulgaria

### European Commission Commences Infringement Procedure against Bulgaria

The European Commission has launched an infringement procedure against Bulgaria over irregularities in the selection procedures for the companies to build the platforms for digital distribution of radio and television programmes (multiplexes, see IRIS 2011-4/12). Reportedly, in the Commission's view, the selection method includes some discriminatory conditions, such as the requirement that bidders shall not perform television activities abroad. Applying the latter condition, the Austrian company ORS was disqualified from the selection process.

In 2009 the Bulgarian Constitutional Court decided on the constitutionality of some provisions of the Electronic Communications Act (ECA) and the Radio and Television Act (RTvA): the claimants had alleged a non-compliance of Art. 47460, Art. 48, para 3 and 4 ECA and Art. 116i RTvA with Art. 19, para 1, 2 and 3 of the Constitution. The latter deals with the free economic initiative and equal legal conditions for businesses with the aim to prevent abuse of monopoly and unfair competition and to protect consumers. It also provides for the protection of investments and of the businesses of Bulgarian and foreign individuals and legal entities. The Court ruled that such non-discrimination conditions are not absolute and therefore do not preclude neither the existence of restrictions nor the possibility to set requirements on economic activities by law and hence they do not infringe free economic initiative (see IRIS 2009-8/8).

The amendments to the ECA and the RTvA aim at putting in place a new legal framework on digital terrestrial broadcasting that will ensure the successful transition from analogue to digital broadcasting. The claimants think the provision of Art. 47460 ECA curtails the constitutional right of individuals and legal entities in the country to free economic initiative. In their view investments are not protected nor are the businesses of Bulgarian/foreign individuals and legal entities. Against this it is argued that although radio/TV activities comprise the production of radio/TV programmes and having the productions broadcast by terrestrial dissemination (analogue and digital) in a way to reach a unlimited audience, there would be no need for the productions of a radio/TV operator to be broadcast by the operator's own network. The limitation of Art. 47460 ECA on the licenses to radio/TV operators and related parties to use radio frequency spectrum and the ban of Art. 48, para 3 ECA on a multiplex operator and related parties to be radio/TV operators and to produce radio/TV programmes were the lawmakers' efficient tools to enforce the principles

of free economic initiative, prevent unfair competition and to protect the rights of Bulgarian and/or foreign individuals and legal entities. It is to protect public interest that a differentiation is made in Art. 47460 and Art. 48, para 3 and 4 ECA, that a multiplex operator and a radio/TV operator shall be separate persons. The placement of the two types of activities into one entity would lead to a monopolistic position and thus infringe consumer rights.

Another violation mentioned by the Commission is that the Bulgarian State was not entitled to reserve the Sofia air only for the Bulgarian National Television since the latter had no regional programming license for this very territory at that time. By doing so, the private broadcaster Evropa was not able to participate in the selection procedure.

The third Commission's remark refers to the requirement that there are some mandatory "must carry" programmes to be broadcast by the multiplexes. In 2009 the mandatory status was granted to bTV and Nova TV (see IRIS 2009-4/7) and in 2010-2011 such a status was given to bTV Action, TV7, MSAT, Darik and BBT. According to the European rules such an obligation can be applied only in exceptional cases.

Now, Bulgaria has two months to reply to the Commission's remarks. The tender for four out of the total six multiplexes, including the public multiplex, which would broadcast the programmes of the Bulgarian National Radio and the Bulgarian National Television, was won by the Latvian company Hannu Pro. Two of the frequencies have been granted to Towercom, which was subsequently acquired by NURTS Bulgaria - a joint-venture between the Bulgarian Telecommunications Company EAD and the offshore Cypriot company Mancelord Limited (see IRIS 2011-4/12) represented by the majority shareholder of the Corporate Commercial Bank.

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### Bulgarian Programmes Addressed to Audience outside of Bulgaria

On 7 June 2011 the Council of Ministers submitted a new Bill to amend the Закон за електронните съобщения (Electronic Communications Act - ЗЕС ) to the Parliament.

Some of its provisions impose new rules on entities which create radio and television programmes in Bulgaria with the purpose to transmit those programmes only abroad. In this connection, in the Transitional and Final Rules of the Bill, some new provisions also to the Закон за радиото и телевизията (Radio and Television Act of 1998 lastly amended in State Gazette No 28 of 5 April 2011 - ЗРТ ) are added.

A new section is created in chapter 7 of the ЗРТ titled "Registration of Radio and Television Operators Creating Programmes Addressed to Audience Outside the Republic of Bulgaria". There are two groups of such operators: those who want to transmit their programmes in Bulgaria and abroad and those who want to create programmes that will be transmitted only beyond the territory of Bulgaria.

According to the proposal the operators from the first group shall be registered under the general rules for the registration of Bulgarian radio and television operators and for the operators belonging to the second group special rules shall be provided. The latter shall submit to the Council for Electronic Media (CEM) an application accompanied by the same set of documents as the operators from the first group except the following:

1. A certification that the applicant does not have any financial obligations to the State of Bulgaria;
2. A declaration that the applicant does not hold any interests, shares or rights or any other kind of participation in radio and television operators in excess of the permissible limit according to the anti-trust legislation of the Republic of Bulgaria;
3. A declaration that the circumstances under Art. 105 para 4 ЗРТ do not apply for the applicant (this article rules which persons are ineligible to apply for such registration);
4. Preliminary copyrights licensing contracts concerning the use of protected works in the programme and preliminary neighbouring rights licensing contracts regarding the dissemination of programme services of others.

The CEM cannot limit the territory in which a programme shall be disseminated. According to the proposal the certificate for the registered programme also will not contain any information on the territory in which the programme will be transmitted.

At the same time enterprises that are re-broadcasting these programmes making the up-link from Bulgaria to another territory shall provide to the CEM evidence for a settlement of the copyrights and neighbouring rights concerning the dissemination of the programme and protected works incorporated in it.

The conclusion is, that according to the recent Bill the CEM will not exercise any effective control whether the radio and television operators follow copyrights and neighbouring rights of protected works used in their programmes re-broadcast outside of Bulgaria, but will control the enterprises that make the up-link of the programme every six months.

• Проект - Закон за изменение и допълнение на Закона за електронните съобщения (Обн., ДВ, бр. 41 от 2007 г.; изм. и доп., бр. 109 от 2007 г., бр. 36, 43 и 69 от 2008 г., бр. 17, 35, 37 и 42 от 2009 г.; Решение № 3 на Конституционния съд от 2009 г. - бр. 45 от 2009 г.; изм. и доп., бр. 82, 89 и 93 от 2009 г. и бр. 12, 17, 27 и 97 от 2010 г.) (Bill to amend the Electronic Communications Act)  
<http://merlin.obs.coe.int/redirect.php?id=13358>

BG

**Ofelia Kirkorian-Tsonkova**  
*Attorney at law*

### Governmental Intentions Regarding the Financing of Film Production

After the Constitutional Court had repealed a provision by which the ruling majority attempted to restrict State subsidy for film productions (see IRIS 2011-5/8), on 3 June 2011, in the course of the Parliamentary control, the Minister of Culture explained that he would request from the budget an amount of BGN 16,6 million to be allocated to the field of film production.

The Minister also mentioned that all his predecessors had signed contracts for film productions without any financial support. According to him in 2008 the budget of the National Film Centre was BGN 5,7 million, whereas the approved projects totalled up to three times more.

In 2010 a total of 144 films was produced (full-, short- and middle-length films). In comparison to 2009 the total number of all films produced increased by 30.9 percent (34 films).

The number of documentary and educational short-length films in 2010 was 1,7 times higher than in 2009. The total of feature short- and medium-length films in 2010 was 17, i.e. 7 films more than produced in 2009. In 2010 the full-length films decreased by 1,8 times - 17 films in total.

The number of films produced for television broadcasting in 2010 increased totalled 69.4 percent of all produced films, which is 16.1 percent compared to 2009.

• Парламентарен контрол 03/06/2011 (Further information on the Parliamentary control)  
<http://merlin.obs.coe.int/redirect.php?id=13357>

BG

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## New Tariff on Radio and Television Activities Fees

By Regulation No 108 dated 26 April 2011 approving the Tariff of Radio and Television Activities Fees (promulgated in the State Gazette, issue No 35 dated 3 May 2011) the Council of Ministers of Bulgaria, acting on the grounds of Art. 102, para 6 of the Radio and Television Act, adopted a new tariff of the radio and television fees and repealed the old tariff, which was adopted by the Council of Ministers in 2006 (Regulation No 135 of the Council of Ministers, promulgated in the State Gazette, issue No 49 of 2006).

The new tariff reflects the changes made in the Radio and Television Act concerning the procedures for the issuance of licenses for television activities and for the creation of programmes aimed at broadcasting through electronic communications networks for terrestrial digital radio transmission (see IRIS 2010-2/6).

The radio and television activities fees are determined in accordance with the following principles:

- Equality between radio and television broadcasters;
- Proportionality with regard to the administrative expenses;
- Promotion of competition and provision of new services; and
- Consumer satisfaction of quality radio and television services.

The new tariff is effective from 3 May 2011.

• ПОСТАНОВЛЕНИЕ № 108 ОТ 26 АПРИЛ 2011 Г. за одобряване на Тарифа за таксите за радио - и телевизионна дейност (Regulation No 108 dated 26 April 2011 approving the Tariff of Radio and Television Activities Fees (promulgated in the State Gazette, issue No 35 dated 3 May 2011))

<http://merlin.obs.coe.int/redirect.php?id=13302>

BG

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## Report on the Activities of the Media Regulator

According to a report on the activities of the Council for Electronic Media of Bulgaria for the year 2010, two licenses for the digital broadcasting of “must carry” programmes have been issued, namely to Towercom Bulgaria EAD and Hannu Pro Bulgaria EAD. The procedure for granting the licenses was completed in February 2011.

During the reported period the procedure for granting licenses for television activities in accordance with the digital broadcasting agreement method was also finalised.

The following issues of concern have been raised in the regulator’s report for the second half of the previous year:

- Intellectual property protection efforts in the activities performed by media service providers;
- Consumer protection within the organisation of radio and television programmes where SMS-communication or other types of audience participation are required;
- Consumer protection through technology neutrality of commercial text in comparison to other content;
- Protection of content variety by introducing a period of prescription on the right to mandatory digital broadcasting of “must carry” television programmes;
- Protection of media independence through redrafting the definitions of national, regional and local programmes and by recognising legally the existence of radio chains.

• Стенограма от пленарното заседание на Народното събрание на Република България на 11 май 2011 г. по т.2 от дневния ред относно Отчет за дейността на Съвета за електронни медии за периода от 1 юли до 31 декември 2010 г. с вносител Съвет за електронни медии (Transcript of the plenary session of the Bulgarian National Assembly of 11 May 2011)

<http://merlin.obs.coe.int/redirect.php?id=13303>

BG

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## CY-Cyprus

### Digital Switch-over Regulated with Amending Radio and Television Law

The Republic of Cyprus is only days away from the digital switch-over on 1 July 2011 and is completing all necessary measures for a smooth transfer. Amendments of the Act on Radio and Television Stations L. 7(I)/1998 (Ο περί Ραδιοφωνικών και Τηλεοπτικών Σταθμών Νόμος ), voted on by the House of Representatives in mid-April, providing for the procedures that radio and television organisations should follow in order to continue operation in the new environment.

The amendments adopted were of a much narrower scope than those proposed in the draft Law (see IRIS 2011-5/11); in view of the urgent need for a swift transfer to the digital environment the House might



have opted to examine further changes at a later stage.

The amending Law provides for the following:

The Act's title changes from 'Act on Radio and Television Stations' to 'Act on Radio and Television Organisations', while the regulator's name remains 'Radio Television Authority'. The position of the Chairman of the Authority changed and the holder of the post will assume full-time executive functions. A renewal of the chairman's term of office is possible for a second mandate.

Existing licence holders are considered to be licensees under the new act, while new applicants may be granted a temporary licence expiring on 30 June 2011. In the meantime, the Radio Television Authority is examining applications for digital transmission licenses that will be effective as from 1 July 2011. Any transmission after that date requires a new licence for the transmitting organisation.

The license fee is set to EUR 51,400 per year for television operators; operators must also pay an additional fee of 0.5% of their income from advertising.

Other issues regulated by the amending act are the following:

- Definitions in order for both, broadcasters and audiovisual media service providers to be covered by the Law.

- The obligation of operators to transmit free of charge messages of the Radio Television Authority that are 'directly related' to the regulator's functions and mission.

- Time and other conditions for the transmission of specific categories of advertising, such as dating and sensual messages, competition games and gambling.

As mentioned above, the act is already promulgated and a number of new and digital licences have been granted by the Authority. In the digital environment, all local stations are turning into island-wide operators.

In the course of the digital switch-over Velister Ltd., the company that holds the licence of the commercial digital platform, and the Office of the Commissioner for Electronic Communications and Postal Services are considering with broadcasters and audiovisual media services operators a draft document on the terms and conditions that will govern the relationship (rights and obligations) between Velister Ltd. and those seeking access to the digital platform.

• L.73(I)2011, Επίσημη 3253063671365301 371364361, 28/04/2011 (Act L.73(I)2011 amending the Act on Radio and Television Stations L. 7(I)/1998, Official Gazette of 28 April 2011)

EL

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## DE-Germany

### KJM Criteria for Recognition of Youth Protection Programs

The *Kommission für Jugendmedienschutz der Landesmedienanstalten* (Land Media Authorities' Commission for the Protection of Minors in the Media - KJM) published criteria for the recognition of youth protection programs on the World Wide Web on 11 May 2011.

The KJM's discussions were based on the notion that providers of content that is potentially dangerous to young people or their development can fulfil their protection obligations under the *Jugendmediensstaatsvertrag* (Inter-State Agreement on Young People in the Media - JMStV) by setting up recognised youth protection programs for their content. The recently published document is designed to provide information about the conditions for such recognition.

The KJM begins by describing youth protection programs as user-independent youth protection filters, i.e., technical filter systems that provide users (who are minors) with age-appropriate access to telemedia services and can be switched on and off, and configured and expanded by parents or guardians. They must also be functional, manageable and compatible with other applications, it must be possible to update their content and technical elements, and they should be easy for parents/guardians to use and, at the same time, difficult for children and young people to bypass. Programs must also be as reliable as possible at blocking unsuitable content, with a block rate of at least 80%, block all content indexed by the *Bundesprüfstelle für jugendgefährdende Medien* (Federal Department for Media Harmful to Young Persons - BPjM) and allow parents/guardians to expand the list of blocked content. Finally, they must provide minors with access to telemedia services appropriate to their age, offering different settings for different age groups, and be able to read and interpret standardised, machine-readable age classifications accurately and reliably.

In addition to the program recognition criteria, the KJM indicates the type of proof that providers must supply or the procedures they must complete in order to show that each individual condition has been met. These conditions are expressly non-exhaustive and open to future technical or content-related adjustments.

• *Informationen der KJM für Betreiber und Anbieter von Jugendschutzprogrammen* (KJM information for youth protection program operators and providers)

<http://merlin.obs.coe.int/redirect.php?id=13355>

DE

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## Hessen Presents Cinema Digitisation Support Programme

At the end of April 2011, the *Hessische Ministerium für Wirtschaft, Verkehr und Landesentwicklung* (Hessian ministry for the economy, traffic and regional development) presented a new cinema digitisation support programme.

The programme is one of the measures being financed by the Hessen region from funds granted by the European Regional Development Fund for the 2007-2013 period. The aim is to help Hessian cinemas switch from analogue to digital projection technology with reference to the European Commission Communication of 24 September 2010 on the digitisation of European cinemas (see IRIS 2010-10/8).

Funding applications can be submitted by cinemas with six or fewer screens per venue and annual total net ticket revenue of between EUR 40,000 (or at least 8,000 tickets) and EUR 260,000, calculated as the average of the three years prior to submission of the application. Commercial cinema operators must also be small or medium-sized companies with fewer than 250 staff and a maximum annual turnover of EUR 50 million.

The funding must be used to support the cinema's initial conversion to digital projection technology, i.e., the purchase and installation of the necessary equipment.

The funding can cover up to 25% of the investment costs, representing no more than EUR 17,500 per screen. These figures can be raised to 30% and EUR 21,000 if certain cultural (high proportion of German/European films) and/or structural (located in a town with fewer than 20,000 inhabitants) criteria are met.

The funding may be granted alongside other aid measures, as long as these do not include European Union funding and the beneficiary covers at least 20% of the overall cost from its own funds. A further condition for the allocation of funds from this programme is the support of the *Beauftragte der Bundesregierung für Kultur und Medien* (Federal Government Commissioner for Culture and Media - BKM).

The overall budget for this programme is EUR 2 million, which is available until 31 December 2013. The application deadline is 31 December 2012.

• *Informationen und weiterführende Links zum Hessischen Programm zur Kinodigitalisierung* (Information and links to the Hessian cinema digitisation programme)

<http://merlin.obs.coe.int/redirect.php?id=13354>

DE

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## Bundestag Publishes Data Retention Report

In a recently published report, the *Wissenschaftliche Dienst* (research office) of the German *Bundestag* (lower house of parliament) concluded that the EU's Data Retention Directive 2006/24/EC was incompatible with the Charter of Fundamental Rights of the European Union (see IRIS 2010-4/12). The report stated that there was "definitely no way of interpreting this Directive [04046] in a way that is compatible with the Charter."

The *Wissenschaftliche Dienst* began by recognising the legitimacy of the purpose, suitability and necessity of the Directive. The objectives of protecting public order, preventing and prosecuting criminal offences and safeguarding the rights and freedoms of others were "legitimate aims because they are in the public interest, and should meet the requirement set out in Article 8(2) ECHR". The Directive was suitable because it provided abstract, general scope for decision-making. It was also necessary, firstly because "the storage of data for no reason is more extensive and therefore more secure and effective than individual suspicion-based storage requests". Secondly, it could not be assumed with any certainty that the more lenient "quick-freeze procedure" was as effective, especially as it could be rendered ineffective by the generally strict data protection laws in this part of the world.

However, with regard to reasonableness, the *Wissenschaftliche Dienst* declared that the Directive was incompatible with the Charter of Fundamental Rights. Aspects relevant to basic rights were data usage, the type of data stored, the length of period of storage and the burden placed on service providers by the cost of storing data. In view of an "only marginal 0.006%" improvement in the crime detection rate, the purpose of the Directive and the means used to achieve it were not proportionately balanced. The *Wissenschaftliche Dienst* paid particular attention to telecommunications providers in this regard, considering that the heavy burden placed on them by the Directive in its current form constituted an unreasonable infringement of their basic right to professional and economic freedom.

The future of data retention remains uncertain, pending a review by the ECJ. According to the *Bundestag* report, it represents one of the most controversial fields of security-related legislation. Its supporters, for example, believe that data retention for a minimum storage period of six months is an indispensable tool for “identifying terrorist networks”. Critics, on the other hand, claim that the data is unlikely to be used very often and warn of the risk of data misuse and profiling.

• *Gutachten (Az. WD 11 - 3000 - 18/11) vom 25. Februar 2011* (Report (no. WD 11 - 3000 - 18/11) of 25 February 2011)

<http://merlin.obs.coe.int/redirect.php?id=13353>

DE

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## FR-France

### **Council of State Revokes Application of Private Copying Levy to Products Acquired for Professional Purposes**

In a decision of 17 June 2011, the *Conseil d'Etat* (Council of State) revoked the application of private copying levies to products acquired for professional purposes. Under Article L. 311-1 of the Intellectual Property Code, which transposes Directive 2001/29/EC, the authors, performers and producers of works fixed on phonograms or videograms are entitled to compensation for the reproduction of their works for private copying purposes. Authors and producers of works fixed on any other media for their reproduction for private copying purposes on a digital recording device are also entitled to the compensation. Article L. 311-5 of the Code entrusts a committee (known as the “Private Copying Committee”) with the task of determining the types of equipment, rates of compensation (which depend on the type of equipment and the maximum length of recording) and how the compensation should be paid.

A number of companies and professional associations of equipment manufacturers and retailers asked the *Conseil d'Etat* to revoke the decision of 17 December 2008 in which the Private Copying Committee had extended the compensation scheme to include certain “new” media and fixed the relevant levies. The applicants disputed the inclusion in the scheme of products acquired by professionals for purposes other than private copying. In its decision, the *Conseil d'Etat* set out the principles governing compensation for private copying. It then pointed out that, in its Padawan judgement of 21 October 2010, the Court of Justice of the European Union, ruling on a preliminary question, said that the indiscriminate application of the private

copying levy, particularly to equipment, devices and digital reproduction media that were not sold to private users but clearly intended for uses other than copying for private use, was incompatible with Directive 2001/29/EC. The *Conseil d'Etat* therefore revoked the disputed decision of the Private Copying Committee to apply the levy to all equipment without the possibility of exempting devices acquired, particularly for professional purposes, “whose conditions of use do not suggest that they are to be used for private copying purposes”. The fact that the committee had calculated the rate of remuneration for certain equipment depending on the extent to which it was used for professional purposes was deemed irrelevant by the *Conseil d'Etat*.

In principle, when an administrative act is revoked, it is considered never to have existed. However, it is thought that, if this act was revoked retroactively, both rightsholders and companies which had paid the levy would face considerable uncertainty, with the risk of requests for reimbursement or additional payments so numerous that the future of the whole private copying compensation system could be seriously affected. For this reason, the *Conseil d'Etat* ruled that the decision should be revoked after a period of six months. This delay should enable the committee to set out new remuneration scales, taking this decision into account. The rightsholders, for their part, believe that “it is now up to the public authorities and the Private Copying Committee to make the necessary adjustments to the private copying remuneration mechanism, while safeguarding the fair compensation of rightsholders.”

• *Conseil d'Etat (10e et 9e sous-sect. réunies), 17 juin 2011 - Canal + Distribution, Motorola, Nokia et a.* ( Council of State (10th and 9th sections combined), 17 June 2011 - Canal + Distribution, Motorola, Nokia et a.)

<http://merlin.obs.coe.int/redirect.php?id=13350>

FR

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### **Fortuitous Inclusion of a Work Upheld as an Exception to Copyright Protection**

The documentary entitled “To Be and To Have” (*Etre et Avoir*), first shown in 2002 and devoted to a single-class rural school, has not only made a name for itself in French cinema history - it has also contributed to making legal progress! After the courtroom saga between the main character in the film, the teacher Mr Lopez, who denounced “infringement of copyright by the non-authorised exploitation of his rights as an author and performer, as well as infringement of his exclusive rights in respect of his image, his name and his voice”, has taken the matter as far as the court of cassation in order to obtain compensation from the director, co-producer and distributors of the film (see



IRIS 2004-10/11), and the court has been called on to pronounce in another dispute, nearly ten years after the film was first shown!

A draughtsman, who was the illustrator of a reading method entitled “Gafi le fantôme”, and the Société des Auteurs et Arts Visuels et de l’Image Fixe (society of authors, visual arts and fixed image - SAIF), of which he is a member, had the film’s production company summoned on a charge of infringement of copyright. They claim that, on a number of occasions in the course of the film and without being authorised to do so, it had reproduced and represented these illustrations. The judges on the merits of the case had rejected the applications on the grounds that the illustrations were merely “accessories” to the main subject of the film and that there was no infringement of copyright in respect of the works. In support of their appeal before the court of cassation, the applicants claimed that in doing so the court of appeal had made an exception to the applicant’s rights that was in no way provided for but indeed was actually excluded by Article L. 122-5 of the intellectual property code (CPI), as worded as a result of the Act of 1 August 2006 transposing the Directive of 22 May 2001 into national law.

The court of cassation recalled that, as the court of appeal had noted, the disputed illustrations, as shown in the documentary at issue and in the bonus material on the DVD, were merely swept by the camera and seen only in passing. More frequently, they were in the background, as only the characters of the schoolchildren and their teacher were kept in the foreground. They were not at any time presented in terms of their use by the teacher, and formed part of the decor, of which they were a habitual element, appearing for short periods of time but never being represented in their own right. The court of cassation found that the court of appeal has deduced correctly that such a presentation of the disputed work was “accessory to the subject being treated”, which was the documentary representation of the lives of and relations between the teacher and the children of a single-class rural school. It should therefore be seen as the “fortuitous inclusion of a work”. However, the court felt that such an inclusion constituted a limitation on the author’s monopoly within the meaning of Directive (EC) 2001/ 29 of 22 May 2001, as intended by the legislator for transposition into positive law, in accordance with the preparatory work for the Act of 1 August 2006.

This judgment is therefore of note in that it creates an exception to copyright protection that was not included in the Intellectual Property Code.

• *Cour de cassation (1re ch. civ.)*, 12 mai 2011 - M. Schikler, dit Merel, et SAIF c. Maia Films (Court of cassation (1st civil chamber), 12 May 2011 - Mr Schikler, known as Merel, and SAIF v. Maia Films) FR

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## Referring Viewers to a specific Social Network Constitutes a Form of surreptitious Advertising

The *Conseil Supérieur de l’Audiovisuel* (audiovisual regulatory body - CSA) received an application from a television channel on the admissibility of referrals to the pages dedicated to its programmes on a number of social network sites under the regulations on advertising. Indeed happens frequently that a television channel or radio station refers viewers or listeners to the pages devoted to its programmes on a number of social networks including Facebook, or invites them to react on the Twitter social network. In a decision adopted on 12 April but not made public until 27 May, the CSA replied that the practice consisting of referring viewers to a social network without giving its name was informative. On the other hand, referring them to a specifically named network took on an advertising aspect. There was a commercial company behind the network, and its name was registered as a brand name. The practice therefore contravened the provisions of Article 9 of Decree No. 92-280 of 27 March 1992, which lays down the general principles defining the obligations incumbent on editors of services in respect of advertising, sponsorship and tele-shopping. According to these provisions, “Surreptitious advertising is not allowed. (...) Surreptitious advertising comprises the verbal or visual presentation of goods, services, the name, the brand name or the activities of a producer of goods or a provider of services during programmes where such presentation is made for advertising purposes.”

The parties concerned, headed by the television channels, as well as a large number of commentators, both French and of other nationalities, have severely criticised both the decision and the position adopted by the regulator, which are considered archaic. To such an extent that the CSA, “in order to dissipate the misunderstanding”, went on to publish on 6 June the full text of the letter it had sent to the channels. Christine Kelly, advisor to the CSA, added her own justification: “We encourage the use of social networks - it is not a matter of blocking them. CSA members spend hours on them. We are merely emphasising that what should be said is ‘find us on the social networks’ rather than ‘find us on Facebook’”, she added, stressing that there are other social networks. “Favouring one over the others distorts competition.” For Michel Boyon, Chairman of the CSA, “If the CSA had adopted the opposite position, there’s no doubt that any of the other social networks would have had a case against us before the Conseil d’Etat.” But he did wonder, “The time seems to have come for the Government and Parliament to embark on consideration with the bodies and professionals concerned - should the regulations on advertising on the audiovisual media, particularly as regards referring to products, services and brands by name, not evolve in keeping with the transformations



that are affecting technologies and society?" That is the question.

• *Renvoi sur les pages des réseaux sociaux : analyse du Conseil, 12 avril 2011* (CSA Analysis, 12 April 2011)

<http://merlin.obs.coe.int/redirect.php?id=13347>

FR

• *Renvoi sur les pages des réseaux sociaux : le CSA publie la lettre envoyée aux chaînes, 6 juin 2011* (Publication of the CSA Letter sent to TV Channels, 6 June 2011)

<http://merlin.obs.coe.int/redirect.php?id=13348>

FR

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### Agreement Signed on Digitising the Cinematographic Heritage

Having already committed itself to the digitisation of its cinema theatres (see IRIS 2011-XXX), the French State has now announced the setting up of a wide-ranging system for financing the digitisation of the restoration of its cinematographic heritage.

Firstly, on 15 May 2011, as part of the "Investing in the Future" programme (*Des Investissements d'Avenir*), financed by the national loan initiated by the President of the Republic, the Minister for Culture Frédéric Mitterrand, and the Minister with responsibility for Industry, Energy and the Digital Economy Eric Besson, signed a framework agreement on the financing of the digitisation of cinematographic works with the main undertakings that hold catalogues of films. The purpose of the framework agreement, co-signed by the undertakings EuropaCorp, Gaumont, Pathé, SNC, Studio 37, StudioCanal and TF1 Droits Audiovisuels, which were the first to manifest the desire to embark on a process of digitising the films in their catalogues, is to cover the digitisation of at least 10,000 full-length cinematographic works, with a budget of EUR 100 millions. It is open to all holders of catalogues of films, who will be able to benefit from suitable financing under the programme. The French State is keen to participate in this way in the investment effort needed to allow the digital exploitation of films, and to share both the profits and the risks with the companies that hold catalogues.

Secondly, on the same day, the Centre National de la Cinématographie (national cinematographic centre - CNC) announced the launch of a supplementary arrangement in support of the digitisation of cinematographic works, in favour of that part of the sector with the strongest heritage that has substantial artistic and cultural ambition but is not able to guarantee sufficient profitability.

This first arrangement for selective support, subject to the agreement of the European authorities, will concern initially the heritage works of silent films and a selection of shorter films that should be able to reach

new audiences as a result of digitisation and the various modes of broadcasting digital content. In the case of the more complex digitisation involved in restoration work, the CNC will intervene selectively in favour of works whose original chemical elements are often seriously damaged. Indeed as Frédéric Mitterrand was at pains to point out at the time of signing the agreement, "In a globalised world, French culture with all its wealth and diversity will either be digital or it will not exist".

• *Un accord pour la numérisation des œuvres cinématographiques, dossier du Ministère de la Culture et de la Communication* (Agreement in favour of digitising cinematographic works; file produced by the Ministry of Culture and Communication)

<http://merlin.obs.coe.int/redirect.php?id=13349>

FR

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### GB-United Kingdom

#### Should the Form and Content of 'Hardcore' Sex Videos Made Available on Websites be Considered 'TV-Like'?

On 13 May 2011, the first-ever decisions on appeals against determinations of The Authority for Television On Demand (ATVOD) to Ofcom were made.

The two cases at hand concerned the question of whether two "adult websites" fall within the scope of the Audiovisual Media Services Regulations 2009, as being on-demand programmes (ODPs) comparable to a television programme.

ATVOD concluded that both services met the statutory criteria, including that their "principal purpose is the provision of programmes, the form and content of which are comparable to the form and content of programmes normally included in television programme services", and so should be considered ODPs.

It was on this point that Playboy TV appealed to Ofcom.

Playboy argued that as the video content on the two sites "features fully explicit sexual images, and was therefore too explicit to be broadcast on UK television, it was not TV-like and was not therefore subject to the new ATVOD rules designed to protect children from video-on-demand content which might cause them serious harm."

ATVOD had ruled that the videos did carry content that was more explicit than adult programmes shown on UK TV services. However, (a) the videos were "comparable to such programmes"; and (b) they "were essentially the same as 'adult' programmes

that are frequently broadcast on linear TV channels in other EU jurisdictions". As such, they were, according to ATVOD, subject to the rules designed to protect children.

Ofcom upheld ATVOD's determinations. It found that the "the form (and format) of the video material available on the Service [were] clearly 'comparable' to the form of programmes normally included on television programme services, and television broadcasting in general." It also found that the content, whilst not identical to programme content found on UK TV, was "comparable and, therefore, subject to the rules concerning the protection of children."

• Ofcom decision - "Climax 3 Uncut", 13 May 2011

<http://merlin.obs.coe.int/redirect.php?id=13315>

EN

• Ofcom decision - "Demand Adult", 13 May 2011

<http://merlin.obs.coe.int/redirect.php?id=13316>

EN

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### Regulatory Rules on Political Advertising by Government Department

The Communications Act 2003 prohibits political advertising on television or radio; this includes advertising which attempts to influence public opinion on a matter of public controversy or to promote the interests of a party or a group organised for political ends. An advertisement had been placed on seven radio stations by the Office of the First Minister and the Deputy First Minister in Northern Ireland relating to the Hillsborough Castle Agreement. The Agreement allowed the devolution of policing and justice functions to the Northern Ireland Executive. The advertisement featured the First Minister and Deputy First Minister stating that "[t]oday's Agreement is the surest sign that there will be no going back to the past" and that it would make life better "for our children, for our grandchildren". Information was then given on how to obtain further details. The leader of a small political party opposed to the Agreement complained that this was in breach of the prohibition on political advertising as the advertisement promoted a political deal and sold a political message rather than merely providing information. The complaint was considered by Ofcom, the UK communications regulator.

An exception to the general prohibition is where a government department places an advertisement of a "public service nature". Ofcom decided that this did not cover the advertisement in question as, although it did direct listeners to sources of further information, this was not its overall purpose and the positive endorsement of the Agreement was not a means of informing or educating the public, but rather encouraged listeners to consider the Agreement in a positive light. Despite the wide public support for the

Agreement, it was a matter of controversy in Northern Ireland and the favourable tone of the advertisement and its portrayal of the Agreement resulted in its being directed towards influencing public opinion and the political process. It had given significant prominence to the First Minister and Deputy First Minister and so was promotional for them and for their respective political parties. The advertisement also contravened a provision in the advertising code applying only to radio requiring advance central clearance from the Radio Advertising Clearance Centre of advertisements that might breach the prohibition.

• 'Hillsborough Castle Agreement: Advertisement Placed by the Office of the First Minister and Deputy First Minister', Ofcom Broadcast Bulletin 182, 23 May 2011

<http://merlin.obs.coe.int/redirect.php?id=13319>

EN

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### IE-Ireland

### No Change in Designated Free-to-Air Sporting Events

The Minister for Communications, Energy and Natural Resources announced on 3 May 2011 that the current list of sports events designated for coverage on free-to-air television services should not be amended at this time.

Section 162 of the Broadcasting Act 2009 provides that the Minister may, by order, designate events of major importance to society, coverage of which can be provided by free-to-air broadcasters in the public interest. Under the Act the Minister may also determine whether coverage should be available on a live, deferred or both live and deferred basis.

The Minister's decision was made following a review carried out in accordance with section 173 of the Broadcasting Act 2009. The review incorporated a consultation process, which invited submissions from members of the public on the existing list of designated events and the possible designation of additional events. The Minister also considered an independent report prepared by Indecon International Economic Consultants, which evaluated the socio-cultural, economic and financial aspects and impacts of the proposed designation of certain sporting events in Ireland.

The events currently designated are all sporting events:

On a live basis:

- The Summer Olympics;

- The All-Ireland Senior Football and Hurling Finals;
- Ireland's qualifying games in the European Football Championship and World Cup;
- Opening games, semi-finals and the final of the European Football Championship Finals and the FIFA World Cup Finals Tournament;
- The Irish Grand National and the Irish Derby (Horse-racing);
- The Nations Cup at the Dublin Horse Show.

On a deferred basis:

- Ireland's games in the Six Nations Rugby Football Championship.

Ireland's games in the Six Nations Rugby Football Championship will remain designated as deferred, but they are in fact shown live. The Minister has stated that he would be prepared to intervene if it was proposed in the future that the 'Six Nations' would no longer be available live and free-to-air.

- Department of Communications, Energy and Natural Resources, "Review of Designated Sporting Events", 3 May 2011  
<http://merlin.obs.coe.int/redirect.php?id=13322> EN

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## Details of Copyright Review Announced

On 9 May 2011 the Minister for Enterprise, Jobs and Innovation announced the terms of reference and timetable for the review of the Copyright and Related Rights Act 2000 (as amended) (see IRIS 2000-8/28). A Copyright Review Committee has been established.

Under the terms of reference, the Review Committee will examine current copyright legislation in order to identify any areas that are perceived as creating barriers to innovation and to propose solutions for removing these barriers. The Committee is also tasked with examining the United States' doctrine of "fair use" in order to determine if it would be appropriate in an Irish and European Union context. Where the recommendations of the Review Committee conflict with current European Union Directives, the Committee is asked to make recommendations for changes to the relevant directives.

The review began with a public consultation process that asked interested parties to submit their views. That consultation process is to close at the end of June 2011. The Review Committee will next examine the submissions and produce a Consultation Paper. Following the publication of the Consultation Paper, a second public call for submissions will be issued. A

closing date of 22 September 2011 is proposed for that phase of the process. The Committee will then produce a Final Report, which will include their recommendations. It is proposed that this be submitted to the Minister by the end of December 2011.

- Department for Enterprise, Jobs and Innovation, "Bruton seeks Radical Copyright Reforms to Boost Digital Industry", 9 May 2011  
<http://merlin.obs.coe.int/redirect.php?id=13375> EN
- Department for Enterprise, Jobs and Innovation, "Consultation on the Review of the Copyright and Related Rights Act 2000", 9 May 2011  
<http://merlin.obs.coe.int/redirect.php?id=13376> EN

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## Right of Reply Scheme Introduced

The Broadcasting Authority of Ireland (BAI) on 3 May 2011 published the BAI Right of Reply Scheme. The Scheme, which came into effect from 4 May 2011, provides for the broadcast of a Right of Reply Statement, which will facilitate the correction of incorrect information which has been broadcast and which has resulted in a person's honour or reputation being impugned. It will not be available in respect of incorrect facts that do not result in a person's honour or reputation being impugned. The Scheme applies only to the correction of facts and does not provide for the broadcast of an alternative or contrary opinion.

The BAI was required by section 49 of the Broadcasting Act 2009 to prepare a scheme for the exercise of the right of reply. As required by section 49(3) of the Act, a Draft Right of Reply Scheme was published in January 2011 and a short period of public consultation closed on 4 February 2011.

The aim and objective of the Scheme is to offer a timely, efficient and effective mechanism that is clearly understood, proportionate and fair to all sides. Exercising a right of reply is free of charge and it offers the individual an alternative to the legal route in order to correct the broadcast of incorrect facts about him/her. Utilising the Scheme does not prevent an individual from taking legal proceedings in relation to a broadcast. However a defendant in a defamation action may seek to lessen damages by giving evidence that he/she granted or offered a right of reply.

The Scheme under section 2 details the process for exercising a right of reply. This includes the requirement that the request must be in writing to the broadcaster and that the request must usually be made not later than 21 days after the date of broadcast. Section 2 also details the potential outcomes of a right of reply request. Where a decision to refuse a request has been made, the broadcaster must inform the compliance committee of the BAI.



Section 3 of the scheme describes the information a Right of Reply Statement should contain and the form the statement should take. As a general principle, a right of reply should be broadcast at a time and in a manner and with a prominence equivalent to that of the original broadcast.

A refusal of a right of reply request can be reviewed (section 4). The review request must be made in writing to the BAI Compliance Committee. A reviewable decision to refuse can also arise where a broadcaster fails to make a decision within 10 days, if the form of a right of reply statement cannot be agreed or if a broadcaster refuses to broadcast a right of reply statement formerly agreed.

Where a refusal is annulled by the compliance committee a broadcaster must broadcast the decision within 7 days of being notified. If a broadcaster fails to broadcast the decision, the compliance committee can recommend that the BAI applies to the High Court for an appropriate order to ensure that the broadcaster complies.

The Scheme applies to all broadcasters regulated in the Republic of Ireland. It does not apply to broadcasters licensed in other countries but widely received in the Republic of Ireland. Under section 49(27) of the Broadcasting Act 2009 the BAI is required to review the operation, effectiveness and impact of the Scheme no later than three years after its operation and every five years thereafter or at such a time as requested by the Minister for Communications, Energy and Natural Resources.

• Broadcasting Authority of Ireland, "BAI Right of Reply Scheme", 3 May 2011

<http://merlin.obs.coe.int/redirect.php?id=13326>

EN

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## **Developments Regarding BAI's General and Children's Communication Codes**

The Broadcasting Authority of Ireland (BAI) has published a revised General Commercial Communications Code and a revised Children's Commercial Communications Code. The two revised Codes came into effect on Monday, 2 May 2011. The codes replace the BCI General Advertising Code and the BCI Children's Code respectively (see IRIS 2010-1/30).

The codes update the standards that must be met by radio and television advertising, sponsorship, product placement and other forms of commercial communications broadcast within the jurisdiction of the Republic of Ireland. The new codes give legal effect to the provisions in the Audiovisual Media Services Directive

(AVMS). Section 42 of the Broadcasting Act 2009 requires the BAI to introduce codes governing standards and practice to be observed by all broadcasters.

The Codes originally came into effect on 10 June 2010; however, under those codes paid product placement was prohibited. The Codes have been revised to allow paid product placement for the first time on Irish television and set out the terms and conditions on which it will be allowed. Sponsors of television programmes will be permitted to place their products and services in the programme that they sponsor, but broadcasters will be obliged to notify viewers before and after the programme that it contains product placement (see IRIS 2011-5/27). Paid product placement is still prohibited from children's programming.

The Children's Commercial Communications Code is comprised of a number of key sections with the following headings: social values, inexperience and credulity, undue pressure, special protection for children in advertising, general safety, violence, diet and nutrition, parental responsibility, programme characters, children's advertising, sponsorship and product placement and prohibitions and restrictions. Under this Code, Children's Commercial Communications are defined as being related to products or services deemed to be of particular interest to children and/or broadcast during and between children's programmes. The Code works on the basis that children of different ages require different levels of protection and accordingly each provision has an age marking beside it for children under 18, under 15 and under 6.

The Children's Communications Code is mindful of the special susceptibilities of children and aims to ensure that commercial communications do not exploit these susceptibilities. The Code outlines even more specifically the precautions advertisers should take when targeting children. For example, they must "not take advantage of the natural credulity and sense of loyalty of children" by omission, exaggerated or misleading claims. Expensive toys must state the price in children's commercial communications. A toy is deemed expensive if it, plus any essential accessories, has a retail price over EUR 30. The language used in presenting the price must not minimise its cost, e.g., through the use of words such as "only" or "just". Communications may not feature celebrities or sports stars save in public health or education campaigns. Broadcasters must be responsible in the manner in which food and drink are portrayed. They must not encourage an unhealthy lifestyle or unhealthy eating or drinking habits, such as immoderate consumption or excessive or compulsive eating. Fast food advertisements must display an acoustic or visual message stating that their products "should be eaten in moderation and as part of a balanced diet". Confectionary products must also display an acoustic or visual message stating that "snacking on sugary foods and drinks can damage teeth".

The BAI is currently undertaking further review of the Children's Commercial Code with a particular empha-



sis on Section 11, which addresses commercial communications for food and drink (except alcohol). The review will invite opinions as to whether the rules should be amended to include specific regulation of food and drink that are high in fat, trans-fatty acids, salts and sugars (so-called HFSS foods). The Irish Heart Foundation, for example, is calling for a 9 p.m. watershed ban on adverts containing foods high in fat, sugar and salt in order to protect children's health.

An expert Advisory Group was set up to advise the BAI on this matter and a copy of its report will be circulated in conjunction with the public consultation due to begin at the end of June 2011. The consultation will elicit views on whether there should be specific regulations for HFSS foods and if so, the type of regulation that is considered preferable. The BAI will publish, if they deem it necessary, a revised code for further consultation and take account of responses to that, with the objective of implementing a new code by June 2012.

• BAI's General Commercial Communications Code 2011 and BAI's Children's Commercial Communications Code 2011  
<http://merlin.obs.coe.int/redirect.php?id=13320>

EN

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## IT-Italy

### **The Yahoo! Decision on the Removal of Links that Infringe Copyright**

A recent decision of the Court of Rome established for the first time liability for contributory infringement for search engines that do not take an active role in combating online piracy.

The Ninth Section of the Court of Rome accused Yahoo! of cooperation with (or failure to combat) online piracy. For ignoring the letter of formal notice from the copyright holders of the Iranian film "About Elly", Yahoo! Italy was found to have become an accessory in the spreading of pirated links. The compatibility of this decision with the EU's E-Commerce Directive's provisions on the non-responsibility of search engines has been questioned.

The claim was placed by the film company PFA Films S.r.l., the exclusive licensee of the exploitation rights in the film "About Elly" by director Asghar Farhadi, which complained about the breach of copyright in the film by links to unofficial sites on search engines Yahoo!, Google and Bing (owned by Microsoft), allowing viewers to stream, download or exchanged the film on P2P networks without the rightsholder's consent.

The court dismissed the case in relation to Google Italy S.r.l. and Microsoft S.r.l., as the Italian branches of these groups did not have an active role in the management of their search engines.

With regards to the principle of law, the judge of the Ninth Section of the Court of Rome (one of the sections in intellectual and industrial property) merely established that the search engine must remove access to the contested content as soon as its illicit nature is brought to their attention.

The judge stressed that Yahoo!, as far as the management of the search engine is concerned, is a caching provider for the purposes of the E-Commerce Directive 2000/31/EC. As Yahoo! was notified by PFA of the infringement, the search engine's failure to remove links to the movie established Yahoo!'s contributory liability. Yahoo! was thus condemned for not using all means possible to tackle online piracy. The court of Rome prohibited Yahoo! Italy from "the continuation and repetition of the violation of PFA Films Ltd.'s economic rights over the film "About Elly" by connecting via search engine to sites that reproduce the work in whole or in part other than the film's official website."

According to the decision, even if a search engine does not exercise ex ante control, after becoming aware of an offense it can no longer enjoy the liability exemptions of the E-Commerce Directive. The European Directive is thus "suspended" for the search engine and can no longer protect search engines on matters of copyright infringement. Yahoo! is responsible for linking to pirate websites, P2P website and streaming websites. The "liability for contributory infringement" is, therefore, the new head of charge for search engines that do not diligently remove contested links. Thus Yahoo!, although a search engine with an algorithm that scours links automatically, is assimilated to a hosting provider.

• *Tribunale di Roma, 20 marzo 2011* (Decision of the Court of Rome, 20 March 2011)  
<http://merlin.obs.coe.int/redirect.php?id=13336>

IT

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### **Media Pluralism**

The *Autorità per le garanzie nelle comunicazioni* (the Italian National Communications Authority - AGCOM) has published a number of press releases and official statements stating the conditions that the media need to follow in order to preserve media pluralism. Italy is currently in the throes of elections, as the provincial and municipal elections were held on the 15 and 16 of May, while a Referendum on four matters will also take place on the 12 and 13 of June.

AGCOM recalls that equal treatment (*par condicio*) is mandatory in the run-up to an election. This applies to TV, radio and newspapers in the fifteen days prior to the polling day and until the close of polling. During this period it is forbidden to make public or disseminate the results of opinion polls on the outcome of elections and the political orientations of voters and voting even if the polls were made in a period preceding the ban. The ban came into force at midnight on 29 April.

The ban also covers direct and indirect propaganda broadcasters and extends to the restatement of political opinions expressed in the days before the ban.

AGCOM found that there was still some imbalance in the speaking time afforded to opposing factions (the prevailing criterion that was taken into consideration).

With respect to the time of news broadcasts, even considering editorial freedom in representing the news, the Authority had identified the need for greater balance in the representation of viewpoints, especially those of the political majority and the opposition, and avoiding situations that could benefit certain forces and certain political or electoral competitors.

The Authority reiterated for the benefit of all the news agencies the need for strict compliance with the principles of completeness, accuracy, objectivity, fairness, impartiality and equal treatment of all party lists and competitors, until the end of the campaign.

The Authority also noted that over time there has been an overexposure of the Prime Minister, who was directly involved in the Milan leadership elections during the provincial and municipal elections.

RAI (the state channels) was issued with several warnings.

In particular, AGCOM's Commission for services and products, reviewed, in light of complaints submitted, the developments on Friday 20 May, in which an interview with the Prime Minister was broadcast during prime time on TG1, TG2, TG5, TG4 and Studio Aperto news channels.

As a consequence, on 21 May the Authority urgently requested an explanation from those broadcasters. Following statements from RAI and Mediaset, the Commission considered that all the interviews containing similar opinions and political views on the issues of the campaign led to a breach of electoral regulations issued by the Parliamentary Committee of Vigilance and AGCOM.

The Commission has therefore decided, by majority, to impose the fullest penalty permitted by law (EUR 258,230) on TG1 and TG4, as repeat offenders, and penalties of EUR 100,000 each on TG2, TG5 and Studio Aperto.

The Authority reminded the broadcasters of their duty of balance and completeness of information until the conclusion of the election campaign.

- Comunicato stampa del 3/6/2011, Provvedimenti in materia di par condicio (referendum) (Press release of 3 June 2011, decision concerning par condicio (referendum))

<http://merlin.obs.coe.int/redirect.php?id=13329>

IT

- Comunicato stampa del 26/5/2011 Provvedimenti in materia di par condicio (Press release of the 26 of May 2011, measures related to the par condicio)

<http://merlin.obs.coe.int/redirect.php?id=13330>

IT

- Comunicato stampa del 23/5/2011 Sanzioni per violazione dei regolamenti elettorali (Press release of 23 May 2011, Sanctions for the violation of the election regulation)

<http://merlin.obs.coe.int/redirect.php?id=13331>

IT

- Comunicato stampa del 13/5/2011 Provvedimenti in materia di par condicio (Press release of 13 May 2011 decision on par condicio)

<http://merlin.obs.coe.int/redirect.php?id=13332>

IT

- Comunicato stampa del 10/5/2011 provvedimenti in materia di par condicio (Press release of 10 May 2011, Decision on par condicio)

<http://merlin.obs.coe.int/redirect.php?id=13333>

IT

- Comunicato stampa del 29/4/2011 Precisazioni in materia di par condicio (Press release of 29 April 2011, Clarification on par condicio)

<http://merlin.obs.coe.int/redirect.php?id=13334>

IT

- Comunicato stampa del 28/4/2011 pluralismo (Press release of 28 April 2011 on pluralism)

<http://merlin.obs.coe.int/redirect.php?id=13335>

IT

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## MT-Malta

### Broadcasting Authority Launches Referendum Programme Scheme

The Broadcasting Authority on 12 April 2011 launched a scheme of political broadcasts for the two principal campaign movements participating in the divorce referendum campaign. The divorce referendum was held on Saturday 28 May 2011. Two main campaign movements were established this year to campaign respectively in favour and against the introduction of divorce legislation in Malta.

According to the said scheme - which was broadcast on the main television and radio stations of the public service broadcaster - each movement was allocated equal airtime. The two movements in question were: the "Marriage without Divorce Movement" and the "Yes for Marriage, Yes for Divorce Movement". The scheme began on 27 April and ended on 26 May 2011. No broadcasts took place on Friday 27 May or Saturday 28 May 2011 as these were the days of reflection.

The scheme consisted of three parts: (a) debates; (b) press conferences; and (c) political spots and party productions.

Insofar as debates were concerned, two debates were held, one of 60 minutes and another of 45 minutes.

There were also two press conferences of 60 minutes duration allocated to each campaign movement. In each press conference, six journalists from local media were invited to participate by putting questions to the campaign movement's representative. Finally, the scheme allocated 60 minutes per campaign movement in terms of both spots and productions. These productions were shorter than five minutes each, whilst spots could not be shorter than 30 seconds each, but not longer than one minute. The logo of the relevant campaign movement was visible on screen in both spots and productions. The campaign movements were entitled to air not more than 30% of the time amounting to 18 minutes in the last week of the campaign, that is, between Sunday 22 May and Thursday 26 May 2011.

Apart from the above scheme, the Broadcasting Authority launched another scheme on 26 April 2011 of divorce referendum broadcasts for political parties. Only two political parties participated in this scheme: Alternattiva Demokratika (The Green Party), which was allocated 10 minutes of political spots, and the Malta Democratic Liberal Alliance, a tiny liberal party, which was granted 1 minute of political spots. The other two main parties represented in Parliament - the Nationalist Party and the Labour Party - decided not to participate in this scheme of political broadcasts even though the Nationalist Party was against divorce legislation and the Labour Party did not take a stand on the matter. Azzjoni Nazzjonali (National Action), a tiny right-wing political party, did not participate in this scheme either.

The referendum was held on Saturday 28 May 2011 and the result was 52.67% in favour of the introduction of divorce legislation and 46.4% against. Hence the referendum approved the proposed divorce bill. Now it is up to Parliament to proceed with the enactment of the Divorce Law.

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## NL-Netherlands

### The Netherlands take Pole Position in the Regulation of Net Neutrality

On 8 June 2011 Maxime Verhagen, Dutch Minister of Economic affairs Agriculture, and Innovation, accepted an amendment to the Dutch Telecommunications Law that guarantees net(work) neutrality. In its purest form, net neutrality is the principle that all users on the internet should be able to communicate with each other without interference by third parties, such as Internet Service Providers (ISPs).

The need for an amendment came after telecom companies declared that they had plans to start charging users for the use of Internet applications and services, such as WhatsApp and Skype. The main spark that started the fire was an announcement last month by KPN's Head of Mobile Services Division, Marco Visser, who declared that KPN uses Deep Packet Inspection (DPI) to determine the content of the packages that users send over the internet. Vodafone joined the debate by stating that they use the same technology, however they hurried to add that DPI benefits users, since it enables Vodafone to streamline and prioritise content. This has stirred up a lot of controversy among digital rights organisations, such as the Dutch NGO Bits of Freedom, as well as in the Dutch Parliament.

After the announcement a few members of the opposition, lead by Kees Verhoeven, a member of the Dutch Parliament for the democratic party D66, took a head start by drafting the proposed amendment of Article 7.4a the Dutch Telecommunications Act (DTA). Their proposed definition of net neutrality is similar to the one proposed by Tim Wu (professor at Columbia Law School and supporter of net neutrality). This amendment was accepted by Minister Verhagen and will most likely pass through Parliament on Tuesday 14 June. It reads as follows:

“Suppliers of public electronic communication networks that provide internet access services and internet service providers will not block or delay internet services or applications, unless it is necessary to block or delay these services:

- to limit the effects of congestion, where similar traffic is treated equally;
- for the integrity and safety of the network and service of the supplier;
- to limit the transfer of unwanted communication to the user (e.g., spam), as mentioned in Article 11.7 (1) DTA, provided that the user has granted his permission, or
- to follow up a legal requirement or court order. (04046)”

The Netherlands is the second country in the world, after Chile, and the first European country to regulate net neutrality in its national legislation.

• Wijziging van de Telecommunicatiewet ter implementatie van de herziene Telecommunicatierichtlijnen (Amendment of the Dutch Telecommunications Act implementing the revised Telecommunications Directives)

<http://merlin.obs.coe.int/redirect.php?id=13377>

NL

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## NO-Norway

### Authorities Ponder Affirmative Action to Strengthen Gender Equality in Feature Film Production

The Board of Governors of the Norwegian Film Institute (NFI) in late May issued a report on "Equality in the film sector". The report follows an announcement on national television in January by the Minister for Culture Anniken Huitfeldt, in which the Minister declared herself "prepared to take political action to attain the goal of 40 per cent" women in leading functions in film production. The announcement was interpreted as raising the possibility of introducing legislation in order to correct the under-representation of women in the film sector, but the Minister opted to refer the matter to the NFI Board first. The Film Institute report, however, limits itself to recommending a series of measures to encourage and facilitate entry into the film industry for women, but stops short of proposing "radical quotas", i.e., the reservation of quotas or amounts of national film support for projects that comply with the official goal of gender balance of minimum 40 per cent representation of either gender.

Observing that 30 per cent of the public support granted to film production by the Norwegian Film Institute goes to female talent, the Minister, in her January statement, declared present efforts to attain gender equality in the film industry "not good enough". The Minister's declaration thus confirmed policies introduced in Norway's 2007 White Paper on film policy, which was unanimously approved by Parliament. The Paper introduced as one of the government's goals for the Norwegian film industry that "[a balance] of 40 per cent women/men in key [production] positions" should be reached by 2010.

Despite consistent and continuous efforts the NFI has not succeeded in raising the overall percentage of female production talent - defined as directors, script-writers and producers - above the 40-per cent threshold. As of the end of 2010 short films and documentaries supported by the NFI have 42 and 45% women in key positions respectively, whereas the percentage for the selective "commissioning executive-scheme" for feature films has risen from 24% in 2002 to 32% in 2010. Ironically, given the industry's wholehearted support for the gender equality measures proposed in a 2010 report, programmatically entitled "Utilise all talents", it is the semi-automatic "market criteria scheme", over which the film business holds most direct influence, that has the lowest share of women in key positions, with 15 per cent in 2010.

Declaring herself "no opponent to gender quotas", Minister Huitfeldt was obliquely referring to the political willingness in Norway to use legislation to man-

date affirmative action in gender-equality policy. Significant in this context is the 2002 decision to make a 40-per cent share of women board members mandatory in Norwegian limited companies under the provisions of Article 6-11a of the Public Limited Liability Companies Act, a legal provision that has since been considered - and in some instances copied - in a number of other countries. In the words of the Minister: "In the film sector, as in all other fields of society, women - despite being talented - do not get the support they deserve".

The use of the legislative option to redress gender imbalance in the film sector would nevertheless seem rather unlikely. In 2003 the EFTA Court ruled that the practice of reserving some academic positions exclusively for women at Norwegian universities was unlawful (case E-1/02). The Court's ruling rested on Norway's obligations under the European Economic Area (EEA) Agreement, as well as on the EU Directive (76/207/EEC) on "The implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion". Thus, the carrot, rather than the stick, would seem to be the only avenue open to further the cause of gender equality in the Norwegian film sector - as demonstrated by the NFI report.

• *Rapport om Likestilling på filmområdet* (NFI May 2011 report on "Equality in the film sector")

<http://merlin.obs.coe.int/redirect.php?id=13338>

NO

• *Lov om allmennaksjeselskaper (allmennaksjeloven)* (Public Limited Liability Companies Act)

<http://merlin.obs.coe.int/redirect.php?id=13341>

NO

• EFTA Court ruling E-1/02, 24 January 2003

<http://merlin.obs.coe.int/redirect.php?id=13342>

EN

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## PT-Portugal

### New Open Standards Law

On 6 April the Portuguese Parliament adopted Law 421/XI on the use of open standards on public IT systems. Although this law concerns the public administration, it is expected to open a discussion on open standards in other areas as well, as it contains a clear definition of both open standards and interoperability.

The law defines "open standard" as a technical standard intended for the publication, transmission and storage of digital information, meeting the necessary requirements established by its provisions. Accordingly, an open standard has to be adopted and maintained by a non-profit organisation and its development has to take place on the basis of a decision-



making process that is open and available to the participation of all stakeholders. The specification documents have to be published and be freely available and have to permit unrestricted copying, distribution and use. Any applicable intellectual property rights (including patents) must be in whole or in substantial part, publicly available on an irrevocable and irreversible way. Finally, there must be no restrictions on its reuse.

The law defines "interoperability" as the ability of two or more systems (computers, media, networks, software and other information technology components) to interact and exchange data according to a defined method in order to obtain the expected results.

The law will be followed by a National Regulation of Digital Interoperability, which will be created within 90 days after its entry into force, and subjected to a process of public discussion for a period of 30 days, establishing deadlines for the implementation of open standards. Technical aspects relating to the implementation of the law will be drawn up by the Agência para a Modernização Administrativa (Agency for Administrative Modernisation - AMA). The agency will monitor, supervise and coordinate technical support for implementation and compliance.

• *Lei n.º 36/2011 de 21 de Junho - Estabelece a adopção de normas abertas nos sistemas informáticos do Estado (Act 36/2011 of 21 June 2011 establishing the adoption of open standards on public IT systems)*

<http://merlin.obs.coe.int/redirect.php?id=13378>

PT

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## **ANACOM's Decisions on Digital Terrestrial Television**

According to the *Autoridade Nacional de Comunicações* (ANACOM), the regulator, supervisor and representative of the communications sector in Portugal, digital terrestrial television covers currently about 87% of the population, while the remainder is serviced via satellite.

The switch-off plan for analogue television broadcasts in the transition to digital terrestrial television adopted by the ANACOM (which is coordinating the process of transition) is due to be concluded by 26 April 2012 and it is expected to be implemented in three phases, i.e., on:

"12 January 2012, for transmitters/relays providing coverage of the coastal area of the mainland territory; 22 March 2012, for transmitters/relays providing coverage of the Autonomous Regions of Azores and Madeira; 26 April 2012, for transmitters/relays providing coverage of the remaining mainland territory."

Previous to these dates analogue television broadcasts are expected to be terminated in three pilot areas: Alenquer on 12 May, Agualva-Cacém on 16 June and Nazaré on 13 October 2011. Distribution will be progressively extended to the entire country.

ANACOM has distributed an information pamphlet on the transition from analogue to DTT, while an electronic version of the DTT Guide has also been prepared. The guide has a set of FAQs on DTT and aims to explain to citizens what to do when preparing for digital TV reception, as television sets that are not integrated with digital capability will need to be connected to a set-top-box.

As part of the shift to digital terrestrial television (DTT), the Associação Portuguesa para a Defesa do Consumidor (Portuguese Association for Consumer Protection - DECO) issued an article on the tests performed on signal modulators for old televisions. Modulators are devices needed for TV sets which do not have SCART or HDMI, which connects the decoder (set-top box) that allows access to DTT. Moreover, it is noted that the acquisition of a decoder is not needed when a TV is already equipped to receive DVB-T and is compatible with MPEG4/H.264, which can be found in the manufacturer's information.

DECO has also signed a protocol with ANACOM and has committed itself to ongoing comparative tests on digital terrestrial television (DTT) decoders and to maintaining an updated and accessible summary of results available on both websites. DECO will work to uphold the rights and interests of consumers.

In the meantime ANACOM has ordered PT Comunicações (PTC), by a determination adopted on 26 of May 2011, to immediately correct non-compliances with obligations detected within the scope of the provision of the digital terrestrial television (DTT) broadcasting service.

ANACOM by a determination of 19 of May 2011 has decided that all commercial practices leading the consumer to believe that they should subscribe to a paid service in order to continue receiving free and unrestricted access to television programme services are prohibited. This prohibition is addressed to electronic communications companies providing television signal distribution services, as well as to agents advertising or marketing such services.

ANACOM has approved by a determination of 24 March 2011 a decision concerning the grant by PT Comunicações (PTC) of a subsidy for the purchase of DTT equipment by citizens with special needs, disadvantaged groups of the population and institutions with a proven social value.

• *Decisão final sobre o fim das emissões de TV analógica (Final decision on the termination of analogue TV broadcasts)*

<http://merlin.obs.coe.int/redirect.php?id=13343>

PT

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## RO-Romania

### Modification of the Audiovisual Law Adopted

The Draft Law projected to change and complete the *Legea Audiovizualului nr. 504/2002* (Audiovisual Law no. 504/2002), proposed by four Deputies of PD-L (Democrat-Liberal Party, the main ruling party), was tacitly adopted by the first chamber of the Romanian Parliament, the Chamber of Deputies (see IRIS 2011-4/31).

According to Art. 75 (2) of the Romanian Constitution the Chamber which is first addressed with a draft law has to debate and vote within 45 days (usually) or within 60 days (in exceptional cases). If no vote occurs, the draft is considered tacitly adopted and sent to the second chamber, which has no deadline to vote on the law. In the present case the constitutional term for the debate and the final vote on the Draft was on 6 April 2011, but had been prolonged by the Deputies to 21 April 2011 and was then even further exceeded. The proposal was debated, but has not obtained a final vote. The vote of the upper chamber (Senate) is decisive but there is no date of expiry for the debate and vote on the document.

One of the most important provisions of the project was the possibility for the members of the Consiliul Național al Audiovizualului (National Council for Electronic Media - CNA), the regulatory body in the field of audiovisual media, to issue much higher fines from Lei 10,000-200,000 (EUR 2,420-48,400) on television and radio stations due to censorship and editorial interference.

Harsh debates occurred in Romania these last months when owners and high-level managers of some important commercial television networks (Antena 3, Realitatea TV) were accused of censorship and interference in editorial decisions. Some employees left the stations and the CNA called for official hearings of more journalists and television owners.

The Draft mainly intended to merge the present Audiovisual Law with most of the provisions of the existing Audiovisual Content Regulatory Code. In the meantime, the CNA adopted a new Audiovisual Code through Decision No. 220/2011 (see IRIS 2011-5/38).

• Propunere legislativă pentru modificarea și completarea Legii audiovizualului nr.504/2002, cu modificările și completările ulterioare, Pl-x. 48/2011 (Draft law proposition to change and complete the Audiovisual Law 504/2002, with the subsequent changes and completions, Pl-x. 48/2011)

<http://merlin.obs.coe.int/redirect.php?id=13364>

RO

Eugen Cojocariu  
Radio Romania International

### Film Dubbing Draft Law Rejected

On 7 June 2011 the Chamber of Deputies, the lower Chamber of Romania's Parliament, rejected a draft law for dubbing films instead of subtitling them, with five votes for the project, ten abstentions and 277 votes against the draft. The final decision will be taken by the upper chamber, the Senate

On 3 May 2011 an opposition member of the Chamber of Deputies had registered a draft law to modify the *Legea Audiovizualului nr. 504/2002* in the sense of dubbing films instead of subtitling them, as it is happening now.

The initiator of the law, a well-known Romanian folk singer, argued that dubbing of foreign-language movies, instead of subtitling the works, would protect the national identity and would preserve the Romanian language, the quality of which would be threatened and altered by foreign words and expressions. He also stated dubbing would increase the accessibility of foreign-language movies to people with visual impairments or who cannot read, such as children and older people.

The draft proposal received a negative advisory opinion from the Legislative Council of Romania, which reproached that the draft was against European trends, statements of the European Commission (COM (2008) 566 final) and even resolutions of the European Council (2008/C 320/01) and European Parliament (2008/2225 (INI)). These institutions recommended to the member states encouraging multilingualism, subtitling and the circulation of European cinematographic works, to promote linguistic diversity and cultural dialogue, including by means of subtitling films, audiovisual works and television programmes, in order to facilitate learning and practising the EU languages and to better understand the cultural context of the respective audiovisual productions.

The draft law triggered instantly a huge amount of critical comments and debates, continued by an online petition and critical pages on a social network. The draft law was broadly (public, politicians, actors, directors, producers, communication specialists, teachers, TV people, writers, psychologists) criticised, arguing that the proposal would be beneficial only from an economic point of view for the dubbing firms, but would decrease the cultural quality of movies and would use Romanian actors for dubbing voices of foreign actors, instead of giving them time to prepare real parts in plays. The critics of the project also state that dubbing movies boosts isolation and intolerance and that Romania has to preserve its tradition of subtitling films, which had positive effects on foreign-language learning and practicing.

- Propunere legislativă pentru modificarea și completarea Legii audiovizualului nr. 504/2002 (Draft Law for the Modification and Completion of the Audiovisual Law no. 504/2002)

<http://merlin.obs.coe.int/redirect.php?id=13363>

RO

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## RU-Russian Federation

### Decree Establishes Intellectual Property Governmental Service

President Dmitry Medvedev of the Russian Federation signed on 24 May 2011 a decree "On the Federal Service on Intellectual Property" (О Федеральной службе по интеллектуальной собственности). In order to streamline the structure of the Government the decree renames the existing Federal Service on Intellectual Property, Patents and Trademarks into the Federal Service on Intellectual Property, as well as adding to it the current powers of the Ministry of Justice as regards to legal protection of the state interests in the civil and economic transactions of the results of research and technological tests for military, special and double purposes at the expense of the federal budget. The agency will be directly under the Government of the Russian Federation, bypassing any ministry in the line of command. The new service is apparently a new step in the current governmental efforts to control intellectual property rights (see IRIS 2011-4/35).

- О Федеральной службе по интеллектуальной собственности (Decree "On Federal Service on Intellectual Property", *Rossijskaja gazeta* No. 111 of 26 May 2011)

RU

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### Decree on Must-Carry Channels Amended

President Dmitry Medvedev of the Russian Federation signed on 12 May 2011 a decree amending his earlier decree of 24 June 2009 on must-carry TV and radio channels (see IRIS 2009-10/25).

This act amends the list of the eight mandatory TV channels on all platforms (including the first multiplex of digital terrestrial television) as several of them have changed their names (and programme policies) since 2009. Channel Sport has become Rossiya-2 with gradually decreasing number of sports broadcasts at the expense of entertainment fare, channel Kultura was rebranded as Rossiya-K, and Russian Information

Channel as Rossiya-24. Another one - Petersburg-5th Channel has changed its remit as a regional channel and now presents itself as a federal broadcaster 5th Channel (see IRIS *plus* 2010-1). The act also specifies that a channel mentioned in the original decree as "channel for children and youth" is indeed a brand new channel Karusel by a state-run joint stock company of the same name.

Thus the list of TV channels includes now: Rossiya-1, Rossiya-2, Rossiya-24, Rossiya-K (all belong to the state broadcaster VGTRK), Channel 1 (run by the state and friendly businesses), NTV run by a Gazprom-owned company, Petersburg-5th Channel (owned by another private broadcaster), and Karusel. The list of radio channels (all belong to VGTRK) remains unchanged.

As expected the decree also expands powers of the state broadcasting communications network RTRS (see IRIS Special: The Regulatory Framework for Audiovisual Media Services in Russia, 2010) in regards to contracting private networks and facilities for the purpose of distribution of the must-carry channels. It also lets RTRS the use of the first multiplex of Digital Terrestrial Television to deliver an additional, a regional one, in each "broadcasting zone" of Russia, apparently a channel of its own choice. The decree imposes the right of the Government to set tariffs for services provided by private operators to RTRS on all platforms, as well as tariffs for RTRS services.

- О внесении изменений в Указ Президента Российской Федерации от 24 июня 2009 г. N 715 "Об общероссийских обязательных общедоступных телеканалах и радиоканалах" и в перечень, утвержденный этим Указом (Decree of the President of the Russian Federation of 12 May 2011 No. 637 "On amending the Decree of the President of the Russian Federation of 24 June 2009 No. 715 "On National Mandatory Free Television Channels and Radio Stations" and the list approved by this Decree", *Rossijskaja gazeta* No. 104 of 18 May 2011)

RU

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### Regulation of Broadcasting and Internet now Part of Media Statute

The Federal Assembly (parliament) of the Russian Federation has adopted the Statute "On amending some legal acts of the Russian Federation in order to improve legal regulation in the sphere of mass information" (О внесении изменений в отдельные законодательные акты Российской Федерации в связи с совершенствованием правового регулирования в сфере средств массовой информации). The Bill was introduced on 29 November 2010 by the chair of the parliamentary committee on the mass media, adopted in the first reading by the State Duma (lower chamber) on 22 February 2011, and in the 2nd and 3rd readings in



one day - on 3 June 2011. The Council of the Federation (upper chamber) approved it on 8 June 2011, and the statute was signed by the President of the Russian Federation on 14 June 2011. Most of the provisions of the statute are to enter into force on 10 November 2011.

About 90% of the statute amends and expands the Statute of the Russian Federation "On the mass media" (No. 2124-I of 27 December 1991). In several ways the new act counteracts the recent Resolution of the Plenary of the Supreme Court of the Russian Federation "On Judicial Practice Related to the Statute of the Russian Federation 'On the Mass Media'" of 15 June 2010 (see IRIS 2010-6/40 and IRIS plus 2011-1).

The amended statute provides a systematic regulation of online media instead of the vaguely-formulated Article 24 ("Other mass media"), now abolished. In particular it includes a "network publication" as one of the types of the mass media, considers a single issue or renewal of a network publication as a form of the product of the mass media, while providing access to a network publication is considered to be a form of dissemination of the product of a mass media outlet. Under a "network publication" the statute defines "any site in information-telecommunications network Internet registered as a mass media outlet". While such registration of a network publication is optional, no editorial office of a mass media outlet may engage in professional activity without such registration.

Article 31 of the Statute "On the mass media" gets new parts that detail licensing of broadcasting. In particular it stipulates that licensing may be based on a tender, competition or auction as shall be determined by the Government. The procedures for them as well as fees for participants shall be determined by the Government. The programme policy, a blueprint document in which the applicant should conceptualise and describe the range of programmes it proposes to offer now becomes part of the licence of the winner, which may not be violated. Other conditions of the license shall be determined by the Government. The new act leaves it open for the Government to license broadcasting online.

The term of the licence shall increase to ten years from the current five. It may be extended by a decision of the licensing body to be determined by the Government (currently such body is Roskomnadzor at the Ministry of Communications and Mass Communications) in case, inter alia, there are no uncorrected violations of the terms of the licence. A licence shall not be transferred to a different legal entity.

According to a new article of the Statute "On the mass media" (31-7), the licensing body has powers to issue a written prescript to any broadcaster for any violation of the law as well as to suspend its activity for up to three months. Any violation is to be corrected within the term stated in the prescript and its acknowledgement shall be reported back to the licensing body. A licence is revoked by a decision of the court of law

(earlier it could be done by the decision of the licensing body alone) on a petition of the licensing body in cases when its prescript has not led to a correction of the violation or when a broadcaster makes "a gross violation" of its licence terms for the second time within 12 months. In addition other grounds for revoking the licence remain in force such as repeated violations of Article 4 of the Statute on the mass media ("Inadmissibility of abuse of the freedom of the mass media") and provisions set by the Federal Statute "On licensing of certain types of activity".

Article 32-1 gives powers to the President of the Russian Federation to approve the list of must-carry channels on all platforms (see IRIS 2009-10/25). The channels that enter the list obtain licences without tender (competition, auction).

The statute redrafts article 19-1 of the Statute "On the mass media" (see IRIS 2001-9/25) to restrict establishment of radio stations by foreign companies. Article 54 has a new provision that bans dissemination of a foreign radio or TV programme without its registration in accordance with the rules set in the Statute on the mass media. Article 31 is also amended to ban TV or radio rebroadcasting unless the original broadcaster has a Russian licence and there is a contract between the rebroadcaster and broadcasting company.

• О внесении изменений в отдельные законодательные акты Российской Федерации в связи с совершенствованием правового регулирования в сфере средств массовой информации (Statute "On amending some legal acts of the Russian Federation in order to improve legal regulation in the sphere of mass information", *Rossiyskaya gazeta* No. 129 of 17 June 2011) RU

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## SE-Sweden

### Supreme Administrative Court Does not Consider Poirot to Be a TV Series

On 12 May 2011 *Högsta Förvaltningsdomstolen* (The Supreme Administrative Court) delivered a judgment in a case regarding the placement of commercial breaks in six episodes featuring the famous private investigator Poirot. The TV programmes had appeared on the Swedish nationwide television channel TV4.

The key issue in the case was whether the Poirot episodes (eight in total, but only six were subject to scrutiny), each of them about 1,5 hours long, constituted a TV series or movies made for television under the Radio and Televisions Act (RTL).

*Granskningsnämnden för radio och TV* (the Swedish Broadcasting Commission - GRN) had initiated proceedings against TV4. The GRN claimed inter alia that TV4 had violated section 8:4 of the RTL, since it had placed four commercial breaks during the TV programmes, whereas section 8:4 (2) of the RTL only allows commercial breaks every half hour in relation to movies made for television.

TV4 disputed the claim arguing that the Poirot episodes were a TV series under the RTL.

Initially the Court noted that the wording of section 8:4 of the RTL is more or less identical to that of Article 20.1 in the Swedish version of the Audiovisual Media Services Directive 2010/13/EU.

Then the Court turned to case C-245/01 of the European Court of Justice, which interprets the notion of "TV series" under the older Television Without Frontiers Directive. In view of that case the Court found that in order that a word be considered a TV series there must be a link between the TV programmes concerned.

The Court concluded that the Poirot episodes were based on different novels, without any common plot, and the episodes need not be watched in any particular order. According to the Court, the common features in the TV programmes were the principal character, Poirot, other characters also made repeat appearances in two or more episodes. Consequently, there was only a diluted link between the various Poirot episodes and they could not be considered to be parts of a TV series.

The Supreme Administrative Court granted GRN's request and imposed a special fee amounting to SEK 650, 000 on TV 4, accordingly.

• Högsta förvaltningsdomstolens dom av den 12 maj 2011 i mål nr 7032-09 (Judgment of the Supreme Administrative Court of 12 May 2011 in case No. 7032-09) SV

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## SI-Slovenia

### Co-production Agreement between France and Slovenia

On 25 May 2011 the Ministers of Culture of Slovenia and France signed an Agreement on Film Co-production in Brussels.

The Agreement is an upgrade to the European Convention on Cinematographic Co-productions. Both

states are also signatories of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and wish to renew and deepen their co-operation in the field of cinematography and to improve the use of their common cinematographic heritage.

The competent institutions are the *Centre national du cinéma et de l'image animée* (CNC - National Centre of Cinematography) and the *Slovenski Filmski Center, javna agencija Republike Slovenije* (SFC - Slovenian Film Centre, public agency of the Republic of Slovenia).

Cinematographic works produced under the Agreement are treated as national works under the legislation applied in the respective national territory. Works that are co-produced under the Agreement have the right to incentives and aid in both countries, which are granted to the producer only from the country where the competent institution confirmed the support. This confirmation is to be made no later than four months after the cinematographic release in Slovenia or France.

The Agreement sets up a protocol of mutual exchange of information about legislation and other relevant acts. The competent institutions communicate about all matters concerning applications for benefits under the Agreement. They must consult each other before they reject an application and have to reach an agreement before cancelling a project that was confirmed. The confirmation of a co-production project does not bind any country to grant the permission to cinematographic release.

To be entitled to benefit the respective production companies must have a good technical and financial organisation and references in the industry that are acknowledged by the competent institution. The creative and technical staff must be Slovenian or French citizens or citizens of another EU member state or of the European Economic Area. Citizens of other countries have to prove that they have lived more than five years in Slovenia or France. As an exception the competent institutions may confirm co-operation projects of staff that does not match the criteria after mutual reconciliation of opinions. The studio shooting must be done in Slovenia or France while the field shooting may be performed on other territories after the competent institutions approval.

The investment share of the co-producers ranges from 20-80% of the final costs of the work. The creative and technical share must be relative to the financial one. As an exception the minimum investment can be reduced to 10% considering the creative and technical share. The income share is set freely by the co-producers respecting the investments.

Each co-producer is owner of all property rights. The material is deposited in a laboratory mutually chosen.

A general balance must be found in terms of the creative, technical and financial contribution. The com-

petent institutions are checking this balance bi-yearly and taking respective measures if necessary. The general balance is judged by a mixed commission consisting of representatives of the institutions and experts from both countries. Each competent institution makes a summary of all grants and financing which then is the basis of the balance analysis.

It must be stated in titles, spots and other promotional material as well as in festival announcements that the work is a French-Slovenian co-production.

It is permitted to co-produce the cinematographic works benefiting from this Agreement with one or more producers from other countries Slovenia or France have signed cinematographic co-production agreements with. In case there are more co-producers involved from the signatory states of the European Convention on Cinematographic Co-productions the provisions of the Convention might apply. The Convention has priority in case the Agreement is in contradiction to it.

Special attention is given to the field of education, especially for cinematic art professions. The competent institutions explore the possibilities of funds that would enable mutual distribution and promotion of cinematographic works of both partners as well as an exchange of film expert's knowledge. They recognise the need to stimulate cultural diversity and mutual recognition through educational programmes or co-operation at film festivals. A co-produced cinematographic work must be presented by the partner providing the major producer unless the competent institutions agree differently.

The Agreement is set for one year term which is prolonged automatically if no partner objects.

• Sporazum o kinematografski koprodukciji med vlado republike Slovenije in vlado Francoske republike (Agreement on Cinematographic Co-production between the Government of Slovenia and the Government of France on the Co-operation in the Fields of Culture, Education, Science and Technology)

<http://merlin.obs.coe.int/redirect.php?id=13309>

SL

**Denis Miklavcic**

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

## TR-Turkey

### Decision of the Internet Authority Concerning Internet Security and Access Restriction

On 4 March 2011 the Turkish Information and Communication Technologies Authority (ICTA) issued a decision concerning Internet security. The objective of

the decision is to protect Internet users against unwelcome content. However, this attempt of the Authority is not highly appreciated among users and related NGOs.

According to the decision, which approves "The Draft on the Principles and Procedures Concerning a Secure Usage of Internet", four types of user profiles are regulated and Internet service providers are obliged to provide these profiles to their users. The profiles, one of which the users must choose, consist of the standard profile, child profile, family profile and domestic internet profile.

The decision determines the scope of the profiles as well. According to Art. 4 of the decision, "standard profile" does not contain any restriction on the access to the internet, as currently regulated. However, when it comes to the other profiles, some restrictions apply: for example, users who choose the "family profile" are not able to access domain names, IP addresses, ports and web proxy sites that are contained in the "black list". Users of the "child profile" are only able to access domain names, IP addresses and ports listed in the "white list". Likewise, the "domestic Internet profile" allows accession only to IP addresses, ports and web sites hosted within the country and not listed in the "black list".

ICTA declared that the decision was required, due to its responsibility, resulting from claims of users, Art. 20 (privacy of individual life) and 41 (protection of the family and children) of the Turkish Constitution and Art. 10 (secure usage of the Internet) of the by-law on Consumer Rights in the Electronic Communications Sector. In the meantime, ICTA assumes that there is no problem with the profiles since no restrictions are imposed on Internet access under the standard profile and users are free to choose any of the profiles.

But as mentioned above, NGOs do not agree with ICTA. The main objections raised by the NGOs may be summarised as follows:

- There is no transparency in the creation of the white and black lists.
- No objection proceeding is provided for those included in the black list.
- There is uncertainty about the results of breaching the profile limits by users.
- There is no compliance with international norms.
- If there was a real need for Internet security, the Government should authorise ISPs to create such filters instead of doing so itself.

Also the Internet users reacted and hundreds of people protested against the decision on 15 May 2011. Furthermore, a lawsuit has been filed in order to have the decision cancelled. ICTA took into consideration the complaints and the directors of the authority and representatives of NGOs met to discuss the decision.



The decision will enter into force on 22 August 2011, unless it is revised or cancelled.

- *ICTA (No. 2011/DK\*10/92)* (Decision of ICTA (No. 2011/DK\*10/92))  
TR

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## Agenda

### 4th Digital Broadcasting Conference: "Being Digital"

25 - 26 August 2011  
Organiser: Levira  
Venue: Tallinn  
Information and Registration:  
<http://www.levira.ee/dyna/site/conference.html>

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