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EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2012-5

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European Court of Human Rights: Aksu v. Turkey (Grand Chamber)

For the facts of this case we refer to IRIS 2010-10/1 in which the Court's Chamber judgment of 27 July 2010 was reported. In essence Mr. Mustafa Aksu, who is of Roma/Gypsy origin, complained in Strasbourg that two publications financed or supported by the Ministry of Culture in Turkey, had offended him in his Roma identity, under Article 14 (the anti-discrimination provision) in conjunction with Article 8 (right to privacy). The action of Mr. Aksu was directed against a book entitled "The Gypsies of Turkey" and a dictionary entitled "Turkish Dictionary for Pupils", both containing insulting, denigrating or stereotyping statements about Roma. In its judgment of 27 July 2010 the European Court was not persuaded that the author of the book insulted Mr. Aksu's integrity or that the domestic authorities had failed to protect his rights. Regarding the dictionary, the Court observed that the definitions provided therein were prefaced with the comment that the terms were of a metaphorical nature. The European Court found no reason to depart from the domestic courts' findings that Mr. Aksu's integrity was not harmed and that he had not been subjected to discriminatory treatment because of the expressions described in the dictionary. The Court, with the smallest majority, concluded that it could not be said that Mr. Aksu was discriminated against on account of his ethnic identity as a Roma or that there was a failure on the part of the Turkish authorities to take the necessary measures to secure respect for Mr. Aksu' s private life (see also IRIS 2010-10/1).

The Grand Chamber has now confirmed that Mr. Aksu' s rights under the Convention have not been violated. The Grand Chamber decided not to examine the complaint under the anti-discrimination provision. According to the Court "the case does not concern a difference in treatment, and in particular ethnic discrimination, as the applicant has not succeeded in producing prima facie evidence that the impugned publications had a discriminatory intent or effect. The case is therefore not comparable to other applications previously lodged by members of the Roma community". The main issue in the present case is whether the impugned publications, which allegedly contained racial insults, constituted interference with Mr. Aksu' s right to respect for his private life and, if so, whether this interference was compatible with the said right. The Court therefore examined the case under Article 8 of the Convention only, clarifying that the notion of personal autonomy is an important principle and that it can embrace multiple aspects of the person's physical and social identity. The Court accepts that an individual's ethnic identity must be regarded as another such element and that in particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group. However, in applying the protection of privacy under Article 8 of the Convention, the Court emphasises that due regard should be given to the requirements of freedom of expression under Article 10 of the Convention.

With regard to the book the Court explains that the Turkish courts attached importance to the fact it had been written by an academic and that it was to be considered as an academic work. It is therefore consistent with the Court's case-law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings. The Court explains why it is satisfied that in balancing the conflicting fundamental rights under Articles 8 and 10 of the Convention, the Turkish courts made an assessment based on the principles resulting from the Court's well-established case law. Although no violation of Article 8 was found, the Court nonetheless reiterated that the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases. Therefore it is clear that in a dictionary aimed at pupils, more diligence is required when giving the definitions of expressions which are part of daily language but which might be construed as humiliating or insulting. In the Court's view, it would have been preferable to label such expressions as "pejorative" or "insulting", rather than merely stating that they were metaphorical. According to the Court, States should promote critical thinking among pupils and equip them with the necessary skills to become aware of and react to stereotypes or intolerant elements contained in the material they use. The Court also emphasises that the authorities and Government should pursue their efforts to combat negative stereotyping of the Roma. Finally the Court considers that the domestic authorities did not overstep their margin of appreciation and did not disregard their positive obligation to secure to Mr. Aksu effective respect for his private life. By 16 votes to one the Grand Chamber holds that there hasn't been a violation of Article 8 the Convention.

• Judgment by the European Court of Human Rights (Grand Chamber), case of Aksu v. Turkey, No. 4149/04 and 41029/04 of 15 March 2012
http://merlin.obs.coe.int/redirect.php?id=15764 EN

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European Court of Human Rights : Vejdeland and others v. Sweden

In a judgment of 9 February 2012 the European Court has ruled that Sweden did not violate the right to freedom of expression in a case about 'hate speech'. The criminal conviction of the applicants for distributing leaflets that contained anti-gay offensive statements was considered necessary in a democratic society in order to protect the rights of homosexuals. It is the first time that the Court applies the principles relating to freedom of expression and 'hate speech' in the context of sexual orientation.

In 2004 Mr Vejdeland, together with three other persons, went to an upper secondary school and distributed approximately a hundred leaflets by leaving them in or on the pupils' lockers. The episode ended when the school's principal intervened and made them leave the premises. The originator of the leaflets was an organisation called National Youth. Vejdeland and his companions were charged with agitation against a national or ethnic group (hets mot folkgrupp) because of the offensive and denigrating statements toward homosexuals. Vejdeland disputed that the text in the leaflets expressed hatred against homosexuals and he claimed that, in any event, he had not intended to express contempt for homosexuals as a group; the purpose had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools. Vejdeland and his companions were convicted by the District Court, but the Court of Appeal rejected the charges on the ground that a conviction would amount to a violation of their right to freedom of expression as guaranteed by the European Convention on Human Rights. The Swedish Supreme Court finally overruled this judgment and convicted Vejdeland and the others of agitation against a national or ethnic group. According to the Supreme Court the leaflets were formulated in a way that was offensive and disparaging for homosexuals as a group and in violation of the duty under Article 10 to avoid as far as possible statements that are unwarrantably offensive to others thus constituting an assault on their rights, and without contributing to any form of public debate which could help to further mutual understanding. The purpose of the relevant sections in the leaflets could have been achieved without statements that were offensive to homosexuals as a group. Vejdeland and his companions complained that the judgment of the Supreme Court constituted a violation of their freedom of expression as protected by Article 10 of the Convention.

The European Court accepted Vejdeland's argument that the leaflets had been distributed with the aim of starting a debate about the lack of objectivity of education in Swedish schools. But the Court also agrees with the Swedish Supreme Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. The Strasbourg Court observes that, according to the leaflets, homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society". The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" tried to play down paedophilia. In the Court's opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations. The Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Indeed, attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour". Furthermore, the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them. The European Court refers to the findings by the Supreme Court stressing that along with freedoms and rights people also have obligations and that one such obligation is, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights. The statements in the leaflets are considered unnecessarily offensive and the applicants had left the leaflets in or on the pupils' lockers, thereby imposing them on the pupils. The European Court also notes that the applicants were not sentenced to imprisonment, although the crime of which they were convicted carries a penalty of up to two years' imprisonment. Instead, three of them were given suspended sentences combined with fines ranging from approximately EUR 200 to EUR 2,000, and the fourth applicant was sentenced to probation. The Court does not find these penalties excessive in the circumstances. The conviction of Vejdeland and the other applicants and the sentences imposed on them were not considered disproportionate to the legitimate aim pursued and the reasons given by the Swedish Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants' exercise of their right to freedom of expression could therefore reasonably be regarded by the Swedish authorities as necessary in a democratic society for the protection of the reputation and rights of others. These considerations were sufficient to enable the Court to conclude that the application did not reveal a violation of Article 10 of the Convention. Although the Court unanimously came to this conclusion, the concurring opinions of five of the seven judges indicate that there was still some hesitation on the argumentation why there was no violation of Article 10 and why the distribution and content of the leaflets amounted to a form of 'hate speech' against homosexuals.

• Judgment by the European Court of Human Rights (Fifth Section), case of Vejdeland and others v. Sweden, No. 1813/07 of 9 February 2012
http://merlin.obs.coe.int/redirect.php?id=15765 EN

• Fact sheet produced by the European Court of Human Rights on Hate Speech, February 2012
http://merlin.obs.coe.int/redirect.php?id=15766 EN

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Committee of Ministers: Recommendation on Human Rights and Social Networking Services

On 4 April 2012, the Council of Europe's Committee of Ministers (CM) adopted Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services.

The CM notes in the Recommendation that social networking services (SNSs) are important for the effective exercise of human rights and fundamental freedoms because they can assist the wider public to receive and impart information. SNSs are of public service value because they offer possibilities for enhancing the potential for individuals' participation in political, social and cultural life and facilitate democracy and social cohesion. At the same time, the CM also acknowledges that other people's rights and freedoms must be respected, e.g. through the promotion of media literacy.

The CM calls on member states of the Council of Europe to take measures in line with the objectives set out in the Appendix to the Recommendation. The Appendix comprises three themes. It sets out, per theme, the respective context and challenges, before explaining what action should be taken by member states in each case.

Concerning the first theme, "Essential information and measures needed to help users deal with social networks", the CM emphasises the need to ensure that users' right to private life will be protected. To prevent harm to users and others, particularly vulnerable people, users should know whether the information they disclose is public or private and they have to be aware of the implications that follow from choosing to make information public. Member states should inter alia help users to understand their profiles' default settings and help them to make informed choices about their personal data.

Regarding the second theme, "Protection of children and young people against harmful content and behaviour", the CM acknowledges that content that is unsuitable for particular age groups will even be protected under Article 10, ECHR. In contrast, it recognises that although SNSs are important in minors' lives, minors nevertheless should be protected because of the vulnerability that their age implies. It is the role of parents, carers and educators to ensure that minors use SNSs in an appropriate manner. Member states should, since age verification systems are not suitable, take appropriate measures to ensure the safety of minors and protect their dignity while also guaranteeing procedural safeguards and upholding Article 10, ECHR.

In respect of the last theme, "Personal data and trust in social networks", the CM recognises that providers of SNSs, in order to protect Article 8, ECHR, must not process personal data beyond the legitimate and specified purposes for which it was collected. Moreover, they "should limit processing only to that data which is strictly necessary for the agreed purpose, and for as short a time as possible".

• Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services, 4 April 2012
http://merlin.obs.coe.int/redirect.php?id=15800 EN FR

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Committee of Ministers: Recommendation on the Protection of Human Rights and Search Engines

On 4 April 2012, the Committee of Ministers of the Council of Europe issued a recommendation to the member states on the protection of human rights with regard to search engines.

The recommendation acknowledges the importance of search engines in the online environment. It points to the ways in which the operation of search engines can threaten fundamental rights. It discusses the requirements following from the right to freedom of expression, the right to private life and the protection of personal data in the context of search engines. More specifically, it provides a number of recommendations to promote diversity, impartial treatment, transparency, an search engine literacy in the context of search results as well as the fair processing of and proper access to user data. These recommendations are stipulated in more detail in the appendix.

The recommendation, a draft of which was made available in 2011 for public consultation, starts with recognition of the "pivotal role" of search engines, which "enable a worldwide public to seek, receive and impart information and ideas and [04046] to acquire knowledge, engage in debate and participate in

democratic processes". On this basis, the recommendation "considers it essential that search engines be allowed to freely crawl and index the information that is openly available on the Web and intended for mass outreach."

After considerations about the protection of search engine providers, the recommendation discusses the possible threats for the protection of human rights and fundamental rights that could follow from the operation of search engines. The recommendation notes that such threats could result from "the design of algorithms, de-indexing and/or partial treatment or biased results, market concentration and lack of transparency about both the selection process and ranking of results". With regard to private life the recommendation addresses the impact of the processing of user data, such as search histories and user profiles, as well as the use of search engines to find personal data which have been published online.

The recommendation and the appendix indirectly touch upon a large amounts of ongoing issues in the legal and regulatory debate about the proper legal governance of search engines in Europe and in the member states. These issues include the application of copyright law to the crawling and indexing of content by search engines, their indirect liability for linking to illegal content, the feasibility of preventive measures such as filtering, the proper retention periods for search engine log data and their anonymisation, the fair treatment of information providers by ranking algorithms and the right to be forgotten.

• Recommendation CM/Rec(2012)3 of the Committee of Ministers to member states on the protection of human rights with regard to search engines
http://merlin.obs.coe.int/redirect.php?id=15802 EN FR

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EUROPEAN UNION

European Commission: Public Consultation on Future Film Support Rules

On 14 March 2012 the European Commission launched a public consultation on the state aid assessment criteria for member states' film support schemes in the future. The current criteria for the compatibility of national, regional and local film and audiovisual support schemes with EU state aid rules set out in the Commission's 2001 Cinema Communication (see IRIS 2001-9/10) are due to expire on 31 December 2012.

The public consultation invites stakeholders to comment on the Commission's draft Communication on State Aid for Films and Other Audiovisual Works. It is the next step in the review process of the state aid rules, which started in June 2011 with a first public consultation on the basis of an issues paper. The draft Communication results from the proposals made in the issues paper and the contributions received in the first round of public consultation. Its objective is to create a level playing field between member states and encourage cross-border productions, taking advantage of the internal market rules.

The draft Communication aims to ensure that European audiences are offered a more culturally diverse choice of audiovisual works. To that effect, the public consultation invites public authorities, organisations and citizens to provide input, before 14 June 2012, on the following issues:

- the extension of the scope of activities covered by the Communication to include all film aspects from story concept to delivery to the audience;

- the limitation of territorial spending obligations on film production;

- the control of competition between member states to use state aid to attract investment from major foreign productions; and

- a better circulation of and increasing access to European films for the benefit of both the European audiovisual industry and the citizens.

After reviewing the comments received, the Commission plans to adopt a revised Communication in the second half of 2012.

• Draft communication on state aid for film and other audiovisual works
http://merlin.obs.coe.int/redirect.php?id=15767 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV

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European Commission: France's Plan to Digitise its Film Heritage Approved

On 21 March 2012 the European Commission gave the green light for the national scheme to digitise France's film heritage (see IRIS 2011-7/23). The national centre for cinematography and animated images (*Centre National de la Cinéma et de l'image animée* - CNC) has been instructed to implement the action programme, which will have a EUR 400 million budget over six years. Short films and feature films produced up to 1999 will be eligible, along with historic silent films.

The European Commission carried out an investigation to determine the compatibility of the digitisation scheme with Community rules on state aid. Under Article 107(3)(d) of the Treaty on the Functioning of the European Union (TFEU), state aid aimed at promoting culture and preserving heritage may be granted under certain conditions. In the present instance, the digitisation scheme aims to preserve and restore works of major interest in terms of European cultural heritage. The aid mainly targets works with highly uncertain commercial prospects and will be adapted according to their money-making potential. Owners of digitised works will be encouraged to make them available to the public and will be free to choose the companies they wish to carry out the digitisation and any necessary restoration of the works. The investigation revealed that the digitisation plan "constitutes a suitable means of achieving the objective of promoting culture and that any distortion of competition will be limited". The scheme was therefore declared compatible with EU rules on state aid.

The project falls within the scope of the European Commission's cultural policy and should help to enhance the distribution of European films, interoperability and accessibility to the collections held by the European digital library *Europeana* (see IRIS 2012-1/4, IRIS 2011-4/6, IRIS 2011-3/5 and IRIS 2008-9/101). The scheme is also "aimed at making European film heritage available to the widest possible audience thanks to new technology".

• Press release of the European Commission, 21 March 2012
http://merlin.obs.coe.int/redirect.php?id=15779 DE EN FR

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NATIONAL

BE-Belgium

Flemish Commercial Broadcaster Allowed to Interrupt a Film for Advertising

On 31 December 2011 at 20:20h, the film "Ratatouille" was broadcast on VTM, a Flemish commercial broadcaster. This movie was interrupted three times for advertising breaks. *Vlaamse Regulator voor de Media* (Flemish Media Regulator - VRM) received a complaint. According to the plaintiff, this movie could not be interrupted by advertising because it is a children's programme (Article 80 (2) Mediadecreet (Flemish Broadcasting Act)). However, VRM judged that this Article was not violated.

The general rule about the interruption of programmes by advertising is that broadcasters can choose when they interrupt their television programmes for advertising, on the condition that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme, and the rights of the rightsholders, are not prejudiced (art. 80 (1)). However, children's programmes cannot be interrupted for advertising (Article 80 (2)).

According to the plaintiff, the film "Ratatouille" should be labelled as a children's programme. As a result, it was forbidden to interrupt this film for advertising blocks. However, VRM judged that "Ratatouille" should not be labelled as a children's programme. Article 2, 19°Flemish Broadcasting Act defines children's programme as "a programme that is mainly aimed at children, evidenced by the content, the time of the broadcast, the design, the presentation and the way it is announced". A child is defined as "a person under the age of twelve" (Art. 2, 18°). The VRM emphasised that not all programmes suitable for children would fall under the definition of children's programme. Only the programmes that primarily aim at children under the age of twelve years do fall under the scope of this definition. The content, time of broadcast and presentation of the film "Ratatouille" (criteria mentioned by the legislature) demonstrate that the film was aimed at a broad audience, including both children and adults. Different reviews of this film even indicate that it is a kid-friendly film, but that adults might like it more because of the nuanced humour and references aimed directly at adults. Additionally, the film was not aired at a time when VTM would normally broadcast children's programmes. As a result, VRM judged that the film "Ratatouille" cannot be classified as a children's programme and, thus, could be interrupted by advertising.

• P.V. t. VMMa, Beslissing 2012/006, 20 februari 2012 (P.V. v. VMMa, Decision 2012/006, 20 February 2012)
http://merlin.obs.coe.int/redirect.php?id=15763 NL

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BG-Bulgaria

Penalty on a Mobile Operator because of TV Gambling Game

On 21 February 2012 the Administrative Court in Sofia confirmed a penal provision issued on 12 May 2010 by the Chairperson of the State Commission on Gambling (SCG) which imposed an administrative penalty on Cosmo Bulgaria Mobile, joint-stock company Globul.

The penalty amounted to BGN 50,000 (EUR 25,564) for organising and conducting the gambling game Големият кеш ("The Big Cash") (during the period September-December 2009) without permission from the SCG. The Court accepted the game "The Big Cash" was gambling. The organising and conducting of that game without prior permission from the SCG are illegal.

The game was broadcast on the national private television channel "Nova TV". "The Big Cash" included a quiz in which the participants answered questions by sending text messages which cost BGN 1.20 (EUR 0.5). If they answered correctly at least one question, their name was included in a list for the daily prize of BGN 15,000 (EUR 7,669). In case of five correct answers the participant was included in the monthly lot for BGN 100,000 (EUR 51,129). With ten correct answers the participant took part in the lot of the grand prize of BGN 500,000 (EUR 255,645) which was drawn at the end of the game (26 December 2009). If they had the highest number of points during the week, they won BGN 30,000 (EUR 15,338). The drawing and the prize-giving ceremony were broadcast live by "Nova TV" in a commercial break of three minutes duration. The organiser paid money to the producers, the television station for the advertising and the presenter.

According to the general conditions of mobile operators, they have a right to send promotional messages to their subscribers, if they have given the subscribers the opportunity to refuse receiving that kind of messages. In the case of "The Big Cash" that condition has been satisfied. Anyone can halt the receipt of text messages on the game by sending a free SMS to the short number 500 with the text message "Stop".

During the investigation the inspectors from SCG found out that the total number of received text messages during the game is 14,644,498. The subscribers of the three mobile operators "VIVACOM", "M-tel" and "Globul" have paid totally BGN 17,573,397 (EUR 8,985,135) for sending these short messages.

The State budget has been adversely affected by unpaid amounts due for a tax on gambling activities under the Law on Corporate and Income Tax and State Fees which amount is BGN 1,326,485 (EUR 750,000).

- Decision of the Administrative Court in Sofia No. 919 of 21 February 2012 BG
- „42347647346547447041740 2 кеш " безспорно е хазартна игра (Information of the SCG)
http://merlin.obs.coe.int/redirect.php?id=15797 BG

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CH-Switzerland

Programme to Promote Diversity of Films on Offer and Digital Cinema

On 9 March 2012 the Swiss Ministry of Culture (*Office Fédéral de la Culture* - OFC) recently adopted a programme intended to promote the diversity of films on offer and the digitisation of cinema theatres in Switzerland. Cinema operators switching to digital in 2011 or 2012 and offering a diversified programme will thus be able to receive financial assistance over a five-year period. A maximum amount of CHF 9 million (EUR 7,491,883) has been earmarked for financing these measures during the period from 2011 to 2015. Support from the OFC may not exceed CHF 12 000 (EUR 9,989) per cinema per year, and no more than 50% of the cost of digitisation may be covered. If the supports approved are not sufficient, the OFC will give priority to operators who make the biggest contribution to diversifying the films they offer, given their geographical location. A maximum of six screens per cinema per locality may receive support. Cinema complexes with seven or more screens and companies with more than 25 screens will not receive support. The support granted by the OFC is based on Articles 2 and 49 of the order on promoting cinema (*Ordonnance sur l'encouragement du cinéma* - OECin) (see IRIS 2003-3/26 and IRIS 2006-8/13), under which a financial contribution may be paid to encourage the diversity of offer in cinemas.

The OFC assesses the diversity of programming in cinema theatres on the basis of the number of tickets sold for each film and each cinema. Cinemas scheduling a minimum number of Swiss, European and international films from the less important film-producing countries may also receive support: the threshold is fixed at 50% of tickets sold in large towns, 30% for medium-sized towns, and 20% for small localities. The granting of financial support is also dependent on selling a minimum number of tickets and providing a minimum number of showings of the films. The OFC also takes the geographical origin of the films into account, by applying weightings. The threshold of points for receiving maximum support from the OFC depends on the region where the screen is located. Contributions are reduced or cancelled if the number of showings does not reach the minimum threshold laid down. The level of diversity is recalculated each year on the basis of the films shown during the previous three years in the cinemas receiving support. If programming diversity falls below the required minimum for more than two years, the OFC may suspend or reduce its support, or even demand repayment of contributions already paid.

Lastly, it should be noted that operators whose cine-

mas went digital before 1 January 2011, or will not do so before 31 December 2012, may receive reduced financial assistance (CHF 5,000, EUR 4,162) if they meet the diversity criteria laid down by the OFC.

• Programme to promote the diversity of films on offer and the digital cinema DE FR IT

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DE-Germany

BGH Rules on Reasonable Share of Revenue from Film "Das Boot"

On 22 September 2011, the *Bundesgerichtshof* (Federal Supreme Court - BGH), in a decision not published until recently, ruled on a dispute over a claim for additional remuneration in accordance with Article 32a of the *Urheberrechtsgesetz* (Copyright Act - UrhG).

In the case concerned, the former chief cameraman of the 1981 film "Das Boot" had demanded an additional share of the revenue generated by the film - which had become a global success - from the producer, a video company and a public service broadcaster. He claimed that the payment he had received at the time was clearly disproportionate to the income received by the defendants from the film. In order to assert a possible claim to remuneration, the plaintiff had, in the first stage of his action, demanded information about the revenue generated from exploitation of the film. His action had been partly successful in the lower-instance courts. For example, the *Oberlandesgericht München* (Munich Appeals Court - OLG) had found a "noticeable disproportion" under Article 32a UrhG, but had ruled that the defendants' obligation to provide information only applied from 28 March 2002 onwards. The requirement of Article 32a UrhG had only been introduced as part of the 2001 copyright reforms and, according to Article 132(3) UrhG, only applied to "circumstances [...] that arose after 28 March 2002" (see IRIS 2010-9/20 and IRIS 2009-6/12). Both parties appealed against this decision.

In its ruling, the BGH stated firstly that the plaintiff, as chief cameraman, had helped to make the film and was therefore, in principle, entitled to information exclusively for his own use in the sense of the Act (Art. 32a UrhG, Art. 242 of the *Bürgerliches Gesetzbuch* (Civil Code)). However, the right to information applied only if there were "clear grounds" to support the claim that there had been a noticeable disproportion. Since the OLG had failed to find sufficient grounds to support this claim, its decision could not be upheld. The same applied to the decision to limit the right to information to the period from 28 March 2002. Although the meaning of the term "circumstances" in the transitional provision of Article 132(3) UrhG was unclear, the explanatory memorandum showed that it did not, in any case, limit the applicability of Article 32a UrhG to contracts concluded after that date; older contracts were also covered. "Circumstances" in this sense meant - in contrast to the OLG's view - exploitation. If the conditions set out in Article 32a UrhG were met, a reasonable share should only be based on "income and benefits from exploitation [...] that took place after 28 March 2002". When the noticeable disproportion arose was irrelevant. Whether such a disproportion existed should be verified, in principle, with reference to all income and benefits generated by those that had exploited the film.

The BGH referred the case back to the lower-instance court for a new hearing and decision.

• *Urteil des BGH vom 22. September 2011 (Az. I ZR 127/10)* (Decision of the BGH of 22 September 2011 (case no. I ZR 127/10))
http://merlin.obs.coe.int/redirect.php?id=15782 DE

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BVerwG Considers Police Officer Photography Ban Unlawful

On 28 March 2012, the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) held that a decision issued in 2008 banning two journalists from photographing on-duty police officers was unlawful.

Members of a special police task force (SEK) were accompanying a prisoner suspected of involvement in organised crime from his place of detention to a doctor's surgery when they were spotted and photographed by two journalists. The leader of the police operation ordered the journalists not to take photographs of the officers and threatened to confiscate the camera if they failed to comply. He claimed that the officers' personal wellbeing and future deployability would be jeopardised if they were identified in press photographs. The newspaper publisher concerned then asked a court to rule the photography ban unlawful. After the *Verwaltungsgericht Stuttgart* (Stuttgart Administrative Court) had initially rejected the complaint, the *Verwaltungsgerichtshof Mannheim* (Mannheim Administrative Court of Appeal) upheld the appeal and ruled the ban unlawful.

The BVerwG has now rejected an appeal against this decision lodged by the *Land* of Baden-Württemberg. The SEK operation was an event of contemporary history in the sense of the *Kunsturhebergesetz* (Artistic Works Copyright Act), so the individuals involved did not need to give their consent for photographs to be

taken and published. Any public exposure of the officers' identity could have been prevented in this case by other measures that did not restrict the freedom of the press to such an extent, such as technical measures to disguise their faces. Therefore a ban on taking photographs should never have been imposed.

• *Pressemitteilung des BVerwG zum Urteil vom 28. März 2012 (BVerwG 6 C 12.11)* (Press release of the BVerwG concerning its ruling of 28 March 2012 (BVerwG 6 C 12.11))
http://merlin.obs.coe.int/redirect.php?id=15785 DE

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OLG Prohibits Rapidshare from Making Available Certain Content

In two rulings of 14 March 2012, the *Hanseatisches Oberlandesgericht* (Hanseatic Appeals Court - OLG) prohibited the file-hosting site Rapidshare from making certain copyrighted content available to its users.

The judges therefore upheld the decision of the *Landgericht Hamburg* (Hamburg District Court - LG), which, in lower-instance judgments, had granted the request of the publishers Campus and De Gruyter and agreed with the legal opinion of the GEMA collecting society concerning Rapidshare's liability and obligations. Therefore Rapidshare is prohibited from making available the aforementioned publishers' literary works and music from the GEMA repertoire.

In order to establish disturbance liability, it was necessary in this case to consider the extent to which Rapidshare was liable for misuse of its service and whether it therefore played an "active role" or merely the role of a "neutral go-between". In this regard, the court ruled firstly that Rapidshare had, through its basic business model, tended to influence its users in such a way that they had committed offences and was therefore liable for the provision of storage space and the allocation of links. Without this, subsequent breaches of copyright would have been impossible. In addition, the measures previously taken to combat illegal use were inadequate. It was not sufficient just to take action against breaches of copyright and delete links after being notified by the copyright holders. If an illegal link was reported, it was also necessary to look for and monitor the link's "surroundings", including all related websites and similar links. Rapidshare should also keep an eye on current developments in order to fulfil its obligation to observe the market, and should not limit itself to known lists of links. This was the only way of effectively preventing the repetition of copyright infringements. Since Rapidshare had failed to meet these obligations, the OLG upheld the lower-instance rulings and prohibited the file-hosting site from making the relevant content available.

Nevertheless, the judges deviated from their previous case law in two respects. For example, they altered their view that a breach of copyright occurred at the point of uploading, since in the era of cloud computing such services were increasingly being used to store authorised copies. Since, in the period between the complaints being filed and the OLG's decision, Rapidshare had increasingly been describing itself as a "largely neutral provider" of serious cloud computing services, the previous accusations that it had tended to influence its customers in such a way that they acted illegally no longer applied. Even so, Rapidshare could still have disturbance liability despite these changes, although no longer on the basis of a tendency to influence users. Rather, such liability could now be based on the fact that Rapidshare enabled customers to use its services anonymously and, in this way, "actively" helped them to infringe copyright. Rapidshare could not justify its actions with reference to Article 13(6) of the *Telemediengesetz* (Telemedia Act - TMG), under which users must be able to use a provider's services anonymously or under a pseudonym. The TMG only allowed this "where this is technically possible and reasonable", which "in view of the dangers posed by the defendant's business model is clearly not the case here". Disturbance liability might therefore still apply in the future.

• *Pressemitteilung des Hanseatichen Oberlandesgerichts zum Urteil (Az. 5 U 87/09), 15. März 2012* (Press release of the Hanseatiches Oberlandesgericht on the ruling (case no. 5 U 87/09), 15 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15787 DE

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Bundestag Approves Bill Strengthening Press Freedom

On 29 March 2012, the German *Bundestag* (lower house of parliament), with the votes of the governing parties, adopted without any amendments a bill strengthening the freedom of the press (PrStG) (see IRIS 2010-9/22).

The bill is designed to strengthen the freedom of the press by offering better protection to journalists and their sources, in order to ensure that the media can fulfil their oversight function vis-à-vis State activities.

In addition, a new paragraph has been added to Article 353b of the *Strafgesetzbuch* (Criminal Code - StGB; breaches of official secrecy and special obligations of secrecy), under which journalists cannot be punished for aiding and abetting breaches of official secrecy if they merely "receive, analyse or publish" the secret or the information that is supposed to be kept secret.

Furthermore, an amendment to Article 97(5)(2) of the *Strafprozessordnung* (Code of Criminal Procedure - StPO) (concerning items that cannot be confiscated) stipulates that journalists in the sense of Article 53(1)(1)(5) StPO (concerning people entitled to refuse to give evidence) may only have their property confiscated if they are seriously suspected of involvement in the offence. Previously, any degree of suspicion was sufficient.

The opposition believes the adopted bill does not go far enough, because incitement, which in practice is often difficult to distinguish from aiding and abetting, remains a punishable offence. Industry representatives had also hoped that the right of journalists to refuse to give evidence would be strengthened.

• *Gesetzentwurf (Drs. 17/3355) vom 21. Oktober 2010* (Bill (document no. 17/3355) of 21 October 2010)
http://merlin.obs.coe.int/redirect.php?id=15783 DE

• *Protokoll der Sitzung des Bundestags vom 29. März 2012* (Minutes of *Bundestag* session of 29 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15784 DE

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ZAK Complains about Advertising Infringements in Several Programmes

On 20 March 2012, the *Kommission für Zulassung und Aufsicht der Landesmedienanstalten* (Media Licensing and Monitoring Commission - ZAK) filed another complaint that the "*Show zum Tag des Glücks*", broadcast by TV broadcaster "Das Vierte", infringed the *Glücksspielstaatsvertrag* (Interstate Gambling Agreement - GlüStV), and prohibited a repeat broadcast (see IRIS 2011-10/12).

During the programme, which was broadcast on 11 November 2011, the *Süddeutsche Klassenlotterie* (South German lottery - SKL) had been mentioned by the presenter a total of 26 times and its logo had appeared more than 200 times. In addition, each participant in the show had to have bought an SKL ticket. The show therefore had a commercial nature and violated the ban on public advertising of gambling services enshrined in Article 5(3) GlüStV.

The ZAK also complained about a break-bumper used by the broadcaster Sat.1 on 2 December 2011, which was designed to signify the start of a commercial break. In the ZAK's opinion, the transitions between programme announcements, the broadcaster's logo and the announcement of a commercial break during the bumper had been so fluid that the visual and acoustic distinction between advertising and editorial content had not been sufficiently discernible. The melody used to denote the end of the commercial break had also been insufficient, especially as it was also used as the broadcaster's own jingle. The ZAK considered the broadcaster's conduct to be a breach of the rule requiring advertising to be easily recognisable and distinguishable and of the separation rule enshrined in Article 7(3) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV).

The ZAK also complained about a children's programme shown by the broadcaster Nickelodeon on 2 December 2011, which had been interrupted with an advertising block almost six minutes long. The broadcaster had therefore infringed the ban on commercial breaks during children's programmes laid down in Article 7a(1) RStV.

• *Pressemitteilung der ZAK vom 20. März 2012* (ZAK press release of 20 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15788 DE

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KJM Grants FSF Broader Powers

In a decision of 7 March 2012, the *Kommission für Jugendmedienschutz der Landesmedienanstalten* (*Land* Media Authorities' Commission for the Protection of Minors in the Media - KJM) agreed to broaden the powers of *Freiwillige Selbstkontrolle Fernsehen* (Voluntary Self-Regulation of the Television Industry - FSF).

FSF had asked for its remit to be extended to include television-like telemedia content. The non-profit-making association of private television providers had previously been responsible for checking the intensity of violent or sexual content of television programmes and deciding at what time they could be broadcast on German television. As a result of the KJM's decision, it is now also responsible for television-like content on the Internet. In principle, this includes the same content as before, i.e., films, TV series and documentaries, in the form in which they are offered on the Internet.

The KJM president stressed that the decision had been taken in the light of increasing media convergence. If, as a result of FSF's broader powers, more providers of television-like content via telemedia could be persuaded to submit their content in advance to the self-regulatory bodies, youth protection would be significantly improved. Following the recognition of *Freiwillige Selbstkontrolle der Filmwirtschaft* (Voluntary Self-Regulation of the Film Industry - FSK) and *Unterhaltungssoftware Selbstkontrolle* (Voluntary Self-Regulation of Entertainment Software - USK), which are responsible for the age classification of films and online computer games respectively (see IRIS 2011-9/16), a further step had now been taken to enhance

the protection of young people in the media. This mainly concerned Internet content that could harm the development of minors, for which each provider must take its own measures to protect young people. This protection could be improved further in the future if cases could be referred back to the various self-regulatory bodies on a voluntary basis in a kind of "regulated self-regulation" system.

• *Pressemitteilung der KJM vom 8. März 2012* (KJM press release, 8 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15786 DE

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Ministry Announces Youth Protection Act Amendment

The *Bundesministerium für Familien, Senioren, Frauen und Jugend* (Federal Ministry for Families, Senior Citizens, Women and Youth - BMFSFJ) has announced plans to initiate an amendment to the *Jugendschutzgesetz* (Youth Protection Act - JuSchG) in the near future.

Under the amendment, providers of films and games will, in future, be able to have their products labelled under the JuSchG, regardless of how they are distributed. At present, the JuSchG only makes provision for such labelling for storage media on which films and games are sold. However, it remains unclear whether films and games offered over the Internet will be evaluated under the JuSchG or the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on Youth Protection in the Media - JMStV).

In order to make it easier for parents to use youth protection programs on the Internet and, at the same time, promote media education in families, a similar youth protection standard is being developed for on- and offline services. To this end, the age labels already used for offline products will, in future, also apply to Internet services.

• *Pressemitteilung des BMFSFJ vom 13. April 2012* (BMFSFJ press release of 13 April 2012)
http://merlin.obs.coe.int/redirect.php?id=15789 DE

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FRK and RTL Deutschland Agree on Cable Retransmission

The media group RTL Deutschland and the *Fachverband für Rundfunkempfangs- und Kabelanlagen* (Association for Broadcasting Reception and Cable Equipment - FRK) are reported to have signed a framework agreement on cable retransmission rights at the end of March 2012.

The FRK represents the interests of its affiliated companies that manufacture and maintain television aerials and cable equipment. The media group RTL Deutschland had terminated its membership of VG Media in March 2010 in order to look after the copyright and related rights for the retransmission of its programmes in Germany and abroad itself (see IRIS 2010-4/15).

The new agreement, which should end the uncertainty that has existed since the end of 2010, covers the broadcasting group's general channels, including HD channels, as well as the new free-TV channel RTL Nitro. It claims to be the first agreement of its kind between a broadcasting group and a cable association in Germany.

• *Pressemitteilung der den FRK beratenden Anwaltskanzlei, 27. März 2012* (Press release of the law firm advising the FRK, 27 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15790 DE

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FI-Finland

Proposal on Press Crimes, Unwanted Communication and Stalking

On 25 April 2012, a proposal of the committee on press crimes, unwanted communication and stalking was officially published. The committee's task was to assess the need to reform the "press crimes" legislation taking into consideration the jurisprudence of the European Court of Human Rights. In addition, the committee had to assess if there was a need for legislation prohibiting the communication to a target which does not want to receive, and consider if there was a need to criminalise the so called stalking.

The committee suggests adding a new criminal provision (Sec. 1 a §) on unwanted communication to Chapter 24 of the Criminal Code. The crime would be at hand if somebody continuously sends messages

or calls another person with the purpose of disturbing him if the action is likely to cause him a major disruption or harm.

Section 8 of Chapter 24 (Dissemination of information violating personal privacy, 531/2000) reads as follows:

"(1) A person who unlawfully, through the use of the mass media, or otherwise by making available to many persons, disseminates information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall be sentenced for dissemination of information violating personal privacy to a fine or to imprisonment for at most two years.

(2) The spreading of information, an insinuation or an image of the private life of a person in politics, business, public office or public position, or in a comparable position, does not constitute dissemination of information violating personal privacy, if it may affect the evaluation of that person's activities in the position in question and if it is necessary for purposes of dealing with a matter with importance to society."

As the ECHR has stated that the imposition of a prison sentence for a press offence is compatible with journalists' freedom of expression only in exceptional circumstances, the committee suggests that the mentioned crime would be divided into normal and aggravated forms. The punishment for normal crime would be a fine. The aggravated crime could result in a maximum of 2 years imprisonment. The penalty for normal defamation would also be mitigated to a fine.

Following the practice of the ECHR, the committee proposes adding the new articles to the sections concerning dissemination of information violating personal privacy and defamation. According to them an expression would not be considered a crime if it concerns a matter that is having a significant public interest and if presenting it does not significantly exceed what is considered acceptable (taking into account its content, format, others rights, and other circumstances).

As following from the practice of the ECHR, publishing libelous information in the mass media or providing information otherwise to numerous people would not be a ground for aggravated defamation anymore.

The committee also suggests adding a new criminalisation named persecution (in some countries called stalking) to Chapter 25 (Sec. 7 a) of the Criminal Code. According to it the crime would be at hand if somebody repeatedly threatens, follows, monitors, takes contact or by other comparable manner to those persecutes the other, so that his behavior is likely to cause fear or anguish for the person persecuted. The punishment is a fine or imprisonment for up to two years.

The Ministry of Justice will ask for opinions on the committee's report. Then it will decide about the further preparation of the proposal. The committee suggests that the law reform would come into effect on 1 January 2014.

• *Sananvapausrikokset, vainoaminen javiestintärauhan rikkominen* (Proposal of the Committee on Press Crimes, Unwanted Communication and Stalking, 25 April 2012)
http://merlin.obs.coe.int/redirect.php?id=15804 FI

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Application for Film and Trailer to be Banned

On 13 April 2012 the regional court in Paris delivered a judgment under the urgent procedure in a case concerning the comedian Dieudonné. A video entitled *Dieudonné l'antisémite - Les camps de concentration* (Dieudonné the anti-Semite - the concentration camps), produced and directed by Dieudonné, which could be viewed on the YouTube site, promoted the film *L'Antisémite* that was to go on sale the following month on the Internet. The disputed sequence, used for the trailer and shown at the start of the film, shows the arrival of an American officer, played by the comedian, discovering a concentration camp in 1945 as he is shown round by a former Jewish prisoner, who explains to him more particularly how the gas chamber works.

Claiming that this on-line material and the showing of the film constituted a number of infringements of the Act of 29 July 1881 (revisionism, encouragement to hatred, and racial insult), the international league against racism and anti-Semitism (*Ligue Internationale Contre le Racisme and l'Antisémitisme* - LICRA) appealed to the courts under the urgent procedure for the withdrawal of the video and a ban on the film. The defendants maintained that the disputed video was no longer on-line, and that the film was available only to subscribers to the defendant's official Internet site. They claimed that the actor, an extremely well-known comedian, who was also the film's director, was entitled to make use of parody, exaggeration and a certain form of excessiveness in order to raise a laugh. They held that the film was covered by the entitlement to freedom of expression and could not be banned in any way.

In its order under the urgent procedure, the court recalled that the measures it was being called on to order, i.e., the withdrawal of a video and a ban on showing a film, counted by their very nature among

those measures most radically contrary to freedom of expression. They could therefore only be ordered in extremely serious cases and if there were serious elements that demonstrated the existence of the manifest danger of irreparably infringing the rights of any third party.

The court held that in the present case, while most of the images and speech might be considered particularly shocking and provocative, it was not actually proven, by such evidence as was required under the urgent (civil) procedure, that they did indeed constitute an infringement of the 1881 Act as claimed. Only violations of the Act that could be classified as a "manifestly unlawful disturbance" justified the intervention of the courts under the urgent procedure. The judge also recalled that the court was not required to comment on the good or bad taste of what was presented as comedy. He felt that, although it was insidious and particularly outrageous, the sequence was in no way presented as a scientific or otherwise serious statement and no-one could be in any doubt as to the parody involved. Thus the limits of freedom of expression had not been exceeded to such an extent that it was necessary to order a ban under the urgent procedure. It was for the LICRA, if it wished to do so, to apply to the ordinary courts for deliberation on the infringements invoked.

• *TGI de Paris (ord. réf.), 13 avril 2012 - Licra c. Dieudonné M'Bala M'Bala, Les productions de la plume et a.* (Regional court of Paris (urgent procedure), 13 April 2012 - LICRA v. Dieudonné M'Bala M'Bala, Les productions de la plume, et al.) FR

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Al Jazeera Legally Commits to not Showing Video of Toulouse Murders

France has been through a national tragedy, with the murder of three children and their teacher outside a Jewish school in Toulouse on the morning of 19 March 2012, coming just days after attacks resulted in the death of three soldiers in nearby towns. The killer was quickly identified and located; he had barricaded himself inside his home, where he was killed by police on the morning of 22 March, after more than 32 hours of negotiation with no result.

At the same time, the Paris headquarters of the news channel Al Jazeera received an anonymous letter, postmarked 21 March 2012, claiming responsibility for the murders. The envelope contained a USB flash drive showing a video montage of the murders in Toulouse and Montauban, filmed by the killer using a mini-camera strapped to his body at the time the murders were committed, with the headline "Al Qaeda attacks France". Along with each 25-minute video were indications of the place, time, identities and ages of the victims, written in red in capital letters. On 27 March 2012, the public prosecutor applied to the courts under the urgent procedure to prevent the channel from broadcasting the content of the recording in any form whatsoever. In a second summons on the same day, the victims' families applied for a court order to have all copies of the film and digital media showing the crimes seized, and for the channel to be required to pay a reserve provision of EUR 100,000 for each proven showing.

At the hearing, the channel Al Jazeera and its representative stated that they had on their own initiative handed the flash drive over to the French police but had made copies of its content, one of which had been sent to their management in Qatar, while others had been left in a safe place at their offices in Paris. They also asked the court to note firstly their undertaking to hand over all the copies made - apart from the one sent to their management in Qatar - to the judges carrying out the investigation, and secondly their undertaking to refrain from broadcasting or passing on the content of the files on the flash drive and its duplicates in France and elsewhere. Taking note of these undertakings, which it accepted, the public prosecutor dropped all its complaints. In a judgment delivered on 28 March 2012 under the urgent procedure, the court endorsed this agreement between the authorities and the channel and noted that the proceedings brought by the victims' families were therefore unnecessary.

"In accordance with its code of ethics and in view of the fact that the videos do not add any information that is not already in the public domain, Al Jazeera will not broadcast their content", a spokesperson for the channel explained in a brief communiqué, after stating that the channel had refused a number of requests from other channels that wanted copies of the videos.

• *TGI de Paris (ord. réf.), 28 mars 2012 - Le Procureur de la République, S. Sandler et a. c. Al Jazeera Channel et Z. Tarrouche* (Regional court of Paris (urgent procedure), 28 March 2012 - Public Prosecutor, S. Sandler et al. v. Al Jazeera Channel and Z. Tarrouche) FR

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Canal Plus Closely Supervised as it Enters the Free-Access TV Market

On 17 April 2012, the French competition authority (*Autorité de la Concurrence*) announced the start of a thorough investigation into the acquisition by the Canal Plus Group of the DTV channels Direct 8 and Direct Star. On 5 December 2011 France's main pay-TV operator notified its acquisition, which gave it a toe-hold in the free-access TV market. In investigating the situation, the competition authority held

that the operation raised "serious fears" that competition was being impeded. The Canal Plus Group occupies an extremely strong position, particularly in the upstream markets for acquiring broadcasting rights (sports events, films and series) on pay TV. Exploitation of this position to the advantage of the channels Direct 8 and Direct Star, which the group wished to acquire, was not without risks to competition in the sector. The investigation of the situation also pointed to serious risks regarding the conditions under which the other free-access channels would be able to gain access to Studio Canal's film catalogue (the leading catalogue in France), compared with their competitors Direct 8 and Direct Star. At the end of March 2012, Canal Plus had in fact promised that it would not offer Direct 8 and Direct Star favourable conditions for buying films in its catalogue, stating that the channels would not be able to acquire the rights for more than six months. The group was also offering to link acquisition of the rights to its free-access and pay-TV channels for a maximum of twenty French cinema films a year. Its competitors felt these undertakings were vague and insufficient; they also failed to convince the competition watchdog, which felt they were "not enough to obviate the risks identified at this stage in the proceedings". During the next stage in the investigation, the competition authority will ask for the opinions of the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA), the e-communications and postal regulatory authority (*Autorité de Régulation des Communications électroniques and des Postes* - ARCEP) and other stakeholders in the market, more particularly to find out how they propose to remedy any distortion of competition. TF1, M6, and most of the DTV channels have in fact never concealed their concern at the entry of a giant such as Canal Plus on the free-access television market. The competition authority should announce its findings by the end of July, by which time it should also have reached a decision on the merger of CanalSat and TPS.

• *Autorité de la concurrence, décision du 17 avril 2012* (Competition Authority, decision of 17 April 2012) FR

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GB-United Kingdom

ISPs Lose Challenge to Digital Economy Act in the Court of Appeal

BT and TalkTalk, internet service providers, were unsuccessful in their appeal against the decision of the High Court last year that provisions in the Digital Economy Act 2010 were not in breach of EU law (see IRIS 2011-6/20).

The provisions impose obligations on Internet Service Providers (ISPs) to notify subscribers if their internet protocol addresses are reported by copyright owners as being used to infringe copyright, and they must keep track of the number of reports about each subscriber and must compile on an anonymous basis a list of those reported on. After obtaining a court order to obtain personal details, copyright owners will be able to take action against those on the list. These obligations would only come into effect once an 'initial obligations code' made by Ofcom, the communications regulator, and approved by Parliament, has been brought into force. The ISPs argued that these requirements should have been notified to the European Commission under the Technical Standards Directive; that they were incompatible with provisions of the Electronic Commerce Directive; that they were in breach of the Data Protection Directive and the Privacy and Electronic Communications Directive; and that they were incompatible with the Authorisation Directive.

The Court of Appeal held that the provisions of the Act do not require notification as they do not have legal effect in themselves, being conditional on implementation through the code. They do not breach the Electronic Commerce Directive as they do not impose any liabilities on ISPs, and being concerned with copyright, are outside the 'coordinated field' under the Directive where restrictions on freedom to provide information society services are prohibited. The statutory provisions are not in conflict with the Data Protection Directive as the processing of data relates to legal claims, nor with the Privacy and Electronic Communications Directive as the limits to the confidentiality of data are to protect intellectual property rights. Finally, the Authorisation Directive does not require that all sector-specific rules be contained in a general authorisation rather than separate legislation. The Court also held that the exclusion of small ISPs and mobile network operators from the scheme was not disproportionate.

The ISPs had also challenged the draft costs order allocating the costs of running the system. The High Court had decided that requiring ISPs to pay part of the cost of establishing the system would breach the Authorisation Directive, and this point was not appealed. The Court of Appeal held that 'case fees' covering the costs of appeals were also incompatible with the Directive.

• R (on the application of British Telecommunications and TalkTalk Telecom Group) v. Secretary of State for Culture, Media, Olympics and Sport [2012] EWCA Civ 232, 6 March 2012
http://merlin.obs.coe.int/redirect.php?id=15770 EN

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The Limits of the Claim "as seen on TV"

A company which sold mattresses made the following claim on one of its websites regarding its products: that they were "as seen on TV".

The sole complainant challenged whether that claim "As seen in" misleadingly implied that the mattress had featured in editorials or product reviews in those media, contrary to rule 3.1 of the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code) which states, "Marketing communications must not materially mislead or be likely to do so."

The company provided a copy of an email requesting a donation of a mattress for a Channel 4 quiz show; another (and a letter) connected to a property make-over programme; and the link to the website of an ITV programme which included a video of a segment in which the company's product was described but not referred to during the video.

The company argued that stating "as seen on TV" was not tantamount to implying that a broadcaster had endorsed or recommended the product (and the average consumer would be able to make that distinction) but "merely iterated the fact that the products had appeared in the media listed and consumers had the opportunity to see the product in those media."

The Advertising Standards Authority (ASA) upheld the complaint. The adjudication states that the ASA considered consumers would understand the claim "as seen on TV" to mean the programme producers "had taken an editorial decision to feature Ergoflex products, thereby constituting an independent endorsement." In addition, the ASA considered that consumers would understand that claim "to mean that, where those products were featured, they would be readily identifiable as Ergoflex products." Such a claim is misleading if the products "merely featured as unbranded props in programmes or in paid-for ads04046"

The ASA ordered the company not to repeat the claim in that form which implied that publications or broadcasters endorsed their products when those products had not featured in the relevant media as a result of independent editorial decisions, and where those products were not readily identifiable as Ergoflex products.

• ASA Adjudication on Ergoflex Ltd, 21 March 2012
http://merlin.obs.coe.int/redirect.php?id=15768 EN

David Goldberg
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Film Tax Credit Scheme Extended to TV, Video Games and Animation

In his annual budget statement, the UK's Chancellor of the Exchequer announced that he is extending the tax credit scheme, previously available to film production (see IRIS 2012-1/29), to high-end television productions, video games and animation. This will be subject to state aid approval and a consultation process, but is likely to be introduced by April 2013.

The film tax credit scheme was introduced under the Finance Act 2006. Under the provisions of the Act, the credit is available for British films intended for theatrical release costing GBP 20m or less at 20%, which means that tax is not liable to be paid on 20% of the UK expenditure on the film. For films which cost more than GBP 20m, the level of eligible tax relief rises to 25%. For films to qualify for a tax credit (or tax relief) they must conform to certain measures, including that they are made by a UK film production company; are intended for theatrical release; pass a cultural test for 'British qualities', as set out in the Films Act 1985; and are administered by the UK Film Council or made under one of the UK's film co-production treaties.

The test of 'British qualities' is complex, but in summary ranges across four categories: cultural content (setting, characters); cultural contribution (heritage, diversity); cultural hubs (photography, post-production); and cultural practitioners (director, actors). A 'cultural test' is applied with scores attributed in each of these categories - for a film to qualify, it must score at least 50% overall. The cultural test is applied by the UK film council.

The details of the application of the new scheme will be worked out during the consultation process. It has been warmly welcomed by the industries affected.

• Budget 2012: Tax Breaks for TV Production, 21 March 2012
http://merlin.obs.coe.int/redirect.php?id=15769 EN

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GR-Greece

Restructuring the Greek Public Service Provider ERT

On 26 March 2012, the Minister of State, Pantelis Kapsis, presented before the Special Permanent Committee on Institutions and Transparency of the Greek Parliament a bill on restructuring the Greek Public Service

Provider, ERT. This initiative of the Minister of State does not aim at the official voting of the bill, since another parliamentary procedure is required to this end, but aspires instead to provoke discussion about the role of public radio and television in Greece and to prepare the way for the next government to take the final decisions.

The bill was composed by an independent committee consisting of experts in various disciplines. The committee was initially formed on 11 October 2011 by the then Minister of State, Elias Mosialos (see IRIS 2011-10/23), while its mandate got renewed by P. Kapsis, Mr. Mosialos' successor to the ministerial post.

The main goal of the bill is to guarantee a truly independent public service provider that would function for the public benefit, without any interventions by the government and political parties, and to remodel the administrative structure of ERT in order to make it more flexible and effective. Necessarily, the pertinent legislation of EU law, such as the Audiovisual Media Services Directive (Directive 2010/13/EU), was also taken into account.

The most important provision of the bill is the one establishing a new administrative body, the so-called Supervisory Body of ERT, which formulates the company's long-term strategy and sets its long-term objects. The members of the new body are selected through a transparent process, in which bodies that specialize in and have great experience of selecting personnel are involved. The Supervisory Body selects the members of the Administrative Board and the Managing Director, who sets the short-term objects of the company and is responsible for its day-to-day operation. Furthermore, the bill provides for the establishment of a Mediator and of an Ethics Committee that are dealing with complaints made by the viewers and, in general, with any issue of ethics that may arise.

• Δημόσια ραδιοτηλεόραση – Αναδιοργάνωση 325341344-321.325. *(26.3.2012)* (Draft bill to restructure the Greek Public Service Provider ERT, 26 March 2012) EL

Amanda Papaioannou
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Digital Transition in Motion

The most important switch off of analogue television signal is to be held in Attica region next July (6 July 2012) according to a ministerial decision of 20 March 2012. This operation is expected to enhance the legislative level that has been ceased since the publication of the first co-ministerial decision on the digital switchover (see IRIS 2008-9/20).

In the last three months significant progress, marked by two legislative initiatives, can be observed in the institutional level. Firstly, in a provision voted in February by the Greek Parliament a timetable related to different stages of the digital switch-over operation (digital licensing procedure, date of definitive switch off : 30 June 2013) is established. All television stations that have no licence but are considered to be legally functioning up to now will continue to enjoy the same legal status only on the condition of participating in this future tender. This provision could be considered as the official response to the latest decision of the Plenary Session of the Συμβούλιο της Επικρατείας (the Council of State - Supreme Administrative Court of Greece) that had declared unconstitutional two legislative provisions permitting all regional television stations, which participated in the 1998 tender, to function even after an indefinite time after the publication of this tender (see IRIS 2011-1/34).

The second provision is a new version of Article 13 of Act 3592/2007 related to digital broadcasting that has been voted in 6 April 2012 by Greek Parliament and incorporated in Article 80 para. 1 element 6 of Act 4070/2012 on electronic communications. The separation of content providers and multiplex (e. g. technical) operators is being officially established, the former being licensed by the audiovisual regulatory authority (Εθνικό Συμβούλιο Ραδιοτηλεόρασης , National Council of Radio and Television), the latter using digital frequencies to be allocated under auctions conducted by the telecommunications regulatory authority (*E*370375371372΄367 Επιτροπή Τηλεπικοινωνιών και Ταχυδρομείων , Hellenic Communications and Post Commission). The public broadcaster ERT S. A. is excepted from licensing tender and has been allocated by ministerial decision its own frequencies.

• ΚΥΑ *13971/365/20.3.2012* "3373013713033044713727367 παύση ορισμένων αναλογικών τηλεοπτικών εκπομπών από το κέντρ ο εκπομπής 345μ367304304377΄305" (346325332 322' *862/20.3.2012)* (Ministerial Decision of 20 March 2012 on the switch off of analogue television signal in Attica, Official Journal B 862 of 20 March 2012) EL

• Νόμος *4038/2012* "325300365΄37136337730530336530 2 ρυθμίσεις που αφορούν την εφαρμογή του μεσοπρόθεσμου πλαισίου δημοσιονομικής στρατηγικής *2012–2015*" (346325332 321' *14/2.2.2012).* (Law 4038/2012, Official Journal A 14 of 2 February 2012) EL

• Νόμος *4070/2012* "341305370μ΄371303365371302 Ηλεκτρονικών 3253003713723773713753113753713 11΄311375, 3343653043613063773013 11΄311375, Δημοσίων Έργων και άλλες 364371361304΄361376365371302" (346325332 321' *82/10.4.2012).* (Act 4070/2012 on electronic communications (Official Journal A 82 of 10 April 2012)) EL

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IE-Ireland

Broadcast of Unverified "Tweet" Unfair to Presidential Candidate

On 7 March 2012 the Compliance Committee of the Broadcasting Authority of Ireland (BAI) upheld a complaint made by a former candidate for the office of President of Ireland. The complaint concerned the use of an unverified tweet during a live televised debate just three days prior to polling. The Committee also held that the broadcaster, RTÉ, (the national public service broadcaster), exacerbated the unfairness by including extracts of the debate in a related radio interview with the complainant broadcast the following morning. This related radio broadcast also failed to include any clarification regarding the provenance of the tweet.

During the debate the tweet was attributed, in error, to the official twitter account of another Presidential candidate. Its content called into question the relationship and prior involvement of the complainant, who was standing as an independent candidate, in fundraising activities for a political party, an involvement which the complainant had rebutted throughout the campaign and had also addressed earlier in the live debate. The tweet formed the basis for the presenter to reopen discussion on the nature and extent of the complainant's involvement with the political party.

During a period of robust exchanges on the topic, the candidate, to whom the tweet was accredited, was not asked to confirm its provenance; nor were there any apparent attempts by the broadcaster to verify the provenance of the tweet. This is despite information being available within minutes that clarified that the tweet was not from the official account of the other candidate.

The complaint was made in accordance with s.48 of the Broadcasting Act 2009, and contended that there had been a breach of s.39(1)(b) of the Broadcasting Act 2009. This section requires that every broadcaster should ensure that in its treatment of current affairs it is fair to all interests concerned and that broadcasts are presented in an objective and impartial manner. The complainant also sought an apology from the broadcaster and an investigation or public hearing into the matter. The broadcaster claimed that the broadcast of the tweet was legitimate for a number of reasons, including:

- the content of the tweet, if not its source, was accurate;

- the other candidate, to whom the tweet was accredited, did not deny its provenance;

- the complainant had the opportunity to respond to the tweet and to matters relating to his relationship with the political party and its fundraising activities.

The Committee in their decision confirmed that the focus of the debate on the character and policies of candidates for the office of President of Ireland was appropriate. Accordingly, questions on the complainant's prior relationship with the political party were considered to be legitimate and in the public interest. Therefore there was a context for inclusion of the tweet in addressing these legitimate interests and the Committee considered that it is reasonable, in principle, for a presenter to reopen topics once the programme as a whole does not breach the requirements of fair, objective and impartial treatment of all contributors to a programme.

It was the Committee's view that the broadcast, in a programme of this nature, of what amounted to unverified information at the time of broadcast, from a source wrongly accredited by the presenter, was unfair to the complainant. The Committee decided that the complaint was not of such a serious nature to warrant an investigation or public hearing. No provision exists to compel broadcasters to issue an apology in such circumstances but the broadcaster was required to carry an announcement detailing the Committee's decision.

The Committee also noted that the disclosure of material relating to the complaint, by persons unknown, during the period of consideration of the complaint by them, demonstrated a lack of respect for the integrity of the complaints process.

• BAI, Compliance Committee Meeting, February 2012
http://merlin.obs.coe.int/redirect.php?id=15771 EN

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IT-Italy

New Law for Cinema and Audiovisual of the Lazio Region

On 14 March 2012 the "Regione Lazio" in Italy adopted a reform (known as "Interventi Regionali per il Cinema e l'Audiovisivo"), aimed at promoting cinema and audiovisual fields according to Articles 21 and 33 of the Italian Constitution. Essentially, the regional government aim is to support the activities of production, distribution, export, promotion, cinema exhibition, preservation, study and dissemination of audiovisual works.

The need for a regional act on cinema was based on two critical aspects of the system: 1) the fragmentation of regulation, resulting in a confused and inefficient use of human and financial resources; 2) the lack of a legal entity with responsibility for strategic interventions. Hence, the recent law states the establishment of a Centre for Cinema and Audiovisual and a regional fund with a total budget of 45 million euros covering the period 2012 - 2014.

The Centre - equipped with two structures called respectively "Film Commission" and "Ufficio Studi e Ricerca sul Cinema e l'Audiovisivo" - will support the film production in the region and monitor the effectiveness of the measures envisaged to promote human and natural resources available. Moreover, it may be able to provide services to the cinematographic industry and carry out connecting activities between the cinema industry and local companies that support it.

The economic aid will be given, in particular, to anyone who will produce in the Lazio Region a certain percentage of their cinematographic or audiovisual works recognized as a cultural product. This might be an incentive for foreign cinematographic companies to choose the Lazio Region and therefore promote the growth of independent cinema.

To complete the rationalisation and coordination process of the film industry, the new law also includes the adoption of the Annual Operational Programme which, year by year, will define goals, priorities, execution times, procedures and criteria for granting aid.

The law also provides grants for training, upgrading and requalification of workers involved in this business and also for research activity. Moreover, in order to grant the collection and preservation of cinema products, it has provided a dedicated audiovisual library.

• *Interventi regionali in materia di cinema ed audiovisivo* (Act on Cinema and Audiovisual of the Lazio Region of 14 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15799 IT

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AGCOM List of Events of Major Importance

On 15 March 2012 the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications authority - AGCOM) gave final approval to a resolution concerning the list of events of major importance to society, pursuant to Article 32-ter of the Italian audiovisual and radio media services code (legislative decree no. 177/2005, as amended in 2010, see IRIS 2010-2/25 and IRIS 2010-4/31), which implements Article 14 of the Audiovisual Media Services Directive.

This resolution ends a process of amending, reviewing and updating the previous and, until now, unmodified list, adopted with Resolution n. 8/99 (see IRIS 1999-7/17) which AGCOM started in June 2010 by launching a public consultation. Italy was one of the first member States to adopt the list of major events pursuant to Directive 89/552/CEE and is now the first one to proceed in updating it, after the AVMS Directive.

The aim of the list is to indicate the events of major importance to Italian society, meaning that these events have to be broadcast in such a manner to ensure to, at least, 80% of the Italian public the possibility of following them free to air, by live or deferred coverage. Each event included in this list fulfils at least two of the following four criteria determined by EU Commission:

(a) the event and its outcome are of special and widespread interest in Italy, interesting persons other than those who usually watch this type of event;

(b) the event enjoys widespread recognition by the general public, has particular cultural significance and strengthens Italian cultural identity;

(c) the event involves a national team in a specific sporting discipline in a major international tournament;

(d) the event has traditionally been broadcast on free television and has enjoyed high viewing figures in Italy.

Pursuant to article 14, paragraph 1 of the Directive, AGCOM approved a preliminary version of the list in July 2011. The list was notified to the European Commission according to the AVMS directive, which gave positive feedback about the compatibility of such measures with EU law in December 2011 (Decision n. C/2011/9488). Consequently, on 15 March 2012, AGCOM gave final adoption to the list as notified to EU Commission. The renewed list includes now additional events, considering the increasing interest of Italian society in some sport disciplines and the high value of the opera in the Italian cultural heritage. The resolution will enter into force on 1 September 2012.

• Delibera n. 131/12/CONS - "Approvazione definitiva della lista degli eventi di particolare rilevanza per la società di cui è assicurata la diffusione su palinsesti in chiaro" (Resolution no. 131/12/CONS, Final adoption of the list of events of major importance to society of which is ensured broadcasting on free television)
http://merlin.obs.coe.int/redirect.php?id=15776 IT

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Agcom Adopts the Final Plan for the Allocation of Frequencies for DTT

On 22 February 2012 the *Autorità per le garanzie nelle*

comunicazioni (the Italian Communications Authority - AGCOM) adopted Resolution no. 93/12/CONS concerning the plan for the allocation of frequencies for digital terrestrial television services in the five Italian regions of Abruzzo, Molise, Basilicata, Apulia, Calabria and Sicily, included in technical areas 11, 14 and 15 as defined by the Governmental Digital Terrestrial Television (DTT) switchover plan adopted in 2008 (see IRIS 2008-10/22). According to this plan Italy has been divided into 16 technical areas only partially coinciding with the regions, in order to allow an orderly switch-off in accordance with international agreements and with the the principle of safeguard of the service to protect end-users (see IRIS 2006-7/26 and IRIS 2008-10/22).

These five regions are the last that, over the coming months, will switch to digital terrestrial television, pursuant to law n. 101/2008 which defined the national calendar, with indication of the geographical areas concerned and the respective deadlines for their final transition to digital terrestrial television broadcasting - expected by 30 June 2012.

The plan for the allocation of frequencies for digital terrestrial television broadcasting consists of a list of usable frequencies in the territories of Abruzzo, Molise, Basilicata, Apulia, Calabria and Sicily. The new element introduced in the planning process is the identification of the multiplexes that can be used locally, in the technical areas 11, 14 and 15 and in individual regions to which the technical areas refer, without the distinction between regional, sub regional and/or provincial frequencies.

The assignment of the rights of use of frequencies is managed by the Ministry of Economic Development, which provides for each technical area or region, a ranking of the subjects legitimately entitled to broadcast at local level. In particular, the measure by which the rights of use are granted must include, for the frequency concerned, the set of radio-related requirements that must be complied with by operators.

• Delibera n. 93/12/CONS Piano di assegnazione delle frequenze per il servizio televisivo digitale terrestre delle regioni Abruzzo, Molise, Basilicata, Puglia, Calabria e Sicilia (aree tecniche nn. 11, 14 e 15) (Resolution No. 93/12/CONS Plan for the allocation of frequencies for the digital terrestrial television service of Abruzzo, Molise, Basilicata, Apulia, Calabria and Sicily - technical areas nn 11, 14 and 15)
http://merlin.obs.coe.int/redirect.php?id=15777 IT

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Agcom Adopts a Regulation on NGN Access

On 12 January 2012, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - Agcom) adopted Resolution no. 1/12/CONS (hereinafter "The Resolution"), on next generation network access services (NGA), in accordance with the comments of the European Commission and the assessments made by the Italian Antitrust Authority (AGCM). It also incorporates the contributions of the previous public consultation launched by Resolution no. 1/11/CONS.

The Resolution defines the obligations of Telecom Italia, both in relation to active (bitstream and Vula) and passive services (in their different types), to ensure a transparent and non-discriminatory offer of services provided over Next Generation Networks (and related ancillary services) (articles 6(1) and 7(1)). Telecom Italia must also publish annual Reference Offers, to be preliminarily approved by Agcom (art. 6(2)).

In the absence of agreements between the parties and at least five years in advance, Telecom Italia must inform the alternative operators, who purchase wholesale copper network access services, of its intention to dismiss or convert the access points located in local switchboards open to the unbundling of services over copper (art. 13(1)).

Telecom Italia is charged to provide unbundled access to its network where it is technically feasible and taking into account the actual development of the market. Within two months after the entry into force of the Resolution, it is required to submit a Reference Offer relating to:

-passive services, such as the end-to-end service (unbundled access to fiber compatible with the current incumbent's network architecture), the individual components that make up the service (called building blocks), access to civil works (ducts);

- active services, such as bitstream fiber, offered at various network layers, and the innovative service Vula (virtual unbundled local access), provided directly at the central network.

Agcom will also initiate proceedings to establish the model to manage long-run incremental costs within a bottom-up approach for the pricing of wholesale access services over fiber networks. In this process, Agcom will identify areas where there is a sustainable competition for the pricing of bitstream services (art. 33).

Finally, the Resolution defines the rules applicable to the procedures necessary to define the discipline of advanced technology VDSL (vectoring and bonding) (art. 18), the possibility of introducing symmetric obligations of access to infrastructure (art. 33), the definition of risk premium and the conditions for economic services (Title II, Chapter I, Section III and Section IV, Chapter II, Section III).

• Delibera no 1/12/CONS - Individuazione degli obblighi regolamentari relativi ai servizi di accesso alle reti di nuova generazione (Resolution no. 1/12/CONS - Identification of regulatory requirements relating to next generation networks access services)
http://merlin.obs.coe.int/redirect.php?id=15774 IT

• Delibera no. 1/11/CONS - Consultazione pubblica in materia di regolamentazione dei servizi di accesso alle reti di nuova generazione (Resolution no. 1/11/CONS - Public consultation on regulation of access services to next generation networks)
http://merlin.obs.coe.int/redirect.php?id=15775 IT

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MK-"the Former Yugoslav Republic Of Macedonia"

Amendments to the Electronic Communications Law for a smoother DTT-introduction

With the analogue switch off deadline set for 1 June 2013 the Macedonian authorities have a quite challenging task to reform the legislative framework, which shall allow smooth transition from analogue into digital broadcasting without endangering media pluralism.

The latest amendments to the Law on Electronic Communication proposed by the Government set out rules which will allow the transmission of TV channels by a multiplex (MUX) operator under principles regulated by law. The existing Law on Broadcasting and the Law on Electronic Communications proved to be a very rigid piece of legislation, which does not encourage investment in the Digital Terrestrial Television (DTT) sector. The process of digitalisation itself could encourage media pluralism, but if wrongly implemented, it could be misused to reduce this pluralism or even to affect the right to freedom of speech.

However, the newly proposed amendments offer much more clarity in the introduction of DTT-services and promise a transparent process of MUX-management. With regard to concentration rules, vertically integrated systems will also not be allowed in the future. Taking into consideration the weak economic power of the highly defragmented broadcasting market on the one hand and the powerful telecom companies on the other, allowing vertical integration could seriously affect media pluralism in the country: the MUX-operators could become gate keepers, who would have an exclusive right to decide what programme service will be re-transmitted. Now the Broadcasting Council, the media regulatory authority, will have the decision making power in view of the content composition of the MUX. According to Art. 120-a, para 2 the MUX-operator is obliged to work according to "the Plan for Allocation and Distribution of the Transmission Capacities of Digital Terrestrial Multiplex, adopted by the Broadcasting Council." This provision clearly prohibits certain MUX-operators to act as a gate keeper of the digital transmission facilities.

The new legislation envisages the Public Enterprise Macedonian Broadcasting, which operates two MUX, to air free-of-charge and in uncoded form the national and regional terrestrial commercial broadcasters during the simulcast period, which will end on 1 June next year. The MUX operator is obliged to make public on its website all conditions and prices for access to its network. According to the amendments, the regulatory body for electronic communications grants permission for the usage of frequencies, aimed to the transmission of those TV-programme services, which have been licensed by the Broadcasting Council. Moreover, the new MUX-operator will have to run a separate accounting of its DTT-activities.

Although these amendments offer solutions to the open issues of access to digital networks and the content of the MUX, some other questions of digitalisation remain unanswered. The new media law - which is still in a preparatory stage - will have to offer proper solutions to the issue of digital licensing, on defining the model on how to subsidise the vulnerable groups and to reduce the digital divide. The most common question raised by the broadcasters is how much they will have to pay to the MUX-operator for distribution through digital networks. On the other hand, when the analogue TV-signal will be switched off, the demand for set-top-boxes will increase, which in return will also increase the selling prices of the receiver equipment. The public mechanisms for competition protection must maintain a healthy competition on the market of set-top-boxes and their interoperability must be guaranteed.

• Предлог - закон изменување и дополнување на Законот за електронските комуникации , по скратена постапка (второ читање) (Draft Law Amending the Law on Electronic Communications, shortened procedure (second reading))
http://merlin.obs.coe.int/redirect.php?id=15756 MK

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Broadcasting Council of the Republic of Macedonia

MT-Malta

Administrative Sanctions Imposed by the Broadcasting Authority Found to be in Breach of Natural Justice

On 7 February 2012, In Smash Communications Limited vs. Broadcasting Authority et, decided by the Civil Court, First Hall, the court concluded that the present system established in the Broadcasting Act regulating the imposition of administrative sanctions by the Broadcasting Authority was in breach of the principle of natural justice *nemo iudex in causa propria* - no person may be a judge in his/her own cause.

In brief, the facts of the case were as follows. The Broadcasting Authority's Chief Executive Officer had issued a charge against Smash Television alleging that in a particular programme there was a breach of the sponsorship rules as a sponsor had been given an excessive credit. The television station requested the Authority to allow it to challenge in court the procedure used by the Authority in the issue of the charge. The Authority agreed and Smash Communications Limited filed a court case against both the Authority and its Chief Executive. The Authority therefore did not hear the charge against the station and suspended the hearing until the court would have decided the case. The television station held that once it was the Chief Executive who was delegated by the Authority to issue the charge against the station and that once the Authority was to decide that charge, the Authority was in breach of the principle of natural justice that no person should be a judge in his/her own cause. This was so because the Chief Executive was an employee of the Authority and, in this respect, he was the *lunga manus* of the Authority. In other words, by issuing a charge against a television station, the Authority was through its Chief Executive alleging that there was a possible breach of broadcasting law. The authority which issued the charge against the station was the same authority called upon to decide the charge. In this case, the Authority was acting both as a prosecutor and a judge at one and the same time. Such conduct was offensive against the right to be adjudged by an independent and impartial tribunal established by law in so far as the Authority was exercising a concurrent jurisdiction: that of prosecutor and that of judge.

The Court further noted that although it was correct to state that the Broadcasting Law had a subsidiary law which stated that prosecutorial functions were to be exercised by the Chief Executive and not by the Authority, the fact still remained that the Chief Executive was an employee of the Authority subject to its direction even if the Chief Executive maintained that in so far as the institution of administrative offences were concerned, he carried out such functions on his own independent judgment and not following the receipt of any direction from the Authority. The Court nevertheless stated that this was more of a legal fiction rather than a reality as the Chief Executive and the Broadcasting Authority were inextricably linked to each other. Moreover, the Court stated that the procedure as set down by law did not comply with the legal maxim that justice should not only be done but must be seen to be done. The Chief Executive was seen as too much part of the Authority: he was appointed and paid by it; his staff were Authority employees; his office was situated in the Authority's building; he was invited to attend all Authority meetings (except when the Authority would be deliberating on the sanction to be imposed following the issue of a charge by the Chief Executive) and participated during Authority meetings even if he was not a member of the Authority and had no right to vote. At certain occasions he was also summoned to provide the Authority with information when it was deliberating its decision on a charge issued by him. All these factors taken together ensured that the Authority was not impartial and therefore could not hear charges issued by its own Chief Executive Officer.

According to Press Release No 05/12, the Broadcasting Authority informed the public that it had appealed the judgment before the Court of Appeal.

• Judgment of the Civil Court, First Hall (reference 481/2004)
http://merlin.obs.coe.int/redirect.php?id=15772 EN

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PT-Portugal

Football Prevails in the Portuguese List of Public Interest Events

The list of public interest events that must be broadcast by national terrestrial open access television channels was published on 22 March 2012 in the official Portuguese news bulletin, Diário da República (2ª Série, nº 59, Parte C).

Amongst the twelve topics that compose this list, seven specifically refer to football (matches from different championships, namely the Portugal Cup and the Europe League) and the other are related to other sport events: cycling (the Portuguese tour on bicycle around the country, which is called Volta a Portugal em bicicleta), hockey, handball and basketball both nationally and internationally (as the participation of Portuguese teams in European or World Championships). The opening and closing ceremonies of the Olympic Games of 2012, in London, are also in the list of this legal communication (Despacho nº. 4214/2012).

The Television Act (Act 8/2011 of 11 April 2011) provides, in article 32, that the government member responsible for the media sector holds the responsibility of publishing annually the list of events that cannot be broadcast by non-national restricted access channels. However, there is a delay registered since the Minister of Parliamentary Affairs, Miguel Relvas, did not published the list until 31 October 2011, as it is legally established.

Following another legal requirement, the Portuguese media regulatory entity (ERC - Entidade Reguladora para a Comunicação Social) was heard on this matter before the publication of the list.

• Despacho nº. 4214/2012 publicado no "Diário da República" - 2ª Série, nº 59, Parte C, 22 de Março de 2012, página 10638 (Official communication of the list of public interest events published in the Official Portuguese Journal, 2nd Serie, no. 59, Part C, of 22 March 2012, page 10638)
http://merlin.obs.coe.int/redirect.php?id=15773 PT

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RO-Romania

Emergency Decree on the Processing of Personal Data and Protection of Private Life

The Romanian Government approved on 3 April 2012 an Emergency Decree for the modification and completion of *Legea nr. 506/2004 privind prelucrarea datelor cu caracter personal şi protecţia vieţii private în sectorul comunicaţiilor electronice* (Law no. 506/2004 with regard to the processing of personal data and the protection of private life in the electronic communications sector).

The Decree transposes into Romanian legislation the modifications of Directive 2002/58/EC, the spokesman of the government stated. He explained the Decree was adopted because the transposition of European legislation was behind the schedule and this delay could have triggered an infringement procedure against Romania (see IRIS 2011-2/35 and IRIS 2012-2/33). The Law no. 504/2006 provides for the obligation of electronic communications service providers to guarantee the security of their services. Through the modification of Directive 2002/58/EC, the focus moved on guaranteeing the security of personal data processing, in order to avoid the accidental or illegal destruction, alteration, unauthorised disclosure of or unauthorised access to personal data transmitted, stored or processed in connection with the provision of electronic communication services directed to the public.

The main obligations for service providers provided by the Decree, as to ensure the security of personal data processing, are as follows:

- to inform users if their personal data were compromised or are at risk to be compromised due to an infringement of data processing security;

- to implement a security policy with regard to the processing of personal data;

- to notify the data protection authority about breaches of personal data processing security;

- to keep a record of all personal data security breaches.

The document approved by the government also provides for users' rights:

- to be informed about information storage in the used equipment;

- to be informed about the reasons for processing stored information;

- to have their personal data included in all public registers of subscribers, in written and electronic format;

- to oppose to the inclusion of personal data in subscribers' registers;

- to be informed with regard to the reason to set up subscribers' registers and the possibilities to use the personal data included in these registers.

On the other hand, the document stipulates the roles of the data protection authority, the *Autoritatea Naţională de Supraveghere a Prelucrării Datelor cu Caracter Personal* (National Supervisory Authority for Personal Data Processing):

- the possibility to audit the measures taken by providers in order to guarantee personal data security;

- the possibility to issue recommendations regarding best practices with regard to the security level these measures have to reach;

- the possibility to decide upon the circumstances under which providers are obliged to notify data security breaches, along with the format of notification;

- to verify the observance of the obligations imposed to providers.

The European Commission started an infringement procedure against Romania on 16 June 2011 for not implementing Data Retention Directive 2006/24/EC, which includes, among others, modifications of Directive 2002/58/EC. A draft law on data retention was rejected on 21 December 2011 by the Senate (upper Chamber of Romania's Parliament). On 22 March 2012 the European Commission transmitted a Reasoned Opinion to Romania with regard to the non-transposition of Directive 2006/24/EC.

• Noi reglementări privind prelucrarea datelor cu caracter personal şi protecţia vieţii private în sectorul comunicaţiilor electronice; comunicat de presă 03.04.2012 (New regulations with regard to the processing of personal data and the protection of private life in the electronic communications sector; press release of 3 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15757 RO

• Asociaţia pentru Tehnologie şi Internet: Iniţiativă legislativă privind reţinerea datelor (Association for Technology and Internet: Legal initiative with regard to data retention)
http://merlin.obs.coe.int/redirect.php?id=15758 RO

• European Commission decisions of 22 March 2012
http://merlin.obs.coe.int/redirect.php?id=15759 EN

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Decree on Public Broadcasting Signed

The President of the Russian Federation Dmitry Medvedev by his decree of 17 April 2012 set legal conditions to establish a TV channel "Public Television of Russia." Its aim shall be to inform population "in a timely, trustworthy and all-sided manner on current affairs of domestic and foreign policy, culture, education, sciences, spiritual life and in other spheres."

A Council on Public Television shall be established within three months to provide "public control over the activity of the TV channel." Candidates for the Council will be put forward by the citizens, approved by the Public Chamber and then selected by the President from those presented by the Public Chamber. (The Public Chamber of the Russian Federation was created in 2005 by a federal law to facilitate interaction of citizens with the governmental bodies in order to take into account needs and interests of citizens as well as to protect their rights and freedom in the process of lawmaking.) The Council members will be appointed for the period of five years. Public officials, members of the parliament, and members of the Public Chamber shall not be appointed to the Council.

The government shall establish a non-profit autonomous entity to serve as the founder, the editorial office and the broadcaster for the TV channel "Public Television of Russia." Its top administrative body will be supervisory council appointed by the Council on Public Television for a three-year term. The CEO of the entity, director-general, is to be appointed for a four year term by the President of the Russian Federation. Director-general also serves as the editor-in-chief. The by-laws of the entity are to be approved by the government.

The government shall see into the issue of allocating federal property to be transferred to the new entity. It will also form an endowment to finance the activity of the new TV channel. Initial financing shall come from budget allocations and bank credits.

The Ministry of Defence is to consider mechanisms that the new TV channel is enabled to use the existing distribution network of Zvezda TV company of the Armed Forces of the Russian Federation.

In a separate decree the President amended the list of national mandatory free television and radio channels originally approved in 2009 (see IRIS 2011-7:1/41) to add the TV channel "Public Television of Russia."

He also announced that the new channel would start broadcasting on 1 January 2013.

• Об общественном телевидении в Российской Федерации (Decree of the President of the Russian Federation "On Public Television in the Russian Federation" No.455 of 17 April 2012)
http://merlin.obs.coe.int/redirect.php?id=15761 RU

• О внесении изменения в перечень общероссийских обязательных общедоступных телеканалов и радиоканалов, утвержденных Указом Президента Российской Федерации от 24 июня 2009 г. N 715 (Decree of the President of the Russian Federation N 456 of 17 April 2012 "On amending the list of national mandatory free television and radio channels approved by Decree of the President of the Russian Federation of 24 June 2009 No. 715)
http://merlin.obs.coe.int/redirect.php?id=15762 RU

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Identifying Media Service Provider

On 23 November 2011 the Council for Broadcasting and Retransmission of the Slovak Republic ("Council") issued a decision concerning a complaint against "Internet TV" run at www.tnitv.weebly.com. The given service was labelled as "Internet TV of the city of Trencin" and provided a list of short (on-demand) videos mostly dealing with topics related to the city of Trencin. After a first assessment of this service the Council gained reasonable suspicion that it may be qualified as on-demand audiovisual media service and its provider thus may have failed to meet the statutory obligation to notify the Council of providing such a service. The Council may impose a fine up to EUR 1,000 for a repeated violation of this obligation.

The service itself failed to clearly identify its provider. Nevertheless the official notice about the start of legal investigations was delivered to the legal entity ("participant") listed within the service as "production". In its response the legal representative of the participant stressed that the participant is not the owner of the given Internet domain and he advised the Council to contact the owner of the domain "weebly.com" (USA hosting service). The participant claimed that the provider of this service is an unspecified company established in the USA and it targets Slovaks living in the USA. The content of the service (mostly related to the city of Trencin and only in Slovak language) was "created and supplied" to this US-company by Slovak "volunteers" such as the participant. The participant thus declared that the content of this service is "created" outside the Slovak Republic (and the EU), the service is not run on Slovak (or EU) domain and the server of this service is stationed outside the Slovak Republic (and EU). Therefore this service could not fall under the jurisdiction of the Council.

The Council repeatedly submitted the participant to answer some additional questions (especially to spec-

ify the US-company that allegedly runs the service) in person but with no response. Eventually the participant explained over the phone that he is not entitled to deliver any more statement concerning the service since he is not its provider and he already presented all relevant facts to the Council in his written response.

The Council, after evaluation of all available facts, delivered a decision where it stated that the service in question does indeed constitute an on-demand audiovisual media service. The Council stated very clearly in its reasoning that it was completely irrelevant where the server of the service is situated and also who owns the internet domain of the service. For the identification of the media service provider it is necessary to determine who is responsible for choosing and organising the service content, in other words who has the editorial responsibility over it. With regard to the given service the Council stated that the participant failed to identify the US-company which allegedly chooses and organises the service content even though the participant itself is supposed to communicate with this company as well as send video content to this company. The Council also argued that the participant failed to explain why all contacts within the service (labelled e.g. "production", "commerce and marketing", "audiovisual manufacturing") refer to people with Slovak telephone contacts and within the whole service there is no reference to the mentioned US-company.

The Council eventually came to the conclusion that this service despite of the participant's allegations does not target Slovaks living in the USA since all advertising within the service refers to businesses that operate solely in the Slovak Republic (mostly in the region of Trencin e.g. local radio, cafés etc.). All content of this service (editorial and advertising) therefore clearly targets the population of the Slovak Republic. The Council stressed that the participant itself is labelled as "production" whereas this word in Slovak language means "(artistic) creation of the (artistic) works or aggregation of artistic work". The Council stated that under these circumstances it is safe to assume that "production" actually refers to choosing and organising the service's content. It thus identified the participant as provider of this on-demand audiovisual media service and imposed a sanction - a warning (it was his first violation therefore warning was mandatory) for the failure to notify the Council.

The Council did not receive any appeal to this decision. The Internet site stopped operating very soon. However, it was recently discovered that probably the same service ("Internet TV of the city of Trencin") is provided on a different site. The contact information refers to a company established in Panama and the participant is clearly identified as a subject that cooperates with this service in the matters of advertising (e.g. selling advertising on this service).

• Rada pre vysielanie a retransmisiu, Rozhodnutie c. RL/98/2011, 23.11.2011 (Decision of the Council for Broadcasting and Retransmission of the Slovak Republic c. RL/98/2011 of 23 November 2011)
http://merlin.obs.coe.int/redirect.php?id=15760 SK

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DE-Germany

Video on Demand Platform of the German Public Service Broadcasters

According to media reports, on 25 April 2012 several subsidiaries of the television broadcaster *Zweites Deutsches Fernsehen* (ZDF), various stations of the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (Union of German Public Service Broadcasters - ARD) and a number of television production companies set up the limited company Germany's Gold GmbH.

The corporate objective is the joint establishment and operation of a video-on-demand (VoD) platform, through which digitised content from the past 60 years of German and international film and television history is to be made available to viewers by the participating providers and third parties via satellite, cable, terrestrial broadcasting, the internet and other technologies. The platform is to be funded from individual on-demand payments, subscriptions and advertising.

On 28 November 2011, the *Bundeskartellamt* (Federal Cartel Office - BKartA) said it had no reservations about the public service broadcasters' joint venture under current merger control laws as the parties involved did not hold a dominant position on the market and would not do so after they had joined forces. However, it went on, irrespective of its assessment under those laws it would be examining the question of a possible breach of antitrust law.

According to the plans made public so far, the VoD platform is due to become operational (probably under another name) at the end of 2012.

In March 2011, the authority turned down a comparable plan by the private broadcasting groups ProSiebenSat1 and RTL on merger control grounds (see IRIS 2011-5/15).

• *Pressemitteilung der WDR Mediagroup, 25. April 2012* (WDR Mediagroup press release, 25 April 2012)
http://merlin.obs.coe.int/redirect.php?id=16237 DE

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Agenda

Levelling the playing field? Towards New European Rules for Film Funding
19 May 2012 Organiser: European Audiovisual Observatory
Venue: Cannes
http://www.obs.coe.int/about/oea/pr/mif2012.html

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