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IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2013-2

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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 • France Courrèges • Paul Green • Marco Polo Sàrl • Katherine Parsons • Stefan Pooth • Erwin Rohwer • Roland Schmid • 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 • Oliver O'Callaghan,The Centre for Law Justice and Journalism, London • Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland) • Martin Rupp, 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
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European Court of Human Rights: Ahmet Yildirim v Turkey

The European Court of Human Rights has reinforced the right of individuals to access the internet in a judgment against wholesale blocking of online content. A Turkish PhD student named Ahmet Yildirim claimed before the European Court that he had faced "collateral censorship" when his Google-hosted website was shut down by the Turkish authorities as a result of a judgment by a criminal court order to block access to Google Sites in Turkey. The court injunction was promulgated in order to prevent further access to one particular website hosted by Google, which included content deemed offensive to the memory of Mustafa Kemal Atatürk, the founder of the Turkish Republic. Due to this order Yildirim's academically-focused website, which was unrelated to the website with the allegedly insulting content regarding the memory of Atatürk, was effectively blocked by the Turkish Telecommunications Directorate (TIB). According to TIB, blocking access to Google Sites was the only technical means of blocking the offending site, as its owner was living outside Turkey. Yildirim's subsequent attempts to remedy the situation and to regain access to his website hosted by the Google Sites service were unsuccessful.

The European Court is unanimously of the opinion that the decision taken and upheld by the Turkish authorities to block access to Google Sites amounted to a violation of Article 10 of the European Convention on Human Rights and Fundamental Freedoms, guaranteeing the freedom to express, receive and impart information and ideas 'regardless of frontiers'. The Court is of the opinion that the order, in the absence of a strict legal framework, was not prescribed by law. Although the order might have had a legitimate aim, as it was aimed at blocking a website allegedly insulting the memory of Atatürk, the order was not sufficiently based on a strict legal framework regulating the scope of a ban and affording the guarantee of judicial review to prevent possible abuses. The Court clarifies that a restriction on access to a source of information is only compatible with the Convention if a strict legal framework, containing such guarantees, is in place. The judgment further makes clear that the Turkish courts should have had regard to the fact that such a measure would render large amounts of information inaccessible, thus directly affecting the rights of internet users and having a significant collateral effect. It is also observed that the Turkish law had conferred extensive powers to an administrative body, the TIB, in the implementation of a blocking order originally issued in relation to a specified website. Moreover, there was no evidence that Google Sites had been informed that it was hosting content held to be illegal, or that it had refused to comply with an interim measure concerning a site that was the subject of pending criminal proceedings. Furthermore, the criminal court had not made any attempt to weigh up the various interests at stake, in particular by assessing whether it was necessary and proportionate to block all access to Google Sites. The European Court observes that the Turkish law obviously did not require the court to examine whether the wholesale blocking of Google was justified. Such a measure that renders large amounts of information on the internet inaccessible must be considered however to effect directly the rights of Internet users, having a significant collateral damage on their right of access to the Internet. As the effects of the measure have been arbitrary and the judicial review of the blocking of access to internet websites has been insufficient to prevent abuses, the interference with Mr. Yildirim's rights amounts to a violation of Article 10 of the Convention by the Turkish authorities.

With this judgment the European Court of Human Rights has explicitly reinforced the right of individuals to access the internet, as in its ruling against the wholesale blocking of online content, it asserted that the internet has now become one of the principal means of exercising the right to freedom of expression and information.

• *Arrêt de la Cour européenne des droits de l'homme (deuxième section), affaire Ahmet Yildirim c. Turquie, requête n° 3111/10 du 18 décembre 2012* (Judgment by the European Court of Human Rights (Second Section), case of Ahmet Yildirim v. Turkey, nr. 3111/10 of 18 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16262 FR

• Fact sheet of December 2012 on the European Court's case law on New Technologies
http://merlin.obs.coe.int/redirect.php?id=16263 EN

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

European Court of Human Rights: Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands

For the third time in a short period, the European Court of Human Rights has found that the Netherlands authorities have disrespected the right of journalists to protect their sources. This time the Court is of the opinion that the telephone tapping and surveillance of two journalists by the Netherlands security and intelligence services (AIVD) lacked a sufficient legal basis as the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with

a view to discovering their sources. Also an order to surrender leaked documents belonging to the security and intelligence services is considered as a violation of the journalists' rights as guaranteed by Article 10 of the Convention.

The case concerns the actions taken by the domestic authorities against two journalists of the national daily newspaper De Telegraaf after having published articles about the Netherlands secret service AIVD, suggesting that highly secret information had been leaked to the criminal circuit, and more precisely to the drugs mafia. The journalists were ordered by the National Police International Investigation Department to surrender documents pertaining to the secret services' activities. The two journalists had also been subject to telephone tapping and observation by AIVD agents. Their applications in court regarding these measures failed, at the level of the Regional Court in The Hague as well as at the level of the Supreme Court (Hoge Raad). It was emphasized that the AIVD investigation was intended to make an assessment of the leaked AIVD-files and, within that framework, it was considered necessary and proportionate to use special powers against the journalists in possession of the leaked files. Also the phone tapping was considered to meet the criteria of necessity, proportionality and subsidiarity.

The European Court however disagrees with this approach by the Netherlands' authorities. Referring to its earlier case law regarding the protection of journalists' sources, the European Court reemphasized the necessity of the "ex ante" character of a review by a judge, a court or another independent body, as the police or a public prosecutor cannot be considered to be objective and impartial so as to make the necessary assessment of the various competing interests. The Court applies this approach also in the present case, as the use of special powers of surveillance and telephone tapping against the journalists appeared to have been authorised by the Minister of the Interior, or by an official of the AIVD, without prior review by an independent body with the power to prevent or terminate it. Therefore, the Court finds that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their sources. Regarding the second issue, the Court agrees that the order to surrender the leaked documents to the AIVD was prescribed by law, that the lawfulness of that order was assessed by a court and that it also pursued a legitimate aim. The Strasbourg Court however estimates the interference with the right of journalists to protect their sources in casu not necessary in a democratic society, as none of the reasons invoked by the AIVD are considered relevant and sufficient by the European Court.

As a consequence of this judgment, the legal framework and the operational practices of many security and intelligence services in Europe will need to be modified, in order to guarantee the rights of journalists under Article 10 of the Convention. Without guarantees of an ex ante review by a judge or an independent body, surveillance or telephone tapping or other coercive measures against journalists by security and intelligence services are inevitably to be considered as breaches of the rights of journalists covered by Article 10.

• Judgment by the European Court of Human Rights (Third Section), case of Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands, nr. 39315/06 of 22 November 2012
http://merlin.obs.coe.int/redirect.php?id=16264 EN

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

EUROPEAN UNION

European Commission: Report of the High Level Group on Media Freedom and Pluralism in the European Union

On 21 January 2013, the High Level Group on Media Freedom and Pluralism published its report entitled "A free and pluralistic media to sustain European democracy". Established by Neelie Kroes in October 2011, the group's remit was to draw up recommendations for the respect, protection, support and promotion of media freedom and pluralism. The group was chaired by Vaira Vīķe-Freiberga and included three other experts, Herta Däubler-Gmelin, Luís Miguel Poiares Pessoa Maduro and Ben Hammersley.

The report contains 30 recommendations and is divided into five sections: why media freedom and pluralism matter; the role of the European Union in maintaining media freedom and pluralism; the changing media landscape; protection of journalistic freedom; and media pluralism.

Media freedom and pluralism are crucial for European democracy. However, there are numerous obstacles that have the potential to restrict journalistic freedom or reduce pluralism (political influence, commercial pressures, the changing media landscape or the rise of new media). The conduct of some journalists, which has recently come to light, may also undermine the sector's credibility and long-term viability.

The group considers that the main responsibility for maintaining media freedom and pluralism lies with the member states. However, the European Union also has an important role to play. In particular, it must uphold the fundamental rights of EU citizens and protect democracy when it is threatened by restrictions imposed by one or more member states. The group recommends that the European Union should

be considered competent to act to protect media freedom and pluralism at State level (recommendation 1), and that there should be further harmonisation, especially of cross-border activities (recommendation 5). The group considers that European and national competition authorities should take into account the specific value of media pluralism in the enforcement of competition rules (recommendation 8). The European Union should protect media freedom and pluralism in Europe and beyond (conditions for accession to the European Union, and journalistic freedom in international commercial fora - recommendations 9 and 10).

The changing media landscape must be taken into account: whether due to the impact of new technologies (recommendations 12 and 13); new business models (recommendations 14-16); the changing nature of journalism (recommendations 17 and 18) or of the way people relate to the media (media literacy and funding for research - recommendations 19 and 20).

The protection of journalistic freedom is at the heart of media freedom and pluralism. One of the fundamental rights of journalists is to be able to protect their sources. The group therefore recommends that all EU members should have enshrined in their respective legislation the principle of protection of journalistic sources (recommendation 21). Journalists should also have free, non-discriminatory access to public or official events (recommendation 22). However, journalists also have responsibilities, particularly vis-à-vis persons whose reputation has been tarnished (recommendation 24). The group recommends respect for and the publication of codes of conduct and editorial lines (recommendation 25).

Finally, in order to ensure media pluralism, the group considers the role that should be played by public media, particularly public service broadcasters (recommendations 26 and 27). It invites European political actors to promote media coverage of European affairs (recommendation 30).

The report was written after consultation with academics, the European Parliament, the Council of Europe, representatives of various associations and media professionals.

• Report of the High Level Group on Media Freedom and Pluralism, 21 January 2013
http://merlin.obs.coe.int/redirect.php?id=16285 EN

Catherine Jasserand
Institute for Information Law (IViR), University of Amsterdam

European Commission: Communication on Access to On-Line Content

On 18 December 2012, the European Commission published a communication "on content in the Digital Single Market" with a view to creating an effective single market in the field of copyright. The communication follows on from a preliminary discussion on the subject in December 2012 and a certain number of initiatives adopted since 2010 (see IRIS 2010-7/4, IRIS 2011-7/4, IRIS 2012-9/6 and IRIS 2012-10/1).

While considerable progress has already been made in the field of neighbouring rights, the Commission intends to work on two parallel tracks of action regarding copyright. The first consists of organising a structured stakeholder dialogue (under the name of "Licensing Europe"), while the second involves reviewing the European copyright legislative framework.

Licensing Europe will bring together representatives of the stakeholders in the form of working parties to come up with proposals for practical solutions in four areas:

- cross-border access and the portability of services (issues connected with cloud computing, the transfer of rights, and the geographical cover of licences);

- user-generated content and licensing for small-scale users of protected material;

- ways of facilitating the on-line deposit and accessibility of films;

- promoting text and data mining for scientific research purposes.

The results of the working groups will be presented at the end of 2013.

In parallel, the Commission will continue its review of the EU copyright framework. The topics broached will include territoriality in the internal market, the harmonisation of copyright, limitations and exceptions to copyright in the digital age, fragmentation of the European copyright market, and how to improve the effectiveness and efficiency of enforcement of the monitoring measures. The Commission's aim is to reach a decision in 2014 on whether to table the resulting legislative reform proposals.

• Communication from the European Commission on content in the Digital Single Market, 18 December 2012, COM (2012) 789 final
http://merlin.obs.coe.int/redirect.php?id=16294 DE EN FR

Catherine Jasserand
Institute for Information Law (IViR), University of Amsterdam

European Commission: Adoption of New Guidelines for Fast Broadband

On 19 December 2012, the European Commission adopted new guidelines for the application of EU State aid rules to the public funding of broadband networks.

The guidelines form part of the European Union's Digital Agenda (see IRIS 2010-7/4), the aims of which are "to promote the deployment of Next Generation Access (NGA) networks throughout the European Union".

The guidelines were drawn up at the end of a two-stage public consultation process (in April 2011 and June 2012) in order to revise the previous guidelines adopted by the European Commission in 2009 (see IRIS 2009-10/114).

The Commission recalls the major principles behind its policy on State aid for NGA networks. These include in particular a number of criteria for determining the presence of State aid (Article 107.1 of the Treaty on the Functioning of the European Union - TFEU), the conditions under which the supply of a NGA network could be considered to be a service of general interest (Article 106.2 of the TFEU), and the conditions for the European Commission appreciating the compatibility of the aid (compatibility test in application of Article 107.3 of the TFEU).

The Commission then sets out its guidelines. For the purposes of assessing State aid in favour of broadband, they distinguish between basic networks and the new generation of very fast networks (Next Generation Access - NGA). They define the characteristics of NGA networks and recall that in the longer term they are expected to supersede existing basic broadband networks. In order to equip half the number of households with very fast Internet connections (the target of its Digital Agenda), the European Commission holds that State aid may be authorised subject to very strict conditions protecting competition. To avoid any distortion of competition, the Commission requires that all public investment must be undertaken in stages: an infrastructure subsidised by public money will only be authorised if it constitutes a significant improvement in comparison with the existing networks (in terms of service availability, capacity, speeds and competition). The Commission would also like to reinforce free network access where the network has been financed by the taxpayer. Lastly, the Commission would like greater transparency on the part of member states; they will be required to publish certain information and send regular reports to the European Commission.

The European Commission undertakes to revise the new guidelines "on the basis of future important market, technological and regulatory developments".

• Communication by the European Commission: EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks
http://merlin.obs.coe.int/redirect.php?id=16282 DE EN FR

Jasserand
Institute for Information Law (IViR), University of Amsterdam

European Commission: Implementation Report on the Film Heritage Recommendation

On 7 December 2012, the European Commission issued a study on "the challenges for European film heritage from the analogue and the digital era". This study constitutes the third implementation report on the European Parliament and Council's recommendation of 16 November 2005 on film heritage (see IRIS 2005-6/9 and IRIS 2006-1/4). The first implementation report was released in August 2008, the second one in July 2010 (see IRIS 2010-9/4).

The current report is based on national reports received from Member States in response to a European Commission's questionnaire sent in July 2011. The report is composed of a general analysis of the situation of film heritage in the European Union and an annex summarizing the situation in each Member State. The general description highlights the best practices put in place in Member States but also points out problems and obstacles encountered by film heritage institutions.

In terms of resources and investments, the report notes that state resources remain stable. However to allow film heritage institutions to properly perform their tasks of preservation of digital film, additional resources (and skills) are required. The study shows that only 1.5% of European film heritage is digitised but that at least 1 million hours of films held by film heritage institutions could still be digitised. The European Commission stresses the importance of digitisation as a pre-condition to online access.

Besides the lack of funding or investment, the European Commission identifies several obstacles to digitisation such as the complexity of copyright and related rights clearance or the formatting and interoperability issues.

One of the consequences of the transition to digital age is also the evolution of the definition of a film, which is not characterised anymore by its production process, recording medium or distribution channel. In that regard, the definition contained in the 2005 film heritage recommendation would need to be updated.

In conclusion, the European Commission notes that only a minority of Member States have adapted to the digital age and devoted additional resources, planning and strategies to digital preservation. The European film heritage is at risk of being lost. The European Commission observes that many opportunities offered by the digital revolution are being missed.

The report does not contain any recommendations but offers general orientations for possible actions. The European Commission will keep monitoring the application of the film heritage Recommendation. Member States should submit their next application report in

November 2013, based on a questionnaire that the European Commission will circulate mid-2013. Last but not least, the European Commission is considering a proposal on digital film in 2013 to foster Member States' actions.

• Commission Staff Working Document on the challenges for European film heritage from the analogue and the digital era (Third implementation report of the 2005 EP and Council Recommendation on Film Heritage), Brussels, 7 December 2012, SWD (2012) 431 final
http://merlin.obs.coe.int/redirect.php?id=16269 EN

Catherine Jasserand
Institute for Information Law (IViR), University of Amsterdam

OSCE

OSCE: High Commissioner on National Minorities: Guidelines on Societal Integration Identify Important Role of Media

The Ljubljana Guidelines on Integration of Diverse Societies, adopted in November 2012 by the OSCE High Commissioner on National Minorities (HCNM), recognise and explain the important roles that the media can play in facilitating societal integration.

The Office of the OSCE HCNM was established in 1992 "to be an instrument of conflict prevention at the earliest possible stage in regard to tensions involving national minority issues" (p. 2). The purpose of the Ljubljana Guidelines is to "provide policymakers and States' representatives with guiding principles and practical advice on how to elaborate and implement policies that facilitate the integration of diverse societies" (p. 5), but it is also hoped that they will prove useful to a wider range of other actors and stakeholders.

The Guidelines are organised as follows: Structural principles; Principles for integration; Elements of an integration policy framework; Key policy areas. "Media" are identified as one of the nine key policy areas, but their relevance is also acknowledged at various other junctures, e.g. in Guideline 11 on the fields covered by integration policies and in Guideline 28 on the potential contribution of private-sector actors (including private media) to integration.

In the dedicated section, "Media" (pp. 60-63), two specific guidelines - nos. 48 and 49 - are set out and subsequently explained and expanded on in detailed fashion. Guideline 48 reads:

"State policies should aim to promote and facilitate the capacity and awareness of the media to reflect and respond to the diversity within their societies, including by promoting inter-cultural exchange and by challenging negative stereotypes and prejudices and in other ways countering intolerance".

This guideline is inspired by the functions of the media as forums for exchanging information and ideas, and as channels for receiving and disseminating information and ideas. In light of these functions, the media have the potential to foster inter-cultural exchange, understanding and tolerance. This potential is also recognised in Articles 6 and 9 of the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) and in the 2003 OSCE Guidelines on the use of minority languages in the broadcast media (see IRIS 2004-1/2).

Guideline 49 addresses the relationship between State and minority languages in the media. It reads: "Measures to promote the State or official language(s) in the media should not disproportionately curtail the right to use a minority language". The implications of this balancing act are then explored in a variety of contexts: language quotas for public service broadcasting (PSB); subtitling, quotas and/or rebroadcasting requirements; "minorities' access to and presence in general public media programming" (p. 62); PSB and cultural and linguistic diversity in society; transfrontier broadcasts; recruitment and retention policies for journalists with minority backgrounds; private and community media; print media and new media(-related) technologies. It is added that while "no language limitations are permitted for print and internet-based media, any limitations on choice of language in the broadcast media, whether public or private", must be proportionate and fully respect freedom of expression (p. 61). The exploration of this guideline references the FCNM, the European Charter for Regional or Minority Languages, the 2003 OSCE Guidelines (mentioned above) and the Thematic Commentary on Language that was adopted by the Advisory Committee on the FCNM in 2012 (see IRIS 2012-9/5).

The Ljubljana Guidelines follow a number of earlier initiatives of thematic engagement by the HCNM. Previous focuses of the HCNM's thematic work have been: education, language, participation, broadcast media, policing and inter-state relations.

• Ljubljana Guidelines on Integration of Diverse Societies, OSCE High Commissioner on National Minorities, November 2012
http://merlin.obs.coe.int/redirect.php?id=16272 EN

Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

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NATIONAL

AL-Albania

Debates on Funding of Regulatory Authority and Public Broadcaster

In several meetings of the *Komisioni për Edukimin dhe Mjetet e Informimit Publik* (Parliamentary Media Commission - KEMIP) in the course of December 2012, the discussions on the 2013 state budget for the electronic media regulatory authority *Këshilli Kombëtar i Radios dhe Televizionit* (National Council of Radio and Television - KKRT) and the public broadcaster *Radio Televizioni Shqiptar* (Albanian Radio and Television - RTSH) highlighted the existing problems in current methods of determining their respective funding.

According to Art. 11 of the Law no. 8410 (on Public and Private Radio and Television in the Republic of Albania), the funding for KKRT derives from five sources: (1) a proportion of the commercial broadcaster's licence fees, (2) revenues from processing the broadcast licence applications, (3) five per cent of the income tax paid by licensees, (4) state budget funding, and (5) donations. Since 2005 the KKRT has pursued the strategy of gradually achieving financial independence from the state budget and becoming self-sustaining. However, commercial broadcasters proved to be tardy in paying their dues. Hence, the KKRT representatives asked the KEMIP for state funding of ALL 83 million (circa EUR 595,000) for 2013. It is needed for a move to new premises, the establishment of a programme monitoring centre, and a call centre needed as support for the implementation of the strategy to the switchover to DTT (see IRIS 2012-7/6).

The RTSH, according to Art. 115 of the Law no. 8410, is funded from a variety of sources: the licence fees, contracts with third parties using RTSH properties and capacities, publication of video and audio productions, performance activities and public shows, advertisement and broadcasting of other paid messages, donations and sponsorships, the sale of RTSH programmes, and the state budget. Among these sources, the license fee is supposed to be the main income of RTSH. However, even though the licence fee is considered to be among the lowest in South Eastern Europe (see IRIS 2011-4/8), there are problems collecting this fee. Since the collection of the license fee is conducted via the electricity bill, the nation-wide problems with the payment of electricity bills in the country also affect the collection of the broadcasting licence fee. The RTSH General Director also pointed out that the cash flow has to improve. The electricity distribution company CEZ should forward the fee directly to RTSH in order to prevent delays which recently occurred.

MPs of the opposition faction did not support the requests of both KKRT and RTSH. In their opinion, KKRT had been inefficient in the enforcement of their entitlements. They also claimed that RTSH's editorial independence was nonexistent and it served the government rather than the public (see IRIS 2004-6/11). Increased governmental funding would aggravate this situation.

In contrast, the MPs of the ruling majority stated that the requests were reasonable and recommended the funding be granted.

• *Procesverbalet - Komisionet Parlamentare / Komisioni për Edukimin dhe Mjetet e Informimit Publik* (Minutes of the Parliamentary Media Commission's meetings in Decemeber 2012)
http://merlin.obs.coe.int/redirect.php?id=16248 SQ

Ilda Londo
Albanian Media Institute, Tirana

AT-Austria

Naming of Lottery in Competition: Product Placement but Not Surreptitious Advertising

In a decision of 5 November 2012, the Austrian *Bundeskommunikationssenat* (Federal Communications Senate - BKS) explained the difference between surreptitious advertising and product placement in a radio competition.

The case concerned a competition organised over several days by the radio station Ö3 and based heavily on the state lottery. On the days of the relevant broadcasts, presenters drew a total of 12 bonus numbers, always just before the hourly news bulletin. Listeners were urged to see if the numbers were on their lottery tickets, which could be up to six months old. After the news bulletin, the 33rd caller with the right bonus number was put through to the programme and won a cash prize of EUR 5,000.

Several people complained to the *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) about the competition, claiming that the Austrian public service broadcaster *Österreichische Rundfunk* (ORF) had violated the ban on surreptitious advertising enshrined in Article 13(1) of the *ORF-Gesetz* (ORF Act - ORF-G) by broadcasting it on the radio station Ö3.

However, in its decision of 14 August 2012, KommAustria referred to the rules on product placement. In its opinion, ORF had infringed Article 16(5)(4) ORF-G by failing to mention clearly the use of product

placement at the start and end of the competition. Both parties appealed to the BKS against this decision. They criticised the fact that KommAustria had "only" taken into account the use of product placement without a suitable warning, but had failed to find the broadcaster guilty of unlawful surreptitious advertising. ORF defended itself against the allegation of inadequate labelling and argued that the acoustic signal that was usually used to denote the separation between advertising and programme material was also sufficient to fulfil its obligation to label product placement.

The BKS rejected both appeals and ruled, firstly, that KommAustria had exhaustively explained why it thought this was not a case of surreptitious advertising. The presenters' comments concerning the broadcast had not been likely to encourage a previously uninformed and undecided average listener to take part in the State lottery. The description of the competition and prizes had neither given excessive prominence to the offer of goods and services nor strongly urged listeners to participate.

Concerning ORF's argument, the BKS found that there was a substantial difference between labelling and separation requirements. Product placement labelling was designed to inform the listener that, at some point during the programme, products or services would be mentioned for non-editorial reasons. In order to avoid misleading listeners, the use of an acoustic signal was therefore insufficient to qualify as "clear" labelling.

• *Entscheidung des BKS vom 5. November 2012 (GZ 611.804/0002-BKS/2012)* (BKS decision of 5 November 2012 (GZ 611.804/0002-BKS/2012))
http://merlin.obs.coe.int/redirect.php?id=16273 DE

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

Promotional Sponsor References Constitute Advertising and Must Therefore be Separated from Programme Material

In a decision of 5 November 2012, the Austrian *Bundeskommunikationssenat* (Federal Communications Senate - BKS) confirmed that a sponsor reference that was excessively promotional in nature should be separated from the preceding programme by optical, acoustic and spatial means, in accordance with the rules on "traditional" television advertising.

The decision concerned a reference to a photography studio as sponsor of a programme broadcast by *Burgenländisches Kabelfernsehen* (BKF). The reference was accompanied by the following spoken text: "Steve Haider photography, your partner for modern corporate and wedding photography and dynamic portraits, hopes you enjoy the following programme."

The lower-instance authority, *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) had considered the sponsor reference likely to persuade previously uninformed or undecided viewers to purchase the sponsor's products and services. It should therefore be considered as advertising in the sense of Article 2(40) of the *Audiovisuelle Mediendienste-Gesetz* (Audiovisual Media Services Act - AMD-G), but had not been separated from the preceding programme under the terms of Article 43(2) AMD-G, which required the separation of programme material and advertising.

BKF appealed to the BKS against this decision, arguing that a neutral reference to or description of a product should be considered admissible and that the boundary between a reference to a sponsor and advertising was only crossed if positive value judgments were made or specific features of the product or service emphasised.

The BKS rejected the appeal and agreed with KommAustria's reasoning. This was not a case of a simply "neutral" reference or objective information. The use of the term "modern" in connection with corporate and wedding photography was a value judgment, since it would give the average viewer the impression that this company provided a state-of-the-art photography service from both the artistic and technical points of view, and portrayed companies and weddings in a contemporary way.

The mention of "dynamic portraits" could also, in accordance with case law, not be considered neutral information. The average customer would not consider the term "dynamic" to be a purely objective description of a particular product group, but as an adjective with a positive meaning in the sense of "energetic", as opposed to "rigid" or "static".

Since this was therefore a form of advertising, it should have been clearly separated in a manner likely to indicate to the viewer that advertising was about to be shown. Rather than meeting this requirement, the promotional sponsor reference, broadcast during the programme without any optical or acoustic separation from the editorial content shown immediately beforehand, had formed an integral part of the BKF programme.

• *Entscheidung des BKS vom 5. November 2012 (GZ 611.001/0002-BKS/2012)* (BKS decision of 5 November 2012 (GZ 611.001/0002-BKS/2012))
http://merlin.obs.coe.int/redirect.php?id=16274 DE

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

BG-Bulgaria

Public Broadcaster's Usage of Film Excerpts Does not Infringe Copyrights

On 3 December 2012, the Administrative Court of Sofia City confirmed the decision of the first-instance court which anulled the fine of the Ministry of Culture for infringement of an independent film producer's copyright. Parts of a film protected by copyright had been used in the programme broadcast by the Bulgarian National Television (BNT).

The facts of the case are as follows: The production company Manifactura EOOD (Manifactura) was contractually bound with the BNT. According to the contract, Manifactura is obliged to produce episodes for the programme BuntArt on a weekly basis. The episodes were included in BNT's programme. In October 2011 Manifactura produced an episode in which several excerpts from the film "Hunting of Small Predators" had been used without the consent of the producer (simultaneously director), the script-writer or the cinematographer. According to Bulgarian law, the aforementioned have the right to prohibit usage of parts of the film by third parties.

All the rightsholders of the film lodged a complaint with the Council for Electronic Media (CEM) alleging an infringement by BNT and Manifactura. CEM forwarded the claim to the Ministry of Culture with a recording of the programme as evidence for the unauthorized usage of parts of the film. The Ministry of Culture did not consider the BNT as liable for the infringement. Instead, Manifactura was held responsible and was fined BGN 2,000 (about EUR 1,000).

Manifactura appealed the fine claiming that it was not clear who exactly the rightsholders of the film are. Their full names had not been mentioned in the penalty notice. Hence, Manifactura claimed not to be not able to defend its position effectively.

The first-instance court followed this reasoning, even though the initial written complaint at CEM was signed with clearly written names of the rightsholders. Likewise, the names were indicated in the official film registration certificate from the Ministry of Culture. Furthermore, the film itself displays the rightsholder's names. According to Article 6 of the Bulgarian Copyright and Related Rights Act, the name outlined in the original gives evidence of the rightsholder, unless otherwise proven. Thus, Manifactura had sound legal evidence for potential proceedings.

The Court nevertheless upheld the reasoning of the first-instance court. Additionally, the Court stated that the usage of parts of the film took place in conjunction with a documentary analysis of the development of Bulgarian film production. Hence, parts of the film could be used without consent of the rightsholders and without any remuneration. The Court did not comment on the fact that the names of the rightsholders have not been indicated throughout the programme.

• Административен Съд София - Град , I Касационен Състав , *03/12/2012* (Decision of the Administrative Court of Sofia City of 3 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16249 BG

Ofelia Kirkorian-Tsonkova
Attorney at law

Increase of Public Financing of Bulgarian National Television in 2013

On 21 December 2012, the Законът за държавния бюджет на Република България за *2013* г . (State Budget of the Republic of Bulgaria Act 2013) was promulgated in the "Official Gazette", Issue 102. The Act points out the state subsidy which will be provided for the public national broadcaster Българска национална телевизия (Bulgarian National Television - BNT). The sum amounts to BGN 70,128,000, which equals an amount of EUR 35.7 million.

According to Art. 70, para. 4 of the Закон за радиото и телевизията (Radio and Television Act - RTA), the State subsidy shall:

1. be provided for the preparation, creation and dissemination of national and regional programme services; the amount of the subsidy shall be determined per programming hour on the basis of a standard endorsed by the Council of Ministers;

2. include an action grant for tangible fixed assets according to a list endorsed annually by the Ministry of Finance.

In comparison with the previous year, the amount of the budget subsidy has increased by nearly 3 million BGN (circa EUR 1.52 million, see IRIS 2011-3/9). Consequentially, the state budget subsidy still constitutes the major part of BNT's financing.

• Закон за държавния бюджет на Република България за *2013* г . (State Budget of the Republic of Bulgaria Act 2013)
http://merlin.obs.coe.int/redirect.php?id=16250 BG

Rayna Nikolova
New Bulgarian University

Tariff for Compensation of Airtime for Referendum Campaign

On 27 January 2013, a national referendum will be held in Bulgaria regarding the question of development of nuclear energy in Bulgaria i.e. the construction of a new nuclear power plant. The Bulgarian public broadcaster Българска национална телевизия (Bulgarian National Television - BNT) is obliged to broadcast an informative and explanatory campaign for the referendum. To that end, a tariff has been published ("Official Gazette", issue 103, 28/12/2012 Decree № 335 of 20 December 2012). It determines the rates of compensation for the Bulgarian National Television in view of the referendum coverage in its programmes.

The compensation for coverage in BNT's channels stipulates airtime minute rates ranging from 100 BGN (≈ 51 Euro) to 2,800 BGN (≈ 1,430 Euro). The amount depends on the TV channel broadcasting (highest amounts for airtime on the main channel BNT 1), the time of transmission (highest amounts for the period from 20.00 to 22.00) and the form of the coverage (highest amounts for reports and lowest amounts for debates).

For information about the compensation of media coverage of local elections in Bulgaria see IRIS 2007-9/8.

• Тарифа, по която се заплащат предаванията по Българската национална телевизия и Българското национално радио и техните регионални центрове в рамките на информационно-разяснителната кампания за националния референдум на *27* януари *2013* г. (Tariff at which the programs are paid on the Bulgarian National Television and the Bulgarian National Radio and their regional centers within the information and explanatory campaign for a national referendum on 27 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16251 BG

Rayna Nikolova
New Bulgarian University

CH-Switzerland

News Report on Brutal Films Breached Youth Protection Rules

In the opinion of the Swiss *Bundesgericht* (Federal Tribunal), the Swiss public service broadcaster *Schweizerische Radio- und Fernsehgesellschaft* (SRG) breached the youth protection rules contained in broadcasting legislation by showing a television report about the brutal film genre known as "gore". The report, lasting around two and a half minutes, had been broadcast on 6 July 2011 at 7.50 p.m. during the evening news bulletin of the SRG channel *Télévision Suisse Romande* (TSR) and concerned the NIFFF film festival in Neuchâtel that was underway at the time. As well as an interview with the gore film-maker Herschell Gordon Lewis, who was in Neuchâtel, it had contained various excerpts from some bloodthirsty films including "Blood Feast" (1963), "The Fly" (1986) and "Hostel" (2005).

According to the Federal Tribunal, the excerpts, characterised by brutality, sadism and perversion, portrayed the "gore" film genre, which was known for its extreme violence. Since the intention was neither to glorify nor to trivialise violence, they did not breach the provisions of Article 4(1) of the *Bundesgesetz über Radio und Fernsehen* (Federal Radio and Television Act - RTVG). This had already been confirmed by the *Unabhängige Beschwerdeinstanz* (Independent Complaints Authority - UBI) in its decision of February 2012.

However, like the UBI, the Federal Tribunal found TSR guilty of breaching the ban on programmes harmful to young people (Art. 5 RTVG). The report had been likely to harm the development of minors, since it was generally known that TSR evening news bulletins were often watched by family audiences. Although the presenter had given an oral warning a few seconds before the report was shown ("*les images du sujet pourraient choquer certaines sensibilities*"), this general remark had not given surprised parents enough time to protect their children from the impending portrayal of murder, horror and torture. Although even longer excerpts from the films concerned were freely accessible on the Internet, they had to be deliberately searched for.

The Federal Tribunal unanimously decided that the restriction of SRG's media freedom was proportionate. The protection of children from harmful television programmes was in the public interest, as the European Court of Human Rights (ECHR) had stressed in its "Sigma Radio Television Ltd. v. Cyprus" ruling of 21 July 2011 (see IRIS 2011-8/3). SRG must now inform the UBI of the measures it plans to take to prevent a repeat of such violations of programming rules.

• *Décision du tribunal fédéral du 27 septembre 2012 (2C_738/2012)* (Decision of the Federal Tribunal of 27 November 2012 (2C_-738/2012))
http://merlin.obs.coe.int/redirect.php?id=16276 FR

• *Décision de l'Autorité indépendante d'examen des plaintes en matière de radio-télévision du 24 février 2012 (b. 643)* (Decision of the Independent Radio and Television Complaints Authority of 24 February 2012 (b. 643))
http://merlin.obs.coe.int/redirect.php?id=16277 FR

Franz Zeller
Federal Communications Office / Universities of Bern, Basel & St. Gallen

CZ-Czech Republic

Act on the Support for Filmmaking

On 26 October 2012, the Parliament of the Czech Republic adopted the new Act on the Support of the Cinematography (the Act). The purpose of the Act is the creation of an institutional basis for the development of resources to finance selected projects in Czech cinematography.

The Act regulates the conditions for the support of Czech cinematography, deriving from the Czech State Fund for Support and Development of Czech Cinematography (the Fund).

The provision of resources to individual projects is conducted by the Council of the Fund (the Council), which is an independent collective body. Its members are elected by the Parliament of the Czech Republic. The Act creates a legal environment which ensures that the financial resources of the Fund are used to finance specific works or activities serving the promotion and development of Czech cinematography. Unspent resources can be transferred to the next calendar year.

Commercial television broadcasters are obliged to contribute CZK 150 million (EUR 5.8 million) per year to the Fund. This corresponds to two percent of the overall turnover from broadcast advertising in Czech commercial television. In the case that the two percent do not reach CZK 150 million, each broadcaster has to pay a proportional share of the residue. Furthermore, the Fund is financed by one percent of the turnover of cinema ticket sales and contributions deriving from copyright to older Czech films, which is estimated to amount to up to 30 million CZK (EUR 1.2 million) per year. Also providers of retransmission and audiovisual media services on demand will have to contribute to the Fund. Retransmission providers have to pay 1 % of their revenue; on-demand AVMS providers 0.5 % of their revenue from respective activities.

If the Council reveals serious misconduct, the matter will be passed on to the tax authorities, which can order the reimbursement of granted subsidies and impose fines to be paid to the general state budget.

The Act aims to replace existing outdated regulation of film subsidy suffering from a lack of resources (see IRIS 2009-10/110). It is intended to not only support the production of films, but also to allow the Czech cinematography to become competitive.

• *Zákon č. 496/2012 Sb., o audiovizuálních dílech a podpoře kinematografie a o změně některých zákonů (zákon o audiovizi)* (Act Nr 496/2012 Coll., on the audiovisual works and on the support of the cinematography and on amendments of other laws)
http://merlin.obs.coe.int/redirect.php?id=16252 CS

Jan Fučík
Česká televize, Prague

DE-Germany

Anti-Competitive Agreement between Private Broadcasters

On 28 December 2012, the *Bundeskartellamt* (Federal Cartels Office - BKartA) fined Germany's two biggest private broadcasters, the RTL Group and ProSiebenSat.1 Media AG, for entering into anti-competitive agreements under which both companies' digital channels were to be broadcast in encrypted form. Even the main channels of both broadcasting groups would only be available for a monthly subscription fee. The companies were fined a total of around EUR 55 million. As well as the companies themselves, fines were imposed on two of their employees, who were held to be responsible for the agreement.

The BKartA found that in 2005 and 2006 both companies had agreed to encrypt their standard definition (SD) digital free-to-air TV channels, after which these channels would only be available in return for a monthly fee. They had also planned to use so-called signal protection restrictions, i.e., technical measures such as anti-ad blockers and copy protection functions. The BKartA considered this an unlawful restriction of viewers' options for the use of the programme signals. The agreements, which covered the cable, satellite and IPTV transmission paths, therefore violated the ban on anti-competitive agreements and the abuse of a dominant market position under Articles 1 and 19(1) of the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against restrictions of competition - GWB). The companies had been actively implementing the unlawful agreements at least until the BKartA investigated them in May 2011.

Meanwhile, both companies have promised the BKartA that they will stop the basic encryption of their SD channels until at least 2023. They will therefore not be able to charge subscription fees or use signal protection restrictions (see IRIS 2007-1/14). The BKartA president said that the unencrypted transmission of digital free-to-air TV was therefore guaranteed for the next ten years.

• *Pressemitteilung des Bundeskartellamts vom 28. Dezember 2012* (Federal Cartels Office press release of 28 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16275 DE

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

Neustadt Administrative Court Extends Admissible Prominence of Product Placement

In a ruling of 17 December 2012 (case no. 5 K 1128/11.NW), which is yet to be published, the *Verwaltungsgericht Neustadt an der Weinstraße* (Neustadt an der Weinstraße Administrative Court - VG) upheld the appeal by the TV broadcaster Sat.1 against a decision of the *Landesmedienanstalt Rheinland-Pfalz* (Rhineland-Palatinate media authority - LMK) concerning unlawful product placement.

The *Kommission für Zulassung und Aufsicht* (Licensing and Monitoring Commission - ZAK), a joint body created by the *Landesmedienanstalten* (regional media authorities) to monitor the media at national level, had found the broadcaster guilty of violating Articles 44 and 7(7)(2)(3) of the *Staatsvertrag für Rundfunk und Telemedien* (Inter-State Broadcasting and Telemedia Agreement), under which product placement must not "give excessive prominence" to the product concerned.

Referring to this decision, the LMK lodged a complaint about the broadcast of a Europa League match on Sat.1. Although the use of product placement had been mentioned in accordance with Article 7(7)(3) RStV, the programme had twice switched to the so-called "*Hasseröder Männercamp*". According to the ZAK, the presenter and an expert had repeatedly made positive comments about "*Hasseröder*" beer. The beer company's logo had also been visible many times on beer bottles and other objects in the studio, for which there had been no editorial justification.

The VG Neustadt held a different view: in its opinion, product placements could be clearly visible during a programme even if the showing or naming of the products was avoidable. Unlawful "excessive" prominence was only given if the product placement was the single dominating element, to the extent that the actual programme content was no longer recognisable.

However, the disputed switch to the "*Hasseröder Männercamp*" had formed part of the concept of the sports broadcast. The product placement had not been unjustifiably conspicuous. The TV broadcaster had therefore not breached the aforementioned provisions of the RStV on product placement.

• *Urteil des Verwaltungsgerichts Neustadt an der Weinstraße vom 17. Dezember 2012 (Az. 5 K 1128/11.NW)* (Decision of the Neustadt an der Weinstraße Administrative Court, 17 December 2012 (case no. 5 K 1128/11.NW)) DE

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

-Estonia

Amendment to the Electronic Communication Act: New Phase in the Must Carry Dispute

On 7 November 2012, the Estonian Parliament adopted an amendment to the Electronic Communication Act. Amended Article 90 now states: 'Broadcasters offering free to air television services have the right to ask from cable operators a reasonable fee for retransmitting their television programs.'

Until the adoption of the amendment, the two parties involved - commercial broadcasters and cable operators - had a different interpretation of Article 90, which on one hand obliged cable operators to re-transmit all free-to-air channels, but on the other hand did not clearly state whether commercial broadcasters were prohibited to ask cable operators any payment for these programs. With the newly adopted amendment this issue has been clarified.

However the conflict is not fully resolved. The new Article 90 does not give a concrete number or formula for fee calculations. It only states that the fee should be reasonable. The threshold is left to stakeholders. Negotiations on this matter have so far ended without agreement. The biggest commercial broadcaster, Kanal2, and the second largest cable operator, STV, could not agree on the exact fee. STV declared itself not willing to pay EUR 0.15 per customer as asked by Kanal 2. Kanal 2 declared its desire to treat all operators on equal basis. As others accepted their offer, Kanal 2 did not see any reason to grant any special discount to STV. As a consequence, a week before Christmas, the Kanal2 schedule did not contain STV programs .

Kanal 2 has reached agreement with all other operators except STV. The second largest commercial broadcaster TV3 has reached an agreement with all operators. In total there are 557,000 TV-households in Estonia. Cable penetration in total is 73% (Analogue cable penetration is 51% and penetration of digital cable and IP-TV is 22%). STV has unofficially declared that they hold a 30% market share. The largest cable operator is telecommunication company Elion offering IP-television services for more than 146500 customers. The third largest player is the cable company Starman.

All cable networks are retransmitting four free-to-air programs: public service Estonian television ETV and

ETV2, Tallinn municipal TTV and private commercial Kanal2.

Cable operators are collecting payments from the end users for viewing these channels, but were reluctant to share their revenues with broadcasters. Economically tough times for private broadcasters (TV-commercial market has decreased more than 30% compared to its peak in 2007) forced them to look into new business models and find ways to increase their profitability. Despite all attempts (cutting costs, new revenue sources etc.), their financial results are still poor. Kanal2 has had during last four years a very small profit and TV3 has reported a loss. At the same time cable operator's owners are pleased with 35% or even higher profit margin.

• *Elektroonilise side seaduse § 90 täiendamise seadus. RT I, 07.11.2012, 1* (Amendment to the Electronic Communication Act § 90, RT I, 7 November 2012, 1)
http://merlin.obs.coe.int/redirect.php?id=16292 ET

Andres Jõesaar
Estonian Public Broadcasting, Institute of Journalism and Communication, University of Tartu, Tallinn University Baltic Film and Media School

ES-Spain

Supreme Court Declares Invalid the 2010 Licensing of National Digital Terrestrial Television

On 27 November 2012, the Supreme Court declared null and void the decision of the Council of Ministers of 16 July 2010, which awarded an entire multiplex to each of the existing national commercial broadcasters (Antena 3, Gestevisión Telecinco, Sogecable, Veo TV, NET TV and La Sexta), for non-compliance with the applicable Audiovisual Law (see IRIS 2010-4/21).

What was challenged was not the spectrum allocation itself, a matter that the Court understands to be mainly a technical issue, but the procedure that was followed for the allocation of frequencies. The licences were awarded without any public tenders, which was not consistent with the applicable audiovisual law.

According to the Court, nevertheless, the ruling cannot affect the validity of the frequency allocation but the procedure of allocation since the award of licences was not only based on the 2010 Council's decision. In any case, it is outlined that the result itself could be objected to, paving therefore the way for a possible challenge to the whole licensing of national DTT to commercial broadcasters.

The appeal to the Court was made in November 2010 by Infraestructuras y Gestión 2002 SL, a company that tried to obtain a DTT license both on national and regional levels. The Supreme Court's judgment was agreed on 27 November 2012 but was not published in the Official Journal until 21 December 2012.

• *Sentencia de 27 de noviembre de 2012, de la Sala Tercera del Tribunal Supremo, por la que se declara la nulidad del Acuerdo del Consejo de Ministros de 16 de julio de 2010, por el que se asigna un múltiple digital de cobertura estatal a cada una de las sociedades licenciatarias del servicio de televisión digital terrestre de ámbito estatal* (Judgment of the Supreme Court of 27 November 2012 declaring null and void the Decision of the Council of Ministers on 16 July 2010 to award a national digital multiplex to every national digital terrestrial television operator)
http://merlin.obs.coe.int/redirect.php?id=16293 ES

Trinidad García Leiva
Universidad Carlos III, Madrid

State Budget Will Remunerate Rightsholders for Acts of private Copying

On 7 December 2012, the Spanish government adopted Royal Decree 1657/2012 which regulates the procedure of compensating rightsholders for acts of private copying. This is a follow-up to the derogation by Royal Decree Law 20/2011 of the so-called *canon digital* (private copying levy) and the introduction of a new system whereby fair compensation for acts of private copying is paid to rightsholders from the state budget. This new system of compensation is the result of the government's intention to introduce changes to copyright legislation in order to achieve full conformity with the regulatory framework and jurisprudence of the European Union after the decision of the CJEU in the *Padawan* case (see IRIS 2012-8/19, IRIS 2011-5/20, IRIS 2011-4/23 and IRIS 2010-10/7).

The amount of compensation owed to rightsholders by acts of private copying shall be calculated on the basis of the harm actually caused to rightsholders as a result of reproduction by individuals, in any format, from works already published and made from a legal source. The calculation will be based on a set of objective criteria, among others, an estimate of the number of copies made by individuals and the impact of private copying on sales. The total amount will be decided each year by the Minister of Education, Culture and Sport after a calculation procedure in which relevant collecting societies are auditioned. These societies will receive the compensation and will be in charge of distributing it to rightsholders.

• *Real Decreto 1657/2012, de 7 de diciembre, por el que se regula el procedimiento de pago de la compensación equitativa por copia privada con cargo a los Presupuestos Generales del Estado* (Royal Decree 1657/2012 of 7 December 2012, regulating the procedure for payment of fair compensation for private copying from the state budget)
http://merlin.obs.coe.int/redirect.php?id=16271 ES

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

FR-France

Article 6-II of Act of 20 December 2011 on Private Copying Found Unconstitutional

On 17 June 2011, the Conseil d'Etat, acknowledging the CJEU's "Padawan" judgment (see IRIS 2010-10/7), cancelled Decision 11 of the "private copy" committee responsible for determining the types of media, the rates of remuneration, and the method of paying the remuneration for making a private copy provided for in favour of rightsholders in application of Articles 311-1 et seq. of the French intellectual property code (Code de la Propriété Intellectuelle - CPI) (see IRIS 2011-7/20). The justification for the cancellation was that all the media were subject to the remuneration, without any possibility of exonerating those acquired, particularly for professional purposes, "where the conditions for their use did not allow the presumption that the media would be used for the purpose of making private copies". Acknowledging this decision, and to bring French legislation into line with European requirements, the Government voted on a new Act on 20 December 2011, "on the remuneration for making private copies" (see IRIS 2012-1/26). The Constitutional Council has already pronounced on the first paragraph of Article 6 of the Act of 20 December 2011 (see IRIS 2012-8/22).

Operating a "legislative validation", Article 6-II of the Act has validated the remunerations received or claimed in application of the "private copy" committee's Decision 11 for media other than those acquired for professional purposes, which had been the subject of proceedings instigated before 18 June 2011 but for which the judgment had not reached the status of res judicata by the time the new law was promulgated.

A telecom operator who, under these provisions, had received a demand from the collecting body for payment of the remuneration for making a private copy in respect of its Internet boxes contested the compliance of this Article with the constitutional principles of the separation of powers and the right to effective legal redress by lodging a priority question of constitutionality. The Constitutional Council examined the question, and in its decision of 15 January 2013 recalls its constant jurisprudence on legislative validations: if they are able to alter retroactively a rule of law or validate an administrative or private-law act, they must pursue a purpose of sufficient general interest and respect both the court judgments with the status of res judicata and the principle of the non-retroactive application of penalties and sanctions. In the case at issue, the Constitutional Court found that the legislator, by this validation, was attempting, for the cases pending, to limit the scope of the cancellation pronounced by the Conseil d'Etat in order to avoid the cancellation depriving the holders of copyright and neighbouring rights of the compensation allocated for media other than those acquired for professional purposes and for which the conditions for use did not allow a presumption of use for private copying. The Council found that the financial reasons invoked, in some cases involving unspecified sums of money, could not be regarded as sufficient to justify such an infringement of the rights of the persons who had instigated proceedings before the date of the Conseil d'Etat's decision. It therefore found paragraph II of Article 6 of Act No. 2011-1898 of 20 December 2011 on remuneration for making a private copy contrary to the Constitution.

This decision will have no effect on the actual remuneration for making a private copy, for which new scales came into force recently, despite much criticism and renewed appeals, particularly from those in the industry, to "thoroughly reform the system" for this remuneration.

• *Conseil constitutionnel, 15 janvier 2013, Société française du radiotéléphone - SFR (décision n°2012-287 QPC)* (Constitutional Council, 15 January 2013, Société française du radiotéléphone - SFR (Decisions No. 2012-287 - priority question on constitutionality))
http://merlin.obs.coe.int/redirect.php?id=16284 FR

Amélie Blocman
Légipresse

CSA Allows Social Networks to be Named on the Air

On 3 January 2013, in plenary assembly at the end of a process of thorough consideration in conjunction with radio and television companies, journalists, and representatives of social networks, the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) revised its decision to ban specific references to social networks in radio and television broadcasts. It has become a frequent occurrence for channels to refer viewers to the pages devoted to their programmes on social networks such as Facebook, or to invite them to respond with a Tweet. Until now, radio and television broadcasts have only been allowed to use the generic term "social networks". In May 2011, the CSA indicated that it considered referring viewers or listeners to a social network without

mentioning its name was informative, whereas giving the actual name of the social network constituted advertising, which contravened the provisions of Article 9 of the Decree of 27 March 1992 prohibiting surreptitious advertising (see IRIS 2011-7/22), a position that was criticised by the profession at the time. The CSA, keen to take account of the evolution in habits while ensuring compliance with the regulations on advertising in the interests of consumers, now allows social networks to be named in reference to a source of information. Similarly, it is now allowed to refer the public to a social network, if the reference is occasional and discreet, does not constitute advertising, and is not a sustained encouragement to connect to the network. On the other hand, the CSA found that including the name of a social network in the title of a programme, and displaying the registered brand names of social networks or the distinctive signs habitually associated with them was contrary to the ban on surreptitious advertising. The court recalled that the social networks are brand names used by commercial companies and the ban may not, under the current version of the legislation, be waived.

• *Recommandations du CSA relatives à la mention des réseaux sociaux dans les programmes de télévision et de radio, Communiqué de presse du CSA du 4 janvier 2013* (Recommendations by the CSA on mentioning social networks during radio and television broadcasts, CSA press release of 4 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16278 FR

Amélie Blocman
Légipresse

CSA to Pronounce on Qualification of "Scripted Reality" Programmes on a Case-by-Case Basis

At the end of a long cycle of hearings of professionals, the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) published on 9 January 2013 its position on the matter of the qualification of "scripted reality" programmes (see IRIS 2013-1/22). The question raised was whether these hybrid low-cost productions could be considered as fiction, and be included as such in the calculation of the channels' production and broadcasting quotas, and receive aid from the national cinema centre (Centre National du Cinéma - CNC). Thus the CSA observes that the programmes broadcast in 2012 used certain production techniques that were characteristic of programmes not recognised as "stock programmes". However, in most cases they appeared to involve scripting, directing and acting, and could therefore be likened to works of fiction. For its part, the CNC, which had received applications for assistance from the fund supporting the programme industry (Compte de Soutien à l'Industrie des Programmes - COSIP), held in 2012 that these programmes were "insufficiently creative" to justify awarding State aid.

As a point of information, the (non-music) terrestrial channels are required to invest at least 12.5% of their turnover in favour of stock works where their contribution is entirely devoted to them, or at least 10.5% where their overall contribution amounts to 15% of turnover. The terms of reference of France Télévisions (a public-sector group) lays down the figure of 20% of turnover in favour of the group's contribution to stock works. It is for the CSA to determine the qualification of the programmes declared by the channels. A number of professionals fear the development of low-cost series qualified as stock fiction, which would dispense the television groups from investing in ambitious prime-time French fiction aimed at competing with the audience figures for American series. Apart from the economic concerns, it is feared in certain quarters that these series would bring down general programme quality.

On 9 January 2013, the CSA announced that it would be pronouncing on the qualification of these programmes "case by case", each time they were declared by the channels under their production (and possibly broadcasting) obligation. It also recalled that there was no automatic link between its appreciations and those of the CNC regarding eligibility for COSIP support.

Thus, faced with a scripted reality programme declared by its editor as a work of audiovisual fiction, to be able to apply the qualification the CSA will look for the presence of creators, and consider the nature of the work and what it involves, in conjunction with the level of the scenario, the content of the contracts for the scriptwriters, producers and performers, their mention in the credits, and the method of their remuneration. The CSA will also pay attention to the channels' compliance with their obligations to invest in stock audiovisual works, and also to the editors' compliance with the requirements for protecting young viewers and programme ethics. Lastly, the CSA will be vigilant regarding compliance with social legislation: compliance with the negotiated collective agreements and social regulations applicable to the creation sector, particularly regarding scales of remuneration applicable to creators, the negotiated collective agreements for performers and technicians, and the agreement protocols between producers and scriptwriters.

• *CSA, Concertation sur les programmes dits de « réalité scénarisée », 9 janvier 2013* (CSA, Concertation on "scripted reality" programmes, 9 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16281 FR

Amélie Blocman
Légipresse

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

First Report by the Commission for Monitoring the Use made of Connected Television

The "Commission for Monitoring the Use Made of Connected Television", launched in February 2012 and headed by Emmanuel Gabla, a member of the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA), brings together about 80 professionals in the sector. On 5 December 2012 it reported on the first stage of its work. "It is obviously not a question of aligning regulation of the new services with regulation of audiovisual services. On the other hand, there is no thought of massively deregulating the audiovisual sector," according to CSA Chairman Michel Boyon. He also said that three of the 14 proposals made by the Commission could be introduced very quickly. Firstly, the proposal to set up an observatory of the use made of connected television, with a view to improving knowledge of the use made of the technologies concerned in terms of both quality and quantity, since this knowledge is "still fragmentary". The second priority proposal would involve drawing up general recommendations and good practices regarding personal data, in collaboration with the national commission on information technology and liberties (Commission Nationale de l'Informatique et des Libertés - CNIL), the CSA and the competent organisations. The third proposal would call for the "launch of inter-professional discussion on revising certain obligations contained in the regulations". For example, regarding media chronology, the different schemes to which the traditional stakeholders in the television and Internet sectors are currently subject, in France and elsewhere, are deemed uneven and in some cases discriminatory. Similarly, the Commission feels there should be concertation among professionals on what tidying-up is necessary in connection with convergence, obligations in respect of catch-up TV, and the thresholds for obligations imposed on on-demand audiovisual media services.

The proposals put forward include adopting tax measures aimed at limiting imbalances in competition in respect of the new stakeholders, and maintaining the effects of the mechanisms for financing creation. One of the methods suggested for achieving this is to extend the tax supplying the fund supporting the programme industry (Compte de Soutien à l'Industrie des Programmes - COSIP) to all companies that earn their income via advertising revenue, from the exposure of audiovisual or cinematographic content. Another topic of major importance is the Commission's recommendation to relax some of the provisions on audiovisual advertising, since it will not be possible to transpose all of them to connected television (authorised time limits for advertising, ban on advertising in favour of certain sectors of the economy, etc.). The Commission will therefore continue its work in 2013 and look to the implementation of its initial proposals.

• *Présentation des travaux de la Commission de suivi des usages de la télévision connectée, conférence de presse du CSA du 5 décembre 2012* (Presentation of the work of the Commission for Monitoring the Use Made of Connected Television, CSA press conference held on 5 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16279 FR

Amélie Blocman
Légipresse

First Stages of "Culture Act II" Mission

Launched on 25 September 2012, the "mission of concertation on digital content and cultural policy in the digital age" ("Culture Act II") headed by Pierre Lescure drew up its first interim report on 5 December 2012. The mission is scheduled to send its final report to the Government on 15 March 2013, and in December it proceeded to hear sixty bodies, companies and individuals out of the hundred or so that are to be heard.

Its work focuses on the following three topics: public access to cultural works and development of the legal offer; remuneration for creators and the financing of creation; the protection and adaptation of intellectual property rights.

After drawing up a report on the legal offer, sector by sector, this interim report points the finger at media chronology as one of the barriers to its development. Rather than a total makeover, which would render the system for financing cinema fragile, a pragmatic approach would envisage more flexibility and experimentation in order to produce a dynamic that would favour the development of the legal offer. Competition from the Internet giants (Google, iTunes, Amazon, etc) is deemed inequitable. Apart from the tax issue, they also avoid specific regulations: in the video distribution sector, a stakeholder such as YouTube is treated as a host, whereas the French VOD platforms are subject to the same obligations of investment and exposure as television editors.

Regarding intellectual property rights, the idea of legalising non-commercial exchanges (via a "global licence" or a "creative contribution licence") is fairly generally rejected, although there are some exceptions. There has been much criticism of the "graduated response" implemented by the HADOPI scheme; its effectiveness is difficult to evaluate. The mission points the finger at the fact that too little emphasis has been placed on combating commercial infringement of copyright aimed at the real culprits, namely the Internet sites (sites for streaming or downloading, hosts, torrent directories, etc.). To redirect repression towards these stakeholders, which are often based outside France and by their nature are more difficult to apprehend, the parties heard referred to a number of possible methods:

- increasing responsibility on the part of hosts by obliging them to withdraw illegal content promptly and prevent its reappearance, and by reinforcing international judicial cooperation in order to punish recalcitrant sites;

- reducing the visibility of the illegal offer by acting on browser referencing, if necessary with the assistance of the public authorities;

- drying up the sources of income from sites that infringe copyright by increasing responsibility on the part of the intermediaries (advertisers, advertising agencies, on-line payment services, etc.).

To promote the development of new uses and content, the mission is considering ways of facilitating the use of free licences for those creators who so wish, and their recognition in the world of creation.

On the remuneration of creators and the financing of creation, the mission notes a high degree of inequality, varying from one sector to another, in the proportion of remuneration represented by digital media. It also notes the unsuitability of aid for creation and the increasingly fragile state of the mechanisms for remuneration and financing. For example, the cinema and the audiovisual sector, through the fund supporting the programme industry (Compte de Soutien à l'Industrie des Programmes - COSIP) and investment obligations, have the benefit of support arrangements financed by all the stakeholders involved in circulating the works in question. The television channels, which make a large contribution (tax on television services paid by editors, investment obligations), could be threatened by fragmentation of audiences and competition on the part of new stakeholders contributing little (DTV channels, connected television). Furthermore, the contribution of the IAP (tax on television services paid by distributors) is currently under threat, in terms of yield and even in terms of principle, as the result of a problem of compatibility with Community law. Lastly, neither the VOD platforms based outside France (such as iTunes) nor the new circulation stakeholders (such as YouTube) make any contribution to the support fund, although some are beginning to set up mechanisms for contributing to the financing of creation on a voluntary basis (the "YouTube Original Programming" project, for example). In conclusion, the hearings noted that many of the topics have a Community dimension, with medium- to long-term negotiation schedules. It is therefore important to identify, by 15 March 2013, more short-term measures that could be deployed at the national level.

• *Auditions retransmises en différé en format audio ou vidéo, et accompagnées d'une synthèse écrite* (Hearings in deferred format (audio or video), accompanied by a written summary)
http://merlin.obs.coe.int/redirect.php?id=16280 FR

Amélie Blocman
Légipresse

GB-United Kingdom

Protecting Children Taking Part in Programmes

The UK communications regulator Ofcom has recently considered complaints that two BBC "police dramas" infringed rules protecting children. The programmes are *Line of Duty* and *Good Cop*.

As regards *Line of Duty*, the issue was the failure to protect a 13 year-old child actor from being exposed to sexually explicit language and violence. In one scene, the character was head-butted and attempted to sever a policeman's finger with pair of bolt-cutters and there was also a scene where sexually-explicit language was directed at him. Issues arising were (i) whether the programme complied with rules of care regarding the physical and emotional welfare of the child and (ii) whether unnecessary distress was caused by his involvement in the programme (Rules 1.28 and 1.29). Ofcom decided that the BBC had infringed Rule 1.28 and 'is requiring the BBC to attend a meeting to reiterate the paramount importance of ensuring its compliance with the Code rules to protect child participants in its programmes.'

As regards *Good Cop*, the issue was the screening of a trailer for the programme, which was aired on BBC One HD before the watershed. Screened at about 1840 GMT, the item showed a police officer being violently assaulted by a group of men and having a television dropped on him following a call-out. The trailer was found to be in breach of Rule 1.3, which requires that children must be protected by appropriate scheduling from material that is unsuitable for them.

Of general interest is that Ofcom has taken the opportunity to publish in the relevant issue of the Broadcast Bulletin a 'Note to Broadcasters :The involvement of people under eighteen in programmes' stating that 'Ofcom is taking this opportunity to remind all broadcasters of the paramount importance of ensuring their compliance with the relevant Code rules in this area.'

• Ofcom Broadcast Bulletin Issue number 220, 17 December 2012
http://merlin.obs.coe.int/redirect.php?id=16258 EN

David Goldberg
deeJgee Research/ Consultancy

Decision of Co-Regulatory Body on Scope of 'On-demand Programme Service' Overturned

Ofcom, the UK communications regulator, has overturned a decision of the co-regulatory Authority for

Television on Demand (ATVOD) that Channel Flip was an 'on-demand programme service' for the purposes of part 4A of the Communications Act 2003. ATVOD's decision meant that it had to notify ATVOD, pay a fee, and meet a limited number of regulatory requirements. This part of the Act had been added to implement the Audiovisual Media Services Directive. Ofcom had designated ATVOD as the appropriate regulatory authority to carry out functions under this part of the Act, but its decisions were made subject to appeal to Ofcom itself, which can substitute its own decision for that appealed against.

The Act provides that a service is an 'on-demand programme service' if 'its principal purpose is the provision of programmes the form and content of which are comparable to the form and content of programmes normally included in television programme services.' Channel Flip was a small business with 15 employees; ATVOD decided that the content of some of its audiovisual content was comparable to television comedy programmes, in particular because items had generic opening sequences including a music soundtrack, a linear narrative and plot, and end credits or an end pictorial logo.

To assist in the resolution of this and other appeals, Ofcom commissioned research into consumers' attitudes to different services. Channel Flip marketed itself as 'the UK's finest video shows' and broadcast brief items, normally 3-4 minutes in length but with some of 10 minutes. Some were presented by TV personalities, and some items were arranged into a series. The style was not 'amateur' but the items were professionally made on a limited budget. The research suggested that users considered Channel Flip to be at the lower end of the spectrum of comparability with linear television, and that it felt like a vehicle to sell particular TV personalities. Ofcom considered that, although some of the series shared characteristics with an established genre of linear TV programmes, the items were not so similar as to compete for audience with such services. Users did not consider them to be associated with, or an alternative to, TV programmes. Their short duration made them more comparable to clips on websites such as YouTube. Though some items were more comparable with television programmes, they were not typical of the output as a whole. Ofcom thus decided that the service did not constitute an 'on-demand television service' and allowed the appeal.

• Ofcom: Appeal by ChannelFlip Media Limited, 14 December 2012
http://merlin.obs.coe.int/redirect.php?id=16259 EN

Tony Prosser
School of Law, University of Bristol

Two Compliance Investigations into 'Newsnight' Find Serious Problems at the BBC

Inquiries into the handling of two separate investigations into alleged child abuse by the BBC's flagship programme *Newsnight* have found serious compliance and cultural problems. As a result of the second problem, the BBC's Director-General was forced to resign.

The first issue concerned the decision to drop an investigation into alleged child abuse by Jimmy Saville, a former disc jockey who had died on 29 October 2011. *Newsnight* commenced an investigation based on allegations by victims, including that the police had dropped their own investigation because of Saville's age. However, the story was taken off the BBC's Managed Risk Programmes List, the mechanism for flagging risk in potential programmes to senior management. It later became apparent that the police investigation had been discontinued because of lack of evidence, though this did not invalidate other allegations, and the proposed programme was withdrawn with no further investigation after December 2011. In late 2012 ITV, the commercial broadcaster, prepared and broadcast a programme with convincing evidence of child abuse by Saville. The BBC gave 'flawed' and 'chaotic' reasons for not pursuing its own investigation. The BBC Trust asked Nick Pollard, the former head of Sky News, to investigate the management of the proposed programme. He concluded that the decision to drop the programme was done in good faith and had not been due to pressure to protect tribute programmes to Saville planned by the BBC. However, it had been flawed and the BBC had been completely unable to deal with the events which followed; there had been 'chaos and confusion' and crucial information about the basic facts of the case had not been shared. The Pollard report made a number of recommendations, including that news and editorial management be reviewed, that the role of the Director-General of the BBC as editor-in-chief was of questionable utility, that full information be shared and that the Managed Risk Programmes List be made more effective. The Report was also highly critical of the BBC internal culture.

In the second case, on 2 November 2012 *Newsnight* broadcast a report that 'a leading Conservative politician from the Thatcher years' had been involved in child abuse. The alleged perpetrator was not identified in the programme; however it was possible to work out his identity as being Lord McAlpine, former treasurer of the Conservative Party, and his name was widely circulated on the internet. The following week the source of the allegation stated that he had wrongly identified his abuser; *Newsnight* issued an apology and settled a libel claim. The Director-General of the BBC, who is also the editor-in-chief, resigned after only 54 days in the role. The BBC Trust's

Editorial Standards Committee found that basic journalistic checks had not been applied to the story and that the *Newsnight* team had not made adequate attempts to seek validation for it. Management of the story was also inadequate. There had been a serious breach of the Editorial Guidelines relating to accuracy; the broadcast allegations had not been based on sound evidence and the audience had been misled. There had been a grave breach which had been costly to all concerned.

• BBC, 'The Pollard Review' and 'The Pollard Review - BBC Response' (2012)
http://merlin.obs.coe.int/redirect.php?id=16260 EN
• BBC, 'Finding of the Editorial Standards Committee of the BBC Trust - Newsnight, BBC Two, 2 November 2012'
http://merlin.obs.coe.int/redirect.php?id=16261 EN

Tony Prosser
School of Law, University of Bristol

The Leveson Report

On 29 November 2012 Lord Justice Leveson published his report relating to the eponymous inquiry on the culture, practices and ethics of the press. The remit of the inquiry was extensive, covering topics from the relationship between the police and newspapers to the closeness of media proprietors to politicians, but perhaps the key focus and most potentially controversial outcome related to plans for the future of press regulation. The press in the UK has been under a loose form of self-regulation since 1991 when the current body, the Press Complaints Commission (PCC), replaced the old Press Council as arbiter of disputes concerning the written media. Membership of the PCC is non-compulsory and the body is significantly constituted and funded by the editors and proprietors of the newspapers subject to its authority, giving rise to accusations that it lacked independence, as well as the desire and power to censure newspapers for transgressions of ethics or the law. In the light of the phone-hacking and other scandals a spotlight was trained upon the wider culture of journalism including invasions of privacy, unethical news gathering techniques and the role of the press in serving the public interest. It was widely agreed, though not universally, that the PCC had failed in its role and some alternative arrangement was necessary to improve the behaviour and practices of newspapers.

Prior to the publication of the report speculation was rife as to what new form of regulation would be recommended. Many publications, which would be subject to the new rules, pre-empted Lord Justice Leveson's conclusions by attacking the inquiry and campaigning against any potential form of statutory regulation. This created pressure on the government to resist any legislative action despite all three main political parties pledging to respect and support the implementation of the Leveson recommendations.

The central recommendations of the report relating to the regulation of the press include the need for a new regulatory body that is truly independent of the press. The body would be created by the press themselves and the report left considerable leeway for the specifics of the body's constitution, but gave crucial guidance. The board or panel and its Chair would be appointed by an independent committee and would include experts in the field but no serving editor nor government official. Editors would have an input to a new code of press standards but the new body would have the final say. The twin tasks of the body would be to promote good journalism and protect the rights of individuals. To do so it would have powers to undertake investigations, facilitate whistle-blowing on unethical practices, and encourage good journalism in the public interest. Most crucially perhaps the body would act as an arbitration mechanism in civil law disputes and would have legal recognition in this respect. This would act as perhaps the key incentive for newspapers and other publications to support the body because failure to do so could have detrimental effects on costs and damages in the event of lost litigation. Lord Justice Leveson opined that this would require legislation to implement but was at pains to emphasise that the actual regulatory body would not be the result of legislation but would be the creation of the press itself. Any legislation would also further enshrine the importance of a free press. The report left open the further possible consequences in the event that the press failed to do what was asked of it but mentioned the idea of an Ofcom (The Office of Communications) style regulator as a last resort. Finally, and importantly, while the new body would apply to the established written press the issue of bloggers and web-centred news outlets was left open.

Despite statements made in advance of the report the government gave a lukewarm response to the notion of legislation and expressed a wish to allow the press an opportunity to respond with a new body, matching the central purpose of the Leveson recommendations but in the absence of new law. This led to much criticism from victims of press transgressions as well as pressure groups for regulatory reform and other politicians.

• An Inquiry into the Culture, Practices and Ethics of the Press: Report [Leveson], 29 November 2012
http://merlin.obs.coe.int/redirect.php?id=16257 EN

Oliver O'Callaghan
The Centre for Law Justice and Journalism, City University, London

IT-Italy

AGCOM Adopts Guidelines for PSB Obligations for Years 2013-2015

Following the public consultation launched with Deliberation no. 130/12/CONS (see IRIS 2012-6/23) which led in October 2012 to the approval of a draft sent for comments to the Ministry of Economic Development, on 29th November 2012 AGCOM (the Italian Communications Authority) approved Deliberation no. 587/12/CONS. With this deliberation, adopted pursuant to Article 45, para 4, of the Italian AVMS Code, AGCOM approved the guidelines for the contract of public service broadcasting, subscribed every three years by RAI Radiotelevisione Italiana spa (Italian public service broadcaster) and the Ministry of Economic Development.

The aforementioned article 45 creates a series of obligations the contract of service must comply with, and prescribes that every renewal of the contract has to be preceded by guidelines adopted by AGCOM with the opinion of the Ministry, defining further obligations deemed necessary by considering market development, technological progress and changing needs of a cultural nature, both at a national and local level.

The guidelines, adopted for years 2013-2015, identify their goals in ensuring a higher quality of both entertainment and information programmes, experimenting with new formats, improving the social and cultural commitment, taking into the utmost consideration the protection of minors, developing audiovisual productions suitable to uphold a positive image of Italian culture and identity, by promoting new audiovisual works but also by spreading to the public the excellent material stored by RAI in its historical archives.

On a more technical side, the public service broadcaster needs to compel to the principle of technological neutrality, guarantee a technical improvement of the service quality, also helping to improve the level of media literacy in Italy and enlarging the offer of online content.

With regard to the financing issue, according to the Protocol on the system of public service broadcasting in the member states, annex to the Treaty of Lisbon, public financing to public service broadcaster is allowed only to comply with PSB obligations and in such a way not to impact on the competition in the internal market. AGCOM, consequently, prescribes more transparency in using public funds, specifying for what obligations these are used.

• *Delibera n. 587/12/CONS "Approvazione delle linee-guida sul contenuto degli ulteriori obblighi del servizio pubblico generale radiotelevisivo ai sensi dell'articolo 45, comma 4, del Testo unico dei servizi di media audiovisivi e radiofonici (triennio 2013-2015)"* (Deliberation no. 587/12/CONS "Guidelines for further obligations of public service broadcasting pursuant article 45, para 4, of AVMS Code (for the years 2013-2015)", 29 November 2012)
http://merlin.obs.coe.int/redirect.php?id=16267 IT

Francesca Pellicanò
Autorità per le garanzie nelle comunicazioni (AGCOM)

AGCOM Advertising Revenues Survey

On 21 November 2012 AGCOM published the results of the survey about the advertising revenues sector in Italy.

The aim of the survey has been to analyse the competition structure of the advertising revenues side in the overall Italian communication market, considered separately from the final users side pursuant to the approach generally followed by the competition authorities. The survey has been conducted taking into account both traditional mass media (broadcasting, radio, press, directories, theatrical and outdoor advertising) and on-line advertising. Advertising revenues represent the main income for the mass media, reaching about 70% of the broadcasting overall turnover, 80% for radio and 50% for press.

Resulting from the survey, the Italian media centre market is currently facing a process of concentration with the involvement of foreign companies in the national scenario. This trend appears to be similar to other national markets and is probably caused by economies both of scale and of scope that increase the entry barriers in this market. The main player (WPP) holds a 40% market share, with six competitors (Aegis, Omnicom, Publicis, Interpublic, Havas, Armando Testa), each of them holding a market share of less than 20% .

Also the broadcasting sector data reveals a high degree of concentration with one operator (Fininvest Group) holding more than 60% of the overall revenues. The main competitors are the public service broadcaster (RAI) and the leading pay tv broadcaster (Sky) both required to comply with more specific restrictions as regards the advertising hourly limit set by the broadcasting law. The survey also points out some selling practices used by the main advertising collectors, such as the discrimination on prices and the bundle offers of the advertising spaces that might cause market distortions.

The national radio sector is characterized by a higher degree of competition between national players - with five companies (l'Espresso, Finelco, RTL, RDS, RAI) holding at least a 20% market share -, low entry barriers and a less developed vertical integration. Local broadcasters have gained significant shares in the

market. The survey also points out the possible consequences of the suspension of the national radio audience monitoring system (Audiradio). AGCOM is still working with the operators to build a new monitoring methodology and the experimental phase is expected to be started in the first semester of 2013.

The structure of the press sector is very competitive both on the newspapers and the magazines side. The leading company (l'Espresso) holds less than a 25% market share and there are many competitors, being the market characterized by low entry barriers and by a good level of diagonal integration between publishers.

The directories sector has been liberalised during the past years but is still highly concentrated with the leader company (Seat Pagine Gialle) holding about 90% of the market share. The directories overall revenues are decreasing with relevant shares moving to related internet services. The reduction of the demand for traditional directories services might in the future push the minor players out of the market.

The theatrical advertising sector is increasing the revenues following some technological innovations (3D, new cinema halls, digitalization); nevertheless the overall dimension is still negligible. The population penetration rate of this medium is still limited if compared to other media. The two main companies (Opus Proclama, Sipra) hold less than 40% market share each, without entry barriers and a limited vertical integration.

The outdoor advertising sector is characterised by a strong competition between national and local players and the presence of many operators at both levels.

The on-line advertising is the most dynamic and innovative sector. The Internet actually represents the second largest advertising media in Italy, having overtaken radio in 2006 and press in 2011. The market is characterized by some traditional players (La Repubblica, Corriere della Sera, Quotidiano.net, TG-Com24) and the new internet players (Google, Yahoo!, Microsoft, Facebook) representing the most relevant part with more than 70% of the national market share. The structure of the market is characterized by significant network economies (i.e. for the social network the utility of one single user is directly connected to the overall number of users), relevant savings for transaction costs for the aggregation of offers and demand of a wide variety of services. These dynamics do not appear sufficient to reduce the market position of the main operator (Google) that still maintains its first ranking in the search engines market.

• *Deliberation no. 551/12/CONS of 21 November 2012, Chiusura dell'indagine conoscitiva sul settore della raccolta pubblicitaria, avviata con Delibera n. 402/10/CONS* (Conclusions of the survey about the advertising sector revenues started with decision n. 402/10/CONS)
http://merlin.obs.coe.int/redirect.php?id=16268 IT

Giorgio Greppi
Autorità per le garanzie nelle comunicazioni (AGCOM)

LT-Lithuania

New Regulation for the Radio and Television Commission of Lithuania

On 1 January 2013 the Amendment of Article 47 of the Act on Provision of Information to the Public came into force. It was adopted by the Seimas (Parliament) on 14 June 2012 and provides for the reformation of the *Lietuvos radijo ir televizijos komisija* (Radio and Television Commission of Lithuania - LRTK). The new provisions change the principles of the formation of the LRTK, define the requirements for the members, the rules for their designation, and the conditions for expiry of the member's powers before the designated term. They also determine the LRTK's financing.

The number of members has been decreased from 13 to 11 and the Commission's formation procedure has changed. Two members shall be appointed by the President of the Republic, one member shall in each case be appointed by the Seimas Committees on Education, Science and Culture and on the Development of the Information Society and another member by the opposition factions. Three more members are to be appointed by the Lithuanian Association of Artists and one member by each of the following: the Lithuanian Bishops' Conference, the Lithuanian Journalists' Union and the Lithuanian Journalists' Society.

New requirements to be met by LRTK members are set by the amended Act as well. Only a Lithuanian citizen of good repute with university education and no less than five years of experience in the fields of audiovisual policy, production or dissemination of public information and professional or academic experience in the public information, educational, cultural, scientific or human rights fields may be appointed as a member of the LRTK. A person, who less than a year ago was a member of the management of a company or organisation falling under LRTK's regulation and/or might have an interest in such company or organisation, shall not be appointed as a member of LRTK. Heads of the appointing institutions or organisations and the employees of the LRTK administration may not be appointed as Commission members either.

The members shall be appointed for a four year period and shall serve for not more than two consecutive terms. At least 60 days before the term of office of the appointed member expires, the LRTK has to request the appointing institutions to designate a new member.

According to the amended Act, the Seimas designates and recalls the chairman and the vice-chairman, who can serve in this position for no longer than two terms in a row. Both are elected on the basis of a consensual nomination of the Seimas Committee on Educa-

tion, Science and Culture and the Committee on the Development of the Informational Society. Until the chairman of the Commission is elected, such function shall be performed by the eldest member of the LRTK. Formerly, the chairman was elected by the LRTK itself and the term was unlimited.

The amended Act provides for possibility mechanism to recall a LRTK member; in such circumstances the LRTK requires the appointing institution to recall the member by not less than two thirds of the members consensually stating that the member committed a violation of LRTK's Regulation.

The amendments also change the financing rules of the LRTK. Firstly, the amount of the fee paid by the broadcasters, re-broadcasters and VOD providers, with the exception of the public broadcaster Lietuvos nacionalinis radijas ir televizija (LRT), is reduced from 0.8 to 0.6 per cent of their income received from commercial communications, advertising, subscription fees and other activities related to the respective broadcasting and re-broadcasting.

According to the recent amendments, LRTK shall prepare a report on its activities and the collection of the financial accounts together with the conclusion of an independent auditor and an audit report to the Seimas each year. The reports and accounts shall be assessed by the Audit Committee, the Committee of Development of the Informational Society and the Committee of Education, Science and Culture. In the case that two of the Committees do not approve the reports, they have to be considered at the Seimas plenary session. If the report is not approved in the plenum, the whole Commission can be formed anew.

• *Visuomenės informavimo įstatymo 47 straipsnio pakeitimo įstatymas, 14/06/2012* (Act on the Amendment of the Act on Provision of Information to the Public of 14 June 2012)
http://merlin.obs.coe.int/redirect.php?id=16290 LT

Jurgita Ieśmantaitė
Radio and Television Commission of Lithuania

MK-"the Former Yugoslav Republic Of Macedonia"

Broadcasting Council Issues Plan for Distribution of DTT Capacities

On 24 December 2012, the Macedonian media regulation authority (Broadcasting Council) adopted the План за намена и распределба на терестријален мултиплекс (Plan for Designation and Distribution of the Transmission Capacities of Digital Multiplexers). The main goal of the plan is the safeguard and improvement of media pluralism in the country once the analogue television will be switched off in June 2013 (see IRIS 2012-5/32 and IRIS 2012-9/30).

The current main piece of media legislation, Закон за радиодифузната дејност (Act on Broadcasting Activity) of 2005, neither regulates the digital terrestrial transmission nor the process of transition from analogue into digital broadcasting. Accordingly, the plan's purpose is to clarify which TV channels will be transmitted via the available digital multiplexes (MUX).

The plan notes that the first, the second and the third MUX shall be used for conditional access audiovisual media services, the fourth and the fifth MUX shall be used for transmission of the public broadcaster's TV channels, whereas according to Art. 11 of the plan the Broadcasting Council will determine which commercial free-to-air TV channels will be transmitted via the sixth and seventh MUX.

The inclusion of commercial TV programme services shall be determined by the Broadcasting Council once a year in accordance with the coverage area and the viewership rates. The Broadcasting Council uses the people meter method of audience research. Apart from that, the plan allows the Broadcasting Council full freedom to select which channels will be transmitted and which will not. Quality of media pluralism is no legally determined criterion to be taken into consideration.

First to be included are broadcasters with nationwide coverage. Secondly, broadcasters with local coverage will be included on the basis of the official ratings outlined in the Broadcasting Council's analysis of the broadcasting market of the previous year.

This practically means that the ratings of the TV channels will be the only criterion determining which TV channels will be included in the MUX allowing the nationwide channels to be the first ones to be transmitted via digital television. The statute itself offers no legal protection mechanisms to the local TV stations and specialized TV programmes like 24 hour news, educational or documentary channels, which not necessarily would have the highest ratings.

• План за намена и распределба на терестријален мултиплекс , *24/12/2012* (Plan for Designation and Distribution of the Transmission Capacities of Digital Multiplexes, 24 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16291 MK

Borce Manevski
Independent Consultant for Media and Public Relations

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

MT-Malta

Broadcasting Authority Directive for March 2013 Elections

On 20 December 2012, the Broadcasting Authority issued to all broadcasting stations its directive on programmes and advertisements to be broadcast during the period 7 January to 9 March 2013. This is because Parliament was dissolved on 7 January 2013 and general elections were held on 9 March 2013. In fact, on that date even local council elections were held.

The directive has been tightened up from past directives. For instance, now it included reference not only to news bulletins but even to updates and special editions which were broadcast during the elections campaign period.

Not later than 3 January 2013 all broadcasting stations had to submit their programme schedules for approval by the Broadcasting Authority. Such requirement is compulsory during an election campaign period. On the other hand, during other periods of the year, the Authority only approves the programme schedule of the public broadcasting service's Television Malta. For the election campaign period stations had to provide also details of programme presenters, participants and producers in the case of current affairs programmes, discussion programmes, investigative journalism programmes and other programmes which include guests who air opinions on current affairs and programmes of a similar nature. Where election candidates participate in programmes the Authority had to be informed accordingly. This measure is intended to ensure that so far as possible balance is maintained with regard to airtime allotted to different political parties. Once the Authority approved the programme schedule no changes could be made by broadcasters unless they sought and obtained the prior approval of the Authority. Nor could promotional material concerning the news programmes be aired once such programmes were still in the process of approval.

The directive also stated that programmes and advertisements could not encourage people to vote in a particular way. Moreover, care had to be taken to ensure that all programmes and all advertisements were free of material which could be interpreted as favouring or giving undue exposure to any political party or candidate, or which could be reasonably considered as being directed towards a political end. In addition, the directive stated that it was not permissible:

(i) in the case of advertisements commissioned by public entities or other entities, to allow persons who had submitted or intended to submit their candidature for these elections to appear in such advertisements, even when the said advertisement could not be considered to be a political advertisement for the purposes of the Broadcasting Act.

(ii) that a programme was presented by a person who had submitted or who intended to submit his or her candidature for these elections when such person was not a regular employee of the station broadcasting such programmes. In such instances, the Authority reserved the right to ask for proof of the employee's fulltime employment status.

(iii) that a person who had submitted or intended to submit his or her candidature for these elections participated in a regular manner in the same programme during the said period. A candidate was considered to have had participated regularly when s/he participated in more than two editions of the same programme during the period between 7 January and 9 March 2013 even if s/he featured in his or her professional or personal capacity. This however did not include coverage in news bulletins but included interviews with candidates on matters that had no bearing on the news items being covered and participation in the party productions/debate in the scheme of political broadcasts organised by the Broadcasting Authority during the election campaign. The Authority reserved the right not to approve proposed programmes where it appeared that these were primarily intended to provide exposure to candidates who already featured in other programmes in the schedule proposed by the same station. An interview/feature or commentary with or by a prospective candidate broadcast solely to give prominence to the candidate and which had no bearing on an event, statement or a news item, could not be broadcast.

(iv) that a person who has submitted or intended to submit his or her candidature for these elections featured in the opening or closing of a programme.

The aim behind this directive is to ensure that no political party or a candidate of such party gets an undue advantage over another political party/candidate. This directive was first issued ten years ago in connection with the 2003 referendum on the accession of Malta to the European Union. Since then it has become standard practice in the field of broadcast regulation.

• *Direttiva Ta' L-Awtoritá tax-Xandir Dwar Programmi U Reklami Mxandra Matul Il- Perijodu 7 Ta' Jannar Sad-9 Ta' Marzu 2013* (Broadcasting Authority Directive on Programmes and Advertisments Broadcast during the Period 7th January to 9 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16265 EN MT

Kevin Aquilina
Department of Media, Communications and Technology Law, Faculty of Laws, University of Malta

SK-Slovakia

Reinstatement of Broadcasting Fee

On 7 November 2012, the President of the Slovak Republic signed the Act. No. 340/2012 Coll. on payments for public services provided by the Radio and Television of Slovakia (hereinafter "Act"). The legislative process thus having been completed, the Act came into effect on 1 January 2013. The Act abolishes the former model of financing the Slovakian public broadcaster*Rozhlas a Televízia Slovenska* (Radio and Television of Slovakia - RTVS) which foresaw an annual contribution from the state budget as the main source of income of the RTVS (see IRIS 2012-1/42). This financing model, however, never came into effect (it had been scheduled to start 1 January 2013 onwards). This means that even though the Act is a new piece of legislation, it merely reinstates the model of financing the RTVS that existed since 2008.

Before 2008 only natural persons that owned a TV set or a radio receiver were obliged to pay the broadcasting fee. Due to the fact that a large number of people officially declared to the authorities that they do not own a broadcasting reception device, the amount of money collected from the fees substantially decreased. This led to a change of the financing model. As of 2008, the fees applied to any natural person registered within the databases of the electricity retailers. This also led to a change of the term used for these fees from "broadcasting fee" to "payments for public services provided by the RTVS". The legislators argued that even people that do not own broadcasting reception equipment themselves can nevertheless benefit from these services (e.g. watching it in a café or in a friend's house etc.).

Another reason for this change was the ambition to increase the effectiveness of the fee collection. However, the initiators of this legislative change never satisfactorily explained why only people using the electricity are eligible to benefit from such public service in contrast to people using other sources of power. The reasoning for the present Act is in line with the reasoning from 2008. The official justification states that this model will create a "direct relation between RSTV and the public on the basis of solidarity". It also states that the need to abolish the state budget-financing model is necessary to "ensure the independence of the RTVS" from governmental influence. Another major reason to abolish the state budget model is beyond doubt the condition of the general state budget of the Slovak Republic.

On the basis of these arguments the Act (re)introduces the broadcasting fee (EUR 4,64 per month) for every natural person that is registered with electricity retailers (household use only) and for employers of at least three employees (from EUR 4,64 up to EUR 464,71 depending on the number of employees). It also reintroduces another form of income for RTVS - the contracts between RTVS and the state (see IRIS 2010-1/40). The Act furthermore upholds the previous system of fee exemptions for certain public organisations and people with permanent disability or people living together in the same household with the latter.

• *Zákon z 18. októbra 2012 o úhrade za služby verejnosti poskytované Rozhlasom a televíziou Slovenska a o zmene a doplnení niektorých zákonov* (Act. No 340/2012 Coll. on payments for public services provided by the Radio and Television of Slovakia, 18 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16255 SK

Juraj Polak
Office of the Council for Broadcasting and Retransmission of Slovak Republic

Promotion of EU Works in On-demand Audiovisual Media Services

On 18 October 2012 the Slovak Parliament passed an Amendment (No. 342/2012 Coll., hereinafter "Amendment") of Act. No 308/2012 Coll. on broadcasting and retransmission (hereinafter "Broadcasting Act"). Its main purpose is the implementation of the Audiovisual Media Services Directive (2010/13/EU - hereinafter "AVMSD") in view of the regulations concerning the promotion, distribution and production of television programmes (Art. 16-18 AVMSD). The Amendment was signed by the President of the Slovak Republic on 7 November 2012 and came into effect on 1 January 2013.

The official reasons for the Amendment state that the necessity for another change of the Broadcasting Act arose from the European Commission's reviewing process of the AVMSD transposition. The main area that needed to be changed for a completion of the AVMSD transposition was the promotion of EU works in video-on-demand services. The original legislation did not impose any obligation in this respect since the original idea was to avoid any regulatory obstacles to the development of this sector.

Hence, the Amendment introduces a minimum monthly quota of 20% for European works for video-on-demand service providers. The calculation is based on the combined length of all provided programmes (not the number of programmes) excluding the programmes covering news, sports events and entertainment games. The providers are obliged to keep records about the European works provided in their service and must submit these records to the Rada pre Vysielanie a Retransmisiu (Council for Broadcasting and Retransmission - RVR) upon request. The RVR imposes sanctions such as warnings and fines in

case of any falling below the stipulated quota. In this respect, the RVR is also entitled to temporarily lower the quota of European works due to the economic situation of the service provider, availability of European works or the nature of the service.

The Amendment also clarifies the timeframe in which the quotas must be achieved. In the past, there were uncertainties among the broadcasters due to the unclear legislation in this respect. Even though the reports submitted to the European Commission outline yearly proportions for each service, the legislator chose that the quotas must be attained within each calendar month. This applies to the promotion of European works in both linear and non-linear services and also for the quotas to increase the accessibility to AV media services for people with visual or hearing disability (Art. 7 AVMSD). The reason for this narrow time frame is the prevention of circumventions by broadcasting European works with sign language, subtitling or audio-description primarily during the "unattractive" months e.g. during the summer holidays.

• *Zákon z 18. októbra 2012, ktorým sa mení a dopĺňa zákon č. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách v znení neskorších predpisov* (Act. No 342/2012 Coll. Amendment of Act. No 308/2012 Coll. on broadcasting and retransmission, 18 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16256 SK

Juraj Polak
Office of the Council for Broadcasting and Retransmission of Slovak Republic

Agenda

Welcome to Internet 2013 – a venue for discussions on freedom of expression online

14 - 15 February 2013 Organiser: OSCE Representative on Freedom of the Media Venue: Vienna
http://www.osce.org/event/internet2013

Book List

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