IRIS
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY
SEPTEMBER 1996 - VOL. II - N° 9

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IRIS LEGAL OBSERVATIONS
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EDITORIAL

Harmonization of national media ownership rules on its way?

During the summer break, contrary to what might have been expected, the production of legal and law related policy documents relating to the audiovisual sector did not slow down. The editorial board of IRIS received so many documents which are interesting to report, that it turned out to be impossible to do so in this September issue. Therefore, we will come back to relevant developments which took place over summer in the October issue (IRIS 1996-9).

In IRIS 1996-7, we reported that the EU Council agreed upon a proposal for a common position in regard to the amendment of the 'Television without Frontiers' Directive. In the editorial of that issue, we indicated that we hoped to publish more information on further developments in this September issue. We can now report that the Second Reading by the European Parliament of the proposal for a new 'Television without Frontiers' Directive is due to take place in November.

In the editorial of IRIS 1996-7 we also indicated that we hoped to publish more information on a Commission proposal regarding the harmonization of national media ownership rules. At this stage, however, a proposal has not been made, although discussions within the Commission continue. It now seems that the Commission intends to set limits on shares of audience and readership in reception zones. The EU Member States would have to substitute for other types of limits on media ownership (e.g., those based on shareholding and number of channels). A 30% audience share limit is being considered in the case of ownership of television or radio broadcasting channels and a 10% limit in cases of ownership of several types of media: television, radio and daily newspapers. Magazines and interactive services are excluded from the proposal.

The notions of media controller, audience and media consumption measurements, the type of information and data to be submitted by, as well as the modalities of the exchange of information and assistance by the Member States, will be defined.

The reason for the Commission to consider a possible proposal for a directive relating to the protection of pluralism in the control of the media are the differences in national rules that try to influence media ownership with a view to protecting media pluralism and diversity. These dispersed national media ownership rules pose a potential threat to the functioning of the internal market for media services and media companies. Therefore, whilst respecting the policy objective of media pluralism and diversity, which is behind the national rules on media ownership, the Commission considers it necessary to harmonize such national media ownership rules so that media owners would have to respect the same rules across Europe rather than different rules in different Member States. The Commission is of the opinion that the latter would hamper the development of European media undertakings able to compete with those from other major markets outside of Europe, the outcome of which might eventually endanger media pluralism and diversity in Europe rather than protect it.

Ad van Loon
IRIS Coordinator

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Documentation: Edwige Seguenny • Translations: Michelle Ganter (Coordination) – Véronique Campillo – Aglaia Citron – Sonya Folca – Brigitte Graf – Graham Holdup – Katherine Parsons – Claire Pedotti – Lazare Rabineau – Véronique Schaffold – Fernanda Strasser – Nathalie-Anne Sturlese – Catherine Vacherat • Corrections: Michelle Ganter, European Audiovisual Observatory – Peter Nitsch, Chancellery of the Federal Republic of Germany in Bonn – Christophe Poirel, Media Section of the Directorate of Human Rights of the Council of Europe – Michael Type, European Broadcasting Union (EBU) • Subscription Service: Anne Boyer, URL http://www.Obs.c-Strasbourg.fr/irissub.htm • Marketing manager: Markus Booms • Contributions, comments and subscriptions to: IRIS, European Audiovisual Observatory, 76 Allée de la Robertsau, F-67000 STRASBOURG, Tel.: +33 88144400, Fax: +33 88144419, E-mail: A.van.Loon@Obs.c-Strasbourg.fr, URL http://www.Obs.c-Strasbourg.fr/irismain.htm • Subscription rates: 1 calendar year (10 issues, a binder + a special issue): FF 2,000/US$ 370/ECU 310 in Member States of the Observatory, FF 2,300/US$ 420/ECU 355 in non-Member States - Subscriptions will be automatically renewed for consecutive calendar years unless cancelled before 1 December by written notice sent to the publisher • Typesetting: Atelier Point à la Ligne, Strasbourg (France) • Print: Finkmatt Impression, La Wantzenau (France) • Layout: Thierry Courreau • ISSN 1023-8565 • © 1996, European Audiovisual Observatory, Strasbourg (France).

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

The global Information Society

European Commission: New mechanism for regulatory transparency with regard to information society services

On 24 July 1996, the European Commission approved a proposal for a Directive designed to set up an information and administrative cooperation procedure between the Community and national authorities on future national draft rules and regulations on information society services. The procedure should prevent inconsistencies and obstacles arising as a result of isolated, uncoordinated national rules and regulations being adopted in this area (*see also* IRIS 1995-4: 4).
The expansion of new services as part of the Information society has led to a wave of preparations for regulating initiatives in most Member States. If isolated, uncoordinated national rules and regulations were adopted, the result might be a refragmentation of the internal market. In this key sector, which requires a market with a European dimension if it is to develop further.
For this reason, Mr Bangemann, Mr Monti and Mr Oreja, the Members of the Commission with special responsibility for the information society, the internal market, culture and the audiovisual industry, placed before the Commission a proposal for an information and cooperation mechanism between the Member States and the Commission concerning future national draft rules and regulations on information society services.
A mechanism of this type was introduced for products some time ago by Council Directive 83/189/EEC of 26 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJEC of 26.4.1983 No L 100) as amended by Council Directive 88/182/EEC of 22 March 1988 (OJEC of 26.3.1988 No L 81,) and by European Parliament and Council Directive 94/10/EC of 23 March 1994 (OJEC of 19.4.1994 No L 100) which requires Member States to notify the Commission and, through it, the other Member States of proposed national technical rules while they are still at the draft stage. The status quo is maintained for a three-month period during which the Commission and the Member States can examine the draft measures and make their views known. Provision is also made for companies to express their opinions on the impact of the proposed national measures. this approach is designed to maintain an environment favourable to competitiveness and to enable firms to derive full benefit from the advantages of the internal market.
The proposal approved on 24 July will extend the scope of Directive 83/189/EEC to cover information society services.
It consists solely of procedural rules and does not provide for any harmonization of national law. However, it does not rule out the possibility of new harmonization initiatives on the part of the Commission; on the contrary, it will enable areas of regulation which may require a Commission initiative to be identified more efficiently and rapidly.
The proposal will not cover draft national rules and regulations transposing existing of future directives, such as the "Television without frontiers" Directive or the Directive on a common framework for authorizations and licences for telecommunications services.

Press release IP/96/695.

Information Society Forum publishes its first annual report

In July, the Information Society Forum published its first annual report to the European Commission. Together with the report, a supplement was published which contains the Working Groups' reports. The Information Society Forum was established by the European Commission in 1995 in order to create a new and authoritative source of reflection, debate and advice on the challenges of the Information Society. The objective was to get opinions on policies and priorities from a broadly based group of representatives.
The 128 members of the Forum were appointed by the Commission, half on the nomination of the Member States and half selected by the Commission. They represent, *inter alia,*
- content and service providers: publishers and authors, film and TV producers, broadcasters, computer software producers and information service providers; and,
- network operators: fixed telecommunications, cable TV, mobile and satellite operators.

The Forum divided its membership in six working groups, each of which presented a report. these reports were published as a supplement to the main report:
- the impact on the economy and employment;
- basic social and democratic values in the "virtual community";
- the influence on public services;
- education, training and learning in the Information Society;
- the cultural dimension and the future of the media;
- sustainable development, technology and infrastructure.

'Networks for People and their Communities. Making the Most of the Information Society in the European Union. First Annual Report to the European Commission from the Information Society Forum', June 1996;
Supplement containing Working Groups Reports, June 1996.
Available in English at URL http://www.ispo.cec.be/infoforum/pub.html or from the Observatory.

(Ad van Loon,
European Audiovisual Observatory)

European Commission:
Consultation on the social and societal aspects of the information society
Work programme to protect consumer interests in the information society

On 25 July 1996, the European Commission published its Green Paper "Living and Working in the Information Society: People First". The Green Paper is based upon the work of two main groups which were established by the Commission in 1995. A High Level Group of Experts began its work in May 1995 and presented its preliminary report "Building the Information Society for us all" in January 1996 (*see* IRIS 1996-3: 3). In parallel, the Commission created an Information Society Forum, which is broadly based and consists of 128 members. The Forum's first annual report was adopted in June 1996 (*see* elsewhere in this issue). The Green Paper examines how information and communication technologies are reshaping production and work organisation and are transforming people's lives.

On the basis of the Green Paper, the European Commission will launch wide consultation on the social deficits raised by the transition towards the information society. The consultation will be launched on the occasion of the symposium that the Irish Presidency of the EU Council is organising on 30 September and 1 October 1996 in Dublin. The consultation will involve the European institutions, Member States, employers, trade unions and non-governmental organisations. The deadline for observations is 31 December 1996, after which the Commission intends to submit its proposals for action.

In addition, Ms Emma Bonino, European Commissioner responsible for consumer policy, established 10 priority actions, which are laid down in the Commission's work programme consumer policy 1996-98, to minimize the risks and maximize the potential benefits of the information society for consumers. The Commissioner suggests actions in the following fields:

1. Legal framework:
- analysis of existing consumer legislation to assess how far the provisions of various EC Directives can be extended to cover the situations arising in the information society (plus a rapid adoption of the distance selling directive, *see* IRIS 1996-1: 5);
- providing for fair, cheap and quick resolution of consumer complaints and redress against suppliers.
2. Carrier responsibility:
- protection of minors: determination of whether measures should be taken at Community level or leave up to individual groups the care of filtering information supplied by electronic transmission services;
- protection of privacy in the new media: enlarging data protection already guaranteed at Community level to adapt it to market practices;
3. Social issues: guaranteeing accessibility of all to services of the information society at a reasonable cost;
4. Policy-making:
respecting the principle of subsidiarity through close collaboration between the Commission and consumer organizations, and consulting consumers themselves.

European Commission, 'Living and Working in the Information Society: People First', Green Paper, COM(96) 389 Available on Internet or from the Observatory. The full text is available in all official languages of the European Union and in different formats from URL http://www.ispo.cec.be/infosoc/legreg/infosoc.html, or from the Observatory;
"Building the European information society for us all. First reflections of the high-level group of experts"; interim report, January 1996. Available on Internet or from the Observatory. The full text is available in English, French and German and in different formats from URL http://www.ispo.cec.be/hleg/hleg.html, or from the Observatory.
'Networks for People and their Communities. Making the Most of the Information Society in the European Union.' First Annual Report to the European Commission from the Information Society Forum, June 1996. The full text is available in English from URL http://www.ispo.cec.be/infoforum/pub/inrep1.html, or from the Observatory.
See also: "EUROPE" Nº 6804 (n.s.) of 5 September 1996.

(Ad van Loon,
European Auviovisual Observatory)

European Commission:
Call for proposals concerning intellectual property rights management in the Information Society

On 15 September 1996, the European Commission launched a Call for Proposals on 'Multimedia Objects Trading and Intellectual Property Rights Management'. The objective is, *inter alia*, to develop common rules and standards emsuring world wide interoperability across different user platforms, different media and different application domains. The call has been launched in the framework of the ESPRIT programme.

For more information, please contact Ms Dominique Gonthier, tel.: +32 2 2968161, fax: +32 2 2968387, e-mail: dominique.gonthier@dg3.cec.be, or refer to the following URL adresses:
http://www.cordis.lu/esprit/home.html
http://www.imprimatur.alcs.co.uk

GERMANY: Information and communication services - new law on the way

As already reported in IRIS 1996-6: 5, the German Federal Government is preparing a multimedia Act to regulate information and communication services. It has now produced a ministry draft of an Information and Communication Services Act (*Informations- und Kommunikationsdienste-Gesetz - IuKDG)* (28.06.96). Within the Federation's powers in the matter of economic and telecommunications policy, the Act sets out to establish a regulatory instrument which takes the form of a Statute *(als Artikelgesetz konzipiertes Regelungswerk)* uniform, clear and reliable framework regulations for the multimedia field. At the same time, the *Länder* are preparing to regulate broadcasting and similar services by concluding a "National Media Services Agreement" (reported in IRIS 1996-7: 14 and 1996-5: 14) and amending the Agreement on Broadcasting between the Federal States in United Germany.
The first part of the draft (Section 1 - Act on the use of teleservices - Teleservices Act - TDG) deals with general economic conditions for the provision and use of information and communication services. These are services "which permit individual use of combinable data, such as graphics, pictures or sound, and which rely on telecommunications for transfer" (Section 2, TDG). Examples given in the draft explanatory memorandum on the Act include E-mail, video-on-demand, data services and news-group conferences. Allowance is made for the transfrontier character of these services, and the principle of freedom of access for service providers and users is to apply. The TDG also contains provisions on transparency of services available and pricing, copyright, responsibility for content and the use made of data. Its data law provisions are based on the principle of restricting data and protecting users' anonymity as far as possible.
Section 2 of the draft uses a Digital Signature Act (SIG) to provide a legal basis for a reliable digital signature procedure. The aim here is to allow this procedure to develop, alongside paper-based procedures, as a new and independent (electronic) medium for legal transactions. The basic idea is to devise digital signatures which cannot be forged, and to set up a national infrastructure to assign those signatures clearly to owners.
Finally, Sections 3 to 8 of the draft adjust and supplement existing federal laws to cover information and communication services.
For example, the scope of the Criminal Code (*Strafgesetzbuch* -StGB) and the Act on the dissemination of writings which endanger young people (*Gesetz über die Verbreitung jugendgefährdender Schriften* - GjS) is extended by assimilating audio-visual media, data banks and other types of representation to "writings" within the meaning of Article 11 (3) of the Code and Section 1 (3) of the Act. Additions and adjustments are also made to the Copyright Act (*Urheberrechtsgesetz*), the Act to protect persons participating in distant study programmes (*Gesetz zum Schutze der Teilnahme am Fernunterricht*) and the Prices Act (*Preisabgabegesetz*) and Order (*Preisabgabe-verordnung*).
With a view to security of the law, the Multimedia Act as a whole aims at international regulations extending beyond the Federal Republic.
Specifically, account is taken of existing European Community legislation, such as Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, which is incorporated in Section 5 of the draft.
Changes and additions to other federal laws are also planned, whenever this proves necessary. This applies to the Act against Restrictions on Competition (*Gesetz gegen Wettbewerbsbeschränkungen* - GWB), the Copyright Act, the Patents Act (electronic patent registration - *Patentgesetz (elektronische Patentanmeldung)*) and the Civil Code (electronic transactions - *Bürgerliches Gesetzbuch (elektronischer Rechtsverkehr)*). Here too, account will be taken of developments at European level.
Implementation of the EC's proposals on teleshopping contracts by the end of 1999 (approx.) is also planned.

(Wolfgang Cloß,
Institut für Europäisches Medienrecht - EMR)

GERMANY: DAB comes to the Saarland

On 11 July 1996, the Saarland Broadcasting Authority (LAR), Deutsche Telekom and the Saarland Prime Minister's Office concluded an outline agreement on the investigation and testing of Digital Audio Broadcasting (DAB) as part of the Saarland's multimedia project.
In addition to using digital technology for broadcasting, the project will centre on testing and introducing data broadcasting and other additional services (radio-related and other data services), which will be made available by the participating broadcasters and other providers. Possibilities of coordinating blocks and exchanging programmes with broadcasters in *Rheinland-Pfalz*, France and Luxembourg will be explored, and conclusions and findings exchanged with neighbouring pilot projects in the Saarland-Lorraine-Luxembourg area.
At least five audio programmes are to be broadcast on the DAB frequency block allocated to the Saarland. The LAR identifies potential providers by public tender and selects them in accordance with the Land Broadcasting Act. The project partners have agreed to set up a DAB project bureau in the Saarland to take practical charge of the project. The Media Psychology Research Institute (MEFIS) and the *Institut für Europäisches Medienrecht* (EMR), Saarbrücken, are involved in the research which accompanies the project.

Outline agreement for the investigation and testing of Digital Audio Broadcasting as part of the Saarland multimedia project, 11.07.1996. Extracts available in German from the Observatory.

(Andrea Schneider,
Institut für Europäisches Medienrecht - EMR)

SWITZERLAND: Report on points of law concerning Internet

A federal working party under the guidance of the Federal Office for Justice has published a report on a number of points of law arising in connection with worldwide data exchange on the Internet, which has developed enormously in recent years. The report provides an overview of matters of criminal law, data protection law and copyright, and makes a number of recommendations to access providers with a view to preventing the illegal misuse of data networks. This supports the efforts of the Internet branch to set up a code of conduct for Internet access providers. The working party does not envisage legislation on the matter. In its report it speaks out specifically against the introduction of a licensing requirement for network providers. It believes it to be much more appropriate to support the creation of a self-regulating system through the Internet branch. The 11 recommendations suggest, *inter alia*, that providers should only conclude subscription contracts with adults in a position to exercise discernment, and should reserve the right to block connections as a precaution in the event of suspicion, and to terminate the contract unilaterally in the case of clients spreading illegal material from their connections or making such material accessible from their connections. Furthermore, providers should inform clients about restrictions on violence and hard pornography, the need to comply with copyright law and related protective legislation, and the implications of data protection law. As regards data protection, it is stated that providers should not produce a personality profile of their clients or make their names, addresses and telephone numbers available by network access unless the persons concerned have given their permission, or if it is legally authorised, or if there is an overriding private or public interest in doing so.

INTERNET: A new medium: new legal issues. Report of an Interdepartmental Working Party on penal, data protection and copyright aspects of the Internet. Federal Office of Justice, Berne, May 1996 The report can be consulted on Internet at URL address http://www.admin.ch/ejpd/d/bj/internet/inbearbe.htm.

(Oliver Sidler,
Medialex, Lucerne)

Council of Europe

State of Signatures and Ratifications of the European Convention on Transfrontier Television: first update (until 4 September 1996)

In IRIS 1996-5: 10 we published an overview of the state of Signatures and Ratifications of, *inter alia*, the European Convention on Transfrontier Television, on 1 May 1996. We reported that Hungary signed this Convention on 29 January 1990. In the meantime, Hungary also ratified the Convention. Ratification took place on 2 September 1996, which means that the Convention will enter into force for Hungary on 1 January 1997.
The instrument of ratification was accompanied by a Reservation and a Declaration. Both are available from the Observatory in English or French, upon request.

European Union

European Parliament: Resolution on the broadcasting of sports events

In IRIS 1996-4: 13-14 and IRIS 1996-5: 14, we published articles on the attribution of broadcasting rights of sports events. Developments like those reported in these issues of IRIS have lead to a Resolution of the European Parliament on the broadcasting of sports events. The Resolution is addressed to the European Commission and the governments and parliaments of the Member States of the European Union.
Although the Resolution was already adopted on 22 May 1996 and was published in the Official Journal of the European Communities on 10 June 1996, IRIS did not have the possibility to report on it before. Since the debate on the exclusive attribution of broadcasting rights of sports events to encrypted channels continue all over Europe, we consider it still relevant to publish an article on this Resolution.
In its Resolution, the European Parliament considers that exclusive broadcasting rights for certain sports events which are of general interest in one or more Member States must be granted to channels which broadcast in non-encrypted form so that these events remain accessible to the population as a whole.
Parliament also emphasizes that the news media have a right to free news gathering and the public a right to adequate and rapid information, and that holders of exclusive broadcasting rights should not therefore prevent other television broadcasters from showing excerpts from or summaries of events in which there is a great public interest.
Parliament indicates that it also wants to promote competition and maximise public access to sport by unbundling different broadcasting rights to the same events (e.g., live television coverage of an event; television highlights of this event; radio broadcasting rights of this event). According to Parliament, these different broadcasting rights should not be allowed to be sold in one package, but should be offered separately on the market.

European Parliament, 'Resolution on the broadcasting of sports events, 22 May 1996, OJEC of 10.06.1996 No C 166: 109-111. Also available in English, French and German from the Observatory.

(Ad van Loon,
European Audiovisual Observatory)

The Court of First Instance annuls Commission's Decision in EBU Case

The Court of First Instance of the European Communities has annulled the Commission's Decision to exempt the European Broadcasting Union's (EBU's) programme exchange system "Eurovision" from the application of Article 85 of the EC Treaty (which prohibits cartel agreements and concerted practices). The EBU is a non profit association of 67 national private and public radio and television broadcasters. Its objective is to represent its members' interests and in particular to promote exchanges of radio and television programmes amongst them. "Eurovision" is an exchange instrument for EBU members who can jointly buy and share television rights in the field of news coverage, reports on topical issues and, in particular, coverage of sporting events.
The TV companies, *Reti Televisive Italiane SpA* (Italy) *Métropole Télévision SA* (France), *Gestevision Telecinco SA* and *Antena 3 de Television* (Spain) complained against the Commission's Decision to allow the cooperation of EBU members in the framework of the "Eurovision" system including the conditions for access to the system. The Commission based its Decision on Art 85 (3)(a) of the Treaty and referred to the specific mission of public interest of the members of the EBU. In order to define such public interest the Commission used the criterion of operating services of general economic interest referred to in Article 90(2) of the Treaty.
The Court of First Instance firstly found that the membership rules of EBU are not objective, not sufficiently determinated, and not capable of being applied on a non-disciminatory basis. The Commission should therefore, according to the Court, have concluded that it was not possible to assess whether the competition restrictions were indispensable within the meaning of Article 85(3)(a).
The Court of First Instance also found that by using the criterion of public mission on the basis of Article 90(2), the Commission based its reasoning on a misinterpretation of Article 85(3). According to the Court, the Commission could be entitled to base itself on considerations in connection with the pursuit of public interest in order to grant an exemption under Article 85(3). However, in such a case it must demonstrate that this public interest criterion and the exclusiveness of the members of "Eurovision" is indispensable to enable the EBU to obtain a fair return of investment. The Court found though that the Commission did not base itself on concrete economic data in this respect. The Commission would not be justified in taking into account the burdens and obligations arising for the members of the EBU as a result of a public mission unless it also examined carefully and impartially other relevant aspects, such as the possible existence of a system of a financial compensation for those burdens and obligations. It follows that by granting an exemption by virtue of Article 85 (3) solely on the fulfilment of a specific mission of public interest as defined in Article 90 (by reference to the mission of managing services of general economic interest), the Commission based its reasoning on an erroneous interpretation of Article 85(3). According to the Court of First Instance, this error is such that it distorts the assessment that the Commission made of the indispensable nature of the competition restrictions that it exempted.

Judgement of the Court of First Instance of the European Communities, 11 July 1996, Joined Cases T-528/93, T-542/93, T-543/93. Available from the Observatory in English and French.

(Helene Hillerström,
TV4 AB, Sweden)

Economic and Social Committee: Opinion on the 'Proposal for a Council Decision establishing a European Guarantee Fund to promote cinema and television production'

In IRIS 1996-7: 12 we reported that the EU Council held an exchange of views on the Commission's proposal to establish a European Guarantee Fund to promote cinema and television production (OJEC of 13.02.1996, No C 41: 8), and that it concluded that there was a need to examine the proposal in more detail. We also reported the intention of the Council to discuss the proposal again at its session in November 1996.
In the meantime, the Opinion of the Economic and Social Committee on the Guarantee Fund, which it adopted on 24 April 1996, has been published in the Official Journal.
The Economic and Social Committee finds it strange that the the Fund will not be allocated its own independent resources from the Community budget, but that the amount (MECU 90) will be subtracted from the appropriation for the MEDIA II programme.
In addition, the Committee finds it disputable whether enough money has been set aside to achieve the Fund's goals, given the fact that it is the intention that, alongside the film industry, producers of TV drama will also be able to benefit from the Fund.
Furthermore, the Economic and Social Committee recommends to identify more clearly which types of producers are to benefit from the Fund: a choice has to be made between large-scale productions capable of competing internationally with the Americans, or the independent producers and film-makers. The Committee is of the opinion that small and medium-scale production companies should be favoured, with emphasis on plans for more films in order to be able to balance possible successes and failures and to limit risks. It is also of the opinion that the Fund should be restricted to cinema alone, excluding audiovisual productions (serials and dramas) made exclusively for television.
The Economic and Social Committee also recommends that, since distribution is a major weakness of the European film industry, to earmark a substantial proportion of the resources for helping with the creation of European distribution consortia.

Opinion of the Economic and Social Committee on the 'Proposal for a Council Decision establishing a European Guarantee Fund to promote cinema and television production'. OJEC of 15.07.1996, No C 204: 5-8.

(Ad van Loon,
European Audiovisual Observatory)

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

National

CASE LAW

BULGARIA: Constitutional Court interprets freedom of communication

In its fullest ruling so far (Decision No. 7 of 4 June 1996), the Bulgarian Constitutional Court has indicated how freedom of opinion, the media and information, which is guaranteed by the Constitution, is to be interpreted. In so doing, it has laid down guidelines for future legislation on the subject. The case, No. 1/1996, was brought by the President of the country. It concerned the dismissal of seven staff of the national radio service. Under Article 149, para. 1 (2) of the Bulgarian Constitution, the Constitutional Court must interpret the standards laid down in Articles 39, 40 and 41 of the Constitution (protection of, and restrictions on, freedom of opinion, the media and information) in terms which are legally binding.

In its decision, which is largely inspired by relevant West European judicial and legislative principles, the Constitutional Court bases itself both on Bulgarian legal theory and on the interpretations given of Article 10 of the European Convention on Human Rights. It particularly emphasises that, under the Bulgarian Constitution, Article 10 of the Convention is binding on the country's courts. Its reflections on the nature and content of freedom of communication (its own term) are based on exploration of its functional premises. Although the Court has no wish to establish a "hierarchy of basic rights", it emphasises that freedom of communication is particularly important among those rights.

It makes the point that the right to freedom of opinion, which it describes as a "personal right", is closely linked with human dignity, and is a basic condition for political pluralism. It goes so far as to term it the "mother-right, from which all freedom of communication derives", and adds: "Freedom of opinion is one of the fundamental principles on which every democratic society is based, and is one of the conditions of its progress and of the development of every individual". According to the Court, freedom of expression is not simply a personal right, protecting the individual against interference by the state, but implies an "institutional guarantee". In other words, the state must not only protect the individual's right, but take steps to ensure the free establishment of a "common public area, in which individual opinions can be exchanged and public opinion formed in the process". Protecting freedom of opinion is in the state's own vital interest, since it secures or establishes the democratic decision-making process and the exercise of democratic control of government. Article 39 protects not only the opinions of individuals, but also those of groups and communities. Basic rights belong not simply to individuals; but to society as a whole. Because the Constitution protects other rights, which sometimes conflict with the right to freedom of opinion, the latter may also be curtailed. But any curtailment of that right must be preceded by a "weighing up of the interests or legally protected rights" involved. In cases where freedom of opinion must be restricted to protect the personal rights of others, the Court makes a distinction between freedom to express an opinion on the private life of ordinary people and freedom to express an opinion on people in the public eye. The latter freedom should receive more protection.

Concerning freedom of the media (Article 40 of the Constitution), the Court ruled that the media fulfil a "public function". They play a major part in forming and influencing public opinion. Freedom of the media is a right which protects them against state interference, and it affects the press more than broadcasting. Article 40 protects the "institution of the free press". The "special situation" in which shortage of frequencies puts broadcasting argues in favour of a limited state role in the granting of licences. It is none the less essential that the superordinate right to freedom of opinion be respected. Because freedom of the media under Article 40 is functionally connected with freedom of opinion under Article 39, the former can be said to "serve" the latter. The Court sees Article 40 as making it constitutionally necessary to turn the state electronic media (Bulgarian Radio and Television) into a "public service", and states that removing any possibility of the state's interfering with it - even through the way in which it is funded - is the "first precondition of its independence". The right enshrined in Article 40 imposes on the state a positive obligation to bring the broadcasting regulations into line with Article 39 (freedom of opinion). As part of this, the state also has a duty to take "measures to prevent excessive media concentration", as soon as it threatens "communication freedoms and rights", interpreted both as end and means. The Constitutional Court advises future legislators to introduce regulations on the "right of reply" in the media.

Concerning freedom of information (Article 41), the Court takes information to be nothing more than the facts, opinions and ideas which are sufficiently protected by Articles 39 and 40. (It has expressly refused to interpret the concept with reference to the new information and communication technologies). The personal right to "seek and disseminate information" also requires the state to make information available. The Court finds, in other words, that this constitutional provision obliges the state to regulate access to information: on the one hand, it must publish information which is of public interest; on the other, it must guarantee access to information sources. This must be regulated by law.

In decision No. 7/1996, the Constitutional Court has decided the fate of the future Broadcasting Act in advance. This controversial text, which regulates (state) supervision and the activity of the electronic media in Bulgaria has since been adopted by Parliament on a second reading. The President, who publishes laws by decree, has refused to ratify the act and has sent it back to Parliament (*see* elsewhere in this issue). If the governing majority passes it again on conclusion of the parliamentary procedure, it risks being sent to the Constitutional Court for a ruling on its constitutional validity. Following the Court's interpretative decision it is likely to be declared unconstitutional.

Decision of the Bulgarian Constitutional Court, No.7 of 4 June 1996, published in *Darzaven vestnik* No. 55/28 June 1996 (60 p.). Available in Bulgarian from the Observatory.

(Radomir Tscholakov,
(Bulgarian National Television - BNT)

SWEDEN: Lack of credit to composers in TV-programmes considered as copyright infringement

The Swedish public service television broadcaster, SVT, was found guilty of copyright infringement. In four different programmes SVT did not mention the composers of the music that was played in the programmes. One of the programmes, *Kulturjournalen,* has been subject of a potentially important judgement of the Supreme Court. The programme reported on cultural news and the music in question was played in its entirety in an item on a theatre play. The item was made in view of both the 100 years celebration of the poet behind the music and the economic situation of the National Touring Theatre.

The rules on moral rights in Swedish Copyright legislation include the right for the author to be mentioned when his work is made available to the public. According to the Copyright Act the author has the right to be mentioned *appropriately* as such in accordance with *good practice*. The legislative materials underlying the enactment of the Act provide some examples of cases when the principal rule does not have to be obeyed. This is the case, for example, when there is hardly any interest for the author to be mentioned or when technical difficulties pose obstacles to it.

The three court instances that dealt with this case all had to consider the definition of what is appropriate and customary ("good practice") in the television sector. The courts came to the conclusion that no uniform customary rule exists. But whereas both the Court of Appeal and the Supreme Court considered an agreement on this between SVT and STIM, the collecting society of composers, to be of importance when assessing the practice of being mentioned as an author on television, the Court which assessed the matter at first instance, did not, and analysed itself to what extent the general exceptions to the main rule could be applied in the television sector. This first court stated in its ruling that there could be exceptions in television due to the character of the programme or due to the time factor, but that these factors should not lead to negligence in respect of authors' rights in the first place.

All the three Courts found that, in general, the credit texts of programmes include the names of persons involved in the production who could not claim any specific authorship to the programme. In spite of the rather long credit texts of the programmes concerned, the authors of the music had not been mentioned.

The case is potentially important, despite the fact that the Supreme Court's judgement leaves some questions as to what extent the Court's definitions of *appropriateness* and *good practice* are applicable to the whole television sector. From the judgement it does not become clear whether the Court would think differently about the practice of mentioning the name of the author in cases where a TV channel normally has short credit texts after the programmes (which is often the case in programmes of private commercial television broadcasters). It also remains unclear whether the Agreement between SVT and STIM is of importance to the whole television sector and thus has an impact on other channels too, or whether its relevance is limited to the relationship between the parties to the Agreement. In this respect the judgement of the court that assessed the matter at first instance appears to be more accurate and clear in its definitions when looking at general rules of exceptions to the principal rule of moral rights. As a result the first court also gives some guidelines for the whole television sector and not only for the parties in the conflict in question.

SVT v. Torgny Björk, DT 112-96. Available in Swedish from the Observatory.

(Helene Hillerström,
TV4 AB, Sweden)

NETHERLANDS: Consumers lose legal action for continuation of analogue satellite transmission

The President of the District Court of Amsterdam decided on 16 August 1996against the claim of the Dutch consumer interests' organisation *(Consumentenbond)* that the Dutch-language commercial broadcasters should be forced to continue the analogue transmissions of their television programmes on the ASTRA-satellite system. Since 1 July 1996, RTL (CLT), Veronica, SBS6 and MultiChoice (NetHold) transmit their programme signals in digital format and as a consequence they decided to stop their analogue transmissions on 19 August to cut costs. The broadcasters have offered the various cable companies, free of charge, digital decoding equipment, but have not made such a provision for individual consumers that rely on a private satellite dish for the reception of the broadcasts. Their Luxcrypt-decoder can only decode analogue signals, and is therefore rendered useless. A digital decoder is difficult to obtain and costs the consumer up to 2000 guilders excluding installation costs. The representative of the Dutch consumers' association, the *Consumentenbond*, asked the President of the District Court to instruct the broadcasters to either continue their analogue transmissions, to provide digital decoders or to reimburse the consumers for their expenses. The President decided in favour of the broadcasters, because they have no special legal obligation towards the consumers to guarantee the usefulness of the (analogue) decoders that they purchased. The cutting of costs was deemed not to be an unreasonable consideration from the part of the private commercial broadcasters. There was also no evidence of a breach of Article 86 of the EC-Treaty, which prohibits the abuse of a dominant position.

Pres. Rb. Amsterdam 16 augustus 1996, *Consumentenbond c.s. vs. RTL/HMG/CLT/Veronica/SBS6/MultiChoice.* Available in Dutch from the Observatory.

(Marcel Dellebeke,
Institute for Information Law of the University of Amsterdam)

USA: A Second US Court Issues a Preliminary Injunction Against Enforcement of the Communications Decency Act

On 29 July 1996, a US District Court in New York became the second court (for the first court decision *see* IRIS 1996-7: 7) to order a preliminary injunction against enforcement of section 223 of the Communications Decency Act ("CDA") since the CDA was enacted on 8 February of this year (*see* IRIS 1996-3: 7-10). Adopted to protect minors using on-line computer services, section 223(d) prohibits transmission to a person under 18 years of age, or making available to a person under 18 years of age, sexually explicit material that is patently offensive as measured by contemporary community standards. Violators are subject to criminal penalties of up to a two-year prison sentence and fines up to $250,000.

In *Shea v. Reno*, the court addressed two issues: (1) whether the CDA impinges on free speech rights for vagueness so that the ordinary citizen would not be afforded adequate notice whether his conduct fell under the purview of the statute, and (2) whether the CDA targets a broader category of speech than necessary and constitutes a ban on constitutionally protected speech between adults. The court found that the statute appropriately distinguished which speech was covered by the statute by referring explicitly to the definition of indecency used by the FCC, which has been construed by the courts for other forms of media. However, the court ruled that the statute would prevent adults from engaging in constitutionally protected speech.

The court explained that characteristics of the Internet dictate that once material is placed on-line the original speaker generally has little control over who gains access to that material. Thus, in order to assure that children do not gain access to indecent material, the speaker would necessarily have to limit such speech to adults as well. The Government conceded this to be the case, but argued that two defenses provided elsewhere in the CDA would adequately protect on-line content providers from prosecution under the statute. First, section 223(e)(5)(A) provides protection to a person that takes "good faith, reasonable, effective, and appropriate actions" to restrict or prevent access by minors using any method which is feasible under available technology. Second, section 223(e)(5)(B) provides protection to a person that restricts access to materials by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number.

The court found that neither defence provided adequate protection to individuals against prosecution under the CDA. The court noted that the "good faith" defence does not protect a speaker where no technology exists to prevent minors from gaining access to indent materials. Indeed, the government stated that the use of available technology would only constitute "substantial evidence" that a speaker had taken actions necessary to keep indecent materials from minors. The court also noted that available technologies prevent minors from receiving materials intended exclusively for adults only with cooperation from parties other than the speaker. Thus, the use of adult access codes, for example, can't adequately assure the original speaker that minors will not receive a particular message.

Shea v. Reno, United States District Court for the Southern District of New York, 29 July 1996, 930 F. Supp. 916. Available in English from the Observatory.

(L. Fredrik Cederqvist
Communications Media Center,
New York Law School)

LEGISLATION

UKRAINE: New Constitution

On 28 June 1996, five years after the break-up of the Soviet Union, the *Verkhovna Rada* - the Ukrainian Parliament - adopted a new Constitution by 315 votes (with 36 votes against and 12 abstentions). According to the new Constitution, the Head of State is the President, with governmental powers in the hands of the Prime Minister. The Crimean peninsula is given autonomous status, with provision for its own parliament and legislation.

An important and particularly extensive part of the Constitution (Articles 21 to 68) deals with fundamental rights. Alongside basic fundamental rights, such as the right to life (Art.27), the inviolability of human dignity (Art.21), and the prohibition of discrimination (Art.24), rights and basic freedoms relevant to the media are also set out in this part of the Constitution.

Article 34 covers the freedom of expression of opinion. Article 50 guarantees the right to and freedom of information. Copyright and rights concerning literature, art and "technical activities" are protected under Article 45. Here, as also in Article 31, which guarantees "other information", alongside privacy of correspondence and telephone conversations, there are unspecified provisions for the protection of the new media and their content.

Furthermore, it is also specifically stated in the general part of the Constitution that censorship is prohibited (Art.15, para.3).

Finally, there is a National Council for Radio and Television, half of whose members are appointed by Parliament (in accordance with Art.85, no.20) and half by the President (in accordance with Art.106, no.13).

Constitution of the Ukraine, 28 June 1996, Available in English from the Observatory.

(Mario Heckel
Institut für Europäisches Medienrecht - EMR)

RUMANIA: A copyright law goes through

Tuesday 26 March 1996 saw the promulgation of the law on copyright and neighbouring rights. The law first of all sets out the subject, the object, the content, the duration of the copyright, the limits and the conditions for the transfer of the rights and then goes on to lay down the fields of application : computer programmes, literary works, artistic and patrimonial works and audio-visual programmes. Special provisions were made for the last-mentioned, in chapter 5 of the law, on "television and broadcasting corporations".
It is also interesting to note that the law makes ample provision for "satellite communication" and "cable retransmission", with this kind of broadcasting coming under the same conditions for rights payments as terrestrial broadcasts. These are important developments for a country which has one of the highest number of households in Europe with satellite dishes and cable (40%, according to the official figures published in June 1996).
Responsibility for the management of the rights comes under the Rumanian Copyright Office (RCO). This organisation "operates like a specialist body, under the Government, and is the sole authority in Rumania for demonstrating, monitoring and checking the application of the law with regard to copyright and neighbouring rights, while its operating and investment costs are wholly financed from the State budget." (article 137). The Office enjoys wide powers to punish offenders, varying from a simple warning through to a 2-year prison sentence.
This long-awaited law will certainly receive a warm welcome from the international audiovisual organisations that Rumania has joined since 1990. It will, however, bring less joy for the seventy or so private local channels broadcasting unrestrictedly in Rumania and benefiting from legal loopholes to broadcast the foreign-made programmes that often make up most of their programme grill.
However, verification that the law is being applied comes down to what material means the Rumanian State will grant to the Office. Given the current poor state of the country's finances, the sun does not yet look like setting on pirate broadcasting. And as the Office comes directly under the executive power, there is a potential risk that certain broadcasting stations may come under closer supervision than others.

"Lege privînd dreptul de autor si drepturile conexe", *Monitorul Oficial al României,* 26 March 1996, p.2-21. Available in Rumanian from the European Audiovisual Observatory.

(Nicolas Pélissier,
École des hautes études en sciences de l'information et de la communication - CELSA
Université Paris-Sorbonne)

UNITED KINGDOM: Broadcasting Act

The Broadcasting Act 1996 received the Royal Assent thus finishing the legislative process in July. The Act makes a number of important changes to the broadcasting law, mainly designed to catch up with developments in the media sector since the Broadcasting Act 1990. The main provisions are as follows.
Part I of the Act creates a framework for the development of digital terrestrial television. This provides for the licensing of multiplexes, frequency bands on which several programme services and also data services can be combined. Six such multiplexes will be provided nationally and licensed by the Independent Television Commission, the major criterion for selecting them being the promotion of digital terrestrial broadcasting. In order to safeguard existing public service broadcasting, each existing broadcaster will be offered half a multiplex for each existing channel; digital cable companies will also be required to carry the public service channels. This will pave the way for an eventual switch-off of existing analogue broadcasting. Part II of the Act makes similar arrangements for digital terrestrial radio, in this case licensed by the Radio Authority.
The Act also makes important changes in the rules relating to concentration of media ownership; these are complex and only the briefest summary can be given here. It clarifies the notion of 'control' of a company, leaving more discretion to the regulator in determining this. The limit of two general Channel 3 licenses is abolished and replaced by a limit of 15% of total television audience. The restriction of newpaper holdings to 20% in television licence holders has also been abolished; newspaper groups with 20% or more of national circulation may not have more than a 20% holding in Channel 3 or 5 licensees, but other newspapers are free to own any broadcasting licenses subject to their passing a public interest test administered by the ITC and involving examination of the effects of the holding on diversity of information sources and competition. Further provisions apply to local newspapers and radio.
Other changes in the Act include amendment of the formula which funds Channel 4 and the Welsh Fourth Channel, extension of the protection of important sporting events (the 'listed events') to prevent them being shown only on a subscription or pay-to-view basis, and a merger form April 1997 of the Broadcasting Standards Council and the Broadcasting Complaints Commission into a new Broadcasting Standards Commission.

Broadcasting Act 1996, available in English from HMSO, price L 16.40, reference number ISBN 0-10-545596-2, tel. +44 171 8739090, fax +44 171 8738200, or http://www.hmso.gov.uk.

(Prof. Tony Prosser,
University of Glasgow School of Law)

NETHERLANDS: Further liberalisation of Media Act

The first stage of the relaxation of the *Mediawet* (Media Act) was completed by Law of 4 April 1996, which introduced the possibility of local and regional private commercial broadcasting (*see* IRIS 1995-8: 12 and 1996-5: 12).

'Wijziging van bepalingen van de Mediawet, de Wet op de Telecommunicatievoorzieningen en de Radio-Omroep-Zender-Wet 1935 in verband met de liberalisering van de mediawetgeving', Law of 4 April 1996, Staatsblad nº 219 (1996). Available in Dutch from the Observatory.

(Marcel Dellebeke,
Institute for Information Law of the University of Amsterdam)

DENMARK: Reference to amended Broadcasting Act

In IRIS 1996-7: 8 we reported on the amended Broadcasting Act of Denmark. At that time we were not able to provide you with the exact reference and we promised to publish the reference in this issue:

Lov nr. 478 af 12. juni 1996 om ændering af lov om radio- og fjernsynvirksomhed (Spredning ved hjælp af satellit) (Law No 478 of 12 June 1996, amending the Law on Radio and Television Broadcasting (Distribution by means of a satellite)). Available in Danish from the Observatory.

POLAND: New anti-smoking law

After heated parliamentary discussion, an Act to protect health against the effects of using tobacco and tobacco products was passed on 9 November 1995. The Act, which came into force on 1 May 1996, marks the start of more vigorous action to curb smoking in Poland.
In addition to preventing dependence on tobacco and tobacco products and protecting health against the effects of using them, the act is intended to protect the right of non-smokers to a tobacco smoke-free environment. It obliges government and local authorities to take all the action needed for this purpose.
The Act imposes numerous prohibitions which are backed by penalties, some of them applying to the media. For example, tobacco products may not be advertised on radio or television, in cinemas or in periodicals intended for children or young people. Smoking and advertising are also banned in health, cultural, educational, sports and recreational facilities. Tobacco may not be sold to people below the age of eighteen or in public facilities. There are also regulations on visibility and legibility of the health warnings which must appear on the packaging of tobacco products and in tobacco advertising.
Offences are punishable by fines of up to 25,000 zloty or imprisonment.

Act on the protection of health against the effects of using tobacco and tobacco products of 9 November 1995, published in *Dziennik Ustaw* No. 10 of 30 January 1996. Available in Polish from the Observatory.

(Andrea Schneider,
Institut für Europäisches Medienrecht - EMR)

LAW RELATED POLICY DEVELOPMENTS

GERMANY: Third Agreement between the Federal States passed amending Agreements between the Federal States on broadcasting

On 29.07.1996 the Minister Presidents of the Federal States (the *Länder)* passed the Third Agreement between the Federal States amending Agreements between the Federal States on broadcasting; this will come into force on 01.01.1997.
Important features in the new regulations include provisions to ensure diversity of opinion in private broadcasting, and extended broadcasting content for satellite channels in public service broadcasting.
§26 of the Agreement on Broadcasting (*Rundfunkstaatsvertrag* - RfStV) regulates the viewer market share model for private television operators; this replaces the existing model. A company with a viewer market share in excess of 30% is deemed to have reached a dominant position in forming opinion, making it necessary to apply measures of varying intensity, even going as far as withdrawing authorisation to broadcast, in order to ensure the necessary diversity. In addition, companies with a market share of at least 10% must reserve broadcasting time for independent broadcasters (§26, para.5 of the RfStV). According to §28 of the RfStV, calculation of the viewer market share should also take account of channels in which the broadcaster has an economic interest.
The competent media authorities in each of the *Länder* are to supervise ensuring diversity of opinion; to do so a commission for reporting concentration in the media (KEK) and the Conference of directors of media authorities in the *Länder* (KDLM) have been set up within the competent media authorities in each of the *Länder* (§35 of the RfStV). The KEK comprises six specialists in broadcasting and economic law, three of whom must be qualified to hold judicial office. Members of the KEK are appointed by the Minister Presidents of the *Länder*. The KDLM comprises representatives of the media authorities in the *Länder*. The KEK and the KDLM do not receive instructions from any other body. The KEK is responsible for the final decision on matters concerning the guarantee of diversity of opinion. If the media authority in the *Land* wishes to diverge from the decision of the KEK, it must refer to the KDLM within one month; within three months the KDLM may authorise the divergence if there is a three-quarter majority of its members in favour.
The planned regulations have been criticised by the Conference of Directors of Media Authorities in the *Länder*, which considers the appointment procedure for the KEK incompatible with the principle of distance from the State and therefore unconstitutional.
According to the new wording of §18 of the RfStV (future §19), ARD and ZDF will have the possibility of jointly operating an additional television channel by satellite; it would have a cultural emphasis, and foreign broadcasters could also be involved. The public service broadcasting bodies in the *Länder* jointly could in addition broadcast two specialised television channels.
The ARD and ZDF Sgreements between the Federal States have also been amended, as have the State conventions on broadcasting licence fees and the financing of broadcasting.

Third Agreement between the Federal States to amend the Agreements on Broadcasting. Available in German from the Observatory.

(Verena Voigt
Institut für Europäisches Medienrecht - EMR)

ITALY: Bill setting up an Authority to oversee communications and radio and television standards

The Italian Cabinet has approved a Bill setting up an Authority to oversee communications and radio and television standards. The Bill will become law after it has been approved by the Public Works Committee of the Senate.
Article 1 establishes the Authority as a single organisation covering the radio and television and the telecommunications sectors. The Authority comes under a Chairman and is made up of three bodies, each with specific functions. The three bodies consist of two committees, one covering infrastructure and networks and the other dealing with products and services and a third structure, comprising the Council, a plenary organisation made up of the Chairman and the committee members. The Chairman is appointed by the Government, while the committee members are elected in equal numbers by each of the two Chambers, by restricted ballot.
Article 2 sets out the principles and the rules as to the ban on dominant positions, in line with anti-trust legislation. It also provides the Authority with executive legislative powers.
Apart from limiting the use of terrestrial frequencies (set nationally at 20% of television or radio channels), the Bill also sets precise ceilings for the economic activities of the sector as a whole, in other words for the profit that can be had nationally in the television sector (30% of resources), in the radio sector, in communications by cable and satellite, in the whole of the publishing and local and national television sector and in advertising (*see* also IRIS 1996-7: 13).

Il disegno di legge sull'instituzione dell'Autorità per le garanzie nelle comunicazioni e norme sul sistema radiotelevisivo, 17 July 1996. Available in Italian from the Observatory.

(Prof. Roberto Zaccaria,
Faculty of Law of the University of Florence)

UNITED KINGDOM: ITC amends rules on long advertisements

The Independent Television Commission has agreed an amendment to rule 7.1.5(A) of the ITC Rules on Advertising Breaks that will in future allow Channel 3, 4 and 5 licensees to aggregate without the prior permission of the ITC their spot advertising allowance between the hours of midnight and 6.00 a.m.to accommodate long form advertisements, including home shopping formats. Any long advertising slot created by this change must be identified separately in published programme listings. The amendment has come into force on 17 July 1996.
Satellite and cable channels carrying both programmes and advertising may already carry up to one hour per day of home shopping, which is the maximum allowed by the European Union Directive on Television Broadcasts for such channels. Channels devoted entirely to home shopping have also been licensed by the ITC for satellite and cable distribution.

Amendment to ITC Rules on Advertising Breaks, Rule 7.1.5(A). Available in English from the Observatory.

(Marcel Dellebeke,
Institute for Information Law of the University of Amsterdam)

UKRAINE: Copyright registration procedure confirmed

In Decision No. 532 of 18 July 1995, the Ukrainian State Council confirmed the procedure for state registration of copyright in works of science, literature and art.
This procedure is based on Section 3 (7) of the Ukrainian Copyright Act of 23 December 1993; as amended and supplemented by the Act of 28 February 1995, which provides for optional registration of copyright with the copyright and related rights agency. For the protection period, this generates a presumption, which is open to disproof, that the registration is correct.
Application for registration must be made in Ukrainian, a copy of the work be deposited with the agency and the registration fee paid.
There are special deposit regulations for computer programmes, data banks and audiovisual works: in the case of computer programmes, the instructions or description and the first and last twenty-five pages of the programme text must be deposited; in the case of audiovisual works, a certificate from the National Film Fund must be produced, attesting that copies of the film are held by the Fund.
If all the documents required are not supplied, the application is rejected without being examined. Otherwise, the agency decides within a month and issues a certificate covering the protected registered right.

Decision No. 532 of the Ukrainian State Council on the procedure for state registration of copyright in works of science, literature and art of 18.07.1995.
Copyright and Related Rights Act of 23.12.1993, amended and supplemented by the Act of 28.02.1995.
Texts available in Ukrainian from the Observatory.

(Andrea Schneider,
Institut für Europäisches Medienrecht - EMR)

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

NETHERLANDS: The Media Authority's first rulings on access to cable

On 23 July and 30 July 1996, the Dutch Media Authority *(Commissariaat voor de Media)* has issued its first rulings in disputes over access to cable networks (in the U.S. called cable systems). By a law of 4 April 1996, the Media Authority has been given this supervisory power to ensure that programme-suppliers are only refused access to cable networks on clear, reasonable and fair grounds (Article 69 of the Media Act, *Mediawet*). The regulatory power is set to expire on 1 January 1997 (*see* IRIS 1996-5: 12 and IRIS 1996-6: 11).

In the case of the complaint of *NetHold Benelux* against *Kabeltelevisie Amsterdam (*KTA*)*, the Media Authority ruled that KTA - contrary to the legislator's intention - failed to show that the distribution fee which it demanded from NetHold, is based on clear, reasonable and fair grounds. The fee KTA demanded for continuing distributing NetHold's subscription channels was four times higher than the amount which NetHold had to pay in the past. The Media Authority allowed KTA another six weeks to submit information which would enable the Authority to evaluate KTA's price setting. Failure to submit this information will result in a penalty of 50,000 guilders per day. In the meantime, KTA must continue the distribution of NetHold's two subscription channels. KTA threatened to stop the distribution on 1 August 1996. KTA and NetHold are also instructed to resume their negotiations over the distribution fee on the basis of the prime cost of distribution - a principle to which both parties said to adhere. The time for these renegotiations is limited to six weeks, so as to limit the period of uncertainty for NetHold. If the negotiations fail, NetHold can ask the Media Authority to determine a reasonable distribution fee.

Visie Marketing & Media's (VMM) complaint concerned the price and conditions which are set for distributing its cable TV information service on the cable network in the city of Tilburg, which is operated by the PNEM - the local electricity company - backed by the municipality of Tilburg. The Media Authority ruled in this case that the distribution fee which VMM was asked to pay was not 'in accordance with market prices'. Such a pricesetting is contrary to the decision of the Minister of Economic Affairs, who decided this April that VMM must be granted access for a fee that is `in accordance with the local market prices for cable distribution' (*see* IRIS 1996-6: 11). As long as the PNEM fails to produce information convincing the Media Authority that the fee it demands from VMM is based on clear, reasonable and fair foundations, VMM's information service must be distributed for a fee provisionally set by the Media Authority. The provisional fee, which would be well below the fee asked, is an average of the fees that the other suppliers of cable TV information services in the Netherlands pay. Furthermore, the Media Authority found that VMM was also being discriminated against because the municipality of Tilburg set several resolutive conditions in the contract offered to VMM, while no such conditions were made in comparable distribution contracts. The Authority ruled that no such discriminating conditions may be set in VMM's contract. The Media Authority allowed the PNEM another six weeks to submit data that will enable the Media Authority to check PNEM's price policy. Failure to submit this information will result in a penalty of 50,000 guilders per day.

A similar ruling, i.e. that the cable distributor has to submit information to the Media Authority in order to enable the assessment of its access policy, was issued as a result of a complaint filed by *MTV Europe*. MTV stated that it was being discriminated against by the refusal of access to the cable network in the city of Helmond, which is operated by a private foundation, *Stichting CombiVisie Regio*. MTV refuses to pay for cable distribution, which resulted in early 1996 in the discontinuation of the distribution of its signal on the Helmond cable TV network. The music channel considers that to be unreasonale and discriminatory, because other programmes are being distributed for free or even against payment by the cable operator. Before making a final ruling, the *Commissariaat voor de Media* decided that it needs more information on the cable distributor's motivations for its attitude towards MTV, to see whether its policy regarding MTV is based on clear, reasonable and fair foundations. In view of MTV's interests in a quick final ruling, *CombiVisie* was to submit the data within five weeks.

Finally, *Arcade Music Group* protested against the price that it was forced to pay for the distribution of its two channels (TV10 and The Music Factory) on - again - the cable TV network of *Kabeltelevisie Amsterdam* (KTA). The Media Authority pointed out that, on the face of it, Arcade seems to be discriminated against, because comparable (private commercial) programme-suppliers have to pay lower and different distribution fees. For example, while Arcade is asked to pay 750,000 guilders in cash (only) per channel, Veronica pays only 350,000 guilders in cash and an additional amount through different modalities (like barters), of which the real economic value is debatable. As a provisional ruling, the Media Authority decided that KTA must distribute Arcade under the same (financial) conditions as Veronica; 350,000 guilders in cash per channel, with the additional 'payment' in other modalities to be further negotiated by the parties. In the meantime, KTA was to produce within six weeks the same information as was deemed necessary in the other cases, so as to enable the Media Authority will have to make a final ruling, based on this information, in the case where the negotiations would fail.

IRIS will keep you informed on the developments in these and possible new cases.

Beschikkingen *Commissariaat voor de Media; NetHold vs. KTA* (23 July 1996), *VMM vs. PNEM/Gemeente Tilburg* (30 July 1996), *MTV Europe vs. Stichting CombiVisie Regio* (30 July 1996) and *Arcade Music Groep vs. KTA* (30 July 1996). Available in Dutch from the Observatory.

(Marcel Dellebeke,
Institute for Information Law of the University of Amsterdam)

LUXEMBOURG: Government replies to alleged violations of 'Television without Frontiers' Directive by RTL

By letter of 20 June 1996, the Prime Minister of Luxembourg has replied to a letter from the Dutch Minister of Culture concerning the alleged violations by (Luxembourg-based) RTL4 and RTL5 of the "Television without Frontiers" Directive. In his letter of 19 December 1995, the Minister informed the Luxembourg Government that the Dutch Media Authority *(Commissariaat voor de Media)* had detected persistent violations in the form of surreptitious advertising and unclear or favourable mentioning of names of sponsors (*see* IRIS 1995-10: 11). The Dutch Government asked for the opinion of the Luxembourg Government in this matter in view of fair competition between the private commercial broadcasters which target the Dutch market, and RTL's persistance in its position towards sponsoring.
In his reply, the Luxembourg Prime Minister informs the Minister that the Government Commissioner for CLT, after consultations, has concluded that the matters raised do not constitute a violation of applicable Luxembourg law (the law of 27 July 1991 on electronic media, which implements the Directive's provisions on advertising and sponsorship). The Prime Minister shares the Commissioner's views, *inter alia,* that the presentation of products or services of the sponsor cannot be considered as surreptitious advertising if the programme is clearly identified as a sponsored programme and the name of the sponsor is indicated at the beginning or the end of the programme. However, because sponsored programmes must not encourage the purchase of the products of the sponsor, the Luxembourg Government asked CLT to pay specific attention to compliance of its programmes with this provision.
The Dutch Minister has accepted the Luxembourg Government Commissioner's invitation, with which he concluded his report, for a meeting between himself and other representatives of the Dutch Ministry of Culture, and representatives of the Luxembourg 'Service des Médias et de l'Audiovisuel'. Topics that will be discussed during this meeting will be the interpretation of the articles of the 'Television without Frontiers' Directive concerning surreptitious advertising and sponsoring, in particular articles 1(c) and 17(1)(d).
Salient fact is that during the inaugural meeting of the European Platform for Regulatory Agencies (EPRA - an informal structure in which media authorities of different European countries meet from time to time and of which the European Institute for the Media runs the secretariat) in the framework of its European Television Forum held in Crete, 1-3 November 1995, videos have been shown of RTL4's and RTL5's sponsored programmes. The experts present were unanimous in their opinion that these showed surreptitious advertising in the sense of the Directive.

Letter of 19 December 1995 (MLB/J/OP/95.3306), Rapport du Commissaire du Governement auprès de la CLT à l'attention de Monsieur le Premier Ministre (18 June 1996), letter of 20 June 1996 and letter of 28 August 1996 (MLB/J/OP/96.2346). Available from the Observatory.

(Marcel Dellebeke,
Institute for Information Law, Amsterdam)

BULGARIA: Report on legal aspects of the freedom of expression in the electronic media

Upon the request of the Joint Parliamentary Committee EU-Bulgaria, Mr Georgi Sarakinov of the Bulgarian Center for the Study of Democracy wrote a report on legal aspects of the freedom of expression in the electronic media. The report was discussed in the third meeting of the Joint Parliamentary Committee, which took place from 24-26 July 1996.
The report discusses the history of the freedom of expression and distribution of information articles which are laid down in the Bulgarian Constitution of 13 June 1991 (Art. 39-41) and their interpretation by the Constitutional Court. The articles and the constitutional case law are compared with Article 10 of the European Convention for the protection of human rights and fundamental freedoms (which guarantees the freedom of expression and the right to communicate information) and the relevant case law of the European Court of Human Rights. Furthermore, the report discusses the constitutionality of the Bulgarian rules relating to the broadcast media.

Sarakinov, Georgi; 'Legal Aspects of the Freedom of Expression in Bulgarian Electronic Media'. Report to the Joint Parliamentary Committee EU-Bulgaria. Center for the Study of Democracy, Sofia: 1996. Available in English from the Center for the Study of Democracy, External Relations Department, Ms Dinka Dinkova, 1 Lazar Stanev Street, BG-1113 Sofia, tel.: +359 2 9713000, fax: +359 2 9712233, or through the Observatory.

(Ad van Loon,
European Audiovisual Observatory)

UNITED KINGDOM: Government announces detailed plans the regulation of conditional access services for digital television

The UK Government has announced its detailed plans for implementing conditional access services for digital television and so implementing the requirements of the EC Advanced Television Standards Directive (95/47/EC - *see* IRIS 1996-2: 5)). This supplements a statement of its general approach issued in January 1996. The plan remains that each element of conditional access (customer management services, subscriber management services, subscriber authorisation services and encryption services) will be authorised by a class licence issued under the Telecommunications Act 1984. Licence conditions will require adoption of a code of conduct on customer confidentiality, an obligation to supply services to any broadcaster, an obligation to interconnect with any other system and a prohibition on undue preference or discrimination. It will also be possible for the regulator to declare an interface as one at which interoperability is essential and so details and technology must be made available to other operators. This will only apply where the operator has a dominant position or significant market power. Regulation will be the responsibility of the Office of Telecommunications rather than the broadcasting regulators.
Annexed to the paper is a draft statutory instrument, licence and code of conduct to implement the plans.

The Regulation of Conditional Access Services for Digital Television, Department of Trade and Industry, Communications and Information Industries Directorate, Room 204, 151 Buckingham Palace Road, London SW1W 9SS, tel. +44 171 2151756.

(Prof. Tony Prosser,
University of Glasgow School of Law)

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