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IRIS

Legal Observations
of the European Audiovisual Observatory

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COUNCIL OF EUROPE

European Court of Human Rights : Avram and other v Moldova

In a judgment of 5 July 2011 the European Court of Human Rights found that five women broadcast on national television in a sauna romp with police officers should have received higher financial compensation for the breach of their privacy. This judgment became final on 5 October 2011.

The applicants in this case are five young women, all friends, who complained about the broadcasting on Moldovan national television of an intimate video footage showing them in a sauna with five men, four of whom were police officers. At the time, three of the applicants were journalists, the first two for the investigative newspaper Accente. The women claimed that they first had contact with the police officers when the editor in chief of Accente was arrested on charges of corruption and that, from that point on, the officers provided them with material for their articles. One of the applicants had even become romantically involved with one of the officers. The footage was used in a programme on national television about corruption in journalism and notably in the newspaper Accente. It showed the applicants, apparently intoxicated, in a sauna in their underwear, with two of them kissing and touching one of the men and one of them performing an erotic dance. The faces of the men were covered in the video, whereas those of the applicants were not. The video was paused from time to time in order to allow the women to be recognized more easily. The applicants alleged in particular that the video had been secretly filmed by the police officers and used to try to blackmail them into not publishing an article on illegalities at the Moldovan Ministry of Internal Affairs. Indeed the video was send to the National Television Service only after the first two applicants had had the article published in their newspaper.

The five applicants brought civil proceedings both against the Ministry of Internal Affairs, for arranging the secret filming and giving documents of a private nature to national television, and against National Television, for then broadcasting the images of a private nature. They requested compensation for a breach of their right to respect for their private and family life under Article 8 of the European Convention. In August 2008 the Supreme Court of Justice in Moldova gave a final ruling in which it dismissed the complaint against the Ministry of Internal Affairs concerning the secret filming on account of lack of evidence. It held, however, that the Ministry was responsible for handing documents of a private nature concerning Ms. Avram over to the National Television Service and that National Television was then responsible for the broadcasting of the sauna scene, in breach of Article 8 of the Convention. The Supreme Court ordered the National Television Service to pay each applicant EUR 214 and the Ministry of Internal Affairs a further EUR 214 to Ms. Avram, these being the maximum amounts allowed under Article 7/1 of the Moldovan old Civil Code by way of compensation for damage to a person's honour or dignity.

Relying on Article 8 of the Convention (right to respect for private and family life), the applicants complained that the domestic authorities had failed to properly investigate the secret filming in the sauna and that the compensation awarded to them for the broadcasting was not proportionate to the severity of the breach of their right to respect for their private lives. In its judgment, the European Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which includes, inter alia, the right to establish and develop relationships with other people. It encompasses elements such as sexual life, the right to live privately and away from publicity and unwanted attention. The Court sees no reason to depart from the conclusion of the national courts, which acknowledged that there had been interference with the applicants' right to privacy in respect of both the secret filming and the broadcasting of the video on television and the defamation. The Court furthermore made clear that a State that awards compensation for a breach of a Convention right cannot content itself with the fact that the amount granted represents the maximum under domestic law. The Court found that the amounts awarded by the Supreme Court of Justice to the applicants were too low to be considered proportionate with the gravity of interference with their right to respect for their private lives, taking into account that the broadcasting of the video on national television had dramatically affected the private, family and social lives of the applicants. There has, accordingly, been a breach of Article 8 of the Convention. In terms of compensation for non-pecuniary damage the Court awarded sums between EUR 4,000 and 6,000 to each of the applicants. The Court also awarded them jointly with a sum of EUR 1,500 for costs and expenses.

• Judgment by the European Court of Human Rights (Third Section), case of Avram and others v Moldova, No. 41588/05 of 5 July 2011
http://merlin.obs.coe.int/redirect.php?id=15554 EN

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EUROPEAN UNION

Court of Justice of the European Union: Ruling on the Obligations of Online Intermediaries

On 24 November 2011 the European Court of Justice delivered its long-awaited judgment on the legality of injunctions obliging ISPs to install filtering systems on their networks for reasons of copyright enforcement. The case involved a dispute between Scarlet Extended SA, an internet access provider operating in Belgium, and the Belgian collective management organisation *Société d'Auteurs Belge - Belgische Auteurs Maatschappij* (Society of Authors, Composers and Publishers - SABAM). SABAM initiated the proceedings alleging that Scarlet (formerly Tiscali) has knowingly permitted the illegal downloading by third parties of its protected works through peer-to-peer file-sharing on its networks. The *Tribunal de Première Instance de Bruxelles* (Brussels Court of First Instance) granted SABAM's request for the imposition of an injunction obliging the ISP to install content management and identification fingerprint-based software so as to prevent the unauthorised exchange of protected material by its subscribers (see IRIS 2011-6/2 and IRIS plus 2009-04). Scarlet appealed the decision and the Cour d'appel submitted a request for a preliminary ruling to the Court of Justice, asking whether EU law permits member states to authorise national courts to order ISPs to install, on a general basis, as a preventive measure, at their own expense and for an unlimited period, a system for filtering all electronic communications in order to identify illegal file downloads.

The Court began by pointing out that, under the both the Copyright Directive and the Enforcement Directive, courts and administrative authorities may impose injunctions ordering service providers to terminate already committed or prevent future copyright infringement. Although the rules governing such injunctions are a matter for national law, national rules must be in conformity with limitations arising from EU law, such as the prohibition of general monitoring obligations as set out in Article 15 E-Commerce Directive. The Court established that the requirement that an ISP install a filtering system would violate this prohibition.

The Court then went on to examine the compatibility of a filtering injunction with the EU's fundamental rights framework. The Court noted that, although the protection of intellectual property is enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union, nothing in the wording of the provision suggests that the right in inviolable and must be absolutely protected. On the contrary, the protection of intellectual property must be balanced against the protection of other fundamental rights.

In this regard, the Court found that the sweeping and costly nature of the injunction under discussion, which would require the monitoring of all electronic communications made through the network of the ISP without limitation of time and at the ISPs expense, would result in a serious infringement of Scarlet's freedom to conduct business. In addition, adverse effects would also accrue for the ISP's customers: firstly, the injunction would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent, which constitute protected personal data. Secondly, since filtering systems cannot adequately distinguish between lawful and unlawful content, their introduction could lead to the blocking of lawful communications, undermining freedom of information. Consequently, according to the Court, the imposition of an injunction ordering an ISP to install filtering systems on its networks cannot be said to strike a fair balance between the rights of the intellectual property holders on the one hand and the rights of internet access providers and their customers on the other.

In light of this reasoning, the Court reached the conclusion that an injunction requiring the installation of a filtering system by an ISP is precluded by EU law.

• Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 24 November 2011
http://merlin.obs.coe.int/redirect.php?id=15552 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT RO SK SL SV

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Court of Justice of the European Union: European Commission v Kingdom of Spain

On 22 July 2009 the European Commission submitted a request to the Court of Justice to declare Spain to be in violation of the Television without Frontiers Directive (Directive 89/552/EEC).

The Commission argued that the Kingdom of Spain has failed to fulfill its obligation under Article 3(2) of the TWF Directive to ensure within the framework of its legislation that television broadcasters under their jurisdiction comply with the provisions of the Directive. The Commission referred in particular to the incorrect and overly narrow interpretation by the Spanish authorities of the concept of 'advertising spots'. As a result of the Spanish approach to the concept, certain types of television advertising broadcast in

Spain, namely advertorials, telepromotions, sponsorship credits and micro-ads are excluded from the advertising hourly restrictions. The main question in these proceedings was to determine whether the four aforementioned types of advertisement can be classified as 'advertising spots', as claimed by the Commission or rather constitute 'other forms of advertising', as claimed by Spain.

The European Court of Justice found a violation of the TWF Directive by Spain. According to the Court, Spain exceeds the advertising maximum limit of 20% broadcasting time per hour. As the Court reasoned, "[i]t follows that any type of television advertising broadcast between programmes or during breaks constitutes, as a general rule, an 'advertising spot' within the meaning of the TWF Directive, unless the type of advertising concerned were to be covered by another form of advertising expressly governed by that directive [04046]".

The Court concluded that "by tolerating a situation in which the broadcasting of certain types of advertising, such as advertorials, telepromotion spots, sponsorship credits and micro-ads, on Spanish television channels has a duration which exceeds the maximum limit of 20% of the transmission time within a clock hour, as laid down in Article 18(2) of Directive 89/552, the Kingdom of Spain has failed to fulfil its obligations under Article 3(2) of that directive".

• Judgment of the Court (First Chamber), Case C-281/09, 24 November 2011
http://merlin.obs.coe.int/redirect.php?id=15553 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT RO SK SL SV

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European Commission: Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation

On 28 October 2011 the European Commission adopted a Recommendation on the digitisation and online accessibility of cultural material and digital preservation. The Recommendation follows up on a similar Recommendation from 2006, updating for new developments such as the launch in 2008 of Europeana, the publication of the "New Renaissance" Report by the Comité des Sages and the adoption of the Commission's proposal for a Directive on orphan works in May 2011. The Recommendation acknowledges the importance of digitisation for making Europe's cultural productions more widely available and thereby boosting the growth of Europe's creative industries. It accordingly challenges member states to step up their digitisation efforts.

On an organisational level, the Recommendation invites member states to set clear and quantitative targets for the digitisation of cultural material. To help manage the high costs of digitisation, public/private partnerships should be encouraged. The EU Structural Funds may also be used for this purpose.

In response to the recent trend among European cultural institutions to assert new rights over digitised versions of public domain works, not always with a solid legal basis, thus impeding their re-use, the Commission declares that material in the public domain should remain in the public domain after digitisation. Intrusive watermarks and other visual protection measures that reduce usability of digitised public domain material are also discouraged.

With regard to material that is still copyright-protected, the Commission concentrates on orphan and out-of-commerce works. It encourages the rapid and correct implementation of the Directive on orphan works as soon as that is adopted. It also promotes the creation of a legal framework conducive to licensing mechanisms that enable the large scale digitisation and cross-border accessibility of out-of-commerce works. Finally, it supports the development of European-level databases of rights information, such as ARROW, which contribute towards uncovering the information necessary to remedy the orphan status of a work or establish the expiry of copyrights.

Finally, the Recommendation addresses the question of digital preservation. As the Recitals point out, digital material has to be maintained otherwise files may become unreadable over time. Currently, no clear and comprehensive policies are in place on the preservation of digital content. Member states are therefore invited to reinforce national schemes for the long-term preservation of digital material and to exchange information with each other on strategies and action plans. Legal deposit and web-harvesting are suggested as ways of minimising the burden of collection for mandated institutions. Coordinating efforts between member states should be encouraged so as to avoid confusing national variations in the relevant rules.

The resultant digitised material, whether in-copyright or in the public domain, should be made available through Europeana, the European digital library. Although already home to over 19 million digitised objects, as the Recommendation points out, the ultimate success of Europeana will depend on its systematic enrichment with new digital content. The Recommendation sets a target of 30 million digitised objects to be added to Europeana by 2015, including all European public domain masterpieces. The free availability of metadata (i.e., descriptions of works) produced by cultural institutions should also be ensured.

• Recommendation on the digitisation and online accessibility of cultural material and digital preservation, C2011 7579 final
http://merlin.obs.coe.int/redirect.php?id=11391 DE EN FR BG CS DA EL ES ET FI HU IT LT LV MT NL PL PT RO SK SL SV

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European Commission: Creative Europe Programme

On 23 November 2011, building on the experience of the Culture and MEDIA programmes that have supported cultural and audiovisual sectors for more than 20 years, the European Commission announced the proposal of a new EU programme, termed 'Creative Europe'. Declaring herself dedicated to investing more in Europe's cultural and creative sectors, Androulla Vassiliou, Commissioner for Education, Culture, Multilingualism and Youth, stated: "This investment will help tens of thousands of culture and audiovisual professionals to make the most of the Single Market and to reach new audiences in Europe and beyond. Creative Europe also promotes cultural and linguistic diversity, as well as contributing to our Europe 2020 objectives for jobs and sustainable growth."

EU studies indicate that the cultural and creative industries account for around 4.5% of the European gross domestic product and provide jobs for over 8.5 million people. This makes Europe the world leader in exports of creative industry products. According to the European Commission, investments in the sector are needed to retain this position: economic growth, employment, innovation and social cohesion would all benefit from a strong cultural and creative sector.

With a proposed EUR 1.8 billion budget for the period 2014-2020, the Creative Europe programme would make it possible to heavily invest in the cultural and creative sector. The European Commission wants to allocate more than EUR 900 million in support of the cinema and audiovisual sector, while EUR 500 million would be available for investments in culture. Furthermore, EUR 210 million is reserved for a new financial guarantee facility, which would make getting bank loans for small operators easier. In addition to decreasing the difficulties in accessing financing, the programme would also enable the European cultural and creative sectors to overcome challenges such as market fragmentation, while it would also contribute to better policy-making through sharing know-how and experience.

The Creative Europe programme, which is now under discussion in the Council of EU Ministers and the European Parliament, is designed to help at least 8,000 cultural organisations and 300,000 cultural professionals and artists, enabling the projects financed by the programme to reach a total of 100 million people.

• Creative Europe: Commission unveils plan to boost cultural and creative sectors, press release, IP 11/1399, 23 November 2011
http://merlin.obs.coe.int/redirect.php?id=15544 DE EN FR BG CS DA EL ES ET FI HU IT LT LV MT NL PL PT RO SK SL SV

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European Parliament: Resolution on European Cinema in the Digital Era

On 16 November 2011 the European Parliament adopted a resolution on European cinema in the digital era.

In the resolution, the European Parliament emphasises the continued popularity and the financial, growth and employment potential of European cinema. It underlines its growing importance for the economy and stresses its significance for the cultural development and identity of Europe.

However, it also notes that the market is highly fragmented and diversified. The transition to digital and the preponderance of US productions are mentioned as being a threat to European cinema in general and small cinemas in particular.

Additionally, the following issues are also considered to be a threat:

- the high costs of digitisation;

- the closure of small cinemas;

- piracy and illegal downloading;

- the problems relating to the circulation and distribution of films;

- a lack of suitable training for projectionists in handling new digital equipment.

To counteract these threats, the resolution proposes some specific measures. The main priority in this respect is given to avoiding the closure of small, independent and art-house cinemas and to public funding of the aforementioned cinemas. Other suggestions made include:

- the standardisation of systems based on ISO standards (to a certain extent);

- encouraging cinemas to make the digital transition as quickly as possible;

- increasing the funding and altering the procedures of the European Structural Funds.

The European Parliament invites the Commission and the member states to take a number of additional measures to support European cinema and small cinemas in particular.

Moreover, the Virtual Printing Fee commercial model is signaled as being only beneficial to digitisation in large cinema networks. Solutions for other cinemas are suggested. Reference is also made to the MEDIA-programme; its importance is stressed and initiatives, particularly regarding digitisation, are suggested and called for.

The resolution calls on member states to include film education in their national education programmes. It also encourages them to promote European productions and offer technology-neutral support for cinemas that show a high number of European films. The initiative now lies with the Commission and the member states.

• European Parliament resolution of 16 November 2011 on European cinema in the digital era (2010/2306 (INI))
http://merlin.obs.coe.int/redirect.php?id=15543 DE EN FR
BG CS DA EL ES ET FI HU IT LT LV
MT NL PL PT RO SK SL SV

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Court of Justice of the European Union: Jurisdiction in cases involving breaches of personality rights

In a judgment of 25 October 2011, the European Court of Justice (ECJ) ruled that claims arising from breaches of personality rights on the internet can also be brought before courts of a member state in which the person concerned has his or her "centre of interests". It also held that the nature of Article 3 of the E-Commerce Directive (2000/31/EG) was not such that it required transposition in the form of a specific conflict-of-laws rule.

Both the Tribunal de grande instance de Paris (Paris Regional Court) (Case C-161/10) and the Bundesgerichtshof (German Federal Court of Justice) (Case C-509/09) had referred several questions on jurisdiction and the applicable law to the ECJ for a preliminary ruling.

A French actor had filed a claim for damages with a French court because of the publication on an English-language internet portal of photographs of him and of a text in English on his alleged relationship with a female singer. The defendant responded that the French court had no jurisdiction as there was no connection between the publication on the internet and the damages claimed in France. The Paris Regional Court stayed the proceedings and referred to the ECJ for a preliminary ruling the question of whether Articles 2 and 5 of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters should be interpreted as meaning that a court's jurisdiction with regard to claims for defamation could be inferred merely from the fact that the internet site on which the defamation is published can be accessed in the sovereign territory of another member state although the site is operated by a company that has its head office in another member state and targets the public of that member state.

The Federal Court of Justice had to rule on a case in which the plaintiff, a convicted murderer, objected to an Austrian internet portal's retention in its online archive of a newspaper article about his crime mentioning him by name. The plaintiff called on the portal operators in out-of-court proceedings to remove the article and issue a cease-and-desist declaration. Although the article was removed in response to this request, no cease-and-desist declaration was issued. After the plaintiff had won both at trial and on appeal, the defendants lodged an appeal on points of law with the Federal Court of Justice, claiming that the German courts had no international jurisdiction. The court also stayed the proceedings and referred to the ECJ the question of whether German courts had jurisdiction on the dispute under the Regulation on jurisdiction in civil and commercial matters and whether according to Article 3(1) and (2) of the E-Commerce Directive (2000/31/EC) German or Austrian law was applicable to the case.

The ECJ ruled that its established case law on jurisdiction over claims arising from defamation through printed press articles distributed in several Contracting States can be applied to other media and means of communication. According to that case law, such claims can be made either before the courts of the member state in which the publisher responsible is established or in all member states in which the publication has been disseminated and damage has been done to the reputation of the person concerned. However, the court pointed out, the publication of content on a website differs in particular from the regional distribution of printed matter because the content can be consulted worldwide. As the impact of content published on the internet is best assessed by the court of the place where the alleged victim has his or her centre of interests, the attribution of jurisdiction to that court corresponds, according to the ECJ, to the objective of the sound administration of justice.

The ECJ also held that Article 3(1) and (2) of the E-Commerce Directive does not constitute a conflict-of-laws rule and accordingly does not order the exclusive application of the law applying in the country of origin. Therefore, the decision as to whether German or Aus-

trian law must be applied to a case to be decided by the Federal Court of Justice must be made according to the relevant rules of German international private law.

• The ECJ judgment in the joined cases C-509/09 and C-161/10, 25 October 2011
http://merlin.obs.coe.int/redirect.php?id=17782 EN

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NATIONAL

AT-Austria

BKS Rules on Labelling Obligation for Sponsored Programmes

On 12 October 2011, the Austrian *Bundeskommunikationssenat* (Federal Communications Board - BKS) partially overturned a decision of the *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) against *Österreichischer Rundfunk* (Austrian public service broadcaster - ORF) and ended a dispute between the regulatory body and the public service broadcaster concerning the labelling of sponsored programmes.

In its decision of 14 June 2011, KommAustria had found ORF guilty of breaching the provisions on labelling of sponsored programmes contained in Article 17 of the *ORF-Gesetz* (ORF Act) in a sports programme (men's downhill at the 2011 World Ski Championships). Since the three-part broadcast comprising previews, live race coverage and subsequent analysis should have been considered as a single programme, the sponsor references that ORF had made before and after the actual event had infringed the *ORF-Gesetz*; in conjunction with the case law of the Austrian *Verwaltungsgerichtshof* (Administrative Court), the *ORF-Gesetz* required such references to be made at the beginning and end of a sports programme that formed an integrated whole.

In addition, it had ruled that ORF, by adding a further sponsor's reference in the advertising break between two starting groups in the race, had breached Article 17(1)(2)(2) *ORF-Gesetz*, which prohibited sponsorship references during a programme.

ORF appealed against this decision. Regarding the first part of the ruling, it told the BKS that the programme in question should not have been considered as a sponsored programme in the sense of Article 17 *ORF-Gesetz*. The spots concerned could not be defined as sponsorship references just because they contained words such as "... presents" or "... hopes you enjoy the programme", since references to programmes were not prohibited in an advertising spot. Since the promotional nature of the spots demonstrated that their purpose was to promote sales for the companies concerned, only the provisions on television advertising should apply.

Responding to the second part of the ruling, ORF explained that Article 17(1)(2)(2) *ORF-Gesetz* did not concern the broadcast of advertising in the form of sponsor references during a commercial break. In ORF's opinion, it also applied to sponsor references without an advertising element, since it would be contradictory to allow sponsor references with an advertising element while at the same time prohibiting the broadcast of those without such an element during a commercial break.

In its decision, the BKS rejected ORF's appeal against the first part of the ruling and held that a sponsor reference contained in an advertising spot was sufficient for the broadcast concerned to be classified as a sponsored programme, and therefore be subject to the programme labelling requirement. As KommAustria had correctly pointed out, ORF had failed to meet this requirement.

In relation to the second part of the ruling, however, the BKS agreed with ORF. According to the *ORF-Gesetz*, so-called "cut-in advertising" was advertising that interrupted a programme. Therefore, sponsor references that were broadcast during a commercial break that was separated from the programme should not be categorised as sponsor references during a programme, within the meaning of Article 17(1)(2)(2) *ORF-Gesetz*.

• *Entscheidung des BKS vom 12. Oktober 2011 (GZ 611.009/0004-BKS/2011)* (BKS decision of 12 October 2011 (GZ 611.009/0004-BKS/2011))
http://merlin.obs.coe.int/redirect.php?id=15564 DE

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Repertory and Regional Cinema Digitisation Aid

Of the 578 cinema screens in Austria, 388 are digitised, most of them in commercial cinemas. The *Bundesministerium für Unterricht, Kunst und Kultur* (Federal Ministry of Education, Art and Culture - BMUKK) and the City of Vienna are now supporting the digitisation of repertory and regional cinemas.

The rapid conversion of commercial cinema screens from analogue to digital projection technology is

putting increasing pressure on repertory and regional cinemas, especially since film distributors are switching more and more to digital film copies, including in the repertory cinema sector. It costs approximately EUR 80,000 to convert each screen; most smaller repertory cinemas cannot afford this from their own funds.

The BMUKK is providing a total of EUR 1 million in digitisation aid, half of which is earmarked for repertory cinemas. The BMUKK defines repertory cinemas as cinemas with a particularly high-quality programme that offer educational programmes linked to the films that they screen and are particularly used to host film festivals. Of the films they have shown in the past three years, at least 10% must have been Austrian and 30% European; they must have no more than five screens, a maximum of three of which have already been converted.

Repertory cinemas are entitled to a maximum contribution of EUR 20,000 per screen. Another condition is that the *Land* or municipal authority must also provide some of the funding. It is assumed that the aid will contribute to the digitisation of around 25 screens.

Regional cinemas, on the other hand, are entitled to a maximum contribution of EUR 5,000 per screen. These cinemas serve a wide public and offer a more diverse programme of films.

The aid programme is designed to support the digitisation of as many cinemas as possible, in order to promote Austrian and European cinema, particularly in the regions. The detailed eligibility criteria will be laid down by representatives of cinemas and film distributors. Around 100 screens will be digitised.

The City of Vienna is making EUR 150,000 available for the digitisation of repertory cinemas. There are currently 16 such cinemas in Vienna, with 27 screens whose projection equipment needed to be converted from analogue to digital in order to remain competitive.

Cinemas that show film premieres are entitled to a maximum of EUR 20,000 per screen, while those showing older films can receive up to EUR 15,000. Aid is only available for cinemas that have already been categorised as repertory cinemas and receive support.

The purpose of the aid being offered by the BMUKK and the City of Vienna is to safeguard the future of repertory cinemas and, thereby, of independent, artistic and socio-critical film programmes.

• *Pressemitteilung der BMUKK vom 12. Oktober 2011, BM Schmied und StR Mailath fördern die Kinodigitalisierung mit über 1 Mio Euro* (BMUKK press release of 12 October 2011, BM Schmied and StR Mailath pledge more than EUR 1 million to support cinema digitisation)
http://merlin.obs.coe.int/redirect.php?id=15565 DE

Harald Karl
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BA-Bosnia And Herzegovina

New Regulatory Framework Transposing the AVMSD Adopted

On 15 November 2011, *Vijeće Regulatorne agencije za komunikacije* (the Council of the Communications Regulatory Agency - CRA) adopted a set of by-laws transposing the provisions of the Audiovisual Media Services Directive (AVMSD) into the regulatory framework of Bosnia and Herzegovina.

More specifically, the Rule on the Provision of Audiovisual Media Services establishes a two-tier system of authorisation for the provision of audiovisual media services in Bosnia and Herzegovina - licensing for linear and an obligatory, but free-of-charge registration procedure for on-demand services. There are different licensing procedures in place for television broadcasting via terrestrial signal and television broadcasting via other electronic communication networks (cable, satellite, IPTV). Nevertheless, all broadcasters will have the same obligations in terms of content, including the rules on European works and short news reporting. Under the new rules, a media service provider can be either a legal or a natural person, which was previously not the case since only legal persons could apply for a licence.

The Code on Commercial Communications covers commercial communication in both audiovisual and radio media services. Qualitative requirements more or less apply to both, particularly with regard to surreptitious or misleading commercial communication, protection of minors, inclusion of discriminatory or harmful content and protection of consumers. In line with the AVMSD, quantitative requirements in television advertising and teleshopping are more flexible in terms of duration and insertion rules. Split-screen advertising, telepromotions and virtual advertising are specifically addressed. In particular, split-screen advertising and telepromotions have to comply with the rules on separation and duration of television advertising. The Code furthermore introduces more detailed provisions on sponsorship (such as identification requirements) as well as the regulation of product placement (see IRIS 2011-6/8). The application of the provisions on product placement, however, is postponed until 1 January 2013 in order to allow media service providers sufficient time to prepare for them.

The Code on Audiovisual and Radio Media Services sets out standards in programming covering issues such as harmful content, fairness and impartiality, privacy, right of reply and in particular the requirements concerning the protection of minors. For the first time, a uniform system for audiovisual content classification and rating is being introduced, together with scheduling restrictions for each category:

- content that is not suitable for minors under 12 may be shown between 20:00 and 06:00 hours;

- content that is not suitable for minors under 16 may be shown between 22:00 and 06:00 hours;

- content that is not suitable for minors under 18 may be shown between 24:00 and 06:00 hours.

More relaxed rules apply to on-demand services that do not have to obey scheduling restrictions but have the obligation to indicate the appropriate visual symbol in their catalogues. The exception is content belonging to category 18+ which may be shown without scheduling restrictions only if there are technical protection measures in place. If this is not the case, such content may be made available only between 24:00 and 06:00 hours.

In addition to rules transposing the AVMSD, some other amendments to the existing regulatory framework have been made, such as separate rules concerning the provision of radio media services and improved rules for the distribution of media services. The Rule on the Distribution of Audiovisual and Radio Media Services thus prohibits any modification of the distributed audiovisual or radio media services and ensures the freedom of the retransmission and reception of these services.

• Kodeks o komercijalnim komunikacijama (Code on Commercial Communications)
http://merlin.obs.coe.int/redirect.php?id=15521 BS

• Kodeks o audiovizuelnim medijskim uslugama i medijskim uslugama radija (Code on Audiovisual and Radio Media Services)
http://merlin.obs.coe.int/redirect.php?id=15581 BS

• Pravilo o pružanju audiovizuelnih medijskih usluga (Rule on the Provision of Audiovisual Media Services)
http://merlin.obs.coe.int/redirect.php?id=15581 BS

• Pravilo o dozvolama za distribuciju audiovizuelnih medijskih usluga i medijskih usluga radija (Rule on Licences for the Distribution of Audiovisual and Radio Media Services)
http://merlin.obs.coe.int/redirect.php?id=15581 BS

Maida Ćulahović
Communications Regulatory Agency

Conference on the "Transformation from State to Public Broadcasting"

The Regional Cooperation Council (RCC) was founded in early 2008, as the successor to the Stability Pact for South Eastern Europe. Its main aim is to promote regional cooperation, as well as to support European and Euro-Atlantic integration of the aspiring countries. So far, much of its activities were dealing with the media sector, also, in particular were dealings with public broadcasting services bearing in mind their role in building democratic, pluralistic and inclusive societies in the region.

In mid-November 2011, a gathering of more than 50 directors-general and representatives of regulatory authorities, civil society and senior government officials, took place in Sarajevo. This seminar-like event was co-organised by the European Commission's Directorate General Enlargement and the RCC Secretariat, supported by the European Association of Public Media in South East Europe, a branch unit of the European Broadcasting Union (EBU) recently formed to address burning issues public service broadcasting is facing in the region, and by the EBU. This conference was titled "South East Europe, 20 Years On: Transformation from State to Public Broadcasting." It was a follow-up to the project called "Enabling the Pivotal Role of Sustainable and Independent Public Service Media for Freedom of Expression and the Media in South East Europe", developed by the EBU. The RCC's twelve South East Europe members discussed and analysed the current state of public broadcasting and possible ways ahead to improve their status and position.

The EBU Head of Member Relations emphasised in his keynote speech that the public broadcasters of South East Europe "need to be strengthened so that they can become truly independent and sustainable" adding that proper funding is of crucial importance for their independence. This statement suggests that public broadcasting in the region is not yet independent or properly funded.

In this context it should be noted that the total revenue of BHRT, an umbrella public broadcaster in Bosnia and Herzegovina (see IRIS 2011-7/10), has dropped by 20 percent in the first six months of 2011. Its subscription fee, i.e., a tax imposed by law for the possession of a radio and television set, is the lowest in Europe, less than EUR 2 per month. Besides this, the collection rate of the subscription fee is about 60 percent and showing a trend of further decrease.

• "South East Europe, 20 years on: Transformation from State to Public Broadcasting", Keynote speech delivered by David Lewis, Sarajevo, 14 November 2011
http://merlin.obs.coe.int/redirect.php?id=15522 EN

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BE-Belgium

Flemish Public Broadcaster Infringes the Right to Short News Reporting Provisions

On 12 August 2011, the commercial broadcaster VTM filed a complaint with *Vlaamse Regulator voor de Media* (Flemish Media Regulator - VRM), because the public broadcaster VRT offered the sports part of its

news programme, including summaries of Jupiler Pro League (the Belgian national football league) on its website, Sporza.be. VRM ruled that this practice infringes Art. 124 para 4 *Mediadecreet* (Flemish Broadcasting Act).

In June 2011, VTM bought the broadcasting rights of the Jupiler Pro League highlights for the 2011-2014 seasons. In order to guarantee the public's right to information, the Flemish Broadcasting Act grants every broadcaster the right to short news reporting. The right to short news reporting ensures that any broadcaster in the EU can broadcast a short news report about events of high interest to the public which are transmitted on an exclusive basis by another broadcaster. This right only applies to providers of linear audiovisual media services and such short news reports can only be included in news programmes and in frequently scheduled current affairs programmes (Art. 120). Such extracts may only be used in on-demand audiovisual media services if the same linear programme is offered on a deferred basis by the same media service provider that previously offered the programme on its linear channel (Art. 124, §4). The *Memorie van Toelichting* (Explanatory Memorandum) clarifies that this restriction is intended to prevent these broadcasters from creating new on-demand business models based on short extracts.

The VRT put forth the argument that it does not violate Art. 124 para 4, as it was not merely offering the short extracts, but news reports that were created under the editorial control of the newsroom. However, in its decision of 24 October 2011, VRM stressed that VRT has violated this Article. On its website, VRT only offers the sports part of its news programme under the (new) name/title 'Jupiler Pro League'. According to the VRM, this is not the identical programme offered by VRT in its linear schedule. As a result, VRT is creating a new business model. Given that it is the broadcaster's first infringement of this Article, the VRM decided not to impose a fine. Instead, the VRM issued a warning.

• VMMa t. VRT, Beslissing 2011/030, 24 oktober 2011 (VMMa v. VRT, Decision 2011/030, 24 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15549 NL

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Penalty for Misleading Advertising

On 25 October 2011 the Bulgarian Commission on the Protection of Competition (Commission) found a violation of Art. 33, para. 2, item 1 in conjunction with Art. 32 of the Law on the Protection of Competition. The infringement was made by the Blizoo Media and Broadband company and the Commission imposed a penalty of BGN 30,379.00 (approximately EUR 15,000).

The reason for the proceedings was a consumer's notice on misleading advertising messages of the company in connection with its "Complete Package"-offer. The package includes digital television with over 150 programmes, internet and fixed telephony services.

The proceeding showed that Blizoo has misled the consumers because it actually offered quite few television programmes. The Commission considered that a conscientious commercial practice requires the media company to ensure the quality and number of the programmes it offers as main features of its services.

Determining the penalty the Commission took into account the extent and duration of the violation and the limited scale of the advertising campaign. The Commission was guided by the idea that the penalty should be of a preventive nature against such fraudulent actions in future.

• Решение № 1465/25.10.2011 г. на Комисията за защита на конкуренцията (Decision № 1465/25.10.2011 of the Commission for Protection of Competition)
http://merlin.obs.coe.int/redirect.php?id=15524 BG

Rayna Nikolova
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New Collecting Societies Register in Bulgaria

According to the latest amendments to the Bulgarian Copyright Act of 25 March 2011 all collecting societies active in Bulgaria during the last five years had to submit an application to the Minister of Culture for new registration in compliance with the new requirements of the law (see IRIS 2011-5/9).

The term for applying expired on 25 May 2011, but the tariff for the fees due to the Ministry of Culture for the new registration was prepared by the Council of Ministers and entered into force in July 2011. On 27 October 2011 the Minister of Culture issued the first certificates under the new rules to six organisations and refused only one.

According to the new register of collecting societies in Bulgaria, published on the website of the Ministry of Culture the official organisations with which only the end-users shall conclude contracts are the following:

- MUSICAUTOR concerning copyrights of authors and composers of musical works as well as the rights of music publishers;

- PROPHON concerning neighbouring rights of phonogram producers and music performers;

- TEATERAUTOR concerning copyrights of authors of stage plays;

- COPYBG concerning the collecting of levies for the private use of protected works;

- FILMAUTOR concerning copyrights and producers' rights on films; and

- EAZIPA concerning copyrights and neighbouring rights in connection with renting and lending of holders of protected works and the re-sale of pictorial and figurative arts.

The only refusal issued by the Minister of Culture was to the foreign organisation AGICOA, which exercises inter alia the rights of (film) producers concerning the retransmission of their programmes and distributes the collected royalties to the rightsholders.

• Регистър на дружествата за колективно управление на права по чл . 40 от ЗАПСП (Register of collecting societies under Art. 40 of the Copyright Act)
http://merlin.obs.coe.int/redirect.php?id=15582 BG

Ofelia Kirkorian-Tsonkova
Attorney at law

Report on the Monitoring of the Pre-election Campaign

In November 2011, the Council for Electronic Media (CEM) issued a report on the monitoring of the pre-election campaign in Bulgaria for the election of the president and vice-president as well as of mayors and municipal councilors. The CEM has considered 19 television programmes, four of which pertain to the National Television Broadcaster (BNT). The overall review of the results indicates the following forms of political propaganda presented in television programmes: videos, chronicles, debates, discussions, interviews, addresses, business cards, reports and messages. The CEM has made the following conclusions:

1. The public media that are restricted by present legislation on elections have difficulties in achieving a real equality and pluralism of viewpoints. They are hindered in meeting, with a variety of information, the needs of their audience and thus to be able to implement fully successfully their public function during the campaign.

2. Private broadcasters fail to make sufficient use of the potential freedom in their programmes to let journalism dominate, rather than paid propaganda.

3. The media campaign could be assessed as impressive in quantitative terms. But there are some problems identified in the analysis: the uniformity of forms and the lack of debate on controversial issues. The lack of a pre-election theme developed and offered by journalists underplays the impact and its meaning. It is a fundamental purpose to satisfy the right of the audience to make an informed choice based on richly varied and selected content, which was not sufficiently achieved.

4. The removal of legal deficits is obviously urgent: a clear definition of political advertising, replacing the term - an anachronism - "agitation", a liberalisation of the rules on public media and a clear regulation concerning the commercial media (at least as a requirement to make paid advertising recognisable to the audience). The campaign shows the need for a synchronisation of media legislation and legislation on elections. Even better, would be the elaboration of a clear and comprehensive set of regulations on the media coverage of elections. Such regulations should be included in a specialised media law.

• Доклад за резултатите от наблюдението върху радио - и телевизионните програми на доставчици на медийни услуги по време на предизборната кампания за избиране на президент и вицепрезидент и органи на местна власт 23 септември -23 октомври 2011 (Report on the monitoring results on radio and television programmes of media service providers during the pre-election campaign for the election of the president and vice-president and members of local authorities, 23 September-23 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15525 BG

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CH-Switzerland

SF info Authorised to Broadcast Multilingual Programmes

Since 1 November 2011, the German-language television channel SF info has been authorised to broadcast programmes from the French- and Italian-speaking parts of Switzerland. Previously, it was in theory only allowed to broadcast programmes already shown on SF1 or SF2, the two television channels of the Schweizer Radio und Fernsehen (SRF). SRF is the German-language business unit and branch of the Swiss radio and television broadcasting company (Société Suisse de Radiodiffusion et Télévision - SSR).

Launched initially on an experimental basis on 3 May 1999, SF info's mandate was confirmed on 17 January 2001. SF info is SRF's continuous news programme, offering mainly programmes on news, sport and culture.

As a result of an amendment to the concession decided on 12 October 2011 by the Federal Council, SF info is now able to transmit the news programmes of Radio Télévision Suisse (RTS) and Radiotelevisione Svizzera (RSI). These programmes will be broadcast in their original languages, with German subtitles.

The aim of the authorisation is to strengthen contact between the different linguistic regions of the country. This brings it within the scope of the measures the SSR is required to take in order to comply with its remit as set out in Article 24 of the Federal Radio and Television Act of 24 March 2006 (LRTV); this provides that the SSR must specifically promote understanding, cohesion and exchange between the various parts of the country, the different language-speaking communities, cultures and social groups, and take account of the specific features of the country and the needs of the cantons.

• Concession granted to SRG SSR idée suisse1 (SSR concession) (consolidated) of 28 November 2007 (as at 1 November 2011) FR

Patrice Aubry
RTS Radio Télévision Suisse, Geneva

Harmonisation of Minimum Age for Cinema Attendance

The minimum age for admission to public showings of films is from now on the same throughout Switzerland. In order to achieve this, the conference of regional directors of justice and police (Conférence des Directeurs Cantonaux de Justice et Police - CCDJP) has drawn up an agreement with the Swiss association of film operators and distributors (ProCinema), the Swiss videogram association (Association Suisse du Vidéogramme - ASV), and the Swiss conference of regional directors of public education (Conférence Suisse des Directeurs Cantonaux de l'Instruction Publique - CDIP). The purpose of the agreement is to create a national commission for films and the protection of minors that will have the task of making recommendations to the cantons and the cinematographic sector on the minimum age for access to cinema performances. The commission's members will be representatives of the cinematographic sector and the authorities as well as independent specialists. The different regions and languages of the country will also be represented.

Until now, each canton has been free to lay down the minimum age for cinema attendance, which meant that the regulations varied from one canton to another. During the procedure of consultation for the Cinema Act of 14 December 2001, a number of cantons and associations in the cinematographic sector had proposed the adoption of national rules for the protection of young people, as they felt that the cantons' regulations were no longer in line with the new methods of audiovisual consumption. Standardised regulations were also needed in order to avoid the distortions in competition produced by the differing cantonal arrangements. The Federal Council had set this proposal aside however, as it felt that the Constitution did not allow federal intervention in an area where the cantons continued to have sole competence.

The new commission will lay down age limits on the basis of the recommendations of the *Freiwillige Selbstkontrolle der Filmwirtschaft* (FSK), the German body responsible for film classification. Its classification will theoretically stand as a commission recommendation, although the commission may diverge from the FSK's opinion if it feels this is necessary. If a film has not been classified by the FSK, the age limit will be laid down by the commission, which may base its decision on a proposal from the distributor.

The age classifications range from 0 (i.e., no age limit) to 18 years. Until a film has been classified, the minimum age limit will be 18 years. Children and young people no more than two years younger than the given minimum age limit may watch films in the next higher category if they are accompanied by a person invested with parental authority. Apart from a recommendation concerning the authorised age, the commission will also draw up a recommendation on the age groups it considers suitable for the films concerned.

The commission will also apply the FSK's classification to DVDs and films on Blu-ray. For films that have not been shown in cinema theatres and have not been classified by the FSK, the commission will validate the distributor's proposal or will decide on its own classification. The commission will not, however, cover video games; these will remain subject to the *Pan European Game Information* (PEGI) classification system.

• Agreement on a national film commission and the protection of minors, 11 November 2011 DE FR IT

Patrice Aubry
RTS Radio Télévision Suisse, Geneva

DE-Germany

BGH Rules Again on Thumbnail Admissibility

On 19 October 2011, the *Bundesgerichtshof* (Federal Supreme Court - BGH) issued another ruling on the admissibility under copyright law of Google's online image search engine.

Google's image search engine enables users to search for specific images posted online by third parties by

typing in a search item. In the subsequent search result list, the images are shown in thumbnail form.

In the case at hand, the plaintiff was a photographer, one of whose photographs had appeared in thumbnail form in the results of a Google image search. The search engine had stated that the image had been found on two Internet sites whose operators had not been granted usage rights by the plaintiff. The plaintiff argued that this breached his copyright and demanded, *inter alia*, that Google stop showing his photograph in thumbnail form.

The BGH rejected this claim, referring to a decision it had taken in 2010, in which it had ruled that a copyright holder who posted an image of his work online without taking technical measures to block access to it via an image search engine should be assumed to have no objection to thumbnail versions of it being made publicly available (see IRIS 2010-6/18). The same applied if the image was posted on the Internet (without technical protection) by a third party with the copyright holder's permission.

Although the plaintiff in this case had not granted the right to use the image of his work to the operators of the websites mentioned, he had granted such a right to a third party. His consent to the online publication of the image in thumbnail form was not limited to copies that he had expressly permitted. This was evident from the fact that automatic search engines could not distinguish between legal and illegal copies.

In this case, the copyright holder was still entitled to take legal action for breach of copyright against the parties who had posted the images on the Internet without his consent.

• *Pressemitteilung des BGH zum Urteil vom 19. Oktober 2011 (Az. I ZR 140/10)* (BGH press release on the ruling of 19 October 2011 (case no. I ZR 140/10))
http://merlin.obs.coe.int/redirect.php?id=15566 DE

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BVerwG Rules on Scope of Freedom of Information Act

On 3 November 2011, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) decided that the *Informationsfreiheitsgesetz* (Freedom of Information Act - IFG) applies, in principle, to all activities of the federal ministries.

In the case at hand, the plaintiffs demanded access to certain documents of the *Bundesjustizministerium* (Federal Ministry of Justice - BMJ): firstly, internal submissions to the Minister in connection with the investigation into the possible need to reform the law on parent-child relations and, secondly, BMJ statements to the Petitions Committee of the Bundestag concerning the rehabilitation of the victims of the land reform in the Soviet occupation zone. The lower-instance court (OVG Berlin-Brandenburg) had upheld these claims.

The BVerwG rejected the appeals lodged against these rulings, stating that the BMJ was a federal authority obliged to provide access to information under Article 1 IFG. The IFG did not distinguish between an authority's governmental and administrative activities; such a differentiation would run counter to the purpose of the Act. The fact that the BMJ's statement had been submitted to the Petitions Committee in accordance with a constitutional obligation was irrelevant. There were no obvious grounds to refuse access to the requested information (Art. 3 *et seq.*), including the protection of confidentiality.

• *Pressemitteilung des BVerwG zu den Urteilen vom 3. November 2011 (BVerwG 7 C 3.11, BVerwG 7 C 4.11)* (BVerwG press release on the rulings of 3 November 2011 (BVerwG 7 C 3.11, BVerwG 7 C 4.11))
http://merlin.obs.coe.int/redirect.php?id=15568 DE

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Photographed Can Photograph Photographer

According to a decision issued by the *Landgericht Köln* (Cologne District Court - LG) on 9 November 2011, whereas photographs taken by a press photographer showing a well-known weather presenter held in a detention centre awaiting trial may not be distributed, photographs taken by the presenter showing the photographer at work can.

The TV weather presenter had been under investigation in 2010 following a serious rape allegation. He was acquitted on 31 May 2011 by the *LG Mannheim* (Mannheim District Court). The proceedings attracted a high level of media interest from the outset. The accused won several legal claims against journalists responsible for highly detailed written reports and photographs.

The complaint heard by the *LG Köln* concerned pictures taken by a press photographer showing the weather presenter in the yard of the detention centre where he was held. The court ruled that the publication of the photographs breached the general personality and image rights of the man awaiting trial. Weighing his personality rights against the freedom of the press and freedom of expression, the court found in the weather presenter's favour because he was entitled to protection of his privacy, even while in custody awaiting trial. The detention centre yard should be treated as a private area, in which the

plaintiff should not expect to be photographed. The news value of the images was "less important". The photographer was liable for their distribution because he had been following instructions to take the photographs in order to illustrate the current press reports. It had therefore been possible and reasonable for him to refrain from violating the plaintiff's rights.

However, the court rejected the press photographer's counterclaim: he had defended himself by claiming that he had been photographed by the weather presenter outside the presenter's home, while he had been sitting in his car reading a newspaper, waiting for an opportunity to take pictures of the weather presenter. The presenter had published this photograph on his Twitter page along with the text: "The brave weekend paparazzo ... prefers the serious press if he spends all day waiting for the famous person." He had wanted to show an example of how he was being followed by the press in connection with the criminal procedure.

The *LG Köln* thought that this image documented a current event. Referring to established case law of the *Bundesgerichtshof* (Federal Supreme Court), it ruled that freedom of the press and freedom of expression included sufficient scope for the press to determine, according to journalistic criteria, what lay in the public interest. It should be emphasised that, in its comments on the public's right to information, the formation of public opinion and the boundaries of the freedom of the press and freedom of expression, the court considered Twitter to be part of the press or a similar service.

The decisive factor was the news value of the publication, which could be derived from the context of the written report. The media's treatment of famous people in their reporting was, in principle, a matter of public interest. This was compounded by the particular importance of the reporting of the specific case involving the defendant in 2010 and 2011, which had "violated personality rights in many respects", and which had been a matter of wide public debate. The interest in public reporting of this issue outweighed the personality rights of the photographer. In addition, the photograph merely showed the photographer carrying out his profession, and therefore in his "social environment". If he was photographed by the plaintiff while preparing to carry out journalistic activities relating to the plaintiff, this did not constitute a significant violation of his interests.

• *Urteil des LG Köln vom 9. November 2011 (Az. 28 O 225/11)* (Ruling of the *LG Köln* (Cologne District Court) of 9 November 2011 (case no. 28 O 225/11))
http://merlin.obs.coe.int/redirect.php?id=15569 DE

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BKartA Has Serious Concerns about Kabel-BW's Takeover by Liberty

At the end of October 2011, the *Bundeskartellamt* (Federal Cartels Office - BKartA) expressed serious concern about the takeover of cable network operator Kabel Baden-Württemberg by the American media group Liberty.

In its provisional legal assessment, the BKartA states that Liberty is already active in Germany - particularly in North Rhine-Westphalia and Hessen - through its subsidiary Unitymedia. The purchase of Kabel Baden-Württemberg would strengthen an oligopoly in the German cable supply market and hinder competition in this market.

The cable supply market, which primarily concerns the delivery of TV signals to residential blocks via broadband cable networks, is currently dominated by three major German cable network operators (Unitymedia, Kabel Baden-Württemberg and Kabel Deutschland GmbH). Although the BKartA believes that the three companies are all technically and economically capable of supplying properties all over Germany, they tend to operate on a regional basis. The planned merger would reduce the number of competitors from three to two, which would make it even less likely that the remaining market participants would compete with one another at national level.

In the meantime, Liberty's German subsidiary, Unitymedia, is reported to have made a number of commitments to the BKartA in order to dispel its concerns about the takeover. In particular, Unitymedia has offered to stop encrypting the digital free-to-air channels. Cable customers in North Rhine-Westphalia and Hessen would therefore be able to receive around 70 digital channels without a smartcard or additional charges. Unitymedia is also prepared to give up its current contractual exclusivity, which would enable users of its TV service to subscribe to other providers' bundled telecommunications services.

The BKartA set a deadline of 15 December 2011 for a final decision.

• *Pressemitteilung des BKartA vom 28. Oktober 2011* (BKartA press release of 28 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15567 DE

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OLG Rejects Claim against YouTube for Disclosure of User Data

According to media reports, the *Oberlandesgericht München* (Munich Appeal Court - OLG) decided in an urgent procedure on 17 November 2011 that YouTube was not obliged to disclose data identifying a user who had uploaded copyrighted material to the copyright holder.

In the case at hand, a YouTube user had published film material, which he had obviously created by filming a cinema screen, on the video portal. The film distributor concerned claimed that this breached its rights and demanded that YouTube remove the material and provide it with information about the user's identity. YouTube immediately complied with the first request, but refused to disclose the user data.

The *OLG München* has now also rejected the data request, confirming the decision of the lower-instance court. Although it was true that copyright had been breached, the commercial nature of the unlawful action required under Article 101 of the *Urheberrechtsgesetz* (Copyright Act) to justify the disclosure of information was not apparent in this case. The relevant information provided by the claimant was insufficient and there was, in particular, no evidence that the user had intended to profit financially from his actions.

According to reports, the film distributor is considering pursuing its claim in the main proceedings.

• *Beschluss des Oberlandesgericht München vom 17. November 2011 (Az. 29 U 3496/11)* (Decision of the Munich Appeal Court of 17 November 2011 (case no. 29 U 3496/11)) DE

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TKG Amendment Passed by Bundestag

On 27 October 2011, the Bundestag adopted, at the third reading, an amendment to the *Telekommunikationsgesetz* (Telecommunications Act - TKG), the main purpose of which is to transpose into German law the 2009 reforms of the EU regulatory framework for electronic communications.

A large number of last-minute changes had been made to the government draft of 2 March 2011 (see IRIS 2011-5/17). These concerned issues such as net neutrality: under the newly added section 41a(1) TKG, the federal government can establish this principle by means of a statutory order with the agreement of the Bundestag and Bundesrat. The order can lay down "the fundamental requirement for non-discriminatory data transmission and non-discriminatory access to content and applications". In addition, the *Bundesnetzagentur* (Federal Network Agency - BNetzA) is entitled, under section 41a(2) TKG, to lay down detailed minimum requirements for service quality in a technical directive.

In order to give planning security to operators of public telecommunications networks wishing to invest in building next generation networks (NGNs), section 15a(4) TKG obliges the BNetzA to provide information, on request, about anticipated regulatory measures in a particular region. The use of alternative infrastructures and federal trunk roads and waterways for the construction of NGNs is facilitated. There are also provisions to improve the protection of telephone service users: under the version adopted by the Bundestag, call-by-call operators must, in future, announce the call price before the call begins. However, the proposed amendment contained in the government draft under which the intercarrier traffic data required for billing purposes should be erased after three months has been removed. The current rule, allowing such data to be stored indefinitely, remains applicable.

Under the amendments, the renewal of frequency allocations for analogue VHF radio stations until the end of the current period, which should not exceed 10 years, will take place automatically. According to the government draft, renewals would have been the subject of an application procedure and evaluation by the BNetzA.

The opposition voted against the draft in the Bundestag. It criticised the fact that net neutrality was not required by law, but could merely be regulated by means of a statutory order. It also demanded the expansion of universal service obligations to include broadband Internet access. However, corresponding proposals by the opposition parties were rejected by the government majority.

The Bundesrat must now examine the Act. At the request of Hamburg and Rhineland-Palatinate, the Culture Committee, which is involved in the legislative process, has recommended referral of the matter to the Mediation Committee. The *Länder* consider that the Bundestag's adoption of the Act particularly threatens their right of participation with regard to the interests of broadcasters. For example, they want to be involved not only in the allocation of frequencies to broadcasters, but also in all decisions that might have an impact on broadcasting. They also want to receive half of the proceeds of the frequency auctions. Only Bavaria and Schleswig-Holstein voted against the idea of referring the matter to the Mediation Committee.

• *Gesetzesbeschluss des Bundestags vom 27. Oktober 2011* (Bundestag decision of 27 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15570 DE

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File-Sharing Administrators Jailed For Linking To Copyright Works

On 27 September 2011, the Provincial Court of Vizcaya sentenced the website managers of the web pages Fenixp2p and MP3-es to imprisonment and payment of a fine for the infringement of intellectual property rights. It is the first case that has convicted administrators of websites that actively link to content protected under copyright law in Spain.

In common with many similar sites, FenixP2P.com and MP3-es.com carried no content of their own, but instead linked to other locations where content was hosted. Breaking a long run of operators being acquitted for similar activities, the Spanish court decided that the act of linking constituted a for-profit communication to the public. A negative ruling against their operators had seemed unlikely, as Spanish courts have continually acquitted defendants running similar sites. It therefore comes as quite a surprise to hear that the Provincial Court of Vizcaya has sentenced the operators of both sites not only to fines, but a year in jail.

After the original acquittal, an appeal in the case was brought by the Spanish Association of Distributors and Publishers of Entertainment Software, ADESE (Asociación Española de Distribuidores y Editores de Software de Entretenimiento - Spanish Association of Distributors and Publishers of Entertainment Software), and Promusicae, the recording industry outfit.

While the court agreed that neither site actually hosted any infringing content, it noted that the defendants organised and made available links that enabled the free download of copyright works, from which they intended to profit via advertising.

Crucially, the Court of Vizcaya viewed linking very differently to other courts handling similar cases in the past, as it described the act as constituting communication to the public and not an exchange between individuals.

• *Sentencia A.P. Bilbao 530/2011, de 27 de septiembre* (Case Fenixp2p & MP3-es, Sentencia de la Audiencia Provincial de Vizcaya, Sección 1ª, núm. 530/11, de 27 September 2011)
http://merlin.obs.coe.int/redirect.php?id=15542 ES

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Regulation on TV Advertising

The Council of Ministers approved on 11 November 2011 a Royal Decree clearing the Regulation developing the Spanish General Law on Audiovisual Communications (see IRIS 2010-4/21) regarding television advertising and the provision of legal certainty to the sector.

The new Regulation develops some elements of the abovementioned Spanish Law on TV advertising that were not sufficiently clear in the General Law, such as those related to the calculation of the 12 minutes of permitted advertising per hour or the maximum number of advertising breaks per programme.

The new Regulation clearly defines the characteristics of the various formats of audiovisual commercial communication, such as self-promotion (for which a maximum of five minutes per hour is permitted), tele-promotion (to which a limit of 3 hours and 36 minutes per day is set) and sponsorship. None of the aforementioned formats are relevant for the 12-minute limit to advertising set by the Spanish General Law on Audiovisual Communications.

According to the text, sponsorship may not exceed 10 seconds per hour, must be linked to programmes or sub-programmes and may not encourage the viewer to purchase the sponsor's product or service. If the sponsorship does not meet these requirements, it shall be deemed to constitute standard advertising and therefore will be included within the 12-minute limit.

Self-promotion (defined as videos advancing TV serials, films, documentaries or TV shows and on-screen overlays of the same broadcaster) may not exceed 5 minutes per hour and tele-promotions (defined as the advertising made by the programme host or hostess or by the main characters of a programme using the scenario and ambience of the same programme) shall have a minimum duration of 45 seconds.

Commercial messages broadcast during the retransmission of sport events are permitted by the Spanish General Law on Audiovisual Communications only when the game is paused or when the advertisements allow the further development of the event. In this case, advertising is allowed by overprints not occupying more than one fifth of the screen.

The above is relevant to a recent decision of the European Court of Justice on Spain's infringement of Article 18(2) of Directive 89/552/EEC, as amended by the European Directive 97/36/EC, according to which the time assigned to all kinds of TV advertising shall not exceed 20% of the hour, i.e., 12 minutes per hour (see IRIS 2012-1/3).

• Real Decreto 1624/2011, de 14 de noviembre, por el que se aprueba el Reglamento de desarrollo de la Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, en lo relativo a la comunicación comercial televisiva (Royal Decree 1624/2011 of 14 November, approving the Regulation implementing General Act 7/2010 of 31 March, on Audiovisual Communication, in relation to television advertising)
http://merlin.obs.coe.int/redirect.php?id=15545 ES

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FR-France

Authorisation to Broadcast a Person's Image - Interpretation by the Court of Cassation

On 4 November 2011 the first civil chamber of the Court of Cassation delivered an interesting decision on the perimeters of the authorisation given by professionals filmed for the purposes of a documentary. In the case at issue, a number of members of the crime prevention police unit in Nice had agreed to their image being used in a reportbroadcast in which they appear carrying out their duties. Although they had agreed to being filmed and their image was broadcast without being blurred, they nevertheless felt that their privacy had been invaded and deplored the fact that their names and rank had been divulged, since they had not given any authorisation in that respect. The police therefore had the television channel, the director of programming, and the programme's production company summoned with a view to claiming reparation of the prejudice they had suffered.

In rejecting their claims, the court of appeal in Aix-en-Provence had noted that since the production company had been authorised to broadcast the images of the police members, it was justified in believing tacitly that it was also authorised to divulge their names and rank. The court held that in this context and by this sole fact their privacy had not been infringed, explaining that the public revelation of their profession was necessarily and fully the result of the mere broadcasting of their image, with such revelation being in itself augmented by revelation of their names and ranks, even if one or other of these revelations could have led to different reactions on the part of viewers. The police officers therefore appealed against the court's decision. The Court of Cassation found that "the agreement given by a person for the broadcasting of his/her image cannot be deemed to constitute agreement to the divulgence of his/her name and rank". The Court of Cassation therefore overturned and cancelled the appeal judgment, under Article 1134 of the Civil Code ("Lawfully formed agreements are binding on those who have entered into them (..) They must be performed in good faith"). In doing so, the Court of Cassation requires courts dealing with the merits of such cases, and the parties involved, to apply a very strict interpretation of the authorisations given by both individuals and professionals regarding the exploitation, particularly by audiovisual media, of their image. Authorisation to broadcast a person's image therefore did not constitute an authorisation to divulge other elements of his/her private or even professional life.

• *Cour de cassation (1re ch. civile), 4 novembre 2011 - Patrick X. et a. c/ TF1 et a.* (Court of Cassation (1st civil chamber), 4 November 2011 - Patrick X et al. v TF1 et al.) FR

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Reform of Private Copying Levies

On 20 December 2011, the French parliament adopted a new act on private copying levies. This followed a ruling of the *Conseil d'Etat* (Council of State) of 17 June 2011 which, particularly in view of the ECJ's Padawan judgement (see IRIS 2010-10/7), revoked a decision of the *Commission « copie privée »* (Private Copying Committee), which is responsible for determining the types of equipment and the rates and methods of remuneration for private copying due to rightsholders under Articles 311-1 et seq. of the Intellectual Property Code. The decision had been revoked on the grounds that all equipment had been subject to remuneration, without the possibility of exempting devices acquired, particularly for professional purposes, "whose conditions of use do not suggest that they are to be used for private copying purposes" (see IRIS 2011-7/20). It was decided that the decision should only be revoked after a period of six months in order to allow the public authorities to adjust the private copying levy mechanism. Previously, on 11 July 2008, the *Conseil d'Etat* had ruled that the private copying levy should only apply to copies made from a legitimately acquired source. Taking note of these decisions, the Ministry of Culture therefore tabled a bill designed to incorporate their provisions into the Intellectual Property Code. Having been the subject of an expedited procedure due to the deadline set by the *Conseil d'Etat*, the bill was therefore debated and adopted by both chambers, before being published in the Official Gazette on 21 December 2011. The text therefore excludes copies made from illicit sources from the private copying levy system and the basis of remuneration. Article 2 of the act concerns the use of usage surveys to determine the level of the private copying levy. A duty to inform consumers is also established, whereby the size of the levy applicable to each recording device must be communicated to buyers when they are offered for sale. As the highlight of the text, the act provides for the possibility of exempting from private copying levies "recording devices acquired, particularly for professional purposes,

whose conditions of use do not suggest that they are to be used for private copying purposes". In practice, the act offers the beneficiaries the possibility to conclude an exemption agreement. In the absence of such an agreement, these people are entitled to reimbursement of the levy on production of a receipt, as described in a decree of 20 December 2011. Requests for reimbursement apply to recording equipment acquired before the law was promulgated.

Although all rightsholders have welcomed the adoption of the text, the Minister of Culture pointed out that it was "a first step before a complete review" of private copying.

• *Loi n°2011-1898 du 20 décembre 2011 relative à la rémunération pour copie privée, JO du 21 décembre 2011* (Act no. 2011-1898 of 20 December 2011 concerning private copying levies, Official Gazette of 21 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15562 FR

• *Arrêté du 20 décembre 2011 relatif au remboursement de la rémunération pour copie privée, JO du 23 décembre 2011* (Decree of 20 December 2011 concerning the reimbursement of the private copying levy, Official Gazette of 23 December 2011)
http://merlin.obs.coe.int/redirect.php?id=15563 FR

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Connected Television - New Regulation in the Audiovisual Sector

After two years of work, the nationwide switch to DTV in France was completed on 29 November 2011. The result is a complete end to analog terrestrial broadcasting - "not an end, but a beginning", according to one member of the CSA, referring to the "irresistible advent of connected television, which will make television and the Internet coexist on the same screen". The combination of audiovisual content, which is heavily regulated, and content from the Internet, which is not regulated, indeed raises new questions concerning regulation. How will it be possible, for example, to protect young people when the sources of content are virtually endless? How will it be possible to ensure financing for audiovisual and artistic creation when an increasing quantity of professional audiovisual content is marketed by sites based outside France? Last spring the Government launched a mission on connected television; after holding about sixty hearings with representatives from right across the sector, the mission has now submitted its conclusions. It makes 13 proposals, aimed at considering the regulation of content and the economic regulation of audiovisual matters in the open world of the Internet and calling for renewed support for creation. Firstly, the rapporteurs recommend adapting the audiovisual regulations on content, and more particularly the rules for programming and broadcasting works on television (Articles 8 to 12 of Decree 90-66 of 17 January 1990 prohibiting the broadcasting by television channels of films on certain evenings in the week and limiting the number of works that may be broadcast each year; quotas for works made originally in French or another European language, etc.). These rules are in fact no longer justified in a universe where viewers are able to choose the programmes they wish to watch from among a range of services that includes delinearised audiovisual media services. Similarly, the rules on advertising will need to be adapted, so that uniform regulations may be applied to advertising to be shown on all types of screens.

The CSA should also be given the task of analysing and recommending arrangements for ensuring the protection of audiences and consumers on all the networks providing access to audiovisual content. The report also calls for a clarification of the areas of competence of the ARCEP and the CSA, at the intersection of the audiovisual and telecommunications sectors.

Militating for a more open audiovisual market, the mission is calling for a change in the rules for supervising media concentrations so that audience and market shares can more thoroughly be taken into account. It also recommends adapting media chronology in keeping with international usage, more specifically by shortening the window for subscription video-on-demand.

As part of the appeal for renewed support for creation, the mission reaffirms the logic of the support account and the need for it, and expresses its desire to revitalise its resources. Telecommunications operators could collect and pay over to the COSIP the product of a contribution charged on the exchanges generated by on-line services. Similarly, the support should be adapted to digital operating methods. Lastly, the rapporteurs believe that maintaining support for creation involves the adoption of a competitive VAT scheme for on-line sales of audiovisual media, and more work on territorialising the turnover or income of Internet players in France.

On the basis of these first approaches, the CSA has already announced that it will be setting up a "commission for monitoring the use of connected television" in January.

• *La télévision connectée - Rapport au ministre de la Culture et de la Communication et au ministre chargé de l'industrie, de l'énergie et de l'économie numérique, novembre 2011* (Connected television - Report to the Minister for Culture and Communication and to the Minister with responsibility for Industry, Energy and the Digital Economy, November 2011)
http://merlin.obs.coe.int/redirect.php?id=15561 FR

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IRIS
Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

New HADOPI Legislation soon to Combat Streaming?

On 18 November 2011, the French President Nicolas Sarkozy announced during a forum on culture in the digital era his desire to extend the fight to combat illegal downloading to the streaming of musical and audiovisual works. "If technology allows us further evolution, then the law will be adapted," he said. It should be recalled that the Decree of 5 March 2010 authorising the HADOPI to process the data transmitted to it by rightsholders and access providers currently only refers to peer-to-peer activity. As a result, and despite the fact that it is increasingly frequent, the HADOPI does not currently include streaming in the "graduated response" system and the efforts to combat illegal downloading. Following on from the President's speech, the HADOPI announced that it intended to embark on a "new stage in the protection of copyright on the Internet that was fully part of its duties, in addition to the possibilities already open to rightsholders under Article L336-2 of the Intellectual Property Code". To achieve this, three areas of action will be implemented consecutively, starting from now. Firstly, the HADOPI will carry out a clear, precise evaluation of what is involved, particularly with regard to technical and economic aspects. It will also assess existing legal and technical measures, and their limitations. This work will be based on experimentation carried out on an ad hoc basis in the HADOPI's "labs" (research workshops entrusted to independent experts, operating in an open collaborative mode). Everyone concerned (rightsholders, IAPs, service providers, etc) is invited to take part straight away. Secondly, the HADOPI announced the start of intensive dialogue with the sites and platforms concerned by the phenomenon, and with all the middlemen contributing to their operation, and more particularly the banks, payment agents and advertising authorities, in order to assess the situation and the ways in which they could help remedy the situation. Lastly, on the basis of earlier work, and according to an assessment of the limitations of the exiting legal tools, the HADOPI will make proposals for adaptation of any kind, including in the field of legislation, the better to achieve the objectives that have been set. The HADOPI has set itself the objective of obtaining the first significant results in each of these three areas by the end of the first quarter of 2012 - right in the middle of the presidential election campaign.

• *Communiqué de presse de l'Hadopi du 25 novembre 2011, « Streaming » et téléchargement direct de contenus illicites : l'Hadopi s'engage dans une nouvelle étape de sa mission de protection des droits* (HADOPI press release of 25 November 2011: "Streaming and the direct downloading of illegal content - the HADOPI embarks on a new stage in its mission to protect rights")
http://merlin.obs.coe.int/redirect.php?id=15560 FR

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GB-United Kingdom

Government to Continue to Provide Film Tax Relief

The Prime Minister has announced that the Government will continue to provide film tax relief, the targeted tax break for the British film industry, until the end of December 2015.

The scheme provides relief for film production companies in relation to the expenses they incur on the production of a film intended for theatrical release in commercial cinemas. For a film to be eligible for relief, it must be certified as British, either by passing a cultural test or under an agreed co-production treaty. The certification process is administered by the British Film Institute on behalf of the UK Government's Department for Culture, Media and Sport. The film must also incur at least 25% of its total production expenditure in the UK. Relief can only be claimed on production expenditure in the UK, up to a maximum of 80% of the total budget; a higher rate of relief is available for limited-budget films (these are films with total production expenditure of £20 million or less). Companies not making a profit may be able to surrender the relief for a payable tax credit worth up to 20% of the total budget for a limited-budget film and up to 16% for other films. A higher value of support may be achieved if the relief is used to reduce company tax liabilities. The extension of support was granted State aid approval by the European Commission.

In 2009/10 the scheme provided around GBP 95 million of support to the British Film Industry, supporting over GBP 1 billion of investment in 208 films. Recent films certified as British include Brighton Rock, Clash of the Titans, Gnomeo and Juliet and Harry Potter and the Deathly Hallows (Parts 1 and 2).

• HM Treasury, 'Government announces extension of film tax relief', Press Release 124/11, 10 November 2011
http://merlin.obs.coe.int/redirect.php?id=15517 EN

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BBC Tightens Rules on Sponsored Programmes after Breaches of Guidelines on BBC World News

The BBC Trust's Editorial Standards Committee has found that fifteen programmes broadcast on BBC World News breached its editorial and/or sponsorship

guidelines. BBC World News is the commercial channel available across Europe and much of the world; unlike the BBC's domestic services, it carries advertising.

All the programmes involved had been acquired by the BBC at no or minimal cost from independent producers. They included Taking the Credit, on carbon trading, which had been funded by Envirotrade; this amounted to sponsorship, which is prohibited for news and current affairs. Other programmes on environmental matters had been funded by international organisations such as the United Nations Environment Programmes and UNESCO and, in one case, by a commercial company. In some cases the funder featured and was promoted in the programmes; there was also a suggestion that commercial, financial or other interests may have influenced editorial judgments, resulting in a breach of the guidelines on conflicts of interests. There were either no sponsor credits or these were insufficiently prominent and not clearly identified. Four episodes of the series Develop or Die and four other programmes had been made by a company forming part of a group of which the Malaysian government was a client. As the programmes concerned Malaysia and its government's policies, this created a conflict of interest in breach of the editorial guidelines. In none of the cases was there found to be any breach of the rules relating to impartiality.

As a result of the decision, the BBC Executive has taken a number of actions to safeguard impartiality and protect it against conflicts of interest. Thus, BBC World News will no longer commission or acquire programmes sponsored by non-commercial organisations and will not commission or acquire programmes at a nominal cost from independent production companies. Instead, all programmes will be commissioned or acquired on a transparent commercial basis. Sponsored programmes will only be commissioned in areas other than news and current affairs genres. A list of approved production companies will be drawn up and due diligence and approval processes strengthened.

• 'BBC to tighten rules on commercial sponsorship following serious breaches of its guidelines on commercial channel World News', BBC Trust News Release 15 November 2011
http://merlin.obs.coe.int/redirect.php?id=15516 EN

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IT-Italy

AGCOM's Rules on Short News Reports Annulled

On 13 July 2011 the Second Chamber of the Latium Regional Administrative Tribunal handed down its judgment on the complaint filed by the broadcaster Sky Italia seeking the annulment of AGCOM Decision 667/10/CONS. That judgment provides valuable insights as to the consistency between the Audiovisual Media Services Directive and the Italian regulatory framework on short news reports.

The Italian Communications Authority adopted Decision 667/10/CONS laying down a regulation on short news reports on 17 December 2010 (see IRIS 2011-8/32). The legal basis for that regulation is Article 32-quater of the Consolidated Law on Radio and Audiovisual Media Services (Legislative Decree no. 177/2005, as amended in 2010; see IRIS 2010-2/25 and IRIS 2010-4/31). That provision, in turn, was designed to implement the rules on short news reports set forth in Article 15 of the Audiovisual Media Services Directive.

The complaint brought by the Italian broadcaster Sky Italia on 8 March 2011 was based on three pleas in law, which will be examined seriatim.

First, the broadcaster argued that, as the AVMSD rules on short news reports only concern cross-border situations, it was unwarranted for the impugned decision to grant access to high interest events transmitted on an exclusive basis to broadcasters established both in Italy and in other member states. The Regional Administrative Court dismissed this plea, holding that it was apparent from the wording and the spirit of Article 15 AVMSD that the rules on short news reports applied both to internal and to cross-border situations, as otherwise the fundamental freedom to receive information would have been undermined.

Second, the broadcaster claimed that Decision 667/10/CONS was at odds with the AVMSD insofar as the Decision provided that short extracts could not be used in "information programmes having an entertainment purpose", whilst the AVMSD allowed their use in all "general news programmes" without distinction. The Regional Administrative Court rejected this contention and found that Italian Communications Authority acted within its implementation powers in specifying that entertainment programmes that included information content or information windows were not akin to the "general news programmes" referred to in Article 15 AVMSD.

Third, Sky Italia submitted that Decision 667/10/CONS was at variance with the AVMSD because the Decision provided that short news reports could not exceed three minutes for each event, whereas Recital no. 55 of the Directive set the maximum duration of those reports to 90 seconds.

The Italian Communications Authority countered that it had acted under Article 15, paragraph 6 of the Directive, which enables member states to derogate from the rules set out in the Directive. The Authority also averred that the provision of a longer maximum duration for short news report was designed to ensure

consistency with the rules governing reports of sport events set out in Legislative Decree no. 9 of 2008.

The Latium Administrative Court acknowledged that Article 15, paragraph 6 of the Directive can be relied upon by member states to lay down more detailed or stricter provisions, but added that doing so alters the balance struck at the EU level between the concerns of the holders of exclusive broadcasting rights and the other interests at stake. The Court thus ruled that, absent a clear indication by the Italian legislature, the Italian Communications Authority had no authority autonomously to set the maximum duration of short news reports. That determination, moreover, could not be justified by reference to the sector-specific rules on sport events.

The Latium Regional Administrative Court, therefore, resolved to annul the provision of Decision 667/10/CONS setting the maximum duration of short news reports at three minutes. The Court, instead, dismissed all other pleas, thus finding that the Italian rules on short news reports can apply both to internal and cross-border situations and can exclude information programmes with an entertainment purpose from the category of programmes in which short excerpts can be used.

• Tribunale Amministrativo Regionale per il Lazio (Seconda Sezione), sentenza n. 7844 del 13 Luglio 2011, depositata il 10 Ottobre 2011 (Latium Regional Administrative Court (Second Chamber), Judgment no. 7844 of 13 July 2011, published on 10 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15518 IT

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Transposition of Directives on the Common Regulatory Framework for Electronic Networks and Services now Complete

Under Luxembourg law, the transposition of the European legislative framework for electronic networks and services was initially provided for by the 2005 "Telecom Package", which comprised four separate acts. The amendments arising from Directives 2009/136/EC and 2009/140/EC have made it necessary to adopt a number of acts amending the initial "package" and to replace several of its component parts. The latest change was made recently by the Act of 28 July 2011 (see also: IRIS 2012-2/33). The other alterations to be made were in fact adopted before the deadline for incorporation into national legislation in May 2011.

The first amending act dates back to 2010 (Act of 26 July 2010 amending the 2005 Act on 1): organisation of the national independent regulatory authority (Institut Luxembourgeois de Régulation - ILR); 2) amendment to the amended Act of 22 June 1963 laying down the scheme for civil servants' salaries) and basically reorganises the ILR. The independence of the national regulatory authorities, as provided for in Article 3 of amended Directive 2002/21/EC, will henceforth be guaranteed under Luxembourg law by special protection granted to their heads.

The transposition of the Directives was completed by the adoption of two Acts on 27 February 2011, one amending the Act of 30 May 2005 on organisation of the management of radio waves ("Act 2011/1"), and one on electronic communication networks and services ("Act 2011/2").

With a view to adapting the law to the requirements of Directive 2009/140/EC, Act 2011/1 proposes dropping the general ban on the transfer of licences (point 1 of Article 2 of Act 2011/1). Similarly, the new Article 7 (1) a) of the 2005 Act amended by Act 2011/1 adds to the obligations that may be associated with the licences that of supplying a service or using a type of technology for which the rights to use the frequency has been granted, including demands in terms of coverage and quality.

Regarding Act 2011/2, complaints had been made that Luxembourg had not transposed Article 11 (2) of Directive 2002/21/EC, which prescribes an effective structural separation in the management of the networks and the authorities issuing the official permits. Since the 2005 Act did not make any provision for such a structural separation, it has been replaced by Act 2011/2, which henceforth provides for this in its Article 38(5). The other major change made is the extension of the definitions of access to the local loop (Article 2 of Act 2011/2). This extension is important because it covers every aspect of requirements for deploying fixed and radio networks. The earlier arrangements were scarcely suited to the deployment of new infrastructures and hence to inter-network competition. Similarly, Article 45 of Act 2011/2 introduces the principle of the security and integrity of networks and services, signifying the adoption of adequate measures for managing the risk in terms of security and to guarantee the integrity and the continuity of the services provided. Lastly, Article 34 of Act 2011/2 transposes Article 13bis of Directive 2002/19/EC on the functional separation of operators' networks and service activities.

These changes, more particularly the replacement of the 2005 Act on electronic communications networks and services by a new updated Act (Act 2011/2) that incorporates a large part of the 2005 Act, constitute the final stage in a total, faithful transposition of the Directives, apart from issues involving the protection of data and privacy that were only transposed by an Act adopted in July 2011.

• Law of 26 July 2010 amending the Law of 2005 on 1) the organisation of the Luxembourg Institute of Regulation; 2) concerning amendment of the amended Law of 22 June 1963 laying down the system on salaries of State employees, gazetted in Mémorial A, no. 132, of 12 August 2010 (p. 2184) FR

• Law of 27 February 2011 on electronic communications services and networks, gazetted in Mémorial A, no. 43 of 8 March 2011 (p. 610) FR

• Law of 27 February 2011 amending the Law of 30 May 2005 on the organisation of the management of radio waves, gazetted in Mémorial A, no. 43 of 8 March 2011 (p. 630) FR

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Transposition of Directive 2009/136/EC on Electronic Communications Completed

In the Grand Duchy of Luxembourg, the important changes in the framework of European legislation on electronic services and communications contained in Directive 2009/136/EC ("the Directive") and Directive 2009/140/EC have been transposed into national legislation by an amount of legislation; some of it is new, and some amends previous legislation (see also IRIS 2012-1/32). Most of these changes were promulgated between June 2010 and February 2011. When the deadline for transposition (25 May 2011) was reached, the European Commission initiated proceedings against twenty member States, including Luxembourg, for failing to transpose the Directive fully into their national legislation.

To avoid any further Commission proceedings, the Chamber of Deputies has adopted the final amending legislation (Law of 28 July 2011 amending 1) the amended Law of 30 May 2005 on the protection of privacy in the electronic communications sector; 2) the amended Law of 2 August 2002 on the processing of personal data in the electronic communications sector; 3) the amended Law of 22 June 1963 laying down the system for the salaries of State employees; 4) the Consumer Code), which came into force on 1 September 2011 ("the Law").

By focusing on the rules on protecting the individual and the processing of personal data in the electronic communications sector, this now completes the transposition of the Directive into national law. The Law amends previous legislation on data protection, both in general and with specific reference to the communications sector.

The main innovation of the Law is that it creates an obligation to report immediately any violations of security and confidentiality in respect of personal data to the national Commission for Data Protection (*Commission Nationale pour la Protection des Données*) (Article 3 of the Law). If an incident is likely to have an unfavourable effect on subscribers in terms of the protection of their privacy and personal data, they must also be notified. The Law also reinforces the protection of transparency and the fair use of Internet cookies by making it possible for the user to either accept or refuse them (Article 4 (3) (e) of the Law). Lastly, the Law amends the Law of 30 May 2005 to enable the police and emergency call centres to gain access to caller identification and localisation data.

As a faithful transposition of Directive 2009/136/EC, the changes keep very close to the elements and terms it contains.

• Law of 28 July 2011 amending 1) the amended Law of 30 May 2005 concerning the protection of privacy in the electronic communications sector; 2) the amended law of 2 August 2002 with regard to the processing of personal data in the electronic communications sector; 3) the amended law of 22 June 1963 laying down the system on salaries for state employees; 4) the Consumer Code, gazetted in Mémorial A, no. 172 of 10 August 2011 (p. 2938) FR

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NO-Norway

Mandatory Subtitling of Films for the Benefit of the Deaf and Hard of Hearing

On 18 November 2011 the Royal Norwegian Ministry for Culture announced that, as of 1 January 2012, all Norwegian feature films (i.e., films screened publicly in cinemas) that have received public funding will be required to be screened with subtitles. The requirement applies to films in ordinary commercial distribution. An exemption is made for special screenings, festival screenings and other similar events. The legal basis for the measure will be amendments to Articles 2-1, 2-2, 2-3, 2-5 and 2-6 of the 2009 Regulations on Support for Audiovisual Productions. The final wording of these amendments has not yet been published.

According to Minister for Culture Ms. Anniken Huitfeldt, the measure is intended to "make films accessible to a greater audience and to contribute to making society more inclusive and accessible for all members of the population". Social inclusion has been one of the pillars of the Norwegian government's cultural policy since the adoption by Parliament of a White Paper on cultural policy in 2003.

The subtitling of films has been demanded by the Norwegian Association of the Deaf and by the National Association of the Hard of Hearing for a number of years and a voluntary system of subtitling has been operated by local distributors and the cinema owner's organisation Film & Kino. The introduction of mandatory subtitling is seen as a result of the voluntary system's not producing the desired effects, but the current measure has also been advanced by the lower

cost of subtitling, following the full digitalisation of Norwegian cinemas (see IRIS 2009-9/25), which was completed during the summer of 2011.

• *Pressemelding, 18.11.2011 Nr.: 105/11 Alle norske kinofilmer skal tekstes for hørselshemmede* (Ministry for Culture's press release, 18 November 2011)
http://merlin.obs.coe.int/redirect.php?id=15550 NO

• FOR 2009-09-07 nr 1168: Forskrift om tilskudd til audiovisuelle produksjoner (Regulations on Support for Audiovisual Productions no. 1168 of 7 September 2009 (consolidated version))
http://merlin.obs.coe.int/redirect.php?id=15551 NO

Nils Klevjer Aas
Norwegian Film Institute

Consumer Ombudsman Renews Call for Ban on Advertising in Cinema Screenings to Children

Following a case of advertising give-aways distributed to cinema audiences at the national release of a children's film, the Norwegian Consumer Ombudsman has, in interviews with the media, renewed her call for a ban on advertising in connection with film screenings to young audiences.

At the national release (99 screens on 28 August 2011) of Coming Home (Til siste hinder), a girls-and-horses epic classified as "suitable for all ages" by the Norwegian Media Authority, the publishers of a magazine/member's club targeting "horse-loving girls" had bags of advertising matter placed in the cinema seats. The bags contained a sample copy of the magazine, a book with pictures of horses, a small wristwatch, a horse poster and an invitation to take part in a lottery for a (live) horse.

"Advertising delivered directly to your cinema seat, and not limited to the screen, becomes rather invasive 04046 One should be particularly cautious of competitions in advertising directed at small children", commented Consumer Ombudsman Gry Nergård to national broadcaster NRK. "[And] a horse is hardly suitable as the prize in a raffle", she added, promising to use her powers under the Marketing Control Act to intervene with the advertising agency that organised the distribution of the advertising items.

In connection with a 2005 review of the Cinema and Video Act, the Consumer Ombudsman argued for a full ban of advertising in connection with cinema screenings to children under the age of seven or to families with young children. The proposal was not taken up when the Act was amended in 2010.

• *Forbrukerombudet vil forby barnereklame på kino* (News item from NRK)
http://merlin.obs.coe.int/redirect.php?id=15519 NO

• *Forslag til endring i film- og videogramloven, 10.08.2005* (Consumer Ombudsman's contribution to 2005 public consultation on amendments to Cinema and Video Act)
http://merlin.obs.coe.int/redirect.php?id=15520 NO

Nils Klevjer Aas
Norwegian Film Institute

PL-Poland

Adoption of the Act Amending the Act on Access to Public Information

On 16 September 2011 the Polish Parliament adopted the Act Amending the Act on Access to Public Information and some other Acts.

The Act provides amendments that are necessary to transpose Directive 2003/98/EC on the re-use of public sector information (see IRIS 2004-1/104). The Act introduces a new right, the right to re-use information of the public sector. Due to this it is possible to use public information or parts of this, regardless of the form in which it was fixed (inter alia paper, electronic, sound, visual or audio-visual form) for both commercial and non-commercial purposes, other than the original aim for which the information was produced. As a general rule, subject to a few exceptions established in the Act, such re-use of public sector information can be made free-of-charge and without restriction.

The Act also provides additional provisions regarding access to information that were proposed by the Senate and introduced at a late stage of parliamentary business. These raised the concerns of journalists and non-governmental organisations advocating freedom of speech. The additional provisions in question restrict the right to public information for the protection of important State economic interests in the field and in time, as providing information that it:

1) would weaken the bargaining ability of the State Treasury in the management of its property or the negotiating power of the Republic of Poland regarding an international agreement or decision-making by the European Council or the Council of the European Union;

2) significantly undermine the protection of property interests of the Republic of Poland or the State Treasury or in proceedings before a court, tribunal or any other adjudicating authority (see Art. 1 para. 1a of the Act on the Access to Public Information).

The President of the Republic of Poland signed the Act but expressed his concern on the proceedings with regard to the aforementioned Senate amendment. The

President declared that, within the post control procedure, he would send a motion to the Constitutional Tribunal to examine the observance of the procedure required by law to promulgate the Act (regarding the Senate's amendment).

Moreover, on 25 October 2011 the National Broadcasting Council of Poland (NBC) adopted a position in regard to the adoption of the Act Amending the Act on Access to Public Information and some other Acts. The NBC expressed concerns that the Act - in regard to the newly introduced restrictions to access to information - uses the broad notion "important State economic interest". This notion is imprecise, and gives too much discretion to the institution obliged to give access to public information. Such a possibility may constitute a threat to freedom of speech and the right to information.

Most parts of the Act Amending the Act on Access to Public Information and some other Acts (including the aforementioned provisions) will enter into force on 29 December 2011, the remaining parts will enter into force on 29 September 2012.

- Ustawa z dnia 16 września 2011 r. o zmianie ustawy o dostępie do informacji publicznej oraz niektórych innych ustaw (Dz. U.11.204.1195) (Act of 16 September 2011 amending the Act on Access to Public Information and some other Acts, Official Journal 11.204.1195)
http://merlin.obs.coe.int/redirect.php?id=15583 PL
- Prezydent nt. ustawy o dostępie do informacji publicznej (Press Release of the President of the Republic of Poland, 27 September 2011)
http://merlin.obs.coe.int/redirect.php?id=15527 PL
- Stanowisko Krajowej Rady Radiofonii i Telewizji z dnia 25 października 2011 roku w związku z przyjęciem ustawy z dnia 16 września 2011 roku o zmianie ustawy o dostępie do informacji publicznej oraz niektórych innych ustaw (Position of the National Broadcasting Council of Poland of 25 October 2011 regarding the adoption of The Act Amending the Act on Access to Public Information and some other Acts)
http://merlin.obs.coe.int/redirect.php?id=15528 PL

Małgorzata Pęk
National Broadcasting Council of Poland

PT-Portugal

Portuguese Government Orders a Report on the Definition of the Concept of Public Service Broadcasting

On 14 November 2011, the report of the Working Group for the definition of the concept of public service broadcasting was delivered to the Deputy and Parliamentary Affairs Minister, Miguel Relvas. In accordance with the programme of the XIX Portuguese Constitutional Government, the formation of this Working Group is authorised under the political commitment to pay attention to changes introduced by technology, as well as from the understanding that it is indispensible to define and rethink the concept of public service covering the three areas still under State supervision: radio, television (RTP) and the news agency Lusa (points 1 and 5 of Decree no 10254/2011).

The Group was comprised of ten persons of different backgrounds, but all related to the field of media. It was formed in August 2011 in accordance with a communication issued by the Deputy and Parliamentary Affairs Minister (Despacho nº10254/2011) and published in the Official Journal (Diário da República, 2ª série, nº157, de 17 de Agosto). After several consultations with media broadcasters, the Group's conclusions were condensed in a written report published within 60 days of the date of its formation.

The major guidelines drawn up by the Working Group focus on the importance of public service media, as assured by the State and define "public service" as the act of "fulfilling tasks for the common good of a population" (topic number 8 of the report). Moreover, future concerns are also raised, justified by the affirmation that in past times the Portuguese in informative programmes broadcast by State operators involved "known illegal or ethically reprehensible interferences by political powers" (number 54). Among the recommendations issued are: shortening and condensing news programmes in public service broadcasters; dissolving the informative thematic operator RTP Informação (since cable broadcasters guarantee pluralism in informative programmes - number 63), as well as the broadcasters of the Portuguese Autonomous Regions RTP Açores and RTP Madeira; placing the strategic orientation of the broadcaster RTP Internacional under the Foreign Affairs Ministry (number 108); ending the contract between the State and the news agency Lusa, thus passing it on to private shareholders (number 27); and abolishing the State media regulator *Entidade Reguladora para a Comunicação Social* (number 28).

- Nota informativa do Gabinete do Ministro Adjunto e dos Assuntos Parlamentares (Informative note issued by the office of the Deputy and Parliamentary Affairs Minister)
http://merlin.obs.coe.int/redirect.php?id=15546 PT
- Relatório do Grupo de Trabalho para a definição do conceito de serviço público de comunicação social (Report of the Working Group for the definition of the concept of public service in the media)
http://merlin.obs.coe.int/redirect.php?id=15547 PT
- Constituição do Grupo de Trabalho para a definição do conceito de serviço público de comunicação social pelo Despacho nº10254/2011 do Ministro Adjunto e dos Assuntos Parlamentares, publicado no Diário da República, 2ª série, nº157, de 17 de Agosto (Official communication no. 10254/2011 issued by the Deputy and Parliamentary Affairs Minister, published in the official Portuguese journal, 2nd. Serie, no.157, of 17 of August 2011)
http://merlin.obs.coe.int/redirect.php?id=15585 PT

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RO-Romania

CNA-Sanctions for the Huidu-Case

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) issued on 3 November 2011 public warnings to five Romanian commercial television stations (Antena 1, Antena 3, B1 TV, Realitatea TV and OTV) due to the way they covered a car accident caused on 16 October 2011 by the Romanian TV-star Şerban Huidu. The CNA monitored twelve TV stations on this matter.

The CNA considered that the accident was covered excessively and that the stations breached legal provisions on dignity, the right to one's own image and the observance of privacy in a difficult moment of a person's life. Several articles (30, 33 (2), 40 (3), 41 (1) and 45 (1), (2)) 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; see IRIS 2010-8/42, IRIS 2010-10/38, and IRIS 2011-1/44) were infringed.

Art. 30 provides that audiovisual media service providers are obliged to observe fundamental human rights and liberties, private life, honour and reputation, as well as the right to one's own image. According to Art. 33 (2) information on the address or telephone number of a person or his/her family may not be disclosed without permission; the use of personal data is only allowed under special law. Art. 40 (3) states that moderators of shows are prohibited from using or allowing their guests to use insulting language or to instigate violence. Art. 41 (1) rules that audiovisual media service providers shall not broadcast a) images of victims without their permission; b) images of a deceased person without the family's permission; c) images that exploit or highlight the trauma or wounds of a person. Art. 45 (1) says that every person has the right to the observance of his/her privacy in difficult moments, such as a bereavement or misfortune, and Art. 45 (2) rules that in case of human suffering, natural disasters, accidents or acts of violence media service providers are obliged to observe the dignity of persons in such situations.

The Council requested on 18 October 2011 that the TV stations should stop exploiting the psychological trauma of several persons and interfering in their private lives in news and debate programmes. On the other hand, 70% of the respondents to a nationwide relevant study issued one week after the accident considered the TV stations acted wrongly by their massive coverage of the case. The study was conducted by IRES (Institutul Român pentru Evaluare şi Strategie - Romanian Institute for Evaluation and Strategy).

The accident, which occurred 150 kilometres north of Bucharest in a popular mountain tourist destination, resulted in the death of three persons and had a huge impact in mass-media and society. In 2010 Huidu was in the centre of public attention when he came very close to death due to a severe skiing accident in Austria. Huidu became famous because of the long-lasting blockbuster TV satirical show Cârcotaşii (The Grumpies) broadcast by Prima TV.

• Extras din procesul verbal al şedinţei de joi, 3 noiembrie 2011 (Excerpt form the minutes of the meeting of 3 November 2011)
http://merlin.obs.coe.int/redirect.php?id=15530 RO

• Decizia nr. 623 din 03.11.2011 privind somarea a S.C. ANTENA TV GROUP S.A. pentru postul de televiziune ANTENA 1 (Decision no. 623 of 3 November 2011 with regard to S.C. ANTENA TV GROUP S.A.)
http://merlin.obs.coe.int/redirect.php?id=15531 RO

• Decizia nr. 624 din 03.11.2011 privind somarea S.C. ANTENA 3 S.A. pentru postul de televiziune ANTENA 3-NEWS & CURRENT AFFAIRS (Decision no. 624 of 3 November 2011 with regard to S.C. ANTENA 3 S.A.)
http://merlin.obs.coe.int/redirect.php?id=15532 RO

• Decizia nr. 632 din 03.11.2011 privind somarea S.C. B1 TV CHANNEL S.R.L. pentru postul B1 TV (Decision no. 632 of 3 November 2011 with regard to S.C. B1 TV CHANNEL S.R.L.)
http://merlin.obs.coe.int/redirect.php?id=15533 RO

• Decizia nr. 633 din 03.11.2011 privind somarea S.C. OCRAM TELEVIZIUNE S.R.L. pentru postul de televiziune OTV (Decision no. 633 of 3 November 2011 with regard to S.C. OCRAM TELEVIZIUNE S.R.L.)
http://merlin.obs.coe.int/redirect.php?id=15534 RO

• Decizia nr. 634 din 03.11.2011 privind somarea S.C. REALITATEA MEDIA S.A. pentru postul de televiziune REALITATEA TV (Decision no. 634 of 3 November 2011 with regard to S.C. REALITATEA MEDIA S.A.)
http://merlin.obs.coe.int/redirect.php?id=15535 RO

Eugen Cojocariu
Radio Romania International

CNA-Sanctions for the Realitatea TV-Case

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) issued on 25 October 2011 several sanctions (fines and public warnings) on the main actors of the commercial news station Realitatea TV case.

One of the main Romanian television news stations, Realitatea TV, was during the last few months at the centre of a big scandal, due to the fight about the taking over of the TV station by the new owner of the network (Elan Schwartzenberg) from Sebastian Ghiţă who had a management contract concerning the station, signed with its former owner, the Romanian tycoon Sorin Ovidiu Vântu. Ghiţă, who entered in a sharp conflict with Vântu last year (a conflict which has triggered an arrest warrant against Vântu for allegations of death threats) refused to step down after the change of the main shareholder.

After months of scandals, mutual accusations and attempts by Schwartzenberg and Ghiţă to obtain a court decision and to impose their will, on 23 October 2011 at 6.00 p.m., the team of the new owner took over

the broadcast using the same satellite frequency, cut the programmes of the station aired from the usual Bucharest studio and started its own programmes, under the same brand Realitatea TV from a new studio in Bucharest. The most important stars of Realitatea TV joined the new team of Mr. Schwartzenberg. Shortly afterwards, the team of Mr. Ghiţă started its own programmes, from the usual Bucharest studios under the name RTV, a company based in south-western Romania, licensed for regional television programmes.

The CNA decided on 25 October to fine the company of Mr. Ghiţă in the amount of Lei 20,000 (EUR 4,580) due to breaches of Art. 54 (1), (2) and 58 (1) of the Audiovisual Law no. 504/2002 because the company had changed the structure of the authorised programmes (national instead of regional, as determined by the license of Ghiţă's television, RTV; Art. 54) and broadcast a television service without having an audiovisual license (Art. 58).

On the other hand, the CNA decided on 25 October to fine the company of Mr. Schwartzenberg in the amount of RON 10,000 (EUR 2,290) due to infringements of Art. 58 (1) of the Audiovisual Law. Further the Council decided to reauthorize Realitatea TV to broadcast from the new studios.

In the meantime, on 1 November 2011, the CNA authorised Ghiţă's television studio, along with the change of RTV's programme structure and format, from a general to a theme channel (news and information).

RTV's programmes were rebroadcast since the beginning by several rebroadcasting service providers, such as UPC and Romtelecom, which received on 25 October public warnings for transmitting the new RTV without permit of the CNA, which was a breach of Art. 74 of Law 504/2002.

- Extras din procesul verbal al şedinţei de marţi, 25 octombrie 2011 (Excerpt of the minutes of the meeting of 25 October 2011)
http://merlin.obs.coe.int/redirect.php?id=15536 RO
- Extras din procesul verbal al şedinţei de marţi, 1 noiembrie 2011 (Excerpt of the minutes of the meeting of 1 November 2011)
http://merlin.obs.coe.int/redirect.php?id=15537 RO
- Decizia nr. 610 din 25.10.2011 privind amendarea cu 20.000 lei a S.C. RIDZONE COMPUTERS S.R.L pentru postul RTV (Decision no. 610 of 25 October 2011 with regard to the Lei 20,000 fine issued to S.C. RIDZONE COMPUTERS S.R.L for the TV station RTV)
http://merlin.obs.coe.int/redirect.php?id=15538 RO
- Decizia nr. 611 din 25.10.2011 privind amendarea cu 10.000 lei a S.C. REALITATEA MEDIA S.A. pentru postul RTV (Decision no. 611 of 25 October 2011 with regard to the Lei 10,000 fine issued to S.C. RIDZONE COMPUTERS S.R.L for the TV station REALITATEA TV)
http://merlin.obs.coe.int/redirect.php?id=15539 RO
- Decizia nr. 612 din 25.10.2011 privind somarea S.C. ROMTELECOM S.A. (Decision no. 612 of 25 October 2011 with regard to the public warning of S.C. ROMTELECOM S.A.)
http://merlin.obs.coe.int/redirect.php?id=15540 RO
- Decizia nr. 613 din 25.10.2011 privind somarea S.C. UPC ROMÂNIA S.R.L. (Decision no. 613 of 25 October 2011 with regard to the public warning of S.C. UPC ROMÂNIA S.R.L.)
http://merlin.obs.coe.int/redirect.php?id=15541 RO

Eugen Cojocariu
Radio Romania International

Psychoactive Substances and Website Blocking

On 7 November 2011 Act no. 194/2011 on fighting activities with substances capable of having psychoactive effects, other than those stipulated in the regulations in force, was promulgated by the President of Romania and published in the Official Journal of Romania no. 796 of 10 November 2011 (Part I).

The Act implements Directive 98/34/EC and establishes the legal framework applicable to products, other than those determined by existing legislation, capable of having psychoactive effects, by imposing measures to prevent, control and fight the consumption of such products. The maximum penalty for infringements of the Act is up to 20 years imprisonment if a person loses his/her life due to illegal operations concerning the above mentioned products.

According to the law, if there is a risk of using such products, or one can reasonably assume that there is such a risk and the respective activities are conducted by electronic means, the Ministry of Communications and Information Society requests the electronic communications service providers to block access to the content of the concerned website within twelve hours. The Ministry can be referred to by the Ministry of Health, the National Consumers Protection Authority or the National Sanitary Veterinary and Food Safety Authority. Infringements of the obligation to block access as requested are a contravention and can incur fines of RON 50,000-100,000 (EUR 11,460-22,930).

Five Romanian NGOs dealing with human rights and freedom of expression expressed their concerns in September 2011 with regard to the website blocking measures proposed in Act 194/2011. The NGOs have sent a position document to the *Biroul Permanent al Camerei Deputaţilor* (Permanent Office of the Assembly of Deputies), the lower chamber of the Romanian Parliament, criticising the measures proposed. The NGOs consider that website blocking without a judicial decision is a measure of censorship of online media content, raising serious concerns with regard to the observance of human rights and, in particular, of freedom of expression. They warn that the EU explicitly included in the Electronic Communications Directive 2002/21/EC the obligation for member states to take measures in order not to block or abusively restrict access to the Internet (see IRIS 2011-6/28). The critical opinions came in the context of other similar legislative measures proposed with regard to adult pornographic websites and the organising and operation of gambling.

• Legea nr. 194/2011 privind combaterea operaţiunilor cu produse susceptibile de a avea efecte psihoactive, altele decât cele prevăzute de acte normative în vigoare, *(M.Of. nr.796 din 10 noiembrie 2011)* (Act no. 194/2011 on fighting activities with substances capable of having psychoactive effects, other than those stipulated in the regulations in force, Official Journal no. 796 of 10 November 2011)
http://merlin.obs.coe.int/redirect.php?id=15529 RO

Eugen Cojocariu
Radio Romania International

SE-Sweden

Refund Offer in TV Commercial Was Misleading

On 6 October 2011 the Stockholm City Court delivered a judgment on unfair marketing practices relating to an offer presented in a TV commercial.

In 2010 Sova AB, a Swedish furniture company, had advertised its beds in TV commercials, which amongst others, included the written promotional message "All your money back if it rains on midsummer's eve". In connection with this message an asterisk was given referring to an additional text stating further conditions about the offer. This additional text appeared only for a few seconds and in very small text at the bottom of the screen.

The Consumer Ombudsman (KO) challenged the TV commercials claiming that Sova had not presented all material information about the offer in a sufficiently clear manner to consumers. Accordingly, the TV commercials were considered to be unfair by the KO.

Sova inter alia argued that all material information was provided in the TV commercials or at least was sufficiently connected to other provided information, such as the company's website.

The Court established that the Swedish Marketing Practices Act (MPA) provides that, as a general rule, each and every advertising unit must include all material information regarding an offer. However, some lenience may apply when there are limitations in time and space in the means of the communications used (such as on television).

However, the Court considered that, given the manner in which they were presented in the TV commercials, it was impossible for a consumer to notice the additional conditions. Accordingly, there was in effect no legally significant indication in the TV commercials that there were additional conditions surrounding the offer.

Consequently, the TV commercials were held to be contrary to the MPA. Sova was ordered to provide consumers with material information about the offer, subject to a conditional fine. However, the KO's request for a market disruption fee, which may be ordered in case of severe violations of the MPA, was denied.

• Stockholms tingsrätts dom den 6 oktober 2011 i mål nr T 9184-10 (Judgment of the Stockholm City Court of 6 October 2011 in Case No. T 9184-10) SV

Erik Ullberg and Michael Plogell
Wistrand Advokatbyrå, Gothenburg

SK-Slovakia

Amendments to the Radio and Television Act

On 21 October 2011 the Slovak Parliament passed an amendment to Act. No 532/2010 Coll. on Radio and Television of Slovakia. The amendment was signed by the President and will come into effect on 31 December 2011 except for the provisions that abolish the TV and radio licence fees and the income from State Contracts. These provisions will come into effect on 1 January 2013.

This amendment provides a new model for financing the Radio and Television of Slovakia (RTS), which was created just in January 2011 by the merging of the public service TV and radio broadcasters of Slovakia (see IRIS 2011-1/49).

Firstly, the amendment abolishes the TV and radio licence fees that until then every household with electricity and employers of at least three employees were obliged to pay. It also abolishes another form of revenue - the contracts between RTS and the State (that existed only from the end of 2009; see IRIS 2010-1/40).

Secondly, the amendment determines a new policy for financing RTS where the main income of RTS is an annual contribution from the State budget. This contribution is set to 0.142% of the GDP with a guaranteed minimum amount of EUR 90 Mio. per year. This is the minimum necessary for RTS to fulfil its remit. In order to calculate the annual contribution the GDP of the past two years shall be used. The amendment also sets out a framework for the actual usage of the State budget contribution. With respect to the Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01) contributions from the State budget may be used solely to cover the net costs of the public service mission. In accordance with this Communication the amendment also specifies the use of unspent sums from the annual State budget contributions.

As it was stated above, the provisions that change the funding system of RTS will enter into force in January 2013. This is due to the state of public funds

in Slovakia. The main RTS income for the year 2012 will therefore remain the TV and radio licence fees. However, the effectiveness of collecting these fees is gradually decreasing. That is why the amendment preserves for 2012 the daily limit for advertising at 1% of the daily transmission time (this may increase by up to 5% for teleshopping spots) as opposed to the initial intention to decrease RTS' daily advertising limit in 2012 to 0.5% (up to 2.5% with teleshopping spots).

The immediate reactions of RTS to the change of the funding system were limited to practical matters, mainly to the fact that TV and radio licence fees are still to be paid for the whole year of 2012 (execution of this obligation is still legally enforceable for 2012). RTS expressed its commitment to deliver to the public a clear message which will explain that TV and radio license fees are to be abolished from the beginning of 2013 but not sooner.

However, the General Director of RTS stated in an earlier press interview that on the one hand financing straight from State budget will be "more comfortable" since payments will be regular and guaranteed whereas income from TV and radio licence fees decreased for various reasons, but on the other hand "one who pays also makes decisions, governs, interferes and owns". The opinion that funding RTS from the State budget will lower its level of independence was also expressed by the (then) main political opposition.

On the other hand, the presenters of the amendment claim that the transparent, stable and predictable system of financing RTS by contributions from the State budget linked to the GDP will strengthen its economic as well as editorial independence, which will eventually lead to a higher level of performance of its public service mission.

• Amendment of 21 October 2011 to Act. No 532/2010 Coll. on Radio and Television of Slovakia SK

Juraj Polak
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US-United States

Network Neutrality Rules Remain Alive

On 10 November 2011, the United States Senate voted against a resolution disapproving the Federal Communications Commission's ("FCC") net neutrality rules (or Open Internet rules) adopted in December 2010. Regardless of the outcome, a United States Senate resolution is an expression of opinion, and is not binding on the FCC.

Net neutrality stands for the principle that consumers should be able to access the lawful Internet content of their choice without content-based discrimination. In December 2010, the FCC (the federal agency majorly responsible for overseeing and regulating the majority of telecommunications in the United States) adopted the highly controversial Open Internet rules for the purpose of preserving consumers' open access to lawful content on the Internet. Not surprisingly, the rules stirred up much commotion within the industry and split the United States Congress. The result: Senate Joint Resolution 6 ("S.J. Res. 6" or "Resolution")—a joint resolution sponsored by 43 Republican Senators disapproving the rules submitted by the FCC with respect to regulating the Internet and broadband industry practices.

On 3 November 2011, the Resolution was placed on the Senate calendar and the Resolution was scheduled for debate and vote on 10 November 2011. Unfortunately for Senate Republicans and others advocating disapproval of the FCC's net neutrality rules, the White House threatened to veto the Resolution, if passed, only days prior to the 10 November 2011 debate and vote.

Leading the debate for those in opposition of the Resolution, Senator Leahy (Democrat, Vermont) argued that the FCC's Open Internet rules allow "the online marketplace to evolve into the vibrant and competitive system..." and ensure "that the Internet remains the ultimate free market place of ideas, where better products or services succeed on their own merits and not based on special financial relationships with providers."

Leading the debate for those in support of the Resolution, Sen. Ayottee (Republican, New Hampshire) argued that the FCC engaged in regulatory overreach due to lack of legal authority to promulgate the Open Internet rules, that the FCC did not justify its rulemaking with a cost-benefit analysis, and that there are "consistent court rulings showing the lack of FCC legal authority to implement net neutrality04046"

Sen. Ayottee argued that the Open Internet rules are a "misguided attempt to regulate a dynamic industry into a static platform," that the rules will stifle innovation, and that the rules should only be implemented in the case of market failure—which Sen. Ayottee claims does not exist.

For a more in-depth discussion and analysis of net neutrality in the United States—including a discussion on whether the FCC had authority to promulgate its Open Internet rules—please see "Net Neutrality" in the United States of America - Who Can Stop the FCC, and Should They? by Michael Erzingher, Law Student, New York Law School, published in Why Discuss Network Neutrality?, IRIS plus 2011-5 (available for purchase at www.obs.coe.int).The article also includes an overview of the FCC's legal authority and role within the legal framework of the United States federal government. The lead article in IRIS plus 2011-5, Net

Neutrality and Audiovisual Services by Nico van Eijk of the Institute for Information Law (IViR), Faculty of Law at the University of Amsterdam, provides an in-depth and unique discussion on net neutrality in Europe.

• FCC Open Internet Order 2010
http://merlin.obs.coe.int/redirect.php?id=15584 EN

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DE-Germany

Media Reporting on Trial of Weather Presenter Continues to Occupy the Courts

On 15 November 2011, the *Oberlandesgericht Köln* (Cologne Court of Appeal - OLG) delivered three further judgments in connection with media reporting on the trial of a well-known weather presenter. In these decisions, the court considered the relationship of press freedom to the personality rights of the individual concerned.

The *Landgericht Köln* (Cologne District Court - LG) had previously decided in several instances, the last on 9 November 2011 (Ref. 28 O 225/11, see IRIS 2012-1/19), that photographs showing the presenter in the prison exercise yard could not be disseminated by the defendant in the way complained about. The OLG endorsed this view in appeal proceedings (Ref. 15 U 62/11) against a judgment of the *LG Köln* of 16 March 2011 (Ref. 28 O 505/10). In their reasoning, the judges relied on an injunction issued by the OLG (Ref. 15 U 105/10) in which the photographer acting on behalf of the defendant in the instant case was prohibited from disseminating the pictures he took or from exhibiting them in public. The plaintiff, the court said, had been in a situation in which he could not expect to be disturbed by the press. That applied all the more as the plaintiff had been in an area that was inaccessible to the public and was to be regarded as part of the private sphere and the pictures had been produced surreptitiously. At the same time, there was no factual connection between the photographs and an as yet unknown event of public relevance. Taking into consideration the Federal Constitutional Court's case law on the right to one's own image in the case of reporting on well-known personalities (the Caroline of Hanover case, see IRIS 2008-6/6), the judges regarded the question of whether there was a sufficient connection with a current affairs event or whether the photo reportage merely served to satisfy an interest in eye-catching stories as a key criterion when weighing up press freedom against general personality rights.

In another case (Ref. 15 U 60/11), the OLG had to rule on the legality of the publication of an email from the plaintiff to a former girlfriend. Here, too, the court held that there had been a breach of general personality rights both as a result of the publication of the email extracts themselves and the actual contents quoted. Firstly, the publication could not be justified from the point of view of reporting on mere suspicions since the statements in the email about the plaintiff's private conduct with women were likely to cast doubts on his "fundamental character structure", which would result in the public remembering him as having a "deficient character". Moreover, the statements in the article complained about hardly made any connection to the actual criminal charge. Secondly, there was no public interest in the email being reported on simply because the plaintiff was a prominent news personality before the trial, since he had hitherto always kept his private life out of public view and, in particular, had never expressed his opinion in public on how relationships between men and women should be conducted. Freedom of reporting therefore had to give way to the plaintiff's general personality rights.

However, the weather presenter lost in a third legal action (Ref. 15 U 61/11) concerning reporting on the finding of a knife that, according to the article in issue, allegedly had his DNA on it. The OLG regarded the way in which the facts were presented as being within the limits of permissible reporting on suspicions and accordingly set aside the lower court's judgment to the contrary, stating that the article met the requirements applying in that context with regard to maintaining a duty of care. In particular, it did not improperly report in a prejudicial manner but merely suggested that the knife found was the decisive piece of evidence that now provided the prosecution with sufficient grounds for an indictment and said nothing about the future course and outcome of any criminal proceedings subsequently brought.

• *Urteil des OLG Köln vom 15. November 2011 (Az. 62/11)* (Judgment of the *OLG Köln* of 15 November 2011 (Ref. 62/11))
http://merlin.obs.coe.int/redirect.php?id=16242 DE
• *Urteil des OLG Köln vom 15. November 2011 (Az. 60/11)* (Judgment of the *OLG Köln* of 15 November 2011 (Ref. 60/11))
http://merlin.obs.coe.int/redirect.php?id=16243 DE
• *Urteil des OLG Köln vom 15. November 2011 (Az. 61/11)* (Judgment of the *OLG Köln* of 15 November 2011 (Ref. 61/11))
http://merlin.obs.coe.int/redirect.php?id=16244 DE

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Porn star must accept his name being mentioned in newspaper reports

In a judgment of 25 October 2011 (Case VI ZR 332/09), the Bundesgerichtshof (Federal Court of Justice - BGH) ruled that an actor who takes part in porno-

graphic films in a way that enables him to be identified must accept his name being mentioned in a tabloid newspaper.

The plaintiff was a sculptor but starred a total of eight times in pornographic films, in which all of his body was shown, including his face. His face was also printed on the cover of the corresponding film material, although his real name was not mentioned. He clearly does not use condoms in the sex scenes.

At an event to present the German Film Awards, the plaintiff appeared in public for the first time together with his new life partner, who is also a well-known actress. The defendant newspaper publisher took the opportunity of the coverage on the film awards to write about the new partnership between the actress and the plaintiff. His name was mentioned in the article concerned and it was pointed out that he was a porn star who did not use condoms in the filming of sex scenes. The plaintiff considered that his general right to privacy had been violated and brought an action seeking a cease-and-desist order and damages.

The action succeeded in the lower courts but the BGH dismissed it, stating that in the necessary process of balancing the plaintiff's general right to privacy against the defendant's right to freedom of expression and the public interest in obtaining information the latter took precedence. Anyone who willingly made the protection of their own sexuality and the core area of their private life accessible to the public and in so doing affected the interests of the community, could not at the same time claim the protection of his or her intimate or private sphere from public gaze. By taking part in professionally and commercially made pornographic films in which he could be identified, the plaintiff had relinquished the protection of his privacy.

• *Das Urteil des Bundesgerichtshofs vom 25 Oktober 2011 (Az.: VI ZR 332/09)* (Judgment of the Federal Court of Justice of 25 October 2011 (Case VI ZR 332/09))
http://merlin.obs.coe.int/redirect.php?id=17784 DE

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Agenda

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