

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Mouvement Raëlien Suisse v. Switzerland	3
European Court of Human Rights: Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland	3
Parliamentary Assembly: Safeguarding Audiovisual Cultural Heritage.....	4

EUROPEAN UNION

Court of Justice of the European Union: Scope of the Exception for Ephemeral Recordings.....	5
European Commission: Poland referred to the EU Court of Justice for not fully implementing the AVMS Directive	6
European Commission: Spain Asked to Stop Discriminations of non-Spanish Movies under the Catalan Law on Cinema	6
European Commission: Support for Reforms in Public Broadcasting Stepped Up	6
European Commission: Media Policy Developments in Former Yugoslav Republic of Macedonia Welcomed	7
European Parliament: Vote against ACTA.....	7

WIPO

WIPO: Adoption of the Beijing Treaty on Audiovisual Performances	8
--	---

NATIONAL

BE-Belgium

Flemish Commercial Broadcaster Infringes Sponsorship Rules	8
--	---

BG-Bulgaria

Change of the Statute of Legal Terms of CEM's Administration.....	9
New Tariffs of the Collective Societies	9

CH-Switzerland

Consultation on Draft Revision of Radio and Television Act	10
--	----

CZ-Czech Republic

Transition to the Digital Terrestrial Broadcasting Completed	11
--	----

DE-Germany

Düsseldorf Appeal Court Confirms Cartel Law Ban on RTL and ProSiebenSat.1 Online Video Platform	11
Munich District Court Upholds ProSiebenSat.1 Complaint Against Save.tv Online Video Recorder	11
Bremen City Parliament Adopts Media Act	12

ES-Spain

Spanish Supreme Court Confirms Private Copying Levy ..	13
--	----

Audiovisual Act Amended.....	13
Merger Antena 3/La Sexta	14

FR-France

Constitutional Council Validates Legislation on Remuneration for Copying for Private Use	14
Court of Cassation Considers "Google Suggest" Could Facilitate Infringement of Music Producers' Rights.....	15
Court of Cassation Recalls that there is no General Obligation to Supervise the Network	16
Merger of TPS and CanalSat: Competition Authority Pronounces Injunctions	16
Canal Plus Purchases Direct 8 and Direct Star: Competition Authority Gives Green Light, Subject to Conditions ..	17
Report on Method of Regulating Product Placement on Television	18

GB-United Kingdom

Sky Movies Does Not Restrict Competition in the Pay-TV Retail Market	19
--	----

IE-Ireland

Supreme Court to Hear Appeal on Three-Strikes Copyright Protocol	19
--	----

IT-Italy

Council of State Upholds Annulment of AGCOM's Rules on Short News Reports	20
Italian Broadcaster Rai Must allow Sky Italia to Broadcast its Channels Free-to-Air	21
Italian AVMS Code Amended	21

KG-Kyrgyzstan

Digital Switchover Programme Approved	22
---	----

RO-Romania

Decision on the Provision of On-demand Audiovisual Media Services	23
Final Rejection of the Modification of the Act on Preventing and Fighting Pornography	24

RU-Russian Federation

New Rules for Internet	24
Advertising of Alcohol on Internet Totally Banned	25

US-United States

Supreme Court on Indecency	26
No Infringement of Copyright through the Use of Embed Codes	26

UZ-Uzbekistan

State Programme of Digital TV Switchover Approved.....	27
--	----

HU-Hungary

Amendment of the new Hungarian Media Act.....	28
---	----

Editorial Informations

Publisher:

European Audiovisual Observatory 76, allée de la Robertsau
F-67000 STRASBOURG

Tél. : +33 (0) 3 90 21 60 00 Fax : +33 (0) 3 90 21 60 19

E-mail: obs@obs.coe.int www.obs.coe.int

Comments and Contributions to:

iris@obs.coe.int

Executive Director:

Wolfgang Closs

Editorial Board:

Susanne Nikoltchev, Editor • Francisco Javier Cabrera Blázquez, Deputy Editor (European Audiovisual Observatory) • Michael Botein, The Media Center at the New York Law School (USA) • Björn Janson, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) • Andrei Richter, Faculty of Journalism, Moscow State University (Russian Federation) • Alexander Scheuer, Institute of European Media Law (EMR), Saarbrücken (Germany) • Harald Trettenbrein, Directorate General EAC-C-1 (Audiovisual Policy Unit) of the European Commission, Brussels (Belgium) • Tarlach McGonagle, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands)

Council to the Editorial Board:

Amélie Blocman, Victoires Éditions

Documentation/Press Contact:

Alison Hindhaugh

Tel.: +33 (0)3 90 21 60 10;

E-mail: alison.hindhaugh@coe.int

Translations:

Michelle Ganter, European Audiovisual Observatory (co-ordination) • Brigitte Auel • Katharina Burger • France Courrèges • Paul Green • Marco Polo Sarà • Manuella Martins • Katherine Parsons • Stefan Pooth • Sonja Schmidt • Nathalie Sturlèse

Corrections:

Michelle Ganter, European Audiovisual Observatory (co-ordination) • Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory • Catherine Jasserand, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) • Johanna Fell, European Representative BLM, Munich (Germany) • Amélie Lépinard, Master - International and European Affairs, Université de Pau (France) • Julie Mamou • Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland) • Anne Yliniva-Hoffmann, Institute of European Media Law (EMR), Saarbrücken (Germany)

Distribution:

Markus Booms, European Audiovisual Observatory

Tel.:

+33 (0)3 90 21 60 06;

E-mail: markus.booms@coe.int

Web Design:

Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com

ISSN 2078-6158

© 2011 European Audiovisual Observatory, Strasbourg (France)

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: *Mouvement Raëlien Suisse v. Switzerland*

The applicant association is the Swiss branch of the Raëlien Movement, an international association whose members believe life on earth was created by extraterrestrials. The association sought to conduct a poster campaign, but the local authorities refused permission on the grounds of public order and morals. The domestic courts upheld this decision, arguing that although the poster itself was not objectionable, because the Raëlien website address was included, one had to have regard to the documents and content published on that website. The courts held that the poster campaign could be banned on the basis that: (a) there was a link on the website to a company proposing cloning services; (b) the association advocated “geniocracy” i.e. government by those with a higher intelligence; and (c) there had been allegations of sexual offences against some members of the association. Mouvement raëlien made an application to the European Court arguing that the ban on its poster campaign was a violation of its right to freedom of expression under Article 10 of the European Convention. In January 2011, the First Section of the Court held that there had been no violation of Article 10. In its judgment of 13 July 2012 the Grand Chamber has affirmed this finding, with a 9-8 vote.

The Court reasoned that because the main aim of the poster and website was to merely draw people to the cause of the Raëlien Movement, the speech at issue was to be categorised as somewhere between commercial speech and proselytising speech. The Court takes the view that the type of speech in question is not political because the main aim of the website in question is to draw people to the cause of the applicant association and not to address matters of political debate in Switzerland. The Court clarifies that for this reason the management of public billboards in the context of poster campaigns that are not strictly political may vary from one State to another, or even from one region to another within the same State. The examination by the local authorities of the question whether a poster satisfies certain statutory requirements - for the defence of interests as varied as, for example, the protection of morals, road traffic safety or the preservation of the landscape - thus falls within the margin of appreciation afforded to States, as the authorities have a certain discretion in granting authorisation in this area.

The Court takes the view that the national authorities

were reasonably entitled to consider, having regard to all the circumstances of the case, that it was indispensable to ban the campaign in question in order to protect health and morals, to protect the rights of others and to prevent crime. The judgment also comments on the controversial approach of banning the poster mainly on account of the content of the association’s website the poster referred to, while the association remained free to communicate via that same website, the website indeed itself not being prohibited, blocked or prosecuted for illegal content. In the Court’s view, however, such an approach is justified: to limit the scope of the impugned restriction to the display of posters in public places was a way of ensuring the minimum impairment of the applicant association’s rights. The Court reiterates that the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question. In view of the fact that the applicant association is able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure cannot be said to be disproportionate. The majority of the Grand Chamber concluded that the Swiss authorities did not overstep the broad margin of appreciation afforded to them in the present case, and the reasons given to justify their decisions were “relevant and sufficient” and met a “pressing social need”. Accordingly, there has been no violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l’homme (Grande chambre), affaire Mouvement raëlien suisse c. Suisse, requête n° 16354/06 du 13 juillet 2012* (Judgment by the European Court of Human Rights (Grand Chamber), case of Mouvement raëlien suisse v. Switzerland, nr. 16354/06 of 13 July 2012)

<http://merlin.obs.coe.int/redirect.php?id=16021>

EN FR

Dirk Voorhoof

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

European Court of Human Rights: *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*

The applicant company, the Swiss Radio and Television Company (SSR) is a radio and television broadcaster based in Zurich. In 2004 it requested permission to have access to the Hindelbank Prison in order to prepare a television interview with A., a prisoner serving a sentence for murder. SSR wished to integrate this interview in the programme “Rundschau”, a weekly programme covering political and economic questions, in a feature concerning the trial of another person who had been accused of murder in the same case. SSR’s request was refused by the prison authorities who referred to the need to maintain peace, order and safety and to ensure equal treatment among

prisoners. SSR complained about this refusal, on account of which it was unable to broadcast the planned interview in its “Rundschau” programme. SSR submitted that an interview with A., who had given her consent, was a matter of public interest given that even after her conviction, the case had continued to attract a great deal of media interest. But all appeals before the Swiss courts failed, as it was argued that the entitlement to film in prisons could endanger prisoner rehabilitation and violate the personality rights of prisoners. It was also argued that the organisation and supervision measures required for television filming exceeded what could reasonably be expected of the prison authorities. It was suggested that instead of filming in the prison, an audio recording or a simple interview could suffice, as images of the prisoner were not necessary for the purposes of a thematic report. Relying on Article 10, SSR complained in Strasbourg that it had not been granted permission to film an interview with a prisoner inside a prison. It argued that this refusal amounted to a violation of its right to freedom of expression and information.

The European Court observed that in determining an issue of freedom of expression in the context of a very serious television broadcast devoted to a subject of particular public interest, the Swiss authorities had limited discretion to judge whether or not the ban on filming had met a “pressing social need”. While acknowledging that there had, at the outset, been grounds to justify the ban on filming - in particular with regard to the presumption of innocence of the person who was the subject of the programme and whose trial was imminent and the interests of the proper administration of justice - the Court observed that the grounds for the courts’ refusal had not been relevant or sufficient, either from the point of view of the other prisoners’ rights (privacy and rehabilitation) or from the point of view of maintaining order or security reasons. Furthermore, the Swiss courts had not examined the technical aspects submitted by SSR regarding the limited impact of the filming. As regards the duty of the authorities to protect A., the European Court noted that she had given her full and informed consent to the filming. The Court reiterated lastly, with regard to the alternatives to filming proposed by the Swiss authorities, that since Article 10 also protected the form by which ideas and information were conveyed, it was not for this Court, or for the national courts, to substitute their own views for those of the media as to what technique of reporting should be adopted by journalists. The telephone interview with A. broadcast by SSR in another programme had not in any way remedied the interference caused by the refusal to grant permission to film in prison. While reiterating that the national authorities in principle were better placed than the Court to make decisions concerning access by third parties to a prison, the Court emphasized that in matters of media reporting on issues of public interest, the margin of appreciation of the domestic authorities is reduced and any interference in this context must be convincingly justified on pertinent and sufficient grounds. The Court concluded

that the absolute ban imposed on SSR’s filming in the prison did not respond to this condition and had not met a “pressing social need”. For that reason, the majority of the Court, with a 5/2 decision (the German and the Swiss judge dissented), came to the conclusion that there has been a violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l’homme (cinquième section), affaire Schweizerische Radio- und Fernseh gesellschaft SRG c. Suisse, requête n°34124/06 du 21 juin 2012* (Judgment by the European Court of Human Rights (5th section), case of Schweizerische Radio- und Fernseh gesellschaft SRG v. Switzerland, nr. 34124/06 of 21 June 2012)

<http://merlin.obs.coe.int/redirect.php?id=16020>

FR

Dirk Voorhoof

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

Parliamentary Assembly: Safeguarding Audiovisual Cultural Heritage

On 25 May 2012 the Parliamentary Assembly of the Council of Europe (PACE) adopted Recommendation 2001 (2012), “Protection of and access to the audiovisual cultural heritage”.

The Recommendation opens with a number of contextualising remarks, e.g., that the media advance cultural education; that the audiovisual media offer an important basis for “common cultural experiences”; that digital media create new opportunities for recording and accessing audiovisual material, and that copyright issues govern the online distribution of audiovisual material in relevant ways.

The Recommendation then welcomes initiatives like the European Commission’s “European Film Gateway” project (which provides a “single access point to films, images and texts from selected collections of 16 film archives across Europe”: <http://www.europeanfilmgateway.eu/>) and Europeana project (which provides “a single access point to millions of books, paintings, films, museum objects and archival records that have been digitised throughout Europe”: <http://www.europeana.eu/portal/>). It “recognises the need for establishing networks of public and private institutions active in audiovisual heritage in Europe”. It “notes commercial projects such as the Google Book Library Project, but emphasises that ensuring diversity of audiovisual heritage may require also public support, especially where audiovisual material does not appeal to a sufficiently large and commercially important group of viewers”. Finally, in this vein, it appreciates existing (named) examples of public audiovisual archives, libraries and museums at the national level and calls for such examples to be followed elsewhere.

The Recommendation includes specific focuses on the potential roles of public libraries and public service broadcasters (PSBs) in protecting and ensuring access to audiovisual cultural heritage. Audiovisual libraries (with physical and/or online presences) should therefore be developed and expanded. Audiovisual material and archives of audiovisual heritage held by PSBs and production companies should be preserved and made publicly available in copyright-compliant ways.

The Recommendation stresses the central importance of the European Convention for the Protection of the Audiovisual Heritage and its Additional Protocol, before unveiling its most far-reaching suggestion, viz., that a new, second additional protocol to the Convention could help States “to make audiovisual cultural heritage accessible through audiovisual archives and libraries”. It reasons: “Such a protocol should strengthen the protection of the audiovisual cultural heritage through public audiovisual libraries and clarify for States the possibilities of using copyright-protected audiovisual material for educational and research purposes”. The PACE therefore asks the Council of Europe’s Committee of Ministers to initiate a feasibility study on the drawing up of a second additional protocol to the Convention.

Concrete recommendations are also put forward to: “develop guidelines for ensuring access to audiovisual heritage for people with disabilities”, and to invite the European Broadcasting Union to “develop, in partnership with the Council of Europe, joint strategies and concrete action for the protection of, and access to, audiovisual material held by public service broadcasters in Europe”.

• “Protection of and access to the audiovisual cultural heritage”, Recommendation 2001 (2012), Parliamentary Assembly of the Council of Europe, 25 May 2012

<http://merlin.obs.coe.int/redirect.php?id=16032>

EN FR

Tarlach McGonagle

Institute for Information Law (IViR), University of Amsterdam

EUROPEAN UNION

Court of Justice of the European Union: Scope of the Exception for Ephemeral Recordings

On 26 April 2012, the Court of Justice of the European Union (CJEU) delivered a judgment in the case of DR, TV2 Danmark A.S. v. NCB-Nordisk Copyright Bureau.

The applicants at national level are DR, a public radio and television broadcasting organisation, and TV2 Denmark, a commercial public television broadcasting organisation. TV2 and DR broadcast radio and

television programmes produced both in-house and by third parties under specific agreements.

The defendant in the main proceedings is Nordisk Copyright Bureau (NCB), a company that administers the rights to record and copy music for composers, songwriters and music publishers in a few Nordic and Baltic States. The dispute at national level relates to the scope of the exception for ephemeral recordings. NCB considered that the exception for ephemeral records also applies to records produced by third parties commissioned by a TV producer. The plaintiffs disagreed, claiming there is no difference between the programmes made by the production company’s own team and those made by third parties, as this distinction is irrelevant under the Danish Copyright Act.

The Osre Landsret (Danish regional court), before which the proceedings were brought, requested a preliminary ruling to the CJEU concerning the interpretation of Article 5(2)(d) and recital 41 in the preamble to Directive 2001/29/EC.

First, the national court asked the CJEU whether the expression ‘by means of their own facilities’ contained in Article 5 (2)(d) of Directive 2001/29/EC should be interpreted according to national law or European Union law. According to the CJEU, directive 2001/29/EC does not refer to national law and recital 41 clarifies this term. Therefore, this term must be interpreted in a uniform way throughout all EU countries.

The second question is whether the ‘own facilities’ of a broadcasting organisation also includes facilities of parties that act on behalf and under the responsibility, or parties that act on behalf or under the responsibility. There is a divergence in translation of recital 41; both sentences are used in different versions. The CJEU decided that not the formulation but the purpose and context are important. Therefore, recital 41 can be explained as parties that act on behalf or under the responsibility of the broadcasting organisation.

The last question the national court asked is which criteria are used to determine whether recordings made by a broadcasting organisation with the facilities of a third party falls within the exception of ephemeral recordings. According to the CJEU, acting ‘on behalf of’ supposes a direct and immediate link between the two parties, precluding all independence on the part of the third party. That link must be unambiguously recognisable as such to outsiders. Acting ‘under responsibility’ means the broadcasting organisation can be held accountable for all actions by the third party concerning the reproduction of the work, especially by the authors (right sholders). It is irrelevant who made the final artistic or editing decisions in terms of content.

• *Domstolens Dom (Tredje Afdeling)*, 26. april 2012 (Case C-510/10, DR, TV2 Danmark A/S v NCB- Nordisk Copyright Bureau, judgment of the Court of Justice of the European Union, 26 April 2012)

<http://merlin.obs.coe.int/redirect.php?id=16063>

DE EN FR

CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV

Charlotte Koning

Institute for Information Law (IViR), University of Amsterdam

European Commission: Poland referred to the EU Court of Justice for not fully implementing the AVMS Directive

On 21 June 2012, the European Commission released a press statement announcing its intent to refer Poland to the EU Court of Justice. The Commission explained that Poland had failed to fully implement the Audiovisual Media Services Directive (AVMS Directive). (see IRIS 2010-8/4 and IRIS 2011-5/5).

According to the Commission, Poland has not fully implemented the provisions regarding on-demand services. The Commission mentions in particular that the requirements that aim to protect viewers, especially children, from commercial communications in the form of hidden advertising or from content containing incitement to hatred are not met. Also, according to the Commission, Poland has not adhered to the rules on promotion of European works by audiovisual media service providers of on-demand services. Since under Polish law on-demand services do not comply with the obligations set by the Directive the Commission considers that Poland has breached its implementation obligations under the Directive.

Under Article 260 of the Lisbon Treaty, the European Commission can propose financial penalties to the Court of Justice taking into account the duration and severity of the infringement as well as the size of the member state. In the present case, the European Commission has proposed the imposition of a daily fine of more than EUR 110,000 until Poland will have notified the Commission of the full implementation of the Directive into Polish law. The fine would be paid from the date of the Court's decision on the infringement.

• Digital Agenda: Commission asks Court of Justice to fine Poland for not fully implementing Audiovisual Media Services Directive, IP/12/631, 21 June 2012

<http://merlin.obs.coe.int/redirect.php?id=16033>

DE EN FR

PL

Kelly Breemen

Institute for Information Law (IViR), University of Amsterdam

European Commission: Spain Asked to Stop Discriminations of non-Spanish Movies under the Catalan Law on Cinema

On 21 June 2012, in a reasoned opinion, the European Commission asked Spain to stop the restrictions on the distribution of non-Spanish movies. The Commission considers that the Catalan law on Cinema (see IRIS 2009-5/21 and IRIS 2011-10/14) is incompatible with Articles 56 of the Treaty on the Functioning of the European Union (rules on the free movement of services).

In application of Article 18 of the Catalan law, films distributed in Catalonia must be distributed with a Catalan version (either dubbed or sub-titled). Only Spanish movies delivered in Castilian are exempted from this obligation. According to the Commission, this exception for Spanish movies is discriminatory and prevents the distribution of non-Spanish movies by raising the costs of distribution (additional cost is estimated between EUR 25,000 and EUR 77,000 for dubbing and between EUR 2,000 and EUR 5,730 for sub-titling). Despite the fact that movies distributed in less than 16 copies are exempted from this obligation, the Commission notes that more than 50% of the movies remain affected.

The European Commission recalls that the Court of Justice of the European Union (CJEU) "does not prohibit the adoption of a policy for the promotion of a language of a Member State." However the measures taken to implement the policy must not be disproportionate nor bring any discrimination against nationals from other member states (Case Groener, C-379/87, 1989, para. 19).

The European Commission concludes that the Catalan law on Cinema is not proportionate to its aim and discriminates non-Spanish movies. The Commission has granted a period of two months for the Spanish authorities to end their discriminatory policy. In case of failure, the Commission may decide to start an action for non-compliance by referring the case to the CJEU.

• Internal Market: the Commission acts to ensure that European films are distributed in Catalonia, IP/12/663, 21 June 2012

<http://merlin.obs.coe.int/redirect.php?id=16030>

DE EN FR

ES

Catherine Jasserand

Institute for Information Law (IViR), University of Amsterdam

European Commission: Support for Reforms in Public Broadcasting Stepped Up

The European Commission and the European Broad-

casting Union (EBU) want to establish closer cooperation in assisting the reform of public broadcasters in countries that aspire to join the EU. This was agreed in a Memorandum of Understanding signed by the EU Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle, and EBU President Jean-Paul Philippot. The reforms are designed, on the one hand, to secure the financial sustainability of public broadcasters, and on the other, to protect them from undue political pressure as well as to bring them up to professional standards in terms of technologies and management. Media pluralism and freedom are particularly important EU accession criteria.

The Memorandum of Understanding will structure the cooperation between the EU and the EBU over a longer period, giving sufficient time for the reforms to take effect. It was a result of the 2011 Speak Up! Conference, which was devoted to media freedom in the Western Balkans and Turkey. Progress in this area will be reviewed in 2013, as a follow-up to this conference.

Commissioner Füle stressed that the EU enlargement process was principally about helping the aspirant countries to develop and reach European standards. In the broadcasting sector, the EBU was an outstanding partner thanks to its expertise and experience. He also promised to support the EBU's work in the European Neighbourhood regions whose national broadcasters were also EBU members. It was in the Commission's interests to cooperate more closely with the EBU in these regions.

- EU steps up support to reforms in public broadcasting, MEMO/12/598, 24 July 2012
<http://merlin.obs.coe.int/redirect.php?id=16039>

EN

Tobias Raab

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

European Commission: Media Policy Developments in Former Yugoslav Republic of Macedonia Welcomed

The Stabilisation and Association Council set up between the Former Yugoslav Republic of Macedonia and the EU (SA Council) held its ninth meeting on 24 July 2012. The EU Commissioner responsible, Štefan Füle, thought the meeting had been a useful opportunity to review the progress of the accession process, including the priority areas under the High Level Accession Dialogue (HLAD). He welcomed the report prepared and adopted by the government, taking stock of the implementation of the Ohrid Framework Agreement. Based on this initial report, various recommendations could be developed for future measures. The SA Council discussed the draft law on civil liability for insult and defamation, and stressed the importance

of freedom of expression, especially in the media. After consultation with the stakeholders, the law should be brought into line with European standards. Füle added that the Criminal Code should be revised accordingly. The SA Council also welcomed the dialogue taking place in the country concerning the issues of freedom of expression, media ownership, political advertising and the labour rights of journalists.

Since the Republic of Macedonia is continuing to fulfil its commitments under the Stabilisation and Association Agreement (SAA), the Commission reiterated its proposal to move to the second stage of implementation of the SAA; the SA Council noted that this proposal was currently under consideration.

- Statement of Commissioner Štefan Füle at the press conference after the Association Council with the Former Yugoslav Republic of Macedonia, MEMO/12/596, 24 July 2012

<http://merlin.obs.coe.int/redirect.php?id=16040>

EN

- Ninth meeting of the Stabilisation and Association Council between the Former Yugoslav Republic of Macedonia and the EU, Joint press release, 12873/12, 24 July 2012

<http://merlin.obs.coe.int/redirect.php?id=16041>

EN

Cristina Bachmeier

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

European Parliament: Vote against ACTA

On 4 July 2012, the European Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA). During the plenary session, 478 Members of the Parliament voted against, 165 abstained and 39 voted in favour. Previously, five parliamentary committees had given a negative opinion on the treaty: the International Trade Committee, the Industry, Research and Energy Committee, the Legal Affairs Committee, the Civil Liberties, Justice and Home Affairs Committee and the Development Committee. The European Parliament also received a petition against ACTA signed by more than 2 million people.

In application of Article 207 (4) and 218 (6) of the Treaty on the Functioning of the European Union (TFEU), the European Parliament had to give its consent to the conclusion of ACTA by the EU Council. The European Parliament could only approve or reject the treaty but was not able to make any changes to the text.

In May 2012, the European Commission officially referred ACTA to the Court of Justice of the European Union (CJEU) to rule on the compatibility of the Treaty with EU acquis and Fundamental Rights (see IRIS 2012-4/3). Without waiting for the CJEU's ruling, the European Parliament rejected the conclusion of the Treaty.

As a consequence of the European Parliament's vote, the European Union cannot ratify ACTA. However the European Commissioner in charge of Trade has announced that the European Commission will still seek the legal opinion of the CJEU on the compatibility of the treaty with the EU *acquis* and fundamental rights. The European Commission plans to take into account the Court's opinion and consult its international partners to decide how to move forward to protect intellectual property at international level.

- European Parliament legislative resolution on the draft Council decision on the conclusion of the Anti-Counterfeiting Trade Agreement, 4 July 2012

<http://merlin.obs.coe.int/redirect.php?id=16026> NN DE EN
FR CS DA EL ES ET FI HU IT LT LV
MT NL PL PT SK SL SV

- Statement by EU Trade Commissioner Karel de Gucht on European Plenary Vote on ACTA

<http://merlin.obs.coe.int/redirect.php?id=16065> DE EN FR

Catherine Jasserand

Institute for Information Law (IViR), University of Amsterdam

WIPO

WIPO: Adoption of the Beijing Treaty on Audiovisual Performances

On 24 June 2012 the Diplomatic Conference of the World Intellectual Property Organization (WIPO) adopted the Beijing Treaty on Audiovisual Performances. The Treaty aims at ensuring worldwide protection of the rights of performers in their audiovisual performances, performers being "actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore" (Article 2 (a)).

The treaty is the result of many years of discussion (see IRIS 2001-2/1 and IRIS 2011-8/1). Its objective is to provide audiovisual performers with a clear international protection, as they are currently not fully protected by other international treaties (i.e. the Berne Convention, the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations/Rome Convention and the WIPO Performances and Phonograms Treaty).

The treaty protects both the moral and the economic rights of performers. Moral rights include the right to be identified as the performer of a performance and the right to object to any distortion, mutilation or other modification of the performance which would be prejudicial to the performer's reputation (Article 5). Economic rights in unfixed performances consist

of the exclusive right of authorizing the broadcasting and communication to the public of the performance and the exclusive right of authorizing its fixation (Article 6). Regarding fixed performances, the Treaty lays down the performers' rights of reproduction, distribution, rental, making available to the public, as well as broadcasting and communication to the public (Articles 7-11). Technological development and convergence of information and communication technologies receive special attention in the Treaty, particularly in Articles 15 and 16 which deal with the circumvention of technological protection measures and electronic rights management information. The term of protection granted under the Treaty is 50 years, computed from the end of the year in which the performance was fixed (Article 14).

Article 4 of the treaty contains a national treatment clause applicable to most of the rights secured by the Treaty, stating that a Contracting Party has to treat nationals of other Contracting Parties as it treats its own nationals, thereby ensuring equal protection. According to Article 19, the protection shall be granted to all existing fixed performances and all (fixed and unfixed) performances that occur after the entry into force of the Treaty. However exceptions to this rule can be made by the Contracting Parties.

Upon its conclusion, 122 countries immediately signed the Final act of the treaty and 48 countries have signed the treaty itself. The Treaty will enter into force three months after ratification by 30 eligible parties (Article 26).

- Beijing Treaty on Audiovisual Performances, adopted by the Diplomatic Conference on June 24, 2012

<http://merlin.obs.coe.int/redirect.php?id=16025> EN FR ES
RU

Manon Oostveen

Institute for Information Law (IViR), University of Amsterdam

NATIONAL

BE-Belgium

Flemish Commercial Broadcaster Infringes Sponsorship Rules

The programme 'De Vlaanders' is broadcast on Stories TV, a Flemish commercial broadcaster. This programme provides local news from two Belgian provinces, Oost- and West Vlaanderen. This programme is followed by a weather forecast. On 10 January 2012, after the weather forecast, the

following sponsorship billboard was broadcast: 'De Client (kapsalon)/Close-Up (kledingzaak)/Loewe (audio/video/TV)' (De Client (hair dresser)/Close-Up (fashion shop)/Loewe (audio/video/TV). According to *Vlaamse Regulator voor de Media* (Flemish Media Regulator - VRM), this practice infringes Article 91 (1) *Mediadecreet* (Flemish Broadcasting Act), which prohibits the sponsoring of news and current affairs programmes.

According to VRM, the programme should be labelled as a news programme. In the past, VRM has often judged that the provision of facilities, such as clothing, should be classified as sponsoring. Although the news programme was not immediately followed by the sponsoring billboard, VRM emphasised that the colours and the design of the weather forecast are similar to these of the news programme and that the presenter of the news programme announced the weather forecast in the following way: "04046and we will take a look at the weather maps". Furthermore, VRM found that there was a clear link between the news programme and the sponsors. For example, Loewe television screens were used in the decor of the news programme. As a result, the VRM concluded that the broadcaster violated Article 91 (1) Flemish Broadcasting Act. Given that the broadcaster no longer shows this sponsoring billboard, VRM decided not to impose a fine. Instead, VRM issued a warning.

• *VRM t. NV Vlamex, Beslissing 2012/010, 14 mei 2012* (VRM v. NV Vlamex, Decision 2012/010, 14 May 2012)
<http://merlin.obs.coe.int/redirect.php?id=16019>

NL

Katrien Lefever

*Interdisciplinary Centre for Law and ICR (ICRI), KU
Leuven - IBBT*

BG-Bulgaria

Change of the Statute of Legal Terms of CEM's Administration

On 18 May 2012, the Bulgarian Radio and Television Act (RTA) was amended and supplemented. The amendments came into effect on 1 July 2012. In accordance with the amendments, the Council for Electronic Media (CEM) is assisted in the performance of its activities by an administration, carried out by civil servants and persons working under employment contracts regulated by the Labour Code. Its structure is self-defined according to the funds provided for the relevant year. The Act on Administration will be applicable to the administration of the CEM, unless otherwise provided in the RTA.

Members of the CEM will keep their current legal status (equivalent to the status of employment under the

Labour Code). According to the amendments to the Law on Civil Servants, the salary rates of employees should be maintained at the previous rates. Appointments are to be made on the authority of the chairperson of CEM. Under Article 10 of the Law on Civil Servants, officials of the administration with less than 14 full years of service for the media regulator are required to attend a competition for appointment.

• *Закон за радиото и телевизията* (Radio and Television Act, consolidated version, last amendment published in State Gazette (SG) № 38 of 18 May 2012)

<http://merlin.obs.coe.int/redirect.php?id=16008>

BG

Rayna Nikolova
New Bulgarian University

New Tariffs of the Collective Societies

After the coming into force of the 2011 amendments to the Bulgarian Copyright and Related Rights Act, all the collective societies are required under Article 40e to request approval of their tariffs by the Minister of Culture. This provision applies in particular to the following collective societies:

- the society of the phonogram producers and music performers (PROPHON);
- the society of the authors and composers of music works (MUSICAUTOR); and
- the Bulgarian organization of the film authors and producers (FILMAUTOR)

The approval procedure requires each organisation to present, together with the fee and the application for its approval, an agreement with the relevant business organisation. The only business organisation of commercial broadcasters in Bulgaria is the Association of Bulgarian Broadcasting Organisations (ABBRO). The agreement should express the consensus of both parties with regard to the agreed amounts of remuneration and be the product of active negotiation between the parties.

The lengthy and exhaustive negotiations between ABBRO and PROPHON lead, in June 2012, to a new umbrella agreement concluded for a (partly retroactive) period of two years (2011-2012) only with regard to radio operators. No agreement was reached on the remuneration in respect of television broadcasting for the expired period (2009-2011) or for future periods. Neither was agreement reached in respect of radio broadcasting for future periods.

In these latter cases the law provides for the appointment by the Minister of Culture of a special committee to assess the tariff offered by ABBRO. Representatives of the two parties (ABBRO and PROPHON) and three

experts for the two parties are required to participate in the committee. If the parties cannot achieve consensus on the three experts, the Minister of Culture is to appoint three persons from the list of mediators with expertise in copyright cases. The committee must within one month prepare a statement on the tariff filed by the collective society. On this basis the Minister of Culture is required within the following month to confirm or refuse the offered tariff.

Since there is no consensus between the two parties on the experts to be involved in the work of the special committee, and taking into account that there is still only one name on the list of mediators specialising in the copyright cases, the Ministry tacitly suspended the procedure for an unspecified period.

MUSICAUTOR claimed that there was an existing 2010 agreement with ABBRO on a fair amount of remuneration for broadcasting, and referred to this agreement in its application. At the request of ABBRO, the Minister of Culture issued a refusal to approve the tariff, on the ground that the submitted agreement was not valid and that ABBRO was not subject to its terms. MUSICAUTOR appealed the refusal to the court. The case will be heard at first instance by the end of 2012.

Until that time, PROPHON and MUSICAUTOR could apply their previous tariffs by virtue of the law, but the users - members of ABBRO - are in disagreement with them and have refused to pay.

Only FILMAUTOR has gained officially approved tariffs for the broadcasting of films, by virtue of the Order of the Minister of culture from 20 April 2012.

• Заповед 09-142 /20.04.2012 - Министерство на културата (Order of the Minister of culture of 20 April 2012)
<http://merlin.obs.coe.int/redirect.php?id=16011>

BG

Ofelia Kirkorian-Tsonkova
Sofia University "St. Kliment Ohridski"

CH-Switzerland

Consultation on Draft Revision of Radio and Television Act

On 9 May 2012, the Federal Council (the Swiss Government) launched a consultation procedure on plans to partially revise the radio and television broadcasting Act (LRTV). Interested parties and the cantons, the political parties and umbrella associations involved in the economy were invited to notify the Federal Communication Office (*Office Fédéral de la Communication* - OFCOM) of their position by 29 August 2012. The main aim of the revision is to replace the current fee by a new reception fee, to be paid by all households

and companies whether or not they have any reception equipment (see IRIS 2012-2/11). This change in the system has been made necessary by the development of multifunctional appliances (smartphones, computers, tablets, etc.) that considerably facilitate access to radio and television programmes. The new fee will also make it possible to save the considerable expense that is currently incurred by the collection agency in checking whether households and companies possess a reception appliance.

The bill also provides for greater flexibility in attributing a proportion of the fee to private radio stations and television channels; instead of the fixed percentage provided for in the current LRTV, the Federal Council proposes allocating a flexible percentage of between 3 and 5%. The system will make it possible to pay the full proportion of the fee to private broadcasters. The present scheme results in an accumulation of surpluses that cannot be distributed, mainly because the commercial revenue of the broadcasters, which determines the amount of the fee to which they are entitled, is often below the threshold for payment.

The Federal Council also proposes requiring regional television channels that have the benefit of a concession to provide subtitling for the hard of hearing on their main news programmes. This service will be funded by the reception fee. These broadcasters will also be authorised to transmit their programmes throughout Switzerland and not just in their respective regions.

Supervision of the SSR's on-line offer will henceforth be delegated to a specific independent authority (*Autorité Indépendante d'Examen des Plaintes en matière de radio-télévision* - AIEP). This supervision is currently in the hands of OFCOM, which is to retain residual competence in this field; the AIEP already has responsibility for investigating complaints about radio and television broadcasts. This attribution of competence is intended to ensure the autonomy of programmes required by the Federal Constitution. The bill also removes a loophole regarding the independence of private broadcasters vis-à-vis the State: in the absence of specific provisions in the LRTV, such independence cannot currently be guaranteed for broadcasters other than those subject to the granting of a concession. The bill therefore proposes introducing a legal foundation in order to extend this guarantee to the other broadcasters, i.e., those that are only subject to the obligation of notifying the OFCOM of their existence.

• *Projet de loi et rapport explicatif du Conseil fédéral concernant la modification de la loi fédérale sur la radio et la télévision* (Federal Council bill and explanatory report on amending national legislation on radio and television)

<http://merlin.obs.coe.int/redirect.php?id=16044>

DE FR IT

Patrice Aubry
RTS Radio Télévision Suisse, Geneva

CZ-Czech Republic

Transition to the Digital Terrestrial Broadcasting Completed

On 22 August 2012 the Czech Government approved the “Final report of the National Coordination Group for Digital Broadcasting in the Czech Republic to complete its transition to digital television broadcasts”.

The report considered the Czech Republic during its transition from terrestrial analogue television broadcasting to digital television broadcasting (DVB-T). The switchover was subject to very complex conditions within the Czech Republic of an economic, legislative, technical and geographical character. The whole transition took place in all 13 designated geographical areas within the time frame established by Government Regulation No. 161/2008 Coll. The Czech Republic also met the European Commission deadline for the disabling of terrestrial analogue television broadcasting in the course of 2012. It is among the first Central European countries with such a high terrestrial platform coverage to do so.

In the Czech Republic there are four networks for DVB-T. The first network (a multiplex attributed to the public service provider) with full coverage reached 99.9% of the population. The second and the third DVB-T multiplexes have a coverage of 99.8% and 96.3%, respectively. The fourth network's coverage reached 22.7% of the population; it is used only in the local areas of Prague, Brno and Ostrava.

The transition to digital terrestrial television led to an increase in the range of television stations available - from 4 analogue programmes to at least 9 digital nationwide programmes and several regional programmes. The switch-off brought the long-awaited “digital dividend”, in helping towards the release of the radio frequency band to be used for the provision of other electronic communications services, such as those specifically dedicated to mobile access to broadband internet. That frequency is in the process of being prepared for auction.

The smooth completion of the switchover to DVB-T created the possibility of further development of a new generation of electronic communications that signify the development of the level of basic infrastructure needed to achieve national GDP growth and to increase competitiveness. Available frequencies also allow for the provision of terrestrial digital radio broadcasting in the bands released by the 12th television channel. The switchover has not caused significant difficulties for either television broadcasters or citizens of the Czech Republic.

• *Závěrečná zpráva Národní koordinační skupiny pro digitální vysílání v České republice o dokončení přechodu na digitální televizní vysílání* (Final report of the National Coordination Group for Digital Broadcasting in the Czech Republic to complete its transition to digital television broadcasts)

<http://merlin.obs.coe.int/redirect.php?id=16235>

CS

Jan Fučík

Ministry of Culture, Prague

DE-Germany

Düsseldorf Appeal Court Confirms Cartel Law Ban on RTL and ProSiebenSat.1 Online Video Platform

According to the *Bundeskartellamt* (Federal Cartel Office - BKartA), the *Oberlandesgericht Düsseldorf* (Düsseldorf Appeal Court - OLG), in a judgment of 8 August 2012, rejected the complaint by RTL and ProSiebenSat.1 against its decision of March 2011 concerning the two broadcasters' joint online video platform (case no. D 332 VI Kart 4/11[V]).

The *OLG Düsseldorf* therefore confirmed the prohibition imposed by the BKartA and shared the cartel authority's concerns (see IRIS 2011-5/15). The BKartA had concluded that, in its proposed form, such a platform would further strengthen the two broadcasting groups' existing market-dominating duopoly in the television advertising market. It also suspected that the joint venture represented a coordination of business interests, which would breach the ban on agreements that restrict competition.

The *OLG Düsseldorf* ruled that its decision could not be appealed. However, both broadcasters can apply to the *Bundesgerichtshof* (Federal Supreme Court) for leave to appeal.

• *Pressemitteilung des Bundeskartellamts vom 8. August 2012* (Press release of the Federal Cartel Office, 8 August 2012)

<http://merlin.obs.coe.int/redirect.php?id=16038>

DE

Peter Matzneller

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

Munich District Court Upholds ProSiebenSat.1 Complaint Against Save.tv Online Video Recorder

According to ProSiebenSat.1, the *Landgericht München I* (Munich District Court 1) upheld the media group's complaint against the online video

recorder Save.tv in a judgment of 13 August 2012 (case no. 7 O 26557/11). ProSiebenSat.1 had asked for an injunction preventing Save.tv from using its programmes.

In the District Court's view, Save.tv infringed the broadcaster's rights by using its broadcast signals to record and retransmit ProSiebenSat.1 programmes to its users without permission. The online video recorder was inadmissible because it was not simply used to create private copies, as its operators had argued.

The Munich court's decision joins a host of other court rulings concerning the legitimacy of such online video recorders - which have had completely different outcomes. Back in November 2010, the *Oberlandesgericht München* (Munich Appeal Court - OLG) had ruled in favour of a broadcasting company and prohibited a Save.tv service provider from continuing to provide technical support for the online video recorder (see IRIS 2011-2/19 and IRIS 2010-9/17).

In contrast, the *OLG Dresden* (Dresden Appeal Court) had decided in July 2011, that the online video recorder operated by Save.tv did not breach the broadcaster's reproduction right (see IRIS 2011-8/21). Previously, however, a similar 2007 ruling by the *OLG Dresden* in the same case had been referred back to the court by the *Bundesgerichtshof* (Federal Supreme Court) (see IRIS 2009-7/9).

• *Urteil des Landgerichts München I vom 13. August 2012 (Az. 7 O 26557/11)* (Judgment of the Munich District Court 1, 13 August 2012 (case no. 7 O 26557/11))

DE

Peter Matzneller

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

Bremen City Parliament Adopts Media Act

The new *Bremische Mediengesetz* (Bremen Media Act) entered into force on 26 July 2012. The Act, introduced by the coalition just last May, was unanimously adopted by all parties represented in Bremen's city parliament in a procedure lasting just seven weeks. It was thought necessary to take the final vote before the summer break so that the Act could enter into force in time for the *Medienrat* (Media Council) to be appointed in its newly prescribed composition rather than under the previous legal provisions.

One of the objectives of the new Media Act is to make the activities of the *Bremische Landesmedienanstalt* (Bremen Land Media Office - brema) more transparent. In future, therefore, its meetings must, in principle, be held in public and all decisions and attendance lists must be published on the Internet, along with the salary of the brema's director.

The composition of the *Landesrundfunkausschuss* (Land Broadcasting Committee), which was renamed the *Medienrat* (Media Council) under the new Act, has also been amended. For the first time, the body responsible for licensing and monitoring private broadcasters will include a student representative, a representative of a self-help association for disabled persons and a Muslim representative, who will be jointly appointed by Bremen's three Muslim associations. In addition, all associations represented in the Media Council will themselves be able to appoint their representatives from now on. This measure is designed to give it greater autonomy from the State; previously, most members of the *Landesrundfunkausschuss* were chosen by the city parliament.

Membership of the Media Council is now limited to a maximum of 12 years. After the government's original plan to reduce the size of the Media Council from 26 to 24 members was publicly criticised, it was decided to increase the number of members to 30. However, this measure has attracted strong criticism, both from the opposition and from the government coalition. In contrast, a broad consensus greeted the expansion of the brema's remit to include improved coordination of Land-wide initiatives designed to promote media literacy.

In addition to these rules on the composition of the Media Council and various aspects of the brema's activities, the new *Bremische Mediengesetz* includes new provisions for private broadcasters. For example, they are required to offer more North German content as well as better access for persons with disabilities. They must also ensure that their programmes serve the interests of migrants in a sustainable way. Although private radio and television providers argued that this interfered with their programming freedom and risked levelling out the differences between public and private broadcasters, the chairman of the city parliament committee responsible for the new Act defended the government's desire to remind programme providers of their responsibilities and ensure that they took these interests into account.

A working group was set up to reform community broadcasting, for which the brema is also responsible. However, contrary to the agreements reached by the government coalition concerning its further development, no reforms have yet been implemented.

• *Bremisches Landesmediengesetz (BremLMG) vom 17. Juli 2012* (Bremen Land Media Act of 17 July 2012)
<http://merlin.obs.coe.int/redirect.php?id=16071>

DE

Tobias Raab

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

ES-Spain

Spanish Supreme Court Confirms Private Copying Levy

On 22 June 2012 the Spanish Supreme Court issued a ruling in favor of EGEDA, a collecting society managing the intellectual property rights of audiovisual producers. EGEDA filed a lawsuit against the company Freephone Axarquia, and its sole administrator, for not paying the amounts corresponding to the private copying levy.

The judgment of the Supreme Court recalls that fair compensation for private copying, contained in the EU Directive 2001/29/CE, is an autonomous concept of European Union law which must be interpreted uniformly in all the member states that have established a private copying exception.

The Supreme Court has taken into account the latest judgments of the European Court of Justice in this regard, such as the Padawan case (see IRIS 2010-10/7) or the Thuiskopie case (see IRIS 2011-7/2). In the mentioned cases, the Court ruled that legal individuals who manifestly do not make effective use of hardware and media devices for private copying should be exempted from paying any compensation, and the States that adopt the system of compensation for private copying are themselves the ones responsible for ensuring that rightsholders receive their compensation.

The plenary assembly of the Tribunal, relying on these judgments of the European Court, highlighted the obligation that public authorities have to ensure fair compensation for private copying to copyright holders. Therefore, the Court held Freephone Anxarquia and its administrator responsible for compensating copyright holders for the private copying of their works in application of the Spanish equitable compensation system. Under this provision, only in force until 31 December 2011, private copying levy was chargeable to those which really copied and had an impact on the rightsholders patrimony.

Hence, the plenary Supreme Court validated the previous system of fair compensation for private copying, without prejudice to being susceptible to future legislative amendments.

Spain will presumably adopt a change of system by placing the barrel in charge of the General State budget. This initiative will offer an alternative that will go beyond the element of nondiscrimination banned by the European Court of Justice, and will make all citizens pay for the levy, not taking into consideration if they really did or not make private copies.

- *Tribunal Supremo, sentencia 321/2011 de 22 de Junio de 2012* (Judgment of the Supreme Court no. 321/2011 of 22 June 2012) <http://merlin.obs.coe.int/redirect.php?id=16062>

ES

Pedro Letai

IE Law School, Instituto de Empresa, Madrid

Audiovisual Act Amended

On 1 August 2012, an amendment to the Audiovisual Act 7/2010 was adopted by the Spanish parliament, introducing a new legal framework for regional public service broadcasters, which aims at allowing regional public service broadcasters greater flexibility in the provision of their audiovisual media services. It also modifies the regulation of protection of minors.

According to this amendment, the Autonomous Communities may opt for direct or indirect management of their public service broadcasters through various models including public-private partnership. If an Autonomous Community chooses not to provide public service broadcasting, it may then call for tenders for the award of the available licenses to private service providers. Moreover, an Autonomous Community may transfer its public service broadcaster to a third party in accordance with its specific legislation.

If an Autonomous Community opts for a model of indirect management or any other instruments of public-private partnership for the provision of a public service audiovisual media service, then it may participate in the capital of the broadcaster providing this service.

The amendment allows arrangements between regional public service broadcasters for joint production or editing of content for improving the efficiency of their business. It also introduces obligations on regional public service broadcasters such as a maximum limit of expenditure for the financial year in question and the obligation to submit an annual report.

The Act also amends the regulation of protection of minors included in the Audiovisual Act. It is forbidden to broadcast audiovisual content that might seriously impair the physical, mental or moral development of minors. In particular, those programmes that involve pornography, child abuse, domestic violence or gratuitous violence are forbidden.

Content that could be harmful to the physical, mental or moral development of minors may only be broadcast unencrypted between 10 pm and 6 am and must always be preceded by an audible and visual warning. The visual warning must be shown throughout the entire programme. When this type of content is broadcast via a conditional access system, the service have to incorporate a parental control system.

The Act establishes three time slots considered to be of “enhanced protection”: between 8 and 9 am and between 5 and 8 pm, in the case of weekdays and between 9 and 12 am during the weekend and holidays. Contents rated +13 shall not be broadcast during these time slots.

Programmes devoted to gambling and betting may be broadcast only between 1 am and 5 am, and those with content related to the esoteric and “parascience”, may be broadcast only between 22 pm and 7 am. Service providers shall be subsidiary liable for frauds incurred through these programmes.

During the child protection watershed, providers of audiovisual media service can not insert commercial communications that promote the cult of the body and the rejection of one’s image.

In the case of on-demand audiovisual media services provided through a catalog of programmes, providers must develop separate catalogs for content that might seriously impair the physical, mental or moral development of minors and establish parental control systems to allow the blocking harmful content for children.

• Ley 6/2012, de 1 de agosto, de modificación de la Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual, para flexibilizar los modos de gestión de los servicios públicos de comunicación audiovisual autonómicos (Act 6/2012 of 1 August 2012, amending Act 7/2010 of 31 March 2010)
<http://merlin.obs.coe.int/redirect.php?id=16036> ES

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

Merger Antena 3/La Sexta

On 24 August 2012, the Spanish government decided to relax the conditions imposed by the Spanish *Comisión Nacional de la Competencia* (National Competition Commission - CNC) for the acquisition of La Sexta by Antena 3. Exceptionally, the Spanish government may authorise economic concentrations on general interest grounds notwithstanding the negative opinion of the CNC.

On 15 March 2012 Antena 3 had notified to the CNC the purchase of 100% of La Sexta’s share capital. On 14 March 2012 this concentration operation had been sent back to Spain by the European Commission for analysis by the CNC. According to the CNC, this merger could encourage Antena 3 and Mediaset (owner of Telecinco) to act in coordination in the television advertising market, thereby harming competition. Furthermore, Antena 3’s bargaining power for acquiring the most attractive audiovisual content could be strengthened, which could affect the ability of other free-to-view television operators and smaller

editors and producers of audiovisual content to compete in this market. On 11 July 2012, the CNC authorised the merger subject to conditions that aim at safeguarding free competition. The conditions are valid for five years and concern the television advertising market, the free-to-air TV market, the market availability of audiovisual content and the supply of information on the activities of the new operator in the relevant markets.

In a press release of 17 July 2012, Antena 3 considered these conditions as unfair and discriminatory. According to the broadcaster, the CNC decision imposes new restrictions and greater obligations than the ones imposed to the merger Telecinco/Cuatro (see IRIS 2011-1/25), although the merger Antena 3/La Sexta would create a smaller TV operator and therefore have less impact on competition on the television market. The CNC decision would make the merger Antena 3/La Sexta de facto unviable by putting it at a competitive disadvantage with regard to Mediaset, strengthening the latter’s dominant position in the field of free-to-air and pay-TV to the detriment of other operators.

• CNC: Expediente: C/0432/12 (Concentraciones) (CNC documents concerning the Antena 3/La Sexta merger)

<http://merlin.obs.coe.int/redirect.php?id=16070> ES

• Antena 3, comunicado de prensa de 17 de Julio de 2012 (Antena 3, press release of 17 July 2012)

<http://merlin.obs.coe.int/redirect.php?id=16035> ES

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

FR-France

Constitutional Council Validates Legislation on Remuneration for Copying for Private Use

On 20 July 2012, the Constitutional Council deliberated on the compliance with the French Constitution of Article 6 of the Act of 20 December 2011 on remuneration for making copies for private use. The purpose of this remuneration is to ensure compensation for the holders of copyright or neighbouring rights in return for the reproduction by users, for their private use, of protected works and other objects covered by neighbouring rights. In a judgment delivered on 17 June 2011, the Conseil d’Etat had cancelled a decision made by the “Private Copy Committee”, which is responsible for establishing the scale for this remuneration, as it held - in accordance with jurisprudence in the Padawan case before the CJEU (see IRIS 2010-10/7) - that the Committee should have excluded media acquired by corporate persons for professional purposes from the scope of the remuneration. The Conseil d’Etat had postponed the effects of its decision for six months so that new rules on the basis for

the remuneration in respect of copying for private use could be adopted before the cancellation took effect (see IRIS 2011-7/20).

Further to this judgment, and in the absence of the new scale for remuneration for the right to make a copy for private use before expiry of the given deadline, Parliament had adopted the Act of 20 December 2011 under the urgent procedure, bringing the French system of remuneration for making copies for private use into line with European requirements (see IRIS 2012-1/26). However, the audiovisual equipment industries syndicate (*Syndicat des Industries de Matériels Audiovisuels* - SIMAVELEC), in support of an application for the Conseil d'Etat to cancel a decision made by the Private Copy Committee in January 2011, had obtained by a decision of 16 May 2012 a referral to the Constitutional Council for a priority ruling on the constitutionality of Article 6 I of the Act of 20 December 2011. It should be recalled that since 1 March 2010, anyone may claim in proceedings before an administrative or judicial body "that a legislative provision infringes the rights and freedoms guaranteed by the Constitution": this involves a priority ruling on constitutionality. In support of its application, SIMAVELEC held that by prolonging the existence of the rules that had been cancelled by the Conseil d'Etat, Article 6 I validated the rules in disregard of the constitutional principles of the separation of powers and the right to effective legal recourse.

In its decision delivered on 20 July 2012, the Constitutional Council found that the contested provisions had been adopted before the expiry of the deadline laid down by the Conseil d'Etat, as the Commission had not been in a position to establish the new remuneration scale in time. By laying down transitional rules pending a new decision by the commission and for a period of time that may not in any event exceed twelve months, the aim of these provisions is to prevent the cancellation pronounced by the Conseil d'Etat producing the effects it had in fact intended to prevent by postponing the effects of such a cancellation. The Constitutional Council therefore found that the contested provisions were of sufficient general interest, strictly defined the scope of the validation, and did not contradict any legal decisions that had the force of *res judicata*. Article 6 I of the Act of 20 December 2011 was therefore declared compliant with the Constitution. Although the rightsholders expressed their satisfaction, SIMAVELEC has announced its intention to appeal to the European Commission, and to refer the procedures for refunding the private copying levy to professionals to the Conseil d'Etat.

• *Décision n°2012-263 QPC du 20 juillet 2012* (Decision No. 2012-263 QPC of 20 July 2012)

<http://merlin.obs.coe.int/redirect.php?id=16055>

FR

Amélie Blocman
Légipresse

Court of Cassation Considers "Google Suggest" Could Facilitate Infringement of Music Producers' Rights

In an important judgment delivered on 12 July 2012, the Court of Cassation found that the Google Suggest semi-automatic search tool made it possible to infringe copyright and/or neighbouring rights, by directing Internet users' searches towards services that offer illegal downloading. In the case at issue, the French national syndicate of music producers (*Syndicat National des Producteurs de Musique* - SNEP) had noted that when an Internet user entered the name of a performer or an album in Google, the browser's "Suggest" tool systematically associated the name with on-line services allowing piracy, such as Torrent, Megaupload and Rapidshare. Under the terms of Article L 336-2 of the Intellectual Property Code resulting from the HADOPI Act of 12 June 2009, "Where an infringement of copyright or a neighbouring right is caused by the content of an on-line service of communication to the public,⁰⁴⁰⁴⁶ the regional court may order any measures such as to prevent or put an end to an infringement of the copyright or neighbouring right in respect of any person likely to contribute to remedying the situation" without taking into account any liability and without demanding that the measure should be totally effective. Deliberating under the urgent procedure, the initial court and the court of appeal in Paris had dismissed the applications for Google Suggest to be ordered to delete the terms Torrent, Megaupload and Rapidshare from its proposed suggestions. The court of appeal had noted that the illegal content was not accessible on the browser's own site and held that the browser could not be held responsible for illegal downloading by Internet users. It had also found that deleting the suggestion would not in fact prevent illegal downloading. In a judgment delivered on 12 July, the Court of Cassation overturned the appeal judgment. It noted that the court of appeal had not drawn the correct conclusions from its findings. Firstly, by flagging key words that were suggested according to the number of searches, Google Suggest systematically directed Internet users towards illegal downloading sites, which meant that the tool provided the means of infringing copyright and neighbouring rights. The Court of Cassation also found that "the measures requested were aimed at preventing or putting an end to such infringement by stopping Google's companies from automatically associating key words with the terms used in searches; the companies could thereby contribute to remedying the situation by making it more difficult to find illegal sites, although it was not possible to achieve total effectiveness."

In its decision, the Court of Cassation considered that the browser's function facilitated the infringement of music producers' rights, and that the measure requested was such as to prevent or put a stop to such

infringements, even if it was only partially effective. It should be recalled that Google has been filtering terms linked with piracy on its Suggest tool since the beginning of 2011.

• *Cour de cassation (1^{re} ch. civ.), 12 juillet 2012 - SNEP c. Google* (Court of Cassation (1st civil chamber), 12 July 2012 - SNEP v. Google)
FR

Amélie Blocman
Légipresse

Court of Cassation Recalls that there is no General Obligation to Supervise the Network

On 12 July 2012, the first civil chamber of the Court of Cassation delivered three important judgments, overturning the judgment of the court of appeal in Paris which had found that Google Images and Google Vidéo had not taken the necessary steps to make it impossible to put images and films that infringed copyright back on line. The Court of Cassation held that this was tantamount to requiring Google to observe a general obligation of supervision and demanding, out of proportion to the desired aim, the setting up of a blocking arrangement for an unlimited period of time.

The Court of Cassation was being called upon to deliberate in disputes between rightsholders (producers of the documentary films *Les Dissimulateurs* and *L’Affaire Clearstream*, and a photographer) and Google, after it had been noted that there were links on a number of sites accessible via Google Images and Google Vidéo that gave Internet users access free of charge to both the full version of the films, either as streaming or to download, and the disputed photograph. The court of appeal had found that, by enabling Internet users to view the disputed videos and photograph that had been put on-line on third-party sites directly on the pages of the sites Google Vidéo France and Google Images, Google was guilty of infringing copyright, for which reparation was required. The court also held that Google had not taken the necessary steps to ensure that it was not possible to put the films and photograph that had already been flagged as illegal back on-line. The company could not therefore claim the limitation of liability provided for in Article 6. I. 2 of the Act of 21 June 2004 and had therefore incurred its liability in this respect. Google contested the court of appeal’s decisions, and applied to the Court of Cassation. The Court began by emphasising that Google was using links to the other sites to offer Internet users the possibility of viewing the films on its own Google Vidéo site and the photograph on Google Images. The court of appeal had been right in deducing from this that Google was using an active function that enabled it to capture content stored on third-party sites so that it could be represented directly on its own site, for the use of its own clients.

The court of appeal, noting that Google was reproducing the film on its sites in this way without the authorisation of the rightsholders, which was characteristic of infringement of copyright, found that Google was going beyond the implementation of a straightforward technical function, legally justifying its decision.

The Court of Cassation however then went on to overturn and cancel, in application of provisions I.2, I.5 and I.7 of Article 6 of the LCEN of 21 June 2004, the appeal judgments inasmuch as they refused the benefit of these provisions and stated that the applicant companies had not “adopted the necessary measures for preventing the items being put on line again”, regardless of whether the films and the photograph had been accessible from addresses that were different to those indicated in the initial reports. The Court of Cassation held that imposing this decision on Google as the referencing service provider in order to prevent the disputed films and photograph being put on line again, without the company having been sent another proper notification, even though this was required by the Act, was tantamount to subjecting the company “to a general obligation of supervision of the images and films it stored, and an obligation to seek out illegal reproductions, and demanding, out of proportion to the desired aim, that it set up a blocking arrangement for an unlimited period of time.”

• *Cour de cassation (1^{re} ch. civ.), 12 juillet 2012 - Google c. Bach Films et a. (3 arrêts)* (Court of Cassation (1st civil chamber), 12 July 2012 - Google v. Bach Films et al. (3 judgments))
FR

Amélie Blocman
Légipresse

Merger of TPS and CanalSat: Competition Authority Pronounces Injunctions

On 23 July, in deliberating again on the acquisition of TPS and CanalSat by Vivendi Universal and Canal Plus, the Competition Authority made its authorisation conditional on a number of injunctions “such as to re-establish sufficient competition in the pay television market”. The operation had only been authorised in 2006 on condition that 59 undertakings were respected, and the Competition Authority, noting that the Canal Plus Group had failed to observe ten of these - including some that were of crucial importance - decided in September 2011 to withdraw its decision authorising the operation (see IRIS 2011-9/17). The parties therefore notified the operation to the Authority once more, and its thorough investigation was carried out on the basis of a broad consultation of the market’s stakeholders, the audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA) and the telecom and post regulatory authority (ARCEP). The Authority found the undertakings offered by Canal Plus for remedying the competition issues raised by

the operation insufficient, and therefore announced its injunctions, as provided for in Article L. 430-7 III of the Code of Commerce.

The Authority noted that, because of Canal Plus' failure to perform a number of its undertakings, competition has been significantly weakened in a number of pay television markets: acquisition of cinema rights, edition of channels, commercialisation of themed channels, and the distribution of services. More particularly, the deterioration of the quality of the unbundled channels, the failure to keep to its undertakings on the conditions for buying independent channels, and the conclusion with these independent channels of exclusive distribution arrangements in favour of CanalSat had had the combined effect of preventing the emergence of competition on markets upstream. More specifically, the development of Internet access providers (IAPs) as competitive distributors offering pay television has been hampered by their inability to constitute attractive packages, for lack of available content. This has left them stuck in the role of carriers of Canal Plus offers. Currently, more than five years after the concentration, the Canal Plus Group represents 90 to 100% of the value of the market, compared with less than 10% for all the IAPs together. The Competition Authority believes these figures reflect the installation, as a result of the operation, of a lasting monopoly in the Group's favour.

There are three aims behind the injunctions that have been issued. The first is to promote diversity among the players in the pay television sector, so that an offer may emerge that, although it will be less extensive than that of the Canal Plus Group, will be less expensive, and therefore more accessible for consumers. Corrective measures ought to preserve editorial diversity by guaranteeing distribution conditions for the independent channels that are equal to those allowed to the channels edited by Canal Plus, by reinforcing their power to negotiate with the Group. To achieve this, the Authority is calling for more control over the purchasing behaviour of Canal Plus regarding cinematographic rights, more particularly by limiting framework contracts to three years, by signing different contracts for each type of rights (first window, second window, series, etc.), and by prohibiting the signature of framework contracts for French films. Canal Plus will also be required to guarantee clear rules for allowing the independent channels access to distribution on CanalSat, and to enable alternative distributors, and more particularly the IAPs, to compete effectively for exclusive distribution on CanalSat. It will also be required to make all the cinema channels it edits for its CanalSat package available to third-party distributors (unbundling).

The second aim is to preserve the competitive future of the new areas, by preventing Canal Plus from pre-empting pay-per-view or subscription video-on-demand. The Authority therefore requires the signature of separate contracts for the purchase of PPV

and subscription VOD rights, on a non-exclusive basis, without coupling them to purchases of rights for linear broadcasting on pay television. Any exclusivity of distribution in favour of Canal Plus' PPV or subscription VOD offer on the IAPs' platforms is also to be prohibited. Lastly, any interested operator may be allowed to acquire VOD rights from Studio Canal.

Thirdly, the Competition Authority stresses the importance of not calling into question the financing of the French cinema industry, which has structured itself around Canal Plus, the main contributor to the financing of French creations.

These injunctions are to be valid for five years, and an independent agent approved by the Competition Authority will be instructed to ensure that they are observed. Canal Plus immediately announced its intention to appeal to the highest administrative authority (the Conseil d'Etat) for the suspension or cancellation of the Competition Authority's decision. At the same time, the Conseil d'Etat is examining the appeal brought by Canal Plus against the Competition Authority's cancellation of its authorisation of the merger in September 2011 and, as part of its investigation, applied to the Constitutional Council at the end of July for a priority ruling on the constitutionality on the powers of the Competition Authority. The saga goes on⁰⁴⁰⁴⁶

• *Décision 12-DCC-100 du 23 juillet 2012* (Decision 12-DCC-100 of 23 July 2012)

<http://merlin.obs.coe.int/redirect.php?id=16043>

FR

Amélie Blocman
Légipresse

Canal Plus Purchases Direct 8 and Direct Star: Competition Authority Gives Green Light, Subject to Conditions

On 23 July 2012, at the end of a thorough three-month examination, the Competition Authority (*Autorité de la Concurrence*) authorised the acquisition by Vivendi and the Canal Plus Group of the DTV channels Direct 8 and Direct Star, subject to a number of conditions. It should be recalled that on 5 December 2011 the main French pay television operator sent notification of this acquisition, which opened up pay television for the operator. In examining the notification, however, the Competition Authority found that the operation raised "serious doubts" as to impeding competition (see IRIS 2012-5/21), which set in motion the procedure for a thorough examination. By giving its authorisation, the Authority deems the undertakings given by the parties to the operation with a view to resolving the competition problems that have been identified are now sufficient.

The main risks that were causing the Competition Authority concern involved the acquisition of rights. As

the main purchaser of cinematographic rights for first- and second-window broadcasting on pay television in France, Canal Plus was able to take advantage of its position to pre-empt the acquisition of more attractive broadcasting rights for showings on Direct 8 and Direct Star. Canal Plus has therefore undertaken to purchase films or American-origin series for both its pay and free channels from only one of the six major American studios (Universal, Paramount, Warner, Sony, Fox or Disney). For first showings of French films, Canal Plus has undertaken to refrain from acquiring the broadcasting rights for both free and pay television in the same year for more than twenty cinematographic works. The parties will also be required to devote the major part of their investments to medium-budget films, without being able to pre-empt the rights of a large number of large-budget films (no more than two films with a forecast budget of over 15 million euros, three with a forecast budget of between 10 and 15 million euros, and five with a forecast budget of between 7 and 10 million euros). Apart from these two cases, the parties have undertaken to negotiate pay and free television rights for recent films and series separately, through specific teams and separate companies.

The second risk of the operation was that Canal Plus, which holds the most important portfolio of rights for French stock films (i.e. those already shown on television) through its subsidiary Studio Canal, would block the free channels' access to these films, thereby protecting its own free channels Direct 8 and Direct Star from competition. The risk was particularly important for the other DTV channels that broadcast few first showings of films and therefore have a vital need for Studio Canal's stock films. The parties have therefore undertaken to limit acquisitions of French stock films by Direct 8 and Direct Star from Studio Canal to the level recorded prior to the operation. Furthermore, the rights will only be allowed for a maximum of six months, and Direct 8 and Direct Star may not be allowed preferential conditions over their competitors in the free channel market.

Since the Canal Plus Group is in a position to acquire, or already holds, the rights for broadcasting sports competitions of major importance, which it must transfer to free channels by virtue of Article 20-2 of the Act of 30 September 1986, the last risk identified for the operation concerned the pre-emption of these events in favour of its own unencrypted channels Direct 8 and Direct Star. To circumvent this risk, Canal Plus has undertaken to transfer these sports rights on concluding a transparent, non-discriminatory tender process involving all the broadcasters concerned. This is to be organised by an independent agent authorised by the Competition Authority.

All these undertakings, adopted for a renewable five-year period, will be closely monitored by the Competition Authority.

In September it will be the turn of the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) to give its final opinion on the operation concluded by the Bolloré and Vivendi/Canal Plus groups. The undertakings made will be included in an addendum to the channels' agreements; these will be negotiated between the CSA and the Canal Plus Group.

• *Décision 12-DCC-101 du 23 juillet 2012 relative à l'acquisition de Direct 8 et Direct Star* (Decision 12-DCC-101 of 23 July 2012 on the acquisition of Direct 8 and Direct Star)

<http://merlin.obs.coe.int/redirect.php?id=16042>

FR

Amélie Blocman
Légipresse

Report on Method of Regulating Product Placement on Television

In June 2012 the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) drew up a report on the result of the application of its deliberation on product placement in television programmes, adopted on 16 February 2010 (see IRIS 2010-4/23). The deliberation made provision for such a report to be drawn up two years after it came into force.

Adopted in application of Article 14-1 of the Act of 5 March 2009 transposing the AVMS Directive into national legislation, the deliberation authorised product placement in France "in cinematographic works, audiovisual fiction works, and music clips, except where these are intended for children's viewing". Products for which advertising is prohibited or regulated for reasons of health or public safety (alcohol, tobacco, medicines, firearms) may not be placed. The deliberation also prohibited placement in favour of gambling organisers. A pictogram must inform the viewer of the existence of product placement in a broadcast.

To be able to report on the results of its prescriptions, the CSA held a series of hearings with organisations of authors, directors, producers, advertisers and communications agencies, channels, and consumer protection associations. The CSA noted that outside the cinema, where it was already well-established, product placement remained "timid" on television. The most frequent cases were observed in the series *Plus belle la vie*, in a number of music clips, and in some French fiction works. Faced with strong demand from both television producers and advertisers, the CSA has therefore decided to embark on consideration of the advisability of opening up one or more types of flow programmes (entertainment, games, reality shows) to product placement, as authorised by European legislation. This consideration should cover the diversity of the broadcasts, the categories of products that may be placed, and the evolution of habits, in order to determine precisely what form any opening up

might take. The CSA also observed that the “P” pictogram started to appear on broadcasts of American series in spring 2011. In most cases, product placement was not aggressive for viewers, and the CSA has therefore decided to make no changes to either the parameters of its definition or its conditions in terms of form. Nor will there be any change to the methods for informing viewers of the existence of product placement. The CSA will however ask the channels to carry out a new information campaign to remind viewers of the meaning of the “P” pictogram. The 2010 deliberation also provided that where product placement was present in a programme that had been produced, coproduced or pre-purchased by the editor there had to be a contract defining the economic relationship between the advertiser, the programme’s producer and the channel’s editor. The profession has however encountered numerous difficulties in implementing this provision, and the CSA has therefore decided to amend the deliberation by replacing the requirement of a tripartite contract by the requirement of a bipartite contract between the producer and the advertiser, coupled with a duty to inform the broadcaster of the existence of product placement. The CSA also decided to lift the ban on product placement by gambling organisers.

• *Délibération n°2012-35 du 24 juillet 2012 modifiant la délibération n°2010-4 du 16 février 2010 relative au placement de produit dans les programmes des services de télévision, JO du 7 août 2012* (Deliberation No. 2012-35 of 24 July 2012 amending Deliberation No. 2010-4 of 16 February 2010 on product placement in television programmes, published in the *Journal Officiel* of 7 August 2012) <http://merlin.obs.coe.int/redirect.php?id=16045>

FR

Amélie Blocman
Légipresse

GB-United Kingdom

Sky Movies Does Not Restrict Competition in the Pay-TV Retail Market

In August 2010 the UK communications regulator Ofcom referred to the general competition authority, the Competition Commission, the supply and acquisition of subscription pay-TV movie rights and packages. It has the power to do this if it has reasonable grounds for suspecting that competition is not working effectively in a market. The Commission has to decide whether any feature or combination of features of a relevant market restricts or distorts competition in the UK.

The Commission has decided that Sky’s position in the acquisition and distribution of movies in the first pay window does not adversely affect competition in the pay-TV retail market. Sky Movies, which offers the first pay movies from all the big Hollywood studios,

is not a sufficient driver of subscribers’ choice of pay-TV provider to give Sky an advantage over its rivals when competing for pay-TV subscribers which harms competition.

This was based on a number of findings. First, that more consumers attach importance to other service attributes such as access to a broad range of content and price, rather than seeing recent movie content. Secondly, competition and consumer choice have been increased by the launch of new and improved competing services by Netflix and LOVEFILM. Thirdly, the launch of Sky Movies on Now TV (a stand-alone service) gives consumers for the first time a choice of subscribing to Sky Movies separately from their subscription to other pay-TV content.

The Commission noted that the way people are watching movies is changing and this has been reflected in new services becoming available. Although Sky holds the rights to the movies of all six major Hollywood studios for the first subscription pay-TV window, LOVEFILM and Netflix have already acquired such rights from several other studios, including those responsible for the *Twilight* series and the *Hunger Games*, and the rights of many of the major studios for subsequent pay-TV windows. As they increase their subscriber numbers, barriers to their acquisition of further rights will continue to fall.

The Commission did, however, note that competition in the pay-TV retail market overall remains ineffective.

• Competition Commission, ‘Movies on pay-TV market investigation’, 2 August 2012

<http://merlin.obs.coe.int/redirect.php?id=16024>

EN

Tony Prosser
School of Law, University of Bristol

IE-Ireland

Supreme Court to Hear Appeal on Three-Strikes Copyright Protocol

The Irish Data Protection Commissioner has lodged an appeal to the Supreme Court against a High Court decision in *EMI v. Data Protection Commissioner*. The High Court judgment of 27 June 2012 found that an enforcement notice, issued by the Commissioner, directing the Internet service provider, Eircom, to cease the implementation of the three-strikes protocol on the grounds that it breached data protection and privacy law, was invalid.

The protocol arises from a series of cases taken by record companies against Internet service providers seeking to address the issue of copyright infringement

over the Internet. These cases led to an agreement between one Internet service provider, Eircom, and the record companies to introduce a graduated response known as the three-strikes protocol to terminate the connections of persistent copyright infringers (see IRIS 2005-10/28, IRIS 2006-4/26 and IRIS 2010-6/34).

The court, in 2010, was asked to assess the compatibility of the protocol with the Data Protection Acts 1988-2003 and found that the settlement was lawful and could be implemented (see IRIS 2010-6/34). The Data Protection Commissioner declined to participate in that court action, citing costs as a factor, and he now argues that he is not bound by that decision. The three-strikes protocol began operation in August 2010. On the basis of IP addresses provided by the recording companies, Eircom subsequently issued at least 29,000 individual notices to subscribers claiming that they had engaged in uploading copyright material in breach of their contracts.

Due to a failure by Eircom to update their systems to account for the change from summer- to winter-time, when clocks moved back by one hour, errors were made in the identification of subscribers linked to the temporary IP addresses provided by the record companies. This led to at least 391 subscribers being incorrectly notified that they were in breach of contract by infringing copyright. A complaint was subsequently made by an Eircom customer to the Office of the Data Protection Commissioner on 17 January 2011.

On 11 January 2012 the Commissioner issued an enforcement notice directing Eircom to stop implementing the three-strikes protocol. Four record companies (EMI, Sony, Universal and Warner) issued proceedings challenging the Commissioner's decision to issue an enforcement notice against Eircom. The High Court held in favour of the record companies; the notice was invalid as the Data Protection Commissioner had failed to give reasons for forming his opinion that Eircom had breached the Data Protection Acts 1988 - 2003, as required by section 10(4)(a) of the Acts.

The court was also concerned that the Commissioner had failed to recognise that the error leading to the misidentification of subscribers was corrected by fixing the clocks and is unlikely to be repeated. Furthermore, the court held that the Commissioner's decision to issue an enforcement notice on this matter appears to involve a misconstruction of the relevant data protection and privacy law. The judge also referred to one of his own earlier decisions in *EMI v UPC* (see IRIS 2011-1/38) where he found that there are no privacy or data protection issues involved in detecting unauthorised downloads through peer-to-peer technology and that the process of detecting online copyright infringement employed by the record companies is essentially anonymous.

The appeal was lodged by the Commissioner on 31 July 2012. It is reported that the Commissioner is ask-

ing the Supreme Court to refer questions to the European Court of Justice for a preliminary ruling, including a request for an opinion on whether the three-strikes protocol is compatible with European law in reconciling subscribers' fundamental rights with the rights of copyright owners.

• *EMI Records (Ireland) Ltd & Others v. The Data Protection Commissioner* [2012] IEHC 264, judgment of 27 June 2012
<http://merlin.obs.coe.int/redirect.php?id=16028>

EN

Damien McCallig

School of Law, National University of Ireland, Galway

IT-Italy

Council of State Upholds Annulment of AGCOM's Rules on Short News Reports

On 23 March 2012, the Council of State handed down its judgment in the case *AGCOM v. Sky Italia*. On 13 July 2011, the Lazio Regional Administrative Court (TAR Lazio) annulled AGCOM's rules on short news reports set out in decision 667/10/CONS insofar as they set at three minutes the maximum duration for such reports, but confirmed the applicability of those rules both to internal and cross-border situations (see IRIS 2012-1/31).

AGCOM and the broadcaster Sky Italia appealed the TAR Lazio ruling before the Council of State. Its judgment clarifies the territorial scope of the provisions on short news reports set out in Directive 2010/13/EU (the AVMSD) as well as on their relationship with the AVMSD's preamble, with the European Convention on Transfrontier Television (ECTT), and with Directive 2001/29/EC on copyright and related rights in the information society.

As per Recital 55 AVMSD, short news reports "should not exceed 90 seconds". Article 15(6) AVMSD, on the other hand, does not place any limit on their duration. In its appeal, AGCOM argued that the body of the AVMSD should take precedence over its preamble so that member states should be entitled to set a longer duration. The Council of State, in contrast, held that the AVMSD preamble provides an "inescapable criterion" for interpreting the AVMSD body and that it constitutes a clear expression of the European legislature's intention to lay down a "clear benchmark" for the duration of short news reports.

Turning to the territorial scope of the AVMSD provisions on short news reports, Sky Italia argued that those provisions apply exclusively to cross-border situations. The Council of State, instead, took the view that the applicability of those provisions both as to internal and cross-border situations can be inferred

from their wording as well as from their aim to protect the right to information of European citizens, a need that deserves protection also in purely internal situations.

Moreover, according to the Council of State, it does not follow from the fact that the ECTT provisions on short news reports only apply to transfrontier broadcasting that also the corresponding AVMSD provisions should apply exclusively to cross-border situations. Indeed, in the Council of State's view, the AVMSD and ECTT rules on short news reports "complement one another."

Furthermore, the Council of State ruled, contrary to Sky Italia's contention, that the statement set out in Recital 56 AVMSD that provisions on short news reports should be "without prejudice to Directive 2001/29/EC" does not prevent member states from introducing additional restrictions on the exercise of copyright in order to protect the viewers' right to be informed about events high interest.

Finally, the Council of State denied Sky Italia's motion for a preliminary ruling from the Court of Justice as to the interpretation of Article 15(6) AVMSD, because that provision did not give rise to any real interpretative doubt. The Council of State thus upheld the findings of the TAR Lazio and dismissed the appeal.

• Consiglio di Stato, sentenza n. 3498 del 23 marzo 2012, depositata il 13 giugno 2012 (Council of State, judgment no. 3498 of 23 March 2012, published 13 June 2012)

<http://merlin.obs.coe.int/redirect.php?id=16029>

IT

Amedeo Arena

University of Naples "Federico II", School of Law

Italian Broadcaster Rai Must allow Sky Italia to Broadcast its Channels Free-to-Air

The TAR Lazio, Italian administrative court in Rome, has ruled that the broadcaster RAI violates its public service charter by encrypting its free-to-air (FTA) channels and denying "Sky Italia" the ability to carry the RAI channels.

The satellite provider had filed a suit with the TAR administrative court challenging a 2009 decision by the Italian communications regulator AGCOM that permitted RAI to encrypt some programming. Rai encrypted some of its content on the sky platform, including football matches. When RAI began encrypting its FTA broadcasts, Sky Italia launched its Digital Key DVB-T decoder that plugs into the USB port on its decoders and which incorporated all free DTT channels into Sky's program guide. RAI's decision obliged Sky subscribers to purchase a separate decoder for Tivusat, the free satellite platform owned jointly by RAI, Mediaset and Telecom Italia.

In its ruling, TAR ruled AGCOM's decision as unlawful, stating that public service programming must be "universally accessible via all technology platforms" regardless of who owns them. The only condition is that the platform owners provide users with free access to RAI channels. The gratuitousness of the sale of programming to distribution platforms' holders becomes in this sense a tool to ensure maximum accessibility of programming and accessibility for free. The sale of public programming from RAI to the distribution platforms might result in the introduction of additional burdens for the end user.

Sky, therefore, as owner of a programming distribution platform via satellite and available for distribution free of charge to the user has the right to supply free programming

The RAI decision reminded that RAI must comply with its public service obligations towards all Italian citizens. With this ruling, the Regional Administrative Court reaffirmed a principle of justice and a principle of non-discrimination towards Sky subscribers who, over the last years, have seen some programs being blacked out on their Sky decoders - as it has recently happened on the occasion of the European Football Championship - even though they pay RAI's licence fee.

Moreover the judgment considered the promotion of Tivusat through AGCOM's initial decision as being an effective "state aid" for Tivusat's shareholders. The Tivusat project, was in fact originally developed by Mediaset and Telecom to serve areas of the state not covered by DTT. According to the judges, however, the project has also resulted in an economic advantage for the participants and has also indirectly favored some private television channels on the platform.

• Tribunale Amministrativo Regionale per il Lazio (Sezione Terza Ter), n. 6320, 11/07/2012 (TAR Lazio Decision n. 6320, 11 July 2012)

<http://merlin.obs.coe.int/redirect.php?id=16031>

IT

Valentina Moscon

Department of Legal Sciences - University of Trento

Italian AVMS Code Amended

On 28th June 2012 the Italian Government adopted Legislative Decree no. 120/2012 amending the Italian AVMS Code (Legislative Decree no. 177/2005, already amended in 2010, when the AVMS Directive was implemented into Italian legislation: see IRIS 2010-2/25 and IRIS 2010-4/31).

This Decree has been adopted with the aim of amending some provisions on the protection of minors and trailers of cinematographic works adopted in 2010 at the time of the implementation of the AVMS Directive

and which led to some remarks by the European Commission (see IRIS 2011-5/5). With regard to trailers of cinematographic works of European nationality, the challenged provision did not calculate their duration within the total time allocated to advertising. Concerning the protection of minors, the Italian transposition did not properly take into account the different provisions regarding minors between linear and non-linear media services.

Following the observations received from the Commission, the Italian Government took steps to amend the concerned articles, while taking also the chance to regulate some issues not specifically falling under the scope of the AVMS Directive, but still coherent with its underlying purpose, introducing some new provisions with regard to European works and sanctions against local AVMS providers.

Article no. 1 introduces major changes to Article no. 34 of the AVMS Code, regarding the protection of minors, to ensure a more consistent implementation of the provisions of the Directive so as to take ensure more restrictive rules for linear services and less severe rules for non-linear ones. It is now clearly stated that audiovisual content that seriously impairs the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence, including cinematographic works classified as unsuitable for minors under 18 years, may never be broadcast on linear services, but can be made available in on demand catalogues in such a way that minors will not normally hear or see such services and in any case provided that a parental control system is activated. AGCOM (the Italian Communications authority) is charged to adopt the implementing measures. As to programmes which are likely to impair the physical, mental or moral development of minors, they may be broadcast when it is ensured that minors in the area of transmission will not see or hear them and in any case together with an informative symbol during the whole transmission time. Cinematographic works classified as not suitable for minors under 14 years or films showing sex or violence may be broadcast only during the night, between 23 and 7, unless appropriate technical measures are available.

Article no. 2 amends Article 38, paragraph 12 of the AVMS Code excluding trailers of cinematographic works of European nationality from the limits on the amount of advertising when they qualify as “promotional messages” instead of “advertising”.

Article 3 amends Article 44, paragraphs 3 and 8 of the AVMS Code and charges the Ministries of Cultural affairs and Economic development to define specific investment sub-quotas, within the general investment quota of 10% of yearly revenues to be destined to independent European works, in relation to the production, financing, pre-purchase or purchase of cinematographic works of Italian expression, independently of the country of production. This Article also

charges AGCOM to adopt a regulation, with the opinion of the mentioned Ministries, in order to define the roll-out of the monitoring activity on the provisions related with European productions and programming and the criteria for the concession of exemptions to AVMS providers fulfilling on of the conditions set by the Decree (no revenues in the past two years, less than 1% market share or thematic channels).

Article no. 4 reduces to one tenth the amount of the penalties for violations committed by local broadcasters in the field of audiovisual sports rights, in uniformity with other reductions for other kinds of violations covered by the Code.

• Decreto legislativo 28 giugno 2012, n. 120 - “Modifiche ed integrazioni al decreto legislativo 15 marzo 2010, n. 44, recante attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l’esercizio delle attività televisive. (GU n. 176 del 30-7-2012)” (Legislative Decree 28 June 2012, no. 120 - Amendments to legislative decree 15th march 2010, no. 44, implementing directive 2007/65/CE on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities)
<http://merlin.obs.coe.int/redirect.php?id=16064>

IT

Francesca Pellicanò

Autorità per le garanzie nelle comunicazioni (AGCOM)

KG-Kyrgyzstan

Digital Switchover Programme Approved

On 2 November 2011, О переходе на цифровое телерадиовещание в Кыргызской Республике (programme for the digital switchover) was approved by the government, following a process of consultation with both civil society and media non-governmental organisations. It outlines the technical and political steps to be taken by stakeholders. In particular it establishes DVB-T2 as a minimum broadcasting standard. The programme also establishes Kyrgyz Telecom as the main service provider and obliges it to distribute the “social package” software multiplex to 95% of the population by 2013.

The State Communications Agency (SCA) was tasked with implementing the programme in four stages:

1. The SCA and the Ministry of Transportation and Communications (MTC) are to develop criteria for allocation of licenses.
2. Allocation of multiplex frequencies is to be subject to competition. The Ministry of Culture is to identify specific television programmes that are to be included in the free-of-charge “social package”.
3. Private broadcasters are to develop their digital own broadcasting networks. The government

promises to create favourable conditions for domestic production.

4. Measures to protect socially vulnerable groups from any negative impact are to be implemented by the Ministry of Social Protection, the Ministry of Finance, the MTC, SCA and the Ministry of Culture.

The programme foresees the following 14 multiplexes allocated for Kyrgyzstan:

- four to Kyrgyz Telecom, including the “social package” multiplex;
- one through a competition to a free-of-charge educational television channel;
- between three and ten multiplexes are to be allocated to private service providers on the basis of competitive tender, and until allocation will be considered reserve frequencies.

The programme suggests that in each province one or two “commercial” multiplexes are to be reserved for private broadcasters and will be auctioned among private telecommunication enterprises in three lots of two multiplexes each. The multiplex operators are to select and contract local broadcasters on the inclusion of their programmes in the line-up.

• О переходе на цифровое телерадиовещание в Кыргызской Республике (Resolution on the digital television switchover in Kyrgyz Republic of 2 November 2011)
<http://merlin.obs.coe.int/redirect.php?id=16006>

RU

Andrei Richter

Faculty of Journalism, Moscow State University

RO-Romania

Decision on the Provision of On-demand Audiovisual Media Services

On 29 May 2012, the *Consiliul Național al Audiovizualului* (National Audiovisual Council - CNA) adopted Decision no. 320 on the provision of on-demand audiovisual media services. The Decision, adopted in order to further the transposition of the Directive 2010/13/EU (Audiovisual Media Services Directive), was published in the Official Journal of Romania no. 434 of 30 June 2012 (see IRIS 2009-3/30).

The provisions of the Audiovisual Law no. 504/2002, as amended, and the Audiovisual Code (Decision no. 220/2011 regarding the Regulatory Code of the Audiovisual Content) apply to on-demand services, bearing in mind their intrinsic availability for viewing at the moment chosen by the user and at its individual request. The Decision covers the activity of

all providers under Romanian jurisdiction and contains provisions for on-demand audiovisual services through electronic communications networks (“video-on-demand” and “video replay”).

The companies and persons who intend to launch on-demand video services, irrespective of the technical way of provision or transmission (TV, internet or other electronic communications networks) must reserve in their catalogue of programmes at least 20% for European audiovisual works, not including the news, sports events, games, advertising or teletext and teleshopping services. They are required to promote on their websites the European audiovisual works of fiction available in the catalogue and to specify the country of origin of each audiovisual programme available. The video-on-demand service providers report annually to the CNA.

Within one year of the publication of the Decision in the Official Journal, the CNA will analyse developments in the market for on-demand audiovisual media services and will review those provisions applicable to the cultural responsibilities of the providers. At the same time, the CNA has established the deadline of 3 September 2012 for all providers to notify the CNA of any intention to offer on-demand audiovisual services. Such a notification must be made at least 7 days prior to the launch of such a service.

The Decision does not apply to web services which do not compete with the on-demand audiovisual media services or websites that provide audiovisual content generated by private users, such as sharing platforms, private correspondence, online gambling, electronic versions of newspapers/magazines or internet search engines.

The provision of on-demand audiovisual media services through digital terrestrial television frequencies is possible only under a digital terrestrial broadcasting licence, issued by the CNA. Applicants may begin transmitting on-demand audiovisual media services only after having obtained a provision note from the CNA. The rights stipulated in the provision note may not be transmitted to third parties. The provision note may be withdrawn by the CNA for any breach of the Audiovisual Act, following termination of the holder's right to provide such services or at the holder's request. The Public Register of on-demand audiovisual services providers will be available on CNA's website.

The Audiovisual Code sets out the applicable rules on:

- the protection of minors;
- the protection of human dignity and the right to a person's own image;
- the provision of accurate information and pluralism
- interactive shows, games and contests
- advertising, teleshopping, sponsorship and product placement; and

- on political advertising applicable to on-demand audiovisual media services.

Providers must improve access to audiovisual content for people with vision or hearing disabilities.

Programmes classified “18” may be transmitted only if the access restriction measures of the Audiovisual Code are implemented (see IRIS 2011-5/38). Programmes classified “18+”, as well as the audiovisual content which is illegal under Romanian law, such as pornographic materials involving minors, are forbidden from being transmitted by audiovisual media service providers within Romania’s jurisdiction. Persons whose rights or interests are harmed or compromised under these provisions may exercise a right to restitution up to 15 days from the date of viewing or accessing the offending material.

A failure to comply with the Decision is subject to penalties under the provisions of the Broadcasting Act.

• Decizie nr. 320 din 29 mai 2012 privind furnizarea serviciilor media audiovizuale la cerere (Decision no. 320 with regard to the provision of on demand audiovisual services)

<http://merlin.obs.coe.int/redirect.php?id=16047>

RO

Eugen Cojocariu

Radio Romania International

Final Rejection of the Modification of the Act on Preventing and Fighting Pornography

On 19 June 2012, the Romanian Chamber of Deputies (lower Chamber of the Parliament) rejected by a large majority a Bill on the revision and modification of Law no. 196/2003 on preventing and fighting pornography. The Bill was rejected by 184 votes to 6, with two absentions. On 26 April 2011, the Bill had been rejected by the Romanian Senate (upper Chamber), although the Chamber of Deputies took the final decision (see IRIS 2003-1/27, IRIS 2004-2/36, and IRIS 2011-6/28).

The bill had been proposed by the Romanian Government in January 2011. It aimed to amend and supplement the legal framework on pornographic activities and to impose regulatory and control measures on access to pornographic material available through computer systems.

The Government intended to fill the gaps in the 2003 Act in respect of online content and to restrict the access of minors to pornographic websites by obliging the creators of such websites to introduce a password-protected access system. At the same time, the Bill sought to place responsibility for links to pornographic content on Internet Service Providers (ISPs). This would have been done under the provisions of Act no. 365/2002 on electronic commerce and been subject to a financial penalty for contravention.

The Government also tried to define pornography both more strictly and widely. The owners of a domain name intending to use it for a pornographic website only, would have been required to notify the Ministry of Communications and Information Society (the Ministry) of that intention. The Bill aimed to oblige those operators to place a warning on their websites as to their content, that is visible at initial access to the site in question. The Bill also aimed to give more powers to the Ministry to enforce the obligations imposed by law.

Six Romanian human rights and mass media freedom Non Governmental Organisations (NGOs) considered the provisions of the Bill to be unclear, to restrict freedom of expression, to endanger the right to privacy and potentially to transform ISPs into a “digital police force”. The Association for Technology and Internet, (ApTI), along with the 5 other NGOs, proposed many amendments to the Bill and considered that the Bill’s aim should not have been to prevent and oppose content that is legal yet harmful to children. It should instead be to protect children from the possible access to such content. The NGOs added that any measure that blocks internet access through ISPs represents a censorship measure. They warned that a Romanian law can be applied only to Romanian natural or legal persons, which could lead to the hosting outside of Romania of sites with pornographic or other harmful content. They recommended to the Parliament that it refrain from any legislative measure in the field which would be, in their opinion, useless and would not achieve its aims. The primary solution proposed by the 6 NGOs was the education of children on the dangers and advantages of the internet.

• Proiect de lege pentru modificarea și completarea Legii nr.196/2003 privind prevenirea și combaterea pornografiei (Bill on the modification and completion of Act no. 196/2003 on preventing and fighting pornography)

<http://merlin.obs.coe.int/redirect.php?id=16014>

RO

Eugen Cojocariu

Radio Romania International

RU-Russian Federation

New Rules for Internet

On 11 July 2012 the State Duma (parliament) adopted in the final reading a federal statute titled О внесении изменений в Федеральный закон “О защите детей от информации, причиняющей вред их здоровью и развитию” и отдельные законодательные акты Российской Федерации (“On amendments to the Federal Statute “On the Protection of Minors against Information Detrimental to their Health and Development” and to other legal Acts of the Russian Federation”). It was signed into law by President Vladimir Putin on 28 July 2012.

The new Statute introduces a number of changes to the regulation of Internet, not necessarily related to the issues of the 2010 Federal Statute "On the Protection of Minors against Information Detrimental to their Health and Development", which was to come into force 1 September 2012 (see IRIS 2011-4/34).

On the one hand, it further specifies the above law. In particular, the amendments provide details of the labeling of harmful audiovisual products; they elaborate on the procedures for expert evaluation of "information products." The changes say that "placement in Internet" should now be called "dissemination via Internet", they introduce the notion of "network publications" to label online media - in line with the recent amendments to the Mass media Law (see IRIS 2011-7/42). These changes are enforced from the day of publication of the Statute.

On the other hand, the new Statute introduces new and more general restrictions on the Internet. It adds to the 2003 Federal Statute "On Communications" a provision stipulating that Internet access providers shall block and unblock access to information on Internet in line with the rules of another law - the 2006 Federal Statute "On Information, Information Technologies and on Protection of Information." The latter statute, in its turn, is extended to include an array of new notions, related to online communications: Internet website, webpage, domain name, network address, website owner and hosting provider.

The new Statute empowers the governmental watchdog agency Roskomnadzor (see IRIS 2011-1/46 and IRIS 2011-7/42) to establish a database of domain names and network addresses of websites that contain information banned for dissemination in the Russian Federation. The database will be formed on the basis of individual court decisions on the illegal character of information on a particular website. A similar blacklist is already being maintained by the Ministry of Justice on the basis of court decisions in anti-extremism cases (see IRIS 2007-9/27), but from now on it can be further expanded to include violations of legislation on advertising, copyright, personal data, etc.

The database will additionally be formed and maintained on the basis of decisions of the federal executive bodies - in relation to information regarding three categories: child pornography, production and distribution of narcotics, and methods of committing suicides.

The procedures on the use of the blacklist are as follows. Within 24 hours of receiving a note from Roskomnadzor on the illegal character of information, the hosting provider informs the website owner on the need to remove the now forbidden webpage. Within 24 hours of receiving the note from the hosting provider the webpage in question should be removed by the website owner. If this does not happen, the hosting provider should block access to the website. If neither takes place the network address itself

is blacklisted and is now to be blocked by the Internet communication operator, also within 24 hours. If this fails to happen the operator faces possible loss of its licence.

These changes are to be enforced beginning 1 November 2012.

• Федеральный закон Российской Федерации от 28 июля 2012 г. N 139-ФЗ "О внесении изменений в Федеральный закон "О защите детей от информации, причиняющей вред их здоровью и развитию" и отдельные законодательные акты Российской Федерации". Российская газета, 30/07/2012 (Federal Statute "On amendments to the Federal Statute "On the Protection of Minors against Information Detrimental to their Health and Development" and to other legal acts of the Russian Federation" No 139-FZ, published on 30 July 2012 in official daily Rossiyskaya gazeta)

<http://merlin.obs.coe.int/redirect.php?id=16060>

RU

Andrei Richter

Faculty of Journalism, Moscow State University

Advertising of Alcohol on Internet Totally Banned

On 6 July 2012 the State Duma adopted an amendment to the advertising law that although is laconic may play a critical role for online media in Russia. The amendment is to the 2006 Federal Statute "On Advertising" (see IRIS 2006-4/34). It extends the list of the media where advertising of alcohol products is banned (Art. 21 para. 2) by adding "information-telecommunication network "Internet". Since 2011 alcohol products in the Federal Statute "On Advertising" include beer or beer products.

The amendment means that any placement of alcohol advertising in any form in Runet (Russian segment of Internet) or by Russian companies shall be punishable [by law] including possible blocking of the websites in question (see IRIS 2012-8/36). The law entered into force on 23 July 2012.

• Федеральный закон Российской Федерации от 20 июля 2012 г. N 119-ФЗ "О внесении изменений в статью 21 Федерального закона "О рекламе" и статью 3 Федерального закона "О внесении изменений в Федеральный закон "О государственном регулировании производства и оборота этилового спирта, алкогольной и спиртосодержащей продукции" и отдельные законодательные акты Российской Федерации и признании утратившим силу Федерального закона "Об ограничениях розничной продажи и потребления (распития) пива и напитков, изготавливаемых на его основе". Российская газета, 23/07/2012 (Federal Statute of 20 July 2012, N 119-ФЗ "On amendments to Article 21 of the Federal Statute "On Advertising" and Article 3 of Federal Statute "On amendments to the Federal Statute "On state regulation of production and turnover of ethyl alcohol, alcohol and alcohol-containing products" and particular legal acts of the Russian Federation and on invalidation of the Federal Statute "On restrictions of retail sale and consumption of beer and beer-based products". Published in official daily Rossiyskaya gazeta on 23 July 2012, N 166)

<http://merlin.obs.coe.int/redirect.php?id=16061>

RU

Andrei Richter

Faculty of Journalism, Moscow State University

US-United States

Supreme Court on Indecency

On 21 June 2012, the Supreme Court issued a much-commented decision on indecency.

The Federal Communications Commission (FCC) recently amended its indecency policy to find fleeting expletives and fleeting nudity actionably indecent. In 2009, the US Supreme Court (the Court) in *Fox v. FCC* upheld the amended policy and remanded the challenge by Fox Television Stations Inc. (Fox) to the Second Circuit for further proceedings consistent with its holding (see IRIS 2009-6/32). On 21 June 2012, the Court resolved the case by invalidating penalties levied against Fox for airing fleeting expletives and invalidating fines levied against ABC Television (ABC) for airing fleeting nudity, while leaving the indecency policy unchanged. The Court held that the FCC was prohibited from penalizing Fox and ABC for the broadcasts by the Due Process Clause of the Fifth Amendment of the US Constitution ("Fifth Amendment") because Fox and ABC had not received Fair Notice or guidance of what was prohibited. The Court found that Fox and ABC were unable to know what was required of them, as required by the Fifth Amendment, because the FCC based its authority for the penalties on a policy it established after the broadcasts were aired, while it made clear at the time of the broadcasts that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency."

Even though the FCC conceded that, "Fox did not have reasonable notice at the time of the broadcasts that the FCC would consider non-repeated expletives indecent," it argued that the issue of due process is moot because the FCC only threatened to fine Fox and agreed to refrain from imposing sanctions and considering a station's record of airing indecent broadcasts when considering whether to renew its license. The Court rejected that argument because it found that due process was established to ensure that regulated parties are not left "at the mercy of *noblesse oblige*". It also found the FCC's assurances were not persuasive because it had already taken actions contrary to those assurances, namely by finding it was "not inequitable to hold Fox responsible for [the 2003 broadcast]" and that, "it has the statutory authority to use its findings to increase any future penalties". The Court noted that even if the FCC forebears from levying fines, a finding of wrongdoing can also harm a broadcaster's reputation with viewers and advertisers because that finding will be widely publicized.

The FCC argued that the fines it levied against ABC did not violate the Fifth Amendment because it provided ABC sufficient notice of the change in the policy via a

1960 FCC decision that had declared that, "televising of nudes might well raise a serious question of programming contrary to 18 U. S. C. §1464." The Court rejected this argument because it found the statement ambiguous and inconsistent with the FCC's prior decisions that isolated and brief moments of nudity are not actionably indecent. The Court also rejected the government's assertion that the shower scene at issue "contains more shots or lengthier depictions of nudity" than other broadcasts the FCC deemed were not indecent, because such an assertion ran contrary to a prior FCC determination that a broadcast by ABC of 30 seconds of nude buttocks was "very brief" and not actionably indecent in the context of the broadcast.

Thus, even though the Court indicated when it remanded the case that it might resolve the First Amendment implications of the FCC's indecency policy "perhaps in this very case", it instead resolved the case on more limited, non-constitutional grounds and left the First Amendment implications unresolved.

• Federal Communications Commission et al. v. Fox Television Stations, Inc., et al. - Certiorari to the United States Court of Appeals for the Second Circuit, No. 10-1293. Argued on 10 January 2012—Decided on 21 June 2012

<http://merlin.obs.coe.int/redirect.php?id=16007>

EN

Jonathan Perl
New York Law School

No Infringement of Copyright through the Use of Embed Codes

On 2 August 2012, the U.S. Court of Appeals for the Seventh Circuit vacated a preliminary injunction that was issued against myVidster.com ("myVidster") for copyright infringement in violation of 17 U.S.C. §§ 106 (1) and (3) of the Copyright Act.

The main point of contention was whether myVidster infringed Flava Works Inc.'s ("Flava") exclusive right to "reproduce" and "distribute" its copyrighted videos (collectively "Reproduction and Distribution Rights") by allowing its visitors to view Flava's videos without Flava's authorization by clicking on bookmarks on myVidster.com. The Court held that myVidster is not a contributory infringer of Flava's Reproduction and Distribution Rights because the conduct it facilitates did not infringe Flava's copyright. While the Digital Millennium Copyright Act provides that a website is a contributory infringer for "referring or linking users to an online location containing infringing material," the Court did not extend that rule to this context because it found that "taken literally, it would make the publication, online or otherwise, of any contact information concerning a copyrighted work a form of contributory infringement." Instead, it found that "as long as the visitor makes no copy of the copyrighted

video that he is watching, he is not violating the copyright owner's Reproduction and Distribution Rights." MyVidster allows its visitors to share videos they find on other websites by placing a link to the website on myVidster.com. When a myVidster visitor clicks on the link to view the video an embed code is triggered that transmits the video directly from the server that hosts the video to the user's computer. The Court explained that viewing a copyrighted video in this manner is equivalent to "stealing a copyrighted book from a bookstore and reading it." Thus while the Court conceded that viewing copyrighted videos in this manner is a "bad thing to do," it concluded that it is not infringing because the users did not upload or copy the videos.

The Court explained that myVidster would be liable for inducing copyright infringement if Flava could demonstrate that the video was uploaded by a myVidster member and that myVidster "invited people to post copyrighted videos on the Internet without authorization or bookmark them on its website." However, it found that even though myVidster knew that some of the videos bookmarked on its site infringed copyright it did not encourage its users to view the infringing material or profit from visitors who watch bookmarked videos.

The Court further found that even if myVidster was a contributory infringer, "[its] effect on the amount of infringement of Flava's videos" might be too remote to warrant damages. For example, it found that the default setting on myVidster blocks the genre of films that Flava produces (gay pornography), there is no information in the record concerning Flava's market share or whether any visitors clicked on any of the bookmarks and thus watched Flava's videos, and Flava has identified only 300 bookmarks of copyrighted Flava videos. Moreover, while Flava claims that its sales have fallen by 30 to 35 percent and has lost more than \$100,000 in revenue, the Court found that "the loss in revenue can't be ascribed entirely to myVidster" because Flava did not explain when the decline in revenue occurred and acknowledged that there are at least 12 similar websites that provide access to Flava's videos.

The Court also rejected Flava's contention that myVidster infringed its exclusive right "to perform [its] copyrighted works publicly" in violation of 17 U.S.C. § 106 (4) by activating the embed code that transmits its copyrighted videos from the server to the viewer's computer because it found that myVidster did not "transmit" Flava's videos, as required by Section 106 (4). The Court rejected the argument that "uploading plus bookmarking a video is a public performance because it enables a visitor to the website to receive (watch) the performance at will" because it found it "odd to think that every transmission of an uploaded video is a public performance." Instead, it held that: (1) a work is "transmitted" to the public when done "in a form in which the public can visually or aurally comprehend the work" and (2) performance be-

gins by the actions of the viewer rather than the uploader of the copyrighted video. Applying this standard the Court found that myVidster did not "transmit" the copyrighted videos because it did not upload any videos. It thus explained that myVidster's actions are equivalent to "a magazine that lists the names and address of theatres where a video is being played" because neither "touch[es] the data stream" or "provide[s] a market for pirated works." However, it also requested "legislative clarification of the public-performance provision of the Copyright Act."

• United States Court of Appeals for the Seventh Circuit, No. 11-3190, *Flava v. MyVidster*, 2 August 2012
<http://merlin.obs.coe.int/redirect.php?id=16059>

EN

Jonathan Perl
New York Law School

UZ-Uzbekistan

State Programme of Digital TV Switchover Approved

On 17 April 2012 President Islam Karimov of Uzbekistan signed a resolution "On the State Programme on technical and technological transfer to digital television broadcasting in Uzbekistan". The document envisages the switch-over taking place in two stages: the first stage in 2012-15 and the second stage in 2016-17. Full introduction of digital television is scheduled by the end of 2017. The government plans to retain both analogue and digital broadcasting until 1 January 2018.

Until 1 January 2018 the state radio transmission centre and the National Broadcasting Company (NTRKU) are entitled to tax relief on profits and on duty fees levied on the import of digital equipment. These provisions are to allow for greater spending on the digital switch-over. NTRKU, the Ministry of Culture and the "Republican Centre of propaganda of spirituality and enlightenment" were invited to suggest more digital TV channels and programming. The National Association of Electronic Mass Media of Uzbekistan (NAESMI), has been assigned the task of modernising private television companies in order allow for a succession of non-state programmes.

The State Programme also deals with a number of related issues, including the establishment of 12 state-run digital television programmes, the protection of minors and the setting of technical standards (in 2012 and 2013). Development of digital networks and digitisation of archives will be funded by "low interest foreign credits". This initiative foresees low interest loans offered to special sectors of the population for

the purchase of set-top boxes and digital television sets.

• О Государственной программе по техническому и технологическому переходу на цифровое телевидение в Республике Узбекистан (Resolution of the President of Republic of Uzbekistan "On the State Programme on technical and technological transfer to digital television broadcasting in Uzbekistan" of 17 April 2012, No. PP-1741.)

RU

Andrei Richter

Faculty of Journalism, Moscow State University

• 2012. évi LXVI. törvény a médiaszolgáltatásokkal és a sajtótermékekkel összefüggő egyes törvények módosításáról (Act of 2012 LXVI on Amendments of Certain Laws regarding the Media Services and the Press Products, 4 June 2012)

<http://merlin.obs.coe.int/redirect.php?id=16507>

HU

Polyák Gábor

Mérték Media Monitor

HU-Hungary

Amendment of the new Hungarian Media Act

Thus far, the Hungarian Parliament has been compelled on four occasions to substantially amend the new media laws, which had been adopted in three stages in 2010. The amendments responded to some aspects of criticisms leveled at the existing regulations, but at the same time they failed to remedy a substantial portion of international and domestic objections regarding the disproportionate curtailment of the freedom of the press.

The most comprehensive package of amendments was adopted during the summer of 2012, after the media laws had been examined by the Constitutional Court in December 2011 (see IRIS 2012-2/25). The Court found several provisions of the media law amendments to be unconstitutional, especially in view of media regulation. In response to the decision, the Parliament narrowed the scope of application of the media laws and of media law sanctions to print and online media products, but it did not cease the supervision of these media products pursued by the Media Council. The amendment significantly clarified provisions concerning the protection of sources of information by making clear that the protection of sources is safeguarded in all of court and authority procedures. The modification narrowed the range of data that media providers are required to submit to the Media Council; the authority cannot request any information apart from a specific procedure regarding behavior of the provider. Furthermore, the amendment constricted the procedural options available to the Commissioner for Media and Communications Rights.

The modifications softened some crucial aspects of the regulation's restrictions on the freedom of the press, but they failed to address - just as the foregoing Constitutional Court decision had failed to do - the independence of the Media Authority and the public service media's institutional framework, or, for that matter, concerns about the regulation of frequency tenders.

Agenda

Connected TV EU Conference

25-26 October 2012 Organiser: Cyprus Radiotelevision Authority & European Commission Venue: Limassol
<http://www.connectedtveuconference.com/>

Book List

Tafforeau, P., Droit de la propriété intellectuelle : propriété littéraire, propriété industrielle, droit international 2012, Gualino Editeur ISBN 978-2297011617
<http://www.lgdj.fr/manuels-precis-mementos/230525/master-pro-droit-proprieete-intellectuelle>
Soproni, S., Médias et diversité européenne 2012, BRUYLANT ISBN 978-2802730903
http://fr.bruylant.be/titres/127257_0_0/medias-and-european-diversity-medias-et-diversite-europeenne.html
Jahrbuch 2011 / 2012: Landesmedienanstalten und privater Rundfunk in Deutschland AML GBS (Herausg.) 2012, Vistas ISBN 978-3891585696 <http://www.vistas.de/vistasindex.php>

Bornemann, R., Ordnungswidrigkeiten in Rundfunk und Telemedien: Rechtshandbuch 2012, Pro Business ISBN 978-3863862619 http://www.pb-bookshop.de/product_info.php?products_id=1844
Zimmermann, D., Die Privatsphäre der Prominenten in der Berichterstattung Grin Verlag, 2012 ISBN 978-3656260264 <http://www.grin.com/de/e-book/199439/die-privatsphaere-der-prominenten-in-der-berichterstattung>
Starks, M., Switching to Digital Television: UK Public Policy and the Market 2012, Intellect ISBN 978-1841501727 <http://www.intellectbooks.co.uk/>
Postigo, H., The Digital Rights Movement: The Role of Technology in Subverting Digital Copyright (The Information Society Series) 2012, MIT Press ISBN 978-0262017954 <http://mitpress.mit.edu/catalog/item/default.asp?tttype=2&tid=12996>
Lunt, P., Livingstone, S., Media Regulation: Governance and the Interests of Citizens and Consumers 2012, SAGE Publications Ltd Paperback ISBN: 9780857025708 Hardcover ISBN: 9780857025692 Ebook ISBN: 9781446253960 <http://www.uk.sagepub.com/books/Book235674?productType=Books&>

The objective of IRIS is to publish information on legal and law-related policy developments that are relevant to the European audiovisual sector. Despite our efforts to ensure the accuracy of the content, the ultimate responsibility for the truthfulness of the facts on which we report is with the authors of the articles. Any opinions expressed in the articles are personal and should in no way be interpreted as representing the views of any organisations represented in its editorial board.

© European Audiovisual Observatory, Strasbourg (France)