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Legal Observations
of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Eon v. France

In a Chamber judgment of 14 March 2013 the European Court of Human Rights made clear that the French president should not be overprotected against insulting statements, especially when these statements, with a satirical undertone, have been uttered as part of a public or political debate.

The case concerns the criminal conviction of Hervé Eon, a socialist and anti-GM activist living in Laval, for insulting the President of France, Mr. Sarkozy. In 2008, during a visit to Laval by the President of France, Eon waved a small placard reading "Casse toi pov'con" ("Get lost, you sad prick"), an allusion to a much publicised phrase that the President himself had uttered earlier that year at the International Agricultural Show in response to a farmer who had refused to shake his hand. The phrase had given rise to extensive comment and media coverage and had been widely circulated on the Internet and used as a slogan at demonstrations. Eon was immediately arrested by police and taken to the police station. He was prosecuted by the public prosecutor for insulting the president, an offence punishable under section 26 of the Freedom of the Press Act of 29 July 1881. The court of first instance of Laval found, in particular, that by repeating the phrase in question, Eon had clearly intended to cause offence to the head of State. Eon was fined EUR 30, a penalty that was suspended. The judgment was upheld by the court of appeal of Angers. Subsequently, an appeal to the Supreme Court (Court de Cassation) was dismissed. Eon lodged an application with the European Court of Human Rights, arguing that his conviction for insulting the President of France had infringed his freedom of expression.

While accepting that the phrase in issue, taken literally, was offensive to the French President, the European Court considered that the showing of the placard with the slogan should be examined within the overall context of the case. The European Court emphasized the importance of free discussion of matters of public interest. The Court considered that Eon's repetition of a phrase uttered earlier by the President had not targeted the latter's private life or honour; nor had it simply amounted to a gratuitous personal attack against him. Instead, the Court took the view that Eon's criticisms had been political in nature. There was therefore little scope under Article 10 for restrictions on freedom of expression in the political sphere. The Court reiterated that politicians inevitably and knowingly laid themselves open to close public scrutiny of their words and deeds and consequently had to display a greater degree of tolerance towards criticism directed at them. Furthermore, by echoing an abrupt phrase that had been used by the President himself and had attracted extensive media coverage and widespread public comment, much of it humorous in tone, Eon had chosen to adopt a satirical approach. Since satire was a form of expression and comment that naturally aimed to provoke and agitate, any interference with the right to such expression had to be examined with particular care. The European Court held that criminal penalties for an expression and conduct such as that displayed by Eon were likely to have a chilling effect on satirical contributions to discussion of matters of public interest, such discussion being fundamental to a democratic society. The criminal penalty imposed on Eon, although modest, had thus been disproportionate to the aim pursued and unnecessary in a democratic society. The European Court therefore found a violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l'homme (Cinquième section), affaire Eon c. France, requête n° 26118/10 du 14 mars 2013* (Judgment by the European Court of Human Rights (Fifth Section), case Eon v. France, Appl. nr. 26118/10 of 14 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16411 FR

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European Court of Human Rights: Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden

Only a few weeks after the Strasbourg Court's judgment in the case of Ashby Donald and others v. France (ECtHR 10 January 2013, see IRIS 2013-3/1), the Court has decided a new case of conflicting rights, opposing copyright as intellectual property right under Article 1 of the First Protocol and freedom of expression guaranteed by Article 10 of the Convention. The case concerned the complaint by two of the co-founders of The Pirate Bay, that their conviction for complicity to commit crimes in violation of copyright law had breached their freedom of expression and information. During 2005 and 2006, Fredrik Neij and Peter Sunde Kolmisoppi were involved in different aspects of one of the world's largest file-sharing services on the Internet, the website The Pirate Bay (TPB). TPB made it possible for users to come into contact with each other through torrent files. The users could then, outside TPB's computers, exchange digital material through file-sharing. In 2008 Nej and Sunde were charged with complicity to commit crimes in violation of the Swedish Copyright Act. Several companies in the entertainment business brought private claims

within the criminal proceedings procedure against the defendants and demanded compensation for the illegal use of copyright-protected music, films and computer games. In 2010 Neij and Sunde were convicted and sentenced to prison sentences of ten and eight months respectively, and ordered to pay damages of approximately EUR 5 million. Neij and Sunde complained under Article 10 of the Convention that their right to receive and impart information had been violated when they were convicted for other persons' use of TPB. They also alleged that they could not be held responsible for other people's use of TPB, the initial purpose of which was merely to facilitate the exchange of data on the Internet.

In its decision of 19 February 2013 the European Court affirmed that the applicants have put in place the means for others to impart and receive information within the meaning of Article 10 of the Convention and that consequently the convictions of Neij and Sunde interfered with their right to freedom of expression. Such interference breaches Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 §2 and was "necessary in a democratic society" to attain such aim or aims.

That the interference by the Swedish authorities was prescribed by law and pursued the legitimate aim of the protection of rights of others and prevention of crime, was not under discussion. Again the crucial question was whether this interference corresponded to a pressing social need, meeting the test of necessity in a democratic society. The Court argued that the Swedish authorities had a particularly wide margin of appreciation to decide on the matter - especially since the information at stake was not given the same level of protection as political expression and debate - and that their obligation to protect copyright under both the Copyright Act and the Convention had constituted weighty reasons for the restriction of the applicants' freedom of expression. Due to the nature of the information at hand and the balancing interest of conflicting Convention rights, the wide margin of appreciation the national authorities could rely on in this case, was therefore particularly important. The Swedish courts advanced relevant and sufficient reasons to consider that the activities of Neij and Sunde within the commercially run TPB amounted to criminal conduct requiring appropriate punishment. In reaching this conclusion, the European Court had regard to the fact that the domestic courts found that Neij and Sunde had not taken any action to remove the torrent files infringing copyright, despite having been urged to do so. Instead they had been indifferent to the fact that copyright-protected works had been the subject of file-sharing activities via TPB. Therefore, the Court concluded that the interference with the right to freedom of expression of Neij and Sunde had been necessary in a democratic society. It rejected the application under Article 10 of the Convention as manifestly ill-founded.

• Decision of the European Court of Human Rights (Fifth Section), case of Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, Appl. nr. 40397/12 of 19 February 2013
http://merlin.obs.coe.int/redirect.php?id=16412 EN

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EUROPEAN UNION

General Court: Partial Annulment of the Commission Decision Finding Anti-Competitive Conduct on the Part of Copyright Collecting Societies

On 12 April 2013 the General Court of the European Union delivered its judgment in Case T-442/08 CISAC v. European Commission, as well as in twenty other related cases involving a like number of European collecting societies. In it, the Court partially annulled the Commission's decision of 16 July 2008 (Case COMP/C2/38.698 - CISAC, 2003 O.J. (L 107), see IRIS 2008-8/5).

The International Confederation of Societies of Authors and Composers (CISAC) is an umbrella organisation representing collecting societies in over 100 countries. Its members provide services in their countries of establishment relating to the management of musical works, mediating between authors (and/or foreign collecting societies) and commercial users, such as broadcasters or organisers of live shows.

The majority of EU collecting societies in this field provide services on the basis of the non-binding CISAC model contract for cross-border management and licensing of authors' public performance rights of musical works. Collecting societies adapt this into Reciprocal Representation Agreements (RRAs), whose scope covers the exercise of offline uses, as well as uses via the Internet, satellite and cable broadcast. Through a network of RRAs, each collecting society is granted multi-repertoire licenses covering the portfolio of other members, but is only allowed to license uses in its territory of establishment.

This restrictive licensing approach led to refusals by collecting societies to grant community-wide licenses to commercial users seeking them, namely television and music broadcasters. As a result, some of these users - RTL in 2000 and Music Choice Europe in 2003 - lodged formal complaints with the European Commission, which led to the 2008 Commission's decision - applying solely to uses via the Internet, satellite and cable transmission. This decision, taken under Art. 81 of the EC Treaty and Art. 53 of the EEA Agreement

prohibited 24 European collecting societies from engaging in practices that limited the provision of services outside their domestic territory, as these were deemed restrictive of competition. Significantly, the decision allowed for the continuance of RRAs, subject to compliance with 3 prohibitions:

1. The imposition (or de facto application) of membership restrictions that limit an author's freedom of choice of collecting society;

2. The grant of exclusive licenses to collecting societies in their territory of establishment;

3. The existence of concerted practices between collecting societies leading to national territorial limitations.

CISAC and 22 collecting societies appealed the decision to the General Court. The Court's baseline for analysis was that, in disputes over the existence of an infringement, it is for the Commission to establish the pre-requisite circumstances of the same, by adducing "precise and consistent evidence" to that effect. CISAC defended the decision to provide for territorial limitations in RRAs by arguing the necessity to maintain a local presence so as to effectively combat unauthorised uses of musical works. In this respect, the Commission's analysis focused mostly on authorised uses, failing to demonstrate how it would be possible for collecting societies to satisfactorily untangle the monitoring of those uses and the enforcement of unauthorised uses.

When analysing the case and the arguments of both parties, the Court concluded that the Commission failed to prove the required evidentiary legal standard for the "existence of a concerted practice relating to the national territorial limitations", either by (1) demonstrating the existence of a concerted practice to that aim, or (2) by showing that the collecting societies justifications for the parallel conduct - namely those related to the need to effectively enforce unauthorised uses - were implausible. As a result, Art. 3 of the 2008 decision was annulled, to the benefit of CISAC and twenty of the collecting societies involved.

The Commission can appeal this decision (on the points of law) to the Court of Justice, within two months.

• General Court of the European Union, press release No 43/13, The General Court partially annuls the Commission decision finding anti-competitive (Luxembourg, 12 April 2013)
http://merlin.obs.coe.int/redirect.php?id=16427 DE EN FR

• Judgment of the General Court (Sixth Chamber) of 12 April 2013, CISAC v. European Commission
http://merlin.obs.coe.int/redirect.php?id=16428 DE EN FR

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European Commission: Public Consultation on the Report from the High Level Group on Media Freedom and Pluralism

On 21 January 2013, the High Level Group on Media Freedom and Pluralism published its report "A free and pluralistic media to sustain European democracy" (see IRIS 2013-2/3). In an effort to gather a variety of views and opinions on the report, the European Commission launched a public consultation on 22 March 2013. Responses to the consultation will contribute to assessing whether additional actions need to be undertaken by the European Union in this field. According to the Commission, the public consultation will lead to a broad debate on media freedom and pluralism among citizens, organisations and public authorities, and is therefore targeted at the widest possible range of stakeholders.

With regard to the content, the consultation recalls the High Level Group's recommendations. They relate to, inter alia, the competence of the European Union in the field of media freedom and pluralism, the foundation of independent media councils, the funding of cross-border European media networks, and the creation of a network of national audio-visual regulatory authorities. The European Commission opens a public debate on the topics "without explicitly foreseeing at this stage the nature, scope and timing of follow-up actions".

The consultation on the report, which is available on the website of the Commission, runs from 22 March until 14 June 2013. Contributions will be published on the website of the Directorate General for Communications Networks, Content and Technology of the European Commission.

• Public Consultation on the Independent Report from the High Level Group on Media Freedom and Pluralism, 22 March 2013
http://merlin.obs.coe.int/redirect.php?id=16461 DE EN FR

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European Commission: Public Consultation on the Independence of Audiovisual Regulatory Bodies

On 22 March 2013, the European Commission launched a public consultation on the independence of audiovisual regulatory bodies. The aim of the Consultation is to gather views on the issue of independence of audiovisual regulatory bodies competent for audiovisual media, and on possible options for strengthening the independence of such regulatory

bodies. It considers that such options may include the revision of Article 30 Audiovisual Media Services Directive (AVMSD). The background of this discussion lies in the essential democratic value of ensuring a free and pluralistic media.

The consultation is a response to the Report of the High Level Group on Media Freedom and Pluralism in the European Union (see IRIS 2013-2/3). This report contains 30 recommendations on the respect, protection, support and promotion of media freedom and pluralism. In short, the Report recommends that Article 30 AVMSD be amended to guarantee the independence of audiovisual regulatory bodies. The current wording of this Article does not impose a direct obligation to create an independent regulatory body if one does not already exist.

Due to the limited scope of Article 30 AVMSD, a European Citizens' Initiative on Media Pluralism was established with the aim of safeguarding media freedom and pluralism. The Initiative was registered with the Commission on 5 October 2012 and will end on 1 November 2013. Also, in January 2013, the Centre for Media Pluralism and Media Freedom published a study that describes the possible positive effects on media pluralism of establishing independent audiovisual regulatory bodies.

These recent studies on media pluralism and the independence of audiovisual regulatory bodies, as well as the Commission's own experience on the topic and recurring calls for a harmonised independence obligation by the European Parliament and society, justify the need for the current public consultation. The consultation aims to get an insight into what members of European society think about the need for (formalised) independence of audiovisual regulatory bodies that act within the scope of the AVMSD.

The Commission will not propose any changes if the results of the Consultation show that the current situation is satisfactory. If the current situation is not found to be satisfactory, five options to strengthen independence are outlined in point 5 of the consultation. Both legislative and non-legislative options are proposed, including for example, strengthening monitoring activities, formalising cooperation between audiovisual regulatory bodies and creating the explicit requirement for member states to guarantee the independence of their national regulatory bodies.

The consultation runs from 22 March 2013 until 14 June 2013 (12 weeks). Contributions will be published on the website of the Directorate General for Communications Networks, Content and Technology.

• Public Consultation on the Independence of Audiovisual Regulatory Bodies, 22 March 2013
http://merlin.obs.coe.int/redirect.php?id=16463 DE EN FR
• European Citizens' Initiative on Media Pluralism
http://merlin.obs.coe.int/redirect.php?id=16467 DE EN FR
• Centre for Media Pluralism and Media Freedom: European Union Competencies in Respect of Media Pluralism and Media Freedom
http://merlin.obs.coe.int/redirect.php?id=16417 EN

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European Commission: Joint Communication on European Neighbourhood Policy

On 20 March 2013, the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy published a joint communication on European Neighbourhood Policy (ENP). The ENP was revised in 2011 in order to "provide more support for partner countries building deep and sustainable democracy". The Joint Communication is accompanied by twelve national reports on neighbouring countries in the southern Mediterranean area (Morocco, Tunisia, Israel, Palestine, Lebanon, Jordan and Egypt) and to the east (Armenia, Azerbaijan, Georgia, Moldova and Ukraine).

The Communication notes that "insufficient progress" has been made on implementation of the recommendations on freedom of expression, the press, and the media since the revision of the ENP. The media suffer from "political and economic interference, a lack of diversity and self-censorship".

The Commission and the High Representative are calling on the various partner countries to make more effort in the media field:

- Armenia should ensure greater independence and diversity in the media, and restrict the conditions for withdrawing broadcasting licences;

- In Azerbaijan, freedom of expression and the media remains a subject for concern: journalists are being intimidated and threatened, and the bill on defamation has still not been submitted to the national Parliament.

- In Egypt, considerable progress has been noted since the change of government, although a number of cases of interference have been reported.

- In Georgia, access to the media has improved (must-carry/must-offer rules), but there is still political interference.

- The exercise of freedom of expression and the media remains "problematic" in Palestine; numerous violations of the freedom of on-line media have also been noted.

- Restrictions on the freedom of the media and the press at the time of revising legislation on the press have given rise to concern in Jordan.

- The report on the Lebanon establishes that the media environment is relatively liberal and that freedom of expression is observed, despite a number of isolated incidences of intimidation and censorship. A bill on regulating on-line media was withdrawn after attracting much criticism. On audiovisual policy, the report indicates that the national audiovisual council (Conseil National de l'Audiovisuel) remains a purely consultative authority, and that decisions on granting licences are made by the Council of Ministers.

- In Morocco, hindrances to freedom of expression and of the media have been reported (including intimidation and violence directed at journalists). The report nevertheless notes the emergence of a "public debate on government action", largely thanks to television broadcasts.

- The report on Moldova notes progress in legislation, with the adoption and implementation of legislation on freedom of expression. There has, however, been no progress with the reform of the Broadcasting Code and public-service broadcasting.

- In Tunisia, a certain number of initiatives with a view to establishing the independence of the media have been reported, although a number of outbreaks of violence on the part of extremist groups are endangering the progress made with freedom of expression.

- Ukraine has not implemented most of the recommendations made in 2012. It is invited to adopt clear rules on access to the media for election candidates. The report also notes a lack of progress in the adoption of a bill on public-service broadcasting and transparency of ownership in the media.

The Commission and the High Representative wish to reinforce their collaboration with the players in civil society, the national parliaments, the social partners and businesses in order to achieve the objectives of the reforms determined with the ENP countries. The partnership also takes the form of economic aid. The Communication concludes that the European Union "will increasingly need to differentiate its policy response, in line with the different developments, ambitions and needs of its partners".

• Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: "European Neighbourhood Policy: Working towards a Stronger Partnership", 20 March 2013
http://merlin.obs.coe.int/redirect.php?id=16441 DE EN FR

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OSCE

OSCE: Recommendations from OSCE Internet Conference

That the right to free expression should apply to online media tops the list of recommendations drawn from the Internet freedom conference organized in February by the OSCE Representative on Freedom of the Media, Dunja Mijatović.

The conference, which took place in Vienna, Internet 2013: Shaping policies to advance media freedom, brought together more than 400 participants representing government, industry, academia and civil society from across the 57-nation OSCE region.

"A key principle is that the rights to free expression and free media fully apply in a digital age," Mijatović said.

Dunja Mijatović, who was reappointed as the OSCE Representative on Freedom of the Media in March 2013 for a 3-year term, called for an inclusive discussion on media freedom in the Digital Age:

"Any attempt at Internet policy must be discussed openly, with the broadest possible involvement involving all stakeholders," she said. "Joint efforts must be taken to focus on how the Internet should be governed to remain open, free, safe and inclusive."

The wide-ranging recommendations touch upon a host of contemporary issues, including the need to protect journalists' sources in online media, the need to protect ISPs from legal liability for content posted, the desirability of ethics codes and self-regulatory bodies to adapt to include those using digital platforms and the need to conduct a full and inclusive debate on the issue of copyright protection in the Digital Age.

• Shaping policies to advance media freedom, Recommendations from the Internet 2013 Conference
http://merlin.obs.coe.int/redirect.php?id=16423 EN

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NATIONAL

AL-Albania

KKRT Proposes a Charter on Child Protection in Media Coverage

On 29 March 2013, the *Këshilli Kombëtar i Radios dhe Televizionit* (National Council of Radio and Television - KKRT) proposed the draft of a Charter on Child Protection in Media Coverage ("Charter").

According to KKRT's public statement, the objective of the charter is to draw attention to children's rights and the respective responsibilities of media representatives. The proposal also states that the Charter will apply to media as a whole, i.e., reports, documentaries, TV programmes and any article in the print media that involves children or reports on them.

This proposal emerged after controversial coverage of a paedophilia case in Albania that caused significant public reaction, especially on social networks.

The KKRT is consulting with various institutions. It reported that the proposal had been sent to several institutions and organisations that focus on media and child protection, such as the Ministry of Labour and Social Affairs, the Commissioner for Protection of Personal Data, the People's Advocate, the UNICEF mission in Albania, the Association of Radio-Television Broadcasters, and the Union of Albanian Journalists. KKRT invited the representatives of these institutions to assemble and draft a common Charter directed at professionals from both print and audiovisual media.

So far the KKRT has issued the "Regulation on Warning Signs Related to Ethical and Moral Norms in Radio and Television programmes," approved in 2009. In terms of self-regulation, the Code of Ethics, first created in 1996 and revised in 2006, has a special section on media dealing with children. Similarly, the Albanian Media Institute, in cooperation with KKRT and other organisations, has drafted guidelines on coverage of minors in the media. However, there are no self-regulatory bodies in the media to oversee the implementation of the Code and related regulations. Besides the regulatory framework of the KKRT, child protection measures are basically laid down in the Law no. 8410 "on public and private radio and television".

A final draft has not so far been created.

- *Propozohet hartimi i Kartës për Mbrojtjen e Fëmijëve gjatë pasqyrimit në media* (Statement on the proposal of a Charter of Child Protection of 29 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16454 SQ

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ORF's Broadcasting Freedom in Conflict with Journalistic Freedom

In a judgment of 14 March 2013, the *Verfassungsgerichtshof* (Constitutional Court - VfGH) decided that *Österreichischer Rundfunk* (ORF), by virtue of the broadcasting freedom guaranteed under the Constitution, can give specific instructions to its journalists on how they should prepare their reports.

The decision followed a circular email sent by the deputy editor of ORF's Lower Austrian regional studio in July 2011, instructing its journalistic staff not to describe the man responsible for the attacks in Norway as a "Christian fundamentalist". In a decision of 28 March 2012, the *Bundeskommunikationssenat* (Federal Communications Senate - BKS) stated that the instruction infringed the freedom of journalistic expression, protected under Article 32(1)(1) of the *ORF-Gesetz* (ORF Act - ORF-G). Instructions from superiors should be primarily aimed at improving the effectiveness of reporting. The more they concerned content or editorial matters, the more they interfered with the freedom mentioned in Article 32(1)(1) ORF-G.

ORF appealed to the VfGH against the BKS's decision and argued that its broadcasting freedom was a specific example of the right to freedom of expression enshrined in Article 10(1) of the European Convention on Human Rights (ECHR) and Article 1(2) of the *Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks* (Federal Constitutional Act concerning the Safeguarding of the Independence of Broadcasting - *BVG-Rundfunk*).

The court ruled that Article 32(1) ORF-G was a restriction prescribed by law, as required under Article 10(2) ECHR. However, it thought that the BKS's understanding of the freedom of journalistic expression was unconstitutional. A right to the unrestricted distribution of programmes with particular content could not be based on either Article 32(1) ORF-G or Article 1(2) *BVG-Rundfunk*. Rather, in non-constitutional law, Article 33(1)(1) ORF-G and ORF's editorial status that was based on this provision, and in constitutional law, the aforementioned Article 1(2) *BVG-Rundfunk* provided for a fundamental right to issue instructions relating to content and editorial matters.

Such exertions of influence were therefore admissible as long as they were necessary to meet the obligations to be objective and unbiased, and to protect plurality of opinion. ORF could therefore decide whether particular reports should be broadcast at all. It was therefore logical that it should be able to influence programme content.

Article 32(1) ORF-G could therefore be breached if an unreasonable restriction was imposed, e.g., if an instruction was designed to suppress particular facts. This was not the case here, since the deputy editor had only banned the term "Christian fundamentalist" because, when the instruction was issued, the views of the man responsible were still not definitely known. The instruction had been designed to ensure objective reporting and therefore to serve ORF's public remit, rather than to suppress a fact.

The VfGH therefore decided that the BKS's decision that the instruction was unlawful violated ORF's broadcasting freedom.

• *Erkenntnis des Verfassungsgerichtshofs vom 14. März 2013 (Az. B 518/12-7)* (Judgment of the Constitutional Court of 14 March 2013 (case no. B 518/12-7))
http://merlin.obs.coe.int/redirect.php?id=16437 DE

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ORF Breaches Public Service Remit by Exceeding Entertainment Limit

In a decision of 18 April 2013, the *Bundeskommunikationssenat* (Federal Communications Senate - BKS) ruled that *Österreichische Rundfunk* (the Austrian public service broadcaster - ORF) had broadcast too much entertainment in its overall programme between January and August 2011. ORF had therefore infringed its public service remit.

The *Kommunikationsbehörde Austria* (the Austrian communications authority - KommAustria) had, as the first-instance body, already upheld a complaint by several private television broadcasters that ORF had failed to fulfil its public service remit under Article 4(2) of the *Bundesgesetz über den Österreichischen Rundfunk* (ORF Act - ORF-G) (see IRIS 2012-10/6).

ORF is obliged by law to "provide a varied overall programme comprising information, culture, entertainment and sports for everyone". According to Article 4(2)(3) ORF-G, there should be an "appropriate" balance between these different categories. Furthermore, in KommAustria's opinion, Article 3(1)(2) ORF-G requires ORF to provide two "comprehensive channels" that must also devote an appropriate proportion of airtime to these categories. KommAustria ruled that ORF had breached this obligation.

ORF appealed to the BKS against this decision. It essentially argued that a well-balanced programme was merely an objective, but by no means a binding requirement that could be enforced before a court by quoting the proportions of airtime devoted to each category. It also claimed that the rigidity of the categories defined by KommAustria was untenable. The concept of culture was too narrowly defined and Article 3(1)(2) ORF-G made no provision for the differentiation of content within individual programmes broadcast on the national channels.

The appeal was rejected in so far as it contested the finding that ORF had, between January and August 2011, failed to provide an appropriate balance in its overall programme between information, culture, entertainment and sport by broadcasting an excessive amount of entertainment.

The BKS agreed with KommAustria's view that the list of categories required for a well-balanced overall programme under Article 4(2) ORF-G was exhaustive. In this connection, there were no grounds, when assessing this balance, for objecting to the practice of allocating each ORF programme to one of the four categories.

In its decision, however, the BKS paid particular attention to the concept of culture. It considered the "narrow definition of culture" on which KommAustria based its decision too restrictive and advocated a broader, although "not too liberal definition of the concept" ("broader definition of culture"). "Culture" should therefore not be interpreted as elitist, sophisticated culture that only met the highest intellectual standards. Rather, the concept of culture in the ORF-G reflected the principle of "culture for all". If there were narrow, medium and broad definitions of culture, the ORF-G would use the medium one.

When considering the overall programme, radio, television and online services must be assessed separately. In the present case, the proportion of airtime dedicated to each category is, in principle, calculated on the basis of all ORF television channels. The BKS ruled that the "varied overall programme" was not merely an objective, as ORF had suggested. However, the definition of rigid percentages appeared problematic in view of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The BKS also distanced itself from the definition of certain upper and lower limits, as KommAustria had advocated. Rather than rigid lower limits for each category, it was essentially a case of checking whether any one category had been allocated an "excessive" share of the overall programme. As part of this process, it should be noted that Article 4(2) ORF-G reflected the legislator's desire to prevent the broadcast of too many entertainment programmes. The BKS confirmed that such an excess had occurred during the period from January to August 2011 and therefore rejected this part of the appeal.

However, the appeal was partly successful in so far as KommAustria had also ruled that Article 4(2) ORF-G had been breached during another period, i.e. January to December 2010. Between 1 January 2010 and 30 September 2010, the current wording of Article 4(2) ORF-G, requiring an "appropriate" balance between the different categories of content in the overall programme, had not yet been in force. Although this rule had been added to Article 4(2) ORF-G through the ORF-G amendment, valid from 1 October 2010, the BKS thought that the observation period of 1 October to 31 December 2010 was too short.

The BKS also disagreed with KommAustria's interpretation regarding channels. It did not dispute that ORF had failed to provide two comprehensive channels meeting the criteria of information, culture, entertainment and sport. However, the ORF-G did not require a balance between the channels. The wording of the law did not require ORF to provide so-called comprehensive channels.

Alongside the central issue of the excessive proportion of entertainment programmes, numerous formal and procedural questions were raised during the appeal procedure (such as the need for oral proceedings). However, they had little ultimate impact on the key aspect of the legal dispute, i.e. the question of excessive entertainment.

• *Bescheid des Bundeskommunikationssenats vom 18. April 2013 (Az. GZ 611.941/0004-BKS/2013)* (Decision of the Federal Communications Senate of 18 April 2013 (case no. GZ 611.941/0004-BKS/2013))
http://merlin.obs.coe.int/redirect.php?id=16439 DE

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BKS Rules on Short Reporting Right After ECJ Judgment

In a decision of 25 February 2013, the Austrian *Bundeskommunikationssenat* (Federal Communications Senate - BKS) reacted to a judgment that it had obtained from the Court of Justice of the European Union (CJEU) and ended the procedure instigated following its request for a preliminary ruling.

In January 2013, the CJEU had decided that the rule on compensation for the exercise of the right to broadcast short reports on events of high public interest enshrined in Article 15 of the Audiovisual Media Services Directive (2010/13/EU, AVMSD) did not infringe the Charter of Fundamental Rights of the European Union (see IRIS 2013-3/3). Article 15(6)(2) AVMSD stipulates that any such compensation may not exceed the additional costs directly incurred in providing access.

In the original case that had been referred to the BKS, Sky Österreich, as the rightsholder, had wanted to force Österreichischer Rundfunk (the Austrian public service broadcaster - ORF) to pay additional compensation for broadcasting short reports on UEFA Europa League football matches.

In view of the CJEU's decision, the BKS essentially rejected Sky's appeal against KommAustria's decision to reject its claim. It ruled that the parties had not reached any contractual agreement on financial compensation for the acquisition of the exclusive rights. Therefore, the basic rule contained in the *Fernsehexklusivrechte-Gesetz* (Exclusive Television Rights Act), under which - based on Article 15(6)(2) AVMSD - only the additional costs directly incurred in providing access were due, applied. Since Sky had given ORF a free subscription, the BKS ruled that the additional cost was zero. The law did not provide for any further obligation to pay compensation.

However, the *Fernsehexklusivrechte-Gesetz* made provision for certain general procedures for the exercise of short reporting rights, creating a reasonable balance by reducing the value of exclusive rights (e.g. limiting the length of short reports, requiring the indication of sources and restricting the use of such reports to news programmes). Furthermore, according to the BKS, KommAustria, when establishing the practical conditions, had properly weighed the public's right to information against the right of ownership and acquisition. For example, ORF had only been allowed to broadcast the short reports at least 30 minutes after the scheduled end of the match concerned. In addition, ORF could only make unchanged short reports available via its online media library for 24 hours after their initial television broadcast, whereas the *Fernsehexklusivrechte-Gesetz*, in principle, provided for a seven-day limit.

• *Entscheidung des BKS vom 25.2.2013 (GZ. 611.003/0002-BKS/2013)* (BKS's decision of 25 February 2013 (GZ 611.003/0002-BKS/2013))
http://merlin.obs.coe.int/redirect.php?id=16438 DE

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BG-Bulgaria

Amendments to Bulgarian Media Law

Several amendments have been made during the months of March and April 2013 to different acts pertaining to the Bulgarian Media Law.

An amendment and a supplement to the Electronic Communications Act (ECA) introduced a new Art. 231

(published on 15 March 2013 in the "Official Gazette", issue 27). The purpose of this provision is the protection of the rights of media consumers, especially in the case of commercial disputes between television broadcasters and network operators. Therefore, Art. 231 envisages that the contract between the consumer and the network operator has to outline a detailed list with the titles of the television programmes being included in the contractual package. Furthermore, the network operators have to keep records of all complaints, reports and suggestions that have been received from consumers both on paper and electronically. Non-compliance with the above-mentioned obligations entitles the consumer to terminate the contract, without any compensation, within one month. Contractual agreements violating these obligations are void.

One of the changes in the Radio and Television Act (RTA) relates to the volume of audiovisual commercial communications and will come into effect as from 1 April 2013 (also published in the "Official Gazette", issue 27). The amendment creates a new paragraph 10 in Art. 75, which states that "The audiovisual commercial communications and commercial communications in radio services shall not be broadcast with a volume higher than the volume of the rest of the programme." According to Art. 126 paragraph 1, media service providers who violate the provisions are liable to a monetary penalty of BGN 3,000 to BGN 20,000 (circa EUR 1,533 to EUR 10,225). Repeated violations shall be punishable by a monetary penalty of double that amount (Art. 126 paragraph 3).

At the same time, another amendment to the RTA came into force (published on 15 February 2013 in the "Official Gazette", issue 15). It envisages that the Chairperson of the Council for Electronic Media (CEM), the General Directors of the Bulgarian National Radio (BNR) and the Bulgarian National Television (BNT) are the first (i.e., the highest) level budget administrators within their entities and thus the very top executive when it comes to matters of expenses.

As to the public media service providers BNR and BNT, their respective Management Boards have the power to adopt changes regarding the general budget spending strategy. On the second and lower levels of budget expenses, the budget administrators are chosen by the Management Boards.

• Закон за електронните съобщения (Electronic Communications Act (consolidated version))
http://merlin.obs.coe.int/redirect.php?id=15653 BG

• Закон за радиото и телевизията (Radio and Television Act (consolidated version))
http://merlin.obs.coe.int/redirect.php?id=16008 BG

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Film Subsidy in 2013

On 12 December 2012, the President of the Republic of Bulgaria vetoed a bill amending the Investment Encouragement Act (IEA). This bill provided a.o. that any investment into objects of intellectual property according to the Bulgarian Copyright Act could be awarded public aid if the budget foresees an expenditure of more than BGN 400,000 (approximately EUR 200,000) in Bulgaria.

As a result of the presidential veto, the bill was rejected by the Bulgarian Parliament with the argument that the criteria for encouraging investment in intellectual property had to be in conformity with the not yet adopted Communication of the European Commission on State Aid for films and other audiovisual works (see IRIS 2012-5/5).

This was the second unsuccessful attempt to introduce alternative financial instruments for the film sector. In 2010, a bill for amendments of the Film Industry Act (FIA) foreseeing tax credits for film producers failed because the Bulgarian Ministry of Finance and the Financial Committee of the Parliament considered that it infringed European standards (see IRIS 2010-5/11).

On 30 January 2013, the Association of TV Producers proposed amendments regulating investment mechanisms in the FIA and not in the IEA. The draft is supposed to be prepared after the adoption of the aforementioned Commission Communication.

At present, the only support for film production in Bulgaria is the state subsidy from the National Film Centre based on Art. 17 of the FIA, which provides as follows:

- at least 10% (equating EUR 640,000) of the funding is reserved for the support of local theatrical distribution of Bulgarian movies (including supported minority co-productions);

- up to 5% (equating EUR 320,000) of the funding is allocated to the support of cinema festivals, related events, and the international promotion of Bulgarian films;

- up to 5% of the funding is dedicated to special film projects on subjects proposed by the Ministry of Culture, and

- at least 80% (EUR 5.22 million) of the funding is destined for any type of film productions (feature film, documentaries, animation and minority co-productions).

• Bulgarian National Film Centre - information on film funding
http://merlin.obs.coe.int/redirect.php?id=16397 EN

• ДЕКЛАРАЦИЯ НА АСОЦИАЦИЯ НА ТЕЛЕВИЗИОННИТЕ ПРОДУЦЕНТИ (Declaration of the Association of TV Producers - Proposal for the Investment Encouragement Act)
http://merlin.obs.coe.int/redirect.php?id=16398 BG

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Supreme Court Rules Again in RTL/Sat.1 v. Shift.tv/Save.tv Case

In a judgment of 11 April 2013, the *Bundesgerichtshof* (Federal Supreme Court - BGH) ruled on the case between RTL and Sat.1 on one side and the online video recording services Shift.tv and Save.tv on the other. The BGH decided that the two online video recorders had infringed the television broadcasters' right to retransmit their programmes, as enshrined in Article 87(1)(1) of the *Urheberrechtsgesetz* (Copyright Act - UrhG).

This question had not been conclusively answered in the ruling of the *Oberlandesgericht Dresden* (Dresden Appeal Court - OLG) of 12 July 2011 (case no. 14 U 801/07, see IRIS 2011-8/21). The OLG Dresden had merely stated that the online video recorders had not breached the broadcasters' right of reproduction.

The BGH pointed out that the online video recorder providers had, in their defence during the appeal proceedings, referred to the obligation to contract set out in Article 87(5) UrhG. Under this provision, broadcasters were obliged, under certain conditions, to conclude a cable retransmission agreement with cable companies. However, in the BGH's opinion, the operators of an online video recorder could only file such a "compulsory licence objection" against broadcasters if they had paid or deposited the licence fees due under such an agreement. The Appeal Court had omitted to check whether the conditions for filing such an objection had been met.

If these conditions had been met, the BGH continued, the Appeal Court should have suspended the proceedings to enable the online video recorder operators to appeal to the arbitration body attached to the *Deutsche Patent- und Markenamt* (German Patent and Trade Mark Office - DPMA) (for details of a failed attempt by Save.tv to force RTL to contract by appealing to the DPMA in a separate dispute, see IRIS 2011-1/22). The arbitration body would then have needed to check whether the operators were entitled to demand the conclusion of a cable retransmission agreement. According to Articles 14(1)(2) and 16(1) of the *Urheberrechtswahrnehmungsgesetz* (Collecting Societies Act - UrhWG), this arbitral procedure was necessary before claims based on the obligation to contract could be brought before the courts. It was particularly necessary if a cable company brought an action for such an agreement to be concluded. However, it was also a requirement if a company - as in this case - defended itself against an injunction suit filed by a broadcaster by arguing that the latter was obliged to sign such an agreement.

• *Pressemitteilung des BGH vom 11. April 2013 (zur Rechtssache I ZR 152/11)* (Federal Supreme Court press release of 11 April 2013 (case I ZR 152/11))
http://merlin.obs.coe.int/redirect.php?id=16430 DE

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Cologne District Court Confirms ARD/ZDF Content Supply Agreement Cancellation

In a ruling of 14 March 2013 (case no. 31 O 466/12), the *Landgericht Köln* (Cologne District Court) rejected the action filed by the cable network operator *Kabel Deutschland AG* for confirmation that the content supply agreement concerning the television programmes of the public service broadcasters ARD and ZDF remained valid. The cable operator claimed that the cancellation of the agreement was invalid.

The plaintiff is a national broadband cable network operator. For two decades, it has transmitted television programmes, including those of the public service broadcasters, via its cable networks in return for a fee and given the broadcasters access to its networks.

The defendant (*Westdeutscher Rundfunk Köln* - WDR), together with eight other regional broadcasters and *Deutsche Welle*, is a member of the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (German public broadcasters' association - ARD). At the end of 2012, the public service broadcasters cancelled their agreements concerning the retransmission of their TV channels by *Kabel Deutschland* and *Unitymedia*.

In its action against WDR, *Kabel Deutschland* claimed that the cancellation was invalid. It argued that, in accordance with their remit, public service broadcasters had to distribute their programmes via the cable network. If they were transmitted via satellite and terrestrial means only, the obligation to serve the whole population would not be met.

The court rejected the main action against the defendant as partly inadmissible and partly unfounded. Since the agreement had been concluded with all the ARD members, *Kabel Deutschland* could not take action against only one broadcaster (WDR).

In any case, the cancellation was valid. It did not constitute an immoral abuse of market power under Article 138 of the *Bürgerliches Gesetzbuch* (Civil Code - BGB), since the ARD members were not obliged to broadcast via cable. Rather, under Article 19 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV), the broadcasters had a degree of discretion when deciding which transmission methods to use, and should particularly take into account the principle of economic efficiency when making such decisions. Incidentally, since the defendant continued to offer its programmes to the plaintiff, a "must-offer obligation", which did not apply here anyway, could not exist on the grounds of competition law. Neither was it immoral that the broadcasters profited from the fact that *Kabel Deutschland* was continuing to broadcast the relevant programmes - now free of charge - since it was doing so in its own interests. The court did not specify whether it thought this interest was (also) based on a possible "must-carry" obligation. However, it thought that the cancellation was compatible with Articles 1, 19 and 20 of the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against restraints of competition - GWB).

• *Urteil des LG Köln vom 14.3.2013 (Az. 31 O 466/12)* (Ruling of the *Landgericht Köln* (Cologne District Court) of 14 March 2013 (case no. 31 O 466/12))
http://merlin.obs.coe.int/redirect.php?id=16431 DE

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Common Remuneration Rules for Film Camera Operators

In a dispute over the remuneration of camera operators, the *Berufsverband Kinematografie* (professional film-makers' association - BVK) - following the example of *Constantin Film Produktion GmbH* (CFP) - accepted the agreement proposed by the *Oberlandesgericht München* (Munich Appeal Court - OLG) on 12 March 2013. The BVK had instigated proceedings with the OLG under Articles 36 and 36a of the *Gesetz über Urheberrechte und verwandte Schutzrechte* (Act on Copyright and Related Rights - UrhG).

As authors of a work, cameramen are entitled to "reasonable remuneration" under Article 32(1)(2) and (3) UrhG. The procedure provided for under Articles 36 and 36a UrhG is designed to define this abstract concept of "reasonableness" by creating so-called "common remuneration rules". Representative and independent associations of authors and of users of works are involved in this process in order to ensure the interests of both sides are taken into account in the common remuneration rules.

The OLG acted as an arbitration body in the sense of Article 36a UrhG and, in accordance with Article 36(4)(1) UrhG, proposed an agreement, including grounds, on 20 December 2012. Following its approval by the BVK and CFP, this constitutes "common remuneration rules" in the sense of Article 36(1)(1) UrhG and defines the reasonable remuneration to which authors are entitled under Article 32(1) UrhG.

This is the first time that the remuneration rights of German film camera operators have been properly regulated. The common remuneration rules include a minimum payment, although this can be exceeded in contracts. Since they define reasonable remuneration, they do not apply only to the parties involved in the arbitration procedure.

The common remuneration rules include the following detailed provisions:

1. Firstly, camera operators must be paid at least the current tariff for their work.

2. If CFP reaches participation threshold 1, camera operators are entitled to 0.85% of CFP's total revenue. Participation threshold 1 is reached if CFP covered or could have covered loans that funded the project, including interest, which have to be repaid, from the income received from its exploitation of the film. A 5% corridor applies, whereby if the participation threshold is exceeded, an initial sum worth 5% of the total budget is paid to the producers only, excluding camera operators, in order to cover the financial risk borne by the film producers.

3. If CFP reaches participation threshold 2, camera operators are entitled to 1.6% of all revenue. This threshold is reached if loans (particularly film aid loans) that only need to be repaid under certain conditions were or could have been paid off from exploitation income.

4. Payments above the agreed rate or dividends paid to camera operators by collecting societies do not reduce the standard entitlement, unlike profit-sharing agreements between camera operators and CFP.

The common remuneration rules do not include a "best-seller clause" as described in Article 32a UrhG. According to the latter provision, the author can demand the adjustment of the agreed payment if it is obviously disproportionate to the amount of revenue generated by exploitation of the film, e.g., if sales far exceed the expectations on which the agreement was based.

The common remuneration rules entered into force on being approved by the BVK and therefore apply to all films shot after 12 March 2013.

• *Einigungsvorschlag des OLG München vom 20. Dezember 2012* (Agreement proposed by the Munich Appeal Court on 20 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16432 DE

• *Pressemitteilung des BVK vom 12. März 2013* (BVK press release of 12 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16433 DE

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Federal Cartel Office Expresses Concern over ARD and ZDF Video-on-Demand Platform

On 11 March 2013, the *Bundeskartellamt* (Federal Cartel Office) announced that it harboured concerns about the compatibility with competition law of the video-on-demand platform operated by the two public service television broadcasters ARD and ZDF. The broadcasters, together with other production and distribution rights companies, had founded an online platform called "Germany's Gold" in April 2012.

After an initial examination, the *Bundeskartellamt* had approved the merger on which the plan was based, on the grounds that it would not create or strengthen a dominant market position.

However, the *Bundeskartellamt* thought that the joint marketing of pay-per-view videos on the Internet by commercial subsidiaries of ARD and ZDF would lead to coordination of the prices and availability of the videos. It also feared that other platforms would have no, or only restricted, access to the videos.

According to the *Bundeskartellamt*, the companies have already indicated that they would be prepared to give certain undertakings. In this respect, the *Bundeskartellamt* hinted at the kind of undertakings that should be given. The broadcasters concerned could allay all competition-related concerns by, for example, abandoning the business model based on joint marketing and limiting the plans to the operation of a purely technical platform.

The *Bundeskartellamt* had raised similar concerns in 2011 regarding an online platform being planned by ProSiebenSat.1 and RTL (see IRIS 2011-5/15). However, an appeal lodged by the two broadcasters with the *Oberlandesgericht Düsseldorf* (Düsseldorf Appeal Court) against the decision of the *Bundeskartellamt* was rejected (see IRIS 2012-8/16).

• *Pressemitteilung des Bundeskartellamts vom 11. März 2013* (Press release of the Federal Cartel Office of 11 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16434 DE

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Dresden Appeal Court Confirms Inadmissibility of "VFF Clause"

In a ruling of 12 March 2013, the *Oberlandesgericht Dresden* (Dresden Appeal Court - OLG) declared the use of the so-called "VFF clause" in contracts between public service broadcasters and commissioned television film producers illegal and therefore upheld the first-instance judgment of the *Landgericht Leipzig* (Leipzig District Court - LG) of 8 August 2012 (see IRIS 2012-9/17). The disputed clause was regularly used in relation to commissioned productions. It allows commissioning broadcasters to claim for themselves all remuneration owed to the film producer by third parties. The OLG also considered that this put the film producer at an unreasonable disadvantage.

Like the LG before it, the OLG thought that an unreasonable disadvantage was created by the fact that the clause, used as a standard business term in the sense of Articles 305 *et seq.* of the *Bürgerliches Gesetzbuch* (Civil Code - BGB), was incompatible with the essential principle, enshrined in the *Urheberrechtsgesetz* (Copyright Act - UrhG), that film producers held copyright-related rights. The film producers' right to choose which collecting society to use was also excessively restricted, since they were required to use the *Verwertungsgesellschaft der Film- und Fernsehproduzenten GmbH* (Film and Television Producers' Collecting Society - VFF). The defendant in the original procedure, *Mitteldeutscher Rundfunk* (MDR), appealed against this decision. As the plaintiff in the the original procedure, the *Arbeitsgemeinschaft Dokumentarfilm* (German Documentary Association - AG DOK), which represents documentary film producers, was also a party in the appeal procedure.

Although MDR used a wide range of arguments to defend the legality of the VFF clause, its appeal was rejected.

The OLG also explained that the VFF clause was not sufficiently clear in the sense of Article 307(1)(2) BGB. The clause entitled the commissioning broadcaster to half of the proceeds, without specifying which proceeds were actually being referred to. The OLG thought the need to interpret the clause could result in further disadvantages for film producers.

The OLG otherwise repeated the LG's comments, particularly concerning the unlawfulness of the clause, which puts film producers at an unreasonable disadvantage by contravening the basic principle, enshrined in the UrhG, that remuneration rights are held by the film producer and cannot be assigned in advance (Articles 94(4), 20b(2), 27(1) and 63a).

• *Urteil des OLG Dresden vom 12. März 2013 (Az. 11 U 1493/12)*
(Ruling of the OLG Dresden (Dresden Appeal Court) of 12 March 2013 (case no. 11 U 1493/12))
http://merlin.obs.coe.int/redirect.php?id=16436 DE

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Inter-State Gambling Agreement Advertising Directive Enters into Force

On 1 February 2013, the *Werberichtlinie* (Advertising Directive - WerbeRL), designed to put the *Staatsvertrag zum Glücksspielwesen in Deutschland* (Inter-State Gambling Agreement - GlüStV) into concrete form, entered into force. It had been adopted on 7 December 2012 by the *Glücksspielkollegium* (Gambling Commission) which, in accordance with Article 9a(5) to (8) of the Inter-State Gambling Agreement, is composed of representatives of all 16 gambling supervisory authorities and acts on behalf of the regional authorities.

Under Article 5(3)(1) GlüStV in conjunction with Articles 7 and 2(2)(7) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV), all advertising for public gambling is, in principle, prohibited on television, the Internet and via telecommunications devices. The *Länder* can, according to Articles 5(3)(2) to (3) and 9a GlüStV, jointly provide for exceptions to this rule, provided they adhere to the objectives of Article 1 GlüStV (prevention of addiction, combating the black market and associated crime, youth protection, and integrity of sporting competition). These exceptions are now mentioned in the WerbeRL.

Under Article 14(1) WerbeRL, exemptions from the advertising ban may be granted if the gambling provider or agent, licensed in accordance with Articles 4a *et seq*. GlüStV, submits an advertising concept describing the actual advertising measures and their scope.

Under the WerbeRL, advertising is also unlawful if it, for example:

- is specifically aimed at minors;

- is misleading;

- only emphasises the benefits of gambling;

- portrays gambling as a sensible strategy for improving someone's financial situation;

- encourages people to try to win back their losses; or

- inappropriately portrays the role played by luck in gambling.

The WerbeRL also contains special provisions for certain forms of gambling. For example, when sports betting is advertised in the context of a live sports broadcast, bets directly related to the sports event concerned may not be advertised. The WerbeRL also contains special rules related to means of advertising. For example, gambling may not be advertising in cinemas before 6 p.m. Shirt and perimeter advertising at sports events is not covered by the ban, however.

According to Article 13 WerbeRL, gambling advertisements must mention the risks of addiction, the ban on the participation of minors, and the advice and therapy available to gambling addicts. If maximum winnings are specified, the mathematical probability of the win must be mentioned. However, this information does not need to be included in simple image or umbrella brand advertising.

Sponsorship by gambling providers and agents is not forbidden and therefore not subject to approval.

• *Werberichtlinie des Glücksspielkollegiums vom 7. Dezember 2012*
(Advertising Directive of the Gambling Commission of 7 December 2012)
http://merlin.obs.coe.int/redirect.php?id=16470 DE

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Regional Media Authorities Publish Revised Television Advertising Guidelines

At the beginning of March 2013, the *Landesmedienanstalten* (regional media authorities) published the revised version of the *Gemeinsame Richtlinien für die Werbung, die Produktplatzierung, das Sponsoring und das Teleshopping im Fernsehen* (Joint Guidelines on Advertising, Product Placement, Sponsorship and Teleshopping on Television), which came into force on 22 February 2013.

Authorised to issue such guidelines under Article 46 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV), the media authorities have therefore put the advertising rules contained in the RStV in concrete form.

While the provisions on the separation and labelling of traditional advertising in particular remain unchanged, the regional media authorities have tightened the rules on split-screen advertising. From now on, the word "*Werbung*" (advertisement) must be clearly legible in the advertising space (previously called the advertising window) throughout the advertisement. Whereas the actual location of the wording was not previously specified, the advertising guidelines now require it to be placed inside or directly adjacent to the advertising space. The wording must also stand out clearly from the background by means of its size, form and colour. This new provision is a

response to the "move splits" that the *Kommission für Zulassung und Aufsicht* (Licensing and Monitoring Commission - ZAK) has complained about in the past.

In terms of the requirement for correct labelling of product placement, the amended guidelines provide that the relevant label may only be broadcast at the beginning and end of a programme and after any advertising breaks during the programme. It is therefore no longer possible to show the label at any other time during the programme, particularly while the placed product is visible on the screen. The reference to the code of conduct on product placement, which is now available, has been removed.

The rules on sponsorship have been amended to take into account the fact that the Audiovisual Media Services Directive 2010/13/EU only bans services that *directly* encourage the purchase of goods or services. However, the passage in which sponsored programmes were deemed to encourage such purchases if, in particular, the sponsor itself was mentioned on advertising boards in the stadium during sports broadcasts was removed.

Finally, the guidelines clarify the situation regarding self-advertising by television broadcasters. In future, spots that contain references to the broadcaster's own programmes will not count towards the maximum hourly advertising limit. In the regional media authorities' opinion, the concept of self-advertising also includes references to other programmes attributable to the broadcaster under the terms of Article 28 RStV. Referring to the provision of the RStV that, in order to ensure plurality, defines the minimum shareholding that must be held in order for television broadcasters to be considered "connected", the advertising guidelines therefore expressly state that so-called cross-promotion within a group of broadcasters does not need to count towards maximum hourly limits.

• *Überarbeitete Werberichtlinien für Fernsehen (in der Fassung vom 12. September 2012)* (Revised television advertising guidelines (in the version of 12 September 2012))
http://merlin.obs.coe.int/redirect.php?id=16435 DE

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ES-Spain

Agreement on Football Rights Found not to be in Breach of Competition Law

On 8 January 2013, the Resolution of the *Comisión Nacional de la Competencia* (Competition Authority - CNC) found that the agreement regarding football rights between the two major media corporations Canal+ and Mediapro (August 2012) was not in breach of Spanish competition law. The Authority reasoned that the agreement was not abusive, nor was it restrictive to smaller clubs opposed to the application of the agreement.

The audiovisual rights to the Football League and the National Cup are the primary source of income for those clubs that participate in the First or the Second Division of the Football League. Until the 1997/1998 season, these audiovisual rights were centralised in the Professional Football League (LFP), which was responsible for transferring them to the individual audiovisual operators for live retransmission in parallel with the games available on open free television or on paid TV.

The system changed following an agreement by the General Assembly of the LFP on 12 April 1996, which recognized the right of every club to negotiate their rights and transfer them to third parties as their own audiovisual rights from the 1997/1998 season onwards. Since then all clubs began licensing their own individual rights following different strategies. These club rights entering the market were the cause of a legal battle between Canal+ and Mediapro. The conflict apparently terminated last summer, when both parties announced that they had reached a settlement on how to deal with the said rights.

In October 2012, the *Asociación por Nuestro Betis* (ABNP), which was set up by the shareholders and fans of the football club Real Betis, made a complaint to the Competition Authority with regard to the agreement between Prisa TV and Mediapro, both of whom are rightsholders of the Professional Football League (LFP), audiovisual rights to the League and the Spanish Cup. ABNP claimed that the agreement discriminated against small football clubs in favour of large football clubs and audiovisual services operators.

The Council of the CNC conducted an investigation into football rights. In its findings, the Council concluded that the conduct complained of "did not constitute an agreement between the Parties that breaches the Competition Act". Furthermore, no evidence was found that the agreement was abusive or exclusionary or that it would be harmful to the rights of consumers.

The Judge for the Council stated that the current football audiovisual rights market is valid in having "different approaches for different football clubs" and that the presumption that the agreement in question would favour or harm some more than others, in itself is not a sufficient basis to merit intervention by the Competition Authorities. Taking into consideration all these factors, the Competition Authority decided to dismiss the claim made by APNB.

Currently, the Competition Authority has another open sanction case pending against Canal+, Telefónica and Mediapro. It is suspected that these

three companies could have reached a level of anti-competitive practices through their football rights merchandise agreements with paid TV. The outcome of this pending case is independent of the final result of the above investigation.

• *CNC, Resolución (Expte. S/0438/12, Liga Futbol Profesional), 8 de enero de 2013* (CNC Resolution No. S/0438/12, Professional Football League, 8 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16468 ES

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Two Commercial Television Stations Have Failed to Fulfil their Financial Obligations in Accordance with Law 8/2009

On 14 March 2013, the *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission - CMT), found that two national commercial television companies, Mediaset España Comunicación and Gestora Inversiones Audiovisual La Sexta had failed to fulfil their financial obligations in relation to their contributions to the funding of the national public service broadcaster, RTVE (Radio y Televisión Española). In accordance with Law 9/2009, CMT found that self-assessments made by the companies with regard to their financial obligations under Law 8/2009 had been wrongly calculated.

Act 8/2009 on the funding of the Spanish Radio and Television Corporation (see IRIS 2010-1/18) removed advertising as a source of income for the public service broadcaster and instead introduced a new financing system based on a State subsidy and three different types of taxes. RTVE obtains revenue from an existing tax on the use of spectrum frequencies. Two new taxes are imposed on national telecommunications operators offering audiovisual services, as well as on national commercial television companies operating pay or free-to-air services via cable, satellite or terrestrial networks.

According to Act 8/2009, the tax to be paid annually by national commercial broadcasters amounts to 3% of their gross operating income in accordance with their yearly turnover. In the self-assessments that Mediaset and La Sexta conducted of their 2011 turnovers, the television companies decided that only profit derived from advertising should be used to calculate the tax. The CMT specifies in its Resolutions that the contribution television companies must make to the funding of the public service broadcaster refers to their gross operating income, whether it is directly or indirectly obtained. The regulator has decided therefore to agree to order Mediaset and La Sexta to contribute EUR 144,728.17 and EUR 417,160 respectively to the funding of the public service broadcaster.

• *Resolución de 14 de marzo de 2013 por la que se acuerda la emisión de una liquidación provisional complementaria de la aportación a ingresar por la entidad Mediaset España Comunicación, S.A. en el ejercicio 2011, establecida en el artículo 6 de la Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española (AD 2012/2301)* (Resolution that agrees to the release of additional funds to be paid by Mediaset España Comunicación, S.A., for its 2011 turnover, established in the Act 8/2009 of 28 August 2009 on the funding of RTVE Corporation (AD 2012/2301), 14 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16458 ES

• *Resolución de 14 de marzo de 2013 por la que se acuerda la emisión de una liquidación provisional complementaria de la aportación a ingresar por la entidad Gestora Inversiones Audiovisual La Sexta, S.A. en el ejercicio 2011, establecida en el artículo 6 de la Ley 8/2009, de 28 de agosto, de financiación de la Corporación de Radio y Televisión Española (AD 2012/2302)* (Resolution that agrees to the release of additional funds to be paid by Gestora Inversiones Audiovisual La Sexta, S.A., for its 2011 turnover, established in the Act 8/2009 of 28 August 2009 on the funding of RTVE Corporation (AD 2012/2302), 14 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16459 ES

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Useful Details from the Court of Cassation on Film Soundtracks

On 19 February 2013, the Court of Cassation delivered an important judgment on a matter of neighbouring rights in a dispute over the soundtrack for the film *Podium*, starring a look-alike of the singer Claude François. In the case, Spedidam, the society for the collection management of the neighbouring rights of performers of music and dance, claimed that the producer of the highly popular film had created the soundtrack of the film without obtaining authority from the performers concerned, using recordings made before neighbouring rights were protect by the Act of 3 July 1985. Collection agreements dating back to 1959 made it possible to do without this authorisation, on condition of payment of remuneration in the form of a "fair supplementary fee in addition to the price determined for the recording session"

The collections management society held that the entry into force of the Act of 3 July 1985 on 1 January 1986 rendered the agreement obsolete and that it was therefore necessary to ask the performers for their agreement to the use of the recording of them in accordance with Article L. 212-3 of the French Intellectual Property Code (Code de la Propriété Intellectuelle - CPI). The court of appeal had noted that the use of phonographic recordings to provide the soundtrack for films was current practice at the time the disputed recordings were made. The Court of Cassation considered that it was by a sovereign appreciation that the court of Appeal had judged the agreements concluded in 1959 betweeen the national syndicate of performers (Syndicat Nationat des Artistes-

Interprètes) and the national syndicate for the phonographic industry (Syndicat National de l'Industrie et du Commerce Photographiques) which were enforceable with respect to Spedidam, should be interpreted as recognition of the right conferred on producers who owned recordings to use them to provide the soundtrack for future films, on condition that they paid a fair extra fee to the performers. The court also noted that the attendance sheets produced in the proceedings, contemporay with the recordings made between 1963 and 1981, did not include any reservation regarding the use to be made of the recordings. For the Court of Cassation, the court of appeal had been able to deduce that the producers were in fact perfectly entitled to use the recordings in exchange for the additional payment provided for in the agreements.

The judgment also raised the question of whether the collective management society was able to take action to defend the rights non-member performers. The Court of Cassation gave a negative answer, stating clearly that "it transpired from Article L. 321-1 ot the Intellectual Property Code that, regardless of its articles of association, a society for the collection and redistribution of performers rights may only be permitted to take legal action to defend the individual rights of a performer if it had received instructions from the performer to do so".

• *Cour de Cassation, arrêt du 19 février 2013, SPEDIDAM c. Canal Plus et autres* (Court of Cassation (1st chamber, civil cases), judgment delivered on 19 February 2013, SPEDIDAM v. Canal Plus and others)
http://merlin.obs.coe.int/redirect.php?id=16453 FR

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Reality TV - Participant's Death Obliges CSA to Re-Open Case

The reaction of the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) was not slow in coming, following the announcement of the death of a participant during filming of the new season of the successful adventure reality TV broadcast Koh-Lanta (an adaptation of Survivor). Since the launch of the first reality TV programme (Loft Story, in 2001), the CSA has considered a number of the issues raised by these programmes (see IRIS 2001-5/9). Its concern has taken the form of a Deliberation in 2005 on young viewers, and the establishment in 2011 of a list of recommendations on broadcasting and participant protection in respect of these broadcasts (see IRIS 2011-10/18), a report on which was drawn up in October 2012. The recent Koh-Lanta tragedy has therefore led the CSA to reinforce its general request for prevention of the risks that reality TV programmes may entail. To achieve this, the Commission for considering programme evolution has been asked to carry out a concertation with the channels over the next few weeks, paying particular attention to both respect for human dignity in all circumstances and the protection of young viewers and minors.

The CSA announced that this concertation with the channels ought to lead to a re-examination not only of current legislation and regulations but also of the conventions with the channels, broadcasting times, etc., in order to establish a new general recommendation. A good practices charter inviting, on a voluntary basis, producers and broadcasters to respect common principles on the behaviour, in the interests of participants, film crews and viewers, should also be drawn up. Olivier Schramek, the CSA's new Chairman, stressed that "it is not a case of the CSA stigmatising, generalising or taking the place of editorial responsibilities in devising programmes; the CSA is neither a censor nor a moraliser."

• *Communiqué de presse du CSA du 3 avril 2013* (CSA press release of 3 April 2013)
http://merlin.obs.coe.int/redirect.php?id=16446 FR

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Negotiations on the EU/USA Free Trade Agreement: National Assembly Defends Cultural Exception

On 10 and 17 April 2013, first the French National Assembly's European Affairs Committee and then its Cultural Affairs Committee adopted a draft resolution defending the cultural exception as part of the negotiations on the free trade agreement between the European Union and the United States. On 12 March 2013, the European Commission had adopted a draft mandate authorising the opening of negotiations on a comprehensive agreement on trade and investment between the European Union and the United States, entitled "Transatlantic Trade and Investment Partnership", which would include cultural and audiovisual services. "This is the first time in twenty years that the Commission has failed to respect the principle of the cultural exception by not specifically excluding the audiovisual sector from an international trade agreement, a fortiori with the United States," deplored the MPs behind the resolution, who feel that "this is an unprecedented liberal offensive that cannot leave national representation indifferent", as "culture cannot be considered as just another type of merchandise, unless we are prepared to accept the disappearance of cultural diversity".

By their resolution, and in order to ensure the continued existence of the European cinematographic and audiovisual industry, particularly in the digital environment, the MPs are calling on the French government to claim the explicit exclusion of audiovi-

sual services from the Commission's negotiation mandate, which is scheduled for approval by voting at the meeting of the General Affairs Council to be held on 14 June. Failing this, the text invites the government to use its right of veto, if necessary, in order to protect cultural diversity, in application of Article 207, paragraph 4 of the Treaty on the Functioning of the European Union. The resolution adopted also affirms its attachment to the principle of technological neutrality, by virtue of which the type of medium does not alter the content of the work, and emphasises that including information and communication technologies in the free trade agreement cannot constitute a means of circumventing the protection of cultural diversity, particularly with regard to audiovisual and cinematographic content. In early April, the European coalitions for cultural diversity (including the French coalition) had reminded Mr Barroso of the European Union's undertaking to protect and promote the diversity of cultural expression at the time of signing the UNESCO Convention in 2006. They immediately called on him to obtain the exclusion of the cultural and audiovisual sector from the framework of commercial negotiations with the United States. For Aurélie Filipetti, Minister for Culture and Communication, "the draft negotiation mandate that the European Commission has just adopted raises problems for us (04046). Yet this choice is not in response to either an actual claim on the part of the United States or to a political or economic necessity. This disturbing rupture justifies extensive mobilisation. (04046)": "We shall not sell the cultural exception down the river."

• *Proposition de résolution européenne relative au respect de l'exception culturelle, présentée par Mme Danielle Auroi et M. Patrick Bloche, députés* (Proposal for a European Resolution on observance of the Cultural exception, submitted by Ms Danielle Auroi and Mr Patrick Bloche, members of the French National Assembly)
http://merlin.obs.coe.int/redirect.php?id=16445 FR

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Collective Agreement in the Cinema Sector: Government Names Mediator

On 28 March 2013, the French Ministers for Labour, Michel Sapin, and Culture, Aurélie Filippetti, announced that they had appointed Conseil d'État member Raphaël Hadas-Lebel as mediator in order to attempt to reach an agreement on the collective agreement in the cinematographic production sector. The sector has been negotiating a collective agreement for nearly ten years. An agreement was signed on 19 January 2012 by most of the employee unions and by just one employer organisation, the association of independent producers (Association des Producteurs Indépendants - API), which is an umbrella organisation of four major groups (Gaumont, Pathé, UGC, and MK2). The agreement, which the Ministers consider "contains real improvements for the employees concerned (technicians)", provides for the introduction of minimum levels of remuneration for directors, labourers and technicians in the cinema sector, and imposes a minimum number of posts for each film made. It can now be extended if the signatories so request, in accordance with the Act. The Minister for Labour had announced his intention of signing the decree extending the arrangement to all production of full-length films on 11 April 2013, with the text entering into force on 1 July 2013.

The text has, however, aroused opposition from a good many organisations representing producers, which fear the economic impact of its extension on employment and the diversity of films being made. A petition, signed by nearly 1,200 producers, directors and actors, calls for the extension to be suspended. According to the signatories, the text "lays down minimum salaries which independent production companies - predominant in the sector - are not always able to apply. It signs the death warrant for a good number of many low-budget films - between 50 and 70 fewer per year, according to estimates". "We solemnly appeal to the Ministry of Culture and to the Ministry of Labour to suspend the announced extension and to carry out voluntary, unbiased studies and discussions necessary for quickly achieving a balanced text that works in favour of employees, companies, and the common good of the French cinema".

The two Ministers said that they have done their utmost in attempting to achieve convergence of the various points of view. In a letter dated 14 March, they laid down for all the parties concerned two conditions necessary for emerging from the blocked situation. Firstly, the cinematographic production sector should be covered by a collective agreement. The collective agreement of 19 January 2012 ought therefore to be extended and also supplemented after collective negotiation for performers and permanent employees. The second condition laid down is the necessary re-examination of the situation of economically fragile films within the collective agreement. It is now up to Mr Hadas-Lebel to facilitate the achievement of these two conditions.

• *Communiqué de presse du ministère de la Culture et de la Communication du 28 mars 2013* (Press release by the Ministry of Culture and Communication on 28 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16444 FR

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HADOPI Delivers Opinion on Interoperability of Blu Ray Protection

On 8 April 2013, the high authority for the broadcasting of works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Œuvres et

la Protection des Droits sur Internet - HADOPI) delivered its opinion on a question on the interoperability of the technical protection measures applied to "Blu Ray" DVDs. The association VideoLAN, the editor of the freeware (i.e., software with a source code that may be accessed and modified by its users under the terms of their licence) entitled "VLC Media Player", the purpose of which is to read media files in the largest possible number of formats, referred to HADOPI under Article L. 331-36 of the French Intellectual Property Code (Code de la Propriété Intellectuelle - CPI). The editor wanted to know how it could provide users with a version of its software that made it possible to read all DVDs currently called "Blu Ray" which incorporated technical protection measures. The denomination "Blu Ray" designates a digital disk format and a technique allowing the storage and restitution of audiovisual content in high definition. The protection of works distributed in Blu Ray format relies on technical protection measures that are mainly intended to prevent the making of unauthorised copies of the content of the Blu Ray disks.

In its opinion, HADOPI recalls that Article L. 331-5 of the CPI provides that "the technical measures used may not have the effect of preventing the effective implementation of interoperability, while respecting copyright protection". Although the notion of interoperability has not been defined by the legislator, HADOPI recalls that it was the intention of the legislators to allow users to read the works they acquire on the reader of their choosing. Seen in this light, interoperability appears to be a condition for users' free use of the works. The referral to HADOPI therefore raises the question of knowing to what extent a software editor is able to benefit from exceptions to copyright protection in developing a freeware reader allowing the legal circumvention of technical protection measures. After careful examination, HADOPI concluded that VideoLAN could not claim the exceptions of either "reverse engineering" or "decompilation" provided for in Article L. 122-6-1 of the CPI in order to provide users with software for circumventing all the technical protection measures protecting Blu Ray DVDs without the authorisation of the corresponding rightsholders. VideoLAN is therefore invited to ask the rightsholders to supply the information on the technical measures that is essential for the interoperability of the measures (via a licence). Should they refuse, HADOPI invites the association to instigate arbitration proceedings, for which it is competent on the basis of Article L. 331-32 of the CPI. In this context, and in order to allow effective interoperability, guaranteeing access to works protected by technical devices, HADOPI considered the association ought to be able to obtain communication - subject to appropriate compensation - of all the information necessary for interoperability, including the trade secrets involved in the technical protection measures. There could be no hindrance to the publication, by transposition into the source code of the VLC freeware, of the information obtained in this way unless the holders of the rights in respect of the technical protection measures used provided proof that doing so would seriously affect the security and effectiveness of the measures.

In the light of the criticism levelled at the opinion by VideoLAN's CEO, who feels that HADOPI is "dodging the issue", Jacques Toubon, a member of HADOPI's college, commented that the opinion "could never exceed the law". He therefore called for "an evolution in the law by creating a regulator capable of taking action". The report of the Lescure mission (see IRIS 2013-2/25), expected in May, will perhaps go some way towards providing an answer.

• *Avis n°2013-2 de la Hadopi* (HADOPI Opinion No. 2013-2)
http://merlin.obs.coe.int/redirect.php?id=16443 FR

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New Agreement Between YouTube and SACEM Signed

The French society of music authors, composers and editors (Société des Auteurs, Compositeurs et Éditeurs de Musique - SACEM) and the on-line video platform YouTube, which is owned by Google, have reached an agreement to ensure remuneration for rightsholders whose works are made available for viewing on the site. The agreement follows on from the agreement concluded in September 2010 that covered the period from 2006 to 2012 (see IRIS 2010-10/32). Concluded for a period of three years, and retroactive to 1 January 2013, this new agreement allows greater transparency, through better coordination of data exchange, while ensuring fair remuneration for rightsholders by associating them fully with the income generated by the platform. The agreement covers all the types of video made available for viewing on YouTube, including content generated by users, as well as the future subscription streaming services being developed by YouTube. It allows the use of works in SACEM's repertoire and of works in the English-language repertoire of Universal Music Publishing International (UMPI) in exchange for remuneration for rightsholders, and now covers 127 countries throughout Europe, the Middle East, Africa and Asia. According to Cécile Rap-Veber, Licences Director at SACEM, rightsholders will be associated with the income generated by the platform, which includes "all YouTube's advertising revenue, (04046) income generated in the near future by a subscription service", and possibly "partnerships". Details on the remuneration negotiated with Google (percentage or flat-rate payment?) remain confidential. This agreement with YouTube is vital for the music sector. With more than a billion visitors every month, the site is the prime destination for Internet users who want to watch videos,

as music clips are the most frequently sought content on the platform.

• *Communiqué de presse de la SACEM du 3 avril 2013* (SACEM press release of 3 April 2013)
http://merlin.obs.coe.int/redirect.php?id=16447 FR

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High Court Orders Internet Service Providers to Block Access to File-Sharing Sites

In its judgment of 28 February 2013, the High Court ordered six leading internet service providers (with a 94% market share of UK internet users) to block access to three peer-to-peer file-sharing websites called KAT, H33T and Fenopy. This follows earlier High Court decisions requiring blocking of other sites (see IRIS 2012-7/25 and IRIS 2011-9/21).

The case was brought by ten leading record companies on their own behalf and on that of other members of the recorded music trade associations. The three websites each operate a substantial profit-making business in file sharing, especially in music. Section 97A of the Copyright, Designs and Patents Act 1988, implementing the Information Society Directive, empowers the Court to issue an injunction against a service provider 'where that service provider has actual knowledge of another person using their service to infringe copyright'. The Court considered that users of the websites with accounts with the defendants had been engaged in sharing, and so making unlicensed copies of, recordings. This was occurring on a large scale. The material was also communicated to a new public and, although the companies were based outside the UK, the websites were targeted at the UK. The entire purpose of each website was to permit copying. Although statements were made on the sites that their teams were against piracy, these were unconvincing given the quantity of material made available that infringed copyright, their ineffective responses to requests to remove the content and steps they had taken to avoid enforcement measures. Both users and operators of the websites used the service providers' services to infringe copyright, and the providers were notified weekly of infringing activities, thereby showing actual knowledge; indeed, none of the providers denied having such knowledge.

The Court also considered that the orders would be proportionate through balancing the property rights of the claimants against the right to freedom of expression. In this case, the service providers had agreed to the orders and had not sought to resist them on the grounds that they would be unduly burdensome or costly; though they could be circumvented, they could still be justified if they only prevent access by a minority of users. Evidence suggested that such orders are reasonably effective. The orders were narrow and targeted, and were necessary and appropriate to protect intellectual property rights. This clearly outweighed the freedom of expression rights of users who can obtain the material from lawful sources, and of the site operators who were profiting from the infringements.

• Emi Records and others v. British Sky Broadcasting Ltd and others, [2013] EWHC 379 (Ch)
http://merlin.obs.coe.int/redirect.php?id=16413 EN

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Media Convergence and Broadcasting Impartiality

The House of Lords Communications Committee released its report on Media Convergence on 19 March 2013. The report focused on the increasing convergence of different media including television and broadcasting, and the traditional print media, in large part due to technological advances, particularly the Internet. The report highlighted the fact that the lines that had previously delineated these areas, to some extent, are becoming increasingly blurred. Newspapers through video content, and broadcasters through written, are using the Internet to encroach upon the traditional territories of each other. The Committee noted that this evolution is creating a plethora of new challenges and opportunities for content creators, audiences and regulators.

The Committee, in the report, touches on a number of different issues and makes several important recommendations, but perhaps the most notable is the observation that at some point in the future it may be necessary to reassess or abandon the requirements of impartiality currently incumbent upon all news broadcasters in the United Kingdom. It has been a requirement since the advent of broadcasting in this jurisdiction that news content is delivered in a way that is impartial and accurate; this is currently enshrined in both the Ofcom (The Office of Communications) Broadcasting Code and, separately for the State broadcaster, the BBC Charter and Agreement. This requirement is in stark contrast to that relating to the print media who are allowed, and in fact expected, to take a critical, partisan and provocative approach to matters of politics and public interest.

In the past, and as things stand at the moment, the mixture of approaches works to provide consumers with news sources originating from differing motivational standpoints. Equally, and crucially, the Committee noted that media audiences are still able quite

easily to discern the difference in content production standards between the impartial and the partisan. However, it may be the case in future that the blurring of boundaries between news sources, caused by media convergence, may change the way news consumers approach sources of content. In this light, a change to the impartiality requirement may be appropriate for non-public service broadcasters. To this effect the report states at paragraph 114:

"In future, we think that non-PSB broadcast news and current affairs should be treated in the same way as non-broadcast news and current affairs as far as impartiality is concerned."

The report goes on to suggest the possibility of an alternative mechanism of voluntary compliance with the Broadcasting Code. This change would not be without controversy and would have a profound effect on the role and duties of non-public service broadcasting in the UK.

• House of Lords Communications Committee Report on Media Convergence
http://merlin.obs.coe.int/redirect.php?id=16420 EN

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Another Step towards Digital Transition

A further step towards digital transition was achieved in October 2012 with the publication of a co-ministerial decision containing the Chart of radio frequencies assigned for terrestrial digital transmission of TV programmes as well as conditions for their use. According to this decision, a timetable containing dates for analogue TV switch-off in different regions is to be published. It is almost certain that the date announced last year (30 June 2013, see IRIS 2012-5/26) for the definitive analogue switch-off cannot be achieved.

Although in practice digital transition is progressing among the existing analogue television stations (functioning without a license), Greece has not yet published all the regulatory texts needed for the licensing of digital content providers. Apart from this, no organization has been created to manage and coordinate the switch-over process and there is no strategy for a well-orchestrated and planned migration to HD channels on the DTT platform.

There has also been a significant delay concerning the designation of a new President and three members of the National Council of Radio and Television by a special body of the Parliament. The term of office of these members expired in February 2012 but has been extended four times. New members are expected to begin their work by the end of April 2013. The role of the independent regulatory authority is to organise tenders for content providers, issue licenses and supervise new regulations for digital terrestrial television.

• Χάρτης Συχνοτήτων Επίγειας Ψηφιακής Ευρυεκπομπής Τηλεοπτικού Σήματος (Chart of frequencies for terrestrial digital transmission of TV signal)
http://merlin.obs.coe.int/redirect.php?id=16418 EL

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IE-Ireland

BAI Launches New Code of Fairness, Objectivity and Impartiality in News and Current Affairs

On 9 April 2013, the Broadcasting Authority of Ireland (BAI) published a new Code of Fairness, Objectivity and Impartiality in News and Current Affairs as part of its statutory remit.

In accordance with the Broadcasting Act 2009 (see IRIS 2009-10/18), broadcasters are required to ensure that all news and current affairs content is reported in an objective and impartial manner without any expression of the broadcaster's own views. The Act also stipulates that broadcasters must ensure that their treatment of current affairs, including matters that are either of public controversy or the subject of current public debate, is fair to all interests concerned and reported in an objective and impartial manner without any expression of the broadcaster's own views. Broadcasters must also ensure that unfair preference is not given to any political party.

The objectives of the BAI's code are:

- To set out clearly the minimum standards and practices that are expected of broadcasters in their treatment and broadcast of news and current affairs content;

- To provide general guidance to broadcasters to assist in their decision-making process, as they pertain to news and current affairs content;

- To promote independent and impartial journalism in the provision of news and current affairs content;

- To inform and generate awareness among citizens with regard to standards they may expect in relation to news and current affairs content;

- To protect the interests of citizens, in their right to access fair, objective and impartial news and current affairs content.

Based on these objectives, the code sets out general principles as well as specific rules to which broadcasters should adhere. The code outlines four main principles to which broadcasters shall comply in their treatment of news and current affairs content. The four principles are: Fairness; Objectivity and Impartiality; Accuracy and Responsiveness; Transparency and Accountability.

More specifically, the code requires broadcasters, inter alia, to ensure that news and current affairs reporting does not express personal views and that conflicts of interest on the part of the editorial team are made known to the public. The code sets out requirements on the use of secret recording and "doorstep" interviews. The code also includes a new rule that requires broadcasters to put in place appropriate policies and procedures for handling contributions to news and current affairs programmes via social media.

The BAI will publish guidance notes on the code shortly for both broadcasters and members of the public. The code will come into effect on 1 July 2013.

• Code of Fairness, Objectivity and Impartiality in News and Current Affairs
http://merlin.obs.coe.int/redirect.php?id=16422 EN

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MK-"the Former Yugoslav Republic Of Macedonia"

Handbook on Media Industry and Fair Competition

In March 2013, the Советот за радиодифузија (Broadcasting Council, i.e., the media regulation authority), published a Прирачник за создавање пазарни услови за одржлив економски раст на медиумската индустрија и фер конкуренција (Handbook on Establishing Market Conditions for the Sustainable Economic Growth of the Media Industry and Fair Competition). Its main purpose is to guide the members of the Broadcasting Council to implement broadcasting legislation in view of market growth, free competition and media pluralism.

The eleven-page document provides an overview of provisions in the current media market legislation, namely the Закон за радиодифузната дејност (Law on Broadcasting Activity) and the Закон за заштита на конкуренцијата (Law on Competition Protection). Just like the recent Прирачник за оценување на медиумскиот плурализам (Guideline for assessing media pluralism) of December 2012, the Handbook comes in response to the EU Commission's Progress Report for 2012, which found the legislative implementation insufficient (see IRIS 2013-3/20): "Efforts were made to enforce legislation on copyright and on media ownership and concentration, but these still remain insufficient. The removal of the license for the TV station A2 raised questions and identified weaknesses in the legal framework and practice for imposing sanctions. The Broadcasting Council needs to review its practices and legal framework in order to address these concerns."

The Macedonian media market proved to be vulnerable especially to political influences. During the March 2013 local elections, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) noted: "While the media monitored by the Election Observation Mission provided extensive campaign coverage in the news, it showed significant bias in favour of the governing parties both in terms of quantity and content of coverage."

The Reporters Without Borders ranked Macedonia in their World's Press Freedom Index 2013 far behind European democracies (116th place): "Judicial harassment based on often inappropriate legislation, the lack of access to public data, physical and psychological violence against those who work in news and information, official and private advertising markets used as a tool, the grey economy's hold over vital parts of the media. All are obstacles to the right to report the news and people's right to know it."

In the Handbook, the Broadcasting Council commits itself to the improvement of its licensing policy in order to consolidate the market: "The market should be open to new players, but prior to granting a license the Broadcasting Council will have to confirm that all necessary preconditions - technical, economic, personnel etc., - have been met as a guarantee that the applicant will increase pluralism".

• Прирачник за создавање пазарни услови за одржлив економски раст на медиумската индустрија и фер конкуренција (Handbook on Establishing Market Conditions for the Sustainable Economic Growth of the Media Industry and Fair Competition)
http://merlin.obs.coe.int/redirect.php?id=16455 MK
• The World's Press Freedom Index 2013 of the Reporters Without Borders
http://merlin.obs.coe.int/redirect.php?id=16400 EN FR
• European Commission's Macedonia Progress Report 2012 of 10 October 2012
http://merlin.obs.coe.int/redirect.php?id=16301 EN
• Statement of preliminary findings and conclusions of the OSCE-ODIHR of 25 March 2013
http://merlin.obs.coe.int/redirect.php?id=16401 EN

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Independent Media Consultant

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

NL-Netherlands

Media Policy Priorities of the Dutch Media Authority in 2013

In accordance with Article 7.20 (1) of the *Mediawet 2008* (Dutch Media Act), the *Commissariaat voor de Media* (Media Authority - CvdM) must report each year to the Minister of Education, Culture and Science on its intended enforcement policy. On 31 October 2012 the CvdM sent its enforcement letter 2013 to the Minister and made it public.

In its letter to the Minister, the CvdM first emphasises the general principles in its enforcement strategy that are focused on stimulating the presence of a level playing field and effective and customised supervision measures for different media institutions. The CvdM also presents the priority topics it has on its agenda for 2013, which include supervising commercial on-demand media services and supervising compliance with product placement rules.

Due to the implementation of the Audiovisual Media Services Directive (AVMSD) in the Dutch Media Act 2008 (see IRIS 2010-3/32), these two important subjects (commercial on-demand media services and product placement) have been added to the tasks of the CvdM. The CvdM has identified these topics as a priority towards developing its enforcement strategy in 2013.

Concerning commercial on-demand media services, last year the CvdM's focus was on the registration of commercial on-demand services. Therefore the Media Authority created a registry where the on-demand services had to be registered. In 2013 the main goal of the CvdM will be to put in place the supervision mechanism of the registered services. The Media Authority also mentioned the protection of Internet users against severely harmful content as another area of interest.

Concerning product placement the CvdM, after an elaborate consultation, developed new policy rules for advertising and sponsoring. The Minister still has to ratify the new regulation on product placement. When this has been done, the focus for 2013 will be on supervising compliance with these new rules. The basic principle will be that national broadcasters may not find themselves in a worse position than competing foreign broadcasters.

• *Handhavingsbrief 2013 Commissariaat voor de Media, 31 oktober 2012* (Enforcement letter 2013 Dutch Media Authority, 31 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16460 NL

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Media Monitor: The Audiovisual Media in the Digital Age

In February 2013, the Media Monitor of the *Commissariaat voor de Media* (Media Authority - CvdM) published a report entitled *Analyse en Verdieping #2, Over audiovisuele media in het digitale tijdperk* (Analysis and Deepening #2, about audiovisual media in the digital age). The report contains, as the title suggests, an analysis of developments in the field of audiovisual media in the digital age. Over ten years ago, the Ministry of Education, Culture and Science instructed the Commissariat for the Media to develop a monitoring system for media concentrations. Since then, the Commissariat reports annually on the state of affairs in the Dutch media market. The Media Monitor provides, for example, an insight into the implications of developments in the media on editorial independence, pluralism and accessibility of the media to the public. Consequently, the Dutch media landscape continues to function properly, because it can quickly be rectified when an undesirable situation is likely to arise. In addition to the publication of annual reports, the Media Monitor publishes incidental reports on specific themes, as is the case in the current report.

The report includes the results of four studies on: the digital television channel packages; the digital radio channel packages; web radio channels; and videos on news sites. Chapter 1 of the report, which deals inter alia with digitisation of the media, is written by one of the three guest authors, Prof. Jos de Haan, Professor of ICT, culture and the knowledge society at Sociaal en Cultureel Planbureau. In Chapter 1, Professor Jos de Haan considers that the media user has to deal more than ever with a varied and rich media landscape. He concludes that the developments in the use of media are wider than the migration from analogue to digital and that the consumer has become part of the media world through the use of social media and user-generated content. The second chapter concerns the use of television. This use is clarified by the second guest author, Mr Bas de Vos, the director of "Stichting KijkOnderzoek". According to Mr Bas de Vos, the most significant development in the field of television is the increased digital reception. Chapters 3 and 4 address the various forms of the digital television offer and the availability of news videos on news websites. Research conducted on news videos appearing on news websites shows that many Dutch newspa-

per publishers, in contrast to publishers in our neighbouring countries, only sparsely enrich their text messages with videos. The fifth chapter details the views of the third guest author, Mrs Liedewij Hentenaar, Director of the "Radio Advies Bureau", on the use of radio. Mrs Hentenaar's chapter shows that the radio remains high in the ranking in the Netherlands when it comes to time devoted to media. Finally, chapters 6 and 7 deal with the offer of digital radio stations and the offer of Netherlands-oriented web radio channels.

In short, the report shows that the digital media offer has significantly increased and has become more diverse than ever before. The opportunities in the field of audio and video in this digital world are endless. The development and enhancement of the offer has led to more choice. However, in relation to the traditional channels, this additional offer is used to a limited extent only. So far, the extensive offer does not seem to lead to the use of a greater variety of sources by the consumer. In the short term it is not expected that this will change dramatically. However, it is evident that the developments of recent years will continue and that the amount of audio and video material on offer will only increase.

• *Analyse en Verdieping #2, Over audiovisuele media in het digitale tijdperk, Commissariaat voor de Media* (Analysis and Deepening #2, about audiovisual media in the digital age, Commissariat for the Media)
http://merlin.obs.coe.int/redirect.php?id=16469 NL

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PL-Poland

VoD Provisions Incorporated into Broadcasting Act

On 28 February 2013, the Act amending the Polish Broadcasting Act entered into force (see IRIS 2013-1/32 for the draft amendment). The Act concerns content regulation of on-demand audiovisual media services (in particular Video on Demand - VoD). It is intended to constitute the last step of the transposition of the Audiovisual Media Services Directive 2010/13/EU (AVMSD) into Polish national law. The provisions regarding linear services had been implemented before (see IRIS 2010-8/41).

The implementation process of the the VoD provisions involved a careful analysis of the market conditions and consumer needs. The rules for VoD service providers now follow the idea of less stringent regulation being nevertheless in conformity with the AVMSD.

There is no obligation of authorisation, registration or even notification for providers of VoD services. The Act provides only for a minimal reporting obligation requiring media service providers to submit an annual report to the regulatory authority (National Broadcasting Council - NBC) outlining

- data of the provider (including a description of the audiovisual media service and the way of dissemination);

- the description of the types of technical security measures or other appropriate measures to prevent minors from the reception of seriously harmful content (Art. 12 AVMSD);

- the description of the promotion of European works (Art. 13 AVMSD), including works originally produced in the Polish language, including the share of these programmes in the catalogue in terms of quantity and overall programming hours. The report must be submitted annually by 31 March for the previous year.

In case of failure to deliver the report, following a notice to file the report within a delay of 14 days from the date of receipt of said notice, the Chairman of the NBC is entitled to impose a fine upon the person publishing the VoD service in the amount of up to PLN 1,000 (approximately EUR 250). The fine may be imposed anew in case of continued non-compliance with the obligation to deliver the report.

As regards Art. 13 AVMSD, the Act stipulates that providers of VoD services shall promote European works, including works produced originally in the Polish language. The Broadcasting Acts foresees particular ways of promotion:

- distinct identification of the origin of programmes available in the catalogue,

- the option to search in particular for both European works and those originally produced in the Polish language, or

- information and additional material about European works, including works produced originally in the Polish language.

VoD providers must allocate at least 20% of the content in their catalogue for European and Polish works. They have to ensure an adequate visibility of such programmes in the catalogue. This obligation does not apply to the catalogues containing specifically non-European works.

The main obligations regarding protection of minors are:

- respect of the ban on VoD content that threatens the physical, mental or moral development of minors (especially pornography or gratuitous violence) without implementing technical security measures or other appropriate measures to prevent the access of minors,

- appropriate qualification and designation of content labelling the degree of harmfulness to minors by different age groups. The labelling shall make the qualification clearly visible both in the catalogue and throughout the playing of the audiovisual programme itself.

The NBC is in charge of monitoring the VoD market in order to identify VoD service providers (established within Polish jurisdiction) and their compliance with the obligations imposed by the Broadcasting Act. The NBC's tasks also include the initialisation and the support of self- and co-regulation of VoD service providers. The Act strongly supports the development of codes of best practice, e.g. in the area of specific requirements for technical measures protecting minors.

• *Ustawa z dnia 12 października 2012 r. o zmianie ustawy o radiofonii i telewizji - Dz.U. 2012.1315* (Act amending the Law on Radio and Television of 12 October 2012)
http://merlin.obs.coe.int/redirect.php?id=16429 PL

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RO-Romania

Financial Basis of Public Television Service Stabilised

On 11 March 2013 the Romanian Senate (Upper Chamber of the Parliament) approved the *Legea pentru aprobarea Ordonanţei de urgenţă a Guvernului nr. 33/2012 privind unele măsuri pentru asigurarea furnizării serviciului public de televiziune* (Law on the approval of the Government's Emergency Decree no. 33/2012 on safeguarding the provision of public service television). The Draft Law had been approved on 8 October 2012 by the Chamber of Deputies (Lower Chamber) and promulgated by Romania's President on 28 March 2013. The Law (Law no. 68/2013) was published in the Official Journal of Romania no. 183, of 2 April 2013, Part I.

The Emergency Decree was adopted by the Romanian Government on 27 June 2012 due to the severe financial problems of the Televiziunea Română (TVR), the Romanian public television. TVR's debts amounted to more than EUR 134 million.

The Government saw the necessity for the Decree as regards the democratic value of public service television and the general public interest to receive information. According to the Emergency Decree, within 45 days of its approval, the Board of Administration of the TVR had to issue an economic recovery plan containing measures restructuring the corporation including the employees. These measures then had to be taken in order to pay the fiscal debts within six months or to defer the debts.

After another six months, the Board had to present a report to the Parliament unveiling the results of the economic recovery plan. Regarding this obligation, the members of the Board would have been personally liable in cases of omission.

The Law no. 68/2013 for the approval of the Emergency Decree no. 33/2012 added new provisions to the Emergency Decree. Most importantly, the six-month term to pay the fiscal debts was extended to seven years, since the fiscal debts could be deferred. Within ten days of the end of this period, the Board of Administration will have to issue a report on the results of the recovery program to the Committee on Culture and to the Committee on Budget and Finance of the Romanian Parliament. The non-observance of this ten-day term may lead to the dismissal of the President of the Board in case of personal fault. The rejection of the report by the Parliament will lead to the dismissal of the whole Board.

The President of the TVR's Board of Administration stated on 3 April 2013 that the TVR now was able to continue the implementation of the reform program and that, due to the deferral, the public television can start to pay off the large debts.

In the course of the recovery plan, a new organisational chart of TVR came into force on 1 February 2013: about 700 employees (out of approximately 3,150) were made redundant by 1 March 2013. Two TVR channels (TVR Cultural and TVR Info) were shut down and their productions were included in other TVR channels.

Meanwhile, the Romanian Senate rejected a Draft Law on the modification of Art. 40 of the Law no. 41/1994 on the organisation and functioning of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation on 12 February 2013. The Draft Law envisaged abolishing the broadcasting licence fee. The draft had been tacitly approved on 15 February 2011 by the Chamber of Deputies, but the Senate's rejection was final. The TVR would have lost its main source of revenues; in 2011 the licence fee accounted for a 55.97% share of the revenues.

• Ordonanţa de urgenţă a Guvernului nr. 33/2012 privind unele măsuri pentru asigurarea furnizării serviciului public de televiziune (Government Emergency Decree no. 33/2012 on safeguarding the provision of the public television service)
http://merlin.obs.coe.int/redirect.php?id=16404 RO

• Proiect de lege pentru aprobarea Ordonanţei de urgenţă a Guvernului nr. 33/2012 privind unele măsuri pentru asigurarea furnizării serviciului public de televiziune (Draft Law on the approval of the Government's Emergency Decree no. 33/2012 on safeguarding the provision of the public television service)
http://merlin.obs.coe.int/redirect.php?id=16405 RO

• Propunere legislativă pentru modificarea art. 40 din Legea nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune (Draft Law on the modification of. Art. 40 of the Law no. 41/1994 on the organisation and functioning of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation)
http://merlin.obs.coe.int/redirect.php?id=16406 RO

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Modification of Electronic Communications Law Enters into Force

The *Legea nr. 67/2013 pentru aprobarea Ordonanţei de urgenţă a Guvernului nr. 19/2011 privind unele măsuri pentru modificarea unor acte normative în domeniul comunicaţiilor electronice* (Law no. 67/2013 on the approval of the Government's Emergency Decree no. 19/2011 with regard to measures for the modification of some electronic communications acts) was published in the Official Journal of Romania no. 176 of 1 April 2013, Part I (see IRIS 2009-5/31, IRIS 2010-1/36 and IRIS 2012-10/23).

The Emergency Decree was triggered by the infringement proceedings of the European Commission against Romania (letter of formal notice, reasoned opinion under the infringement proceedings) for breaches of Directive 2002/21/EC with regard to the common regulatory framework for the electronic communications networks and communications services (Framework Directive; see IRIS 2010-7/31).

Previously, the Emergency Decree no. 19/2011 modified the following acts:

(1) the Government's Emergency Decree no. 79/2002 approved by means of the Law no. 591/2002 with further modification and completions with regard to the general regulatory framework for the communications;

(2) the Government's Emergency Decree no. 22/2009 approved by means of the Law no. 113/2010 with regard to the installation of the *Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (National Authority for Administration and Regulation in Communications – ANCOM);

(3) *the Legea Audiovizualului nr. 504/2002, cu modificările şi completările ulterioare* (Audiovisual Law no. 504/2002, with further modifications and completions).

The modification of the above-mentioned laws was intended to lead to an effective structural separation of the regulatory functions and of the activities linked to ownership and control in the field of electronic communications.

Subsequently, when deliberating the Law no. 67/2013, it was decided not to make fundamental changes to the above-mentioned acts. Instead, the legal framework regarding the installation of the ANCOM was approved in its entirety, whereas specific provisions of the Audiovisual Law have been modified. The provisions of the Emergency Decree no. 19/2011 are contained in Art. 10:

- ANCOM's powers in the fields of electronic communications, audiovisual communications, radio and telecommunications terminal equipment including electromagnetic compatibility and postal services, and

- ANCOM's specific tasks in the field of electronic communications, audiovisual communications, and postal services.

As for the Audiovisual Law, the Emergency Decree no. 19/2011 stipulated rules on the following issues:

- Art. 19: the strategy for the usage of radio frequencies, the national plan for radio frequencies assigned to audiovisual media services, the analysis of problems linked with the spectrum's use.

- Art. 59: the allocation procedure for digital terrestrial radio frequencies;

- Art. 65: the revocation or suspension of licences for the usage of digital terrestrial radio frequencies and

- Art. 73: the usage of radio and television terrestrial broadcasting transmitters under Romania's jurisdiction.

In turn, the Law no. 67/2013 now, i.e., deviating from what had been envisaged by the Emergency Decree no. 19/2011,

- repealed the whole of Art. 19;

- envisages in Art. 52 the temporary renewal of the analog broadcasting licenses until the digital switchover;

- specifies Art. 59 in view of the licensing procedure of digital terrestrial radio and the licence fees to be paid. It is now made clear that during the transition to digital broadcasting, broadcasters can make use of digital terrestrial systems pending the general switchover in the case of approval of the ANCOM;

- specifies in Art. 65 the violations leading to license revocations and suspensions along with the peculiarities regarding the temporary continuity of licenses and the digital switchover.

• *Ordonanța de urgența a Guvernului nr.19/20011 privind unele măsuri pentru modificarea unor acte normative în domeniul comunicațiilor electronice. Publicat în Monitorul Oficial,nr. 146 din 28.02.2011* (Emergency Decree no. 19/2011 with regard to measures for the modification of some electronic communications acts)
http://merlin.obs.coe.int/redirect.php?id=16407 RO

• *Legea 67/2013 pentru aprobarea OUG 19/2011 privind unele masuri pentru modificarea unor acte normative in domeniul comunicatiilor electronice. Publicat in Monitorul Oficial, Partea I nr. 176 din 1 aprilie 2013* (Act no. 67/2013 on the approval of the Government's Emergency Decree no. 19/2011 with regard to measures for the modification of some electronic communications acts, Official Journal of Romania no. 176 of 1 April 2013, Part I)
http://merlin.obs.coe.int/redirect.php?id=16407 RO

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SK-Slovakia

Non-compliance with Product Placement Identification Requirement

On 15 January 2013, the Council for Broadcasting and Retransmission of the Slovak Republic ("CBR") imposed a fine of EUR 1,500 on the major commercial broadcaster for the failure to inform the public about the existence of product placement in its programme and for giving undue prominence to the product in question.

The programme was a reality show taking place in a bar. Even though the bar was an operating business, it was built solely for the purpose of producing the reality show. The bar contained many products with commercial logos visible. Since this programme was under the exclusive editorial control of the broadcaster, it was considered by the CBR that this was no case of incidental display of commercial trade marks.

The CBR therefore began a legal investigation and queried the broadcaster as to whether any payments had been made in connection with these products or whether products had been provided free of charge. However, the broadcaster did not provide any information to the CBR.

The CBR refrained from imposing charges in respect of seven out of eight products, reasoning that there is no clear evidence that references made to these products fulfilled the definition of product placement, due to reasonable doubts about the existence of remuneration. All of the products were items that naturally occur in the given environment (beer tap, glasses, menus, coffeemaker etc.). The CBR stated that at the current stage it could not be ruled out that the broadcaster obtained these items itself and included them in the programme with the intention of increasing the credibility of the appearance of a real bar. References to these products also did not support the idea of commercial "placement" since these products were in no case shown in a prominent way (all references were visual and the products were displayed in the background only). With regard to these products, the CBR maintained its "in dubio pro reo" approach already adopted in previous cases (host of the show wearing a t-shirt with a trade mark, open notebook with visible logo in its back) when it also did not impose fines in cases when the broadcaster denied or did not confirm the product placement in the programme and the products were not displayed in a clearly promotional manner.

The CBR instead did impose the sanction due to the references made to the last product - a bottle of champagne. The programme contained two zoomed shots aimed directly at the label of the bottle rendering the trade mark clearly visible. The CBR stated that clearly promotional references to the product are references that cannot possibly serve any other than a promotional interest. Such references are always made in return for payment or some other similar consideration. The actual form of this consideration - cash payment, barter deals, written contracts or gentleman's agreements - is irrelevant (see IRIS 2013-1:36). The CBR also stated that the programme gave undue prominence to the product in question. When assessing the "prominence" of the product it is necessary to review whether specific shots of the product may serve any reasonable editorial purpose. When there is no other logical explanation for featuring a product in the given way it means that the intention is to promote this product. The CBR emphasised that merely having a bottle of champagne in the given scene (champagne in a hot tub) is editorially understandable within the concept of the show. However, there is no editorial reason for the detailed shot of the label while the champagne is being poured into the glasses.

The broadcaster paid the fine on 26 March 2013 and did not appeal against the decision.

• *Rada pre vysielanie a retransmisiu. Rozhodnutie c. RP/007/2013 - 15.01.2013. Správne konania c.: 368-PLO/O-4821/2012* (Decision of the Council for Broadcasting and Retransmission of the Slovak Republic of 15 January 2013)
http://merlin.obs.coe.int/redirect.php?id=16410 SK

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

Complaint against Satirical Video of Slovak President Dismissed

On 9 April 2013, the Council for Broadcasting and Retransmission of the Slovak Republic ("CBR") dismissed a complaint against a satirical video about the President of the Slovak Republic ("President"), which had been provided within the audiovisual on-demand service ("TV" section) of one of the major Slovak press publishers.

The video provided allegedly "leaked" audiovisual material from the traditional New Year's speech of

the President. It was provided within a section called "dead serious" run by two journalists well-known for their satire and comedy work. The given clip contained features in the nature of intense caricatures: the president was presented as a senile individual not being able to remember a few lines of his speech or to sit up straight without sitting on a piece of wood. The clip also featured a fake conversation between the President's spokesman and the Prime Minister of the Slovak republic referring to the President in rather profane language. Profanities were "beeped out", but could, however, easily be discerned in the context.

The CBR pointed out that the President is the highest public official and therefore must bear more criticism than other individuals. It referred to the most important rulings of the European Court of Human Rights (ECtHR) and their basic principles, having special regard to the recent Chamber judgment of 14 March 2013 in the case Eon v. France (application no. 26118/10, see IRIS 2013-5/1). The CBR stated that even though the video used a high level of exaggeration and shocking effect, its dissemination is covered by legitimate matters of public interest.

The CBR also took into account that the vulgar reference to the President resembled the way the President himself had allegedly referred to his predecessor in the past. Furthermore, it is a fact that many slips of the tongue occur during the President's official speeches. Presenting the President as a "marionette" of the Prime Minister referred to the fact that, as a presidential candidate, the President had emphasized his independence of any political party, whereas material had been found that showed the President stating that "my success will be the success of this party and my failure will be the failure of this party".

The CBR declared in its paper that the authors clearly presented one-sided opinions and did not have the ambition to seriously present or analyse facts in a journalistically required way. Nevertheless, even such expressions regardless of their "specific" nature might foster public debate. Since the given video referred to legitimate matters of public interest it must be highly protected under the freedom of expression as provided in Art. 26 of the *Ústava Slovenskej republiky* (Constitution of the Slovak Republic). The dismissal of the complaint was necessary to safeguard free and diverse public debate, which is one of the highest values in any democratic society.

An appeal against the CBR's unpublished decision is not possible.

• Decision of the Council for Broadcasting and Retransmission of the Slovak Republic of 9 April 2013 SK

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

Re-instatement of Second Watershed

On 14 March 2013, the Minister of Culture signed the amendment of the Decree No. 589/2007 Coll. laying down details on a single labelling system for audiovisual works, audio recordings of artistic performances, multimedia works, programmes and other components of programme services ("labelling system"). The amendment came into force on 1 April 2013 and by this date the second watershed (15+ programmes only after 8 pm) was revived in Slovakia.

The second watershed was part of the original labelling system that applied to television programmes only. In 2008, this labelling system was replaced by a new one that covered not only television programmes, but also radio programmes, cinemas, video and DVD rentals, CD and DVD distributors and, since 15 December 2009, (transposition of AVMS Directive), also on-demand audiovisual media services.

After dropping the second watershed in 2008 the Council for Broadcasting and Retransmission of the Slovak republic ("CBR") recorded an increased amount of viewers' complaints against the broadcasting of films clearly aimed at the 15+ audience during daytime (e.g., midday on Sunday or weekday afternoons). The final impulse for the re-installment of the second watershed in Slovakia was the re-runs of reality shows with clearly "conflicting" and offensive content i.e., offensive language, sexual behaviour etc., (e.g., reality shows where female/male contestants chose each week other contestants with whom to share a room and a bed) that were broadcast in the afternoon (4:30 pm). The Minister of Culture opened a public consultation on this matter and asked the industry to present realistic safeguards that would prevent broadcasting of such content during daytime.

Since the industry failed to provide mechanisms that would guarantee socially responsible programme scheduling it was decided that the watershed at 8 pm for programmes not suitable for minors under 15 years of age will be re-introduced in Slovakia. The broadcasters and the legislator reached an agreement on a small modification of some classification criteria e.g., expressive or aggressive language may appear in 12+ programmes (may be broadcast all day long) but only in the form and intensity suitable for minors aged 12 and over. The practical assessment of these criteria is, however, exclusively within the competence of CBR, therefore the upcoming regulatory activity in this matter will be decisive for the final "shape" of legal daytime TV programme scheduling in the Slovak republic.

• *50/2013 Z.z. Vyhláška Ministerstva kultúry Slovenskej republiky, ktorou sa mení a dopĺňa vyhláška Ministerstva kultúry Slovenskej republiky č. 589/2007 Z. z., ktorou sa ustanovujú podrobnosti o jednotnom systéme označovania audiovizuálnych diel, zvukových záznamov umeleckých výkonov, multimediálnych diel, programov alebo iných zložiek programovej služby a spôsobe jeho uplatňovania v znení vyhlášky Ministerstva kultúry Slovenskej republiky č. 541/2009 Z. z.*
(Decree No 589/2007 Coll. as amended on 14 March 2013)
http://merlin.obs.coe.int/redirect.php?id=16457 SK

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Office of the Council for Broadcasting and Retransmission of Slovak Republic

Agenda

Herausforderungen und Chancen von Connected TV
3 July 2013 Organiser: Institut für Rundfunkökonomie an der Universität zu Köln Venue: Cologne http://www.rundfunk-institut.uni-koeln.de/institut/tagungen/2013.php

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