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IRIS
Legal Observations
of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Gillberg v. Sweden (Grand Chamber)

The Grand Chamber of the European Court has, more firmly than in its Chamber judgment of 2 November 2010 (see IRIS 2011/1-1), confirmed that a Swedish professor, Mr. Gillberg, could not rely on his right to privacy under Article 8, nor on his (negative) right to freedom of expression and information under Article 10 of the Convention to justify his refusal to give access to a set of research materials belonging to Gothenburg University, on request of two other researchers, K and E. Mr. Gillberg was convicted of misuse of office. He was given a suspended sentence and a fine of the equivalent of EUR 4,000. In Strasbourg Mr. Gillberg complained that his criminal conviction breached his rights under Articles 8 and 10.

As to the alleged breach of Article 8 of the Convention, the Court is of the opinion that the conviction of Mr. Gillberg did not affect his right to privacy. The Court confirmed that Article 8 cannot be relied on in order to complain of a loss of reputation that is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence. As there was no indication that the impugned conviction had any repercussions on Mr. Gillberg's professional activities that went beyond the foreseeable consequences of the criminal offence of which he was convicted, his rights under Article 8 had not been affected.

Regarding the alleged breach of Article 10, the Court clarified that in the present case the applicant was not prevented from receiving and imparting information or in any other way prevented from exercising his "positive" right to freedom of expression. Indeed Mr. Gillberg argued that he had a "negative" right to refuse to make the disputed research materials available, and that consequently his conviction was in violation of Article 10 of the Convention. The Court is of the opinion that the finding that Mr. Gillberg would have a right under Article 10 of the Convention to refuse to give access to the research materials in this case would not only run counter to the property rights of the University of Gothenburg, but "it would also impinge on K's and E's rights under Article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned".

The Court also rejected the claim by Mr. Gillberg that he could invoke a right similar to that of journalists in having their sources protected under Article 10 of the Convention. The Court is of the opinion that Mr. Gillberg's refusal to comply with the judgments of the Administrative Court of Appeal, by denying K and E access to the research materials, hindered the free exchange of opinions and ideas on the research in question, notably on the evidence and methods used by the researchers in reaching their conclusions, which constituted the main subject of K's and E's interest. In these circumstances the Court found that Mr. Gillberg's situation could not be compared to that of journalists protecting their sources. On these grounds the Grand Chamber reached the conclusion that the rights of Mr. Gillberg under Articles 8 and 10 of the Convention had not been affected and that these rights did not apply in the instant case.

• Judgment by the European Court of Human Rights (Grand Chamber), case of Gillberg v. Sweden, No. 41723/06 of 3 April 2012
http://merlin.obs.coe.int/redirect.php?id=15815 EN

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Parliamentary Assembly: Protecting Freedom of Expression and Information Online

On 25 April 2012 the Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1877 and Recommendation 1998, both entitled, "The protection of freedom of expression and information on the Internet and online media". The Resolution sets out a number of lines of action for member states of the Council of Europe, whereas the Recommendation is directed at the Committee of Ministers (CM).

The texts were born, inter alia, out of the PACE's concern that "the intermediaries of ICT-based media might unduly restrict access to, and dissemination of, information for commercial and other reasons without informing their users and in breach of the latter's rights" (Resolution 1877, para. 10).

The Resolution calls on member states to protect freedom of expression and information on the Internet and online media in various ways, including:

- Ensuring adherence to freedom of expression and information standards in an online environment, while also protecting privacy and personal data;

- Encouraging self-regulatory initiatives by ICT-based media;

- Ensuring corporate and operational transparency by ICT-based media;

- Implementing CM/Rec(2007)16 on measures to promote the public service value of the Internet (see

IRIS 2008-2/2), in particular its provisions on non-discriminatory provision or termination of services to users;

- Holding "intermediaries of ICT-based media responsible for unlawful content, if they are the author of such content or have the obligation under national law to remove unlawful third-party content" (para. 11.5);

- Seeking to ensure that such intermediaries "can be held accountable for violations of their users' right to freedom of expression and information".

The Recommendation, for its part, calls on the CM to take account of the Resolution in its own work and to forward it to the relevant national regulatory authorities. It recommends that the CM cooperate with the European Commission and the European Body of European Regulators for Electronic Communications (BEREC) in order to ensure the consistent application of Article 10 of the European Convention on Human Rights and Article 11 of the European Union's Charter of Fundamental Rights (both of which focus on the right to freedom of expression) in an online environment. It also recommends that the CM promote the signature and ratification of the Convention on Cybercrime and its Additional Protocol against racism and xenophobia.

• The protection of freedom of expression and information on the Internet and online media, Resolution 1877 (2012), Parliamentary Assembly of the Council of Europe, 25 April 2012
http://merlin.obs.coe.int/redirect.php?id=15825 EN FR

• "The protection of freedom of expression and information on the Internet and online media", Recommendation 1998 (2012), Parliamentary Assembly of the Council of Europe, 25 April 2012
http://merlin.obs.coe.int/redirect.php?id=15826 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: Interpretations of 'Communication to the Public'

On 15 March 2012, the Court of Justice of the European Union published two decisions (case C-162/10 and case C-135/10) on the right to equitable remuneration when a user allows his own clients to hear music as background music in a place subject to the user's control.

In case C-135/10, SCF, the Italian broadcasting and neighbouring rights collecting agency sued Mr Marco Del Corso, a dentist who played background music, free of charge, in the waiting room of his dental practice. At national level, the Court of Appeal of Turin (Italy) requested a preliminary ruling on the question whether the free broadcasting of background music in a non-public place where persons were engaged in professional economic activity, such as a dentist's, to patients who were not given any active choice, constitutes 'communication to the public' for the purposes of the application of Article 3(2)(b) of Directive 2001/29 and whether such an act of transmission entitles the phonogram producers to payment of remuneration.

In case C-162/10, PPL, the Irish collecting society representing the rights of phonogram producers to sound recordings or phonograms sued the Irish government before the High Court for breach of EU law in exempting hotel operators from the obligation to pay equitable remuneration for broadcasting music in hotel bedrooms. At national level, the High Court of Ireland requested a preliminary ruling on the following questions:

Is a hotel operator who provides televisions and/or radios in guest bedrooms, a 'user' making the music available to the hotel guests a 'communication to the public' for the purpose of Article 8(2) Directive 2006/115/EC Is a hotel operator who does not provide radios and/or televisions, but who does provide other devices using which phonograms in digital or physical format can be heard, a 'user' making a 'communication to the public'? Does the exemption from the obligation of paying remuneration on grounds of private use apply in this case?

The question in these two cases was whether playing background music constitutes a 'communication to the public'. The reasoning of the CJEU leads to divergent decisions.

First of all, in order to determine whether playing music is communication to the public, the CJEU determines the role played by the user. Without the user's intervention, the customers could not enjoy the broadcast works. The Court also specifies that 'communication to the public' means making sounds, or recordings of sounds, by means of a phonogram, available to the public. Providing devices for playing music and broadcasting music specifically to be heard by means of those devices therefore constitutes communication to the public.

Secondly, the CJEU explained the term 'public' in earlier cases. 'Public' implies an indeterminate number of potential listeners as well as a large number of persons. The term 'indeterminate' refers to persons in general, not restricted to specific individuals belonging to a private group. In case C-135/10, patients of a specific dentist constitute a consistent group of people because they have (only) access to treatments by that particular dentist. They are therefore not 'persons' in the general sense. Furthermore, as the number of persons that could be present at the dentist's at any given time is very limited, they do not generally hear the same music. Hotel guests on the other hand, in case C 162/10, comprise an indeterminate number

of potential listeners insofar as their access to the music is the result of their own choice and limited only by the capacity of the hotel. As such, they are 'persons in general'. Hotel guests are a large number of persons, so they can be considered 'public'.

Thirdly, the extent to which a profit is made has to be considered. Providing an additional service to clients by playing music could affect the price. Playing background music does not impact on the income of a dentist. It is not to be expected that broadcasting music in a dental practice will produce an increase in patients or income. The hotel allows its customers to listen to the music as an additional service, which has an influence on the hotel's standing and on the price of the rooms. It is likely that guests are interested in this additional service and will pay more because of it. The hotel operator therefore stands to make a profit by playing this music.

Therefore, the CJEU decided that in case C-135/10 playing background music does not constitute 'communication to the public' for the purpose of the Directive whereas in case C-162/10 it does.

Finally the Court rejected the application of any exemption of private use to the hotel operator as hotel guests are 'public' and public is (by its very definition) not private.

In conclusion, in order to decide whether a specific case involves 'communication to the public', a court needs to assess if there is a 'public' (indeterminate, large number of potential listeners), if these persons have simultaneous access to the music, and if the user aims at making a profit through this music. If the case meets these conditions, the user makes a 'communication to the public' and must therefore pay an equitable remuneration.

- Judgment of the Court of Justice of the European Union, Case C-132/10, Società Consortile Fonografici v. Marco Del Corso, 15 March 2012
http://merlin.obs.coe.int/redirect.php?id=15823 DE EN FR
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- Judgment of the Court of Justice of the European Union, Case C-162/10, Phonographic Performance (Ireland) Limited v. Ireland, 15 March 2012
http://merlin.obs.coe.int/redirect.php?id=15824 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV

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Court of Justice of the European Union: Bonnier Audio AB and others v. Perfect Communication Sweden AB

On 19 April 2012, the Court of Justice of the European Union (CJEU) delivered a judgment in the case of Bonnier Audio AB and others v. Perfect Communication Sweden AB.

Bonnier Audio and others are publishing companies, which hold, inter alia, exclusive rights to the reproduction, publishing and distribution to the public of 27 audiobooks. The publishing companies claim that their exclusive rights are infringed by public distribution of the 27 audiobooks, without their consent, via an online filesharing programme. Based on Article 53c of the Swedish Copyright Act, the publishing companies applied to the Swedish District Court to order ePhone (the Internet Service Provider through which the file exchange took place), to disclose personal data (name and address) of the person using the IP address from which the files were sent. ePhone challenged this application arguing that the injunction sought is contrary to Directive 2006/24/EC on data retention (amending Directive 2002/58/EC). In the absence of implementation of Directive 2006/24/EC into Swedish law, Directive 2002/58 is still in force in Sweden.

The Swedish District Court granted the injunction requested. ePhone successfully appealed. The publishing companies then brought the case before the Swedish Supreme Court, which referred two preliminary questions to the CJEU to determine whether:

- Directive 2006/24 (in particular Articles 3 to 5 and 11), precludes the application of a national provision that is based on Article 8 of Directive 2004/48 (the IP enforcement Directive) and, in order to identify an Internet subscriber, permits an internet service provider in civil proceedings to be ordered to give a copyright holder information on the subscriber to whom the internet service provider assigned a specific IP address that was used in the alleged infringement;

- the answer to the first question is the same if that member state has not implemented Directive 2006/24 despite the fact that the time-limit for implementation has expired.

According to the CJEU, Directive 2006/24 must be interpreted as not precluding the application of national legislation based on Article 8 of Directive 2004/48. Directive 2006/24 on data retention deals exclusively with the handling and retention of data generated or processed by the providers of publicly-available electronic communications networks, for the purpose of investigating, detecting and prosecuting serious crime. Directive 2006/24 applies only to data retained specifically for that purpose. In this case, the national legislation at issue pursues a different objective, namely, the communication of data in order to establish an infringement of IP rights. That does not fall within the material scope of Directive 2006/24. It is therefore irrelevant whether the Directive has been implemented or not.

In this case, the CJEU applies Directive 2002/58 (Directive on Privacy and Electronic Communications)

making use of its prerogative to consider EU law provisions that have not been referred by the national court. The CJEU recalls its judgment in Promusicae (see IRIS 2008-3/4) and states that the personal data sought by the publishing companies falls under Article 2 of Directive 2002/58 and therefore that Directive applies.

In the present case, the object of the communication of personal data is to ensure effective copyright protection that falls within the scope of Directive 2004/48. Article 8 of Directive 2004/48 does not preclude member states from imposing an obligation to disclose personal data in order to bring civil proceedings for copyright infringements. Article 53c of the Swedish Copyright Act contains this obligation.

The CJEU concludes that Directive 2002/58 and Directive 2004/48 must be interpreted as not precluding the application of national legislation in the main proceedings, in so far as that national legislation enables the national court to weigh the conflicting interests involved on the basis of the facts of each case and taking due account of the European Union law principle of proportionality.

It is left to the national courts how to weigh these conflicting interests.

• Judgment of the Court of Justice of the European Union (Third Chamber), Case C-461/10, Bonnier Audio AB and others v. Perfect Communication Sweden AB, 19 April 2012
http://merlin.obs.coe.int/redirect.php?id=15822 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: First Report on the Application of the Audiovisual Media Services Directive

On 7 May 2012, the European Commission presented its first report on the application of the Audiovisual Media Services Directive (AVMSD) (see IRIS 2008-1/3). Article 33 of the Directive invites the European Commission to submit a report on its application every three years. This report covers the period 2009-2010. The document is divided into two parts: the first relates to the application of the Directive (including implementation status) and the second to the influence that recent technological developments has had on the regulatory framework.

In its introduction, the report recalls the goal of the Directive, which is to ensure the free circulation of audiovisual media services while taking into account important public policy objectives.

25 member states have notified having completed the transposition of the Directive into their national law. Two member states still need to adapt their laws.

The report assesses the concrete implementation of the rules laid down in the AVMSD according to the following categories:

- Country of origin (together with free circulation and freedom of expression);

- Public policy objectives (namely protection of minors and incitement to hatred);

- Audiovisual media services for all (more precisely accessibility for hearing and visually impaired people);

- Freedom of expression (linked to the right to information on events of major importance);

- Cultural diversity (with a highlight on the promotion of European and independent works);

- Commercial communications (covering advertising and teleshopping spots, alcohol advertising, advertising targeting children and also revealing discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation);

- Self-regulatory initiatives (alternative means of regulation existing notably in the field of advertising).

For each topic, the report mentions whether the European Commission has asked for clarification from one or more member states on its/their national law or whether the European Commission has required some action to be taken by the national authorities. The report also mentions if some member states have included stricter (or additional) rules in their national law. Stricter rules have been adopted, for example, in the fields of advertising targeting children as well as alcohol advertising involving channels, advertised products or time slots. Since advertising practices are considered to be key issues, the European Commission plans to update its interpretative communication on televised advertising in 2013.

Finally, the emergence of Connected (or Hybrid TV) marks a new stage in the convergence of TV and Internet. Connected TV services already exist in two member states and should be introduced in at least two others. Connected TV is expected to grow very quickly in the coming years. Thus, the European Commission announces the launch of a public consultation (before the end of 2012) to assess the consequences of this technological development and test the regulatory framework set up by the Directive.

• First Report from the European Commission on the application of Directive 2010/13/EU "Audiovisual Media Services Directive", 7 May 2012
http://merlin.obs.coe.int/redirect.php?id=16002 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 Data Protection Supervisor: Second Opinion on ACTA

In February 2010, the European Data Protection Supervisor (EDPS) issued a first opinion on ACTA (Anti-Counterfeiting Trade Agreement) on its own initiative (See IRIS 2010-4/5) to draw the European Commission's attention to privacy and data-protection related aspects. At that time, negotiations on ACTA were conducted in secret.

Now that the text of the proposed agreement has been made public and that the adoption procedure has started at EU level (see IRIS 2011-8/7), the EDPS considered it appropriate to issue a second opinion on the privacy and data protection issues raised by ACTA. In its Opinion issued on 24 April 2012 the EPDS places emphasis on the fact that a correct balance must be struck between demands for the protection of intellectual property rights and the rights to privacy and data protection. Strengthening the enforcement of IP rights must not come at the expense of the fundamental rights and freedoms of individuals to privacy, data protection and freedom of expression.

The EDPS notes in particular that the provisions relating to enforcement of IP rights on the Internet raise concerns from a data protection perspective. Many of the proposed measures would involve the monitoring of users' behaviour and of their electronic communications on the Internet. If not implemented properly, these measures may therefore interfere with their rights to and freedoms of privacy, data protection and the confidentiality of their communications.

The EDPS underlines that measures that entail broad and indistinct monitoring of Internet users' behaviour, or electronic communications, in relation to small-scale not for profit infringement would be disproportionate and in breach of Article 8 ECHR, Articles 7 and 8 of the Charter of Fundamental Rights, and the Data Protection Directive. The Agreement does not contain sufficient limitations and safeguards in respect of the implementation of measures that imply monitoring electronic communications networks on a large-scale.

Furthermore, the EDPS raises specific concerns in relation to several specific provisions of ACTA. The scope of enforcement measures in the digital environment (Article 27) is unclear and the notion of 'commercial scale' in Article 23 of the Agreement is not sufficiently defined. The same applies to 'competent authorities' in Article 27(4). Therefore, this provision does not provide the legal certainty necessary to ensure that the disclosure of alleged infringers' personal data would only take place under the control of judicial authorities. Lastly, many of the voluntary enforcement co-operation measures that could be implemented under Article 27(3) of the Agreement would entail a processing of personal data by ISPs, which goes beyond what is allowed under EU law.

• Second opinion of the European Data Protection Supervisor on the proposal to the Council on the conclusion of ACTA, 24 April 2012
http://merlin.obs.coe.int/redirect.php?id=15820 EN

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NATIONAL

AT-Austria

BKS Clears ORF of Breaching Objectivity Requirement in Gambling Addiction Report

In a ruling of 27 February 2012, the Austrian *Bundeskommunikationssenat* (Federal Communications Office - BKS) decided that the Austrian public service broadcaster *Österreichischer Rundfunk* (ORF) had not breached the objectivity requirement set out in Articles 4(5) and 10(5) of the *ORF-Gesetz* (ORF Act) in a report about a gambling addict.

After the *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) had reached the same decision in a previous procedure, the plaintiff had appealed to the BKS, arguing that the disputed report, describing an individual's experiences, had included heavy and ultimately unjustified criticism. Not only had ORF failed to challenge this criticism, but the reporter's remarks and comments had served to reinforce it. The average viewer would have inevitably been given the impression that the addict's experiences could, in principle, apply to anyone. In general, the plaintiff condemned the lack of objective commentary, referring to the "subtle behaviour" of ORF, which had broadcast a considerable amount of advertising for State betting products shortly before and after the programme.

The BKS disagreed and, in accordance with KommAustria's lower-instance decision, noted that the concept of objectivity in the sense of the ORF Act should be

understood as the statement of facts and the avoidance of bias, partisanship and distortion of events. The BKS stated that the objectivity requirement would be breached by any statements or wording in a report that had a significant effect of pushing the general context into the background, with the result that the average viewer would inevitably receive a distorted impression of the subject-matter. The BKS did not find any passages in the report concerned that would give the average viewer a distorted impression detrimental to the plaintiff. Also, the report did not contain any polemical or unreasonable wording.

The average viewer would therefore be able to recognise the descriptions of the addict's experiences as portrayed as being personal and individual rather than an accurate portrayal of the private gambling industry as a whole. An objective commentary was unnecessary. Furthermore, the title "*Wette verloren - Sportwetten bis zum Ruin*" ("Bet lost - sports betting leads to ruin" clearly showed that the report dealt with an individual case, in which the social problem of gambling addiction was meant to be portrayed together with background information relevant to criminal law and society.

Finally, the BKS stated that the report could not be considered as a sweeping defamation of private providers nor a recommendation for State providers. Furthermore, the report's structure did not suggest that ORF agreed with the addict's critical comments, or that it was therefore clearly designed as cheap propaganda against private operators, while portraying State providers in a particularly positive light.

On these grounds, the BKS rejected the appeal.

• *Entscheidung des BKS vom 27. Februar 2012 (GZ 611.995/0002-BKS/2012)* (BKS decision of 27 February 2012 (GZ 611.995/0002-BKS/2012))
http://merlin.obs.coe.int/redirect.php?id=15832 DE

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Information Channel Broadcasting only Still Images Must Record Programmes

On 25 January 2012, the Austrian *Verwaltungsgerichtshof* (Administrative Court - VwGH) rejected a broadcaster's appeal against a decision of the *Bundeskommunikationssenat* (Federal Communication Office - BKS) and ruled, *inter alia*, that an information channel that broadcasts only a sequence of still images that changes approximately every two months (mainly job advertisements and other advertising) is obliged to record its broadcasts under the terms of the *Privatfernsehgesetz* (Private Television Act - PrTV-G).

In a ruling of 9 March 2009, the BKS had stated that the company concerned should be treated as a broadcaster in the sense of Article 2(1) PrTV-G, since it compiled items to be distributed via its cable network and therefore conducted activities that defined it as a broadcaster in the sense of the PrTV-G. The broadcaster had breached the recording requirement under Article 47(1) PrTV-G since the PowerPoint presentation that was produced for this purpose during the proceedings was not sufficient to ensure that the content actually broadcast could be reproduced at a later date without any changes.

In its appeal, the broadcaster mainly argued that the disputed transmission of information was not a programme in the sense of Article 47(1) PrTV-G, since programmes needed to have a minimum amount of creative and intellectual content. The mere transmission of static, unchanging teletext with still images that changed at certain intervals, with no other video or audio content, could not constitute a programme.

The VwGH agreed fully with the BKS's opinion and confirmed the classification of the plaintiff as a broadcaster. It explained that the recording obligation under Article 47(1) PrTV-G obliged broadcasters to record all their programmes, keep them for a precisely defined period of time and make them available to the regulatory body on request. The Act did not contain a more detailed definition of the concept of a "programme". Agreeing with the BKS, the VwGH ruled that the purpose of this provision was to guarantee effective legal control and enforcement of the law. The provision was therefore designed to enable the regulator to check the programme actually transmitted by the broadcaster as part of its control remit. The duty to record and keep programmes therefore encompassed broadcast programmes in the broadest sense, regardless of how much editorial, creative and intellectual input was needed to produce them and no matter how extensive their information content was.

On these grounds, the VwGH rejected the appeal as unfounded.

• *Entscheidung des VwGH vom 25. Januar 2012 (Az. 2011/03/0059)* (VwGH decision of 25 January 2012 (case no. 2011/03/0059))
http://merlin.obs.coe.int/redirect.php?id=15834 DE

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Bundesrat Ratifies Council of Europe Cybercrime Convention

On 29 March 2012, the Austrian *Bundesrat* (upper house of parliament) ratified the Council of Europe Convention on Cybercrime with the aim of making

criminal prosecution in the field of cybercrime more efficient.

The Convention on Cybercrime was adopted by the Committee of Ministers of the Council of Europe on 8 November 2001 and signed by Austria and some other states on 23 November 2001 (see IRIS 2001-10/3). It entered into force on 1 July 2004 and is now in force in 33 contracting states.

The Convention essentially harmonises the criminal substantive law elements of offences that must be incorporated into domestic law, and provides for criminal procedural law powers necessary for the investigation and prosecution of such offences. To this end, the competent authorities are given special powers. For example, they should be able to expeditiously preserve stored computer data. Here, Austria reserves the right to refuse a request for legal assistance with the preservation of computer data, apart from in cases of dual criminality. This reservation does not apply to the offences listed in Articles 2 to 11 of the Convention, i.e., offences against the confidentiality, integrity and availability of computer data and systems, computer-related offences, certain offences related to child pornography and copyright infringements. Harmonised rules in the field of international cooperation should also facilitate extradition and legal assistance in particular, in view of the dual criminality requirement.

Austria has already transposed the essential provisions of the Convention. A 24-hour point of contact is still to be set up in accordance with Article 35 of the Convention for the purpose of investigations, proceedings and the collection of evidence concerning the offences covered by the Convention.

The Cybercrime Convention was approved by the majority of Austrian *Bundesrat* members. Although, on the one hand, the protection of citizens and businesses from cybercrime through so-called hacking, for example, was stressed, various aspects were criticised also: there were complaints that the Convention was already more than ten years old and therefore did not take into account recent developments, including a new interpretation of the law. It was also unacceptable that serious crimes and illegal downloads were treated in the same way. Finally, some critics feared that the Convention's provisions might be "excessively" transposed, leading to censorship and surveillance, particularly in view of the fact that it was being ratified at the same time as the entry into force of data retention laws in Austria (see IRIS 2011-6/7).

• *Übereinkommen über Computerkriminalität (1645 d.B.): Beschluss des Bundesrates und weitere Unterlagen* (Decision of the *Bundesrat* and other documents)
http://merlin.obs.coe.int/redirect.php?id=15833 DE

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Austria Enters Crucial Phase of Cinema Digitisation in 2012

With around 70% of screens digitised, Austria already appears to be leading the way as far as the digital rollout is concerned, apparently thanks to the 3D boom on the one hand, and the dominant position of an integrator (provider of digital cinema services including VPF contracts, e.g. XDC, Arts Alliance) in the Austrian market. In parallel with the ministry's efforts to promote the digitisation of repertory and regional cinemas, reported in IRIS 2012-1/8, film distributors in the Fachverband der Film- und Musikindustrie (Film and Music Austria) have been discussing the details of their own involvement in cinema digitisation since spring 2011.

The starting position was clear: around 70% of the Austrian market had been digitised by means of an integrator model, in which only one large integrator is active in the Austrian market. This model is highly beneficial to multiplex cinemas and cinemas that frequently screen new releases. However, it is largely unsuitable for repertory and regional cinemas, which are therefore forced to cover the high investment costs of around EUR 70,000 (excluding additional costs such as financing, air conditioning, refitting, maintenance, etc.) themselves. The difficult financial position of the cinema industry makes this virtually impossible.

As in other countries, the involvement of the distribution industry via a so-called Virtual Print Fee (VPF = a refinancing mechanism to finance the digital switchover; to put it simply, in order to support the digital switchover, the distributor reimburses the cinema the money it saves by distributing a digital rather than an analogue copy) was therefore discussed. The completely independent proposal of the Austrian film distribution industry is described below.

The Austrian VPF model creates the possibility of refinancing all or part of the investment costs for every cinema and every screen, minus the cinema's own contribution and any aid received, by means of a discount scheme operated by the distribution industry. It is ultimately in the interests of film distributors to ensure that the digital rollout is as quick and smooth as possible, that the logistically expensive combined use of digital and analogue copies is abolished and, for the Austrian film production and distribution sector in particular, that repertory and regional cinemas are protected.

In contrast to the German system, the Austrian VPF model does not distinguish according to the type of cinema (repertory, regional or multiplex) or the number of screens. Instead, any cinema can participate with any screens that are not included in an integrator model. The cinema must either be already digitised or prove no later than 31 December 2012 that

it has invested in digitisation (e.g. by ordering digital hardware) and register for the discount scheme by the same deadline. Unlike direct aid schemes, the model includes so-called "first movers", i.e. cinemas that invested in digital projection before the scheme was launched (1 March 2012).

The voluntary VPF model of the Austrian film distribution and cinema industry also includes the following essential features:

- Actual investment costs for digital hardware plus financing costs are taken into account, up to a maximum of EUR 80,000 (EUR 70,000 for equipment and EUR 10,000 for financing). To calculate the relevant figures for the refinancing period, the cinema's own contribution and any direct aid received must be deducted from this figure.

- The obligation to pay the VPF ends when the refinancing share is reached, or after seven years at the latest.

- The cinema's own contribution is 25% of the refinancing share on which actual costs are based. 50% of public aid can be used to cover a maximum of half the cinema's own contribution.

- Cinemas may participate regardless of the number of screens.

- The VPF is EUR 500 plus a EUR 50 administration fee.

- For poorly attended films, the VPF is EUR 1 per viewer, up to the maximum VPF. The VPF model is therefore meant to be attractive for smaller distributors with small copy numbers and small expected audiences.

- In the first two weeks of screenings, 100% of the VPF is due, after which the amount is gradually reduced. Films are VPF-free from the eighth week onwards.

The model is voluntary. Although cinemas have to be registered (free of charge) for the scheme as part of the compulsory registration process, individual distribution companies can decide for themselves whether to participate in the system.

If the majority of distribution companies consider the management and administration of the scheme by a not-for-profit third party and the equal treatment envisaged under the scheme to be sufficiently advantageous, they can participate in the system by paying the VPF. The Austrian market could therefore become virtually 100% digitised in 2012, bringing closer the objective set out by politicians as well as the film and cinema industry: loss-free, digital image quality, widely available digital content both for the multiplex market and for repertory, art house and regional cinemas, and the logistical advantages of digital rollout via hard disk or satellite.

• *Freiwilliges VPF-Modell der österreichischen Verleih- und Kinowirtschaft* (Voluntary VPF model for the Austrian distribution and cinema industry)
http://merlin.obs.coe.int/redirect.php?id=15856 DE

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Judgment on the Show "The Price of Truth"

On 27 February 2012 the Administrative Court in Sofia confirmed penal decree No. 63/17.11.2009 issued by the chairperson of the Council for Electronic Media (CEM). The penal decree imposed a penalty in the amount of BGN 8,000 on the private national television Nova Broadcasting Group. The reason for the penalty was a violation of good morals in "The Price of Truth" which was broadcast on 16 September 2009 on the channel Nova TV. The anchorman of the show had posed questions to the female contestant in the presence of her 16-year old son about her relationship with a 19-year old man, including questions about having sex without condoms and about abortions she had had.

Representatives of the media concerned claimed that the show "The Price of Truth" was one of the most attractive television formats where personal questions have been asked, always aiming that the answers should correspond with the truth. The media referred in its appeal to the opinion that showing the whole truth may not prejudice good morality.

The thesis of the Nova Broadcasting Group was dismissed by the second, the final court. The court shared the arguments of the first-instance District Court in Sofia, which had held that, according to the interpretation of the constitutional provision on freedom of expression (Art. 39, para. 2) in its Decision No 7/1996, the Constitutional Court allows some intervention and restrictions in order to protect morality. The Court considered the broadcast frames as publicly unacceptable and inconsistent with generally accepted standards of propriety.

• АДМИНИСТРАТИВЕН СЪД СОФИЯ - ГРАД , *X406406 КАСАЦИОНЕН СЪСТАВ , 27.02.2012 г .* (Decision of the Administrative Court in Sofia of 27 February 2012)
http://merlin.obs.coe.int/redirect.php?id=15805 BG

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CH-Switzerland

Federal Court Denies SRG Boycott of *Verein gegen Tierfabriken*

Since 2008, the *Verein gegen Tierfabriken* (VgT) has been complaining that *Deutschschweizer Fernsehen* (SF) has boycotted it systematically for non-objective political reasons. The VgT asked the broadcasting regulator *Unabhängige Beschwerdeinstanz für Radio und Fernsehen* (Independent Radio and Television Complaints Authority - UBI) to order SF to bring an end to its "television censorship" of the VgT. On 22 October 2010, the UBI rejected the VgT's complaint against the *Schweizerische Radio- und Fernsehgesellschaft* (Swiss radio and television corporation - SRG), which operates the SF channel. According to the UBI, there were insufficient grounds to rule that the VgT had been the victim of unconstitutional discrimination.

The VgT's appeal against the UBI decision was rejected by the *Bundesgericht* (Federal Court) on 24 February 2012. The highest Swiss court ruled, in principle, that individuals could nowadays raise public awareness through numerous media thanks to new forms of technology (Internet, digital television, etc.). If, in an individual case, the authorities, on the basis of the European Convention on Human Rights (ECHR) or the Federal Constitution, granted the right of access to a particular television channel, the broadcaster's programming independence would be restricted. Although the State, as the guarantor of media diversity, could interfere in programming independence in order to protect specific interests, such as equal opportunities in the run-up to elections or referenda, it could only do so "in exceptional circumstances".

The VgT case was not exceptional. However, the *Bundesgericht* admitted that some of *Schweizer Fernsehen's* behaviour towards the VgT showed a degree of animosity. For example, SF's long-standing editor in chief had inappropriately stated in an interview that the VgT President was "a participant not to be taken seriously in the public debate". This had genuinely given rise to the fear that SF would no longer give sufficient coverage to the VgT and the animal welfare issues that it represented. SF had regularly reported on the VgT and its activities between 1989 and 1997, but had done so rather less since then. According to the *Bundesgericht*, there were objective reasons "for the relatively small number of reports" about the VgT. The fact that SF was, in some cases, paying greater attention to other animal welfare organisations and the issues they were raising was linked to the current news situation. It was understandable if SF gave proportionally more coverage to larger animal protection organisations and their views on animal welfare issues than to the VgT. The SRG had a journalistic duty of care and could not provide the kind of one-sided, uncompromising reporting that the VgT wanted.

The VgT had particularly complained that SF had failed to report immediately about the second ruling of the European Court of Human Rights concerning the broadcast of a VgT advertisement (see IRIS 2010-3/10). However, the *Bundesgericht* did not consider this to be sufficient evidence of unconstitutional discrimination. There were "thousands of other people and organisations that considered other events or reports as very important and which - measured against the benchmark laid down by the plaintiff - could make an equally valid claim to be mentioned, which is clearly impossible in view of the limited airtime."

• *Entscheid des Bundesgerichts vom 24. Februar 2012 (2C_408/2011)* (Judgment of the Federal Court of 24 February 2012 (2C_408/2011))
http://merlin.obs.coe.int/redirect.php?id=15837 DE

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CZ-Czech Republic

Constitutional Court Rules on Freedom of Expression in Broadcasting

On 8 March 2012, the Constitutional Court rejected the complaint of FTV Prima Ltd. against the judgment of the Supreme Administrative Court of 14 September 2011, the judgment of the Municipal Court in Prague of 17 March 2011 and the decision of the Council for Radio and Television Broadcasting of 22 June 2010.

In the constitutional complaint delivered to the Court the petitioner sought the annulment of the above decisions, because of a breach of the constitutionally guaranteed fundamental right to freedom of expression, as protected by Art. 17 of the Charter of Fundamental Rights and Freedoms and Art. 10 of the European Convention on Human Rights and Fundamental Freedoms. The complainant alleged in particular the violation of editorial freedom and independence of the media. FTV Prima stated that both the Council for Radio and Television Broadcasting and subsequently the ordinary courts applied the standard sub-constitutional law, particularly §32 para. 1 pt. g) of Act No. 231/2001 Coll. on radio and television broadcasting, without duly considering the constitutional dimension of this case. The general courts opposed these objections and did not recognise any interference arising from their decisions with the constitutionally protected rights of the petitioner.

In the present case the complainant was punished for a report about the group Jackass Praha, whose behaviour is generally as well as in terms of aesthetic (and in some cases even of moral) values hardly acceptable. The complainant was convinced that the inclusion of reports showing the performance of the above-mentioned publishing and editorial work belongs to a democratic state and independent media and is generally covered by the freedom of speech. A fine in the amount of CZK 3,000,000 (EUR 120,000) could therefore undoubtedly be regarded as intervention in the legal sphere of the complainant.

After having examined the files, evidence and legal status the Constitutional Court concluded that the petition was clearly unfounded since the alleged infringement of constitutionally guaranteed rights by the institutions mentioned had obviously not occurred. The Supreme Administrative Court had agreed with the opinion of the Council for Radio and Television Broadcasting that showing instances of gambling with one's own health and life, the endangerment of the health of other persons and the inadequate presentation of hazards and risks by the complainant was contrary to the general ethical values as accepted by most of Czech society, and that therefore the report was capable of endangering the physical, mental and moral development of minors. The Constitutional Court on the objection of the petitioner noted that the matter was not an evaluation of the broadcast from the perspective of journalistic ethics, nor of journalistic resources and techniques. The law empowered the administrative authority to examine the content of reports only from the perspective of its impact on the physical, mental or moral development of minors as defined in §32 para. 1 pt. g) of Act No. 231/2001 Coll. because it was a show broadcast during the period from 06.00 to 22.00 h at a time when television is subject to the above-cited provision. The petitioner did not state any other facts that would justify the alleged violation of constitutionally guaranteed rights. Given that the Constitutional Court found no violation of the fundamental rights of the complainant, the relevant constitutional law or international agreements binding the Czech Republic, the complaint was rejected.

• Rozhodnutí Ústavního soudu č. I. ÚS 3628/2011 z 8. března 2012 (Decision of the Constitutional Court No. I. US 3628/2011 of 8 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15850 CS

Jan Fučík
Ministry of Culture, Prague

Constitutional Court - Tabloid Media Must Be Prepared to Pay for Lies and baseless Allegations substantially higher Sums than ever before

On 6 March 2012 the Constitutional Court issued a decision concerning the Czech writer Michael Viewegh. In 2004 the newspaper Aha! published a report about Viewegh's alleged affair with a mistress with the subtitles "My secret lover", "V. likes young author" and "He showed me his big pencil sharpener". The writer claimed that he knew the woman only as a pupil and met with her only in the classroom. He said months after the publishing of the article he still was not at ease. Furthermore, advertising on television repeatedly aired the article and the information therefore reached not only readers of Aha! but also millions of television viewers.

The Prague Municipal Court first awarded compensation of CZK 50,000 (EUR 2,000) to Viewegh. The High Court in Prague increased, in November 2006, the amount by a further CZK 150,000. His appeal to the Supreme Court was rejected.

The complainant sought the annulment of the decisions of the ordinary courts because he argued that they violated his fundamental right to the protection of his personal honour and good reputation as guaranteed by Art. 10 para. 1 of the Czech Charter of Fundamental Rights and Freedoms and also his right to protection against any unauthorised intrusion into private and family life, guaranteed by Art. 10 para. 2 of the Charter and Art. 8 para. 1 of the ECHR. In the constitutional complaint he disagreed with the ordinary courts' conclusions on the adequacy of the amounts of the financial compensation awarded. He regarded as reasonable an amount of compensation several times higher. The verdict apparently contained no legal analysis or evaluation of the non-pecuniary harm. The unfounded information was published at a time when the writer's wife was pregnant. He considered the amount of CZK 200,000 too low and asked for five million, since low penalties would not discourage the media from publishing unsubstantiated and false reports - and the Constitutional Court agreed.

The compensation in the amount of CZK 200,000 appeared to be completely inadequate from a constitutional point of view, the Constitutional Court said. The publication was a significant intrusion into the intimate sphere of private life (sexual life). It was capable of striking at the very essence of humanity, human dignity, the judges decided. According to the Constitutional Court, reports on the privacy of famous people generate profit for tabloid media, which therefore should pay higher compensation for any inaccurate information. According to the Constitutional Court the tabloid used the notoriety of the writer to increase its own profits.

Viewegh has been fighting with the tabloids for a long time. Together with the actor Mark Vašut he initiated a petition against the unscrupulous practices of the Czech tabloid press. Signatories to the petition pointed out characteristics such as "bad taste, indiscretion, vulgarity, half-truths disguised as truth, provocation, photomontages, fictional interviews, ruthlessness and outright journalistic hyenismus".

The Constitutional Court concluded that the ordinary courts failed in their constitutional duty to protect the complainant's fundamental rights (Art. 4 Constitution) and did not adequately protect the respect for private life guaranteed by Art. 10 of the Charter and Art. 8 of the Convention.

• Nález Ústavního soudu Čj. 1586/09 z 6.března 2012 (Decision of the Constitutional Court Nr. 1586/09 of 6 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15814 CS

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DE-Germany

Hamburg District Court Rules in Dispute between GEMA and YouTube

On 20 April 2012, the *Landgericht Hamburg* (Hamburg District Court - LG) ruled, in the dispute between the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (society for musical performing and mechanical reproduction rights - GEMA) and the video portal operator YouTube, that YouTube was liable, although only in cases in which it "knowingly breached certain rules of conduct and control obligations". YouTube was under no general obligation to check all content uploaded onto its portal for copyright infringements, to block such content or to take measures to prevent repeat infringements. Rather, the operator was only obliged to act after being notified of a copyright infringement (see IRIS 2010-9/19).

In its complaint, the collecting society had sought an injunction against YouTube preventing it from continuing to provide online access to 12 musical works for which the GEMA held the copyright. However, its request was only partially granted. The court granted an injunction against YouTube with regard to seven of the 12 works. However, since the defendant had not uploaded the aforementioned videos itself and had not given the impression that they were its own content, the court did not agree with the GEMA's interpretation that YouTube was liable as the primary offender. Rather, it merely found YouTube liable under the principle of secondary liability. By providing and operating the online portal, YouTube contributed to copyright infringements, as a result of which it had certain obligations. YouTube had breached these obligations with regard to the seven works because it had taken one-and-a-half months to block them. The court considered that no further uploads of the other five videos were apparent. Since the defendant's breach of its obligations with regard to these works had not therefore caused any further copyright infringements, the complaint concerning them should be rejected.

In addition, the court ruled that YouTube had further examination and control obligations, such as to use so-called Content ID software, which can prevent the upload of content identical to previously reported recordings. YouTube should use this software itself, rather than expect copyright holders to do so, as was its current practice. Since this software could only block absolutely identical audio recordings and therefore did not recognise live performances rather than studio recordings, the defendant should also, in future, install a word filter. This should filter out new clips whose names contained both the title and the name of the artist of a previously reported work.

However, the court added that proportionality should always be respected in relation to the obligations imposed on the defendant. These should not excessively impede its activities, which were, in principle, admissible. YouTube should therefore not be required to search its entire database for copyright infringements. The defendant was not liable under the principle of secondary liability until it was notified of an actual copyright infringement. The obligation to take precautions against further infringements only applied to future copyright breaches.

The ruling is not yet final. After it was published, both parties signalled a willingness to negotiate a new contractual agreement.

• *Urteil des LG Hamburg vom 20. April 2012 (Az. 310 O 461/10)* (Decision of the LG Hamburg (Hamburg District Court) of 20 April 2012 (case no. 310 O 461/10))
http://merlin.obs.coe.int/redirect.php?id=15835 DE

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ZAK Bans Gambling Advertising and Complains about Advertising Violation

At its meeting on 24 April 2012, the *Kommission für Zulassung und Aufsicht* (Licensing and Monitoring Commission - ZAK) decided that the broadcast of advertising for sports betting provider bwin by pay-TV broadcaster Sky breached current law. It banned further broadcasts of all forms of television advertising for bwin and ordered the immediate execution of this measure.

Sky had broadcast numerous sponsor references and split-screen advertisements for bwin during the programme "*Live Fußball: Bundesliga/Samstags-Konferenz*" on 28 January 2012. The Commission deemed that this breached the ban on television advertising for public gambling services.

The ZAK also lodged a complaint against the broadcaster ProSieben. On "Disney Day" (20 November

2011), the broadcaster's evening programmes had been introduced by "Kermit the frog", the well-known character from the "Muppet Show". At the same time, the programme introductions had clearly drawn attention to the cinema release of the film "The Muppets". These references had not been labelled as advertising. The Commission considered this to be a breach of the obligation to label advertising, which the broadcaster admitted.

• *Pressemitteilung der ZAK vom 24. April 2012* (ZAK press release of 24 April 2012)
http://merlin.obs.coe.int/redirect.php?id=15836 DE

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FR-France

Penalty for Film on Video Platform Infringing Copyright

On 9 May 2012, the court of appeal in Paris delivered its decision in the dispute between the producers of the film *Sheitan* and the video-sharing platform Dailymotion regarding five videos, corresponding to the entire film divided into five parts, that could be viewed on the platform using streaming despite an order issued by the regional court in Paris demanding communication of data allowing identification of the person who had broken the law by putting the videos online.

On 11 June 2010, the regional court in Paris had found the platform guilty of infringing copyright and had fined it EUR 15,000 in damages (see IRIS 2010-7/19), after noting its status as a host, which the film's producers refused to accept. The court did not however accept the company's argument that it was covered by the limited liability scheme instituted by Article 6-I-2 of the Act of 21 June 2004 (LCEN), since it had not "promptly" withdrawn the disputed content when it was reported by the producers. It should be recalled that according to this text the liability of natural or legal persons whose activity includes storing content may only be invoked "if (04046) as soon as they have knowledge of the unlawful nature of stored content they take prompt action to withdraw the data or bar access to it". The platform had appealed against the conviction. In its decision on 9 May 2012, the court noted that, contrary to the initial proceedings, and in the light of jurisprudence that was now well established, the parties were agreed in considering that Dailymotion met this definition of a host, since it provided the public with a service for storing audiovisual content (in the present case, personal programmes) supplied by the persons using the service, without being able to select the content. The parties therefore agreed that Dailymotion's liability was indeed incurred in the light of the provisions laid down specifically in the LCEN regarding the place where storage was provided. They did not agree, however, on whether the platform had fulfilled its obligations with regard to its status. Recalling these obligations, the court was to deal with the case in two stages. Firstly, in accordance with Art. 6-I-2 of the LCEN, it examined whether the platform had been "prompt" in withdrawing the content that infringed intellectual property rights as soon as it had been made aware of its existence. On this point, the court noted that the platform had written to the lawyers of one of the plaintiff production companies on the day the order was notified, providing all the data and statistics concerning the five videos at issue (date they were put on-line, IP address of their initiator and statistics). The decision added that there was therefore no justification in claiming "not without bad faith" that the elements of the order were insufficient to allow it to identify and locate the disputed content. Indeed it had allowed more than three months to pass after the date on which it had knowledge of the disputed content before withdrawing it, thereby failing in the obligation of prompt withdrawal incumbent on a storage provider.

Secondly, the court demonstrated that the platform had failed in its obligation under the LCEN to prevent further access on the host platform to content previously withdrawn. Contrary to Dailymotion's defence claims, the excerpts of the film available on the site after the initial withdrawal could not be considered as different content from the content that had been withdrawn. They therefore constituted a repeat infringement of the intellectual property rights in the same work.

Although the court confirmed Dailymotion's liability, it found that the prejudice suffered by the applicant production companies had been under-estimated in the initial proceedings. Noting that the unlawful content had not been withdrawn until three months after notification, that it had been reinstated after having been withdrawn, and that it had been viewed more than 12,000 times by the time it was withdrawn, the court ordered Dailymotion to pay each of the production companies EUR 30,000 in damages (compared with EUR 15,000 ordered in the initial proceedings).

• *Cour d'appel de Paris (pôle 5, ch. 1), 9 mai 2012 - Dailymotion c. SARL 120 Films et La chauve-souris* (Paris court of appeal (section 5, chamber 1), 9 May 2012 - Dailymotion v. 120 Films Sàrl and La Chauve-Souris) FR

Amélie Blocman
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Relaxation of Rules for Scheduling Cinematographic Works on Television

On 2 May 2012, a decree was adopted, amending the Decree of 17 January 1990 on the broadcasting on television of audiovisual and cinematographic works. Previously, the Decree prevented the free-access channels from broadcasting feature films on Wednesdays, on Friday evenings, and during the day on Saturdays and Sundays before 8.30 pm. The new Decree reflects in part the agreements reached recently by France Télévisions and Canal+ with representatives of the cinematographic industry. The aim of these agreements is to relax the times for showing cinematographic works on television services as laid down in Articles 10 and 11 of the Decree of 17 January 1990, in exchange for financial undertakings on the part of these television groups in favour of pre-financing the cinema industry. It now becomes possible for editors of non-cinema services with an average annual audience not exceeding 5% of the total audience of television services to broadcast feature films on Wednesdays in the early evening, solely on condition that they abide by the conditions attesting greater commitment on the part of the service editor, or the group to which it belongs, in favour of cinematographic creation. Specifically, they must earmark at least 3.5% of their annual turnover - instead of the minimum of 3.2% provided for in the current regulations - for expenditure that contributes to the development of the production of European cinematographic works other than the mere purchase of broadcasting rights. Service editors must also reserve at least 85% of the total annual number of initial and repeat showings of feature films for broadcasting European works or works originally made in the French language. This relaxation of the rules on the broadcasting of films on Wednesdays in the early evening concerns the channel France 4 in the first instance, which is why a decree amending the terms of reference for France Télévisions was published in the *Journal Official* on the same day.

The new Decree on the broadcasting on television of audiovisual and cinematographic works provides that cinema services showing films for the first time other than exclusive premieres (referring to the Ciné+ bundle) may now broadcast feature films on Fridays between 6 pm and 9 pm and on Saturdays from 6 pm to 11 pm. This relaxation is also conditional - the films must have been released in France more than ten years previously and they must have been seen by fewer than 1.5 million people during the first year they were shown in cinemas in France. The relaxation also applies to cinematographic heritage services and to other cinema services if they are included in a grouping of several services including at least one cinema service showing films for the first time.

• *Décret n°2012-757 du 9 mai 2012 modifiant les articles 10 et 11 du décret n°90-66 du 17 janvier 1990 pris pour l'application de la loi n°86-1067 du 30 septembre 1986 et fixant les principes généraux concernant la diffusion des œuvres cinématographiques et audiovisuelles par les éditeurs de services de télévision* (Decree No. 2012-757 of 9 May 2012 amending Articles 10 and 11 of Decree No. 90-66 of 17 January 1990 adopted for the purpose of application of Act No. 86-1067 of 30 September 1986 and laying down the general principles for the broadcasting by television service editors of cinematographic and audiovisual works)
http://merlin.obs.coe.int/redirect.php?id=15829 FR

• *Décret n°2012-758 du 9 mai 2012 portant modification du cahier des charges de la société nationale de programme France Télévisions* (Decree No. 2012-758 of 9 May 2012 amending the terms of reference of the national programme company France Télévisions)
http://merlin.obs.coe.int/redirect.php?id=15830 FR

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Launch of Plan for Restoring and Digitising Heritage Films

On 9 May 2012, a new decree on aid for digitising heritage cinematographic works was to allow the practical implementation of a wide-ranging plan to digitise cinematographic works embarked upon by the French State last year (see IRIS 2011-7/23). The aim of the plan is to assist rightsholders in restoring, using and conserving works with a view to promoting their wider circulation. The action programme is in two parts. Firstly, it involves investing alongside catalogue holders through a major national loan system. A first agreement has just been signed with Gaumont, under which it should be possible to restore 270 feature films over a four-year period. The second part of the programme involves public aid from the national centre for cinematography (Centre National de la Cinématographie - CNC), with supplementary arrangements in support of the digitisation of cinematographic works in favour of the most heritage-related part of the sector, namely films that offer serious artistic and cultural content but for which profitability is not assured. Implementing the plan required authorisation from the European Commission, however, and this was issued on 21 March 2012, as the plan was deemed compatible with the EU rules on State aid. The authorisation means that things can now start moving. The decree of 9 May 2012 has now created selective aid in favour of restoring and digitising heritage cinematographic works. The text lays down the conditions and criteria for granting the aid, particularly with regard to works and beneficiaries. The aid will take the form of subsidies or loans to be repaid over a very long period, and may cover as much as 90% of the total cost in exceptional cases. Expenditure taken into consideration will include the cost of actual restoration that may be necessary prior to digitisation, the cost of digitisation and digital restoration, the cost of calibration and producing a digital file, and if necessary the return of digital elements restored in this way to film, for conservation purposes.

For CNC Chairman Eric Garandeau, "This is the first initiative on such a scale in Europe; it will enable us to keep our cinematographic heritage in public use, using up-to-date technologies."

• *Décret n°2012-760 du 9 mai 2012 relatif à l'aide à la numérisation d'œuvres cinématographiques du patrimoine, JO du 10 mai 2012* (Decree No. 2012-760 of 9 May 2012 on aid for digitising cinema heritage works, published in the *Journal Officiel* of 10 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15831 FR

Amélie Blocman
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CSA Keeps an Eye on the Presidential Campaign

On 30 November 2011, after obtaining the opinion of the Constitutional Council, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) adopted a recommendation on the coverage of presidential elections determining the scheme applicable to coverage of the campaign in the audiovisual media (see IRIS 2012-2/20). With the end of campaigning on 6 May 2012 and the election of François Hollande as President of France, it is now time to take a look at how the rules have been observed. Throughout the campaign, the CSA ensured compliance with firstly the principle of equity, and subsequently the principle of equal air time and speaking time for the candidates, applicable from 9 April 2012 onwards by virtue of the recommendation. To achieve this, air time and speaking time were calculated and listed regularly and commented on the CSA's Internet site; the CSA was pleased to see that the principles had been respected during the campaign.

It was however necessary to distinguish between this principle of speaking time and the rules laid down in the Electoral Code, the aim of which was to ensure the honesty of the ballot. Thus paragraph 2 of Article L.49 of the Code prohibits communication to the public of any unsolicited electoral propaganda on the day of the election and on the previous day. This "reserve period" applies to both audiovisual communication services and on-line services for communication to the public. Opinion polls may not be published, circulated or commented on during this period (Art. 11 of the Act of 19 July 1977). The purpose of this is to suspend discussion on the election so that voters are under no external influence when they vote. In accordance with Article L.52-2 of the Electoral Code, no results of the election, either partial or final, may be communicated to the public before the last polling station in France has closed. A special watchdog unit had been set up at CSA headquarters to ensure the rules were being observed. At the end of the first round of voting (22 April 2012), the CSA declared itself satisfied that the radio stations and television channels had on the whole complied with the rules, particularly by not divulging any estimates before 8 pm. A number of irregularities were nevertheless noted - France 2, RMC and Canal Plus received official notifications and TF1 and BFMTV received warnings for occasionally failing to observe the reserve period. In order that viewers should receive fair information, the CSA invited radio stations and television channels to update the estimates shown on screen during election evenings, with a reminder that these were not provisional results. It was also felt to be desirable for them to mention the estimates of other opinion polls, particularly where these were very different.

For the second round of the elections, held on 6 May 2012, the CSA announced that at its plenary assembly the following week it had voted to issue a formal notification to TF1, as one of its journalists had, at about 7 pm, read out a text message referring to the victory of the Socialist candidate. The CSA felt that this incident constituted giving out information before 8 pm, which was prohibited. Another formal notification was to be sent to France 3, where a weather forecaster had infringed the rules by announcing the results in her own way.

Since the rules on speaking time laid down by the CSA have been widely criticised by all the media during the campaign, "a mission should be carried out in the very near future with the channels and the political parties, putting everything on the table and discussing it all, so that we can reach new solutions that are more appropriate", announced Christine Kelly, advisor and chairperson of the CSA's working party on 'pluralism and election campaigns'.

• *CSA, communiqué de presse du 26 avril 2012* (CSA, press release of 26 April 2012)
http://merlin.obs.coe.int/redirect.php?id=15828 FR

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GB-United Kingdom

High Court Orders Internet Service Provider to Hand Over Personal Details of Customers to Pornographic Film Producers Alleging Breach of Copyright

The English High Court has ordered the Internet Service Provider O2 to hand over the personal details of over 9,000 customers to a company acting on behalf of copyright owners and to a pornographic film production company, whilst rejecting similar claims by 12 other copyright owners.

Golden Eye International Limited, an organisation acting on behalf of copyright owners, and 13 pornographic film producers sought a 'Norwich Pharmacal

Order' to compel O2 to give them the personal details of 9,124 O2 customers in order to demand GBP 700 each in damages for alleged copyright infringement, and to threaten to take court action and/or have the customers' internet service slowed down or cut off if they did not pay. The proposed letters also wrongly asserted that bill payers are liable for any copyright infringement that may have occurred on their internet connection, whether or not they committed the infringement. This tactic is known as 'speculative invoicing' and aims to intimidate consumers into paying without the need to go to court. The application was referred to the High Court, which was concerned that those consumers whose details would be released would not be able to challenge the application. It asked the consumer organisation Consumer Focus to represent their interests in court.

The High Court balanced the competing interests of copyright owners and the customer's right to privacy and protection of his or her personal data. In relation to Golden Eye and 12 of the copyright owners it concluded that the order should not be granted as this "would be tantamount to the court sanctioning the sale of the Intended Defendants' privacy and data protection rights to the highest bidder". This was because the owners had surrendered total control of the litigation to Golden Eye, which would receive around 75% of the proceeds. In relation to Golden Eye and one producer, Ben Dover Productions, which were bringing the litigation jointly, the Court held that it would be proportionate to order disclosure of the personal details of bill payers, as there was a good arguable case that many of the intended defendants had infringed copyright. However, the order and the proposed letter to the customers must be framed so as to safeguard properly the legitimate interests of consumers, particularly those who had not in fact committed the alleged copyright infringements. The proposed letters were objectionable in a number of respects, and should instead request customers who admitted copyright infringement for details of their P2P filesharing and then individually negotiate an appropriate settlement. The Court will hold a second hearing to impose conditions on the wording of the letters and order.

• High Court (Chancery Division), Golden Eye (International) and another v. Telefonica UK Ltd [2012] EWHC 723 (Ch), 26 March 2012
http://merlin.obs.coe.int/redirect.php?id=15817 EN

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Co-Production Treaty with the Palestinian Authority Comes Into Force

On 12 April 2012 the UK Government ratified a co-production treaty with the Palestinian Authority. The aim of the treaty is to strengthen the relationship between the film industries in the UK and the Palestinian Occupied Territories by encouraging British and Palestinian producers to make films together that reflect the creativity and diverse culture and heritage of both territories.

The Treaty provides a number of benefits for co-productions. These include temporary import and export - free of duties and taxes - of equipment necessary for making such productions. Personnel employed in the making or promotion of approved co-productions are permitted to enter the UK or the Palestinian Occupied Territories and to remain during the making and promotion of the film.

Films made as approved co-productions may also meet the eligibility conditions for UK Film Tax Relief (see IRIS 2012-5/24) and for support from the British Film Institute Film Fund through qualifying as British; they will also be eligible for any funds from the Occupied Palestinian Territories.

The Treaty joins eight other bi-lateral treaties with Australia, Canada, France, Jamaica, Israel, India, New Zealand and South Africa; the UK is also a signatory to the European Convention on Cinematographic Co-production. The UK has signed a treaty with Morocco that will come into effect when it has been ratified.

• Film co-production agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Palestine Liberation Organisation for the benefit of the Palestinian Authority
http://merlin.obs.coe.int/redirect.php?id=15816 EN

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IT-Italy

Agcom Launches a Public Consultation with the View of Drawing up Guidelines for PSB Obligations

On 15 March 2012 the *Autorità per le garanzie nelle comunicazioni* (the Italian Communications Authority - Agcom) adopted Resolution no. 130/12/CONS, launching a public consultation with the view of drawing up guidelines on the obligations on public service broadcasting for the years 2013 -2015, pursuant to Article 45, paragraph 4 of the Italian AVMS Code (IRIS 2005-9/24 and IRIS 2010-2/25) according to which prior to each three-year renewal of the Contract of Service between RAI and the Ministry of Economic Development, Agcom, in consultation with the Ministry, shall lay down guidelines for the definition of further public service broadcasting obligations in addition to those

already envisaged by the AVMS Code, by considering market development, technological progress and changing needs of a cultural nature, both at national and local level.

The current Contract of Service for 2010-2012, which was approved by a Ministerial Decree of 27 April 2011 and entered into force on 28 June 2011, is based on the guidelines approved by Agcom, in consultation with the Ministry, together with Resolution no. 614/09/CONS of 12 November 2009. The obligations as laid down in the applicable Service Agreement (2010-2012) have assumed a predominantly technical nature, stemming from the need to provide details concerning the complex process of the switching-over of analogue TV channels.

As switchover will be completed this year, the new guidelines will have to focus primarily on the supply side, as well as being in accordance with the attention paid in other European countries to the content of public service broadcasting. Due to the changes introduced by the digitization process, the next three years will accordingly be strategic in terms of content fruition and delivery on different distribution platforms where multimedia consumption is already a reality. In this transition phase a key role will have to be played by the public service broadcaster by ensuring the high quality and variety of programmes, attention to media literacy and the cultural divide.

The consultation includes questions related to the new services that may be delivered, the validity of the PSB core business as to its obligation to educate, inform and entertain, the investments in media education projects also with regard to the responsibilities of minors and parents, the access of programming by people with disabilities and the promotion of diversity and quality of programming that allows PSB to be identified as a specific brand.

• Delibera n. 130/12/CONS "Avvio di una indagine conoscitiva propedeutica alla definizione delle linee-guida sul contenuto degli ulteriori obblighi del servizio pubblico generale radiotelevisivo per il triennio 2013-2015 ai sensi dell'art. 45, comma 4 del testo unico dei servizi di media audiovisivi e radiofonici" (Resolution No. 93/12/CONS Launching a preliminary investigation with a view to defining the guidelines on the content of any further obligations of public service broadcasting for the period 2013-2015 under Article 45, paragraph 4, of the Italian Code on audiovisual media and radio services, 15 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15819 IT

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Autorità per le garanzie nelle comunicazioni (AGCOM)

Agcom Board Presents an Assessment of the 2005-2012 Term

On 2 May 2012, the board of the *Autorità per le garanzie nelle comunicazioni* (the Italian Communications Authority - Agcom) presented an assessment of its term of office from 2005 to 2012, showing how during this period the overall landscape of the communications sector has changed drastically: in 2005 the most successful company in regard to capitalization was Exxon corporation, in 2012 it is Apple; in 2005 social networks were at a start-up phase, today they reach over one billion subscribers. Internet has enhanced the circulation of products and services and the number of companies registered on the National Communications Register managed by Agcom has increased from twelve thousand in 2005 to sixteen thousand in 2012.

The television sector has been deeply affected by Agcom action. After 30 years of administrative lack of clarity, the National Frequencies Register has been completed, followed by a rational allocation plan for the transition from analogue to digital television. In addition, part of the digital dividend that accrued from the switchover process has been allocated to the telecommunication services with a contest that generated EUR 4 billion. The Italian TV market has faced a slow process of renewal, the share of the six main channels edited by Rai and Mediaset has decreased from 85% in 2005 to 67% with the corresponding growth of Sky, La7 and thematic channels, and 90% of the economic resources are mainly shared by Rai (28.5%), Mediaset (30.9%) and Sky (29.3).

Agcom's monitoring of television content has been continuous and has been followed by many interventions such as moral persuasion, warnings and sanctions that over the seven-year term has amounted to over EUR 2.2 million, all confirmed by the administrative courts. Agcom has also reported to Parliament about the need for an update of the regulatory framework, specifically in the field of political and electoral messages and called for a reform of public service broadcasting activity.

Despite the current Italian phase of economic phase stagnation, the telecommunications sector has maintained a 6% average annual growth rate, and overall turnover has reached 3.2% of national GDP (2.7% in 2005). The retail market quota of the incumbent operator has faced a 20% decrease from 2005, with a final cost decrease for end consumers of over 33%, while the final cost of essential services such as transport, energy and water has been increased. The fixed TLC (Telecommunication Line Provider) overall turnover has increased from 20.3 billion euro in 2005 to 23.5 billion euro in 2012.

Agcom has completed two market analysis cycles following EC Commission Recommendations nos. 2003/311 and 2007/879, revisiting the relationships between the incumbent operator and other competitors. Furthermore, by the creation of a structure called "Open Access" within Telecom Italia, Agcom has finally realized the organic separation between the incumbent operator's access network and services, which achieved a fair level playing field for all players. Open Access is considered as a benchmark in the EU. Regarding price regulation, Agcom has introduced

new bottom-up models also based on forward-looking long-run incremental costs. From 2005 to 2012 there has been a 15% decrease in fixed retail final prices.

The mobile sector has reached 52% coverage of the TLC market, while the number of users with mobile internet connection has increased by 16 times since 2005. There is no mobile operator with a market share above 35%. Mobile data traffic has exceeded voice traffic due to a 48% penetration rate by smartphones (EU average rate 39%).

The alternative dispute resolution system has been implemented on a regional basis with more than 246 thousand disputes solved, 72% of these decisions favoured consumers. Mobile number portability transfers have reached 30 million since 2005, with a speedy procedure reduced from 10 days to 1 day. Over the seven-year term the sanctions adopted for consumer protection amounted to 27 million euro. National broadband penetration is still below the EU average rate (lines/citizens ratio is 21 versus 27 EU average), with a related lower penetration of connected families, e-commerce transactions and ICT exports. TLC operators are investing in the acquisition of mobile frequencies for LTE technology. Agcom has provided a system of regulation for VoIP services, distinguishing between the unmanaged VoIP and the managed VoIP for which Agcom has also introduced specific obligations.

Regarding copyright protection over electronic communication networks, Agcom has carried out two public consultations and asked for a legislative initiative to update the existing framework.

Following an Agcom report to the government and to Parliament, legislative decree no. 201/2011 appointed Agcom as the national regulator for the postal sector.

Agcom has also maintained a strong relationship with Parliament with more than 40 hearings, in addition to the yearly reports, and has played a leading role in the international field, assuming the Presidency of the European regulatory group (formerly ERG, now changed to BEREC), the Euro-Mediterranean network of Regulators (EMERG) and the Radio spectrum policy group (RSPG).

• *Agcom*, Bilancio di mandato 2005-2012 (AGCOM, Assessment of the 2005-2012 term, 2 May 2012)
http://merlin.obs.coe.int/redirect.php?id=15821 IT

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LT-Lithuania

National Film Centre Established

On 18 April 2012 the Government of the Republic of Lithuania adopted a Resolution by which it approved the formation of the Lithuanian Film Centre under the auspices of the Ministry of Culture.

The Lithuanian Film Centre will be established following the revised Law on Cinema of 22 December 2011, which will come into force on 1 May 2012 (see IRIS 2012-2/29).

The main aims of the activities of the Lithuanian Film Centre will be to form an effective State film policy and to foster long-term development and competitiveness in the Lithuanian cinema sector.

The Lithuanian Film Centre will perform the following functions:

- Allocate funds for the selected projects;

- Control the expenditure of funds;

- Consult with filmmakers;

- Maintain the film registry;

- Rate films according to viewers' age;

- Organise the work of the Cinema Board;

- Invite tenders to support projects on film dissemination and presentation, cinema education and cinema heritage preservation;

- Cooperate with international film festivals and film markets in order to promote Lithuanian cinema;

- Promote the attraction of investments in Lithuanian cinema;

- Hold events focusing on children's education in the cinema field;

- Perform any other foreseen functions.

The Ministry of Culture allocated LTL 0.5 million for the establishment and maintenance of the Lithuanian Film Centre for the year 2012 with an office in Vilnius and a staff of 15 persons.

• Lietuvos Respublikos Vyriausybės 2012 m. balandžio 18 d. nutarimas Nr. 427 „Dėl biudžetinės įstaigos Lietuvos kino centro prie Kultūros ministerijos įsteigimo" (Government Resolution of 18 April 2012 No. 427 on the Establishment of a Budgetary Institution Lithuanian Film Centre under the auspices of the Ministry of Culture)
http://merlin.obs.coe.int/redirect.php?id=15851 LT

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LV-Latvia

A new Public Service Broadcasting Concept Developed in Latvia

The Ministry of Culture has developed a new concept paper on the creation of a new public service broadcasting medium in Latvia and, on 17 April 2012, the concept was approved by the National Electronic Media Council (NEPLP), selecting one of the three alternative models suggested by the Ministry.

The concept is an extensive political planning document, providing a detailed analysis of the current situation of public service broadcasting (PSB) in Latvia, its deficiencies and potential solutions, taking into account also the experience of PSB systems in other member states of the EU. The main reason for developing the concept was the currently weak position of PSB in Latvia, the decline of its audiences, insufficient financing and lack of authority and visibility among the Latvian public. It was established that the PSB organisations, Latvian Radio (Latvijas Radio) and Latvian Television (Latvijas Televīzija), are not capable of optimally carrying out the public remit function and of addressing all groups of society. Due to insufficient financing from the state budget both companies are simultaneously participating in the advertising market, competing with commercial broadcasters. On the other hand, certain problems of management and insufficient technological means have created the situation that commercial broadcasters often offer similar high-quality content provided by skilled journalists, thus, the role of PSB is unclear and undefined.

The concept is rooted in the consideration that PSB must be grounded on the idea of its public remit, based on a public value assessment. The goal of PSB is to render outstanding content and quality, to provide universal service in the sense of its availability and access to all groups in society and to ensure media transparency and public involvement in the management, supervision and creation of content.

In order to achieve this goal, the concept paper offered three alternative solutions: (1) partial convergence of Latvian Radio and Latvian Television, leaving two independent organisations that would cooperate on specific projects, such as running an internet portal, keeping an archive, research journalism etc.; (2) full convergence of Latvian Radio and Latvian Television, leaving in place the brands and editorial independence of the current channels, but merging administration, technical functions, management, using single infrastructure; this merged entity would itself create most of the content by employing skilled, professional journalists; (3) creating a new merged PSB organisation, which, however, would itself create only news broadcasts, purchasing other content from independent producers. The concept paper left open the question of which of the options should be chosen.

Consequently, the NEPLP assessed the concept and selected the second option (full convergence) as the optimal solution for the Latvian situation. It explained that this option had the most strengths, as the new, merged entity would be more efficient both in creating content and using its financing wisely. This model would include a substantial start-up investment (however, not larger than in option 1), but the running costs would be lower than in option 3. It is planned that the financing of the new medium would be gradually changed from state subsidy and advertising to a public license fee or similar payment (the concept refers to the experience of Finland in introducing a media tax). Certain parts of the project are planned to be financed by European instruments, such as the European Social Fund and the European Regional Development Fund. It is estimated that the introduction of the second option would cost more than EUR 75 million.

If implemented, several amendments to legal enactments will be necessary, including the Electronic Media Law, as the model also provides for a change in the functions of the NEPLP. Currently, the NEPLP is both a media regulator and has a shareholder's function in the PSB organisations. In the new model the PSB organisation might be an independent public person, directly accountable to Parliament and to the public.

The concept paper and the option selected by the NEPLP must still be submitted to the Ministry of Culture, which will subsequently present it for the approval of the Cabinet of Ministers in order to move forward. Thus, the current endorsement of option 2 by the NEPLP does not as yet mean that this option will be implemented, as neither the Ministry nor the Cabinet of Ministers is bound by the recommendations of the NEPLP.

• *Koncepcija par jauna Latvijas sabiedriskā elektroniskā medija izveidi* (Concept paper on the creation of new public service medium in Latvia)
http://merlin.obs.coe.int/redirect.php?id=15852 LV

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MT-Malta

Guidelines on the Obligation of Due Impartiality

In April 2012, the Maltese public service broadcaster - Public Broadcasting Services Limited - issued a set

of Guidelines on the Obligation of Due Impartiality addressed at news, current affairs programmes and programmes dealing with controversial issues. According to these Guidelines, "due impartiality is the presentation of divergent views on any issue that is objectively presented by the producer and presenter". Responsibility in law vests in the Head of News for decisions concerning the content of news bulletins and current affairs programmes transmitted by the public service broadcaster. These Guidelines apply to all PBS employees. These employees are debarred from associating themselves "with a political party or undermin[ing] the perception of the impartiality, integrity, independence and objectivity of PBS".

The Guidelines further provide that topics selected for discussion should be selected without any pressure whatsoever and should be presented in an objective manner, with the presenter providing accurate information. Programme guests are enjoined to offer a wide range of opinions and views. In the case of programmes dealing with political or industrial controversy or public policy, guests should reflect a balanced and adequate representation of all interested parties. The Guidelines also mandate that audiovisual material used should reflect divergent views as well.

Interestingly enough, the Guidelines state that: "Journalists, presenters and producers are not expected to be neutral on every controversial issue," but if they do air their views "care is to be taken that they do not favour one opinion as opposed to another in such a manner that gives advantage to that opinion or that invites the viewers or listeners to adhere to that opinion". Where presenters have a strong opinion on a topic they have to consult the editor to guide them as to "whether the presenter should declare his position during that programme."

A presenter's conduct is not limited to the actual programme but extends to when s/he is engaged in activities off-air. A presenter's behaviour off-air may tarnish the reputation as to the objectivity of the public service broadcaster. Hence, they should not express support for any political party or lobby group or campaign in favour of a policy that is of the nature of political or industrial controversy. Nor can they disclose their voting intentions either in elections or in referenda. Nor can they endorse political candidates. Furthermore, presenters of public broadcasting services programmes are prohibited from demanding a change in "high profile public policy". All "news presenters, producers, journalists and presenters of news and current affairs programmes are not to undertake promotions or endorsements of political parties or individual candidates or political organisations as well as endorse commercial products". All these persons are also requested not to write on or participate in public debate on a number of matters such as current affairs, politics, economics, business, finance, public policy and matters of political or industrial controversy. This participation can take place through letters to the editor, newspaper contributions, blogging online, posting remarks or opinions online, participating in public debates and fronting a campaign. Should any of the above take place, prior authorisation is required and the Registered Editor may, depending on the circumstances of each case, change, adapt or even stop the programme in question.

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NL-Netherlands

End of Public Broadcasters' Monopoly on Programme Data

On 10 April 2012 the Dutch government adopted an amendment to Article 2139 of the Dutch Media Act 2008, which makes programme data available by abolishing the monopoly held by public broadcasting organisations. The new Article 2139 of the Dutch Media Act 2008 will enter into force on 1 January 2013.

The amendment is based on the main conclusions set forth in a 2011 report by the *Commissariaat voor de Media* (Dutch Media Authority) initiated by the *Ministerie van Onderwijs, Cultuur en Wetenschap* (Ministry of Education, Culture and Science - OCW). The goal of the amendment is to liberalise the market for television and radio programme guides. The data needed from broadcasting organisations to establish a programme guide must now be publicly offered at a set market price. The Dutch Media Authority will determine and recalculate this price every two years. Prices for electronic and online programme guides will be set at a lower rate.

Each public broadcasting organisation shall provide the *Nederlandse Publieke Omroep* (Netherlands Public Broadcasting - NPO) with its programme data. The NPO will be in charge of distributing the programme data by signing contracts with other broadcasting organisations or other interested parties. Programme data shall be distributed among the contracting parties at least 6 weeks before the actual broadcasting.

The programme guide monopoly is a remainder of the traditional Dutch media landscape in which broadcasting organisations, often linked to political parties, churches and social movements, provided for their own programme guides. Subscribers to these guides automatically became members of the broadcasting organisations. Because the designation of air time is partly based on the number of members, the programme guides were of great importance.

• *Wijziging van onder meer de Mediawet 2008 in verband met aanpassing van de rijksmediabijdrage, beëindiging van de wettelijke taken van de Stichting Radio Nederland Wereldomroep en aanpassingen van meer technische aard* (Amendment to Article 2139 of the Dutch Media Act)
http://merlin.obs.coe.int/redirect.php?id=15855 NL

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PL-Poland

Method of Introduction of Certain Provisions of the Act Amending the Act on Access to Public Information found unconstitutional

On 18 April 2012 the Constitutional Tribunal recognised the motion submitted by the President of the Republic of Poland to examine the constitutionality of the method of introducing certain provisions of the Act of 16 September 2011 Amending the Act on Access to Public Information (see IRIS 2012-1/36).

The Amending Act adopted by the Sejm (lower chamber of the Parliament) concerned in its entirety the implementation of Directive 2003/98/EC on the re-use of public sector information into Polish law. After passing it to the Senate (upper chamber of the Parliament) new rules extending restrictions to the right to public information in order to protect public order, security and important economic State interests were added.

At an advanced stage of the proceedings the Senate proposed that a new set of rules, unconnected with the principal aim of the Amending Act, should be included. These provisions raised the concerns of journalists and non-governmental organisations advocating freedom of speech. The additional provisions in question restrict the right to public information for the protection of important State economic interests in regard to providing information in that it would:

1) weaken the bargaining ability of the State Treasury in the management of its property or the negotiating capacity of the Republic of Poland concerning international agreements or decision making by the European Council or the Council of the EU;

2) significantly undermine the protection of the property interests of the Republic of Poland or the State Treasury in proceedings before a court, tribunal or other adjudicating authority.

The President has been concerned about the possibility of a breach of the procedure required by provisions of the law to promulgate the Act (in regard to the Senate's amendments). He submitted an application to the Constitutional Tribunal to examine this aspect of the case.

The Tribunal adjudicated that the provisions of Art. 1 para. 4 (a) and (b) of the Amending Act of 16 September 2011 were inconsistent with Art. 121 para. 2 in conjunction with Art. 118 para. 1 of the Polish Constitution, due to the addition of Art. 5 para. 1a and para. 3 to the Act on Access to Public Information. The Tribunal did not assess the substantive content of these rules, but only the constitutionality of the method of their introduction into the Act. It underlined that there was the well-established jurisprudence of the Constitutional Tribunal and a doctrine supporting that jurisprudence, both of which specified the scope of admissible amendments that might be proposed by the Senate with regard to a bill passed by the Sejm. The limitation on the scope of matters regulated by such amendments serves the main purpose of legislative proceedings, which consists in ensuring that the basic content that is ultimately included in the final version of a parliamentary act has been subjected to the complete procedure carried out by the Sejm (three readings).

The Tribunal issued a reminder that the Senate was bound by the substantive content of the bill passed by the Sejm; the Senate may modify and amend measures adopted therein, but it may not add completely new normative elements to the bill, i.e., those that have not been provided for in the text of the bill.

The Senate has the right to introduce legislation (right to initiate new bills). Still, this right cannot be understood as the competence to add - through Senate amendments - entirely new normative proposals to an Act passed by Sejm. The challenged amendments concerned matters not covered by the Act as passed by the Sejm; they certainly went beyond the scope of the issues regulated in the Act sent to the Senate for examination.

The Tribunal also noted that in this case there were additional limitations referring to the scope of the Senate's amendments; these were connected with the character of the bill (the amending Act) and the procedure in accordance with which it had been examined (the expedited procedure). The challenged amendments constituted an interference with the content of the Amending Act, with disregard to the purpose of the Amending Act of justifying the expedited procedure of examining the Act.

• Komunikat prasowy po rozprawie dotyczącej dostępu do informacji publicznej (ograniczenie prawa do informacji z uwagi na ważny interes państwa) (Operative part of the Tribunal's judgment of 18 April 2012 in case K 33/11 and press release on this case)
http://merlin.obs.coe.int/redirect.php?id=15853 PL

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National Broadcasting Council of Poland

RO-Romania

Decision with Regard to the Electoral Campaign for Local Elections

The *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) adopted on 24 April 2012 Decision no. 195 on the principles and rules for the electoral campaign on radio and television stations for the local elections (see IRIS 2011-3/29). The local elections in Romania are scheduled for 10 June 2012.

According to the Decision the electoral campaign on radio and television stations, including cable-TV, takes place between 11 May and 7 June, at 24.00 h local time. Broadcasters that intend to cover the campaign have to notify the Council in writing of the expected starting date, names of the programmes concerned, types of electoral programmes as well as the days and broadcasting hours for each station they own.

The electoral campaign on audiovisual media (including cable-TV), public and private, must serve the following general interests: those of the electorate, to receive accurate information and to exercise their right to vote with full knowledge of the facts; those of the competitors to be known and present their platforms, political programmes and electoral offers; and those of broadcasters, to exercise their rights and duties.

The broadcasters are obliged to ensure a fair, balanced and correct electoral campaign for all competitors. Candidates benefit from free access to public and private radio and television services. Only the candidates and the representatives of competitors can attend electoral programmes and debates. During the electoral campaign, the candidates and the representatives of competitors may not be producers, directors or anchors of audiovisual shows. Broadcasters are not allowed to air commercial advertisements that feature candidates and/or representatives of competitors. Buying broadcasting time with a view to attending electoral programmes or debates or broadcasting electoral videos or shows showing electoral activities during informative shows is forbidden.

During the electoral campaign, information concerning the election system, voting procedure, electoral campaign calendar, political programmes, opinions and messages with electoral content shall be presented only in news bulletins, electoral shows and electoral debates. The campaign coverage can be aired from Monday to Friday and the campaign programmes have to be clearly indicated by the broadcasters. The participants have to be clearly identified as to their capacity: candidate, supporter, representative of the candidate or political forces, analyst, journalist, political consultant. 30-second electoral videos (spots), for which responsibility is clearly assumed by competitors, may be broadcast only within the shows stipulated above and only about the competitors attending that show. They are not considered as commercial advertisement. Electoral advertisements are aired in separate, signaled blocks.

The informative programmes have to observe objectivity, fairness and correct information of the public. The presentations of the campaign activities can be done only by broadcasters, without using content offered by competitors, nor interviews with them. Candidates who are already in public positions may appear in news bulletins strictly in matters related to the exercise of their position, but the broadcasters have to observe balance and pluralism of opinions.

The electoral shows and debates must ensure equal conditions for all candidates as regards freedom of expression, pluralism of opinions and impartiality. During electoral shows the competitors must not make statements against human dignity or public morals, must prove allegations that could have criminal or moral implications and must not make statements that incite hatred or discrimination.

The directors and anchors of electoral shows and debates have to be impartial, ensure balance during the show, ask unbiased, clear questions and intervene whenever guests behave wrongly or breach electoral law. The rights to reply and rectification are also provided for in the Decision, as well as the conditions for broadcasting opinion polls. The Council will sanction breaches of the legislation.

• Decizie nr. 195 din 24 aprilie 2012 privind principii şi reguli de desfăşurare, prin intermediul posturilor de radio şi de televiziune, a campaniei electorale din anul 2012 pentru alegerea autorităţilor administraţiei publice locale (Decision no. 195 of 24 April 2012)
http://merlin.obs.coe.int/redirect.php?id=15809 RO

Eugen Cojocariu
Radio Romania International

License of the Commercial Station OTV Withdrawn

On 24 April 2012 the *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA) decided to withdraw the audiovisual license of the commercial TV station OTV as from 29 May 2012, almost 10 months before its normal expiry date of 1 April 2013. The Council had already reduced twice, on 27 March and 10 April 2012, the duration of the license of OTV, each time by half of the remaining period of validity. The sanctions, the most severe ever taken by the CNA, were due to OTV's repeated and continual breaches of audiovisual legislation with regard to political advertising (see inter alia IRIS 2002-9/21, IRIS 2011-10/36 and IRIS 2012-3/30).

OTV was repeatedly accused of infringing Art. 139 of the *Codul Audiovizual - Decizia nr. 220/2011 privind Codul de reglementare a conţinutului audiovizual, cu modificările şi completările ulterioare* (Audiovisual Code - Decision no. 221/2011 with regard to the Audiovisual Content Regulatory Code, with further modifications and completions), which provides that political advertising, whether positive or negative, in connection with political parties, politicians and political messages shall be prohibited, except during election campaigns. The owner of OTV, Dan Diaconescu, is the founder of a Romanian populist party, Partidul Poporului - Dan Diaconescu (People's Party - Dan Diaconescu, PP-DD), with a good chance of entering Parliament in the next general election.

The Council stated that even though the station was fined several times because of political propaganda in favour of the mentioned party outside electoral campaign periods, OTV continued this behaviour, which is prohibited by audiovisual legislation. The CNA stated that political advertising in favour of PP-DD continued even after the first two reductions of the validity of the license. Dan Diaconescu accused the members of the Council of political bias.

For this specific accusation of breaching Art. 139 of the Audiovisual Code in 2010-2012 OTV was sanctioned with a public warning, a RON 5,000 (EUR 1,140) fine, a RON 10,000 (EUR 2,280) fine, a RON 50,000 (EUR 11,400) fine and two RON 100,000 (EUR 22,800) fines; subsequently the station was obliged in October 2011 and January 2012 to suspend its broadcast for ten minutes and to relay only the CNA's sanction text in prime time (19.00-19.10) and in March and April 2012 to suspend, after each license validity reduction, its broadcast for three hours and to relay only the CNA's sanction in prime time (18.00-21.00).

Since 1 April 2004 (when the nine-year license of the station entered into force) OTV was fined almost 180 times and had its broadcasting suspended nine times for ten minutes and, six times for three hours, respectively, being obliged to relay only the CNA's sanction text for various breaches of the law.

In 2002 OTV had its previous license withdrawn because infringed Art. 40 of the *Legea audiovizualului nr. 504/2002, cu modificările şi completările ulterioare* (Audiovisual Law no. 504/2002, with further modifications and completions), which provides that the transmission of programmes comprising any form of incitement to hatred on grounds of race, religion, nationality, gender or sexual orientation is prohibited.

Another station owned by Diaconescu, DIRECT DIGITAL TV (DDTV), was sanctioned on 27 March 2012 with a public warning because it relayed and rebroadcast on 23 and 25 March 2012 two of the programmes of OTV that breached the Audiovisual Code.

• Decizia nr. 156 din 27.03.2012 privind somarea S.C. TELECROMA MEDIA S.R.L., pentru postul DIRECT DIGITAL TV (Decision no. 156 of 27.03.2012 concerning DIRECT DIGITAL TV)
http://merlin.obs.coe.int/redirect.php?id=15810 RO

• Decizia nr. 157 din 27.03.2012 privind sancţionarea radiodifuzorului S.C. OCRAM TELEVIZIUNE S.R.L. cu reducerea cu 6 luni a termenului de valabilitate a licenţei audiovizuale nr. S-TV 78.3/05.02.2004, cumulată cu obligaţia de a difuza, în ziua de 29.03.2012, timp de 10 minute, între orele 19.00-19.10, numai textul deciziei de sancţionare emise de C.N.A. (Decision no. 157 of 27.03.2012 concerning S.C. OCRAM TELEVIZIUNE S.R.L. as to the reduction of audiovisual license no. S-TV 78.3/05.02.2004, together with the obligation to broadcast only the text of the sanction decision issued by the CNA)
http://merlin.obs.coe.int/redirect.php?id=15811 RO

• Decizia nr. 187 din 10.04.2012 privind sancţionarea radiodifuzorului S.C. OCRAM TELEVIZIUNE S.R.L. cu reducerea cu jumătate a termenului de valabilitate a licenţei audiovizuale nr. S-TV 78.4/05.02.2004, cumulată cu obligaţia de a difuza, în ziua de 12.04.2012, timp de 10 minute, între orele 19.00-19.10, numai textul deciziei de sancţionare emise de C.N.A. (Decision no. 187 of 10.04.2012 concerning S.C. OCRAM TELEVIZIUNE S.R.L. with the reduction by half of the audiovisual license no. S-TV 78.4/05.02.2004, together with to the obligation to broadcast on 12.04.2012 only the text of the sanction decision issued by the CNA)
http://merlin.obs.coe.int/redirect.php?id=15854 RO

• Decizia nr. 196 din 24.04.2012 privind sancţionarea radiodifuzorului S.C. OCRAM TELEVIZIUNE S.R.L. cu reducerea cu jumătate a termenului de valabilitate a licenţei audiovizuale nr. S-TV 78.5/05.02.2004, cumulată cu obligaţia de a difuza, în ziua de 26.04.2012, timp de 10 minute, între orele 19.00-19.10, numai textul deciziei de sancţionare emise de C.N.A. (Decision no. 196 of 24.04.2012 concerning S.C. OCRAM TELEVIZIUNE S.R.L. on the reduction by half of the audiovisual license no. S-TV 78.5/05.02.2004, together with the obligation to broadcast on 26.04.2012 only the text of the sanction decision issued by the CNA)
http://merlin.obs.coe.int/redirect.php?id=15813 RO

Eugen Cojocariu
Radio Romania International

SE-Sweden

Exposure of Footballer's Book Was Considered an Unfair Promotion of Commercial Interests.

On 19 March 2012 *Granskningsnämnden för radio och TV* (the Swedish Broadcasting Commission - GRN) delivered a decision regarding the promotion of a commercial interest in an improper manner in a television program. The case concerned the application of sections 5:5, 17:5 and 19:4 of *Radio- och TV-lagen* (The Radio- and Televisions Act - RTL). The RTL is based inter alia on Directive 89/552/ECC, as amended by 97/36/EC.

Section 5:5 of the RTL states that programs that are not advertising may not encourage the purchase or rental of goods or services or provide other marketable foreign elements, or highlight a product or service in an improper manner. A promotion of a commercial interest is improper if it is not justified by sufficient information or entertainment interest. Sections 17:5 and 19:4 of the RTL stipulates that *Granskningsnämnden för radio och TV* (the Swedish Broadcasting Commission - GRN) can apply to *Förvaltningsrätten* (the Administrative Court) to establish that the broadcaster must pay a special fee for viola-

tion of the provision of favoritism by commercial interests.

The program in question was Sportnytt, broadcast by the Swedish nationwide television channel SVT 2 on 11 November 2011. In a feature of the program the author Björn Ranelid reviewed footballer Zlatan Ibrahimović´s autobiography "I am Zlatan". During the review, which was about 4 minutes long, the book and a picture of Zlatan Ibrahimović were visible on a large screen in the background for about 2 minutes and 50 seconds.

Granskningsnämnden för radio och TV (the Swedish Broadcasting Commission - GRN) initiated proceedings against SVT 2 and ruled against the television channel, ordering that a special fine of SEK 50,000 (EUR 5,528) should be imposed on SVT 2 for promotion of a commercial interest in an improper manner. The GRN claimed that the exposure of the book was so highlighted that it comprised an undue commercial promotion.

• *Granskningsnämnden för radio och tv, Beslut 2012-03-19 Dnr: 11/03506* (Decision of the Swedish Broadcasting Commission, 19 March 2012)
http://merlin.obs.coe.int/redirect.php?id=15818 SV

Erik Ullberg and Michael Plogell
Wistrand Advokatbyrå, Gothenburg

Agenda

Pan-European Forum on Media Pluralism and New Media

27 June 2012 Organiser: University of Leuven – IBBT, The Honourable Society of Gray's Inn, Centre for Media Pluralism and Media Freedom Venue: Brussels
http://www.mediapluralism.eu/

Book List

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