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Legal Observations
of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Sigma Radio Television Ltd. v. Cyprus

This case concerns a complaint by a broadcasting company regarding a number of decisions by the Cyprus Radio and Television Authority (CRTA) imposing fines on the company for violations of legislation concerning radio and television programmes in its broadcasts and the alleged unfairness of the related domestic proceedings. The breaches found by the CRTA concerned advertisements for children's toys; the duration of advertising breaks; the placement of sponsors' names during news programmes; product placement in a comedy series; news programmes that lacked objectivity or contained material unsuitable for minors or were disrespectful of crime victims and their relatives; films, series and trailers that contained offensive remarks and inappropriate language or included scenes of violence unsuitable for children; and, in one particular case, racist and discriminatory remarks in an entertainment series.

Sigma RTV alleged substantially that it had been denied a fair hearing before an independent and impartial tribunal, invoking Article 6 of the Convention. In this connection it complained about the proceedings before the CRTA and the judicial review proceedings before the Supreme Court. Sigma RTV's grievance as to the proceedings before the CRTA concentrated on the multiplicity of its functions in prosecuting, investigating, trying and deciding cases and imposing sanctions. In addition, Sigma RTV complained that the members and staff of the CRTA had a direct and personal interest in imposing fines, as the amounts thus collected were deposited in the CRTA's Fund, from which their salaries and/or remuneration were paid.

The European Court notes that a number of uncontested procedural guarantees were available to Sigma RTV in the proceedings before the CRTA: the company was given details of the probable violation or the complaint made against it and the reasoned decisions were arrived at after a hearing had been held, while Sigma RTV was able to make written submissions and/or oral submissions during the hearing. Furthermore, it was open to Sigma RTV to make a wide range of complaints in the context of the judicial review proceedings before the CRTA. Despite the existence of these safeguards, the combination of the different functions of the CRTA and, in particular, the fact that all fines are deposited in its own fund for its own use, gives rise, in the Court's view, to legitimate concerns that the CRTA lacks the necessary structural impartiality to comply with the requirements of Article 6. Nonetheless, the Court reiterates that even where an adjudicatory body, including an administrative one as in the present case, which determines disputes over "civil rights and obligations" does not comply with Article 6 §1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has 'full' jurisdiction and does provide the guarantees of Article 6 §1". Although the Supreme Court could not substitute its own decision for that of the CRTA and its jurisdiction over the facts was limited, it could have annulled the decisions on a number of grounds, including if the decision had been reached on the basis of a misconception of fact or law, if there had been no proper enquiry or a lack of due reasoning, or on procedural grounds. The European Court notes that indeed the Supreme Court examined all the above issues, point by point, without refusing to deal with any of them and that the Supreme Court gave clear reasons for the dismissal of the Sigma RTV's points. The Court came to the conclusion that Sigma RTV's allegations as to shortcomings in the proceedings before the CRTA, including those concerning objective partiality and the breach of the principles of natural justice, were subject to review by the Supreme Court and that the scope of the review of the Supreme Court in the judicial review proceedings in the present case was sufficient to comply with Article 6 of the Convention.

The Court also dismissed Sigma RTV's complaints regarding the alleged violation of Article 10 of the Convention as all decisions by the CRTA were in accordance with Art. 10 §2, the sanctions and fines being prescribed by law, being proportionate and being pertinently justified on the basis of legitimate aims. These aims, in general, included the protection of consumers and children from unethical advertising practices, the protection of children from broadcasts containing violence or any other material likely to impair their physical, mental or moral development, the importance of ensuring that viewers were informed of the true content of the broadcasts by the use of appropriate acoustic and visual warnings, the protection of pluralism of information, the need for a fair and accurate presentation of facts and events and the protection of the reputation, honour, good name and privacy of persons involved in or affected by the broadcast. The Court found therefore, that the interference with Sigma RTV's exercise of their right to freedom of expression in these cases can reasonably be regarded as having been necessary in a democratic society for the protection of the rights of others. The Court accordingly declared inadmissible, as manifestly ill-founded, Sigma RTV's complaints under Article 10 in respect of the CRTA's decisions. One complaint however received a more thorough analysis on the merits: the complaint regarding the racist and discriminatory content of a fictional series. The Court emphasises that it is particularly conscious of the vital importance of combating racial and gender discrimination in all its forms and manifestations and that the CRTA could not

be said in the circumstances to have overstepped its margin of appreciation in view of the profound analysis at the national level, even though the remarks had been made in the context of a fictional entertainment series. Lastly, as to the proportionality of the impugned measure, the Court found, bearing in mind the amount of the fine and the fact that the CRTA, when imposing the fine, took into account the repeated violations by the applicant in other episodes of the same series, that the fine imposed (approximately EUR 3,500) was proportionate to the aim pursued. Accordingly, there has been no violation of Article 10 of the Convention.

Finally the Court also dismissed the complaint regarding the alleged discrimination against Sigma RTV, operating as a private broadcaster under stricter rules, restrictions and monitoring than the national public broadcasting company in Cyprus, CyBC. The European Court was of the opinion that, given the differences in the legal status and the applicable legal frameworks and the different objectives of private stations and the CyBC in the Cypriot broadcasting system, it cannot be said that they are in a comparable position for the purposes of Article 14 of the Convention. The Court found, therefore, that the present case does not indicate discrimination contrary to Article 14 of the Convention.

• Judgment by the European Court of Human Rights (Fifth Section), case of Sigma Radio Television Ltd. v. Cyprus, Nos. 32181/04 and 35122/05 of 21 July 2011
http://merlin.obs.coe.int/redirect.php?id=13402 EN

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EUROPEAN UNION

Court of Justice of the European Union: Case Mediaset SpA v. European Commission

In its judgment of 28 July 2011 the Court of Justice of the European Union dismissed an appeal by Mediaset SpA, a digital terrestrial programme broadcaster, against a judgment of the General Court of 15 June 2010 in Case T-177/07. The judgment reaffirmed that subsidies granted to consumers in Italy for the purchase of certain digital terrestrial television decoders should be qualified as unlawful State aid, as the subsidy was favouring Mediaset's terrestrial programme over its rivals' satellite programmes.

According to Italian legislation, transmissions in analogue TV broadcasting mode should have ceased before December 2006. In 2004 and 2005 the Italian government granted a subsidy of EUR 150 to consumers purchasing a certain type of digital terrestrial television decoder (the T-DVB decoders). This subsidy was intended promote the transition from analogue to digital broadcasting. Since then, the deadline for the cessation of analogue broadcasting has been postponed twice, first until 2008 and subsequently until November 2012.

On 3 May 2005 Sky Italia filed a complaint with the European Commission against the subsidy measure, claiming that it constituted unlawful State aid. In 2007 the Commission adopted a decision concluding that the subsidy (as concerns 2004 and 2005) indeed constituted unlawful State aid within the meaning of Art. 107 TFEU (ex Article 87(1) TEC). The Commission found that none of the derogations provided for in Art. 107(3) TFEU were applicable to the subsidy measure at issue, as the measure was not technologically neutral, since it only applied to terrestrial broadcasters and to cable pay-TV operators, but not to digital satellite broadcasters. Furthermore, the measure was found not to be proportionate to the pursuit of the objective of the transition of analogue to digital television broadcasting and would amount to a distortion of competition. The Commission declared the subsidy measure to be incompatible with the common market and unlawful State aid.

Mediaset brought an action before the General Court in May 2007, seeking the annulment of the Commission's decision. However, the General Court rejected the Mediaset's pleas, agreeing with the European Commission that the subsidy granted cannot be considered to be technologically neutral and that therefore the aid granted was selective and conferred an economic advantage. The General Court also stated that there was no breach of the principle of legal certainty, as no provision requires the Commission to fix the exact amount of the aid to be recovered. It is up to the national court to rule on the amount of State aid that the Commission had ordered to be recovered, if necessary after referring a question to the Court of Justice for a preliminary ruling.

• Case C-430/10 P, Mediaset SpA v. European Commission, Judgment of the Court of Justice of the European Union (Third Chamber) of 28 July 2011
http://merlin.obs.coe.int/redirect.php?id=13403 EN FR

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Court of Justice of the European Union: Eleftheri Tileorasi v. Ethniko Simvoulio Radiotileorasis

On 9 June 2011 the Court of Justice delivered its judgment in the case between a Greek broadcasting company (Ελεύθερη Τηλεόραση - Eleftheri Tileorasi) and

the Greek Εθνικό Συμβούλιο Ραδιοτηλεόρασης (National Council for Radio and Television - ESR)

Eleftheri Tileorasi owns and operates a private channel called 'ALTER CHANNEL'. In November 2003 Eleftheri Tileorasi broadcast a programme that contained a presentation of a cosmetic dental treatment. The programme included shots of before, during and after the treatment. Furthermore, the programme provided information about the efficacy and the costs of the treatment. The ESR imposed a fine of EUR 25,000 on Eleftheri Tileorasi on the ground that the television programme contained surreptitious advertising. Eleftheri Tileorasi lodged an action for annulment of the decision before the Greek Council of State (Συμβούλιο της Επικρατίας - Simvoulio tis Epikratias). The Council subsequently referred a question to the Court on whether the Television without Frontiers Directive must be interpreted as meaning that the provision of payment or of consideration of another kind is a necessary condition for establishing the intentional nature of surreptitious advertising (see IRIS 2010-4/28).

Firstly, the Court emphasised that the aim of the Directive is to ensure that the interests of consumers as television viewers are fully and properly protected. It continues by stating that in order to meet that objective, it is essential for television advertising to be made subject to a certain number of minimum rules and standards.

The Court pointed out that the decisive element in surreptitious advertising is that it must be intended by the broadcaster to serve advertising. Referring to the definition of surreptitious advertising in the Directive and the purpose of the Directive, the Court stated that the mention of payment in the definition is an indication of an intention to advertise, but not a necessary condition. Thus the fact that no payment is made does not mean that there is no surreptitious advertising.

The Court pointed out that another interpretation could run the risk of depriving the provision of its effectiveness, since it could be difficult or maybe even impossible to prove that payment or of consideration of another kind has been provided in exchange for the advertisement. Advertising that nevertheless displays all the characteristics of surreptitious advertising could thus then not be prohibited. The Court emphasised that this could undermine the interests of television viewers. The Court therefore concluded that Article 1(d) of the Television without Frontiers Directive is to be interpreted as meaning that the provision of payment or of consideration of another kind is not a necessary condition for establishing the element of intent in surreptitious advertising.

• Case C-52/10, Alter Channel and Konstantinos Giannikos v. Ipourgos Tipou kai Meson Mazikis Enimerosis and Ethniko Simvoulio Radiotileorasis, 9 June 2011
http://merlin.obs.coe.int/redirect.php?id=13421 DE EN FR
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Court of Justice of the European Union: VEWA v. Belgium

According to Art. 1 of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, authors have an exclusive right to authorise or prohibit the rental and lending of originals and copies of their copyright-protected works. Article 6(1), however, provides member states with the possibility of introducing a derogation from this principle in the case of public lending, provided that the authors at least obtain remuneration for such lending.

The correct interpretation of these provisions was brought into dispute before the Belgian courts. On 7 July 2004, the Belgian copyright management society *Vereniging van Educatieve en Wetenschappelijke Auteurs* (VEWA) brought an action for annulment before the *Raad van State* (Belgian Council of State) against the Belgian act transposing the Directive, the Royal Decree of 25 April 2004 on remuneration rights for the public lending of authors, interpreting or performing artists, phonogram producers and producers of the first fixation of films. VEWA submitted that that royal decree, by fixing a flat-rate remuneration of EUR 1 per adult per year and EUR 0.50 per child per year registered with the lending institutions, as long as that person has borrowed once during the reference period, infringes the provisions of the Directive, which require that "equitable remuneration" be paid for a loan or a rental.

The Belgian court, noting that Art. 6 of the Directive 2006/115/EC makes no mention of "equitable remuneration", but instead of mere "remuneration", made a reference for a preliminary ruling to the European Court of Justice, asking whether the provisions of the Rental Right Directive preclude the institution of a flat-rate remuneration system of the type in operation in Belgium.

The Luxembourg Court first observed that, under Art. 6 of the Directive, a wide margin of discretion is reserved to the member states to determine, in accordance with their own cultural promotion objectives, the amount of the remuneration payable to authors in

the event of public lending. However, the Court also noted that the remuneration must enable authors to receive an adequate income and cannot therefore be purely symbolic. On the contrary, the remuneration is intended to constitute consideration for the harm caused to authors by reason of the use of their works without their authorisation. The determination, consequently, of the amount of that remuneration cannot be completely dissociated from the elements that constitute that harm. Such relevant elements should not only be limited to the number of borrowers registered with a lending establishment, but should also include the number of works made available to the public. A system that omits to take into account the latter factor cannot be seen as having sufficient regard for the extent of the harm suffered by authors and is therefore incompatible with the Directive.

The Court also noted that, according to the Royal Decree, where a person is registered with a number of establishments, the remuneration is payable only once in respect of that person. According to VEWA, 80% of the establishments in the French Community in Belgium declare that a large number of their readers are also registered with other lending establishments and, consequently, those readers are not taken into account for payment of the remuneration of the author concerned. As a result, many establishments are, in effect, almost exempted from the obligation to pay remuneration. Such a de facto exemption is, however, according to the Court's interpretation, at variance with Art. 6(3) of the Directive, according to which only a limited number of categories of establishments potentially required to pay remuneration may be exempt from payment.

• Case C 271/10, Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v. Belgische Staat, 30 June 2011
http://merlin.obs.coe.int/redirect.php?id=13457 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV

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European Commission: Negotiations on ACTA Concluded

On 24 June 2011 the European Commission proposed a Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement (ACTA) between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America.

In its explanatory memorandum to the proposal, the Commission states that ACTA aims to establish a comprehensive international framework that will assist the EU in its efforts to effectively combat the infringement of intellectual property rights (IPR). In this respect ACTA promotes international cooperation, for example through the sharing of information and cooperation between enforcement agencies, capacity building and technical assistance to improve enforcement.

ACTA does not modify the EU acquis, but it will introduce a new international standard that builds upon the TRIPS agreement. This will be beneficial for EU exporting rightsholders in protecting their rights on a global scale.

Previously European academics have expressed their concerns on several aspects of ACTA related to the compatibility of its provisions with EU law and to safeguarding a balance between the interests of different parties (see IRIS 2011-6/5). The Commission however states that ACTA is a balanced agreement, in which both the rights of citizens and the concerns of important stakeholders are safeguarded.

The 11th and final round of negotiations was on 2 October 2010 in Tokyo, Japan. The participants in these negotiations worked constructively together and all substantive issues were resolved, with the consolidated and definitive text being published on the Internet on 3 December 2010. Now that the ACTA negotiations have been completed, it is up to each ACTA party to decide, in accordance with its internal procedures, whether and when ACTA will enter into force in its territory.

• Proposal for a Council Decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America, Brussels, 24.6.2011 COM(2011) 380 final 2011/0167 (NLE)
http://merlin.obs.coe.int/redirect.php?id=13405 DE EN FR
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European Commission: Public Consultation on Challenges and Opportunities for Audiovisual Media in the Online Age

In accordance with the Europe 2020 Strategy, the EU is aiming at becoming a smart, sustainable and inclusive economy. Since the cultural industries in Europe, including the audiovisual sector, contribute significantly to the EU economy and innovation, the European Commission has focused on this sector in the Europe 2020 and IPR Strategy. The goal is to create

a digital single market wherein the internet is borderless. For the time being, the online markets in the EU are still fragmented by multiple barriers.

Because of the shift from broadcasting over air, satellite or cable towards on-demand services, new digital platforms, social media and "cloud-based services", new legal issues and business models have arisen. The European Commission has acknowledged the current developments by the publication of a consultation on the online distribution of audiovisual works in the European Union. Stakeholders are asked to comment and advise on how to best to seize the opportunities for TV and film in the online age.

The Green Paper assesses the impact of the advent of the internet on the audiovisual sector. It refers to new business models, more online services and better remuneration for rightsholders in the context of online distribution and exploitation as points of attention for creators, industry and consumers. The Green Paper also discusses the issue of rights clearance for films and television. Finally, special uses of audiovisual works are addressed, such as the preservation of film heritage and their online availability and the accessibility problems to cultural material that disabled persons experience.

Internal Market Commissioner Michel Barnier, who initiated the Green Paper, stated: "I want to ensure that Europeans can seize the opportunities offered by the internet. It is important for me to hear the views of all stakeholders concerned - creators, performers, producers, distributors and consumers. The results of this consultation will provide a significant contribution to the initiatives I am preparing, including a legislative proposal on collective copyright licensing, an examination of the framework set by the 2001 Information Society Directive, and a review of the Intellectual Property Enforcement Directive.""

Replies can be submitted up until 18 November 2011.

• Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market, Brussels, 13 July 2011, COM(2011) 427 final
http://merlin.obs.coe.int/redirect.php?id=13407 DE EN FR
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European Commission: Letters of Formal Notice on the Implementation of the Telecoms Package

On 19 July 2011 the European Commission sent requests for information in the form of letters of formal notice, the first step in the process of an EU infringement procedure, to 20 EU member states. The member states in question, namely Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain, have not yet notified to the Commission measures to implement the new EU Telecoms Package, formally adopted after two years of heated negotiations at the end of 2009 (for more information see IRIS 2008-10/3, IRIS 2009-1/5, IRIS 2009-6/6 and IRIS 2010-1/7).

Timely implementation of the package of new directives is a priority for the Digital Agenda for Europe. Although the deadline for implementation was 25 May 2011, to date only seven states (Denmark, Estonia, Finland, Ireland, Malta, Sweden and the UK) have notified the Commission that they have transposed the directives into national law in full. It should be noted that legislative processes are ongoing in all EU member states and a majority of states have informed the Commission of at least some implementation measures.

The 20 member states have two months to respond to the letters of formal notice. Failure to respond or an unsatisfactory reply will trigger a formal request to implement the legislation, in the form of a reasoned opinion under the EU infringement procedures and, ultimately, a referral to the Court of Justice.

It should be noted that the European Data Protection Supervisor (EDPS), the EU's own privacy watchdog, has criticised the Commission for offering inconsistent guidance on how member states should implement the new rules. In a speech on 7 July 2011, Peter Hustinx pointed out the development of a self-regulatory framework by the advertising community and US-style "do not track" measures, both of which have been encouraged by Digital Agenda Commission Neelie Kroes, are not consistent with the requirements of the e-Privacy Directive, which is part of the Telecoms bundle.

• "Digital Agenda: Commission starts legal action against 20 member states on late implementation of telecoms rules", press release, IP 11/905
http://merlin.obs.coe.int/redirect.php?id=13406 DE EN FR
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OSCE

OSCE: June 2011 Joint Declaration by the Four Special International Mandates for Protecting Freedom of Expression

On 1 June 2011 the four special IGO mandates for protecting freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) and the Special Rapporteur on Freedom of Expression and Access to Information, adopted a Joint Declaration. The Declaration was adopted with the assistance of the Centre for Law and Democracy and ARTICLE 19 (for former Joint Declarations see IRIS 2010-5/1, IRIS 2009-9/101, IRIS 2009-2/101, IRIS 2008-4/1, IRIS 2007-2/101, IRIS 2006-3/2, IRIS 2005-2/1 and IRIS 2004-2/12).

The 2011 Declaration builds on a significant focus on the Internet by some of the special mandates in recent years. The OSCE Representative has just launched a major survey of participating States' law and practice regarding the Internet, entitled "Freedom of Expression on the Internet". The Internet was also the main thrust of the 2011 Annual Report by the UN Rapporteur to the Human Rights Council.

The preamble to the Joint Declaration highlights both the unprecedented power of the Internet to enable realisation of freedom of expression and growing threats to freedom of the Internet. It notes the "transformative nature" of the Internet for people in countries all over the world, both in terms of giving them a voice and in enhancing access to information. But it also notes that billions of people still lack any, or at least good quality, access to the Internet. Furthermore, many States have actively sought to control Internet content, while others have, sometimes even in good faith, imposed excessive restrictions on Internet freedom. The preamble also notes that some States have sought to "deputise responsibility" for policing the Internet to the increasingly diverse range of intermediaries providing Internet services.

The main body of the Joint Declaration is divided into six sections dealing, respectively, with General Principles, Intermediary Liability, Filtering and Blocking, Criminal and Civil Liability, Network Neutrality and Access to the Internet. The first section makes the fairly obvious points that freedom of expression applies to the Internet, that regulatory systems designed for other technologies cannot simply be imposed on the Internet, that self-regulation can be an effective tool in addressing harmful speech on the Internet and that awareness-raising is important. It calls for more attention to be given to developing "alternative, tailored approaches" for the Internet. Importantly, it recognises the systemic nature of the Internet, calling for assessments of the proportionality of restrictions to take into account its overall power to "deliver positive freedom of expression outcomes".

The Joint Declaration sets out strong standards of protection against intermediary liability. It calls for absolute protection against liability for content produced by others for those who simply provide technical Internet services, unless they intervene in that content or have been ordered by a court to remove it. It also recommends the same treatment for all intermediaries and, at a minimum, for intermediaries not to be required to monitor user-generated content or to be subject to extrajudicial content takedown rules (which is the case with most notice and takedown systems currently in place).

Section three of the Declaration rules out mandatory blocking except in the most extreme cases, for example to protect children against sexual abuse. It also rules out filtering systems that are imposed on users, which it describes as a form of prior censorship, and calls for strong transparency rules regarding products designed to facilitate end-user controlled filtering.

In terms of criminal and civil liability, the Joint Declaration calls for a "real and substantial connection" test, along with a requirement of "substantial harm", before jurisdiction may be asserted. Limitation periods should start to run from the first time the content was uploaded, and only one action for damages should lie for that content (single publication rule). Once again, the Declaration stresses the need to advert not only to the public interest in specific content, but also to the wider public interest in protecting the forum in which the content was expressed.

The Declaration rules out discrimination in the treatment of Internet traffic (network neutrality) and calls for transparency in relation to any information management practices put in place by intermediaries.

Finally, the Declaration highlights the fact that States are under an obligation to promote universal access to the Internet, as part of their general obligation to promote freedom of expression. As a result, cutting off access to the Internet, as happened in Egypt earlier this year, is absolutely ruled out and it may be legitimate to deny individuals the right to access the Internet only in the most extreme cases, where ordered by a court. On the positive side, the Declaration calls for States to adopt multi-year actions plans for increasing access to the Internet and to consider a range of specific measures to this end, such as establishing community-based ICT centres and imposing universal service requirements on service providers.

• Joint Declaration on Freedom of Expression and the Internet by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 1 June 2011
http://merlin.obs.coe.int/redirect.php?id=13400 EN

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REGIONAL AREAS

Commonwealth of Independent States: Model Law on Internet Regulation

The Commonwealth of Independent States (CIS) Interparliamentary Assembly which is currently comprised of delegations from the parliaments of Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan and Ukraine enacted on 16 May 2011 a Model Statute on the Basics of Internet Regulation (Модельный закон « Об основах регулирования Интернета »). It consists of 3 chapters with a total of 13 articles.

The Act sets out principles and determines major directions of regulation of relations that have to do with the use of Internet, sets procedures for state support of its development, and rules for determining place and time of legally relevant actions with the use of Internet.

The Model Statute (Art. 2) provides definitions of "Internet", "operator of Internet services", "national segment of Internet", etc. Article 5 sets out principles of legal regulation such as: (1) protection of human rights and liberties, "including the right to use Internet and access to the information placed there"; (2) consideration of peculiarities of construction and development of Internet, including existing international rules and technical procedures; (3) limitation of state regulation by the subject-matters that are not or may not (due to national law) be regulated by international norms or rules adopted by self-regulatory organizations of users and operators of Internet services; (4) non-proliferation of regulation of relations that are connected with the development of Internet and "do not touch upon the rights and interests of a human being, society and the state".

State bodies are required to provide conditions for the equal and non-discriminatory access to Internet of all users (Arts. 7 and 10). They shall not allow for "ungrounded" restrictions on the activity of operators of Internet services and on the exchange of information via Internet (Art. 7).

CIS member states are encouraged to oblige operators of Internet services to store data on the users and services provided to them for at least 12 months and to supply it upon request to the courts and/or law-enforcement agencies for the sake of counteraction to illegal activities with the use of Internet (Art. 13).

Article 11 of the Model Statute stipulates that legal actions with the use of Internet are considered as performed on the territory of the state if such an action that gave rise to legal consequences was committed by a person during his stay in that state. The time of such an action is the time of the first action that gave rise to legal consequences.

• Модельный закон « Об основах регулирования Интернета » (Model Statute "On the Basics of Internet Regulation", adopted at the 36th plenary meeting of the CIS Interparliamentary Assembly (Resolution No. 36-9 of 16 May 2011))
http://merlin.obs.coe.int/redirect.php?id=13446 RU

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WIPO

WIPO: SCCR Strengthens the Position of Performers in the Audiovisual Industry

After more than ten years, the Standing Committee on Copyright and Related Rights (SCCR, WIPO's top copyright negotiating body), reached agreement on the last outstanding issue relating to the transfer of rights during a session that took place from 15 to 24 June. In 2000 the treaty on the protection of audiovisual performances failed to be adopted during a diplomatic conference - the highest level of negotiations in the WIPO context. All but one article was agreed upon at that time, however this was characterised by some sources as very important to the treaty.

Originally, the problem had been that the transfer of rights was dealt with inconsistently, given that in some countries the performer owned the rights, while in others they were in the hands of the producer. It also proved difficult to reach agreement on what should be regulated on the national level and what through international consensus. The new Article 12 is intended to strike a balance between the rights of performers and producers. Thus, member states at the Standing Committee on Copyright and Related Rights, meeting in June 2011 in Geneva, have now been able to reach agreement on the article relating to the transfer of rights, thereby paving the way for the conclusion of a treaty.

The adoption of a new instrument would strengthen the position of performers in the audiovisual indus-

try by providing a clearer legal basis for the international use of audiovisual works, both in traditional media and in digital networks. Such an instrument would also contribute to safeguarding the rights of performers against the unauthorised use of their performances in audiovisual media, such as television, film and video.

On the protection of broadcasting organisations, after lengthy discussions delegates could only agree on a work plan, not on a negotiation text. Further discussion on this topic will take place in November during the next SCCR session. This informal consultation will aim at working on a draft treaty "with a view to making a recommendation to the 2012 WIPO General Assembly on the possible scheduling of a Diplomatic Conference," according to the chair's summary.

• Agreement on Transfer of Rights Paves Way to Treaty on Performers' Rights, WIPO press release, 24 June 2011
http://merlin.obs.coe.int/redirect.php?id=13420 EN FR

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NATIONAL

AT-Austria

BKS Submits Short Reporting Rights Question to ECJ

On 31 May 2011, the Austrian *Bundeskommunikationssenat* (Federal Communications Board - BKS) asked the Court of Justice of the European Union (ECJ) for a preliminary ruling on the application of Article 15 of the Audiovisual Media Services Directive 2010/13/EU (AVMSD), which regulates short reporting rights.

The procedure before the BKS concerned a decision taken by the *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) in December 2010 in a dispute between *Österreichischer Rundfunk* (Austrian Broadcasting Corporation - ORF) and *Sky Österreich GmbH* (Sky). In 2009, Sky acquired the exclusive pay-TV rights for the UEFA Europa League for the seasons 2009/10 to 2011/12 in Austria and signed a contract granting short reporting rights to ORF. Under this contract ORF was obliged to cover the cost of providing access to the broadcast signal as well as rights fees of EUR 700 per minute. The contract was only valid until the entry into force on 1 October 2010 of Article 5(4) of the *Fernsehexklusivrechtegesetz* (Exclusive Television Rights Act - FERG), which states, in accordance with the AVMSD, that the television company "is only entitled to compensation for the additional costs directly incurred in providing access". A dispute then arose between the parties concerning the obligation to pay the additional rights fees for the broadcast of matches held after 1 October 2010. In the end, the matter was referred to KommAustria, which decided on 22 December 2010 that "there is only an entitlement to compensation for the additional costs directly incurred in providing access. Since Sky gave ORF [...] a free subscription to the channel concerned, the related cost amounts to EUR 0. Article 5(4) FERG does not provide scope for any additional obligation to pay "reasonable" compensation [...], but rather its clear wording rules out any such interpretation."

In its appeal against this decision, Sky argued that the compensation rule of Article 15(6) AVMSD and Article 5(4) FERG violated national constitutional law, the EU Charter of Fundamental Rights and the European Convention on Human Rights. It claimed that the indiscriminate and comprehensive exclusion of any kind of compensation for the restriction of exclusive rights was disproportionate and in breach of the fundamental right of ownership.

The BKS has now suspended the appeal procedure and asked the ECJ whether Article 15(6) AVMSD is compatible with primary law.

• *Entscheidung des BKS zur Aussetzung des laufenden Verfahrens (GZ 611.003/0004-BKS/2011) vom 31. Mai 2011* (BKS decision suspending the current procedure (GZ 611.003/0004-BKS/2011) of 31 May 2011)
http://merlin.obs.coe.int/redirect.php?id=13428 DE
• *Entscheidung der KommAustria vom 22. Dezember 2010 (KOA 3.800/10-006)* (KommAustria decision of 22 December 2010 (KOA 3.800/10-006))
http://merlin.obs.coe.int/redirect.php?id=13429 DE

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KommAustria Conditionally Approves ORF Special Interest Channel

The Austrian media sector is currently discussing the plan of *Österreichischer Rundfunk* (Austrian Broadcasting Corporation - ORF) to launch a new information and culture channel. On 18 May 2011, as part of a prior evaluation, the *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) conditionally approved the broadcast of the ORF special interest channel, after which the Austrian competition authority intervened and criticised what it considered to be the inadequacy of the conditions laid down.

For the approval of a new special interest channel, Article 4c of the *ORF-Gesetz* (ORF Act) states that

the media authority must conduct a prior evaluation, in which it should assess whether the channel would help the ORF to fulfil its core public mandate without distorting competition in the television market. The *Bundeswettbewerbsbehörde* (Federal Competition Authority) and the *Public Value-Beirat* (Public Value Review Board), set up by the Federal Government, have a duty to participate in this evaluation process.

The approval granted by KommAustria is essentially subject to two conditions. ORF is prohibited from advertising its new channel through so-called "cross promotion" on other ORF channels. Only brief references to the channel's content are permitted during programmes on other ORF channels. ORF is also prohibited from selling advertising slots on the new channel as part of a package with advertising on its other channels. This measure is designed to prevent ORF from offering discounts to the disadvantage of other broadcasters and from developing structural superiority. According to the Act, KommAustria may not interfere with the content or editorial freedom of the new channel. KommAustria commissioned *Rundfunk und Telekom Regulierungs-GmbH* (Regulatory Authority for Broadcasting and Telecommunications - RTR) to draw up its own comprehensive evaluation.

According to media reports, both the competition authority and ORF have filed objections with the *Bundeskommunikationssenat* (Federal Communications Board - BKS) against the KommAustria decision. The competition authority is demanding tougher conditions for the special interest channel. Keen to agree a compromise, ORF therefore promised not to broadcast any advertising between 8 and 10 p.m. on two evenings per week for the next three to five years. ORF is also thought to be prepared, for the time being, not to actively seek to secure the third channel slot for the special interest channel, and not to broadcast US blockbusters. In return, the competition authority has hinted that it could withdraw its demand for a percentage limit on fictional content, while at the same time reserving the right to ask the European Commission to examine a compromise, if necessary.

If ORF and the competition authority reach an agreement, both parties are expected to withdraw their objections with the BKS, whereupon the KommAustria decision would acquire legal force.

• *Bescheid der KommAustria vom 18. Mai 2011* (KommAustria decision of 18 May 2011)
http://merlin.obs.coe.int/redirect.php?id=13430 DE

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BA-Bosnia And Herzegovina

Court Decision on the Defamation Case against FTV

According to reports the Banjaluka Municipality Court (Court of First Instance) decided on the case of Milorad Dodik v. Federal Television (FTV), on 8 August 2011, ordering FTV - more precisely the editor-in-chief of the political magazine programme "60 minutes" and its two reporters - to pay jointly KM 5,000 (approximately EUR 2,500) plus interest charged as a penalty for tardiness, and procedural costs of KM 3,300.

At the time of lodging this civil suit the claimant, Mr. Milorad Dodik, was acting as Prime Minister of the Republika Srpska (RS), an entity within Bosnia and Herzegovina. His complaint concerned episodes of the "60 minutes"-a magazine programme produced by FTV and broadcast on 28 January and 25 February 2008. According to the claimant, who currently is the President of the RS, the primitive, vulgar and abusive rhetoric used in the magazine seriously damaged his honour and reputation, "inflicting mental anguish".

The ruling of the Banjaluka Municipal Court was based on Art. 11 (Fines) of the Law on Defamation and Libel (Sluzbeni glasnik RS) No. 37/2001.

Acts of defamation and libel have been decriminalised in Bosnia and Herzegovina in 2001 (in the Federation of BiH in 2002): in brief, journalists cannot be sent to prison for inflammatory reporting, but such can be subject to civil suits. The fines prescribed by law are not high, but put in the context of the rather poor material status of journalists, they might nevertheless cause a chilling effect.

The guiding principle of journalistic reports should be the balancing of rights and responsibilities. In the present case the words chosen in "60 minutes" relating to the claimant and several persons associated with him at that time (e.g., "political mafia", "criminalised party leaders", "mentally sick persons", "crooks and psychopaths", "bandit of Laktasi", "new racist order" etc.) infringed this principle.

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BE-Belgium

Report Covering Funeral of Politician Not Unethical

On 22 June 2011 the *Conseil de déontologie journalistique* (Council for Journalism Ethics of the French Community) pronounced its decision regarding a complaint filed against the public broadcaster RTBF because of a report covering the funeral of M.-R. Morel. The latter was attached to the extreme right political party *Vlaams Belang* (Flemish Interest) and she eventually died of cancer, after her illness had been widely publicised with her consent. The report was part of the public broadcaster's news bulletin. In this report an explicit link was drawn between the illness of M.-R. Morel and her commitment to the extreme right. According to the complainants, the report sent the message that M.-R. Morel had deliberately exploited her medical situation in the media to gain sympathy for and further the political goals of the extreme right. Not only is this believed to be defamatory to Ms. Morel herself, in violation of Article 5 of the Belgian Code on journalism ethics of 1982, which prescribes respect for human dignity and proscribes intrusions into personal grievance and pain, but it would also constitute an expression of hate culture against all Flemish people.

In its decision the ethical council emphasised the importance of the angle chosen as a basic element from a journalistic point of view. The RTBF had chosen to focus on the relation between Ms. Morel and her extreme right political engagement, whilst the Flemish media had opted to approach the story from another angle, a more emotional one, in which Ms. Morel was portrayed as a heroine in the fight against cancer. Given this different point of view, it is understandable that the approach of the RTBF shocked certain viewers, while being approved of by others. According to the Council, the choice of the RTBF may have lacked tact and refinement, but this does not make it illegitimate. A crucial element of the Council's argument lies in the fact that the RTBF considered the result of the media exploitation in terms of furthering extreme right political goals, instead of alleging that it was also the intention on the part of Ms. Morel to obtain such results. Although it is not certain that this nuance came through clearly in the rapidity of an oral communication, it still precludes an accusation of violation of the boundaries of journalistic ethics. Other claims in terms of invasion of privacy, racist anti-Flemish remarks, and incitement to hatred were easily swept aside, as the report contained no information that had not previously been made public by Ms. Morel herself and given that expressed differences between 'the north' and 'the south' of Belgium were purely factual and did correspond to well-known and verifiable realities.

• *Avis du Conseil de déontologie journalistique,* X c. Mitea / RTBF - JT, *22 juin 2011* (Council for Journalism Ethics of the French- and German-language media in Belgium, X v. Mitea / RTBF - JT, 22 June 2011)
http://merlin.obs.coe.int/redirect.php?id=13401 FR

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BG-Bulgaria

Developments concerning the Retransmission of TV Programmes

On 24 August 2011 the relevant period under Art. 125v of the Radio and Television Act expired. This period concerns the submitting of evidence for the settlement of copyrights and neighbouring rights in transmitted TV programmes and the protected works included in these to the Council for Electronic Media (CEM) by the cable and satellite operators.

This requirement of the law has existed since 2009, but its strict fulfillment has been postponed by the CEM several times with different reasoning. In February 2011 the CEM was informed by the Bulgarian Association of Cable Communication Operators (BACCO) about starting negotiations with the two biggest organisations for the collective management of copyrights and neighbouring rights in music works MUSICAUTOR and PROPHON, and the authority decided that the operators will not be punished for not submitting proofs for agreements with the collecting societies (see IRIS 2011-4/13).

Six months later the situation is not much different. Despite the agreement on signing two umbrella agreements between BACCO and the two societies at the beginning of August, this will not happen because none of them has completed the procedure for re-registration under the Transitional Provisions of the Copyright and Neighbouring Rights Act of 25 March 2011 (see IRIS 2011-5/9). For this reason BACCO states that there is not sufficient guarantee for the case that - after signing the agreements - the societies get refusals for re-registration by the Ministry of Culture or are re-registered as a second society for the relevant category of rights, which is not entitled by the law to sign contracts with the users, but only with the first registered society for the same category of rights.

The main reason for the delay in the re-registration of the societies was the late preparation of the Tariff of the Ministry of Culture determining the amount of fees that the societies shall pay for the re-registration. It

was published in the State gazette issue 58 of 29 July 2011 and entered into force immediately. Although MUSICAUTOR and PROPHON have paid the fees due the Ministry of Culture is still examining their applications and there is no final decision on them. The same is true for the application of the local society for film rights FILMAUTOR.

Probably the CEM will be asked again by BACCO for a non-enforcement of the provision of Art. 125v of the Radio and Television Act concerning the copyrights and neighbouring rights in the protected works included in the programmes.

The next control period will expire on 24 February 2012.

• Закон за радиото и телевизията (Radio and Television Act from 1998, State gazette 138/24 November 1998, last amended by State gazette 28/05 April 2011) BG

• Закон за авторското право и сродните му права (Copyright and the Neighbouring Rights Act from 1993, State gazette 56/29 June 1993, last amended by State gazette 25/25 March 2011) BG

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An Election Memorandum Rejected by the Commercial Media

On 2 June 2011 the team of the Slavi Show, broadcast by the private national channel bTV, dedicated its daily episode to the candidacy of Mrs. Miglena Kuneva for president of the Republic of Bulgaria. The show was aired four days before Mrs. Kuneva's candidacy was formally launched on 6 June 2011.

On 3 June 2011, the management of the bTV Media Group stated that the publicity for Mrs. Kuneva in the Slavi Show had not been the subject of consultation with the company's management as the Slavi Show is an outside production having its own independent editorial policy and all statements made in the show are those of the production company. Immediately after the participation of Mrs. Kuneva in the Slavi Show many members of the Parliament requested the Council for Electronic Media to intervene in the political propaganda made by the Slavi Show's team.

On 7 June 2011 the Council for Electronic Media made a proposal only to thirteen private electronic media (including the bTV Media Group) to sign an agreement containing certain rules and principles for the broadcasting of political events before and during the presidential election campaign. The legal form of the proposal of the media regulator is an "election memorandum", which is not explicitly mentioned in the Bulgarian Radio and Television Act.

On 9 June 2011 the Bulgarian Radio and Television Operators Association and its members declared that they would not sign the proposed election memorandum as they believe that the electronic media should adhere to the terms and conditions set out in the Ethics Code of the Bulgarian Media, which provide for sufficient guarantees for the citizens' rights to obtain impartial and objective information from the media.

• Предизборен меморандум (The Election Memorandum)
http://merlin.obs.coe.int/redirect.php?id=13448 BG

• Позиция на членовете на АБРО относно подписване на предизборен меморандум , предложен от СЕМ (The position of the members of the Bulgarian Radio and Television Operators Association on the Election Memorandum)
http://merlin.obs.coe.int/redirect.php?id=13442 BG

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CH-Switzerland

Agreement on Cinematographic Co-production with Germany and Austria Enters into Force

The Swiss Government has concluded another agreement on cinematographic cooperation with Germany and Austria. The aim is to facilitate international co-productions and promote the circulation and exploitation of films from any of the contracting States, and it came into force on 23 June 2011. It is the first trilateral agreement Switzerland has concluded in the field of cinematographic cooperation, and it replaces the bilateral agreements concluded with Germany in 1984 and with Austria in 1990.

The new agreement on cinematographic cooperation applies to films intended mainly to be shown in cinema theatres that have been produced in the contracting States as bilateral or trilateral co-productions. Co-productions produced under this agreement and recognised as such by the relevant authorities in Germany, Switzerland and Austria are classified as "national" films in all three contracting States. The co-producers can benefit from the advantages granted to co-productions if their technical and financial organisation is adequate and they have sufficient professional qualifications and experience. They must also meet the respective national requirements.

The participation of the co-producers must include financial, artistic and technical contributions. The artistic and technical contribution of each co-producer must theoretically be in proportion to its financial contribution. There must also be a balance between the contracting States as regards both the artistic and technical contributions and the financial contributions. To increase the possibilities for co-production between Germany, Switzerland and Austria, the new

agreement reduces from 30 to 20% the minimum participation by the minority co-producer country to the cost of producing a film. In exceptional cases the contracting States may even agree to reduce the participation to 10%. This is because practice shows that increased production costs cause difficulties for minority co-producers if the minimum participation rate is too high. The tripartite agreement also allows co-financing (i.e., co-productions for which one or more co-producers participate in financial terms only) where the financial participation is between 10 and 20% of the production costs.

The agreement provides that the competent authorities in Germany, Switzerland and Austria may also recognise as co-productions films produced by co-producers from the contracting States in collaboration with producers from other countries with which one of the contracting States involved has concluded a co-production agreement. The conditions for accepting such films need to be examined by the competent authorities for each individual case before filming starts.

• *Trilaterales Abkommen vom 11. Februar 2011 zwischen der Regierung der Bundesrepublik Deutschland, der Regierung der Republik Österreich und der Regierung der Schweizerischen Eidgenossenschaft über die Zusammenarbeit im Bereich Film* (Trilateral agreement of 11 February 2011 between the Governments of the Federal Republic of Germany, the Republic of Austria, and the Swiss Confederation on cooperation in cinematographic matters)
http://merlin.obs.coe.int/redirect.php?id=13445 DE FR IT

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CY-Cyprus

Switch-over to Digital Television

The Republic of Cyprus switched over to digital television transmission on 1 July 2011 and all broadcasters ceased their analogue transmissions.

According to the Office of the Commissioner for Electronic Communications and Postal Services, the operation was successful thanks to the close co-operation of public services, broadcasters and digital networks operators. A period of concurrent digital and analogue transmissions that lasted for several months allowed all actors to adapt and provided a smooth passage to the new era.

The procedure for the digital switch-over essentially started in 2007 and 2008 with a series of consultations and the elaboration of a policy plan as well as of the legal framework regulating the relevant issues (see IRIS 2008-10/10). In 2009, it was decided to adopt the standard DTB-T MPEG4 instead of MPEG2. In accordance with the policy plan the first of two digital networks provided for broadcasting was granted on the basis of negotiations to the public service broadcaster Ραδιοφωνικό Ίδρυμα Κύπρου (Cyprus Broadcasting Corporation - RIK). The second network, for commercial broadcasters, was granted to Velister Ltd. after a multiple-round auction procedure, for a record sum of EUR 10,000,000 per year (see IRIS 2010-9/16).

The new environment led to changes in the broadcasting media landscape with local channels becoming island-wide. The public service network transmits its two television channels and the programmes of the public service channel of Greece NET and Euronews in English, all in Standard Definition. Its High Definition channel has not started transmission yet. RIK's four radio channels are also broadcast by the network.

Velister's private digital network broadcasts the following channels: ANT1, MEGA, SIGMA, TV Plus, EXTRA, CAPITAL, MAD CY and MUSIC TV. The pay TV broadcaster Lumiere (LTV) offers ten different thematic channels, run on its own and other platforms, while its sibling ALFA has cancelled operations.

In addition to digital television platforms, the following television service providers operate in the Republic: CytaVision, Cablenet, Primetel, Lumiere TV, all offering also Internet and telephony services, and Nova Cyprus that offers DBS (Direct-broadcast Satellite), but does not include the Cyprus channels in its programmes. Their operation is still not regulated.

In the course of the digital switch-over, the Office of the Commissioner for Electronic Communications and Postal Services ran a campaign of information for all actors, including broadcasters, consumers, technicians, television sets sellers and others (see IRIS 2010-8/20).

The Law on Radio and Television Stations L. 7(I) /1998 (Ο περί Ραδιοφωνικών και Τηλεοπτικών Σταθμών Νόμος) was amended in mid-April to prepare the ground so that radio and television organisations can continue their operation in the new environment (see IRIS 2011-5/11). Its new name will be the Law on Radio and Television Organisations of 1998 to 2011. The Cyprus Radio Television Authority issued new digital licences to applicants that wished to continue operating in the digital era.

• Ανακοίνωση σχετικά με τις Εκπομπές Ψηφιακών Καναλιών στην Κύπρο (More Information)
http://merlin.obs.coe.int/redirect.php?id=13449 EL

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DE-Germany

BVerwG Rules on Licence Fee Obligation for Internet PCs

In several rulings issued on 17 August 2011, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) decided that Internet-capable PCs used for professional purposes could be exempted from the licence fee obligation (see IRIS 2009-7/14).

The rulings followed complaints lodged by three self-employed individuals who worked from home. Their home offices contained Internet-capable PCs that they used for work purposes. These devices were subject to fees levied by the public service broadcasters because they were considered as new types of broadcast-receiving devices in the sense of the *Rundfunkgebührenstaatsvertrag* (Inter-State Agreement on broadcast licence fees - RGebStV). Their owners complained that the PCs concerned should be exempt from the licence fee obligation as secondary devices (Art. 5 RGebStV).

The complaints were upheld in the lower instance courts and the appeals lodged by the broadcasters concerned were rejected by the BVerwG.

The plaintiffs had traditional broadcast-receiving devices (radio and television sets) in the other rooms of their homes, which were used for private purposes and for which they also paid licence fees. These devices should be treated as primary devices, while the Internet-capable PCs, since they were located at the same property, should be considered as fee-exempt secondary devices (Art. 5(3) RGebStV). These provisions were designed to favour new types of broadcast-receiving devices - particularly those not used exclusively for private purposes - because they were often used "not (primarily) to receive broadcasts, but [...] as work tools".

• *Pressemitteilung des BVerwG zu den Urteilen vom 17. August 2011 (Az. 6 C 15.10, 45.10 und 20.11)* (BVerwG press release on the rulings of 17 August 2011 (case no. 6 C 15.10, 45.10 and 20.11))
http://merlin.obs.coe.int/redirect.php?id=13433 DE

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LG Berlin Bans Advertising Claiming Beer Can Improve Looks or Health

On 10 May 2011, in a dispute between the plaintiff, *Verbraucherzentrale Bundesverband e.V.* (federal association of consumer organisations), and *Deutscher Brauer-Bund e.V.* (German brewers' association), the *Landgericht Berlin* (Berlin District Court - LG) ruled that advertising should not claim that beer can improve people's looks or health.

The case concerned information published on the defendant's website about the effects of beer on human health. It was claimed, *inter alia*, that moderate beer consumption reduced the risk of dementia, adult diabetes and cardiovascular problems, and that its high Vitamin B content promoted clear skin and beautiful hair.

The plaintiff argued that these claims represented image advertising. They infringed Article 4(11) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - UWG) in connection with Article 4(3) of Regulation (EC) No 1924/2006 on nutrition and health claims made about foods (Health Claims Regulation) because they made a connection between consumption of a food or beverage and health. The defendant argued that this provision represented a disproportionate restriction of the freedom of speech. It added that the Health Claims Regulation did not apply in this case because the beverages had to "bear" the unlawful claims, which could only be understood as meaning that they should appear on the product's label.

The LG disagreed and ruled that the disputed claims represented a promotion of alcoholic beverages that was unlawful under EU law. The advertising infringed Article 4(3) of the Health Claims Regulation, which meant that the plaintiff was entitled to an injunction under Articles 3 and 4(11) UWG. According to Article 4(3) of the Regulation, beverages containing more than 1.2% by volume of alcohol must not bear health claims. It was generally forbidden to ascribe "medical properties" to foods in advertising, unless they conformed to the nutrient profiles established by the European Commission. Since breweries and their association were free to report on the health effects of beer consumption outside advertising, there was no disproportionate restriction of freedom of speech. The claims had not been made in a journalistic article. Furthermore, it was not necessary for the product itself to "bear" the claims on its label. Article 4(3) also applied to advertising on the Internet, as could be seen from the interpretation of its wording: the verb "tragen" was used as a synonym of the words "enthalten" and "aufweisen". This was also confirmed by the French version, which used the verb "comporter" ("aufweisen" in German).

• *Urteil des LG Berlin vom 10. Mai 2011 (Az. 16 O 259/10)* (Ruling of the LG Berlin of 10 May 2011 (case no. 16 O 259/10))
http://merlin.obs.coe.int/redirect.php?id=13431 DE

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RTL Loses Dispute with Save.tv

According to media reports, the *Oberlandesgericht Dresden* (Dresden Appeal Court - OLG) issued its ruling in the case between the online video recording service Save.tv and the RTL media group (case no. 14 U 801/07) on 12 July 2011. Save.tv reported that the court had decided that its online video recorder did not infringe the broadcaster's right of reproduction.

In the same case, the OLG Dresden had already ruled in favour of Save.tv on 9 October 2007. However, after upholding an appeal against this ruling, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided on 22 April 2009 (case no. I ZR 175/07) to refer the matter back to the OLG Dresden for a final ruling. It instructed the court to examine in detail who actually carried out the recording. Only if the recording process was automated could it be attributed to the customer and therefore be considered as a lawful recording for private use. It should also clarify the extent to which the service, by forwarding the recorded programmes to the "personal video recorders" of several users, infringed the broadcaster's retransmission rights (see IRIS 2010-9/17 and the similar case RTL v Shift.tv, IRIS 2009-7/9).

According to Save.tv, in the proceedings before the OLG Dresden, an independent expert stated that the user initiated an automated recording process in order to create a private copy of television programmes. It was therefore a similar process to that of a traditional video recorder which, according to the BGH, did not infringe the broadcaster's reproduction right. A further appeal was not permitted.

However, according to Save.tv, the question of a possible breach of RTL's retransmission rights by the online video recording service was not resolved. Before the proceedings, referring to the obligation to conclude a contract with the *Verwertungsgesellschaft Media* (media collecting society - VG Media), which looks after the relevant rights of RTL, Save.tv had tried in vain to obtain a licence for the retransmission rights (regarding RTL's announcement in March 2010 that it wished to look after its own rights in future, see IRIS 2010-4/15). In response, the *Deutsche Patent- und Markenamt* (German Patent and Trade Mark Office - DPMA) had decided in September 2010 that Save.tv could not rely on the obligation to contract because the retransmission of programme signals by the operator of an online video recorder represented a separate type of use that was not covered by the purpose of the agreement between the broadcasters and VG Media (see IRIS 2011-1/22). In a separate procedure between RTL and Save.tv, the *OLG München* (Munich Appeal Court), in a ruling of 18 November 2010, referring to the DPMA's decision, had rejected Save.tv's objection that RTL was not entitled to take legal action because it had transferred its rights to VG Media. In the OLG München's view, RTL is entitled to prohibit Save.tv from retransmitting its programmes (see IRIS 2011-2/19).

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ZAK Complains that Programmes Breached Separation Rules

On 28 June 2011, the *Kommission für Zulassung und Aufsicht der Medienanstalten* (Licensing and Monitoring Commission of the State Media Authorities - ZAK) complained that several RTL and Sat.1 programmes had infringed the rules on the separation of advertising and programme content set out in Article 7(3) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement).

Both TV companies had, in a total of three cases, used so-called move-splits, a form of split-screen advertising in which a particular advertisement appears as part of a scene somewhere on the screen and the camera then zooms in until it fills the whole screen. In both RTL cases, the advertisement was on a poster that was initially in the background of a scene, while Sat.1 used a split-screen advertisement on a television set as the starting point for an advertising spot.

The ZAK began by stating that, although the use of these so-called move-splits was fundamentally lawful as a special form of split-screen advertising, it should be clearly labelled as advertising. Although RTL had already inserted the appropriate label during the scene in both cases, the label had not been sufficiently clear. Sat.1, on the other hand, had not inserted the label until the advertisement had filled the screen.

In all three cases, the ZAK considered that the advertising had not been visually separated from the programme to a sufficient degree, nor adequately labelled, which was why it claimed that the principle of separation between advertising and programme material had been infringed.

• *Pressemitteilung der ZAK vom 28. Juni 2011* (ZAK press release of 28 June 2011)
http://merlin.obs.coe.int/redirect.php?id=13432 DE

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State Media Authorities and Sport 1 Reach Settlement on TV Competitions

On 7 July 2011, the *Kommission für Zulassung und Aufsicht der Landesmedienanstalten* (Licensing and Monitoring Commission of the State Media Authorities - ZAK) announced that the special interest television broadcaster Sport 1 and the *Landesmedienanstalten* (State media authorities - LMA) had agreed to settle their disputes concerning consumer protection in game shows (see IRIS 2011-1/23).

Under the settlement, the broadcaster Sport 1 recognised the media authorities' interpretation of the rules on competitions adopted in 2009 (see IRIS 2009-3/12) as binding, withdrew its appeals and objections against complaints and fines and paid a fine of EUR 52,500 for three breaches of the rules on competitions.

For their part, the media authorities cancelled four fines and agreed to stop related court procedures. According to reports, however, one procedure will go ahead, with both parties believing the outcome will be relevant to the interpretation of the law.

Sport 1 also declared its intention to ensure that the rules on competitions are respected in its programmes in future by providing its staff with appropriate training and taking organisational precautions.

The *Bayerische Landeszentrale für neue Medien* (Bavarian new media authority - BLM), as the media authority responsible for Sport 1, will ensure that these agreements are honoured.

• *Pressemitteilung der ZAK vom 6. Juli 2011* (ZAK press release of 6 July 2011)
http://merlin.obs.coe.int/redirect.php?id=13434 DE

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ES-Spain

New Way of Calculation of Film Audiences in Spain

The Spanish Ministry of Culture has approved an Order, published in the Spanish Official Gazette on 28 June 2011, by virtue of which the procedure for the calculation of the audience attracted by a cinematographic film has been modified, directly affecting the system of calculation of economic aids extended to films based on tickets sold. Until this date, the aid based on the exploitation of a film took into account only the tickets sold in theatrical exhibition. But nowadays the theatre is not the only place in which the success of a film can be measured.

The most significant changes introduced by the Order, which is unprecedented and innovative for both Spain and Europe, are the following:

1) The Order institutes, for the first time in Spain, an official calculation of the audience of cinematographic films based, not only on the audiences attracted by theatres, but also by film festivals and events, Internet paying portals, such as Filmin or Filmotech, as well as those represented by the sales and renting of DVDs and other devices.

In all these cases, the Cinematographic and Audiovisual Arts Institute (Instituto de la Cinematografía y de las Artes Audiovisuales - ICAA) has established a system by which after fulfilling certain requirements to ensure transparency and reliability and under the supervisory authority of the Administration, Internet service providers may certify how many people have watched a movie.

2) The Order also promotes positive discrimination for cinematographic works produced by women. Economic aids granted to cinematographic works produced by women shall apply to all female producers, whether or not the work is their first.

3) In addition, for the rating of cinematographic films and other audiovisual works, a category for films "specially recommended for the promotion of gender equality" has been established, which shall be applied to all movies presented for such rating by age-group. This category will be assigned by the ICAA, where appropriate, at the time of its qualification.

• ORDEN CUL/1772/2011, de 21 de junio, por la que se establecen los procedimientos para el cómputo de espectadores de las películas cinematográficas, así como las obligaciones, requisitos y funcionalidades técnicas de los programas informáticos a efectos del control de asistencia y rendimiento de las obras cinematográficas en las salas de exhibición (Order of the Ministry of Culture of 21 June 2011, which sets up the proceedings for calculating the number of people viewing cinematographic works, as well as the obligations, requirements and technicalities related to the computer programmes for controlling the attendance to theatres and film revenue)
http://merlin.obs.coe.int/redirect.php?id=13437 ES

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RTVA adopts a Self-Regulation Code on the Reporting of Sexist Violence on Television

The Council of Professionals of Canal Sur Television and Canal Sur 2, both Andalusian public service broadcaster Radio y Televisión de Andalucía (RTVA)

channels, have elaborated a code containing recommendations and guidelines on gender equality and the portrayal of sexist violence on television. These consist of a set of principles to be followed by professionals linked to the corporation and have been developed in broad consultation with experts in law, security and sociology, as well as with associations for gender equality and protection.

By the end of June 2011 RTVA's general manager, Pablo Carrasco, was presented with a Self-Regulation Code on Sexist Violence Related Information that aims to combat sexist stereotypes and violence in the media, while backing public policy on gender equality. The document, closely connected to journalism ethics, presents best audiovisual editorial practices and answers to most frequently asked questions and doubts as regards sexism, violence and privacy issues.

A special conference dedicated to the protection of minors and the reporting of violence against women on television, held by Canal Sur in Seville, was the origin of the code, which is dedicated to supporting the use of non-sexist language in the media, especially when reporting news. The initiative is one of the first of its kind in Spain.

• Código de los Profesionales de CSTV para la elaboración de informaciones sobre violencia machista (Code of the Professionals of Canal Sur Television on the reporting of sexist violence)
http://merlin.obs.coe.int/redirect.php?id=13404 ES

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FR-France

TF1 International Penalised Heavily for Failing to Distribute a Film by Spike Lee

"Miracle at St Anna", the film by Spike Lee first shown in the USA in September 2008, has not had an international career, and for good reason. In October 2007 the production company On My Own had granted TF1 International the exclusive right to exploit and distribute the film worldwide except in the USA, Canada and Italy. In return, TF1 International undertook to pay it an advance of USD 11 million: 5% to be paid at the time of signing the agreement ("deal memo") and 95% on acceptance of delivery of all the film material. One year later, however, as the film - which tells the story of four black American soldiers during the Second World War - was reaching the final stage of production, TF1 International suspended its exploitation and distribution, claiming that the version it was being offered did not correspond to what it had been promised. There was some dispute among the co-contracting parties as to the length of the film, the content of the "long" and "short" versions, delivery, and payment of the amounts due in performance of the "deal memo". The director and his producer then had TF1 International summoned on grounds of violation of its contractual obligations, calling for the contract to be declared terminated, solely as a result of the distributor's action, and for the payment of damages in compensation for the financial and moral prejudice they had suffered.

In its judgment delivered on 21 June 2011, the regional court in Paris upheld these claims. In the light of the various preparatory stages for the film, the court found that by abstaining from contesting the duration of the film, of which it had had knowledge for more than three months, and at the same time carrying out positive activities to produce, promote and market the "long" version of the film, lasting 2 hours and 35 minutes, TF1 International had knowingly accepted the said version and renounced its complaint that the duration of the showing as provided for in the 2007 "deal memo" had been exceeded. As a result the distributor could not call for a "short version". The court found that since at the end of 2008 the production company had delivered all the film material listed in the "deal memo" for a version of the film that complied with the approved screenplay and a duration known and accepted by TF1 International, the company could not then invoke any contractual default on the part of the applicant production company, nor validly refuse to accept delivery of the film. It had, on the contrary, failed in its contractual obligations by not paying the recoverable advance of USD 11 million and by having suspended performance of its obligations. The court therefore pronounced the contract terminated, with TF1 International exclusively in the wrong. In the light of the box-office figures achieved by the film in the USA, the amount of pre-sales that TF1 could have achieved if it had not failed in its contractual obligations (EUR 30 million in the rest of the world), expenditure incurred by TF1 International for marketing the film, the number of cinema theatre tickets that could have been sold compared with expenditure on distribution (1 million tickets for EUR 780,000 in distribution expenditure), the minimum sale price for TV sales laid down in the "deal memo", and the recoverable advance of USD 11 million that TF1 was to pay, the court calculated the operating losses suffered by the production company as a result of TF1 International's failure to perform its contractual obligations at EUR 20 million. It also awarded EUR 1.5 million to Spike Lee, EUR 200,000 to the co-author of the screenplay, and EUR 1 million to the producer in compensation for the moral prejudice suffered by each. The bank BNP Paribas, for its part, was awarded USD 11 million (plus interest) in respect of the recoverable advance provided for in the "deal memo". In all, TF1 International has been ordered to pay EUR 42 million. On 25 July 2011 the parties announced that they had reached an out-of-court settlement of their difference, but no details have been revealed.

• *TGI de Paris (3e ch., 1re sect.), 21 juin 2011, J. Lee alias Spike Lee,* On my ownProduzioni cinematografiche et a. c. TF1 International et BNP Paribas (Regional court of Paris (3rd chamber, 1st section), 21 June 2011, J. Lee alias Spike Lee, *On my ownProduzioni cinematografiche et al. v TF1 International and BNP Paribas*) FR

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HADOPI: Beneficiaries Will Be Able to Claim Damages as Part of Criminal Proceedings

At long last the repressive part of the HADOPI legislation has now been finalised. The arrangements, set up by the Act of 12 June 2009 and supplemented by the Act of 28 October 2009, attempt to combat the illegal downloading of works by introducing 'a graduated response". The first stage is in the hands of the HADOPI, an independent administrative authority with responsibility for sending warning messages to Internet users using peer-to-peer systems whose IP addresses have been collected by the authorised rights management societies. For the second stage, the Constitutional Court censured the HADOPI's capacity to impose the penalty of suspending Internet access, and requires this to be ordered by a criminal court, thereby obliging the legislator to rework the corresponding legislation. The Act of 28 October 2009, referred to as "HADOPI 2", now requires the criminal courts to order the suspension of Internet access, if this is necessary, as a supplementary penalty. To reduce the courts' workload and to speed up proceedings, the Act also provides for cases to be dealt with by a single judge, under the penal order procedure - a simplified procedure not requiring the presence of both parties or justification. In its decision of 22 October 2009, the Constitutional Council validated most of this second HADOPI Act, but would not allow the provision enabling the judge to deliberate by means of a penal order in response to the application for damages entered by the victim of the offence, i.e., the beneficiaries. The Council found that although there was nothing against this possibility, it was nevertheless for the legislator to lay down the applicable rules in the Act and not to have them dependent on a decree, as provided for in the Act; the provision was therefore axed. This meant that a third HADOPI Act was needed. The axed Act has now been corrected, with the adoption on 12 July 2011 of the bill "on the distribution of disputes and the simplification of certain court procedures". Article 20 of the Bill provides that "The simplified procedure of the penal order shall apply to the following offences: (04046) 11. Offences of infringement of copyright provided for in Articles L. 335-2, L. 335-3 and L. 335-4 of the Intellectual Property Code if they are committed using an on-line service of communication to the public".

The Act has not yet been gazetted because of some disagreement between the two Chambers on quite a different matter, and the text should therefore be voted on again in early October. The HADOPI recently announced that it had summoned about a dozen Internet users who had already received three warning messages, although there is as yet no news as to whether it has decided to pass these first cases on to the public prosecutor. It is no doubt waiting for this final procedural part of the Act to be promulgated.

• *Projet de loi « sur la répartition des contentieux et l'allègement de certaines procédures juridictionnelles »* (Bill "on the distribution of disputes and the simplification of certain court procedures")
http://merlin.obs.coe.int/redirect.php?id=13436 FR

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GB-United Kingdom

Bid to Merge BSkyB and News Corp Withdrawn after Phone-Hacking Scandal

The long-running story of the bid by News Corporation to purchase the whole of BSkyB (see IRIS 2011-2/4, IRIS 2011-3/22 and IRIS 2011-5/25) has reached a surprising conclusion with the withdrawal of the bid as a result of the effect of the UK phone-hacking scandal on the reputation of News International.

In March, the Secretary of State for Culture, Media and Sport had announced that he intended to accept undertakings from News Corporation as an alternative to referring the bid to the Competition Commission for a full investigation on plurality grounds. The undertakings would have involved Sky News being "spun off" as a separate company, with a number of special protections for its editorial independence. After consultation, revised undertakings were published for final consultation in June. It was assumed that after this consultation the undertakings would be accepted by the Secretary of State so that the merger could be implemented.

However, at the beginning of July it was found that journalists from the News of the World, a News International paper, had engaged in widespread illegal phone-hacking. This had included hacking into the voicemail of a murdered schoolgirl during the police search for her and the deletion of messages on her voicemail by journalists. As a result of public revulsion, the News of the World (the UK's best-selling Sunday newspaper) was closed by News International; political fallout was widespread and resulted in the resignations of the Commissioner and Assistant Commissioner of the Metropolitan Police due to links with News International and the failure of an earlier police investigation. The events will also result in major changes to the regulation of the press in the UK, with

the Prime Minister having announced the end of the self-regulatory Press Complaints Commission and the establishment of two inquiries into the police investigation and the culture, practices and ethics of the press.

The consultation on the undertakings received no fewer than 156,000 electronic submissions, largely by internet campaigns against the merger; reading them would have delayed the process even further. On 11 July the Secretary of State referred to the serious public concern that News Corporation should be able to take control of what would become Britain's biggest media company and News Corporation withdrew its undertakings, thereby forcing a reference of the bid to the Competition Commission on plurality grounds. Two days later News Corporation announced that the bid was withdrawn.

This may not be the end of the story. There is speculation that the bid may be renewed when the political climate has eased. However, Ofcom, the UK communications regulator, has announced that it is considering whether News Corporation is a "fit and proper person" to hold a broadcasting licence, as required under the Broadcasting Acts. Should it find in the negative, this could force the divestment of News Corp's existing 39% stake in BSkyB.

- Department for Culture, Media and Sport, 'News Corp - BSkyB Merger Update', Press Release, 30 June 2011
http://merlin.obs.coe.int/redirect.php?id=13408 EN
- Department for Culture, Media and Sport, "News Corp - BSkyB Merger to be Referred to the Competition Commission", Press Release, 11 July 2011
http://merlin.obs.coe.int/redirect.php?id=13409 EN
- Ofcom, Letter to John Whittingdale, MP, Press Release, 8 July 2011
http://merlin.obs.coe.int/redirect.php?id=13410 EN

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The Yahoo! Decision (follow up)

On 16 June 2011 the Intellectual Property Section of the Italian Court of Appeal overturned the Court of Rome's recent decision in the Yahoo! Case regarding the removal of links that infringe copyright (see IRIS 2011-7/30).

The Ninth Section of the Court of Rome had found that Yahoo! acted as an accessory in the proliferation of pirated links, establishing for the first time liability for contributory infringement of search engines that do not take an active role in combating online piracy.

The Court of Appeal has now accepted all the requests submitted by Yahoo!.

According to the Court, Yahoo! does not have "liability for contributory infringement" and does not have an obligation of preventive control. Furthermore, in cases concerning online piracy, the complainant has to be precise in their submissions and has to provide specific evidence. In order to obtain a "take down" on the presumed illegal material, IP rightsholders have to prove their ownership of the rights of copyright protection and have to clearly identify the challenged links. According to the appeal decision, PFA Films S.r.L., the film company and copyright holder for the Iranian film "About Elly", never precisely identified a URL in relation to the violation.

The Court of Appeal stated that "the limitation of liability introduced to the benefit of ISPs [i.e., the liability exemption prescribed by the E-Commerce Directive 2000/31/EC] is mainly aimed at avoiding a new case of objective liability [i.e., liability without negligence] that is not identified by the law or at least a contributory liability of providers to the unlawful contents published by third parties making use of the connectivity service of the ISP".

European copyright "enforcement" is built on the principle of balancing interests between the IP rightsholder, the user and the suppliers of services in the information society. The requirement of the promotion and protection of the free movement of services in the information society has to be assured.

In this context the limitations of liability introduced to the benefit of ISPs are aimed at avoiding the introduction of a new hypothesis of objective liability not provided in the law or at least of a hypothesis of a shared action in collaboration with the providers of the illegal material transmitted by third parties using the connectivity services furnished by the latter.

The appeal decision also found that there was no reason, in the field of online copyright protection, to derogate from the general rules relating to the burden of proof. The burden of proof remains with the rightsholder, who has to prove their ownership and identify the violation on every piece of material made available to the public whose removal or the blocking of the distribution of which is requested. A generic allegation of copyright infringement is not sufficient. The precise links have to be identified in order to prove their illegal nature.

In addition it was noted that PFA Films owns only some of rights for the use of the work "About Elly", restricted to certain territories. Consequently, the rights can be legitimately used by third parties, including online intermediaries.

In relation to interim measures, Articles 14, 15 and 16 of the legislative decree 70/2003 require judicial verification of the alleged violations. However, no judicial verification is possible in the absence of clear evidence provided by the complainant.

Furthermore, it is important to stress that, considering that the interim measures requested may produce ef-

fects for numerous persons unaware of the procedure, this request requires rigorous verification of the facts.

• Tribunale di Roma IX sezione civile, sezione specializzata in material di Proprietà Intellettuale - Sentenza Yahoo! (Intellectual Property section of the Italian Court of Appeal - Yahoo! Decision, 16 June 2011)
http://merlin.obs.coe.int/redirect.php?id=13427 IT

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AGCOM Measures to Protect Pluralism in Digital Terrestrial Broadcasting Lifted, but then Temporarily Restored

In its Decision of 16 February 2011, No 70/11/CONS, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) surveyed the measures to protect pluralism set out in Decision 136/05/CONS and repealed the obligation imposed on RTI to rely upon an advertising agency other than Publitalia for the sale of advertising for its digital terrestrial transmissions.

According to Agcom, RTI has fulfilled that obligation by establishing Digitalia and entrusting to that company the sale of advertising for pay-TV programmes broadcast on digital terrestrial networks. The sale of advertising for free-to-air digital terrestrial transmissions, instead, remains the prerogative of Publitalia. In Agcom's view, this solution is consistent with the aims pursued by Decision 136/05/CONS and is without prejudice to other transparency and non-discrimination obligations imposed on Publitalia in that decision.

However, RTI's competitor Sky Italia promptly brought an action before the Latium Regional Administrative Court seeking to obtain the annulment, following the suspension of its effects, of Decision 70/11/CONS. In its Order of 13 July 2011, the Second Chamber of the Latium Regional Administrative Court suspended the effects of Decision 70/11/CONS. In particular, the Court held that the impugned measure was prima facie unlawful because, in spite of its appearance as a merely confirmatory measure, it substantially modified the obligations set out in Decision 136/05/CONS. The Court also stated that Decision 70/05/CONS was liable to cause serious and irreparable harm to the advertising market.

Following the order of the Latium Administrative Court, the full effectiveness of the obligations imposed on RTI in Decision 136/05/CONS has been restored until the Court delivers its judgment on Decision 70/11/CONS.

• *Agcom, Delibera 70/11/CONS del 16 febbraio 2011, Ricognizione delle misure stabilite dalla delibera n. 136/05/CONS del 2 marzo 2005 recante "Interventi a tutela del pluralismo ai sensi della legge 3 maggio 2004, n. 112", in Gazzetta Ufficiale 55 dell'8 marzo 2011* (AGCOM Decision of 16 February 2011, No 70/11/CONS, survey of the measures established by Decision of 2 March 2005 No. 136/05/CONS on "Measures to protect pluralism under Law of 3 May 2004, No 112", Official Journal of the Italian Republic, 8 March 2011, No. 55)
http://merlin.obs.coe.int/redirect.php?id=13455 IT

• TAR Lazio (Seconda Sezione), Ordinanza 13 Luglio 2011, Sky Italia Srl c. AGCom, Ricorso n. 3441/2011 (Latium Administrative Court (Second Chamber), Order of 13 July 2011, Sky Italy Srl v. AGCom, Application No. 3441/2011) IT

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Linear and Non-Linear AVMS to Be Authorised according to Agcom Regulations

On 25 November 2010 the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) adopted two regulations on the authorisation of linear and non-linear audiovisual media services (deliberations no. 606/10/CONS and 607/10/CONS), pursuant to legislative Decree no. 44/2010 implementing the Audiovisual Media Services Directive into Italian legislation.

For the purposes of licensing, linear services include audiovisual media and radio services conveyed through electronic communications networks other than coaxial cable, satellite and terrestrial platforms, which are regulated by separate provisions (deliberations no. 127/00/CONS and 435/01/CONS, see IRIS 2000-4/16 and IRIS 2002-1/18). The scope is limited to linear services intended for the general public, providing a weekly schedule of at least 24 hours and does not include cable TV services in limited areas, such as railway stations, metros, airports. As far as on-demand services are concerned, the scope is limited to catalogues accessible to the general public, excluding catch-up TV or archive services of content already broadcast on a linear basis, which are considered as ancillary to linear services. No rules are provided with reference to on-demand radio.

In addition, in order to determine presumptively which economic activity is in real competition with broadcasting, a threshold of yearly revenues above EUR 100,000 has been introduced and user-generated content posted on websites that do not provide for ex ante selection, but only an indexing activity of the content uploaded by users, would not fall under the scope of the regulations.

The authorisation system is different for the two kinds of services: for on-demand services it is sufficient to notify a declaration on the same day that the activity started, whereas for linear services it is necessary to wait for a thirty day period to elapse to get a general authorisation.

Existing services may continue to be supplied while awaiting authorisation; start-up activities are allowed a one year term to verify whether yearly revenues exceed the EUR 100,000 threshold.

The authorisations last for 12 years and are renewable. Authorised operators are subject to a one-time fee of EUR 500 for audiovisual media services and EUR 250 for radio and on-demand services. There are no annual fees, but authorised providers are subject to the general annual contribution to Agcom that applies to all operators falling within its competence.

• Delibera 25 November 2010, no. 606/10/CONS, Regolamento concernente la prestazione di servizi di media audiovisivi lineari oradiofonici su altri mezzi di comunicazione elettronica ai sensi dell'art. 21, comma1-bis, del Testo unico dei servizi di media audiovisivi e radiofonici (Regulation concerning the provision of linear audiovisual media or radio services over other electronic communications networks according to Art. 21-1bis of the Audiovisual Media Services Code)
http://merlin.obs.coe.int/redirect.php?id=13411 IT

• *Delibera 25 November 2010, no. 607/10/CONS, Regolamento in materia di fornitura di servizi di media audiovisivi a richiesta ai sensi dell'articolo 22-bis del Testo unico dei servizi di media audiovisivi e radiofonici* (Regulation concerning the provision of on-demand audiovisual media services pursuant to Art. 22-bis of the Audiovisual Media Services Code)
http://merlin.obs.coe.int/redirect.php?id=13412 IT

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Agcom Regulation on Short News Reports of Events of Major Interest to the Public

On 17 December 2010 the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) adopted a regulation concerning short news reports of events of major interest to the public, which are transmitted on an exclusive basis by a broadcaster under Italian jurisdiction. The regulation was adopted after a public consultation launched in June 2010, pursuant to Article 32-quater of the Italian audiovisual and radio media services Code (legislative decree no. 177/2005, as amended in 2010: see IRIS 2010-2/25 and IRIS 2010-4/31), which implements Article 15 of the Audiovisual Media Services Directive.

An "event of major interest to the public" is defined (Article 1) as a single event, such as a sports match, or a cultural, artistic or religious happening, whose importance to the public is well recognized and which is organized in advance by an event organizer who is legally entitled to sell its rights.

With a view to granting access to information on events of major interest, the aim of the regulation (Article 2) is to lay down a procedure for the exercise of the right to inform and to be informed. The right of accessing these events, when transmitted on an exclusive basis, is guaranteed to any broadcaster for the purpose of transmitting short news reports, which may solely be used within news programs, including those with a thematic character (Article 3). Local broadcasters may have access to highlights of events of high interest related to the local area covered by their transmissions. These extracts must be provided on a fair, reasonable and non-discriminatory basis, taking due account of exclusive rights.

Using images of the event for short news reports is allowed for a maximum of three minutes for each event, for a period from 1 to 48 hours after the conclusion of the event. In the case of events of very short duration, short extracts should have a proportionate extent and not exceed 3% of the entire duration of the event.

With regard to technicalities, the regulation outlines two alternative ways (Article 4) in which broadcasters can acquire the images of the event:

- the organizer of the event may make the whole event available for broadcasters through an electronic system that enables them to view the same event in its entirety and to extrapolate short news reports;

- if the above-mentioned system does not exist, broadcasters may access the broadcast signal of the licensee and freely choose the images for short news reports. In this case, broadcasters need to indicate the sources for the whole duration of the extract.

Such terms of use should be communicated by the organizer not later than one week before the event takes place, to give broadcasters enough time to exercise such a right. Any compensation, where it is provided for, may not exceed the additional costs directly incurred in providing access.

Should there be a disagreement between broadcasters regarding transmissions of an event as defined above, with reference to e.g., the qualifying of the event as being of a major interest to the public, the definition of the technical procedures of transmission of short extracts, the payment of fair compensation for the access to the signal of the licensee or to the location of the event, the regulation lays down a specific dispute resolution procedure whereby Agcom can adopt a binding decision if both parties agree (Article 5).

• Delibera no. 667/10/CONS of 17 December 2010, Regolamento concernente la trasmissione di brevi estratti di cronaca di eventi di grande interesse pubblico (Regulation concerning broadcasting of short news reports events of major interest)
http://merlin.obs.coe.int/redirect.php?id=13418 IT

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Agcom Adopts a Regulation on Parental Control

On 22 July 2011, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) adopted Regulation no. 220/11/CSP on parental control (hereinafter "the Regulation"). The Regulation establishes technical measures aimed at preventing minors from viewing films that have been denied clearance for their projection or representation in public or that have been rated as unsuitable for minors under eighteen years and adult content, in accordance with Article 34, paragraphs 5 and 11, of the Audiovisual Media Services and Radio Code, adopted with legislative decree no. 44/2010. The Regulation was adopted through co-regulatory procedures.

For the development of the new rules, Agcom has established a technical board, with the cooperation of the Department of Communications of the Ministry of Economic Development, the Higher Institute of Communications and the Committee for the implementation of the self-regulatory code on media and minors. The technical board has also been open to other stakeholders.

The board was established on 6 May 2010 with deliberation no. 88/10/CSP. After an almost year-long discussion, the new Regulation has introduced a parental control feature that specifically and selectively inhibits access, from first use, to adult content.

Article 1 requires that audiovisual media service (AVMS) providers offer, for programmes that are subject to the Regulation, a parental control feature capable of prohibiting access to certain selected content from first use and for each subsequent use. The user must be able to deactivate the parental control measure through a secret and personal code.

Under Article 2, the viewing of adult content is possible only by entering a secret, specific, personal and individualised code. The preset PIN put in place by the access device producer must be changed at first usage.

Article 3 relates to the obligation of AVMS providers to make the public aware of the function of the parental controls and the procedures for setting the secret code that enables viewing. The user can decide to eliminate the parental control feature and then re-enable it at any time.

Article 4 concerns the obligation of AVMS providers to provide a description of the parental control feature available on their websites together with adequate and comprehensive information on the classification of audiovisual content.

AVMS providers, according to Article 5, are obliged to adapt their technical procedures to bring them into accordance with the Regulation within six months after its entry into force. For this purpose, providers will have to employ the utmost diligence in their dealings with producers and/or importers of decoders so as to ensure compliance with the provisions of the Regulation.

Article 6 deals with devices already installed and available on the market. With regard to these devices, AVMS providers have an obligation to inform and make the users aware of the possibility of setting a PIN.

Finally, Article 7 envisages the establishment, after a separate deliberation by Agcom, of a specific technical board, open to the participation of representatives of internet service providers and AVMS providers, in order to define specific rules relevant to connected TV and web-TV.

• Deliberation no 220/11/CSP - Regolamento in materia di accorgimenti tecnici da adottare per l'esclusione della visione e dell'ascolto da parte dei minori di film ai quali sia stato negato il nulla osta per la proiezione o la rappresentazione in pubblico, di film vietati ai minori di diciotto anni e di programmi classificabili a visione per soli adulti ai sensi dell'articolo 34, commi 5 e 11, del Testo unico dei servizi di media audiovisivi e radiofonici (Regulation concerning technical measures aimed at preventing minors from viewing films that have been denied clearance for their projection or representation in public or that have been rated as unsuitable for minors under eighteen years and adult content, according to Article 34, paragraphs 5 and 11, of the Audiovisual Media Services and Radio Code)
http://merlin.obs.coe.int/redirect.php?id=13416 IT

• Deliberation no. 88/10/CSP - Costituzione del tavolo tecnico per l'adozione della disciplina di dettaglio sugli accorgimenti tecnici da adottare per l'esclusione della visione e dell'ascolto da parte di minori di contenuti audiovisivi classificabili a visione per soli adulti ai sensi dell'articolo 9 del decreto legislativo 15 marzo 2010, n. 44 (Establishment of a technical board for the adoption of the implementation rules on the technical measures to be adopted in order to prevent minors from viewing adult content as defined by Article 9 of legislative decree no. 44/2010)
http://merlin.obs.coe.int/redirect.php?id=13417 IT

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New Italian Draft Regulation on Online Copyright

On 6 July 2011, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) approved (with seven votes in favour, one vote against and one abstention) a draft regulation of online copyright, *Delibera 668/2010* (Decision 668/2010).

The regulation establishes that for the removal of content protected by copyright, Agcom's procedure is an alternative procedure, not substitutive in respect of the judicial procedure, intended to cease from the moment one of the parties appeals to the courts.

The publication of the draft in the *Gazzetta Ufficiale* (Official Gazette) will be followed by a public consultation for sixty days (ending on 15 September 2011)

that will give stakeholders the opportunity to make their contribution.

At a later date, according to the statement of Agcom's President Calabro, Agcom will accept contributions and suggestions, as the final version of the regulation will not be adopted before November.

The new draft has addressed some of the issues raised by previous consultations.

Although important changes have been included compared to the previous versions of the draft, the final version still remains quite controversial.

The regulation has two important parts. The first part concerns the measures that need to be developed with regard to the legal demand and the effective promotion of access to content by users.

The second part provides several measures designed to protect copyright. Two stages can be distinguished: one concerning the procedure with the web server and a second concerning the procedure with Agcom.

During the first phase a so-called "notice and take down" rule is applied, in accordance with which the web server has 4 days to desist from infringement. In the second phase, if the "notice and take down" is ignored, one of the parties concerned can apply to Agcom. Following a cross-examination process of 10 days, Agcom will be able to give a decision on the removal of illegal content or its restoration within the following 20 days (with a possibility of delaying for a further 15 days).

The ISP will then have a 4 day period in which to remove the challenged material following the notice from the rightsholder. If removal fails to occur within that timeframe, the rightsholder may send notice to Agcom within the following 7 days.

If Agcom believes that the notice from the rightsholder is well grounded, it will first check whether the ISP intends to voluntarily comply with the request for removal. If this does not occur, the Agcom board can order an Italian website manager to remove the challenged material and can also order audiovisual service providers to block the transmission of challenged material.

In the case of foreign websites, Agcom can adopt 3 procedural steps, a form of "three strikes", with an initial warning followed by the request for the removal of the challenged material and the final notification to the judicial authorities.

As mentioned above, the Agcom procedure is an alternative procedure and is not intended as a substitute for the judiciary procedure; it is blocked from the moment that one of the parties applies to the judge. Furthermore, as with all Agcom decisions, any decision is subject to appeal before the Tribunale Amministrativo Regionale del Lazio (Regional Administrative Court of Lazio).

On the principle of non-commercial use, this regulation will exclude and will not concern the following: blogs and websites that do not have a commercial scope; freedom of the press issues; comments, criticisms, or discussions; didactic and scientific uses; the partial reproduction, concerning quality or quantity, of the content of the entire work that does not affect or damage its commercial development.

During the previous phase of consultation a White Paper on copyright and protection of fundamental rights on the Internet was presented on 14 June 2011 in the Italian Parliament. The White Paper consisted of 125 pages of international studies, independent research, 500 references, and fifteen authors from the world of journalism, business and academic research.

- *Consultazione pubblica sullo schema di regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica, delibera n. 398/11/CONS, 6 luglio 2011* (Public consultation on the draft Regulation on online copyright, Decision n. 398/11/CONS, 6 July 2011)
http://merlin.obs.coe.int/redirect.php?id=13424 IT
- *Delibera N. 668/10/CONS, 17 dicembre 2010* (Decision n. 668/10/CONS, 17 December 2010)
http://merlin.obs.coe.int/redirect.php?id=13463 IT

Ana Perdigao
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Agcom Sets Up a Monitoring Observatory on Product Placement

On 20 January 2011 the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) adopted deliberation no. 19/11/CSP setting up a standing monitoring Observatory on product placement. On account of the complexity of the subject, the Observatory is aimed at dealing with the practical enforcement of the primary rules adopted in 2010 in implementation into Italian legislation of Article 11 of the AVMS Directive 2010/13/EU (see IRIS 2008-1/3).

Article 15 of legislative decree no. 44/2010 (see IRIS 2010-2/25) which introduced a new Article 40-bis into the Italian Broadcasting Code (see IRIS 2005-9/24), now renamed the AVMS Code, is an almost literal transposition of the AVMS Directive and allows product placement in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes, excluding children's programmes. According to this provision, goods or services may be placed in the above-mentioned programmes free of charge or in return for payment. In addition, product placement must not affect the responsibility and the editorial independence of the audiovisual media service provider and programmes that contain product placement must not directly encourage the purchase or the rental of the placed products nor give

undue prominence to the products in question. Viewers shall be clearly informed about the presence of product placement in the programme both at the start and at the end of the programme, as well as when the programme resumes after an advertising break. In any event, product placement of tobacco products and medical products available only on prescription is prohibited.

In order to implement to these new rules, Article 40-bis of the AVMS Code obliges producers, audiovisual media service providers and advertisers to adopt self-regulatory codes on product placement and to notify these to Agcom, who is charged with monitoring their application. Before setting up the Observatory, on 5 November 2010 Agcom published a notice inviting all interested stakeholders to transmit their codes to Agcom and asked for comments on the occasion of setting up a permanent consulting unit in order to discuss the practical issues arising from the implementation of the codes together with the industry.

Having received general consensus in this regard, the permanent Observatory was established with deliberation no. 19/11/CSP within Agcom's Audiovisual Content Directorate. The mission of the Observatory is, on the one hand, to allow an ongoing discussion between Agcom and all concerned stakeholders in order to deal with the practical enforcement of the codes and with the different forms of product placement that may appear over time, so as to ensure their compliance with internal and Community law, and, on the other hand, to guarantee Agcom's technical support in the debate both at the national and international level on issues related to product placement.

As to its working procedures, linear and non-linear AVMS providers, consumers' and users' associations, producers, national and local broadcasters, institutions, self-regulatory and non profit-making organisations that have specific competences on the subject, as well as any other stakeholder, are invited to interact with the Observatory by sending their comments to Agcom's Audiovisual Content Directorate. The dates for the Observatory's meetings will be published on Agcom's website.

• Delibera n. 19/11/CSP - Istituzione di un osservatorio permanente in materia di inserimento dei prodotti ai sensi dell'articolo 40 bis del Testo unico dei servizi di media audiovisivi e radiofonici - Decreto legislativo 31 luglio 2005, n. 177, come integrato dal Decreto legislativo 15 marzo 2010, n. 44 (Deliberation no. 19/11/CSP - Establishment of a standing monitoring unit on product placement under the Article 40bis in the AVMS code in the legislative decree n. 177/2005 ("Testo unico dei servizi di media audiovisivi e radiofonici"), as integrated into the legislative decree no. 44/2010)
http://merlin.obs.coe.int/redirect.php?id=13414 IT

• Circolare sull'autoregolamentazione dell'inserimento di prodotti all'interno della programmazione (Notice on the self-regulation of product placement (according to Article 40-bis of the Audiovisual media services and radio code))
http://merlin.obs.coe.int/redirect.php?id=13415 IT

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MK-"the Former Yugoslav Republic Of Macedonia"

Reforms of the Media Regulation for more Effectiveness and Transparency

The latest amendments to the Broadcasting Law increase the number of members of the Macedonian independent media regulatory authority 'Broadcasting Council' from nine to fifteen. The parliamentary majority, established after the early elections this year, decided on this expansion of membership.

According to the Broadcasting Act, the members of the Broadcasting Council are nominated by official proposers: the Parliamentary Commission for Appointments and Dismissals (3 nominations), the Inter-University Conference (3 nominations), the major association of journalists in the country (2 nominations) and the Macedonian Academy of Sciences and Arts (1 nomination). The latest changes add four more official proposers: the President of the country (2 nominations), the Anti-corruption Commission (1 nomination), the Association of Units of Local Self-government (2 nominations) and the Competition Protection Commission (1 nomination). The main reason for these addenda to the law - as it was pointed out by the parliamentary majority - was to increase the effectiveness and the transparency of the media regulatory authority.

The lack of visible effectiveness of the media regulation has been a widely-known issue in Macedonia. The 2010 Country's Progress Report of the EU noted that the media regulator "is not able to monitor the market effectively". Furthermore, illegal media concentration and the opaque media ownership situation have been burning issues in the media sector for years, which also has been pointed out as a serious problem in international reports.

The Competition Protection Authority and the Broadcasting Council indeed made several attempts to address the issue of high media concentration, however, with no results. For years this media ownership constellation has been giving a false image that the great number of broadcasters (at the moment 160) would improve media pluralism in the country. This thesis has proved to be wrong, due to the fact that the media outlets share a small advertising cake and face serious financial problems. This media regulation policy has put the media in the situation of needing to turn to centres of political and economic power in order to survive. Despite the weak local economy and the global economic crises, surprisingly no media outlet was closed due to underfunding. On the other hand market research showed that the share of political advertising kept its position among the five biggest advertisers.

The intention to reform the media regulatory mechanisms has been overshadowed by criticism, inter alia concerning the way the amendments became part of the national legislation. Critics say that such major reforms of media legislation needed public debates and consultation with national and international experts, especially due to the fact that Macedonian media democracy was still fragile and even a small wrong move could inflict serious damage. A further question is whether the Broadcasting Council will be more effective and efficient by merely increasing the number of its members at a time when the general tendency is towards the reduction of State officials in independent regulatory authorities in order to make them compact and effective expert bodies.

Media legislation will have to undergo thorough reforms very soon to transpose the EU Audiovisual Media Services Directive. This could be an opportunity to - through public consultations - revise the Broadcasting Council's competencies and obligations in order to create a legal environment that would guarantee increased transparency, accountability and effectiveness of the media regulatory mechanisms.

• Закон за изменување и дополнување на Законот за радиодифузната дејност од *2011.* Законот за изменување и дополнување на Законот за радиодифузната дејност беше објавен во "Службен весник" на РМ, бр. *97* од *18.07.2011* година (Latest changes to the Broadcasting Law of 18 July 2011)
http://merlin.obs.coe.int/redirect.php?id=13450 MK

• 2010 Country's Progress Report of the European Union
http://merlin.obs.coe.int/redirect.php?id=13391 EN

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Broadcasting Council of the Republic of Macedonia

MT-Malta

General Interest Objectives Regulations

In exercise of the powers conferred by Article 40(3) of the Broadcasting Act, the Prime Minister, after consultation with the Broadcasting Authority, has issued the General Interest Objectives (Television Services) (Selection Criteria) Regulations, 2011, Legal Notice 240 of 2011. These regulations came into force on 21 June 2011 and set out the criteria to be adopted by the Broadcasting Authority in the selection of television services that fulfil a general interest objective. Two categories of general interest objective television services are dealt with: generalist and niche.

In so far as generalist general interest objective television services are concerned, such services are obliged to broadcast a minimum of programme content of a continuous duration of 16 hours, covering broadcasting hours between 7 a.m. and 11 p.m. Such a television service has to offer a wide range of quality programming that addresses a broad range of genres. Thirty-five per cent of the output during the mandatory broadcasting time is to consist of a selection of at least five genres that are considered to fulfil a core or extended public service obligation. These genres are listed in Schedule A. Generalist television services may only broadcast up to a maximum of three hours of teleshopping windows per day in the mandatory broadcasting time. In addition, they have to broadcast at least one news bulletin during the mandatory broadcasting schedule. Another obligation imposed upon such generalist television services is that they have to broadcast at least 30 minutes of weekly programming accessible to people with hearing disabilities. Furthermore, such generalist television services have to produce at least one current affairs programme per week during the period from October to June of each year. Finally, the duration of repeat programming on a generalist general interest objective television service cannot exceed an annual average of thirty-five per cent of the total mandatory broadcasting time. This requirement does not however apply to repeat broadcasts of documentaries, dramas, cinematographic productions and educational and cultural programmes.

In so far as niche general interest objective television services are concerned, these may be of a highly varied nature and consequently the Broadcasting Authority is expected to be flexible in the application of these regulations and to be ready to adapt in order to address particular requests that would enhance the range of offer to consumers. Such niche television services are to broadcast a minimum duration of ten hours of programme content per day, which may be spread over broadcasting hours between 7:00 a.m. and 10:00 p.m. In addition, such services have to predominantly transmit programmes from a limited number of genres that are considered to fulfill a core or extended public service obligation, as listed in Schedule A. Sixty per cent of the output (whether first run or repeat) during the mandatory broadcasting timetable has to consist of such programmes. Furthermore, a niche television service may only broadcast a maximum of two hours of teleshopping windows per day in the mandatory broadcasting time. Finally, the duration of repeat programming on a niche service is normally not to exceed an annual average of forty-five per cent of the total mandatory broadcasting time. This requirement does not however apply to re-runs of programmes first broadcast by other services or the repeat broadcasts of documentaries, dramas, cinematographic productions and educational and cultural programmes.

The list of programme genres in Schedule A comprises the following: the transmission of events of a national character as determined from time to time by the Government; public service announcements without payment; one-off transmissions of Parliamentary debates; current affairs programmes; discussion programmes dealing with topics of a social, cultural, educational, environmental, economic, industrial or polit-

ical nature; programmes dealing with religious topics and the transmission of Mass on Sundays and some holy days of obligation; programmes that have children as their principal audience; drama programmes in Maltese, with preference being given to original dramas in Maltese; programmes that are cultural in nature and especially those that enhance the Maltese language, the arts and culture; as well as programmes of classical music; programmes that are focused on Gozo and in particular that highlight Gozitan society, culture and way of life; programmes that focus on Maltese communities abroad; general information programmes; programmes that are educational in nature; news bulletins; and programmes featuring local sports.

• General Interest Objectives (Television Services) (Selection Criteria) Regulations, 2011
http://merlin.obs.coe.int/redirect.php?id=13419 EN MT

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NO-Norway

Government Wants to Adopt Regulation on Listed Events

On 24 June the Ministry of Culture circulated for public consultation a proposal to amend the Broadcasting Regulation to include a list of sporting events that are considered to be of major importance for society and which accordingly should be available on free-to-air television.

The need for such a regulation has constituted an ongoing debate in Norway for years and the Government has consulted the public on the matter at least twice before. However, this is the first time the Government has actually drafted a list of events that should be available on a non-exclusive basis. The Government considers that the increase in costs for television rights, and in particular sporting events, over the last few years now requires the establishment of a list. In Norway, as elsewhere, exclusive sports rights are increasingly being acquired by pay-TV channels, thus preventing a large section of the public from viewing these events.

The proposed regulation means that rightsholders of the listed events will be obliged to offer their exclusive rights to broadcasters that are accessible for free and that provide a service that is being received by at least 90 per cent of all viewers. According to the proposed definition of a qualified broadcaster, a broadcaster is free-to-air if it can be received by viewers without additional costs, excluding license fee, basic tier fee or basic fee. What services are considered to be received by a substantial proportion of the public may vary from time to time and the Norwegian Media Authority (NMA) will accordingly be obliged to present a list of qualified services from time to time on the Authority's webpage. All broadcasters not on the list may request an individual assessment.

The regulation establishes a detailed procedure for dealing with listed events. A qualified broadcaster interested in a particular event on the list must at the latest 10 months before the event takes place request the non-qualified broadcaster holding the rights for an acquisition. A written quotation concerning remuneration for transferring in part or in their entirety the rights to the event concerned must be submitted to the qualified broadcaster at the latest one month after the request has been received. If the broadcasters involved cannot agree on the remuneration, it is proposed that they ask the NMA for an advisory opinion on what should be considered the market-price for the event. The opinion of the NMA would be due at the latest six months before the event is to take place. It is suggested that the NMA draw up guidelines for the assessment of prices, modeled on the system adopted by the UK regulator Ofcom. In the consultation paper the Ministry of Culture explicitly solicits, however, viewpoints on whether the NMA should be given a more active role, for example in resolving disputes and/or in ordering non-qualified broadcasters to sell television rights to qualified broadcasters.

The events that are included on the proposed list should, as a general rule, be transmitted via live coverage. An obligation for broadcasters to report acquisitions of rights to listed events to the NMA in order to enforce the regulation effectively is also established.

The proposed list includes the Olympic Summer and Winter Games, the Football World Cup and European Football Championship for men, the World and European Handball Championship for women, the Norwegian Football Cup final for men and the World Ski Championship, Nordic disciplines, the Alpine Skiing World Championships, the Holmenkollen Ski Festival and the Biathlon World Championship.

• Consultation on a proposal for amendments to the Broadcasting regulations – listing of events of major importance for society
http://merlin.obs.coe.int/redirect.php?id=13460 EN

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Constitutional Tribunal Judgment on the Issue of Election Campaigns in the Media

On 20 July 2011 the Constitutional Tribunal decided on the conformity of certain new rules on conducting elections and election campaigns, envisaged in the Act: Electoral Code of 5 January 2011 (Dz. U. Nr 21, item 112, with further amendments), with the Constitution of the Republic of Poland (case K 9/11).

The judgment referred to various topics relating to organising elections (inter alia two-day elections, proxy voting, postal voting and single-member constituencies in elections to the Senate) and election campaigns (inter alia the question whether television and radio advertising, as well as billboards could be ruled out).

One of the issues examined was whether the newly-introduced ban on paid election advertising on radio and television is consistent with the Constitution. The Act of 3 February 2011 introduced this restriction in order to improve the quality of political discourse and to optimise the spending of public funds allocated to election campaigns which, in the case of a political party, mostly come from the State budget. The other Electoral Code provisions on conducting election campaigns on radio and television were not changed. The election campaign on radio and television was to take place in the form of free-of-charge election programmes broadcast on the public radio and television programme services at the cost of these broadcasters, starting on the 15th day before the election day until the end of the election campaign.

In the judgment the Constitutional Tribunal adjudicated that the Act of 3 February 2011 is inconsistent with Art. 2 of the Constitution (democratic State under the rule of law) and with Art. 54 para. 1 (freedom to express opinions, to acquire and to disseminate information) in conjunction with Art. 31 para. 3 of the Constitution ("Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute and only when necessary in a democratic State for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.").

Moreover the Tribunal adjudicated that Art. 110 para. 4 in conjunction with Art. 495 para. 1 point 4 of the Electoral Code is inconsistent with Art. 54 para. 1 in conjunction with Art. 31 para. 3 of the Constitution. The abovementioned provisions ban, on penalty of a fine, the use of election posters and slogans the surface area of which is greater than two square meters.

The Tribunal observed that freedom of speech is both a personal freedom used in private life and a political freedom used in the context of public life. Those entitled to use the freedom of speech are both natural persons and collective entities, such as political parties and election committees. The Tribunal underlined the importance of the role that, in a democratic society, the freedom to express opinions and to disseminate information plays in political parties and election committees. An equally important role is played by the freedom to acquire information by citizens, who need to learn about parties participating in elections and their candidates.

The ban on the use of big election posters and slogans and the ban on broadcasting paid election radio and television advertising restrict both freedom to express opinions and to disseminate information and freedom to acquire information. These restrictions do not fulfil the proportionality criteria specified in Art. 31 para. 3 of the Constitution.

Stating the unconstitutionality of the abovementioned provisions means that they are eliminated from the Polish legal system from the day of the publication of the judgment in the Official Journal. Publication took place on the same day as the announcement (20 July 2011). The Electoral Code entered into force on 1 August 2011.

• *Wyrok Trybunału Konstytucyjnego z dnia 20 lipca 2011 r. sygn. akt K 9/11* (Judgment of the Constitutional Court of 20 July 2011 (K 9/11))
http://merlin.obs.coe.int/redirect.php?id=13392 PL

Małgorzata Pęk
National Broadcasting Council of Poland

Constitutional Tribunal Judgment on Fees for Granting Broadcasting Licences

On 19 July 2011 the Constitutional Tribunal decided on the conformity of rules establishing the amount of the fee for granting a broadcasting licence with the Constitution of the Republic of Poland.

Art. 40 para. 1 of the Broadcasting Act of 29 December 1992 (Dz. U. of 2011, Nr 43, item 226, with further amendments - BA) specifies that a fee shall be charged for awarding a broadcasting licence, irrespective of the fee for the use of radiocommunications equipment or the use of a frequency, provided for in the Act on Communications. Art. 40 para. 2 BA specifies also that the exact amount of such a fee shall be determined by the National Broadcasting Council of Poland (NBC), in agreement with the Minister of Finance, taking into account the nature of the particular broadcasters and their programme services. These fees constitute a source of income for the State budget. Specific rules for determining such a fee were subsequently announced in the Regulation of the NBC

of 4 February 2000. According to the guidelines given in Art. 40 para. 2 BA the aforementioned NBC Regulation established specific rules for determining the amount of a fee for radio and television programme services and for the various technical ways of distribution (analogue terrestrial, digital terrestrial, DVB-H standard, satellite or cable).

The Constitutional Tribunal found that Art. 40 para. 2 BA is inconsistent with Art. 217 ("The imposition of taxes, as well as other public impositions, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, shall be by means of statute".) and Art. 92 para. 1 of the Constitution ("Regulations shall be issued on the basis of a specific authorisation contained in, and for the purpose of the implementation of, statutes by the organs specified in the Constitution. The authorisation shall specify the appropriate organ to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.") of the Constitution. In consequence, the regulation adopted on the basis of Art. 40 para. 2 BA has also been found inconsistent with Art. 92 para. 1 of the Constitution. The Tribunal stated that specific rules for establishing the amount of a fee for granting a licence should have been established by an act adopted by the Parliament, not by regulation. The Tribunal held that Art. 40 para. 2 BA does not include sufficiently specific guidelines for determining the amount of such a fee.

It should be observed, however, that the rule that a fee is charged for granting a licence was not questioned by the Tribunal. It ruled that Art. 40 para. 2 BA and the regulation adopted on its basis will lose force 12 months after the publication of the judgment in the Official Journal, which took place on the day the judgment was announced by the Tribunal.

It is expected that Parliament will adopt an amendment to the BA containing a new redaction of Art. 40 para. 2.

• Wyrok Trybunału Konstytucyjnego z dnia 19 lipca 2011 r. sygn. akt P 9/09 (Tribunal decision of the Constitutional Tribunal of 19 July 2011)
http://merlin.obs.coe.int/redirect.php?id=13393 PL

Małgorzata Pęk
National Broadcasting Council of Poland

SI-Slovenia

Slovenian Film Centre on the Way

After the adoption of *Zakon o Slovenskem filmskem centru, javni agenciji* (Slovenian Film Centre Law, public agency - ZSFCJA) in October 2010 the *Slovenski filmski center* (Slovenian Film Centre - SFC) acquired a managing director who took the first steps towards giving a fresh impetus to the Slovenian film industry (see IRIS 2010-5/37 and IRIS 2010-3/36).

The SFC was established in January 2011 in accordance with a request of *Računsko sodišče Republike Slovenije* (Court of Audit of the Republic of Slovenia - RSRS) based on the *Zakon o javnih skladih* (Public Funds Act - ZJS-1).

The SFC shall become the most important pillar of the development of Slovenian cinematography, the managing director announced in his programme. He believes producers to be the main partners of the SCF and sees his tasks not only in disseminating financial means but also in supporting producers regarding the production itself and in finding partners.

Furthermore he wants to conduct research on the impact the audiovisual industry has on the national economy and employment in order to support his ambition to boost local and non-budgetary financial sources and to raise awareness of the benefits film production is able to generate. The target is to raise the production of Slovenian feature films up to 8-10 productions per year.

The SFC launched a public debate on the proposed procedures regarding the entry to a competition, selection criteria, eligible costs and the mode of co-financing film projects. The public debate is open until 15 September 2011.

In addition the SFC has already published a call for proposals for film projects for 2011. It includes feature films, short- and medium-term film projects, co-financing of first feature films, co-production projects, the development of animated, documentary and feature films, co-financing of script development of animated, documentary and feature films, co-financing of blow-up and transfer and the co-financing of film festivals. The total budget is over four million Euro. The deadline for applications is 5 September 2011.

The SFC will this year also support the digitalisation of Slovenian cinema, film education and the functioning of professional societies.

• Zakon o Slovenskem filmskem centru (Slovenian Film Centre Law, Official Journal 77/2010 of 4 October 2010)
http://merlin.obs.coe.int/redirect.php?id=13451 SL
• Zakon o javnih skladih (Public Funds Act, ZJS-1, Official Journal 77/2008 of 28 July 2008)
http://merlin.obs.coe.int/redirect.php?id=13452 SL
• Slovenski filmski center (Slovenian Film Centre)
http://merlin.obs.coe.int/redirect.php?id=13397 SL

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

Act on Audiovisual Media Services instead of the rejected Media Act

Less than two weeks after the rejection of the proposed Media Act (*Zakon o medijih* - ZMed - 1; see IRIS 2011-2/38 and 2010-10/39) by the Parliament during the first reading on 15 July 2011, the Ministry of Culture prepared a draft Act on Audiovisual Media Services (*Zakon o avdiovizualnih medijskih storitvah* - ZAMS), aimed at the transposition of the Audiovisual Media Services Directive into Slovenian legislation. The preparation of ZAMS was urgent due to the pending infringement procedure started this year by the European Commission, as Slovenia has failed to notify any measures for the implementation of AVMSD.

The drafting of the ZMed - 1 began back in 2009, when the then newly formed Government initiated the revision of both the general act for all media and the act regulating the Slovenian public service broadcaster. Despite the establishment of an expert group and a wide public debate on the drafts, both proposals failed (see IRIS 2009-10/27). The Act on RTV Slovenia (*Zakon o Radioteleviziji Slovenija* - ZRTVS - 2), adopted in October 2010, was defeated in a referendum, held upon an initiative of the opposition political parties on 12 December 2010 (see IRIS 2011-1/48).

As reported before, the law was intended to modify, among others, the right to reply and correction, to change rules on public co-funding of media, to promote some new mechanisms for the protection of freedom of the press and to introduce the establishment of the Media Council. During the public discussion, the provisions aimed at fostering editorial and journalistic autonomy, the media co-funding mechanisms and the obligatory quota of Slovenian music in radio and television programming attracted the most attention. The most controversial issue turned out to be the provision aimed at the change of radio networks into single radio stations. The provisions intended for the transposition of the AVMSD, on the other hand, were almost taken for granted and did not provoke any major reaction.

The Ministry of Culture submitted the ZAMS for Governmental approval without prior presentation to the public, justifying the hurry by explaining that the AVMSD provisions have undergone public consultation already as a part of the rejected ZMed - 1, but unlike many other provisions were not the subject of controversy.

The proposal of ZAMS is however somewhat different from the equivalent ZMed - 1 provisions, as it allows product placement also in audiovisual services of the public service broadcaster. It does not reduce the allowed advertising in the programmes of RTV Slovenia, and abolishes the obligation to report on the European audiovisual work quota for the public service news channel, aimed at the television coverage of parliamentary meetings (SLO3). The proposal was approved by the Government on 28 July 2011 and is expected to be addressed by the Parliament under the urgent procedure in September or October 2011 at the latest.

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SK-Slovakia

Amendment to the Press Act

On 1 September 2011 Act No. 221/2011 Coll. amending and supplementing Act No. 167/2008 Coll. on periodicals and news agency services (hereinafter referred to as the "Press Act") proposed by the Minister of Culture on 15 February 2011 shall come into force (hereinafter referred to as the „Amendment").

The attempt to improve the previous controversial Press Act, which had often been criticised by Slovak as well as European institutions, had also been welcomed by the International Press Institute (IPI) at a meeting of the Minister of Culture with representatives of the Executive Board of IPI in February 2011 (IRIS 2011-4/36).

The Amendment - repeatedly approved by the National Council of the Slovak Republic (hereinafter referred to as "NR SR"), after being vetoed by the President of the Slovak Republic - introduces several changes to the previous Press Act. Most importantly, it has restricted the right of reply of public officials with regard to statements concerning the performance of their functions (s. 8(2) of the Amendment). However, it is to be noted that such restriction shall not apply to statements of fact referring to a person performing the function of a public official as a private person.

In order to achieve exactness, the Amendment provides a clarification of the term "public official" and also refines the character of "a statement of fact", in relation to which persons concerned will have the right of reply, i.e., untrue, incomplete or distorting factual statements concerning the honour, dignity or privacy of a natural person or the name or good reputation of a legal entity. It is interesting to mention that according to the previous regulation any statement (i.e., either untrue or true relating to the particular natural person or legal entity) was subject to the right of reply and it was also possible for the person concerned to exercise the right of reply as well as the right of correction concurrently. However, according

to the Amendment, by publishing a reply the right of correction relating to the same matter is extinguished.

Other important changes introduced by the Amendment include those regarding the extent of certain obligations relating to the publication of a correction, reply and additional announcement. The Amendment introduces a wider range of grounds on which publishers of periodicals and press agencies may refuse to publish such a correction. The common ground allowing the refusal to publish a correction, reply as well as additional announcement includes the case in which the publication thereof could cause the commitment of a crime, misdemeanour or other administrative offence or be contrary to good manners or the interests of a third party protected by law.

Moreover, under the Amendment the right of monetary compensation in the case where a correction, response or additional announcement is not published or some of the conditions necessary for its publication are not met, has been abolished.

As already mentioned above, the Amendment faced criticism from the Slovak President who vetoed it and returned it to the NR SR for further approval. The President had criticised the provision containing the term "good manners" since such term is not provided with a legal definition within the Slovak legal system.

However, the Amendment received the required number of votes of the MPs and shall come into force on 1 September 2011 even without the signature of the President.

• Zákon z 29. júna 2011, ktorým sa mení a dopĺňa zákon č. 167/2008 Z. z. o periodickej tlači a agentúrnom spravodajstve a o zmene a doplnení niektorých zákonov (tlačový zákon) a ktorým sa mení zákon č. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách v znení neskorších predpisov (Act No. 221/2011 Coll. Of 29 June 2011 amending and supplementing Act No. 167/2008 Coll. on periodicals and news agency services)
http://merlin.obs.coe.int/redirect.php?id=13454 SK

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BE-Belgium

Flemish Digital-Only Channel Sanctioned for Broadcasting Harmful Content for Minors

On Sunday 1 May 2011 in the early evening (around 18:20), the programme True Blood was broadcast on the Flemish digital-only channel Acht. This episode contained horrific images, such as a chained man in a dungeon between dead bodies covered with blood. The *Vlaamse Regulator voor de Media* (Flemish Media Regulator - VRM) ruled that the broadcaster infringed Art. 42, §2 of the *Mediadecreet* (Flemish Broadcasting Act).

Article 42 of the Flemish Broadcasting Act contains rules protecting minors against harmful content. Article 42 §1 includes an absolute ban on linear television programmes that might seriously harm the physical, mental or moral development of minors, in particular programmes with pornographic scenes or gratuitous violence. Article 42 § 2 contains a relative ban on programmes that are likely to impair the physical, mental or moral development of minors. Such programmes can be broadcast, but only on condition that it is ensured, by selecting the time of the broadcast or by any technical measure, that minors will not normally hear or see such broadcasts. Additionally, if such programmes are broadcast in an un-encoded manner, these programmes need to be preceded by an acoustic warning or be recognisable during the broadcast by means of a visual symbol.

The broadcaster argued that it had not infringed Article 42 §2 in its broadcast of True Blood early in the evening. Given that Acht is a digital-only channel, it can only be accessed via a decoder. Such a decoder can be used for parental control purposes, because access to specific content could be blocked for minors through the electronic programme guide. In particular, given that Acht labels True Blood episodes as 'Adult 17', access to the programme can be blocked via the parental control system. In other words, a proper setting of the decoder could limit minors' access to this content.

VRM stressed that the images might impair the physical, mental or moral development of minors. As a result, this programme should be accessable under the conditions of Article 42 §2. VRM verified whether technical measures would have ensured that no minors would have access to these images. Although such a parental control system could function optimally, practice indicates that parents are not aware of the existence of this system: only 0.2% - 0.9% of digital television subscribers use this option. Therefore, in its decision of 30 August 2011, VRM argued that the technical measures taken by Acht could not be labelled as a sufficient protection as required under Article 42 §2. VRM only issued a warning, because Acht announced that it would support the launch of an information campaign about parental control.

• P. Gonnissen t. NV Bites Europe, beslissing 2011/017, 30 augustus 2011 (P. Gonnissen versus NV Bites Europe, decision 2011/017, 30 August 2011)
http://merlin.obs.coe.int/redirect.php?id=15610 NL

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Agenda

Europe's Data Protection Future: Prospects And Implications For Business
5 October 2011
Organiser: Friends of Europe
Venue: Brussels
Information & Registration:
http://www.friendsofeurope.org/Contentnavigation/Events/Eventsoverview/tabid/1187/Default.aspx?type=Event&view=Event&id=1092&e=34884dataprot

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