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IRIS

Legal Observations
of the European Audiovisual Observatory

IRIS 2011-10

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Publisher:
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76, allée de la Robertsau F-67000 STRASBOURG
Tél. : +33 (0) 3 90 21 60 00 Fax : +33 (0) 3 90 21 60 19
E-mail: obs@obs.coe.int www.obs.coe.int
Comments and Contributions to:
iris@obs.coe.int
Executive Director:
Wolfgang Closs

Documentation/Press Contact:
Alison Hindhaugh
Tel.: +33 (0)3 90 21 60 10;
E-mail: alison.hindhaugh@coe.int
Translations:
Michelle Ganter, European Audiovisual Observatory (co-ordination) • Brigitte Auel • France Courrèges • Paul Green • Marco Polo Sàrl • Manuella Martins • Katherine Parsons • Stefan Pooth • Erwin Rohwer • Nathalie-Anne Sturlèse
Corrections:
Michelle Ganter, European Audiovisual Observatory (co-ordination) • Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory • Christina Angelopoulos, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) • Johanna Fell, European Representative BLM, Munich (Germany) • Amélie Lépinard, Master - International and European Affairs, Université de Pau (France) • Julie Mamou • Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland) • Anne Yliniva-Hoffmann, Institute of European Media Law (EMR), Saarbrücken (Germany)
Distribution:
Markus Booms, European Audiovisual Observatory
Tel.:
+33 (0)3 90 21 60 06;
E-mail: markus.booms@coe.int
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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights : Karttunen v Finland

The European Court of Human Rights has delivered a decision regarding the criminalization of the possession, reproduction and public display of child pornography, freely downloaded from the Internet, and its compatibility with freedom of (artistic) expression. The issue before the European Court was whether the conviction of an artist for including child pornography in a work exhibited at an art exhibition violated the right to freedom of expression under Article 10 of the European Convention of Human Rights.

Ms. Ulla Annikki Karttunen is a Finnish artist who exhibited her work "the Virgin-Whore Church" in an art gallery in Helsinki in 2008. The work included hundreds of photographs of teenage girls or otherwise very young women in sexual poses and acts. The pictures had been downloaded from free Internet pages. One day after the opening of the exhibition, the police seized the pictures and the exhibition was closed down. The police also seized Karttunen's computer and the public prosecutor pressed charges against the artist. The domestic courts convicted the artist of possessing and distributing sexually obscene pictures depicting children under the age of 18, also referring to the finding that some of the pictures were of an extremely violent or degrading nature. Even though the artist's intention had not been to commit a criminal act but, on the contrary, to criticise easy Internet access to child pornography, the possession and distribution of sexually obscene pictures depicting children were still to be considered criminal acts according to Chapter 17, sections 18/19 of the Finnish Penal Code. Taking into account that Karttunen had intended to provoke general discussion about child pornography and that the crimes were minor and excusable, the Finnish court did not impose any sanctions on the artist. Instead, all the pictures were ordered to be confiscated.

Karttunen complained in Strasbourg under Article 10 of the Convention that her right as an artist to freedom of expression had been violated. She argued that she had incorporated the pornographic pictures into her work in an attempt to encourage discussion and raise awareness of how widespread and easily accessible child pornography was. The European Court noted that the artist's conviction, even if no sanction was imposed on her, constituted an interference with her right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. As the interference was prescribed by law and pursued the legitimate aim of protecting morals as well as the reputation or rights of others, within the meaning of Article 10 § 2, it still was to be determined whether the interference in the artist's freedom of artistic expression was necessary in a democratic society. The European Court considered that the domestic courts had adequately balanced the artist's freedom of expression with the countervailing interests. The Court referred to the finding by the Finnish courts that the possession and public display of child pornography was still subject to criminal liability, the criminalization of child pornography and the artist's conviction being mainly based on the need to protect children against sexual abuse, as well as violation of their privacy and on moral considerations. The Court also noted that the domestic courts had acknowledged the artist's good intentions, by not imposing any sanctions. Having regard as well to the aspect of "morals" involved and to the margin of appreciation afforded to the state in this area, the Court considered that the interference was proportionate to the legitimate aim pursued. Thus, the Court concluded that "it does not follow from the applicant's claim that her conviction did not, in all the circumstances of the case, respond to a genuine social need". The Court declared the artist's application manifestly ill-founded and therefore inadmissible.

• Decision by the European Court of Human Rights (Fourth Section), case of Karttunen v Finland, No. 1685/10 of 10 May 2011
http://merlin.obs.coe.int/redirect.php?id=15465 EN

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

Committee of Ministers: Recommendation on a New Notion of Media

On 21 September 2011, the Council of Europe's Committee of Ministers (CM) adopted a Recommendation on a new notion of media. The Council of Europe has been engaging with new media issues in a piecemeal fashion for over a decade. This Recommendation is the organisation's most explicit attempt yet to engage with relevant issues in a coherent and comprehensive manner. The direct impetus for the elaboration of the Recommendation was provided by the first Council of Europe Conference of Ministers responsible for Media and New Communication Services in 2009 (see IRIS 2009-8/2).

The structural divisions of the Recommendation are indicative of the themes it addresses: "The purpose of media", "Media and democracy", "Media standards and regulation", "Developments in the media ecosystem" and "A new notion of media which requires a

graduated and differentiated approach". The Recommendation is supplemented by an Appendix entitled, "Criteria for identifying media and guidance for a graduated and differentiated response".

The Recommendation describes the role traditionally played by the media in society and sets out a number of familiar rationales for media regulation. It then documents various technology-driven changes in the media sector and their broader consequences, including "unprecedented levels of interaction and engagement by users, offering new opportunities for democratic citizenship" and the facilitation of "users' participation in the creation process and in the dissemination of information and content, blurring the boundaries between public and private communication". The evolving relationship between traditional and new media is also considered.

These developments prompt the need for the re-examination of existing media policy. The Recommendation states that "[a]ll actors - whether new or traditional - who operate within the media ecosystem should be offered a policy framework which guarantees an appropriate level of protection and provides a clear indication of their duties and responsibilities in line with Council of Europe standards". It continues: "[t]he response should be graduated and differentiated according to the part that media services play in content production and dissemination processes". To these ends, it recommends that member states:

- "adopt a new, broad notion of media" encompassing all relevant actors;

- "review regulatory needs in respect of all actors";

- "apply the criteria set out" in the Appendix "when considering a graduated and differentiated response for actors [04046], having regard to their specific functions in the media process and their potential impact and significance in ensuring or enhancing good governance in democratic society";

- "engage in dialogue with all actors in the media ecosystem in order for them to be properly apprised of the applicable legal framework [04046]";

- "adopt strategies to promote, develop or ensure suitable levels of public service delivery" so as to ensure, inter alia, "a satisfactory level of pluralism, diversity of content and consumer choice";

- "remain attentive to addressing situations of strong concentration in the media ecosystem [04046]";

- "undertake action, individually or collectively, to promote these approaches in appropriate international fora".

The Appendix to the Recommendation comprises two substantive parts and an extensive list of relevant Council of Europe standards. The first substantive part, "Media criteria and indicators", sets out a number of key criteria and accompanying indicators. The criteria are: "Intent to act as media", "Purpose and underlying objectives of media", "Editorial control", "Professional standards", "Outreach and dissemination" and "Public expectation". The second substantive part, "Standards applied to media in the new ecosystem", is divided into the following sections: "Rights, privileges and prerogatives", "Media pluralism and diversity of content and "Media responsibilities". A number of indicators are proposed for each of these sections.

• Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 21 September 2011
http://merlin.obs.coe.int/redirect.php?id=15494 EN FR

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

Committee of Ministers: Recommendation on the Protection and Promotion of the Universality, Integrity and Openness of the Internet

On 21 September 2011, the Committee of Ministers adopted Recommendation CM/Rec(2011)8 on 'the protection and promotion of the universality, integrity and openness of the Internet.' In the recommendation, the Ministers explicitly connect the resilience and stability of the Internet with freedom of expression and access to information (para. 2-6). Furthermore, the Recommendation acknowledges the interdependence of member states on each others' actions and legal systems for the proper functioning of the Internet and its infrastructure. Thus, it ambitiously calls upon states to cooperate and assist each other - "in good faith" (Arts. 1.2 and 2.2.4) - in avoiding a transboundary impact on access to and use of the Internet. This unanimous political ambition makes sense and, even though recommendations are not legally binding, could set the standard for future policy-making in the field of network security and resilience.

The explicit connection of Art. 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) to the access to and use of the Internet, and the stability and resilience of the Internet in particular (paras. 4-5), is in line with the standard jurisprudence of the European Court of Human Rights. In its ruling on Autronic AG v Switzerland, and more recently in Saygili v Turkey, the Court had already extended the protection of Art. 10 ECHR to "the means of transmission or reception, since any restriction imposed on the means necessarily interferes with the right to receive and impart information." Now that member states are recommended to actively ensure stability and resilience on the Net, and observe the public's general interest in freedom of expression in internet policy-making (para. 9), it will be interesting to see whether the Court will continue along the path towards reaching legally-binding

positive obligations related to network security under Art. 10 ECHR in future judgments. Indeed, the Court increasingly observes recommendations in the "Relevant International Instruments" section of its judgments.

As for now, the recommendation lays out general principles that states should observe in their interactions within the field of internet policy-making, such as i) no-harm; ii) co-operation; iii) due diligence in preventing, managing and responding to transboundary disruptions and interferences; iv) preparedness; v) notification; vi) information sharing, and vii) mutual assistance. Along with these principles, member states are also recommended to be guided by a Declaration adopted by the Council on the same date, on 10 principles for Internet Governance (para. 12) (see IRIS 2011-10/7).

• Recommendation CM/Rec(2011)8 of the Committee of Ministers to member states on the protection and promotion of the universality, integrity and openness of the Internet, 21 September 2011
http://merlin.obs.coe.int/redirect.php?id=15491 EN FR

Axel M. Arnbak
Institute for Information Law (IViR), University of Amsterdam

Committee of Ministers: Freedom of Expression and Information, Assembly and Association with regard to Internet Domain Names

On 21 September 2011, the Council of Europe's Committee of Ministers (CM) adopted a Declaration on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings.

The Declaration is rooted in Articles 10 (Freedom of expression) and 11 (Freedom of assembly and association) of the European Convention on Human Rights (ECHR). It also draws on previous standard-setting work by the CM, e.g., Recommendation CM/Rec(2007)16 on measures to promote the public service value of the Internet (see IRIS 2008-2/2), CM Declaration on freedom of communication on the Internet (see IRIS 2003-7/3), CM Declaration on human rights and the rule of law in the Information Society (see IRIS 2005-6/2) and Recommendation CM/Rec(2008)6 on measures to promote respect for freedom of expression and information with regard to Internet filters (see IRIS 2008-5/101).

The Declaration stresses the need to ensure that freedom of expression also applies to the naming of Internet websites because "individuals or operators of websites may choose to use a particular domain name or name string to identify and describe content hosted on their websites, to disseminate a particular point of view or to create spaces for communication, interaction, assembly and association for various societal groups or communities". It notes that "instances of measures proposed in [some] Council of Europe member states to prohibit the use of certain words or characters in domain names and name strings are a source of concern". It also notes the relevance of the protection of freedom of expression and information, and assembly and association for "policy development processes which are taking place in the Internet Corporation for Assigned Names and Numbers (ICANN) to expand the domain name space so as to include new top-level domain extensions that contain generic expressions".

The CM encourages Council of Europe member states to apply fundamental rights safeguards to the management of domain names. It cautions that "over-regulation of the domain name space and name strings" could interfere with the exercise of the rights to freedom of expression and information, and assembly and association. It recalls that Articles 10 and 11, ECHR, should guide regulation in this area and commits itself to undertaking further relevant standard-setting. Finally, referring to the Resolution on "Internet governance and critical Internet resources", adopted by the first Council of Europe Conference of Ministers responsible for Media and New Communication Services in 2009 (see IRIS 2009-8/2), the CM expresses its wish that the multi-stakeholder approach to the management of domain name space should take "full account" of international human rights law.

• Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings, 21 September 2011
http://merlin.obs.coe.int/redirect.php?id=15484 EN FR

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

Committee of Ministers: Declaration on Internet Governance Principles

With the adoption on 21 September 2011 of a declaration on Internet governance principles, the Committee of Ministers sets out to explicitly support and promote a "sustainable, people-centred and rights-based approach to the Internet" (para. 5). The declaration is intended to encourage member states to uphold ten principles in their national and international Internet policy-making.

Essentially, the principles can be seen as general commitments on ten broad issues: 1) the protection of human rights, democracy and the rule of law; 2) multi-stakeholder governance; 3) the responsibility of states; 4) the empowerment of Internet users; 5) universality; 6) integrity; 7) decentralised management;

8) the open standards, interoperability and end-to-end nature of the Internet; 9) open network; and 10) cultural and linguistic diversity.

The Committee of Ministers places these commitments in the context of what we can now safely call an Internet governance tradition, as it cites as its primary sources of inspiration the Geneva phase and Tunis agenda, which are linked to the World Summits on the Information Society in 2003 and 2005 (para. 2). Indeed, many of the principles reiterate the normative status quo in Internet governance discussion, such as respect for fundamental rights and multi-stakeholder governance. More interestingly, the wording of some of the less familiar principles might interplay with several recent Internet policy debates in unexpected ways.

For example, under the declaration's suggestion that states should "refrain from any action that would directly or indirectly harm persons or entities outside their territorial jurisdiction" (para. 3 on the responsibility of states), EU-US negotiations on the extra-territorial revocation of domain names and IP addresses - following the General Affairs Council of the Council of the European Union, under Spanish Presidency in April 2010, and recently discussed in a LIBE committee hearing on the draft Directive on cyber-attacks against computer systems in the European Parliament - might become problematic.

With these ten principles, the Committee of Ministers provides an important stimulus for the debate on Internet governance. Declarations by the Committee are not legally binding on the member states, but they do possess a certain moral and political authority. It will be interesting to analyse the authority they will carry in specific cases of policy-making on both national and international level, given this new context of a shared vision and general commitment to a sustainable, people-centred and rights-based approach, as put forward in this declaration.

• Declaration by the Committee of Ministers on Internet governance principles, 21 September 2011
http://merlin.obs.coe.int/redirect.php?id=15486 EN FR

• Council of the European Union, "Council conclusions concerning an Action Plan to implement the concerted strategy to combat cyber-crime", 3010th GENERAL AFFAIRS Council meeting Luxembourg, 26 April 2010
http://merlin.obs.coe.int/redirect.php?id=15488 EN FR

Axel Arnbak
Institute for Information Law (IViR), University of Amsterdam

EUROPEAN UNION

European Commission: Belgium and UK Requested to Implement Outstanding Provisions of the AVMS Directive

The European Commission has requested Belgium and the UK to implement outstanding provisions of the EU's Audiovisual Media Services (AVMS) Directive. The AVMS Directive aims at ensuring a single market and legal certainty for Europe's TV and audiovisual industry. This is done through the creation of a level playing -field for both broadcast and on-demand audiovisual media services across borders, while ensuring cultural diversity, the protection of children and consumers, the safeguarding of media pluralism and combating racial and religious hatred. This Directive is based on the principle of the "country of origin", according to which audiovisual media service providers are bound by the regulations in their country of origin only. In pursuance of this principle, such services cannot be subject to regulation in the destination country, except in very limited circumstances, such as that of incitement to hatred. EU member states had agreed to implement the AVMS Directive into their national law by 19 December 2009 (see IP/09/1983).

Belgium has informed the Commission of measures to implement the AVMS Directive in regard to all audiovisual media services that are based in the three linguistic communities: French, Flemish and German. Nevertheless, audiovisual media services located in Brussels that are not in French or Dutch fall outside the scope of competence of the linguistic Communities and remain under the scope of competence of the federal authorities. Laws covering these services have not yet been adopted by the Belgian federal state. This results in the absence of regulation for on-demand services in Brussels that are not provided in French or Dutch. The Commission has been notified by the Belgian authorities about the preparation of a new draft law, which is still in a preliminary phase.

The UK has also informed the Commission of measures to implement the AVMS Directive into its national law, but the new legislation does not cover audiovisual services provided in Gibraltar. A draft law is being prepared, but the adoption process is still in progress.

The requests are presented in the form of 'reasoned opinions' covered by EU infringement procedures. Both Belgium and the UK have a two-month period within which to notify the Commission of the measures that they have taken to comply with EU rules. If they do not succeed in doing so, the Commission could refer them to the EU's Court of Justice. Without measures to implement the Directive fully in Brussels

and Gibraltar, audiovisual services will not have full legal certainty in these regions.

• "European Commission: "Digital Agenda: Commission requests Belgium and UK to implement Audiovisual Media Services Directive in Brussels and Gibraltar", Press Release of 29 September 2011
http://merlin.obs.coe.int/redirect.php?id=15449 DE EN FR

Edith van Lent
Institute for Information Law (IViR), University of Amsterdam

OSCE

OSCE: Internet Regulation in the OSCE Region

The Office of the Representative on Freedom of the Media of the OSCE commissioned a regionwide study of Internet laws to get a picture of government attempts to regulate content.

The report was based on results from a 120-question survey distributed in September 2010 to all 56 OSCE participating states.

The study concluded with several recommendations; these include:

1. The open and global nature of the Internet should be ensured: The participating states need to make sure the Internet remains an open and public forum in line with OSCE media-freedom commitments and other international free-expression agreements.

2. Access to the Internet should be regarded as a human right and recognised as implicit in the right to free expression and free information: Access to the Internet is one of the basic prerequisites to the right to freedom of expression and the right to impart and receive information regardless of frontiers. As such, access to the Internet should be recognised as a fundamental human right.

3. The right to freedom of expression is universal - including in regard to the type of medium and technology: restrictions to this right are only acceptable if in compliance with international norms and standards. Any restriction should be weighed against the public interest.

4. Network neutrality should be respected: Online information and traffic should be treated equally regardless of the device, content, author, origin or destination. Service providers should make their information management practices of online data transparent and accessible.

5. Internet "kill switch" plans should be avoided: Reaffirming the importance of fully respecting the right to freedom of opinion and expression, the participating states should refrain from developing, introducing or applying "Internet kill switch" plans as they are incompatible with the fundamental right to information.

6. OSCE participating states should avoid vague legal terminology in speech-based restrictions: Legal provisions are often vague and open to wide or subjective interpretation. Any restriction must meet the strict criteria under international and regional human rights law.

7. OSCE participating states should refrain from mandatory blocking of content or websites: Blocking of online content can only be justified if in accordance with these standards and done pursuant to a court order and where absolutely necessary. Blocking criteria should always be made public and provide for legal redress.

8. Voluntary blocking and content removal arrangements should be transparent and open to appeal: Any blocking or removal system based on self-regulation and voluntary agreements should be transparent, compatible with international norms and standards and provide for redress mechanisms and judicial remedies.

9. Filtering should only be encouraged as an end-user voluntary measure: OSCE participating states should encourage the use of end-user filtering software on individual home computers and in schools if their use is deemed necessary. However, the deployment of state-level upstream filtering systems, as well as government-mandated filtering systems, should be avoided.

10. 'Three-strikes' measures to protect copyright are incompatible with the right to information: While countries have a legitimate interest in combating piracy, restricting or cutting off users' access to the Internet is a disproportionate response that is incompatible with OSCE commitments on the freedom to seek, receive and impart information.

11. Reliable information on applicable legislation and blocking statistics needs to be made available: Participating states should put mechanisms in place that allow for the maintenance of reliable information on Internet content regulation and statistical data on blocking statistics and prosecutions for speech-related offences.

• Freedom of Expression on the Internet - Study of legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in OSCE participating States
http://merlin.obs.coe.int/redirect.php?id=15458 EN

Mike Stone
Office of the OSCE Representative on Freedom of the Media, Vienna

UNITED NATIONS

Human Rights Committee: New General Comment on Freedom of Expression

In a much-anticipated development, the United Nations' Human Rights Committee adopted a new General Comment on Article 19 (freedom of opinion and expression) of the International Covenant on Civil and Political Rights (ICCPR) on 21 July 2011.

The Human Rights Committee is the body of independent experts entrusted with the task of monitoring the implementation of the ICCPR by states parties. General Comments focus on specific themes or Covenant provisions and they are the leading source of interpretive guidance for the ICCPR. The new General Comment (No. 34) replaces the Committee's earlier General Comment (No. 10) on Article 19, ICCPR, which was adopted in 1983 and did not anticipate the current reality of a globalised communications environment dominated by Internet-based technologies.

The structural divisions of the new General Comment are: 'General remarks', 'Freedom of opinion', 'Freedom of expression', 'Freedom of expression and the media', 'Right of access to information', 'Freedom of expression and political rights', 'The application of Article 19(3)', 'Limitative scope of restrictions on freedom of expression in certain specific areas', 'The relationship of Articles 19 and 20'.

The General Comment reiterates the interrelationship between freedom of expression and other rights safeguarded by the ICCPR, e.g., privacy, religion, association and assembly, electoral and participatory rights, minority rights, etc. It stresses that all branches of the state are under an obligation to respect freedom of opinion and expression. It recalls that freedom of opinion cannot be subject to exception or restriction. It uses a very extensive set of examples to demonstrate the broad scope of freedom of expression.

The General Comment recognises (and explains) the importance of ensuring a free, independent and diverse media in a democratic society. States are specifically called upon to guarantee the operational, editorial and financial independence of public service broadcasting services. The need for states to appreciate the emergence of, and foster the independence of, new media (e.g., "Internet and mobile based electronic information dissemination systems") is also emphasised. States are moreover urged to ensure access by individuals to those new media.

The right of access to information held by public bodies is considered in detail and in order to give effect to that right, states are encouraged to "proactively put into the public domain Government information of public interest". States should furthermore "make every effort to ensure easy, prompt, effective and practical access to such information".

The lengthiest sections of the General Comment are those dealing with Article 19(3) - restrictions on the right to freedom of expression, and the limitative scope of those restrictions in specific areas. The former elaborates in detail on the specific conditions subject to which restrictions on freedom of expression may be permitted: the restrictions must be provided by law; be based on one of the grounds set out in Article 19(3)(a) and (b), and conform to the strict tests of necessity and proportionality. The latter scrutinises the scope of permissible restrictions in specific contexts, such as political discourse, media regulation, journalism, counter-terrorism and defamation. It stipulates, for instance, that blasphemy laws and laws penalising the expression of opinions about historical facts are incompatible with the ICCPR.

In respect of the media, the new General Comment repeatedly states that restrictions on freedom of expression must comply with the requirements of Article 19(3) (e.g., licensing processes; new media), or finds particular restrictions to be presumptively impermissible (e.g., the penalisation of a media outlet (or prohibition of a website or information dissemination system) solely for criticising the government; generic bans on the operation of certain websites). The promotion of media pluralism is strongly advocated.

The new General Comment concludes with a succinct treatment of the relationship between Articles 19 and 20, ICCPR. The latter article requires states parties to prohibit by law any "propaganda for war" and any "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". The General Comment clarifies that the two articles are "compatible with and complement each other" and that the acts addressed in Article 20 are all subject to Article 19(3). It also states firmly that restrictions on the right to freedom of expression should not "go beyond what is permitted in [Article 19] paragraph 3 or required under Article 20".

- United Nations, Human Rights Committee, General Comment No. 34 - Article 19: Freedoms of opinion and expression, Doc. No. CCPR/C/GC/34 (Advance unedited version), adopted on 21 July 2011
http://merlin.obs.coe.int/redirect.php?id=15493 EN
- United Nations, Human Rights Committee, General Comment No. 10 - Freedom of expression (Article 19), adopted on 29 July 1983
http://merlin.obs.coe.int/redirect.php?id=15459 EN

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

NATIONAL

AT-Austria

National Assembly Committee Approves Government's TKG Amendment Bill

On 12 October 2011, the *Ausschuss für Forschung, Innovation und Technologie* (Committee for Research, Innovation and Technology - FIT) of the Austrian *Nationalrat* (National Assembly) approved a Government bill amending the *Telekommunikationsgesetz* (Telecommunications Act - TKG 2003) without adding any amendments. The bill had been adopted by the Austrian *Ministerrat* (Council of Ministers) and submitted to the *Nationalrat* on 30 August 2011. It was due to be debated at a plenary session on 19 October 2011.

The proposed bill is designed to transpose into national law the amendments to the EU legislative framework for electronic communications that were adopted in 2009 (see IRIS 2010-1/7). It also addresses some well-known deficiencies in the current regulations.

The bill therefore seeks primarily to bring the TKG 2003 into line with the provisions of the amending directives and the Regulation establishing the Body of European Regulators for Electronic Communications (BEREC). It covers regulations on the liberalisation and "flexibilisation" of spectrum management, risk-sharing in relation to the financing of new infrastructure such as Next Generation Networks (NGN) and the joint use of such infrastructure by competing telecom companies, and the strengthening of consumer rights in particular. Contracts for communications services should, in future, have a maximum initial term of 24 months, for example; companies must also offer contracts with a maximum one-year term for each communications service. Customers are also entitled to switch telecommunications provider within one working day, without having to change their phone number. The bill also allows the regulatory body, KommAustria, to oblige telecommunications providers to offer their customers cost-control mechanisms. These rights are supplemented by information and transparency obligations for operators.

Some of the new regulations go beyond the provisions of EU law, as some FIT members pointed out. For example, the bill also entitles consumers to receive paper bills from their provider. However, a draft resolution submitted by two opposition parties, which would have provided even more extensive consumer rights, was rejected by the committee.

In order to increase administrative efficiency, the bill proposes to standardise the procedures for spectrum allocation and the licensing of radio equipment operators. Stricter procedures should also help to stop the abuse of value-added services more quickly.

The Telecom Package should actually have been transposed by 25 May 2011. If the *Nationalrat* adopts the Government bill, the amendments could come into force before the end of this year.

• *Regierungsvorlage zum Änderungsgesetz zum TKG 2003 und die weiteren Dokumente des Gesetzgebungsverfahrens* (Government bill amending the TKG 2003 and other documents relating to the legislative procedure)
http://merlin.obs.coe.int/redirect.php?id=15472 DE

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

BG-Bulgaria

Reporting on Election Campaigns by Radio and Television Broadcasters

On 2 September 2011 the Central Election Commission, on the grounds of the Bulgarian Election Code presently in effect, adopted a resolution on the terms and conditions on which radio and television broadcasters shall report on the election campaigns for president and vice-president and municipal councils and mayors to be held on 23 October 2011.

In summary the resolution contains the following rules:

1. The Bulgarian National Television ("BNT") and the Bulgarian National Radio ("BNR") shall report the election campaign in the form of statements, video clips, disputes, briefs, chronicles and other means. The managements of the BNT and BNR are obliged to adhere to the principles of equality and impartiality in reporting the campaigns of the candidates, the political parties, coalitions and initiative committees during the broadcast programmes.

2. In the programmes of BNT and BNR dedicated to the election campaign it is forbidden to use elements of commercial advertising. Nor is it permitted for candidates and representatives of political parties, coalitions and initiative committees to participate in commercial advertising. Furthermore, it is prohibited to include in commercial advertising political manipulation in favour of or against participants in the election.

3. The other broadcasters (except BNT and BNR) may also report on the election campaigns of the parties, coalitions and initiative committees in their programmes on equal terms and prices. The terms and

conditions for broadcasting the election campaign and the tariffs should be published on the Internet sites of the broadcasters not later than 12 September 2011, i.e., 40 days prior to the polling day. The terms and conditions, as well as the applicable tariffs, should be presented to the Audit Chamber and the Central Election Commission (in the case of electronic media with national coverage) and to the Municipal Election Commissions (in the case of electronic media with regional and local coverage) not later than 12 September 2011, i.e., 10 days prior to the start of the election broadcasts.

4. From the day prior to the polling day (22 October 2011) until the official end of the polling day (21.00h on 23 October 2011) it is forbidden for the electronic media to broadcast any election polls, including any via hidden or abstract means. The outcome of exit polls can be aired after 19.00h on 23 October 2011.

5. In the case of broadcasting a programme that has infringed the rights or reputation of a candidate or a representative of a party, coalition or initiative committee, the offended person is entitled to a right of reply in accordance with Art. 18 of the Radio and Television Act.

• РЕШЕНИЕ № *656*- ПВР /*434430*, София , *02.09.2011*, ОТНОСНО : предизборната кампания по радио - и телевизионните оператори в изборите за президент и вицепрезидент на републиката и в изборите за общински съветници и кметове на *23* октомври *2011* г . (Resolution No 656-PVR/MI of the Central Election Commission regarding the election campaign on radio and television operators in the elections for president and vice-president and municipal councils and mayors on 23 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15439 BG

Rayna Nikolova
New Bulgarian University

CH-Switzerland

Supervisory Body Examines Small Party's Request to Participate in TV Election Broadcast

In October, the *Unabhängige Beschwerdeinstanz für Radio und Fernsehen* (Independent Radio and Television Complaints Authority - UBI) dealt for the first time with a dispute over a party's participation in a forthcoming TV election broadcast. The small party "La Gauche", which has one representative in the Swiss parliament, told the UBI that it should be given greater prominence in the election broadcasts of the public service broadcaster *Schweizerische Radio- und Fernsehgesellschaft* (Swiss radio and television corporation - SRG). It complained that the SRG's *Télévision Suisse Romande* had categorised it as a small party ("petit parti") and had therefore allocated it much less airtime in its programmes concerning the parliamentary election of 23 October than the 12 large parties.

In particular, since the SRG was due to broadcast one more major live debate, the UBI, an independent court-like body, dealt with the complaint in an expedited procedure. At a public hearing, it ruled on the case the day before the TV election debate was broadcast. The majority of the UBI members agreed that the complaint should be examined on the merits, rejecting the argument that it should not be considered on procedural grounds.

The UBI therefore discussed whether the application of the SRG criteria represented an unlawful refusal to grant access to the programme. It ruled that this was not the case by 5 votes to 1. Excluding the small party from certain election broadcasts could be objectively justified, especially since it had not been treated any differently to similar parties. Broadcasters had considerable autonomy in determining the content of their programmes, including in the run-up to elections.

Access to radio and television election broadcasts is often the subject of disputes in Switzerland. In relation to previous elections, several court decisions have examined the broadcasters' criteria, particularly those of the SRG. In 1999, for example, the *Bundesgericht* (Federal Supreme Court) ruled that the SRG should take into account equal opportunities, the ban on discrimination and the protection of minorities. This did not mean that all candidates and parties should be treated in exactly the same way in the run-up to an election. However, differences in treatment should be based on objective, non-discriminatory grounds, such as the public interest in detailed information about parties and candidates with a realistic chance of being elected.

The right to non-discriminatory treatment in TV election broadcasts is based not only on the Swiss Federal Constitution, but also on the European Convention on Human Rights (Article 13 in conjunction with Article 10). In order to integrate this right into procedural law, the Swiss legislature had created the entitlement to file a complaint against a refusal to grant access in 2006 (Art. 94(1) of the *Radio- und Fernsehgesetz* (Radio and Television Act), RTVG). Previously, complaints could only be lodged against programmes that had already been broadcast. If a discriminatory refusal to grant access is substantiated, legal action may be taken, independently of any particular programme. In its recent decision, the UBI made it clear that such complaints are valid even if a candidate or party is not completely refused access to a programme, but claims to be the victim of uncalled-for unequal treatment.

Incidentally, "La Gauche" had taken other steps to secure the right to participate in two specific election broadcasts when the civil courts granted it full access to radio and television programmes with candidates in the Valais canton. In provisional measures issued by the *Bezirksgericht Sion* (Sion district court) on 20 September, the SRG was instructed to grant the party's request to participate. This decision was

based on provisions on the protection of personality rights (Art. 28 of the *Zivilgesetzbuch* (Civil Code)).

• *Pressemitteilung der Unabhängigen Beschwerdeinstanz für Radio und Fernsehen vom 11. Oktober 2011* (Press release of the Independent Radio and Television Complaints Authority of 11 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15473 DE

Franz Zeller
Federal Communications Office / Universities of Bern and Basel

DE-Germany

ZAK Complains that Programme Breached Ban on Public Advertising for Gambling Services

On 14 September 2011, the *Kommission für Zulassung und Aufsicht der Landesmedienanstalten* (Media Licensing and Monitoring Commission - ZAK) filed a complaint that the "*Show zum Tag des Glücks*", broadcast on 25 April 2011 by TV broadcaster "Das Vierte", infringed the *Glücksspielstaatsvertrag* (Interstate Gambling Agreement - GlüStV), and prohibited a repeat broadcast.

During the programme, the participants of which had to have bought a ticket for the *Süddeutsche Klassenlotterie* (South German lottery - SKL), the lottery's logo was repeatedly shown. The ZAK also considered that extensive references to the SKL had been made by the programme's presenter. The ZAK deemed this to be evidence of the commercial nature of the programme, which therefore violated the ban on public advertising for gambling services enshrined in Article 5(3) GlüStV.

In its defence, the broadcaster had referred to the recent judgments of the Court of Justice of the European Union (ECJ) on gambling activities (judgments of 8 September 2010, C-316/07, C-358/07 to C-360/07, C-409/07, C-410/07 and C-46/08), arguing that, on this basis, the ban on advertising enshrined in the GlüStV was inapplicable.

In response, the ZAK argued that these ECJ judgments only concerned the state monopoly on sports betting and its effects on the fundamental freedoms enshrined in EU law. It claimed that the validity of the ban on advertising in the GlüStV was not affected by the ECJ's case law.

The ZAK therefore echoed previous decisions of the *Landesmedienanstalten* (*Land* media authorities) concerning television programmes based on state lotteries, including the decision of the *Niedersächsische Landesmedienanstalt* (Lower Saxony media authority) to file a complaint in July 2008 following the broadcast of the "*5-Millionen-SKL-Show*" by the broadcaster RTL.

• *ZAK-Pressemitteilung 18/2011 vom 14. September 2011, „Show zum Tag des Glücks" bei Das Vierte beanstandet - Wiederholung untersagt* (ZAK press release 18/2011 of 14 September 2011, Complaint filed against "*Show zum Tag des Glücks*" on "Das Vierte" - repeat prohibited)
http://merlin.obs.coe.int/redirect.php?id=15471 DE

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

ES-Spain

Spanish War over Football Broadcasting Rights

On 5 October 2011, the Commercial Court No. 7 in Barcelona ruled in favour of a Valencian regional television channel in a lawsuit filed against Mediapro, the company that owes Spanish football broadcasting rights, for breaching several contracts signed between the two parties.

The decision states that Mediapro is responsible for the damages caused by its breach of contract. As a result, Televisión Valenciana (TVV) is entitled to compensation.

Under the relevant contracts, TVV owned the right to broadcast, until the end of the 2010-2011 season, a football game for each date of the Liga, two Spanish Cup matches, the right to edit and broadcast the highlights from the games of the First Division, Second Division and the Spanish Cup and the right to broadcast a football game from each Second Division date until the 2011-2012 season.

The fight began when Mediapro refused to provide TVV with access to the 2010-2011 game between Atlético de Madrid and Sporting de Gijón. In the face of that refusal, which was repeated in the following days, TVV decided to sue Mediapro. Barcelona's Commercial Court Number 7 initially ordered on 17 September 2010 as a precautionary measure Mediapro's mandatory compliance with the contract terms as agreed with TVV.

Mediapro challenged the Court's decision and continued to refuse to provide the signal to TVV. The Commercial Court has now vindicated TVV and again declared that Mediapro has breached its contractual obligations.

Therefore, Mediapro is under an obligation to enforce the provisions of these contracts, providing access for free to TVV for the signal for broadcasting the games

of the Liga as issued by the television network La Sexta, owned by Mediapro, as well as the signal for two games from the Spanish Cup, along the lines of the terms agreed in the contract signed by the parties on 25 August 2006.

The ruling also suggests that Mediapro should provide TVV with the edited highlights from the games of the Liga and the Spanish Cup and the signal to broadcast the Second Division games, on the terms agreed in the contract signed by the parties on 12 February 2010.

• *Sentencia del Juzgado de lo Mercantil número 7 de Barcelona, 5 de octubre de 2011* (Decision of the Commercial Court No. 7 in Barcelona, 5 October 2011) ES

Pedro Letai
IE Law School, Instituto de Empresa (Madrid)

Controversies over the Catalan Cinema Law

A new Catalan Cinema Law was approved by the Catalonian Government on January 2010 and came into force on 7 July 2010 (see IRIS 2009-5/21)

This new Cinema Law has been particularly controversial, as its main innovation is the obligation to dub and subtitle foreign movies into the Catalan language (a co-official language in the Autonomous Community of Catalonia alongside Spanish). By virtue of Article 18, when more than one copy of a dubbed or subtitled movie is released in Catalonia, distribution companies are obliged to distribute fifty per cent of the analogue copies in the Catalan version. The only exemption is for dubbed European movies of which less than sixteen copies are distributed in Catalonia. Previously, foreign language movies were normally only dubbed into Spanish.

Controversy has been caused by the high increase in costs that this new measure will necessitate. As a result, it has been the object of serious debate among producers, distributors and exhibitors.

After much discussion, the Catalonian Government and the US majors reached an agreement in September 2011 that will end this conflict at least in the medium term. The agreement states that the Catalonian Government shall assign EUR 1.4 million in economic aid in order to help distribution companies in the dubbing and prints, as well as with promotion. This more than doubles the budget of EUR 600,000 assigned in 2010 towards the same concept. As a result of the agreement in 2014, one out of four movie showings will be in Catalan and the number of spectators will rise from 117.000 in 2010 to over 1.5 million by next year.

The European Commission has also intervened in the controversy over the new Cinema Law. The Commission considers that the Law infringes the principle of European competition, as it favours productions in Spanish (Castilian) over other European films, as films in Spanish will not be under an obligation to comply with the new measures. The Commission has accordingly sent a letter to the Spanish Government informing it of the opening of a file that will aim to examine the nature of Articles 17 and 18 of the Cinema Law, which are considered to be unacceptable.

• Llei 20/2010, del 7 de juliol, del cinema (Catalan Act 20/2010 of 7 July 2010)
http://merlin.obs.coe.int/redirect.php?id=15489 CA ES

Laura Marcos and Cristina Mora
Enrich Advocats, Barcelona

FR-France

Conseil d'Etat Confirms Legality of the HADOPI Decrees

On 19 October 2011 the Conseil d'Etat rejected the applications brought by the Apple companies and the Internet access provider FDN against the decrees on the organisation and functioning of the high authority for broadcasting works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet - HADOPI). In doing so, the Conseil d'Etat validated the "graduated response" procedure, which it deems to be in compliance with the European Convention on Human Rights. This procedure, set up by the Acts of 12 June 2009 and 28 October 2009 and their implementing decrees, which was the subject of the applications, is an attempt to combat the unlawful downloading of works that are protected by copyright. The first stage of the graduated response is in the hands of the HADOPI, an independent administrative authority responsible for sending warning messages to Internet users using peer-to-peer technology whose IP addresses have been collected by the authorised rights management societies.

The applicant IAP was calling for the cancellation of the Decree of 26 July 2010 on the procedure and the investigation of cases before the HADOPI's committee for the protection of rights. The arrangements at issue lay down the rules for the admissibility of the applications it receives, the establishment of a system for reports by sworn agents, the conditions for hearing Internet users, the procedure for applying to the public prosecutor, the recommendations sent to Internet users, etc. The grounds for the application are that all these disregard the adversarial principle and

violate Article 6 of the European Convention on Human Rights. However, the Conseil d'Etat rejected the claims, recalling that the recommendations referred to in the Decree at issue that are sent to Internet users by the HADOPI's committee for the protection of rights do not have the status of a sanction or an accusation; their purpose was firstly to state the facts regarding certain information likely to point to a failure to comply with the user's obligation to secure access to the Internet, and secondly to inform the Internet users concerned, by merely reminding them of the law, of the obligations incumbent on them in application of the provisions of the Intellectual Property Code. Thus, the Conseil d'Etat recalled, these recommendations could not be dissociated from any possible criminal proceedings in court, at which point the person concerned would have the possibility to discuss both the facts to which they refer and the conditions of their being sent. Thus the argument that the HADOPI's recommendations, by their very nature, could only be made by an authority meeting the requirements of the stipulations of Article 6 of the European Convention on Human Rights was rejected.

The Conseil d'Etat also rejected the application brought against the Decree of 5 March 2010 laying down the method for processing personal data entitled "System for managing measures to protect works on the Internet". The applicants claimed that the procedure for adopting the decree was irregular, because the regulatory authority for electronic communications and the postal service (Autorité de Régulation des Communications Electroniques et des Postes - ARCEP) had not been consulted. However, the Conseil d'Etat held that neither the object of the decree nor the provisions of either the Post and Telecommunications Code or the Intellectual Property Code made consulting ARCEP obligatory. Lastly, the Conseil d'Etat rejected Apple's contesting the decree of 29 December 2009 in the hope of neutralising the powers of the HADOPI, which is also responsible for regulating technical protection (DRM).

• *Conseil d'Etat, 19 octobre 2011, Société Apple Inc et Société I-Tunes Sarl, n°339154* (Conseil d'Etat, 19 October 2011, the company Apple Inc. and the company I-Tunes Sàrl, no. 339154)
http://merlin.obs.coe.int/redirect.php?id=15498 FR

• *Conseil d'Etat, 19 octobre 2011, French Data Network, n°339279 et n°342405* (Conseil d'Etat, 19 October 2011, French Data Network, nos. 339279 and 342405)
http://merlin.obs.coe.int/redirect.php?id=15499 FR

Amélie Blocman
Légipresse

Six more HD channels on DTV

In a notable response to the reasoned opinion issued on 29 September by the European Commission holding that the arrangements provided for by the 1986 Act granting additional "compensatory" channels to the three historic groups TF1, M6 and Canal+ were contrary to European Union law (see IRIS 2011-9/7), Prime Minister François Fillon announced a number of measures on 11 October. Firstly, a bill is to be tabled within a period of two months with a view to repealing the arrangement for "compensatory" channels. Secondly, in order to enable viewers to benefit from a wider audiovisual offer without having to change their television sets, the technical standard for broadcasting DTV is not to be changed in the immediate future. The Prime Minister did not, however, call into question the decision to apply more modern norms for compression and broadcasting in the future. As advocated in Michel Boyon's report, this would eventually result in all the DTV channels using the DVB-T2 broadcasting standard. The Prime Minister also encouraged a start to be made straight away on making a natural transition towards these new standards, by making provision for the compatibility of new television sets being commercialised. Following this announcement, the audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) announced on 18 October 2011 that it was calling for applications from candidates for the broadcasting of six DTV channels in high definition using the DVB-T MPEG 4 standard. Applications must be submitted by 3 January 2012; the successful candidates are to be selected in mid-March 2012, and authorisations issued to the editors before the end of May. "The arrival in the near future of six new channels in high definition on the DTV platform will give a new boost to this type of reception, and will also enrich the offer of programmes for viewers throughout the country," announced the CSA .

• *Communiqué de presse du CSA du 18 octobre 2011, Appel à candidatures pour six chaînes de télévision en haute définition sur la TNT* (CSA press release on 18 October 2011 on the call for candidates to operate six HD television channels on DTV)
http://merlin.obs.coe.int/redirect.php?id=15468 FR

Amélie Blocman
Légipresse

CSA Sends out formal Notices for Failure to Observe Political Pluralism on the Air

In accordance with Article 13 of the Act of 30 September 1986, the audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) notified the President of the Senate and the National Assembly and the leaders of the political groups represented in Parliament at the end of September 2011 of the speaking times for politicians timed during television news, news programmes and other programmes on the major national television channels, news channels and the main news radio stations during the second quarter of 2011. Since July 2009, a new "principle of pluralism", decreed by the CSA, governs the balance of speaking time for politicians on television and radio

(see IRIS 2009-8/19). The rule is that the speaking time of the parliamentary opposition may not be less than half the aggregate speaking time of the head of State and the presidential majority. Furthermore, only speeches by the President that, by their content or context, are part of the "national political debate" are taken into account.

On 19 October 2011, the CSA announced that it had sent a formal notice regarding failure to abide by these rules to the three news channels iTélé, LCI and BFM-TV, and to the general radio stations Europe 1 and France Inter as, during the period from 1 July to 30 September 2011, these channels had totally failed to abide by this balance which provides for the opposition having the benefit of speaking time of between 50 and 100% of the speaking time allowed to the majority. According to Christine Kelly, the CSA member with responsibility for pluralism, iTélé had allowed the parliamentary opposition speaking time of 146% longer than that allowed to the majority; the figures for BFM-TV and LCI were 142% and 130% respectively.

It has to be said that national political news in recent months has been dominated by the Socialist primaries (election of the opposition candidate in the upcoming presidential election in May 2012) and reporting on the "DSK affair" (involving Dominique Strauss-Kahn, former Chairman of the IMF and member of the opposition), which had largely contributed to upsetting the balance in the distribution of speaking time for politicians.

The CSA stressed that these formal notices, which are on a par with a "yellow card" for the channels in question, in fact constitute an order to make sure this does not happen again, and are the preliminary stage in a possible sanction procedure.

• *Temps d'intervention des personnalités politiques à la télévision et à la radio au premier semestre 2011* (Speaking time of politicians on television and radio during the first half of 2011)
http://merlin.obs.coe.int/redirect.php?id=15470 FR

Amélie Blocman
Légipresse

CSA Makes Recommendations on Reality TV Programmes

In response to the concern expressed frequently by a large number of viewers, the audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) called on its Committee for considering programme evolution to carry out a considered analysis of reality TV programmes. This was done between February and July 2011, and has resulted in a list of the CSA's actions in respect of these broadcasts, concluding with the compilation of a number of recommendations, which were made public on 4 October 2011. The CSA stresses the need to reinforce protection for the two categories of people most at risk, namely young people and participants, as shown unfortunately by the suicide this summer of a former candidate in the "Secret Story" programme. It is calling on both producers and channels on the one hand and adults responsible for children on the other to exercise greater responsibility and vigilance. On the protection of participants, the CSA is calling for much more care to be taken in selecting candidates for programmes based on the principle of confinement, particularly with regard to young or potentially fragile people. It wants participants to have the benefit of real, personalised medical and psychological accompaniment before, during, and for several months after filming, and for this to be stated in the rules for the broadcast. It should be borne in mind that participants must not in any circumstances be placed in degrading situations. Their contracts must indicate that they are entitled to apply to the CSA on any matters within its remit. In order to afford young people more protection, producers and editors are being called on to think about their social and ethical responsibility concerning the values promoted by these programmes. The CSA is encouraging them to display the "not for the under-10 age-group" pictogram for the entire duration of reality TV programmes, and the signage for Category II. Producers and editors are also being invited to provide audiences with information on the way the broadcasts are produced (filming conditions, selection of participants, any specific staging, etc). Adults responsible for children are being asked to be more vigilant and to discuss the content of the programmes they watch on television or follow on the Internet. The CSA draws their attention more particularly to certain risks connected with the substantial mobilisation of young people via the Internet (particularly on social networks) around certain programmes. Lastly, the CSA proposes meeting any of the various parties who so wish, with a view to promoting discussion and cooperation.

• *Bilan de la réflexion sur la « téléréalité » : les préconisations du CSA* (Final report on consideration of reality TV programmes; recommendations made by the CSA)
http://merlin.obs.coe.int/redirect.php?id=15469 FR

Amélie Blocman
Légipresse

CSA Equalises Sound Intensity of Programmes and Advertising on Television

The intensity of the sound of commercials has been a recurrent source of complaints from viewers to the audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) for more than ten years (an average of three complaints each week), and the legislator and the regulatory authority have now taken the matter in hand. Article 177 of Act No. 2010-788

of 12 July 2010, Article 14 of Decree No. 92-280 of 27 March 1992 (as amended), and Article 27 of the Act of 30 September 1986 (as amended) require channels to observe an even volume of sound for both television programmes and commercial breaks, and give the CSA authority to deal with this. In order to enable the editors of television services to comply with these provisions, the CSA has carried out a thorough review of the technical aspects of the matter, in cooperation with editors, producers, advertisers and sound specialists. This is essential before setting up quantitative obligations, and has made it possible to establish a method for measuring the intensity of sound that is compatible with industrial measurement equipment. The CSA has also instructed manufacturers to ensure that they do in fact apply the international recommendations so that differences in sound intensity are not reintroduced in content to be shown on television sets and other domestic equipment. Once this review was completed, the CSA adopted a deliberation on the sound intensity of programmes and advertising on television. It said it would be appropriate to continue efforts up to the stage of broadcasting to viewers using both digital television (DTV) and other methods of broadcasting (including cable, optic fibre, satellite and ADSL). The CSA's aim is to make sure that any nuisance caused by the sound level of a commercial is no greater than that produced when changing channels. In order to achieve this, the recommendation lays down a level of -23 LUFS for the sound intensity when broadcasting commercial breaks and each commercial that is included during programmes produced before and after 1 January 2012 and during programmes broadcast live. The arrangement is to be implemented gradually so as to give those involved time to comply. Initially, the difference in sound intensity perceived between one channel and another should begin to be reduced in December 2011. Two other stages of improvement are to follow, in January 2012 and 2013, aimed at both programmes and commercials.

• *Délibération n°2011-29 du CSA relative aux caractéristiques techniques de l'intensité sonore en diffusion des programmes et des messages publicitaires de télévision, JO du 11 octobre 2011* (CSA Deliberation No. 2011-29 on the technical characteristics of sound intensity of programmes and advertising on television, gazetted on 11 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15467 FR

Amélie Blocman
Légipresse

GB-United Kingdom

Visual Reference to Skype May Constitute Product Placement

The UK communications regulator, Ofcom, has decided that a continuous visual reference to Skype during an interview may constitute product placement.

Sky News broadcast an interview via a video call in its coverage of the Utoya Island massacre in Norway. Whenever the interviewee was shown full-screen, the words 'VIA SKYPE' were shown almost continuously in a caption in the top right-hand corner. There was no product placement agreement with Skype, and Ofcom was concerned that this amounted to giving undue prominence in a programme to a product, service or trade mark, which is prohibited by the broadcast code implementing the Audiovisual Media Services Directive.

Sky stated that it had included the caption to explain the relatively low production values for picture and sound quality in the interview, especially as a growing proportion of viewers watched the HD version of the channel. No fees were paid for the use of the brand name, while the word "Skype" has become common parlance for "video conferencing". Sky had declined to use the Skype logo and had used the brand name instead.

Ofcom noted that the presenter had made a verbal reference to Skype at the beginning of the interview and the separate locations of presenter and interviewee were frequently indicated by graphics during the interview. This should have been sufficient to explain to viewers the lower production quality of the interview. Thus there was little editorial justification for displaying the Skype brand name throughout the ten-minute interview. However, in view of the fact that Sky has decided to reduce in future the prominence of references to services such as Skype in order to ensure compliance with the Code, no penalty was imposed. References to material broadcast "via web-cam" or "via video link" were found to be unlikely to raise issues under the Code, but any brand references should be editorially justified and brief.

• 'Sky News', Ofcom Broadcast Bulletin, Issue 190, 26 September 2011, page 25
http://merlin.obs.coe.int/redirect.php?id=15450 EN

Tony Prosser
School of Law, University of Bristol

Broadcasters Must Do More to Protect Children after the Watershed (and before It too)

Section One of the Ofcom Broadcasting Code deals with "Protecting the Under-Eighteens" and should be read in conjunction with Section Two ("Harm and Offence").

Guidance already exists to assist broadcasters to interpret the Code and, in this context, in particular, Rule 1.3. This reads, "Children must04046be protected

by appropriate scheduling from material that is unsuitable for them".

However, "a fundamental requirement underpinning these rules is the application of the watershed, which applies to television only".

The watershed runs between 21:00 - 05:30. Between those hours, one should expect a shift towards so-called "adult content". But research conducted by Ofcom during 2011 indicates that 33% of parents and/or carers surveyed "expressed some level of concern regarding what their children had seen on TV before 9pm in the previous 12 months."

More broadly, in 2010, the UK Government nominated the Chief Executive of the Mothers' Union to review the pressures on children to grow up too quickly. The Review included research indicating that "41 per cent of 1,025 parents and carers questioned had seen content on television before the watershed which they considered unsuitable for children because of sexual content. The review also highlighted music videos as an area of particular parental concern."

Now Ofcom has published a Guidance Note for television broadcasters regarding compliance with rules relating to pre-watershed content in Section One of the Broadcasting Code, in particular in relation to (a) material broadcast before and soon after the watershed and (b) music videos broadcast before the watershed.

Ofcom has a statutory duty to ensure that under-eighteens are protected. This is one of the most fundamental aspects of the Code and for Ofcom's regulation of standards in broadcasting. Although it issues rules, Ofcom insists that "[e]very complaint or case will be dealt with on a case by case basis according to the individual facts of the case".

• Ofcom, Protecting the Under-Eighteens: Observing the watershed on television and music videos
http://merlin.obs.coe.int/redirect.php?id=15451 EN
• Ofcom Broadcasting Code, Section One
http://merlin.obs.coe.int/redirect.php?id=15452 EN
• Ofcom, Guidance Notes, Section One: Protecting the under 18s
http://merlin.obs.coe.int/redirect.php?id=15453 EN
• Bailey Review, "Letting Children Be Children", June 2011
http://merlin.obs.coe.int/redirect.php?id=15490 EN

David Goldberg
deeJgee Research/ Consultancy

GE-Georgia

Broadcasting Act Amended

A number of important amendments were recently introduced into the Statute of Georgia "On Broadcasting" of 23 December 2004 (see IRIS 2005-7/24).

The first set of changes was adopted by parliament on 8 April 2011 and promulgated on 2 May 2011 (Statute No. 4525). Article 37 of the broadcasting law is amended to prohibit a broadcasting license from being held by a legal entity registered in an off-shore zone, and/or a legal entity, whose share/stock is directly or indirectly owned by a person registered in an off-shore zone. The Statute also adds Article 37-1 that obliges applicants for a license to disclose information about the owners, board members and managers of the company in order to prove that the applicants or their beneficiaries do not constitute entities banned from holding broadcasting licenses. Amendments also make more information on the broadcasters and the licensing body available online.

Another set of changes adopted on 19 April 2011 and promulgated on 5 May 2011 (Statute No. 4546) grants the broadcasters an increased time for commercials and possibilities for more frequent interruptions of programmes by commercials. They also increase the length of commercial breaks, e.g., in news and public affairs programmes from 120 to 300 seconds. The amendments clarify the provisions of Articles 63 and 64 on advertising and teleshopping and are aimed at bringing particular norms of the national broadcasting law into line with the EU directive on audiovisual media services.

• [U+10DB][U+10D0][U+10E3][U+10EC][U+10E7][U+10D4][U+10D1][U+10DA]
[U+10E8][U+10D4][U+10E1][U+10D0][U+10EE][U+10D4][U+10D1]"
[U+10E1][U+10D0][U+10E5][U+10D0][U+10E0][U+10D7][U+10D5][U+10D4][U+
[U+10D9][U+10D0][U+10DC][U+10DD][U+10DC][U+10E8][U+10D8]
[U+10D3][U+10D0][U+10DB][U+10D0][U+10E2][U+10D4][U+10D1][U+10D4][U
[U+10D3][U+10D0] [U+10EA][U+10D5][U+10DA][U+10D8][U+10DA][U+10D4][
[U+10E8][U+10D4][U+10E2][U+10D0][U+10DC][U+10D8][U+10E1]
[U+10D7][U+10D0][U+10DD][U+10D1][U+10D0][U+10D6][U+10D4]
(Statutes "On Amendments and Addenda to the Law of Georgia on Broadcasting" Nos. 4525 and 4546)
http://merlin.obs.coe.int/redirect.php?id=15480 KA

Andrei Richter
Faculty of Journalism, Moscow State University

GR-Greece

Reorganisation Plan for the Greek Public Service Broadcaster Announced

On 19 August 2011, the Minister of State, government spokesman and government member responsible for media regulation Elias Mosialos announced the restructuring of the Greek public service broadcaster, ERT. The measures announced include closing ET1, the oldest television station of ERT, and the digital channels Cine Plus and Sport Plus. Nineteen regional radio stations will be merged into nine, now centrally administered, while fifteen out of the twenty medium-wave transmitters will be closed. The reorganisation

plan also includes the abolition of the Hellenic Audiovisual Institute, the national applied research organisation in the field of audiovisual communication, and of the Hellenic National Audiovisual Archive. The remit of these two organisations will be transferred to ERT.

According to Mr Mosialos, the reforms also aim at establishing a public service broadcaster that operates in a transparent manner and that is "not politicised". An independent committee, composed of distinguished jurists, economists and journalists was formed on 11 October 2011 in order to clarify the role of public radio and television and indicate how the public company could take advantage of the licence fee that every citizen pays through the bill for electricity consumption. This committee will be aided by specialists on public service broadcasting in France, Germany, Sweden and the UK.

So far no legislative or other regulatory texts have been presented in implementation of these propositions, which have caused much reaction from the Greek political parties and the professional associations of the public broadcaster.

• Απόφαση του Υπουργού Επικρατείας Ηλία Μόσιαλου για τη συγκρότηση επιτροπής για τον επαναπροσδιορισμό των δημοσίων 334.334.325. (Decision of the Minister of State Elias Mosialos on the establishment of a committee for the restructuring of public mass media)
http://merlin.obs.coe.int/redirect.php?id=15454 EL

Alexandros Economou
National Council for Radio and Television

HR-Croatia

Act Amending the Electronic Media Act

On 8 July 2011, the Act Amending the Electronic Media Act was adopted. In particular it rules as follows:

- It specifies the provisions of Article 52 regarding the transparency of the ownership structure of media service providers, so as to prescribe the obligation to submit to the Council for Electronic Media certified copies of documents relating to the acquisition of stocks or shares in the relevant provider's company;

- It prohibits legal activities that aim to conceal the ownership structure of a media service provider or the ownership of an acquirer of stocks or shares in such a media service provider;

- It determines that all legal transactions concealing the ownership structure of a media service provider or the ownership of an acquirer of stocks or shares in a media service provider shall be void;

- It stipulates that it shall not be permitted to transfer the concession to provide television or media services to another person;

- It specifies the misdemeanour provisions governing the delivery of data and documents to the Council for Electronic Media and the introduction of a misdemeanour liability for concealing the ownership structure of a media service provider, or not publishing data on the relevant holders of stocks or shares, in the Official Gazette.

• *Zakon o izmjenama i dopunama Zakona o elektroničkim medijima, Narodne novine br.: 84, 20.07.2011.* (Act Amending the Electronic Media Act, Official Gazette No. 84/11, 20 July 2011)
http://merlin.obs.coe.int/redirect.php?id=15481 HR

Nives Zvonarić
Agencija za elektroničke medije, Novo Cice

HU-Hungary

Recommendation on the Classification of Programmes Issued by the Media Council

On 19 July 2011 a Recommendation on aspects necessary for the classification of programmes and on the displaying of symbols corresponding to the classification of programmes was issued by the Media Council of the National Media and Communications Authority (hereinafter referred to as "Media Council"). The Recommendation is aimed at ensuring the protection of minors from harmful media content. This Recommendation was issued after a public hearing held on 11 July 2011 with the participation of media service providers, distributors and lobby organizations of the Hungarian media market.

The Recommendation completes the provisions for protection of minors of the new Hungarian Media Act that came into force on 1 January 2011. It defines the content of the different classification categories included in the Hungarian Media Act, which are based on the age of the possible audience. It also defines in a more detailed fashion the displaying of symbols in relation to the specific classification categories. The purpose of the Recommendation was not to set strict and rigid regulations for the classification but rather to give the media service providers information and guidance on the classification of programmes. In Hungary the rating of programmes based on the age of the intended audience and the displaying of the proper symbol concerning the specific category is also the obligation of the media service providers. The Recommendation is not legally binding; however, due to the fact that the Media Council is authorised by the new Hungarian Media Act to issue such recommendations, the provisions of the recommendations are

applicable and can be referred to in individual cases and decisions.

According to the new Media Act, the Hungarian classification system currently consists of six classification categories: from Category I (programmes that may be viewed or listened to by persons of any age and can be aired at any time) up to Category VI, (programmes that may seriously impair the physical, mental or moral development of minors, particularly because they involve pornography or extreme and/or unnecessary scenes of violence and therefore can be aired only in an encrypted form or by the use of another effective technical solution). The Recommendation describes the psychological characteristics and the media competence of the different age groups in relation to the classification categories that have been set out in the Media Law Act. Furthermore, it illustrates by several examples which genres, harmful elements or problem areas can appear in each specific category and which content shall be classified as falling into a higher (stricter) category.

According to the Media Act, in linear media services the rating of the programme shall be communicated at the beginning of the broadcasting of the programme. The Recommendation defines this labeling requirement more precisely: it stipulates among others that in the case of television programmes the rating shall be published both visually and verbally, as well as providing that the informative screen text shall be legible, be singled out from the background and shall cover a minimum of 50% of the screen.

Furthermore, in linear audiovisual media services, at the time the programme is aired, a symbol corresponding to the classification of the programme shall also be displayed in the form of a pictogram in one corner of the screen so that it is clearly visible throughout the entire course of the programme. The Recommendation determines in detail to what extent, in which coordinates and in which corner of the screen the pictogram shall be placed. Although the Media Act does not contain any provision for distinguishing which programmes could be especially recommended to children by a special pictogram, the Recommendation emphasises, that besides the protection of minors from harmful media content the media organisation shall also endeavour to convey constructive information to specific age groups. Therefore, the media service providers are entitled to indicate programmes classified as the Category I and made expressly for children under 6 years of age by a special, so-called, "child-friendly" pictogram. The media service providers can thereby help parents and educationalists to choose suitable programmes for children. To this effect, the Media Council organised an Internet poll whereby television viewers could vote on which pictogram would be assigned to the "child-friendly" programmes. More than ten thousand people voted for a pictogram that figured a little boy.

• A Nemzeti Média- és Hírközlési Hatóság Médiatanácsának ajánlása a médiatartalmak korhatár-besorolásánál irányadó szempontokra, az egyes műsorszámok közzététele előtt és közben alkalmazható jelzésekre, illetve a minősítés közlésének módjára vonatkozó jogalkalmazási gyakorlat elvi szempontjairól, 2011. július 19. (Recommendation by the Media Council of the National Media and Communications Authority on the most important conceptual aspects of the enforcement practice concerning the criteria governing the classification of media content, the symbols to be used prior to and in the course of broadcasting the various programmes and the method of communicating the classification, 19 July 2011)
http://merlin.obs.coe.int/redirect.php?id=15461 HU

Réka Sümegh
European Audiovisual Observatory

Recommendation on Effective Technical Solutions Issued by the Media Council

According to paragraph 6 of Article 10 of the new Media Act, which came into force on 1 January 2011, linear media service programmes that may seriously impair the physical, mental or moral development of minors, particularly because they involve pornography or extreme and/or unnecessary scenes of violence (Category VI programmes), may be published only if the media service holds the programme in an encrypted form and can only be accessed via a digit code available only to subscribers over the age of eighteen, or that uses another effective technical solution to prevent viewers or listeners under the age of eighteen from accessing the media service. Also in the case of on-demand media services that fall into the category mentioned above (Category VI programmes) or programmes that may impair the physical, mental or moral development of minors, particularly because they are dominated by graphic scenes of violence or sexual content (Category V programmes), the Media Act prescribes media service providers and distributors the use of an effective technical solution in order to prevent minors from accessing programmes with such content.

On the basis of the authorisation by the Media Act, the Media Council of the National Media and Communications Authority (hereinafter referred to as "Media Council") published a Recommendation on 22 June 2011 with the aim of informing media service providers and distributors about the effective technical solutions available for the protection of minors from harmful media content (hereinafter referred to as "Recommendation"). The Media Council also involved concerned media service providers and distributors in the creation of the Recommendation by holding a public hearing on 7 June 2011. The Recommendation was issued primarily for media service providers but its provisions contain valuable and useful information for parents too.

In order to filter out harmful contents universally, the Recommendation provides solutions for each techni-

cal platform. It details the effective technologies, solutions and methods to be used in the analogue and digital cable television services, in the digital satellite, digital terrestrial and internet protocol television services as well as in linear and on-demand media services provided in mobile communications networks or on the Internet. In the case of digital cable television services, for example, only digital decoders (Set-Top-Boxes) with a child safety lock with at least a four-digit parental code shall be used. The Recommendation also prescribes that after the third keying in of the wrong parental code, if the STB allows for it, the system shall automatically prevent the user from accessing the chosen channel or programme for a period of ten minutes at least.

The Recommendation calls attention to the fact that such technical solutions may be reliable only if the media service providers and distributors are able to monitor continuously how efficient a method or technology is and develop it further. According to the Recommendation the efficacy of the protection of minors from harmful content can be increased by providing information to the users about the accessibility and use of special technical equipment and measures as well as by progressively developing the media literacy of minors, parents and educationalists. The Recommendation emphasises that besides media service providers, the authorities have to take an active part in teaching adults to use different effective technical solutions.

The Recommendation is not legally binding, however, due to the fact that the Media Council is authorised by the new Hungarian Media Act to issue such recommendations, its provisions are applicable and can be referred to in individual cases and decisions.

• A Nemzeti Média- és Hírközlési Hatóság Médiatanácsának ajánlása a kiskorúak védelmében a lineáris és lekérhető médiaszolgáltatások esetén alkalmazandó hatékony műszaki megoldásokra, 2011. június 22. (Recommendation by the Media Council of the National Media and Communications Authority on the effective technical solutions used in linear and on-demand media services for the protection of minors, 22 June 2011)
http://merlin.obs.coe.int/redirect.php?id=15463 HU

• *Médiatanács: Hatékony műszaki megoldások a gyermekek védelmében, 2011. június 23.* (Media Council: Effective technical solutions for the protection of children, 23 June 2011)
http://merlin.obs.coe.int/redirect.php?id=15464 HU

Réka Sümegh
European Audiovisual Observatory

IT-Italy

The Court of Rome Protects the TV Show "Ballando con le Stelle" and Blocks "Baila!"

On 23 September 2011, the Court of Rome decided to uphold a complaint made by RAI, Milly Carlucci (TV presenter of the show "Ballando con le Stelle") and Bailandi Entertainment s.p.a. against RTI and Endemol (Mediaset group) for infringement of broadcasting rights in RAI's TV show "Ballando con le stelle" by Mediaset's show "Baila!".

Milly Carlucci and the other co-authors of the show "Ballando con le Stelle" initiated a complaints procedure in order to protect their copyright in the show. In the second phase RAI also intervened in the complaint, arguing the infringement of competition law as well. Bailandi Entertainment s.p.a. (which has licensed the BBC's format of the show "Strictly Come Dancing") intervened asking for the protection of the format of the show and for an order of removal of the show "Baila!", as it is a copy of "Ballando con le Stelle".

Mediaset states that it has bought the rights over the format from the South American show "Bailando por un sueno", which they claim is a differentiated, unique and original show, from Endemol.

In its decision the court of Rome states that both shows fall into the talent show category, more precisely into that of dance competitions featuring a combination of dancers and so-called VIPs (very important persons).

The decision of Judge Muscolo specifies that, according to the jurisprudence, a television show will qualify as an intellectual work protected by copyright (l.n. 633/41), as long as it exhibits creativity (even if in a modest way). It excludes works that are evidently banal.

Furthermore, the court stresses that the comparison between the two shows, which is necessary in order to check whether copying has taken place or not, has to be done in an immediate way. It has to use parameters such as the ordinary consumer and, in this case in relation to the television work, the ordinary viewer.

Having said that, the judge underlined that the show "Ballando con le Stelle" is characterised by a sufficient level of creativity to differentiate it from other dance competitions in many respects. Those characteristic elements are also present in the competing show "Baila!". This show has a few differentiated elements, but those elements are marginal and not enough to give the television work a sufficient level of creativity. So according to the immediate impression and perception of an ordinary viewer of the two shows, it appears that one show is reproducing the other.

The judge concludes that there has been copying of "Ballando con le Stelle" and prohibits Mediaset from broadcasting "Baila!" or any show, even with another name, that has the same characteristics of the show "Ballando con le Stelle".

An infringement of intellectual propriety rights was found to have taken place and so the *fumus boni iuris* (presumption of appropriate legal basis) of the claim

and the demand for the removal of "Baila!" are accepted.

The decision states that for the purposes of this prohibition imposed on Mediaset, the question of the protection of the format is absorbed into the ascertainment of the protection of the show. In addition, the decision concludes that there was no infringement of competition rules.

The decision will probably soon be appealed by Mediaset, as on 26 September 2011 the first show of "Baila!" was already broadcast.

• Tribunal di Roma sentenza Baila! del 23 Settembre 2011 (Court of Rome, decision Baila! of 23 Septembre 2011)
http://merlin.obs.coe.int/redirect.php?id=15455 IT

Ana Perdigao
Biontino Consultants

AGCOM Adopts a New Regulation on Digital Terrestrial Television

On 23 June 2011 by Deliberation no. 353/11/CONS the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - AGCOM) adopted a new Regulation concerning the licensing of digital terrestrial television pursuant to Directive 2010/13/UE and Legislative Decree no. n. 177 of 2005, as amended by Decree no. 44/2010 implementing the Audiovisual Media Services Directive into Italian legislation. The new Regulation replaces Deliberation no. 435/01/CONS (see IRIS 2002-1/18 and IRIS 2003-4/20) and was adopted after a public consultation (launched by Deliberation no. 212/11/CONS), to which many stakeholders have contributed by submitting their comments and proposals for amendments.

This Regulation governs the provision of linear audiovisual media services, including content distribution of digital radio, interactive or conditional access services and the activity of network operators on digital terrestrial television frequencies, which are defined as follows:

- a media service provider is defined as any person or entity responsible for the choice and the organisation of the audiovisual content provided by an audiovisual media service; natural persons or legal entities that deal solely with the transmission of programmes for which the editorial responsibility lies with third parties are excluded from the definition of "media service provider";

- a provider of interactive or conditional access services is defined as any entity that provides, for the public or third party operators, conditional access services, including pay-per-view, by distributing numeric keys for direct access to programmes, billing services and possibly the supply of equipment, or providing information society services in accordance with the E-Commerce Directive, or providing electronic programme guides;

- a network operator is defined as the person with the right of installation, operation and delivery of a television network on digital terrestrial TV frequencies and of broadcasting equipment allowing multiplexing, distribution and dissemination of frequency resources to end-users.

The authorisation system differs according to the kind of services offered (see IRIS 2011-8/31): for linear audiovisual media services it is necessary to wait for the lapse of a thirty day period to get a general authorisation from the *Ministero per lo sviluppo economico* (Italian Ministry for Economic Development), whereas for interactive or conditional access services and for network operators it is sufficient to notify AGCOM by a declaration on the same day that the activity starts.

In particular the authorisation for national linear audiovisual media services is issued solely for capital companies and cooperatives with share capital, fully paid up (net loss deducted) of no less than EUR 6,200,000 and at least twenty employees. The authorisation for local providers is issued solely for capital companies and cooperatives with share capital, fully paid up, with net losses no less than EUR 155,000 and at least four employees.

The authorisation for linear audiovisual media services lasts for 12 years and is renewable. The authorisation for television broadcasting networks at national or local level lasts for 20 years and is also renewable.

In addition, the Regulation contains provisions for the protection of pluralism, transparency, competition and the principle of non-discrimination. In particular, one-third of available television multiplexes are reserved for local television broadcasters, while the same entity may not broadcast more than 20% of digital television programmes in the same local area. A limit of 20% concentration of national frequencies that are available according to the national frequency plan applies also at national level (see IRIS 2008-10/22). The provider of linear audiovisual media services nationally, which is also a service provider, must adopt separate accounts for each activity subject to authorisation.

• Delibera n. 353/11/CONS del 23 giugno 2011, Nuovo regolamento relativo alla radiodiffusione televisiva terrestre in tecnica digitale, Gazzetta Ufficiale della Repubblica italiana del 6 luglio 2011 Serie Generale n. 155 (AGCOM Regulation no. 353/11/CONS concerning the licensing of digital terrestrial television broadcasting)
http://merlin.obs.coe.int/redirect.php?id=15457 IT

Francesco Di Giorgi
Autorità per le garanzie nelle comunicazioni (AGCOM)

AGCOM Adopts Interpretative Guidelines on Parental Control

In order to clarify the interpretation of Regulation no. 220/11/CSP on parental control (hereinafter "the Regulation"), adopted on 22 July 2011 (see IRIS 2011-8/33), the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - AGCOM) published, on 1 August 2011, interpretative guidelines on the broadcasting of films rated as not suitable for minors under 14 and 18 years (*"Chiarimenti interpretativi sulla normativa in materia di diffusione sui servizi di media audiovisivi di film vietati ai minori di anni 18 e 14"*). Considering the existence of different interpretations of the provisions of the Audiovisual media services and radio Code (hereinafter "the Code") concerning films rated 14 and 18 years, AGCOM has decided to circulate specific interpretative criteria regarding the different paragraphs of Article 34 of the Code and specifies the following:

- The prohibition contained in paragraph 1, for conditional access programs, is not absolute. The national law refers to a specific regulation for the determination of conditions, constraints, rules and technical measures preventing minors from accessing this type of content. Therefore, the blocking of the picture is carried out by means of a parental control feature, which prevents access to audiovisual content and can be disabled with a special secret code;

- The second paragraph of the article, however, prohibits the broadcast of programs that can harm the physical, mental or moral development of minors, unless, by selecting the time of transmission or by means of a technical device, it is possible to exclude minors from viewing;

- Paragraph 3 allows conditional access broadcasts with parental control of films rated 18 years during the night between 11 pm and 7 am, whereas they are banned during daytime between 7 am and 11 pm;

- Paragraph 4 prohibits the broadcasting of films rated 14 years in any mode during daytime between 7 am and 10.30 pm, while they are allowed during the night between 10.30 pm and 7 am;

- Paragraph 5 adopts, with co-regulatory procedures, indications of technical devices such as personal identification numbers and filtering systems, in order to prevent minors from viewing prohibited programs.

As further interpretative criteria, the guidelines specify that in regard to films rated 14 years, paragraph 3 of Article 34 is a further clarification of what is stated in paragraph 1, which provides for a time zone of absolute prohibition.

Similarly, paragraph 4 limits the time period of prohibition for films rated 14 years. These films are not considered to be seriously harmful, therefore the provisions of paragraph 4 must be read in light of paragraph 2. This paragraph allows the transmission of these programs even outside the permitted time slot, but with the use of technical measures that prevent minors from viewing them. Therefore, the supply of such content is conditional on the time of transmission or, alternatively, by the adoption of measures that exclude its viewing by children and adolescents.

Finally, with regard to films rated 18 years, the adoption of parental control systems, according to the measures contained in the Regulation approved by resolution of 220/11/CSP, meets the requirements of law, provided that these systems effectively prevent minors from accessing this type of content.

• AGCOM, Chiarimenti interpretativi sulla normativa in materia di diffusione sui servizi di media audiovisivi di film vietati ai minori di anni 18 e 14 (AGCOM, Interpretative guidelines on the broadcasting of films rated as not suitable for minors under 14 and 18 years)
http://merlin.obs.coe.int/redirect.php?id=15447 IT

Angela Creta
Sapienza University of Rome

AGCOM Launches a Public Consultation on Measures to Protect Pluralism in Digital Terrestrial Broadcasting

On 22 July 2011, by approving Deliberation no. 427/11/CONS, the Italian Communications Authority (AGCOM) launched a public consultation on the protection of media pluralism in the digital terrestrial broadcasting market. Remedies for the protection of pluralism were first set up by Deliberation no. 136/05/CONS (see IRIS 2005-5/19), and then revised by Deliberation no. 70/11/CONS (see IRIS 2011-8/30), in accordance with a revision clause contained in the first Deliberation.

In particular, Deliberation no. 70/11/CONS repealed Article 1, paragraph 1, lett. b) no. 1 of Deliberation no. 136/05/CONS, which required RTI, the main Italian commercial broadcaster, to rely upon an ad hoc advertising agency, other than Publitalia, for the sale of advertising space for pay-TV digital terrestrial broadcasting. The company complied with this decision by establishing the new advertising agency Digitalia.

The repeal of this measure was justified by reference to the overall changes that have influenced the DTT market over the past ten years, i.e., the development of the regulatory framework, the switchover from analogue to digital terrestrial transmission and the identification of the relevant markets in the *Sistema integrato delle comunicazioni* (Integrated System of Communications - SIC). More precisely, with Deliberation no. 126/11/CONS (see IRIS 2011-10/31), AGCOM determined that free-to-air digital terrestrial transmis-

sion and digital pay-TV are different relevant markets within the audiovisual sector, whereas advertising does not constitute a relevant market as such, but only a resource contributing to achieving profit within a single medium. Consequently, as the analysis of the SIC subsequent to Deliberation no. 136/05/CONS has shown, there has been a radical change in the relevant television markets and their financial sources.

Following a suspension order of Deliberation no. 70/11/CONS and its effects by the Latium regional administrative court, AGCOM had decided to submit the issue to public consultation and thus invited stakeholders to send their comments and suggestions to AGCOM's Audiovisual Content Directorate within 45 days from the publication of Deliberation no. 427/11/CONS in the *Gazzetta Ufficiale* (Official Gazette). The deadline for the submission of the written contributions expired on 30 September 2011 and the consultation will conclude with a new Deliberation after the oral hearings of the interested parties.

• Delibera AGCOM 427/11/CONS - Consultazione pubblica concernente l'art. 1 comma 2 della delibera 70/11/CONS, recante "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" (AGCOM Deliberation No. 427/11/CONS - Public consultation on Article no. 1, paragraph no. 2 of Deliberation no. 70/11/CONS, on "Survey of the measures established by Deliberation of 2 March 2005 No. 136/05/CONS on "Measures to protect pluralism under Law of 3 May 2004, No 112")
http://merlin.obs.coe.int/redirect.php?id=15483 IT

Manuela Branco
Autorità per le garanzie nelle comunicazioni (AGCOM)

AGCOM Evaluation of Media Pluralism in the Integrated Communications System (SIC)

Pursuant to Article 43 of the Italian Audiovisual and Radio Media Services Code (Legislative Decree no. 177/2005, as amended in 2010 when the AVMS Directive was implemented into Italian legislation, see IRIS 2010-2/25 and IRIS 2010-4/31), which, in view of the value of competition and pluralism in the broadcasting sector, prohibits achieving and maintaining dominant positions, the Autorità per le garanzie nelle comunicazioni (Italian Communications Authority - AGCOM), periodically conducts a specific analysis in order to estimate the resources included in the so-called "SIC" (Sistema Integrato delle Comunicazioni - integrated communications system). The SIC is defined in the aforementioned Article 43 as the economic sector determined by the process of convergence between traditional broadcasting, newspapers and magazines, publishing (also via the Internet), radio and audiovisual media services, and cinema and advertising both above and below the line. Companies registered as communications operators may not amass, either directly or indirectly, more than 20% of the total revenue of the SIC.

On March 2011 AGCOM approved, with Deliberation no. 126/11/CONS, the assessment regarding the economic dimensions of the SIC in 2009, following an intervention that took place in 2010 concerning the analysis and detection of relevant markets (AGCOM Deliberation no. 555/10/CONS "Procedure for the detection of relevant markets in the integrated communications system"), which were stated to be the following: free-to-air TV, pay TV, radio, daily and periodical publishing.

The resources included in the SIC in 2009 reached the amount of EUR 23 billion. The analysis showed how the SIC performance during 2009, taken as a whole, had shown an overall decrease of 5.2%, which is consistent with what happened in other sectors (in the same year, the reduction of prices to GDP market was just 5.2%). These income reductions have been particularly serious in the advertising sector, whereas some sectors, specifically pay-TV and the Internet, have grown.

In 2009, none of the communications operators had reached the maximum threshold allowed (20% of total revenue).

National broadcasters who amass more than 8% of the total revenues of the integrated communications system are not allowed to acquire, prior to 31 December 2012, shares in publishers of daily newspapers or to participate in the establishment of new daily publishers. This prohibition applies to all main broadcasters, as they have reached the following percentages of total revenues of SIC: Mediaset 13.34%, Rai 11.80%, Sky 11.58%.

• Delibera n. 126/11/CONS - "Procedimento per la valutazione delle dimensioni economiche del sistema integrato delle comunicazioni (SIC) per l'anno 2009" (AGCOM Deliberation no. 126/11/CONS, Procedure for the evaluation of the economic dimensions of the integrated communications system (SIC) for 2009)
http://merlin.obs.coe.int/redirect.php?id=15456 IT

Francesca Pellicanò
Autorità per le garanzie nelle comunicazioni (AGCOM)

LV-Latvia

Amended Law Requires Revealing Media Ownership and Confirms Editorial Independence

The Latvian legislator has adopted amendments to the *Likums Par presi un citiem masu informācijas līdzekļiem* (Law on Press and Other Mass Media), which inter alia require the revealing of the true owners of media and confirm the objective to safeguard editorial independence.

As previously reported (see IRIS 2011-5/31) the Latvian Saeima (Parliament) is reviewing amendments to the Law, which would require printed and electronic media to reveal their true beneficial owners. On 22 September 2011 the Saeima adopted the amendments in the third and last reading. The final amendments to the Law include not only new requirements regarding the true owners, but also many other changes and clarifications. It should be noted that the Law was initially adopted in 1991, thus several of the amendments address technical and terminological issues.

The amendments ensure that the terminology is now the same in this Law as in the Law on Electronic Mass Media. It is also provided that an internet site may be registered as a mass medium.

The rights to establish a mass medium are provided for natural persons or for legal entities registered in Latvia. During the amendments process there was a suggestion to allow foreign legal entities too to establish a medium, arguing that at least legal entities registered in other member states of the European Union should have such rights. However, the suggestion was rejected by the majority of the Saeima.

As before, all mass media must be registered at the Company Register of Latvia, but the amendments provide more precise and clear information as to what must be submitted for the registration. Also, the registration procedure is clarified. The amendments provide an exhaustive list of cases where registration may be refused, as well as a procedure for the registration of any changes concerning registration information.

The duty to reveal the true media owners is specified by reference to the Commercial Law. The Latvian Commercial Law requests that legal entities registered in Latvia must inform the Commercial Register about their true beneficial owners. The duty applies to persons holding at least 25 percent of shares in the company for the benefit of another person.

Another important amendment is a clear and unequivocal statement in regard to editorial independence, which the previous reading of the Law implied only indirectly.

Finally, the Law indicates that in a case of conflict between the provisions of this Law and the Law on Electronic Mass Media, with respect to electronic media the norms of the latter shall prevail.

The amendments to the Law have been published in the Official Journal Latvijas Vēstnesis on 6 October 2011 and gained legal force 14 days after the publication.

• Grozījumi likumā "Par presi un citiem masu informācijas līdzekļiem", Latvijas Vēstnesis, *06.10.2011* (Amendment to the Law on Press and Other Mass Media, Official Journal of 6 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15482 LV

Ieva Andersone
Sorainen, Latvia

Competition Authority Concludes an Investigation into Digital Terrestrial Television

The Latvian Competition Authority has concluded an investigation into SIA Lattelecom, the company introducing digital terrestrial television into Latvia, without finding an abuse of its dominant position.

As previously reported (see IRIS 2010-4/33) the Competition Authority was investigating complaints that SIA Lattelecom (Lattelecom) had abused its dominant position in the implementation of digital terrestrial broadcasting. One complaint alleged that Lattelecom charged television broadcasters unfair prices for the inclusion of their channels in the free-to-air package. Another complaint argued that Lattelecom cross-subsided the transmission of its own fee-based programmes from the income earned from the transmission of free-to-air programmes (for which other television broadcasters have to pay Lattelecom). Also, cross-subsidy allegedly took place when offering package-deals, including pay-TV and voice telephony services.

On 25 August 2011 the Competition Authority came to a decision to conclude the case without finding an abuse of a dominant position in Lattelecom's activities. Nevertheless, the decision includes a criticism of the way in which digital terrestrial television was introduced and suggests improvements for the consideration of the legislators.

The Competition Authority initially established the relevant markets in which a potential abuse of a dominant position could take place. The two relevant markets in the audiovisual sector were: the service market for terrestrial transmission of free-to-air television programmes for public reception in the territory of Latvia (infrastructure market); and the service market for pay-TV in Latvia (content market). Lattelecom has a dominant position in the infrastructure market as, according to the law and to the decisions of the National Electronic Media Council, it is the only entity ensuring transmission of free-to-air television programmes in DVB-T technology. In addition, Lattelecom has a dominant position in the public fixed-telephony market in Latvia.

The Competition Authority proceeded with the analysis of the pricing policy of Lattelecom and pointed out that the pricing policy must be analysed in regard to the whole period in which Lattelecom has the legal

monopoly in introducing digital terrestrial television: from 2009 to the end of 2013. Currently, this information is unavailable, thus it is impossible to perform a full expenditure and income analysis or to determine potential cross-subsidy and unfair pricing. The analysis of existing expenditure data and earnings forecast evidenced that Lattelecom would not profit from digital terrestrial television services before 2011 and the profit forecasted would not exceed 15 percent.

The Competition Authority indicated that unfortunately the decisions appointing Lattelecom as the only digital terrestrial television services provider did not specify the maximum profit margin. Furthermore, these decisions did not specify how the costs of the introduction of digital terrestrial television should be covered. Therefore all the costs of providing free-to-air television have to be met by the relevant television broadcasters whose channels are included in the free package.

Due to the lack of data the Competition Authority could not establish the existence of potentially predatory pricing in Lattelecom's offers on the pay-TV market, either. The relevant data would not be available before 2014, but the term for the adoption of the decision cannot be extended for such a long period of time.

The decision to conclude the case could be appealed within one month to the Administrative Court by the parties to the case, including the complainants.

• *Par lietas izpētes izbeigšanu - Lieta Nr.297/10/03.01.-01./6 - Par Konkurences likuma 13.panta pirmās daļas 4.punktā noteiktā aizlieguma pārkāpumu SIA „Lattelecom" darbībās* (Decision of the Competition Council No. 56 in case No. 297/10/03.01.-01./6 of 25 August 2011)
http://merlin.obs.coe.int/redirect.php?id=15441 LV

Ieva Andersone
Sorainen, Latvia

NL-Netherlands

Mandatory Registration for Video On-Demand Services Initiated

The Dutch *Commissariaat voor de Media* (Media Authority - CvdM) recently published a Regulation containing policy rules defining "commercial media on-demand services", or video on-demand services, under the Dutch Media Act. Under the regulation, such video services must be registered as of 1 November 2011.

The policy provides an elaboration of the criteria that determine whether a commercial media on-demand service is covered by the Dutch Media Act. The Act regulates matters such as the separation of commercial and editorial content, the protection of minors, advertising, product placement and sponsoring. This creates a level playing field among providers of similar services with regard to the protection of the users under the provisions of the Media Act. In order to be found in compliance with its rules each of the following five criteria need to be met:

- The videos must be offered as part of a catalogue;

- The main purpose of the service must be delivery of videos;

- The offer and organisation of videos must be subject to the editorial responsibility of the supplier of the service;

- The service must have a mass media character;

- The service must constitute an economic service.

Not only mainstream broadcasting services, but also on-demand services offered over the Internet or on mobile phones, such as catch-up services and online video shops, may meet these criteria and will accordingly fall within the ambit of the Media Act. Websites offering video content that do not meet these conditions are not subject to the mandatory registration requirement. Every service that meets the five criteria must register within a two-week period after the new policy has come into force or risk a fine. An annual contribution will be paid by the providers of these services.

• Regeling van het Commissariaat voor de Media van 22 september 2011 houdende beleidsregels omtrent de classificatie van commerciële mediadiensten op aanvraag zoals bedoeld in artikel 1.1, eerste lid, van de Mediawet 2008 (Beleidsregels classificatie commerciële mediadiensten op aanvraag 2011) (Interpretative Regulation of the Media Authority of 22 September 2011 containing policies regarding the classification of commercial media on-demand services, as referred to in Article 1.1, first paragraph, of the Media Act 2008 (classification of commercial on-demand media services 2011))
http://merlin.obs.coe.int/redirect.php?id=15496 NL

Edith van Lent
Institute for Information Law (IViR), University of Amsterdam

PL-Poland

New Regime of Must-carry / Must-offer

On 30 June 2011 the Polish Parliament enacted the Act on the introduction of terrestrial digital television. Most of its provisions entered into force on 10 August 2011, the remainder of the provisions on 26 August 2011.

The Act establishes the mode of the introduction of DTT, the obligations of the operators of DTT multiplexes I and II (MUX 1 and 2) as well as the obligations of the broadcasters of programme services set on MUX 1 and 2 with regard to the public information campaign about DTT.

The Act also contains significant changes to the Broadcasting Act and Telecommunications Law. One of these changes is the introduction of a new legal must-carry regime within the Broadcasting Act.

Each operator retransmitting programme services (in the following referred to as "operator"), with the exception of an entity that retransmits programme services on the DTT platform ("DTT platform operator"), is obliged to retransmit the public service channels (Telewizja Polska I, Telewizja Polska II) and one regional television channel broadcast by the public service broadcaster - Telewizja Polska S.A.

Moreover, such an operator is obliged to retransmit those programme services that were broadcast on the basis of a broadcasting licence in analogue form terrestrially on the day of the entering into force of the Act on the introduction of terrestrial digital television, by the four commercial broadcasters: Telewizja Polsat S.A., TVN S.A., Polskie Media S.A., Telewizja Puls S.A. (namely the channels: Polsat, TVN, TV4 and TV Puls). These rules apply to all operators regardless of the technical mode of distribution, so they are basically technologically neutral (with the sole exception of retransmission by DTT platform operators, since these channels are broadcast on DTT platforms anyway).

These broadcasters cannot refuse to give their consent to the retransmission of the above-mentioned channels nor demand financial consideration for granting such consent. They are obliged to make these channels available free of charge on the motion of the operator within 14 days of receiving such a motion. The operator is obliged to retransmit these channels and to inform viewers that these channels are also available free-to-air and free of charge in digital form via terrestrial diffusion.

The Chairman of the Polish National Broadcasting Council ("NBC") conducts an analysis of the realisation of these requirements at least once every two years, in guidance with the public interests goals in respect to the provision of information, the making available of culture and arts to the general public, the facilitation of access to education, sports and science, as well as the popularisation of civic education. The Chairman of the NBC presents the results of the analysis to the Minister of Culture and National Heritage, who may take appropriate steps to propose amendments to the above-mentioned must-carry / must-offer regime, taking into account the need to keep these rules transparent, proportionate and objectively necessary.

• Ustawa z dnia 30 czerwca 2011 r. o wdrożeniu naziemnej telewizji cyfrowej (Act on the introduction of terrestrial digital television of 30 June 2011)
http://merlin.obs.coe.int/redirect.php?id=15497 PL

Małgorzata Pęk
National Broadcasting Council of Poland

RO-Romania

Sanctions for Infringements of the Electoral Rules

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) imposed severe sanctions on two commercial Romanian television stations for breaches of Art. 139 of the *Codul Audiovizualului - Decizia nr. 220/2011 privind Codul de reglementare a conţinutului audiovizual, cu modificările şi completările ulterioare* (Audiovisual Code - Decision no. 220/2011 concerning the regulation of audiovisual content, with further modifications and completions), and Art. 1 of *Decizia nr. 210/2010 privind principii şi reguli de desfăşurare a campaniei electorale pentru alegerile parţiale parlamentare, prin intermediul serviciilor de programe audiovizuale* (Decision no. 210/2010 concerning the principles and rules for carrying out electoral campaigns for partial parliamentary elections by audiovisual programme services; see inter alia IRIS 2009-6/28 and IRIS 2009-1/29).

Art. 139 of the *Codul Audiovizualului* states that positive or negative advertising for political parties, politicians or political messages is forbidden, except during electoral campaigns. Art. 1 of Decision no. 210/2010 states that electoral campaigns start 15 days before the elections and end 24 hours before the start of polling.

The commercial television station OTV was obliged to broadcast for 10 minutes, on 6 October 2011 at 19.00 h, the text of the sanction issued by the CNA due to infringements of Art. 139 of the *Codul Audiovizualului*. OTV had repeatedly breached electoral advertising rules between May and September 2011, when it aired political and electoral messages with regard to the founder of OTV who in the meantime had founded a political party, Partidul Poporului - Dan Diaconescu (People's Party - Dan Diaconescu) and intends to be a presidential candidate in the next election. The station had already been fined five times for the same infringement, between October 2010 and May 2011, a total of RON 265,000 (EUR 61,200). The Council considered that the conduct of OTV had a political aspect and was a real electoral campaign activity, potentially affecting other possible electoral competitors, who had respected the audiovisual legislation.

Prior to this, the CNA had imposed on 13 September 2011 a fine of RON 50,000 (EUR 11,550) on the private local station UNU TV, for broadcasting electoral spots on behalf of a candidate for a vacant seat in the Camera Deputaţilor (Chamber of Deputies), the lower chamber of the Romanian Parliament, after the electoral campaign and during the polling. UNU TV had already been sanctioned by a public warning on 11 August 2011 for breaching the audiovisual rules on partial MP elections, by broadcasting before the start of the electoral campaign several electoral and promotional programmes for the same candidate. The partial elections took place on 21 August 2011 and the electoral campaign was scheduled between 6 and 20 August 2011.

• Decizia nr. 585 din 04.10.2011 privind sancţionarea radiodifuzorului S.C. OCRAM TELEVIZIUNE S.R.L., cu obligaţia de a difuza, în ziua de 06.10.2011, timp de 10 minute, între orele 19.00-19.10, numai textul deciziei de sancţionare emise de C.N.A. (Decision no. 585 of 4 October 2011 concerning the sanctioning of the broadcaster S.C. OCRAM TELEVIZIUNE S.R.L., with the obligation to broadcast the text of the sanction issued by the CNA)
http://merlin.obs.coe.int/redirect.php?id=15445 RO

• Decizia nr. 522 din 13.09.2011 privind amendarea cu 50.000 lei a S.C. EUROMEDIA TV S.R.L. (Decision no. 522 of 13 September 2011 concerning the fine of RON 50,000 imposed on S.C. EUROMEDIA TV S.R.L.)
http://merlin.obs.coe.int/redirect.php?id=15446 RO

Eugen Cojocariu
Radio Romania International

Recommendation on Roşia Montană Case Coverage

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) issued on 27 September 2011 a recommendation to radio and television broadcasters on how to deal with the media coverage of a very sensitive politico-economic long-run case: the Roşia Montană project.

The lack of impartiality in the coverage of the topic by Romanian media already induced the Council to issue several sanctions, including public warnings issued on 22 September 2011 on the main domestic channel of the public radio broadcaster, Radio România Actualităţi, and the private television station, The Money Channel.

The Council found that several broadcasters had breached the rules of observing the principles of impartiality and equality and to support freedom of opinion. The CNA considered Art. 40 (1) and (2) along with Arts. 66 (1) and (2) and 67 of the *Codul audiovizualului* (Audiovisual Code) were infringed by the broadcasters (see inter alia IRIS 2011-7/39, 2011-5/38 and 2008-1/25).

Art. 40 (1) states that accusations during audiovisual programmes have to be proven and that the accused persons shall have the opportunity to express their opinion on the subject; if the accusations are made by the broadcaster, it has to observe the principle audiatur et altera pars and to announce if the accused person refuses to present his or her point of view. Art. 40 (2) provides that moderators are obliged to strongly request interlocutors to provide evidence for accusations or at least to produce the proof they have, in order to allow the public to evaluate to what extent the allegations are justified.

Art. 66 (1) refers to impartiality, equality and the right to freedom of opinion, by airing the main opposing points of view during the public debate on a certain issue, and forbids any forms of discrimination. Art. 66 (2) requests media to present the conflicting points of view during the same broadcast, and only exceptionally in the next show; in any case, if one party refuses to express his or her opinion, the moderator has to announce on air this refusal and to find other ways to ensure impartiality of treatment in the programme.

Art. 67 states the obligation for presenters and moderators to observe impartiality and to clearly separate opinions from facts.

Due to the complexity of the Roşia Montană case and its potential impact on the environment, the Council recommended the media to host and broadcast only qualified opinions (from experts, specialists, etc.), in order to help the public to understand the topic under debate.

The project, promoted by a Canadian company, is very much contested by some Romanian political forces and ecologists and dates back to the 1990s. Its aim is to extract gold by means of the cyanides techniques , which are allegedly very dangerous and hazardous to the environment, in an area in the central part of Romania that has been known for its gold mines since Roman times.

• Recomandare CNA din 27.09.2011 (CNA Recommendation of 27 September 2011)
http://merlin.obs.coe.int/redirect.php?id=15442 RO

• Decizia nr. 549 din 22.09.2011 privind somarea Societăţii Române de Radiodifuziune (Decision no. 549 of 22 September 2011 with regard to the public warning to the Romanian Radio Broadcasting Corporation)
http://merlin.obs.coe.int/redirect.php?id=15443 RO

• Decizia nr. 551 din 22.09.2011 privind somarea S.C Realitatea Media S.A. (Decision no. 551 of 22 September 2011 with regard to the public warning to S.C. Realitatea Media S.A.)
http://merlin.obs.coe.int/redirect.php?id=15444 RO

Eugen Cojocariu
Radio Romania International

DE-Germany

Higher Administrative Court Confirms Press's Right to Information in Case brought against the *Land* of Brandenburg

In a decision of 28 October 2011, the *Oberverwaltungsgericht Berlin-Brandenburg* (Berlin-Brandenburg Higher Administrative Court- OVG) issued an injunction ordering the*Land* of Brandenburg to provide the applicant in the proceedings, the chief reporter of a national newspaper, with information in accordance with the *Brandenburgisches Pressegesetz* (Brandenburg Press Act - BbgPG).

The applicant had requested detailed information on a total of thirteen judges and a public prosecutor who are currently working for the Brandenburg courts and in respect of whom there is evidence that they co-operated with the *Ministerium für Staatssicherheit* (Ministry of State Security) of the former German Democratic Republic (GDR). The OVG partially allowed the application.

First of all, the OVG established that the applicant, as a reporter, could in principle be entitled under sections 5 and 3 BbgPG to be given information on certain facts by the respondent for the purpose of fulfilling the public service remit of the press. Moreover, it pointed out, the subject concerned was one in which the public had become interested in the light of current events.

The court affirmed that the applicant had a right to information regarding at what ordinary and specialised courts the judges concerned were employed and on how many of those judges had been in charge of restitution proceedings under the *Vermögensgesetz* (Property Act) and the *Strafrechtliches Rehabilitierungsgesetz* (Criminal Rehabilitation Act) in the past 21 years. That information could be provided in an anonymised form, i.e. without it being possible to draw conclusions as to the identity of the judicial employees concerned, so that no legitimate private interests stood in the way of the request for information at that point.

However, the OVG refused the applicant's request for the additional information (on the incriminating evidence available on the persons concerned as well as the naming of these individuals).

With regard to the incriminating evidence, the OVG referred to the priority of the *Gesetz über die Unterlagen des Staatssicherheitsdienstes der DDR* (Act on the Documents of the State Security Service of the GDG - StUG), pointing out that it provided for the strict application of the "purpose limitation principle" to the data preserved and transmitted in that connection by the *Bundesbeauftragter für die Unterlagen des Staatssicherheitsdienstes der ehemaligen DDR* (Federal Commissioner for the Records of the State Security Serviceof the former GDR). In the case concerned, the purpose was the examination some years before of the reemployment of the persons concerned in the Brandenburg court service, and there was no provision for any exception to be made in favour of the press. No different conclusion could be drawn from Article 5(1) of the *Grundgesetz* (Basic Law - GG) since that provision protected access to generally available sources of information but not the opening up of a source of information not generally available.

With regard to the request to name the persons concerned, the respondent had a right to refuse to disclose information under section 5(2)(3) BbgPG because of the legitimate private interests involved. A consideration of those interests primarily revealed that the personality rights of members of the legal service protected by Articles 2(1) and 1(1) of the Basic Law outweighed the press's right to information and the public's interest in that information. The disclosure of the names would be a breach of the right to informational self-determination and result in the stigmatisation of the individuals concerned in both their private and their professional lives. A role was also played by the fact that they had not sought public attention and that during the appointment process they had not concealed their work for the state security service, which now lay twenty years in the past. Furthermore, the committees set up at that time to select judges and appoint public prosecutors had not expressed any reservations concerning the reemployment in the judicial service of those concerned. That employment decision now meant that the *Land* of Brandenburg had a legal duty of care under public service law not to disclose its employees' identity.

• *Beschluss des OVG Berlin-Brandenburg vom 28. Oktober 2011 (Az OVG 10 S 33.11)* (Decision of the *OVG Berlin-Brandenburg* of 28 October 2011 (Case OVG 10 S 33.11))
http://merlin.obs.coe.int/redirect.php?id=16239 DE

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

NL-Netherlands

Court Dismisses Complaint by convicted Criminal about the Broadcasting of the Filming of his Crime

On 21 October 2011, the *Rechtbank Amsterdam* (Amsterdam Court) dismissed an action brought by a convicted criminal against the broadcasting of the filming of his crime.

The plaintiff was involved in the kidnapping of a well-known Dutch businessman in 1983. He is currently in prison for a conviction unconnected with the abduction. The defendant in the instant case was a Dutch film production company that filmed the kidnapping. Inter alia, the plaintiff claimed that the film portrayed the victim's abduction and weeklong imprisonment as more violent than it actually was and thus breached his right to social rehabilitation. The public perception of the plaintiff was, he claimed, shaped to a significant extent by the film character portraying him and not by the crime that had actually been committed, a perception enhanced by the fact that the actor playing the role of the plaintiff bore a strong physical resemblance to him. The producer pointed out, however, that the plaintiff's name was not mentioned in the film and that the characters in the film were fictitious "blends" of the actual kidnappers. Moreover, it was not clear how the film could harm the plaintiff's social reputation more than the crime he had committed. The defendant also pointed to the considerable economic loss that would be sustained if the broadcasting of the film were stopped so shortly before the scheduled date (end of October 2011).

The court dismissed the action, stating that, after balancing the conflicting interests and with due regard for Articles 8 and 10 of the European Convention on Human Rights and Article 7 of the Dutch constitution, the interests of the defendant producer predominated. Although the film character bore a physical resemblance to the plaintiff, so that it could be assumed that he was supposed to portray him, it was not unusual and, moreover, was legitimate for actors who resembled the individual portrayed to be chosen for films on historical events. Owing to the actions of the perpetrators and the fact that the victim was a prominent individual, the abduction had created quite a stir and caused public outrage. The crime was inextricably linked to the plaintiff, as was, consequently, any treatment of the subject, including in a film. However, it did not follow that such a film was unlawful. The defendant had admitted that he had added fictitious elements to it, but that was part of the freedom of artistic expression and the choice of artistic form, both of which were protected by law. It was not to be expected that the public would, in its perception, see the plaintiff mirrored in the behaviour of the film character concerned, especially when the defendant had clearly stated - and continued to state - that the film was not a purely factual portrayal of the actual crime. The limits of artistic expression had accordingly not been exceeded.

• *LJN: BT8893, Rechtbank Amsterdam , 500921 / KG ZA 11-1542 WT/JWR, 21/10/2011* (Decision of the court (LJN: BT8893, Rechtbank Amsterdam, 500921 / KG ZA 11-1542 WT/JWR) of 21 October 2011)
http://merlin.obs.coe.int/redirect.php?id=16247 NL

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

Agenda

Audiovisual authors online - seizing the digital revolution
29 November 2011 Organiser: Society of Audiovisual Authors Venue: Brussels Information & Registration: http://www.saa-authors.eu/en/news/45/SAA-Conference29th-November-2011

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