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IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2013-3

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Ashby Donald and others v. France

For the first time in a judgment on the merits, the European Court has clarified that a conviction based on copyright law for illegally reproducing or publicly communicating copyright-protected material can be regarded as an interference with the right of freedom of expression and information under Article 10 of the European Convention. Such interference must be in accordance with the three conditions enshrined in the second paragraph of Article 10 of the Convention. Due to the important wide margin of appreciation available to the national authorities in this particular case, the impact of Article 10 however is very modest and minimal.

All three applicants in this case are fashion photographers. They were convicted in France for copyright infringement following the publication of pictures on the Internet site Viewfinder. The photos were taken at fashion shows in Paris in 2003 and published without the permission of the fashion houses. The three fashion photographers were ordered by the Court of Appeal of Paris to pay fines of between EUR 3,000 and EUR 8,000 and an award of damages to the French design clothing Federation and five fashion houses, amounting in total to EUR 255,000. The photographers were also ordered to pay for the publication of the judgment of the Paris Court of Appeal in three professional newspapers or magazines. In its judgment of 5 February 2008 the Supreme Court (Court de Cassation) dismissed the applicants' argumentation based on Article 10 of the Convention and on Article 122-9°of the Code de la Propriété Intellectuelle (French Copyright Act). The Supreme Court was of the opinion that the Court of Appeal had sufficiently justified its decision, as the applicants could not rely on an exception in French copyright law, allowing the reproduction, representation or public communication of works exclusively for news reporting and information purposes.

In Strasbourg the applicants complained in particular of a breach of their rights under Article 10 of the European Convention. The Court explicitly recognises the applicability of Article 10 in this case, considering the conviction of the applicants and the order to pay damages as an interference with their right to freedom of expression, which also includes the publication of pictures on the internet. The Court, however, is of the opinion that a wide margin of appreciation is to be given to the domestic authorities in this case, as the publication of the pictures of models at a fashion show and the fashion clothing shown on the catwalk in Paris was not related to an issue of general interest to society and concerned a kind of "commercial speech". Furthermore, the member states are considered to be in a position to balance conflicting rights and interests, such as the right of freedom of expression under Article 10 of the Convention with the right of property (including intellectual property), as protected by Article 1 of the First Protocol to the Convention.

The European Court agrees with the French Court's finding that the applicants reproduced and represented the pictures without the authorisation of the copyright holders, hence infringing the rights of the intellectual property of others. The European Court refers to the reasoning by the Paris Court, emphasizing that it saw no reason to consider "that the national judge had overstepped his/her margin of appreciation by giving prevalence to the rights of fashion creators over the right to freedom of expression of the applicants". The European Court does not find the fines and the award of damages disproportionate to the legitimate aim pursued, arguing that the applicants gave no evidence that these sanctions had "financially strangled" them and referring to the guarantees of a fair trial not being under dispute in this matter. In these circumstances and taking into account the particularly important margin of appreciation of the national authorities, the Court concludes unanimously that there is no violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l'homme (cinquième section), Affaire* Ashby Donald et autres c. France*, requête n° 36769/08 du 10 janvier 2013* (Judgment by the European Court of Human Rights (Fifth Section), case Ashby Donald and others v. France, Appl. nr. 36769/08 of 10 January 2013)

http://merlin.obs.coe.int/redirect.php?id=16319 FR

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Parliamentary Assembly: State of Media Freedom in Europe

The Parliamentary Assembly of the Council of Europe (PACE) adopted its Resolution 1920 (2013) on the state of media freedom in Europe on 24 January 2013. The Resolution provides a critical audit of media freedom across Europe and thereby continues the PACE's earlier work on the same theme, e.g. its Recommendation 1897 (2010), "Respect for media freedom" (see IRIS 2010-3/3).

The Resolution addresses several very troubling and persistent problems, including threats to, and attacks on, investigative journalists (and those working with

them); the prosecution and imprisonment of journalists and Internet users for the expression of political opinions; the excessive application of criminal defamation laws (and excessive instances of civil-law defamation actions); interferences with freedom of expression and information through the media before and during elections; threats to the political independence of the media, in particular public service broadcasters, and precarious working conditions for journalists.

The PACE identifies specific states in which these problems are most pressing, typically highlighting individual cases and victims in respect of each problem. It is very significant that the PACE has taken this approach because it focuses attention on real examples and not just on general trends. It also increases pressure on States authorities to investigate particular attacks on, and assassinations of, media professionals properly.

Another strategy used by the PACE in this Resolution is to link the identified problems to relevant Council of Europe standards, e.g. the European Convention on Human Rights and the case-law of the European Court of Human Rights on freedom of expression; the (revised) European Social Charter; the Committee of Ministers' (CM) Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings (see IRIS 2003-8/4); CM Recommendations CM/Rec(2007)15 and No. R (1999) 15 on measures concerning media coverage of election campaigns (see IRIS 2007-10/103 and IRIS 1999-9/7); PACE Recommendation 1897 (2010) on respect for media freedom (see IRIS 2010-3/3); PACE Resolution 1577 (2007) "Towards decriminalisation of defamation" (see IRIS 2007-10/104), and PACE Resolution 1636 (2008) on indicators for media in a democracy (see IRIS 2009-1/4). This linking strategy is important because it uses relevant standards as European human rights bench-marks for shortcomings in practice at the national level.

The Resolution demonstrates awareness of relevant monitoring and reporting activities by other Council of Europe organs. Thus, it refers to the Commissioner for Human Rights' Report on Turkey (2011), when calling for reform of the Turkish Penal Code and it calls for the Commissioner's findings in his Opinion on Hungarian media legislation (2011) to be "fully implemented". It also refers to Opinions of the European Commission for Democracy through Law (Venice Commission) on Belarus (2010, 2011), when condemning the "persistent and systematic violation of media freedom" in the country.

The Resolution is based on a background report bearing the same name.

• "The state of media freedom in Europe", Resolution 1920 (2013), Parliamentary Assembly of the Council of Europe, 24 January 2013
http://merlin.obs.coe.int/redirect.php?id=16325 EN FR

• "The state of media freedom in Europe", Report, Parliamentary Assembly of the Council of Europe (Rapporteur: Mats Johansson), Doc. No. 13078, 7 December 2012
http://merlin.obs.coe.int/redirect.php?id=16326 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: Sky Österreich GmbH v. Österreichischer Rundfunk

Article 15 of the Audiovisual Media Services Directive (AVMSD) allows television channel operators to acquire exclusive broadcasting rights to events of high public interest. Other channels, however, must be able to have access to such events for the purpose of short news reports. The owner of an exclusive right must therefore provide other broadcasters with access to its signal to allow them to freely choose short extracts. The Directive permits that owners be compensated for access to their signal, but this compensation may not exceed the additional costs directly incurred in providing that access.

In accordance with the Directive, KommAustria, the Austrian regulatory authority for electronic audio media and electronic audiovisual media, decided in 2010 that Österreichischer Rundfunk, the country's public broadcaster, did not need to pay for the use of privately-owned broadcaster Sky Österreich's signal of certain Europa League matches for short news reports, because the additional costs incurred in providing ORF access to Sky's satellite signal were zero.

Sky brought the case to the Bundeskommunikationssenat, the Austrian Federal Communications Tribunal, which referred the issue to the Court of Justice of the European Union (CJEU) asking whether Article 15(6) of the AVMSD on compensation for the use of short extracts infringed the right to conduct a business and the right to property of holders of exclusive rights, as protected in Articles 16 and 17 of the Charter of Fundamental Rights of the European Union.

The CJEU, relying on Article 11 of the Charter of Fundamental Rights of the European Union, rules that the EU legislature was entitled to adopt the provision on compensation for the use of short extracts for the purpose of short news reports. The importance of safeguarding the fundamental freedom to receive information and the freedom of pluralism of the media (recital 48 of the Audiovisual Media Services Directive) allows the legislator to prioritize rights of public access to information over contractual freedom in

conducting a business. When Sky bought the exclusive rights, EU law already limited the amount of compensation to the additional costs directly incurred in providing access to the signal. Thus, Sky cannot rely on any (contractual) legal position that allows it to autonomously exercise its exclusive broadcasting rights for the purpose of short news extracts.

• Judgment of the Court of Justice of the European Union, Case C-283/11, Sky Österreich GmbH v. Österreichischer Rundfunk, 22 January 2013
http://merlin.obs.coe.int/redirect.php?id=16318 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV

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Advocate General: British and Belgian Lists of Events of Major Importance Confirmed

On 12 December 2012, Advocate General Jääskinen delivered his opinion to the Court of Justice of the European Union (CJEU) in the appeals procedure between UEFA and FIFA and the European Commission and thereby upheld the previous decisions of the European General Court (cases T-385/07, T-55/08 and T-68/08).

The General Court had dismissed the football authorities' complaints about the British and Belgian lists of events of major importance that must be broadcast on free-to-air television. The member states concerned had prepared their lists in accordance with Article 3a of the Television Without Frontiers Directive 89/552/EEC (now Art. 14(1)(2) of the Audiovisual Media Services Directive 2010/13/EU). Belgium's list included, *inter alia*, all of the matches of the World Cup finals, while the United Kingdom's list also included all of the matches of the European Championship finals. FIFA and UEFA had brought actions against those decisions, contesting the finding that all of those matches may constitute events of major importance for the public of those states.

In his opinion, the Advocate General states, firstly, that the check which the Commission is authorised to carry out in respect of the exercise of the member state's discretion in establishing national lists is limited to ascertaining whether there is a manifest error of assessment. Nevertheless, the Commission must examine carefully and impartially all the relevant aspects of the individual case. The review must remain restricted to ascertaining whether the Commission properly found or rejected the existence of a manifest error. There is no such manifest error in this case, he concludes.

The Advocate General explains that the restriction of exclusive broadcasting of sports events does not infringe the sports authorities' right to property. A right to property that protects the exclusive broadcast of sports events is defined neither in national law nor in European Union law. Its field of application therefore depends on the provisions setting out its limits, such as those of the Directive. The disputed measure therefore does not represent a restriction of the right to property in the sense of the Charter of Fundamental Rights.

The fact that the World Cup and European Championship are mentioned in recital 49 of the Directive as examples of events of major importance for society does not mean that the entirety of these events can always be included in the national lists of every member state, irrespective of their interest to the public. However, the reference to both competitions in the Directive means that a member state, if it includes the matches in these tournaments in its national list, does not need to include them in its notification to the Commission giving specific grounds concerning their nature "as an event of major importance for society".

• Advocate General's Opinion (C-201/11 P, C-204/11 P and C-205/11 P) of 12 December 2012
http://merlin.obs.coe.int/redirect.php?id=16328 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV

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European Commission: Bulgaria Referred to Court over Assignment of Broadcasting Authorisations

On 24 January 2013 the European Commission (Commission) issued a press release stating that it would refer Bulgaria to the Court of Justice of the European Union (CJEU) over the assignment of digital terrestrial broadcasting authorisations. Bulgaria stands accused of hampering competition in the future digital terrestrial broadcasting infrastructure market.

Bulgaria is preparing a switchover from analogue to digital terrestrial television to create more radio spectrum for new wireless communications services as from 1 September 2013, to comply with the EU's policy objectives under the Digital Agenda. In 2009 Bulgaria held two contest procedures to assign five spectrum lots for digital terrestrial television. Applicants had to meet certain criteria: amongst others, the criterion of having no link with content providers (TV channels operators) or broadcasting network providers (see IRIS 2009-4/7). The Commission considers that the contest procedures and the

applicable criteria unjustifiably limited the number of companies that can enter the Bulgarian digital terrestrial television infrastructure market (see IRIS 2011-4/12).

In May 2011 the Commission began infringement proceedings against Bulgaria (see IRIS 2011-7/11). The Commission concluded that Bulgaria did not comply with the requirements of the Competition Directive (Directive 2002/77/EC) by limiting the number of companies that could potentially enter the market for digital terrestrial broadcasting. The objective of the Competition Directive is to enhance competition in the electronic communications networks sector by preventing member states from excluding undertakings from providing such services or networks without proper justification. Two other Directives regarding the allocation of extra spectrum capacity, the Authorisation Directive (Directive 2002/20/EC) and the Framework Directive (Directive 2002/21/EC) were also adjudged to have been breached by Bulgaria due to the restrictive criteria that applicants in the competition for the spectrum lots for digital terrestrial television had to meet.

As a response to the complaints of the Commission the Bulgarian Government announced a new tender procedure for the allocation of extra spectrum capacity. Yet, regardless of the announced tender, the Commission has decided to take the final step in the EU infringement proceedings and refer Bulgaria to the CJEU, the reason for this being the fact that the spectrum allocated after the tender will only be available after the analogue switch-off, which is due on 1 September 2013. The Commission foresees that current TV channels will conclude agreements with broadcast network operators to be able to broadcast on the digital terrestrial broadcasting infrastructure when the switchover takes place, leading to the absence of operators willing to enter the digital terrestrial broadcasting infrastructure market after the switchover planned later this year. Bulgaria is not the only member state under scrutiny in the area of the digital broadcasting spectrum. The Commission has also sent a letter of formal notice to Italy (see IRIS 2006-8/5) and a "reasoned opinion" to France (in September 2011).

• Press release by the European Commission of 24 January 2013
http://merlin.obs.coe.int/redirect.php?id=16317 DE EN FR BG

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European Commission: Private Copying Recommendations Following Stakeholder Mediation

Private copying levies are a constant topic of debate in EU copyright law and policy. They have been on the harmonization agenda since the 1988 Green Paper on Copyright and the Challenge of Technology and, following stakeholder consultations (in 2006 and 2008) and the 2011 IPR Strategy, remain an on-going initiative of D.G. MARKT. In 2010 alone, the overall amount of levies collected in the EU was over EUR 600 million. The latest installment in this saga was the appointment in November 2011 of Mr António Vitorino as mediator to lead a stakeholder dialogue in this field. On 31 January 2013, Mr Vitorino's report on the results from such mediation was published as a recommendations document (Recommendations).

The Recommendations cover new business models, licensed services and the private copying exception (Part I), as well as levy systems in the internal market (Part II). Appendix I lists the stakeholders involved in the mediation process, while Appendixes II and III contain copies of statements concerning the process.

The Recommendations address both private copying and reprography levies, focusing on the problems caused by divergent national levy systems to the internal market. They are taken in line with existing Court of Justice of the European Union (CJEU) case law - namely Padawan v. SGAE (see IRIS 2010-10/7) and Stichting de Thuiskopie v. Opus (see IRIS 2011-7/2) -, and reference is made to the many existing CJEU referrals awaiting decision, namely Joined Cases VG Wort v. Kyocera Mita (already with an Opinion by A.G. Sharpston), Austro Mechana v. Amazon, Constantin Filmverleih v. UPC Telekabel, Copydan Båndkopi v. Nokia and ACI Adam et al. v. Stichting de Thuiskopie.

Mr Vitorino's recommendations were as follows:

- On the development of new and innovative duly authorized business models in the digital single market, it should be clarified "that copies that are made by end users for private purposes in the context of a service that has been licensed by rightsholders do not cause any harm that would require additional remuneration in the form of private copying levies."

- "Levies should be collected in cross-border transactions in the member state in which the final customer resides."

- In what concerns double payments in cross-border sales and payment liability, either (1) "the liability for paying levies should be shifted from the manufacturer's or importer's level to the retailer's level while simplifying the levy tariff system and obliging manufacturers and importers to inform collecting societies about their transactions concerning goods subject to

a levy.", or alternatively (2) "clear and predictable ex ante exemption schemes should be established."

- In the field of reprography "more emphasis should be placed on operator levies than on hardware based levies."

- "Levies should be made visible for the final customer."

- Finally, "more coherence with regard to the process of setting levies should be ensured by (a) defining 'harm' uniformly across the EU as the value consumers attach to the additional copies in question (lost profit); and (b) providing a procedural framework that would reduce complexity, guarantee objectiveness and ensure the observance of strict time-limits."

• António Vitorino, Recommendations resulting from the mediation on private copying and reprography levies, 31 January 2013
http://merlin.obs.coe.int/redirect.php?id=16323 EN

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NATIONAL

AL-Albania

Office for Copyright Protection Recommends Suspension of Licenses for Collective Rights Agencies

On 16 January 2013, the Office for Copyright Protection (Office) recommended to the Ministry of Culture the suspension of the licenses of two agencies that administer intellectual property rights. The agencies are Albautor, which holds rights to musical works, and AKDIE, which administers the rights of interpreters.

According to the Office, which is the state supervisory body for the area of copyright, these two agencies have not been able to collect royalties and to distribute them among authors. In addition, the Office stated that these agencies failed to submit the required information to this body, such as a list of fees and royalties, the authorisations issued by them together with the invoices, and information on their activity, as requested by the Office. In addition, the office claimed that these two agencies had not summoned the General Assembly every year, as requested. Thus, based on Law no. 9380 "On copyright and other related rights", the Office suggested to the Ministry of Culture that it should suspend the licenses of both agencies for a six-month term.

• *Zyra Shqiptare për të Drejtën e Autorit i propozon Ministrit të Turizmit, Kulturës, Rinisë dhe Sporteve pezullimin e licencës së agjencive "ALBAUTOR" dhe "AKDIE"* (Press release of the Albanian Copyright Office, January 2013)
http://merlin.obs.coe.int/redirect.php?id=16296 SQ

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Parliamentary Media Commission Completes Discussion of Audiovisual Media Services Bill

On 30 January 2013, the Parliamentary Commission on Education and Public Information completed the discussion of all articles of the audiovisual media services bill. The new act will replace the Act No. 8410 "On Public and Private Radio and Television." The debates on the amendment of the existing law have been ongoing since 2007.

First, the discussions focused on amending the existing law, while later a new bill was drafted, with the aim of harmonizing legislation with the Directive on Audiovisual Media Services of the European Union (2010/13/EU). So far, the discussions have been slow and unfruitful, due to political tension in the Parliament, political crisis, and further delays caused by other circumstances.

The Members of Parliament assembled in the Commission were, however, unable to agree on the formula for appointment of members to the new regulatory bodies, the Audiovisual Media Authority and the Steering Council of the public broadcaster. Failure to reach consensus in the Commission in this crucial matter might further delay the approval of the act.

In the current draft, the members of the Commission have agreed to elect members to the regulatory bodies by dividing the proposed members between the opposition and the ruling majority. The controversy has arisen over the last member of each body, since both regulators have an odd number of members. The representatives of the opposition maintain that the last member should be elected only with the consensus of both sides. Meanwhile, the ruling majority has stated that in cases where consensus is not possible, the last member should be allowed to be elected by a majority of votes. Since this is a crucial point for the future functioning of regulatory bodies and the implementation of the new act, it remains to be seen how the matter will be resolved and what will be the effects.

• *Ligji i Medias, mbetet pezull formula e dy institucioneve* (Media Law, the formula of two institutions yet undecided, January 2013) SQ

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AT-Austria

Video Section of Newspaper Website is Notifiable On-Demand Service

In a decision of 13 December 2012, the Austrian *Bundeskommunikationssenat* (Federal Communications Senate - BKS) ruled that the video section of a newspaper's website meets all the criteria of an on-demand service in the sense of Article 2(4) in conjunction with (3) of the *Audiovisuelle Mediendienste-Gesetz* (Audiovisual Media Act - AMD-G). Under Article 9 AMD-G, it must therefore be notified to the regulatory authority.

The "*Tiroler Tageszeitung*" operates a news portal, www.tt.com, which contains the online edition of its daily newspaper. Under the subdomain video.tt.com, the operator provides access to videos that are divided into categories (including news, culture, politics and economy) and can be searched. The video section has the same design and general navigation system as the rest of the newspaper's website.

The operator argued that the videos merely supplemented the rest of the website. They were not an on-demand service since the videos were not the principal purpose of the overall service. Furthermore, they were only short videos, which were not "television-like" in the sense of recital 24 of the Audiovisual Media Services Directive (2010/13/EU - AVMSD).

The BKS disagreed. Firstly, it was not obvious why the individual videos in the various categories were not "television-like". In terms of content and form, the videos were no different from traditional linear television broadcasts. In addition, the legislation did not set a minimum duration for a programme.

According to the BKS, the video section should also not be considered an incidental element of the newspaper's website. The videos were part of a separate subdomain that, apart from short descriptions, was reserved for exclusively audiovisual content and represented a "consumable" service without any textual content. The presentation and content of the videos stored in this subdomain confirmed that they did not merely fulfil the secondary or subordinate function of illustrating a particular text. The catalogue of programmes contained in the video section was therefore separate from the rest of the www.tt.com website and should therefore be treated as an independent service. According to the AVMSD, and in line with the AMD-G, such on-demand audiovisual services are notifiable and subject to the corresponding regulations.

• *Entscheidung des BKS vom 13. Dezember 2012 (GZ 611.191/0005-BKS/2012)* (BKS decision of 13 December 2012 (GZ 611.191/0005-BKS/2012))
http://merlin.obs.coe.int/redirect.php?id=16327 DE

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BE-Belgium

Flemish Public Broadcaster Fined for the Display of Red Bull and Burton

During the programme Café Corsari on één, a channel of the Flemish public broadcaster VRT, Seppe Smits, a snowboarder, was interviewed about the Snowboard World Cup in Antwerp. Seppe Smits was wearing a cap with the logo of his sponsor, Red Bull, and a t-shirt bearing the brand of another sponsor, Burton. During the interview with Seppe Smits and during two interviews with other guests, the Red Bull logo and the Burton brand were displayed several times. According to Vlaamse Regulator voor de Media (Flemish Media Regulator - VRM), this practice infringes Article 100, § 1, 3°Mediadecreet (Flemish Broadcasting Act) stating that product placement is allowed if no undue prominence is given to the products included in the programme.

According to the public broadcaster, the references to this brand and logo could not be labeled as product placement, because the broadcaster did not receive any payment or any equivalent consideration for their display. Furthermore, the public broadcaster emphasized that it did not have the intention to promote these two sponsors of the snowboarder. Finally, the public broadcaster stressed that it did its best to avoid the display of brands and logos in its programmes. Before the interview, for example, Seppe Smits was asked to take off his cap, but he refused to do so.

In order for product placement to exist, VRM had to examine whether the programme promoted the products of Red Bull and Burton. According to VRM, the positive display of brands and logos during programmes resulted in a positive attitude of the public towards these products. With this in mind, one can reasonably assume that some of the viewers of the programme will be convinced to buy these products. Hence, VRM judged that the systematic display of brands and logos during programmes promotes at least indirectly the products, services or images of these companies. Furthermore, the fact that the public broadcaster decided to do the interview with the snowboarder indicates that the broadcaster choose to display the brand and logos in exchange for this interview. In such a situation, the display of brands and logos becomes a commercial product and, thus, should

be considered as a similar consideration. Given that VRM stressed that the interview with Seppe Smits should be considered as a production aid for the public broadcaster, the several displays of the Red Bull logo and the Burton brand should be labeled as product placement. The general rule is that broadcasters are allowed to include product placement in their programmes. However, programmes containing product placement may not give undue prominence to the product, service or brand in question. According to VRM, this means that broadcasters are allowed to exchange the display of brands or logos of the sponsors of an interviewee for an interview with that person. However, at the end of the interview with Seppe Smits, the logo and brand were displayed 35 times during a period of 200 seconds. VRM decided that the public broadcaster had violated the limits of acceptable attention that could be given to a product in a programme containing product placement. As a consequence, Red Bull and Burton had benefited from undue prominence, in breach of Article 100, §1, 3. Due to the gravity of the violation, VRM decided to impose a fine of EUR 5,000.

• *VRM t. VRT, Beslissing 2012/036, 17 december 2012* (VRM v. VRT, Decision 2012/036, 17 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16320 NL

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CEM Position on Sponsorship from Manufacturers or Traders of Medicinal Products Available on Prescription

On 18 January 2013, after having consulted with the Bulgarian Drug Agency (BDA), the media authority Съвет за електронни медии (Council for Electronic Media - CEM) published a position on the sponsorship of media services by manufacturers or sellers of medicinal products. The CEM asked the BDA for an interpretation of a relevant provision of the Medicinal Products in Human Medicine Act (MPHMA).

According to Article 244 para. (1) MPHMA, an advertisement of medicinal products is any form of information, presentation, promotion or offer with the aim of encouraging the prescription, sale or use of the medicinal product.

On the other hand, Article 244 para. (2) MPHMA provides an exhaustive list of the cases that are not considered advertising. This list does not include the so-called sponsored messages which contain information about a medicinal product.

Consequently, the BDA and the CEM consider that the broadcasting of trade names of medicinal products, showing their packaging and providing information about them is to be treated as advertising aimed at the public under the MPHMA. It is therefore subject to an authorisation regime even though it might be part of a sponsorship deal.

On the other hand, when the purpose of an advertisement is only to remind the public of an already known medicinal product, it may contain only its brand name and an international non-patent name of the active substance. This is specified in Article 5 para. (5) of Regulation No. 1/25.01.2012 on the requirements for the advertising of medicinal products. The Regulation is the basis for the authorisation of advertising for medicinal products. Its requirements relate to packaging as well as to the content of articles, broadcasts and films.

Neither the MPHMA nor the Regulation talk about sponsorship as defined in the Radio and Television Act (RTA). The BDA therefore considers that sponsorship messages should be treated as advertising and concludes that sponsorship of medicinal products available only upon prescription cannot be allowed.

• ПРЕССЪОБЩЕНИЕ Спонсорство на медийни услуги от фармацевтични производители и / или търговци с лекарствени продукти (CEM Press release, 18 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16335 BG

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Mediaset Fined for Breach of Commitments in Telecinco/Cuatro Merger

On 6 February 2013, the Comisión Nacional de la Competencia (Spain's antitrust authority - CNC) ruled that its Resolution of 28 October 2010 concerning the merger of TV broadcasters Telecinco and Cuatro had been breached and that Mediaset España Comunicación, S.A. (owner of Telecinco) had therefore committed a very serious infringement under Article 62.4.c) of the Spanish Competition Act 15/2007 of 3 July 2007. Accordingly, it fined Mediaset EUR 15,600,000 pursuant to Article 63.1.c) of that Act.

On 28 October 2010, the CNC had approved the merger between TV channels Telecinco and Cuatro subject to the commitments given by Mediaset's channel (see IRIS 2011-1/25). On 6 June 2012, the CNC opened formal proceedings against Mediaset (owner of Telecinco) on the basis of the following allegations:

- Mediaset had breached the requirement for advertising companies Publiespaña and Publimedia to be functionally separate from each other, as the same persons were members of the managing bodies of both enterprises.

- Mediaset had unjustifiably delayed waiving its preemptive rights for the acquisition of audiovisual content and had also delayed or omitted granting option rights for adjusting the term of contracts in force. Furthermore, Mediaset had included prohibited clauses in certain contracts for the acquisition of audiovisual content.

- CNC found prima facie evidence that Mediaset had breached a commitment relating to the advertising market by implementing a strategy to link, de facto, the sale of advertising time on its different channels, a strategy strengthened by the recent introduction of a new advertising sales model by Mediaset.

• Press release of the CNC, 7 February 2013
http://merlin.obs.coe.int/redirect.php?id=16324 EN

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

Prisa and Telefónica Fined

"Trío Plus" is a package launched by Digital Plus (Prisa), DTS and Telefónica, offering Digital TV and ADSL (High Internet Bandwith).

On 28 January 2010, the Spanish National Competence Commission (Comisión Nacional de Competencia - CNC), opened an investigation regarding "Trío Plus", financed by Prisa, DTS and Telefónica. Therefore, the parties undertook to accept the obligation by virtue of which the products that were marketed together ("Trío Plus" or any other package) should also be offered separately at the same price.

Notwithstanding, the parties started marketing another package "Digital +Mini" through "Trío Plus". Consequently, CNC initiated another investigation as it considered this was a breach of the Resolution of 28 January 2010.

In application of Article 62.4.c of the Spanish Law of Competition (stating that breaching what it set forth in any resolution, agreement or commitment adopted according to the application of this Law, shall be considered as a serious infringement), the non-compliance with the resolution of 28 January 2010 shall be considered a serious infringement. CNC opened disciplinary proceedings against Prisa, DTS and Telefónica, which ended with a Resolution of 23 January 2013 establishing that the breach of the resolution was a serious infringement. As a consequence, Prisa and DTS were jointly and severally fined EUR 88,387, whereas Telefónica was fined EUR 100.259.

• *Resolucion de la Comisión Nacional de la Competencia (Expediente SNC/0016/11 DIGITAL+MINI), 23 de Enero de 2013* (CNC Resolution, case SNC/0016/11 DIGITAL+MINI, 23 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16342 ES

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FR-France

Programmes about Court Cases and the Right to be Forgotten

The 17th chamber of the regional court in Paris and the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) have been referred to in turn on the matter of the use and broadcasting of the image of prisoners, who invoke their entitlement to privacy and the right to be forgotten. As part of the programme entitled *Enquêtes Criminelles*, the television channel W9 broadcast a report on a widely-reported case in 1991 in which four soldiers were given life sentences for a number of rapes and murders carried out in a particularly barbarous fashion. One of the men sentenced, who has been in prison for more than 21 years, where he is studying for a doctorate in computer science and is employed by a computer services company, instigated proceedings against the production company and the television channel claiming compensation for the prejudice he had suffered as the result of the infringement of his privacy and his right to restrict the use of his own image. He was also calling for a ban on future broadcasting of the programme or, at the very least, for details in the programme to be rendered anonymous. He claimed that broadcasting images of him without his permission violated Article 9 of the Civil Code, on the right to privacy. The court recalled the principle that the protection afforded by Article 9 of the Civil Code could be overridden by the freedom to provide information on anything within the scope of legitimate public interest, as is justified in the case of certain types of topical events or items of general interest, and that it was therefore for the courts to seek a to find a balance and to opt for the solution that provided most protection for the interests of the most legitimate party. In the present case, the applicant party's image appeared in the disputed documentary in the form of both identity photographs taken in the course of his military career and in still photographs and footage filmed during the criminal trial. These documents were deemed to constitute relevant illustrations of a subject of general interest, namely reporting on a court case that constituted a public event at the time, since it helped to revive the debate on the

death penalty. The court found that the applicant's right to dispose of his own image had not been infringed.

Examining the alleged infringement of the applicant party's privacy, the court noted that the criminal facts and the context of the case had been lawfully revealed by the court transcripts. Repeating them could not be deemed to be without legitimate justification, even though this was not directly related to a topical matter. Moreover, the report did not reveal any element of the applicant party's current life. Lastly, the court found that the applicant party could not invoke a right to be forgotten as this was not set out in any text and, in the present case, it could not override the public's right to free, complete and objective information on a criminal case, since the disputed report brought to the public's knowledge the facts discussed in court that subsequently resulted in a court decision against the parties involved. The court also noted that the director had not failed in his duty to exercise prudence and objectivity in relating the acts committed by the applicant party and in his description of that party, who indeed did not contest the accuracy of the information contained in the programme. As a result, the court did not agree that his rights had been infringed, and the case was thrown out in full.

The CSA was subsequently required to pronounce on the programme entitled *Faites Entrer l'Accusé*, which relates major French criminal cases, and is broadcast on France 2. It invited the channel to strike a balance between informing the public and protecting individuals and their entourage, recommending that those elements connected with the case that are not strictly necessary for informing the public should be rendered unrecognisable. It has also written to all the editors broadcasting programmes dealing with past or current court cases reminding them of their obligations and informing them of these recommendations.

• *TGI de Paris, 17e ch. Civ., 14 janvier 2013 - T. El Borgi c. Métropole Télévision et a.* (Regional court of Paris, 17th chamber (civil cases), 14 January 2013 - T. El Borgi v. Métropole Télévision and others) FR

Amélie Blocman
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Court Re-Assesses Financing for Co-Producers of a Film

A company co-producing full-length films that signed a contract with two executive producers for the co-production of the film *Sans Arme, Ni Haine, Ni Violence*, which came out in 2008, has brought court proceedings against the executive producers, claiming that they infringed the provisions of the contract by failing to keep to the budget, the financing schedule and even the scenario for the film as set out in the contract. The company alleged that the executive producers had submitted an excessively high budget in order to obtain more financing, and had allowed themselves remuneration very much in excess of the amount that had been agreed. By seeking to make savings, to their sole advantage, the executive producers had had a substantially adverse effect on the scenario, and the final film was not what had originally been agreed. The result did not correspond to what the company expected on the basis of the original budget and its own investment, and it therefore claimed compensation for the prejudice suffered.

The commercial court noted that the co-production contract signed by the parties in the case referred to a forecast budget of EUR 10.8 million, with the executive producers contributing EUR 4.1 million, i.e. 63% of the financing requirement, taking into account the contribution made by the distributors, and indicated that "no change may be made to the forecast budget without the joint agreement of the parties". The final cost of the film was in fact EUR 7.4 million, with the executive producers contributing 26% of the financing requirement. Closer analysis of this final cost showed that personnel charges in respect of the executive producer and the line producer amounted to EUR 1.2 million, whereas the corresponding amount in the forecast budget was EUR 670,000, and that this increase of over 84% had not been the subject of any agreement between the parties. The forecast budget and the final financing schedule were therefore considerably out of step with the balance agreed in the contract, to the advantage of the executive producers. In the absence of any elements proving that the applicant co-production company would have agreed to maintain its financing unchanged despite the lower budget and the reduced contribution from the producers, the court found that the respective amounts of financing contributed by the parties should be recalculated on the basis of the actual cost. To maintain the original balance of the financing agreed by the parties, and in view of the actual cost of the film, the applicant company should have contributed EUR 687,000, not EUR 1.7 million. The court therefore ordered the defendant executive producers to pay back the difference of EUR 1 million to the applicant. The court rejected the application for damages for loss of opportunity however, as it felt nothing had been shown in court to establish that the lower budget for the film would have had a direct impact on its income. Similarly, the alleged failings regarding the scenario, which concerned the form rather than the content of the film, and according to the co-production contract involved choices on the part of the executive producers, did not constitute violation of the contract. Lastly, the court acceded to the request for its decision to be published in four newspapers (daily newspapers and specialised cinema press).

• *Tribunal de commerce de Paris (8e ch. contentieuse), 5 février 2013 - SA Studio 37 c. Vertigo Productions et Elia Films* (Commercial court of Paris (8th chamber, for disputed cases), 5 February 2013 - Studio 37 S.A. v. Vertigo Productions and Elia Films) FR

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CSA Sets Framework for Broadcasting Brief Excerpts of Sport Competitions

Legislation of 1 February 2012 intended to strengthen ethics in sport and the rights of sportsmen and sportswomen has amended Article L. 333-7 of the Sport Code by providing that "the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) shall lay down the conditions for broadcasting brief excerpts (of sport competitions) after consulting the French national Olympic committee (Comité National Olympique et Sportif Français - CNOSF) and the organisers of the sport events referred to in Article L. 331-5" (see IRIS 2012-3/22). Since 1984, Article L. 333-7 of the Sport Code, has given the channels the right to broadcast brief excerpts of sports events for which the rights are held by another editor, by virtue of the public's entitlement to be informed. Since no implementing legislation has ever been adopted, the legislation of 13 July 1992 reiterated the main features of a code of good conduct drawn up by the main broadcasters, the CNOSF, the CSA, sport journalists' unions, etc. The scheme adopted was the application to sports of the right to reproduce a brief excerpt contained in the legislation on rights similar to copyright (the broadcaster must be able to prove identification of the source, the excerpt must be brief, and incorporated in a news work). Two major areas of uncertainty remain, however, regarding the interpretation of the notions of "information broadcast" and "brief excerpts", and this has given rise to a number of court cases. On the basis of its new prerogatives resulting from the legislation of 1 February 2012, the CSA initiated a public consultation in order to obtain observations from all the stakeholders, and to determine the practicalities of exercising this broadcasting right. This process has now been completed, and the CSA published its deliberation on 15 January 2013; this defines the "conditions for broadcasting brief excerpts of sport competitions and non-sport events of major interest to the public for which audiovisual exploitation rights have been conceded". The adopted text, which came into force on 1 February 2013, applies to all television services established in France, and to their on-demand audiovisual media services. Although the initial draft of the deliberation, published by the CSA in September 2012, allowed the broadcasting of such excerpts on the Internet, "on clearly identified pages or areas devoted to the broadcasting of topical content of a general or sport nature, editorialised as part of an audiovisual offer, that may not be restricted solely to those images acquired under the right to broadcast brief excerpts", these provisions have been deleted from the final deliberation. As a result, brief excerpts may not be shown on the Internet, except via catch-up TV sites.

The deliberation states that the channels holding broadcasting rights must not "hinder the broadcasting by another television service or on-demand audiovisual media service", subject to two conditions: the broadcast must not precede the end of the original broadcasting of the programme by the service holding the rights, and the channel that holds the original rights must be clearly identified when each excerpt is broadcast, for at least five seconds. The text also defines the programmes during which brief excerpts may be broadcast, namely "information broadcasts", which are understood to include television newscasts and regular news updates, sport magazines covering a number of disciplines, general information programmes, and sport magazines dedicated to a single sport. Their broadcasting may not exceed ninety seconds per hour of airtime per day of the competition or event.

• *Délibération du CSA n°2013-2 du 15 janvier 2013 relative aux conditions de diffusion de brefs extraits de compétitions sportives et d'événements autres que sportifs d'un grand intérêt pour le public, JORF, 30 janvier 2013* (CSA deliberation no. 2013-2 of 15 January 2013 on the conditions for broadcasting brief excerpts of sport competitions and non-sport events of major public interest, Official Gazette of 30 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16344 FR

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GB-United Kingdom

Regulator Fines On-Demand Services for Failing to Protect Children from Potentially Harmful Pornographic Material

The UK communications regulator, Ofcom, has fined two video-on-demand services, Demand Adult and Playboy TV (both owned by Playboy) for failing to verify effectively the age of users accessing pornographic websites.

On-demand services, unlike other websites, are regulated under the Communications Act 2003 by means of a co-regulatory regime. The Association for Television on Demand (ATVOD) has been designated as the appropriate regulator of editorial content in such services, whilst Ofcom itself has retained the power to impose sanctions (see IRIS 2012-9/26). The ATVOD rules, which implement the requirements of the Audio Visual Media Services Directive, state that 'if an

on-demand service contains material which might seriously impair the physical, mental or moral development of persons under the age of eighteen, the material must be made available in a manner which secures that such persons will not normally see or hear it.' This may include the requirement of the use of a credit card, which is not available to those under 18, but not of a debit card, which is available to under-18s.

Demand Adult displayed hardcore pornographic material that could be viewed by clicking on a button labeled 'Enter I am over 18', and payment could be made by a debit card in order to access additional content. Playboy TV also required users to self-certify their age before accessing the main site, although here the material on the homepage showed sexual activity without explicit details. To access hardcore pornographic material, users could register with a debit card.

Ofcom considered that in neither case was there an effective age verification system. The breach was serious, repeated and reckless and therefore merited the imposition of a financial penalty. The penalties were GBP 65,000 in relation to Demand Adult and GBP 35,000 in relation to Playboy TV.

• Sanction: Decision by Ofcom Imposed on Playboy TV/Benelux Limited for the provision of the On-Demand Programme Service "Demand Adult" (www.demandadult.co.uk) from 31 May 2012 to 24 July 2012, decision of 16 January 2013
http://merlin.obs.coe.int/redirect.php?id=16312 EN

• Sanction: Decision by Ofcom to be imposed on Playboy TV/Benelux Limited for the provision of the On-Demand Programme Service "Playboy TV" (www.playboytv.co.uk) from 31 May 2012 to 24 July 2012. Decision of 16 January 2013
http://merlin.obs.coe.int/redirect.php?id=16313 EN

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Ofcom Fines Broadcaster after it Surrenders its Licences

An Arabic news and current affairs broadcaster has been fined GBP 25,000 by the UK Telecommunications regulator, Ofcom, for promoting a political movement in Tunisia. The regulator found that Al Mustakillah Television Ltd had breached rules concerning impartiality and political reporting in two programmes broadcast around the time of the Tunisian general election in October 2011. Unusually, Ofcom went ahead with the sanction despite Al Mustakillah handing back its UK licences last year, because of the seriousness of the breach, and to "act as an effective deterrent to other licensees."

Three viewers had complained that two programmes were used to promote the Popular Petition for Freedom, Justice and Development - a manifesto written by Dr Mohamed Elhachmi Hamdi, who appeared in both programmes. Dr Hamdi was also the sole director of Al Mustakillah, the sole director and majority shareholder of its holding company and the Ofcom compliance contact. As such, Ofcom considered Dr Hamdi was the 'person providing the service' and was therefore in breach of Rule 5.4 of the Ofcom broadcasting code, which says that programmes must exclude all expressions of the views and opinions of the person providing the service on matters of political controversy and current public policy.

Ofcom found that the first programme - broadcast before the election - consisted of almost entirely positive statements about the Popular Petition, and pejorative references to other parties, breaching rules 6.1 (election coverage), 5.11 (due impartiality) and 5.12 (the need to give significant views due weight). The second programme broke Rule 5.5 because the broadcaster did not provide evidence that the other parties' viewpoints were included when considering their programmes as a whole.

Al Mustakillah argued it had invited other parties' leaders to appear in the first programme - but they had declined to do so. Furthermore, it said that parties adopting the Popular Petition and Dr Hamdi were excluded from the mainstream Tunisian media, despite significant electoral support.

Ofcom considered Al Mustakillah's right to freedom of expression against the Code's requirement of due impartiality - and concluded that the broadcaster had breached the code in such a way as to require statutory sanction. In November 2012, Al Mustakillah surrendered its television broadcast licences; but Ofcom still considered the sanction relevant due to the seriousness of the breach, the possibility it could have influenced the Tunisian general election outcome and, while Al Mustakillah was no longer broadcasting under Ofcom's jurisdiction, it would "act as a deterrent and effective incentive to compliance to other licensees".

In setting the level of the fine, Ofcom looked at precedents such as the 2007 Islam Channel decision concerning Respect party candidate Yvonne Ridley (GBP 30,000), the 2008 Talksport case when presenter James Whale urged listeners to vote for Boris Johnson (GBP 20,000) and Aden Live in 2012, supporting the Southern Movement and independence of South Yemen (GBP 10,000).

• Decision by Ofcom Imposed on Al Mustakillah Television Limited in respect of the service: Al Mustakillah Television, 4 January 2013
http://merlin.obs.coe.int/redirect.php?id=16314 EN

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IE-Ireland

Renewed Efforts to Block File-Sharing Websites

On 6 December 2012 four music companies (EMI, Sony, Warner and Universal) launched a fresh legal bid aimed at blocking access on the part of Irish Internet users to the file-sharing website The Pirate Bay. This is the first legal action taken under the controversial copyright injunction law that was introduced in February 2012 (see IRIS 2012-4/31).

The European Union (Copyright and Related Rights) Regulations 2012 permit the owner of the copyright or a related right in a work to apply to the High Court for an injunction against an intermediary whose services are used by a third party to infringe a copyright or related right in respect of that work. The Pirate Bay is already blocked by another Internet service provider (ISP), Eircom, without a court order. The music companies are seeking orders against five ISPs (UPC, Vodafone, Imagine, Digiweb and Hutchinson 3G) who have not voluntarily blocked The Pirate Bay.

The application by the music companies was initially adjourned to allow the parties to meet in order to narrow down technical and other differences. It was subsequently reported in the media that the music companies had indicated that a further 260 websites have been identified by them as being objectionable and that they also intend to seek to have access to those sites blocked.

When the matter returned to the court, on 29 January 2013, Digital Rights Ireland Limited -an organisation established to defend civil, human and legal rights in the digital age - applied to intervene in these proceedings as an Amicus Curiae - a friend of the court. While no party to the proceedings objected to the application by Digital Rights Ireland Limited, the court set a date of 25 February 2013 to deal with their application.

• European Union (Copyright and Related Rights) Regulations 2012 (S.I. No. 59/2012)
http://merlin.obs.coe.int/redirect.php?id=15724 EN

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MK-"the Former Yugoslav Republic Of Macedonia"

Media Regulatory Authority adopts Guideline on Protection of Media Pluralism

The Macedonian media regulation authority, the Broadcasting Council, adopted a Прирачник за оценување на медиумскиот плурализам (Guideline for assessing media pluralism), whose aim is to provide the Council with the tools required to adjust its decision-making process in order to foster media pluralism in the country. This document comes in response to the remark in the EU Commission's Progress Report for 2012 where the Commission expressed "[...] widespread concerns about lack of pluralism and self-censorship [...]". Moreover, the EU Commission points out that the intense governmental advertising activity has a strong impact on editorial policy: "There continues to be concern that a large proportion of government-funded advertising campaigns is being directed to media supportive of the government."

The Guideline is a 10-page document, which sums up the provisions of the Закон за радиодифузната дејност (Broadcasting Activity Law from 2005) having Ofcom's paper "Measuring Media Plurality: Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport" as a starting point. The Guideline adapts the Ofcom's paper to the Macedonian media legal framework and defines the areas that will be taken into consideration when media pluralism is assessed:

1) Indicators for assessment of basic preconditions: the indicators in this part assess to what extent the legal environment creates conditions for fostering media pluralism and media freedom. 2) Indicators for assessment of pluralism of media types and genres: this part lists the indicators for assessing media genres, used by the broadcasters, as well as the regulatory guarantees, which ensure the independent allocation of funding for the public broadcasting service. 3) Indicators for assessment of political pluralism: these indicators measure if there is a proportionate presence of different political options, if the right for correction and reply is guaranteed, how the legal provisions on political advertising during elections are implemented etc. 4) Indicators for assessment of cultural pluralism: these indicators measure to what extent the provisions on European audiovisual works are put into practice, whether national minorities have TV and radio channels in their native languages and to what extent representatives from marginalized groups are employed in the electronic media, especially in the public broadcasting service. 5) Indicators for assessment of geographical pluralism: in this part the Guideline measures to what extent local and regional con-

tent is produced and the penetration rate of other delivery platforms in the geographical regions.

In regard to the issue of fostering pluralism and media freedom, the EU Commission in the 2012 Progress Report also suggested that the Broadcasting Council should improve its policy on granting and revoking licenses: "the Broadcasting Council also revoked the license of the television channel A2 TV on the grounds that the programming content was not in line with the license requirements. The Broadcasting Council needs to demonstrate that it is following a non-discriminatory and transparent approach".

• Прирачник за оценување на медиумскиот плурализам (Guideline for assessing the media pluralism, December 2012)
http://merlin.obs.coe.int/redirect.php?id=16300 MK

• The Former Yugoslav Republic of Macedonia 2012 Progress Report, SWD(2012) 332 final, 10 October 2012
http://merlin.obs.coe.int/redirect.php?id=16301 EN

• „Measuring Media Plurality: Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport", June 2012
http://merlin.obs.coe.int/redirect.php?id=16302 EN

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Broadcasting Authority Directive on Broadcast of Debates between Party Leaders

On 16 January 2013 the Broadcasting Authority issued, for the first time, a Directive setting out rules to be followed in debates between the leaders of the political parties during the election campaign aired on the broadcasting media. In its Directive the Authority stated that it wanted to ensure that in debates between the leaders of political parties and between their deputy leaders, equal treatment is afforded to them not only in so far as the allocation of time was concerned but also in so far as the behaviour of presenters and the audience was concerned. The Directive puts all the responsibility for ensuring fair treatment of the leaders and deputy leaders of political parties on the producer, presenter and broadcasting station. Ultimately it is the registered editor of the broadcasting station who has to bear the brunt of administrative proceedings before the Authority.

The Authority's Directive also addresses the role of the audience during such programmes which might, if not regulated, disturb the balance of a programme. The audience has to be equally distributed in such a way as to reflect the views of participants and political parties involved. No clapping or other form of interruption is allowed during such debates except at the beginning and the end of the programme. The audience should be given a copy of the rules of behaviour during the programme and such rules should be agreed to by the political parties and the producer. Where members of the public pose questions to the leaders, such questions have to be given to the producer before the programme begins. The criterion for selection of questions should be impartiality, balance and fairness (in the sense of equal treatment). Audience questions should reflect equal treatment of the participants in the debate.

Questions should be relevant to the political debate in the country. During the debate the same number of questions has to be addressed to the participants. Members of the audience, when asking questions, should limit themselves to posing the questions without adding frivolous comments or supplementary questions. No cutaways or reactions of individual members of the audience are allowed whilst one of the speakers is answering a question. A close-up of a member of the audience is permitted whilst s/he is posing the question. A cutaway shot of an individual member of the audience is allowed only when one of the leaders or deputy leaders is specifically addressing the individual member posing the question. Group and wide shots of the audience are allowed during the debate. If these shots are used during the reply of both leaders they have to be distributed equally.

The Directive also addresses the role of presenters. The presenter has to ensure that the leaders abide by the time allotted to them. S/he has to ensure that the programme is a lively one and that the participants are given equal treatment. It is not the presenter's role to pass comments on the leaders' interventions and replies, but s/he may ask in a fair way about facts that emerge from questions posed. It is not the task of the presenter to take part in the discussion: his or her role is restricted to posing questions and conducting the programme in a just, impartial, fair and balanced way. The presenter has to ensure that the programme is conducted in a civilised way, does not allow interruptions when the leaders are talking and uses every element of her/his skill to ensure that viewers can follow what is being stated by the leaders. The presenter should not make any gesticulation, signs or movements that could distract the attention of the leaders.

Finally, in so far as programme structure is concerned, the participants have to be at their respective allocated places before the programme starts. The presenter has to introduce the participants and invite them, one after another, to introduce themselves within one-and-a half-minutes or such other length of time that may be agreed to beforehand by the participants. The audience may, in each part of the programme, pose up to two questions or such other number of questions as may be agreed beforehand with the participants. The participants will be given equal time to answer questions. Part of the programme will be an open debate between the participants, who will be given identical camera work. The participants are entitled to a concluding address of the same time al-

location. The order of the debate is as follows: the Leader of the Opposition introduces; the Prime Minister concludes. In the case of a debate between the deputy leaders, an agreement should be reached between the party representatives and the producer and, should no agreement be reached, the order is established by lot. The order of the speakers has to be inserted in the running order of the programme.

The subjects to be discussed should be agreed upon between the producer and the party representatives. This will ensure impartiality and fair treatment. No televoting question can be asked as to whom of the leaders performed well. The station is required that in the case of a televoting question on a political matter to broadcast a tablethat states that televoting does not constitute a scientific survey and that the result does not necessarily reflect general opinion.

• *Direttiva tal-Awtorità tax-Xandir dwar regoli g147al Dibattiti bejn il Mexxejja Politiċi, 16.01.2013* (Broadcasting Authority Directive on Broadcast of Debates between Party Leaders, 16 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16316 MT

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NL-Netherlands

Dutch Public Broadcaster Fined for Infringing Limitations on Commercial Promotion

In 2009 and 2010, the Dutch public service broadcaster Omroepvereniging Tros aired the children's television series "Het Sprookjesboomfeest". On 28 June 2011, the Commissariaat voor de Media (the Dutch Media Authority - CvdM), imposed a fine of EUR 120,000 for non-compliance with the Dutch Media Act, the Mediawet 2008 (Mw). According to the CvdM, Omroepvereniging Tros had infringed the principle of non-commerciality by being servant to the profits of commercial third parties (Article 2.141(1) Mw) and by acting in conflict with the sponsor rules for public service broadcasters (Article 2.89(1)(b) Mw). By broadcasting "Het Sprookjesboomfeest", Omroepvereniging Tros was being servant to and promoted goods of the amusement park "De Efteling", because the park had developed an attraction and a musical, both called "Sprookjesboom".

Omroepvereniging Tros raised objections against the judgment, which were rejected by the CvdM, after which Tros appealed the decision before the District Court of Amsterdam. On 14 November 2012, the District Court affirmed, to a great extent, the decision of the CvdM. First, since Omroepvereniging Tros had failed to impose contractual limitations on the amusement park's abilities to make use of the fame of the brand "Sprookjesboom" that had been acquired through the television series, the court presumed that the public broadcaster was servant to the profits of De Efteling, which is prohibited by Article 2.141(1) Mw. According to the court, Omroepvereniging Tros had failed to rebut this presumption. Second, by using the name "Sprookjesboom" or "Sprookjesboomfeest" in the television series, Omroepvereniging Tros might have encouraged consumers to buy and use (forthcoming) articles and services related to the amusement park's brand "Sprookjesboom" and the amusement park itself, which is a violation of Article 2.89(1)(b) Mw. The court, however, did not agree with the CvdM's arguments concerning the musical performances, because the first series of performances ended before the television series had started, and the second series started several months after the end of the television series. Thus, the decision of the CvdM was affirmed, but the fine was reduced to EUR 108,000.

• *LJN: BY3391, Rechtbank Amsterdam, AWB 12/2446 WET, 14.11.2012* (Judgment of the District Court of Amsterdam, AWB 12/2446 WET - Omroepvereniging Tros v. Commissariaat voor de Media, 14 November 2012)
http://merlin.obs.coe.int/redirect.php?id=16315 NL

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No Permit Required for Fox Entertainment Group's Acquisition of Dutch Soccer Broadcasting Rights

On 29 November 2012, the Raad van Bestuur (Board of Directors) of the Nederlandse Mededingingsautoriteit (Competition Authority - NMa) decided that the acquisition of Eredivisie Media & Marketing (EMM), exploiter of the Dutch premier league soccer broadcasting rights on behalf of the top league clubs, by Fox International Channels is a concentration that does not require a permit.

Fox would obtain a 51 percent share in EMM as a result of the acquisition. According to the Board, the concentration does not lead to horizontal effects that could lead to a significant impediment of the competition on the national markets for broadcasting rights to audiovisual content, transmission of television signals on a wholesale level, and television advertisements. The Board's main reason for this conclusion is Fox' and EMM's small market share on these markets. While the Board notes that a further distinction can be made with regard to the markets for broadcasting rights of audiovisual content on the basis of types of rights or types of content, it does not see soccer rights as a separate market. In addition, the

Board states that there is no need for a further subdivision of the market to assess the concentration in question, as this would not influence the evaluation of the transaction.

With regard to vertical effects - excluding other market parties from content ('input foreclosure') or from potential markets ('customer foreclosure') - the Board asserts it has no reason to presume that the concentration will lead to vertical effects resulting in significant hindrance to competition. As to input foreclosure, the decision states that Fox does not merely offer its broad variety of content to its own television stations and that television stations have several options to obtain alluring broadcasting rights for content. With regard to customer foreclosure, the Board notes that the television stations of the parties to the concentration make up only a limited share of the market, partly due to the large number of other television stations than those of Fox and EMM.

In conclusion, the Board holds that it has found no reason that the concentration of which it was notified could substantially impede actual competition on the Dutch market or on a part thereof. Therefore, it clears the acquisition.

• *Besluit van de Raad van Bestuur van de Nederlandse Mededingingsautoriteit, zaak 7500/Fox - Eredivisie, 29 november 2012* (Decision of the Board of Directors of the Netherlands Competition Authority, case 7500/Fox - Eredivisie, 29 November 2012)
http://merlin.obs.coe.int/redirect.php?id=16322 NL

• *Besluit NMa inzake melding voorgenomen concentratie Fox Entertainment groep, Eredivisie Beheer B.V. en Eredivisie Media & Marketing C.V., NMa, Staatscourant Nr. 25298 7 december 2012* (Decision NMa with regard to the intended concentration Fox Entertainment Group, Eredivisie Beheer B.V. and Eredivisie Media & Marketing C.V., the Netherlands Government Gazette Nr. 25298 7 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16343 NL

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Tariffs for Supervising On-demand Services Introduced into Dutch Media Regulation

In a Regulation of 17 December 2012, the Dutch State Secretary of Education, Culture and Science amended the annex to Article 17 of the Mediaregeling 2008 (Media Regulation 2008). Consequently, as of 1 January 2013, on demand media services are subject to supervision costs.

The Media Regulation 2008 contains implementation provisions of the Mediawet 2008 (Media Act 2008). According to Article 17, commercial media organizations must contribute to the costs of supervising their media services by the Commissariaat voor de Media (the Dutch Media Authority). These costs are determined on the basis of the annex to Article 17. The annex was deemed outdated as it previously focused on traditional linear broadcasting services and allegedly did not correspond any longer to actual supervision costs.

Therefore, the current amendment aims to simplify and improve the cost arrangement in order to adjust it to current practice. To that end, the Regulation includes several changes. A new element is the replacement of the zero-tariff for both broadcasting services on the 'open internet' and commercial on demand services: the Regulation introduces a 'flat fee' of EUR 200 per year. The State Secretary justifies the low amount by explaining that the existing criteria (applicable to linear services) of 'average broadcasting time' and 'potential reach' do not apply to on-demand media services; furthermore, the regime with which on-demand services have to comply is less strict and accordingly requires less supervision. Other amendments regard: the same criteria will be used to determine the costs for different media services; foreign-oriented broadcasting services become a separate category with fixed rates; and the actual reach of television broadcasting services will be taken into account through market shares. As a result, major national stations and foreign-oriented services will contribute more to supervision costs.

• *Regeling van de Staatssecretaris van Onderwijs, Cultuur en Wetenschap van 17 december 2012, nr. MLB/461975, houdende wijziging van de bijlage behorende bij artikel 17 van de Mediaregeling 2008* (Regulation of the State Secretary of Education, Culture and Science of 17 December 2012, regarding amendment of the annex to Article 17 of the Media Regulation 2008)
http://merlin.obs.coe.int/redirect.php?id=16338 NL

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RO-Romania

CNA Withdraws Licenses of two Romanian TV Stations

On 22 January 2013, the *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA), the audiovisual regulatory authority, has withdrawn with immediate effect the license of the commercial TV station OTV. The decision was taken because OTV has not paid the numerous fines issued by the CNA in the last years for repeated breaches of the audiovisual legislation (see IRIS 2002-9/21, IRIS 2011-10/36, IRIS 2012-3/30, and IRIS 2012-6/31).

The TV station was accused of breaching Art. 57 (1) d) of the *Legea Audiovizualului nr. 504/2002* (Audiovisual Law no. 504/2002), which provides that the license for analogue transmission is withdrawn if the

holder does not provide to the Council proof of payment of the fines imposed upon it, within 6 months.

The Bucharest Court of Appeal on 31 January 2013 rejected OTV's request of temporary suspension of CNA's decision to withdraw the station's license. The owner of OTV stated he will contest this rejection before the High Court of Cassation and Justice. In addition, he had already on 28 January 2013 triggered a judicial procedure before the above-mentioned Court against the members of the CNA, for abuse of office in connection with the decision to withdraw the broadcasting license and for continuing to fine the station after the final decision.

Between 2009 and 2012, OTV was fined numerous times to a total of 1.17 million lei (approx. EUR 260,000) for breaches of the Audiovisual Law and of the *Codul Audiovizual - Decizia nr. 220/2011 privind Codul de reglementare a conţinutului audiovizual* (Audiovisual Code - Decision no. 221/2011 with regard to the Audiovisual Content Regulatory Code). OTV's license would normally have come to an end on 28 March 2013.

In 2012 the Council had reduced three times the duration of the license for OTV, but the decisions were contested and the station was allowed to continue its programmes. OTV has already been closed once in 2002 for repeated breaches of the legislation, but the station appeared again in 2004.

In another case, on 31 January 2013 the CNA also withdrew the license of the local TV station Televiştea Boişoara, from the Vâlcea County (southern part of Romania) for the same reason as for OTV, i.e., the lack of proof that the station had paid the fines due during 2010-2012 (a total of RON 290,000, approx. EUR 64,450).

• *Comunicat CNA, 22.01.2013* (CNA Press Release of 22 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16303 RO

• *Comunicat de presă_Sancţiuni, 31.01.2013* (CNA Press Release, 31 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16304 RO

Eugen Cojocariu
Radio Romania International

Culture Standing Committee Rejects Bills for the Modification of the Audiovisual Act

On 16 January 2013, the Culture Standing Committee of the Romanian Senate (upper Chamber of the Parliament) rejected a bill for the modification of the *Legea Audiovizualului nr. 504/2002* (Audiovisual Law no. 504/2002). The same day, the Committee also rejected a bill which intended to prohibit the use in radio and TV commercials of objects or symbols belonging to the national cultural patrimony. The plenum of the Senate will have the final decision on both bills, but there is no time limit (see IRIS 2010-1/36, IRIS 2011-4/31, and IRIS 2011-7/37).

The first bill was proposed by four members of the Parliament of PD-L (Democrat-Liberal Party) led by the former President of the above mentioned Committee, and was tacitly adopted on 17 May 2011 by the first chamber of the Romanian Parliament, the Chamber of Deputies.

The actual Culture Standing Committee of the Senate considered that there are too many amendments to the existing Act, which would modify 60-70% of the document, and - having regard to the legislative method - requested to draft a completely new Act, instead of amending the Act currently in force.

A sensitive subject currently being discussed is the future role of the *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA), the regulatory body for the audiovisual media. It was argued that the Council should only regulate the technical broadcasting standards of the radio and TV stations, and leave to the consumers' protection watchdog and to prosecutors to decide upon legal breaches in connection with the editorial contents of the programmes.

One of the most important provisions of the bill was the possibility for the CNA to impose higher fines on broadcasters due to censorship and editorial interference. Another proposal was to gradually impose fines on TV and radio stations for breaches of the Act. The existing form of the Audiovisual Law, adopted through the Emergency Government Decree no. 181/2008, was promulgated by Romania's President on 10 November 2009 and was aimed at implementing Directive 2007/65/EC into Romanian law and to set up the general framework for introducing digital audiovisual services for the general public (see IRIS 2010-1/36).

On the other hand, Senators from the Culture Standing Committee unanimously rejected a bill that was also intended to modify the Audiovisual Law and to ban the use in radio and TV commercials of objects or symbols belonging to the national cultural patrimony, such as the Romanian Atheneum concert hall, the statue of the national poet Mihai Eminescu or ancient carols. The draft law was initiated in December 2011 by a former social-democrat member of the Parliament. The Culture Standing Committee held that the initiative would limit freedom of expression and the possibility of making commercials.

• *Proiectul lui Turcan de modificare a Legii audiovizualului, respins de Comisia de Cultură a Senatului* (Turcan's project for the modification of the Audiovisual Law, rejected by the Culture Standing Committee of the Senate)
http://merlin.obs.coe.int/redirect.php?id=16305 RO

• *Proiectul lui Socaciu de interzicere în reclame a patrimoniului, respins de Comisia de Cultură-Senat* (Socaciu's project prohibiting patrimony in commercials, rejected by the Culture Standing Committee of the Senate)
http://merlin.obs.coe.int/redirect.php?id=16306 RO

Eugen Cojocariu
Radio Romania International

SK-Slovakia

Promotion of a Slovak Film

The Council for Broadcasting and Retransmission of the Slovak Republic ("Council") in April 2012 imposed a fine of EUR 497 on the (radio) public service broadcaster (PSB) for failing in its obligation to clearly separate (by acoustic means) advertising from editorial content. Although the present case concerned a radio station, its outcome may also be applied to audiovisual media, since the separation obligation is also valid for the latter.

The PSB aired a short message about a new Slovak film. The spot contained short extracts from the film along with the date of its premiere. It also introduced the main characters in a quite promotional manner, e.g., "Holder of the Czech lion (Czech version of the Oscar) Miroslav Krobot is a father04046Breakout actress of this season Judith Bárdos plays the rebellious daughter04046." and pointed out that the film was the "most award-winning film of this season". The PSB claimed that the message did not promote the actual film itself, but merely informed the public about the existence of a new Slovak film. According to the PSB, such a broadcast represents the "creative" way of fulfilling its obligation to promote Slovak culture, specifically Slovak film.

The Council disagreed with the PSB and stated that the message contained clear promotional references. Thus, its purpose was not merely to inform the public of the film's existence, but, on the contrary, its aim was to increase the size of this film's cinema audience. The spot therefore met the definition of advertising and should have been clearly separated by acoustic means from the editorial content.

The PSB filed an appeal before the Supreme Court stating the same arguments. The Court cancelled the decision and stated that "at given stage of the process [in view of the given reasoning] it cannot agree with Council that the spot fulfils the definition of advertising". The Supreme Court stressed that the Council did not pay enough attention to the "contradiction" between PSB's obligation to promote Slovak culture, e.g. Slovak film, and the restrictions on advertising (that applies to all broadcasters). In the Court's opinion, the Council did not answer the substantial question whether PSB may broadcast the spot devoted to Slovak film to fulfill its remit without breaching advertising rules.

On 4 December 2012, the Council adopted another decision in regard to this matter with the same result (a fine of EUR 497). The Council stated that the necessity for the PSB to follow the rules on advertising to the same extent as any other (commercial) broadcaster is essential in order to ensure a level playing field in the broadcasting sector. It is not the role of the Council to determine what the most suitable ways to promote Slovak film are, but when doing so, the PSB must abide by the existing rules on advertising.

The Council also stressed that it considers media coverage as a key issue in the positive development of Slovak film. That is why it adopted (in June 2012) the policy of transmitting announcements regarding new Slovak films. This policy enables broadcasters (public and commercial) to air short spots, e.g., on the premiere of a new Slovak film, which may inform the public about the plot, characters, the date of the premiere etc. Such a spot must however be part of a larger campaign aimed at promoting a Slovak film or carry a special message that indicates the intention to promote Slovak film as a whole. Such spots will qualify as public service announcements, thus falling outside the definition of advertising.

The PSB seems to accept the Council's arguments since it paid the fine and did not appeal against the decision.

• *Rozhodnutie c.: RP/083/2012, 04.12.2012* (Council's decision of 4 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16307 SK
• *Najvyšší súd, 4Sž/10/2012, 18.09.2012* (Supreme Court's decision, 4Sž/10/2012, 18 September 2012)
http://merlin.obs.coe.int/redirect.php?id=16336 SK

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

Broadcasting of a Film Trailer is Advertising

The Supreme Court on 13 November 2012 confirmed a decision of the Council for Broadcasting and Retransmission of the Slovak republic ("Council") in which the Council had imposed a fine of EUR 3,319 on the major commercial TV station broadcasting the channel "TV JOJ" for broadcasting more than 12 minutes of advertising in one hour.

The Council's monitoring revealed that during one of the examined hours the broadcaster transmitted advertising spots that altogether lasted 11 minutes and

59 seconds. However, during the same hour, another message (of 19 sec.) about a film that was coming to cinemas that week was broadcast. This spot was aired amongst announcements made in connection with the broadcaster's own programmes. The announcement contained short extracts from the film with brief text information on its plot. The words "In the cinemas from 04046." with the name of the distribution company was displayed at the end of the message.

During the legal investigation, the broadcaster claimed that the particular spot was a usual trailer for his own programme and should therefore not be counted as advertising time. In order to sustain this statement, the broadcaster presented the license agreement that entitled him to transmit the film on his TV channels. He also claimed that viewers must have understood that the film is his own programme because of the time slot of the spot (amongst other trailers not among advertising spots).

In its decision, the Council stressed that any announcement must be assessed on the basis of its content and nature and not by the provisions of a particular contract. The spot itself did not carry any kind of message that would inform viewers about the fact that the broadcaster would air this programme in future. On the other hand, the spot contained very clear information about the date of the cinema premiere.

The Council also reviewed the contract and pointed out that according to its provisions the broadcaster was not allowed to broadcast this film on its TV channels for at least one year and three months from the broadcast of the so-called trailer. On the contrary, it was obliged under the contract to promote this film on its TV channels one week before its cinema premiere. Based on these facts, the Council stated that despite the fact that the broadcaster owns the broadcasting rights for this film, the purpose of this message was clearly to promote the premiere of this film in cinemas. Thus, the spot qualifies as an advertising spot and must be counted within the total time devoted to advertising.

The broadcaster claimed in its appeal that no regulation sets any "time restrictions" regarding announcements made in connection with own programmes. The Court however dismissed the broadcaster's appeal and agreed with the Council that a regular viewer could not have known that the featured film would be aired on the broadcaster's TV channels.

The Court however did not answer the question touched upon in the Council's decision, if a "trailer" may serve its purpose if it is connected with a film that will be aired at soonest in more than a year's time. This question will yet have to be resolved soon since the Council is already investigating a similar case where the same broadcaster aired a spot about another film (that was just coming to the cinemas), but this time it carried along with the date of the premiere the text "TV JOJ will broadcast this film in the future".

• *Najvyšší súd, 3Sž/10/2012, 13.11.2012* (Supreme Court decision of 13 November 2012, 3Sž/10/2012)
http://merlin.obs.coe.int/redirect.php?id=16337 SK

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

TM-Turkmenistan

New Law on Mass Media

The new Act "On Mass Media" adopted by the parliament on 22 December 2012 entered into force in Turkmenistan on 4 January 2013. It replaces the Act of Turkmen SSR "On Press and Other Mass Media", which was adopted in 1990 at the time of the Soviet Union and had never been amended since.

The Act proclaims a number of basic principles of state policy in the media area. It declares the freedom of the media and the freedom to choose the forms in which one expresses one's views and convictions, prohibits censorship and promotes journalists' self-regulation. It bans interference in the activities of the media, the creation of monopolies and guarantees economic support, including the right to receive tax incentives and state subsidies.

Nevertheless, the Act does not lay down trigger mechanisms for their implementation, and many of its principles may be considered mere formalities. However, the declarative character was fundamental to the previous Act, which on paper also enshrined the right to establish media for political parties, non-governmental organizations, for creative, religious, and other associations, as well as for adult citizens of Turkmenistan.

A distinctive feature of the Act is the expansion of its scope and the introduction of provisions on Web publications, which henceforth must be registered by a state body as legal entities. The Act also requires any content produced for public distribution to be registered. Thus, the Act allows for the possibility to hold responsible those who distribute user-generated content on the Internet without special registration.

• Закон Туркменистана « О средствах массовой информации » (Act of Turkmenistan "On Mass Media" of 22 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16295 RU

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

US-United States

Court Issues Corrective Statements for Anti-Tobacco Campaign

On 17 August 2006, the U.S. Federal District Court for the District of Columbia ("Court") issued a judgment against cigarette manufacturers ("Manufacturers") for violating civil racketeering laws by deceiving the public about the health risks of smoking. The Court ordered the Manufacturers to disseminate court-approved corrective statements ("Statements") to the public via television for at least 15 seconds on at least one "major" television network once per week between the hours of 7:00 p.m. and 10:00 p.m. between Monday and Thursday for one year and ordered the parties to submit proposals for the exact wording of the Statements.

The Court recently completed its review of the proposals and issued an amended final opinion on 27 November 2012 that set out five specific declarations that the Manufacturers may use for their Statements. The Court explained that it selected the approved declarations, such as "[a] federal court has ruled that the defendant tobacco companies deliberately deceived the American public by falsely selling and advertising low tar and light cigarettes as less harmful than regular cigarettes," because these declarations are "purely factual." Each declaration must also be prefaced by an admission that the Manufacturer "deliberately deceived the American public about the health effects of smoking". The United States Justice Department is set to meet with the Manufacturers in the coming months to discuss how the advertisements must be aired and further clarify the media that must carry the Statements and the anticipated costs involved.

A spokesman for the Campaign for Tobacco-Free Kids praised the ruling, exclaiming that it is "a small price to pay for the devastating consequences of [the Manufacturers'] wrongdoing." By contrast, the Manufacturers demonstrated a more cautious reaction to the ruling. A spokesman for Reynolds American Inc. Philip Morris USA explained that it is "reviewing the judge's ruling and considering their next steps," which may include appealing the ruling.

- U.S. Federal District Court for the District of Columbia, decision of 17 August 2006
http://merlin.obs.coe.int/redirect.php?id=16310 EN
- U.S. Federal District Court for the District of Columbia, amended final opinion of 27 November 2012
http://merlin.obs.coe.int/redirect.php?id=16311 EN

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Agenda

The European Cyber Security Conference: Securing The Internet Economy
16 May 2013 Organiser: Forum Europe Venue: Brussels Tel.: +44 2920 783 020 Fax: +44 2920 668 992 Email: info@forum-europe.com http://eu-ems.com/summary.asp?event_id=146&page_id=1219

Book List

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