OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2013-6

INTERNATIONAL

COUNCIL OF EUROPE

EUROPEAN UNION

NATIONAL

BE-Belgium

BG-Bulgaria

DE-Germany

DK-Denmark

FR-France

GB-United Kingdom

GR-Greece

IE-Ireland

NL-Netherlands

RO-Romania

RU-Russian Federation

SK-Slovakia

US-United States

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

Editorial Informations

Publisher:
European Audiovisual Observatory 76, allée de la Robertsau F-67000 STRASBOURG
Tél. : +33 (0) 3 90 21 60 00 Fax : +33 (0) 3 90 21 60 19
E-mail: obs@obs.coe.int www.obs.coe.int
Comments and Contributions to:
iris@obs.coe.int
Executive Director:
Wolfgang Closs

Documentation/Press Contact:
Alison Hindhaugh
Tel.: +33 (0)3 90 21 60 10;
E-mail: alison.hindhaugh@coe.int
Translations:
Michelle Ganter, European Audiovisual Observatory (co-ordination) • Brigitte Auel • Katharina Burger • France Courrèges • Paul Green • Marco Polo Sàrl • Katherine Parsons • Stefan Pooth • Erwin Rohwer • Nathalie Sturlèse
Corrections:
Michelle Ganter, European Audiovisual Observatory (co-ordination) • Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory • Annabel Brody, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) • Johanna Fell, European Representative BLM,Munich (Germany) • Amélie Lépinard, Master - International and European Affairs, Université de Pau (France) • Julie Mamou • Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland) • Martin Rupp, Institute of European Media Law (EMR), Saarbrücken (Germany)
Distribution:
Markus Booms, European Audiovisual Observatory
Tel.:
+33 (0)3 90 21 60 06;
E-mail: markus.booms@coe.int
Web Design:
Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com
ISSN 2078-6158

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Animal Defenders International v. the United Kingdom

The Grand Chamber of the European Court held, by nine votes to eight, that the UK's ban on political advertising on television did not violate Article 10 of the Convention. The majority opinion in this controversial judgment reflects a somewhat particular approach compared to the Court's previous case law on political advertising, such as in VgT Vereinigung gegen Tierfabriken v. Switzerland (see IRIS 2001-7/2 and IRIS 2009-10/2). Essentially the judgment in the case of Animal Defenders International v. UK accepts that a total ban on political advertising on television, characterized by a broad definition of the term "political", with no temporal limitations and no room for exceptions, is in accordance with the right to freedom of political expression. The dissenting opinions attached to the judgment argued for a radically different approach, but their arguments could not convince the majority of the Grand Chamber.

The applicant in this case is an NGO (Animal Defenders International, "ADI") campaigning against the use of animals in commerce, science and leisure, seeking to achieve changes in law and public policy and to influence public and parliamentary opinion to that end. In 2005, ADI began a campaign directed against the keeping and exhibition of primates in zoos and circuses and their use in television advertising. As part of the campaign, it wished to screen a TV advertisement with images of a girl in chains in an animal cage followed by a chimpanzee in the same position. It submitted the advert to the Broadcast Advertising Clearance Centre ("the BACC"), for a review of its compliance with relevant laws and codes. The BACC refused to clear the advert, drawing attention to the political nature of ADI's objectives, referring to section 321(2) of the Communications Act 2003, which prohibits advertisements "directed towards a political end". The refusal to broadcast the advert was confirmed by the High Court and later reached the House of Lords, which held that the ban on political advertising and its application in this case did not violate Article 10 of the European Convention. ADI subsequently submitted an application to the European Court, arguing that the refusal of their advert breached Article 10 of the Convention.

In the first part of its reasoning, the Court emphasizes that both ADI and the UK authorities had the same objective of maintaining a free and pluralist debate on matters of public interest, and more generally, of contributing to the democratic process as a legitimate aim. The Court weighed in the balance, on the one hand, ADI's right to impart information and ideas of general interest which the public is entitled to receive, with, on the other hand, the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.

The Court had three main considerations in making its assessment: the legislative process by which the ban had been adopted and any review by the judicial authorities; the impact of the ban and any steps that might have been taken to moderate its effect; and, what happens in other countries, particularly those where the Convention applies. As far as the process was concerned, account was taken of the fact that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews and validated by both parliamentary and judicial bodies. The Court also referred to the influential, immediate and powerful impact of the broadcast media, while there is no evidence that the development of the internet and social media in recent years in the United Kingdom has shifted this influence to the extent that the need for a ban specifically on broadcast media should be undermined, internet and social media not having "the same synchronicity or impact as broadcasted information". The Court also noticed that the ban was relaxed in a controlled fashion for political parties - the bodies most centrally part of the democratic process - by providing them with free party political, party election and referendum campaign broadcasts. The European Court agreed with the UK authorities that allowing a less restrictive prohibition could give rise to abuse and arbitrariness, such as wealthy bodies with agendas being fronted by social advocacy groups created for that precise purpose or creating a large number of similar interest groups, thereby accumulating advertising time. Given the complex regulatory background, this form of control could lead to uncertainty, litigation, expense and delay.

As to the impact of the ban, the Court noted that the ban only applied to advertising and that ADI had access to alternative media, both radio and television and also non-broadcast, such as print media, the internet and social media, demonstrations, posters and flyers. Finally, because there is no European consensus on how to regulate paid political advertising in broadcasting, this broadens the margin of appreciation to be accorded to the UK authorities in this case. Accordingly, the majority of the Court considers the reasons adduced by the authorities, to justify the prohibition of ADI's advertisement to be relevant and sufficient. The prohibition cannot therefore be considered to amount to a disproportionate interference with ADI's right to freedom of expression. Hence there is no violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights (Grand Chamber), case Animal Defenders International v. the United Kingdom, Appl. nr. 48876/08 of 22 April 2013
http://merlin.obs.coe.int/redirect.php?id=16544 EN

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

European Court of Human Rights: Saint-Paul Luxembourg S.A. v. Luxembourg

Ten years after the finding by the European Court of a violation of Articles 8 (right to respect for private and family life) and 10 (freedom of expression and information) of the European Convention of Human Rights in the case Roemen and Schmit v. Luxembourg (25 February 2003, IRIS 2003/5-3), the Luxembourg authorities have again been found in breach of these Articles by issuing a search and seizure warrant disrespecting the protection of journalistic sources.

In 2009 a judicial investigation was opened concerning an article in the newspaper Contacto, published by Saint-Paul Luxembourg S.A. The article described the situation of families who had lost the custody of their children. A social worker who was mentioned in the article and his employer, the central social welfare department, had lodged a complaint with the Attorney General, alleging defamation of the social worker in question and also of the judicial and social welfare system in Luxembourg in general. An investigating judge issued a search and seizure warrant of the offices of the publishing house in order to identify the author of the article at issue. A few days later, police officers presented themselves at the premises of the newspaper, with the search warrant. The journalist who had written the article (his name was partly mentioned under the article), was formally identified and he handed over a copy of the newspaper, a notebook and various documents used in preparing the article. During the search one of the police officers also introduced a USB-stick in the computer of the journalist, eventually copying files from that computer. A short time later the applicant company and the journalist applied to the District Court to have the warrant set aside and the search and seizure operation declared null and void, but this claim was rejected. Later the Court of Appeal upheld the warrant.

Relying on Article 8, Saint-Paul Luxembourg S.A. alleged that the search of the newspaper had infringed the inviolability of its "home" and had been disproportionate. Relying on Article 10 it argued that the measure in question had consisted of an attempt to identify the journalist's sources and had had an intimidating effect. With regard to Article 8 of the Convention„ the European Court is of the opinion that the investigating judge could have opted for a less intrusive measure than a search in order to confirm the identity of the article's author, as it was rather obvious which journalist of Contacto had written the article at issue. As the search and seizure operation was not necessary and had not been reasonably proportionate to the legitimate aims pursued, the European Court held that there had been a violation of Article 8 of the Convention. The Strasbourg Court also considered that the warrant in question had given the police officers access to information that the journalist had not intended for publication and that would have made it possible to identify his sources. The purpose of the warrant had been to search for "and seize any documents or items, irrespective of form or medium, connected with the alleged offences". Being formulated in such broad terms, the warrant had conferred extensive powers on the investigating officers. The search and seizure operation had been disproportionate in so far as it had enabled the police officers to identify the journalist's sources and the warrant itself had not been sufficiently limited in scope to avoid the possibility of such abuse. Since the sole purpose of the search had been to ascertain the identity of the journalist who had written the article, a more narrowly-worded warrant would have sufficed. The European Court therefore also found a violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l'homme (Cinquième section), affaire Saint-Paul Luxembourg S.A. c. Luxembourg, requête n° 26419/10 du 18 avril 2013* (Judgment by the European Court of Human Rights (Fifth Section), case Saint-Paul Luxembourg S.A. v. Luxembourg, Appl. nr. 26419/10 of 18 April 2013)
http://merlin.obs.coe.int/redirect.php?id=16476 FR

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

EUROPEAN UNION

Advocate General: Opinion on Italy's Stricter Hourly Advertising Limits for Pay-tv

On 16 May 2013, Advocate General Kokott delivered her opinion in Case C-234/12, Sky Italia v. AGCom concerning the issue of whether Directive 2010/13/EU (the AVMS Directive) and EU primary law should be interpreted as precluding the Italian asymmetric hourly advertising limits for pay-tv operators. Under Italian law pay-tv broadcasters are subject to a 14% hourly limit, whereas free-to-air commercial broadcasters must comply with an 18% hourly limit.

The referral to the ECJ originates in a dispute before the Latium Regional Administrative Court (TAR Lazio) in which Sky Italia impugned a decision by the Italian Communications Authority (AGCom). In its deci-

sion, AGCom found that one of Sky Italia's pay-tv stations had infringed the 14% hourly limit and imposed a €10,329 fine on the broadcaster. Reti Televisive Italiane (RTI), Italy's largest free-to-air broadcaster, which has a dominant position on the television advertising market, intervened in the main proceedings as well as before the ECJ.

AG Kokott first dealt with the interpretation of Article 4(1) of the AVMS Directive, which enables Member States to lay down "more detailed or stricter rules" for broadcasters subject to their jurisdiction. Contrary to RTI's contention, the AG took the view that such a provision does not grant Member States a "window of discretion" within which national rules are to be regarded as per se legal. By the same token, the AG rejected Sky Italia's argument that Article 4(1) of the AVMS Directive lays down a general prohibition on graduated national rules that distinguish between different categories of broadcasters.

AG Kokott then noted that the examination of the Italian provisions on the basis of the general principle of equal treatment under EU law had a different result depending on those provisions' main aim - which was for the referring court to determine. If the focus of the Italian rules were the protection of consumers against excessive advertising, then differentiated rules for pay-tv and free-to-air broadcasters would be compatible with the principle of equal treatment, because pay-tv viewers have already paid a contractual fee and may reasonably expect to be confronted with less advertising than on free-to-air TV. If, instead, the focus of the Italian provisions were to ensure that free-to-air broadcasters receive greater advertising revenues, then those provisions would be at variance with the principle of equal treatment, insofar as pay-tv and free-to-air broadcasters are in a comparable situation (they both compete on the market of airtime for television adverting) and no competitive disadvantage exists to warrant asymmetric rules in favour of free-to-air broadcasters.

The AG then looked at the Italian rules against the background of EU internal market fundamental freedoms. While the effects of such rules on investment decisions by foreign broadcasters or investors appeared too uncertain and indirect to result in a restriction of the freedom of establishment or the free movement of capital, those rules did constitute a restriction on the freedom to provide services. In this connection, AG Kokott reiterated her proposition that while ensuring free-to-air broadcasters greater advertising revenues did not constitute a legitimate justification, the goal to protect viewers from excessive advertising could justify the restriction caused by the Italian rules, provided those rules are appropriate and necessary to achieve that aim. Again, AG Kokott left that determination to the referring court.

The AG finally turned to the question of whether the Italian rules were compatible with the principle of media pluralism to the extent that they distorted competition by creating or strengthening a dominant position in the television advertising market. AG Kokott took the view that the request for a preliminary ruling contained insufficient data on the relevant market for the ECJ to answer that question, which accordingly should have been declared inadmissible. In the alternative, AG Kokott averred that the principle of media pluralism precludes national provisions capable of significantly distorting competition between broadcasters, but added that not every change in the conditions of competition necessarily resulted in an impairment of media pluralism.

• Opinion of Advocate General Kokott delivered on 16 May 2013, Sky Italia v. AGCom, Case C-234/12
http://merlin.obs.coe.int/redirect.php?id=16494 EN FR IT NL

Amedeo Arena
University of Naples "Federico II", School of Law

European Commission: Third and Final Public Consultation on State Aid Criteria for Films and other Audiovisual Works

On 30 April 2013, the European Commission launched a public consultation on the state aid criteria for films and other audiovisual media. The aim of the consultation is to assess the support schemes for films and other audiovisual works of the European Member States. The criteria for state aid were previously set out in the 2001 Cinema Communication, which expired on the 31st of December 2012. These criteria are now set out in a (revised) draft Communication. The final Communication is expected to be adopted by the Commission in July 2013. The public consultation was designed to collect opinions on the draft Communication in the interim period and ran from 30 April 2013 until 28 May 2013.

As noted in the Commission's Communication, the European Union (EU) has in due course become one of the largest players in the global film producing industry. These films represent the cultural diversity of the EU with its different traditions and cultures in each Member State. Besides this cultural importance, the European film industry is also of significant economic importance. In the area of European audiovisual media, state aid has become increasingly important. On average, an estimated €3 billion circulates in film support per year. There is a high demand for state aid in the film industry due to the risks associated with producing a film and the perceived lack of profitability of this sector. However, such support may (threaten to) distort competition and is therefore regulated under Article 107 Treaty on the Functioning of the European Union.

The draft Communication introduces certain amendments to the state aid criteria of 2001. The 2001 cri-

teria only applied to production support whereas the draft rules extend the scope of application of the criteria to other related activities, covering all phases from the original concept of the work to actually putting the work on the market. Also, the new draft rules are designed to ensure the proportionality of territorial obligations with the aid granted (this is the obligation to spend a certain part of the film production budget in a particular territory). It takes into account specific characteristics of tax incentives in order to support the film industry and introduces a higher maximum aid intensity level for cross-border productions.

In short, the main objective of the draft Communication is to create a level playing field for film producers in each Member State and to enhance the possibility of cross-border audiovisual productions. The Commission expects that media pluralism will be ensured by offering a more culturally diverse catalogue of audiovisual works.

• Public Consultation on State Aid Criteria for Films and other Audiovisual Works Bodies, 22 March 2013
http://merlin.obs.coe.int/redirect.php?id=16496 DE EN FR
• Revised Draft Communication from the Commission on State Aid for Films and Other Audiovisual Works
http://merlin.obs.coe.int/redirect.php?id=16543 DE EN FR

Alexander de Leeuw
Institute for Information Law (IViR), University of Amsterdam

European Commission: Green Paper on a Fully Converged Audiovisual World

On 24 April 2013, the European Commission announced the adoption of a Green Paper on "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values". The aim of the Green Paper is to foster public discussion on the implications of the on-going transformation of the audiovisual media landscape, which is characterised by a steady increase in the convergence of media services and the way in which these services are consumed and delivered. The Commission decided to initiate this discussion due to the fact that convergence will become gradually more tangible over the next decade and it may have an impact in the future on a number of legal instruments including the Audiovisual Media Services Directive or AMVSD (2010/13/EU), E-Commerce Directive (2000/31/EC), Universal Services Directive (2002/22/EC) and Access Directive (2002/19/EC). The Green Paper queries whether the process of convergence in a larger European market can be transformed into economic growth and business innovation, and whether the process of convergence will have an impact on established European values.

The Commission firstly states that key elements such as a big enough market to grow, a competitive environment, a willingness to change business models, interoperability and an adequate infrastructure should be put into place while fostering the values underpinning the regulation of audiovisual media services in order to shape the future of media driven by the internet. In light of economic growth and business innovation, the Commission discusses market considerations, financing models, interoperability of connected TV, infrastructure and spectrum. The Commission poses questions for public consultation on, inter alia, competition issues, promotion of European works, international fragmentation in the EU market, relevance of infrastructural differences between platforms and frequency allocation models.

Subsequently, the Commission takes several values into account that underpin the regulation of audiovisual media services in Europe. The Commission highlights core values such as freedom of expression, media pluralism, the promotion of cultural diversity, protection of personal data as well as the protection of consumers, including vulnerable groups such as minors and persons with disabilities. The Commission discusses the European regulatory framework, media freedom and pluralism, commercial communications, protection of minors and accessibility for persons with disabilities in the light of the core values as stated above. The Commission poses questions for public consultation on, inter alia, broadening the scope of the AVMSD, the relationship between the AMVSD and the E-Commerce Directive, filtering mechanisms, the scope of the Universal Services Directive and Access Directive, the scope for self/co-regulation with regard to changing advertising techniques, awareness of parental control tools, measures for effective age verification, complaints-handling mechanisms and additional standardisation efforts in the field of accessibility for persons with disabilities.

All stakeholders are invited to submit responses to the different policy questions set out in the Green Paper before 31 August 2013.

• Green paper: European Commission, Green Paper on Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values, Brussels, 24 April 2013 COM(2013) 231 final
http://merlin.obs.coe.int/redirect.php?id=16545 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV
• Press release: Internet on TV, TV on Internet: Commission seeks views on rapidly converging audiovisual world (IP/13/358 of 24/04/2013)
http://merlin.obs.coe.int/redirect.php?id=16502 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV
• Memo: Green Paper: Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values Frequently Asked Questions (MEMO/13/371 of 24/04/2013).
http://merlin.obs.coe.int/redirect.php?id=16503 EN

Rutger de Beer
Institute for Information Law (IViR), University of Amsterdam

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

European Parliament: Resolution on the Implementation of the Audiovisual Media Services Directive

On 22 May 2013, the European Parliament adopted the Resolution on the Implementation of the Audiovisual Media Services Directive (AVMSD). The Resolution, which was written by Polish MEP Piotr Borys, stresses that the AVMSD is the backbone of EU media regulation: it guarantees a free flow of audiovisual media services and respects the right to freedom of expression and access to information, while protecting public interest objectives such as author's rights and media freedom.

At the same time, the report makes it clear that some Member States have not transposed the AVMSD in a timely manner or have not fully or correctly implemented it, and that the expansion of the audiovisual services markets with the development of hybrid services presents new challenges which call into question the adequacy and effectiveness of the AVMSD. Thus, the document calls on the Commission to encourage the consistent and full implementation of the AVMSD in Member States. It also calls on the Commission to carry out a full impact assessment of the current state of play on the market and of the regulatory framework and to closely monitor the development of hybrid services in the EU.

The Resolution also highlights the AVMSD's failures in the field of accessibility of audiovisual media services for the elderly and people with disabilities. The report encourages the rewording of Article 7 to include stronger, binding language requiring media service providers to ensure that their services are made available to these groups.

Other key points of the Resolution include: a call on the Commission to assess whether Article 14 and 15 have been implemented in a way that preserves the balance safeguarding the principle of freedom of access to information and the protection of rightholders; a call to ensure the effective implementation of Article 13 on the promotion of European audiovisual works; and a call to consider how the basic requirements of the AVMSD, which are applicable to non-linear services, can be extended to other online content and services which are currently out of its scope.

Finally, the report urges the Commission to analyse the effectiveness of the regulations on advertising aimed at children and minors. It also requests a ban on prejudicial advertising during programmes for children and young people and stresses that further efforts are needed in the field of improving media literacy for all EU citizens.

• Resolution on the Implementation of the Audiovisual Media Services Directive, 22 May 2013
http://merlin.obs.coe.int/redirect.php?id=16497 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV

Michiel Oosterveld
Institute for Information Law (IViR), University of Amsterdam

European Parliament: Call for Annual EU Monitoring of National Media Laws

On 21 May 2013, the European Parliament adopted a Resolution on standard settings for media freedoms across the EU.

The Resolution states that media freedom and pluralism should be monitored in all member states. This should include the monitoring of developments and changes in media legislation as well as the impact of such changes on media freedom in member states, most notably in relation to government interference. The results of the monitoring should be published in an annual report prepared by the European Commission, the Fundamental Rights Agency and/or the European University Institute (EUI) Centre for Media Freedom.

The Resolution calls on the Commission to extend the scope of the Audiovisual Media Services Directive to include minimum standards "for the respect, protection and promotion of the fundamental right to freedom of expression and information, media freedom and pluralism". The revised AVMSD should also include provisions on "transparency on media ownership, media concentration, conflict of interest rules to prevent undue influence on the media by political or economic forces, and independent media supervisory bodies."

The Resolution also calls for the protection of journalists from internal pressures from media proprietors and managers as well as from external pressures from governments, economic lobbies or other interest groups. It urges member states to support investigative journalism and to promote ethical journalism in the media by the development of professional standards through professional training of journalists and codes of practice.

Member states should also ensure that procedures for the appointment of public media heads, management boards, media councils and regulatory bodies are transparent and based on merit, expertise and experience, rather than on political or partisan criteria. I In addition, the Resolution calls on member states to safeguard the independence of media councils and regulatory bodies from political influence.

• European Parliament resolution of 21 May 2013 on the EU Charter: standard settings form media freedom across the EU
http://merlin.obs.coe.int/redirect.php?id=17701 EN FR ES IT NL

Annabel Brody
Institute for Information Law (IViR), University of Amsterdam

NATIONAL

BE-Belgium

RTBF Infringes Self-Promotion Provisions of Broadcasting Act

On 28 February 2013, during a news programme on RTBF, the French public broadcaster in Belgium, a news report was shown regarding an upcoming episode of RTBF's programme "The Voice Belgique". According to the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body- CSA) this report infringed Article 14, § 1 of the *décret coordonné sur les services de médias audiovisuels* (the Broadcasting Act) requiring that commercial communication must be readily recognizable as such. The CSA also argued that the report was in breach of Article 18, § 3 of the Act which prohibits the inclusion of self-promotion in news programmes.

RTBF denied having infringed the self-promotion provisions of the Act. Firstly, according In regard to RTBF, it was justifiable to include a report about the particular episode of The Voice Belgique in the news programme, because it was a hot and important topic that day (newspapers also referred to the episode on their front pages). Secondly, the reference to The Voice Belgique did not differ from other references made in the news programme to other programmes on the public broadcaster, such as "Questions à la Une". As a result, RTBF argued that this report could not be labelled as self-promotion.

However, CSA did not share RTBF's opinion. According to CSA, a programme could be presented in two different ways: in an informative way or in a promotional way. The latter should be referred to as self-promotion, that is, any message transmitted at the initiative of a broadcaster to promote its own programmes, channels, services or products that have a direct link with the programmes - Article 1, 3°of décret coordonné sur les services de médias audiovisuels. CSA stated that The Voice Belgique report did not promote the programme in an informative way, but rather in a promotional way. In particular, the way in which the news report about The Voice Belgique was presented differed from the way the other news reports were made. The Voice Belgique report was characterised by any lack of criticism. Furthermore, CSA judged that this news report could not be compared with the references made to Questions à la Une, because that programme was made by the same news department of RTBF. As a result, CSA decided that this report should be labelled as self-promotion and that the broadcaster had infringed Articles 14, § 1 and 18, § 3 of décret coordonné sur les services de médias audiovisuels. On this occasion, the CSA decided not to impose a fine on RTBF but instead issued the broadcaster with a warning.

• *CSA, Décision du 28 mars 2013* (CSA, Decision du 28 mars 2013 (CSA, Decision of 28 March 2013))
http://merlin.obs.coe.int/redirect.php?id=16492 FR

Katrien Lefever
iMinds - ICRI - KU Leuven

BG-Bulgaria

Rerun of Political Interview during Day of Reflection Violates Election Code

The Central Election Commission (CEC) in its decision of 12 May 2013 found that the rerun of a political interview within the last 24 hours prior to the election day violates Art. 133 paragraph 6 of the Bulgarian Election Code. According to the law, the so-called day of reflection prohibits political campaigning throughout the day prior to the election and the election day itself.

The proceedings of the CEC were initiated on 11 May 2013, when the political party "Citizens for European Development of Bulgaria" (GERB) lodged a complaint with the CEC regarding violations of the Election Code. The complaint states that there had been irregularities performed by the Chief Executive Officer (CEO) of the TV channel "TV 7" during the day of reflection. On that day in the very hours of the early morning, TV 7 has repeatedly broadcast an interview with the Chairman of the Bulgarian Socialist Party (BSP). According to the GERB, broadcasting of an interview with political representatives violates the provisions of the Election Code relating to campaign during the day of reflection.

On 11 May 2013, the CEC requested a copy of the recording from TV 7 and the Council for Electronic Media (CEM) that contains the interview broadcast on 11 May 2013 from 1:46:29 am to 3:04:22 am on the day of reflection.

After inspection of the recording, it has been found that it was a rerun of the transmission "Bulgaria

chooses - without censorship", first broadcast on the previous day and hosted by Nikolai Barekov. He had done a television interview on 10 May 2013 with the Chairman of BSP. The interview contains different issues related to the election programme of BSP and some messages in favour of the party. The CEC found that all of those messages had the character of pre-election campaigning. The fact that the interview had been broadcast as a rerun of an earlier transmission does not alter this fact.

Accordingly, the CEC ruled that TV 7 had violated the provisions of Art. 133 paragraph 6 of the Election Code prohibiting the transmission of materials having the character of political campaigning or advertising during the last 24 hours before the election day and the election day itself. The CEC assigned its Chairperson to adopt an administrative act accordingly and to impose a respective fine on TV 7.

The Commission's decision cannot be appealed.

• Решение на ЦИК № *2607-HC/12/05/2013* (CEC Decision № 2607-HC/12 May 2013)
http://merlin.obs.coe.int/redirect.php?id=16478 BG

Rayna Nikolova
New Bulgarian University

DE-Germany

Constitutional Court Rejects Landlord's Satellite Dish Ban for Infringing Freedom of Information

In a ruling of 31 March 2013 (case no. 1 BvR 1314/11), the Third Chamber of the First Senate of the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) found a landlord's decision to ban the installation of a satellite dish incompatible with the basic right to freedom of information if it failed to take the specific situation of linguistic and cultural minorities sufficiently into account.

The appellants are Turkish nationals of Turkmen descent and mother tongue, who live in Germany. Without their landlord's permission, they brought a satellite dish to their rented flat in order to receive a channel only available via satellite that broadcasts only in the Turkish and Turkmen languages.

Referring to the cable connection provided in the flat, the landlord applied to the courts for removal of the dish and injunctive relief. This application was successful in the first instance and on appeal.

The appellants disputed these rulings of the district and regional courts, referring to their fundamental right to freedom of information under Article 5(1)(1)(2) of the *Grundgesetz* (Basic Law - GG). The BVerfG ruled that both these civil court judgments infringed this basic right.

It was true that the appellants' freedom of information was limited under general laws, including the provision of the *Bürgerliches Gesetzbuch* (Civil Code - BGB) concerning claims for removal and injunction (see IRIS 2011-1/20). In the weighing up of the conflicting interests, the specific nature of the appellants' right to information should be taken into account. Foreign nationals living in Germany could therefore not be referred to a cable connection in their rented property if it did not provide any channels from their home country that enabled them to follow events in and maintain a linguistic and cultural link with that country (see IRIS 2004-5/9).

Although the regional court had recognised the need for mother-tongue channels from the appellants' home country, it had assumed, without paying sufficient attention to their arguments, that the Turkmen language was a dialect of Turkish, which was covered by channels available via the cable network.

The BVerfG therefore referred the dispute back to the district court for a new decision, in which it would have to take into account the extent to which the Turkmen language and traditions actually influenced the appellants' daily lives, even though they had never lived in a Turkmen-speaking territory.

• *Pressemitteilung des Bundesverfassungsgerichts vom 14. Mai 2013* (Press release of the Federal Constitutional Court of 14 May 2013)
http://merlin.obs.coe.int/redirect.php?id=16517 DE

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

Federal Supreme Court Submits Questions on Embedding of Online Videos to CJEU

In an as yet unpublished decision of 16 May 2013, the *Bundesgerichtshof* (Federal Supreme Court - BGH) submitted to the Court of Justice of the European Union (CJEU) a request for a preliminary ruling concerning the admissibility, under copyright law, of embedding online videos.

The case concerned a company's advertising video lasting approximately two minutes, which could be watched without the company's permission via the online video platform YouTube. Two independent sales representatives of a competitor had embedded the video on their websites so it could be downloaded from the video platform's server and played in a window that opened on their websites. The company that owned the rights complained that the competitor's sales representatives had unlawfully made the video

available to the public in the sense of Article 19a of the *Urheberrechtsgesetz* (Copyright Act - UrhG).

According to the BGH, the appeal court had correctly ruled that simply linking a work stored on a third-party website to one's own website by means of "framing" (i.e. embedding) does not, in principle, constitute making the work available to the public within the meaning of Article 19a UrhG. Only the owner of the third-party website could determine whether the work stored on its website should remain available to the public.

However, under an interpretation of Article 15(2) UrhG, with reference to Article 3(1) of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, such a link could infringe an unnamed right to public communication. The BGH therefore had to decide whether, in this case, the embedding of a third-party work made available to the public via a third-party website into one's own website constituted communication to the public in the sense of Article 3(1) of Directive 2001/29/EC. In the BGH's view, there was no clear answer to this question, even taking into account CJEU case law, so it could be referred to the CJEU for a decision (for a similar case in the USA, see IRIS 2012-8/39).

• *Pressemitteilung des BGH vom 16. Mai 2013 (zu Az. I ZR 46/12)* (BGH press release of 16 May 2013 (case no. I ZR 46/12))
http://merlin.obs.coe.int/redirect.php?id=16515 DE

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

Federal Supreme Court Rules on Google "Autocomplete" Suggestions

In an as yet unpublished decision of 14 May 2013, the *Bundesgerichtshof* (Federal Supreme Court - BGH) ruled on the admissibility of Google "autocomplete" suggestions that breach personality rights.

Google uses a so-called "autocomplete" function, which automatically shows users various suggested search terms in the form of word combinations as they enter search items in its search engine.

In the case at hand, a businessman applied for an injunction to stop Google showing his full name as part of the "autocomplete" function with the words "Scientology" and "Betrug" (the German word for "fraud") which, he claimed, infringed his personality rights and damaged the reputation of his business. He had no connection with Scientology and had not been accused of or investigated for fraud. Not a single search result seemed to contain any link between him and Scientology or fraud.

In the BGH's opinion, the "autocomplete" suggestions "Scientology" and "Betrug" that appeared when the businessman's first name and surname were entered constituted an infringement of his personality rights, since they conveyed a comprehensible message. They created a link between the businessman and the terms "Scientology" and/or "Betrug", which had negative connotations.

This infringement was directly attributable to the search engine. It had evaluated user behaviour using computer software that it had created and made the relevant suggestions to its users.

However, according to the BGH, this did not mean the search engine was liable for every personality right infringement resulting from "autocomplete" suggestions. It should not be condemned for developing and using "autocomplete" software, but merely for failing to take adequate precautions to prevent "autocomplete" suggestions generated by the software infringing third-party rights.

Search engine operators were only liable if they failed to carry out due diligence. They were not generally obliged to check software-generated "autocomplete" suggestions for possible rights infringements in advance. In principle, they were only liable if they were aware of the unlawful breach of personality rights.

However, the BGH concluded that if someone informed the operator of an illegal breach of their personality rights, the operator concerned was obliged to prevent further such infringements (see IRIS 2012-8/23).

• *Urteil des BGH vom 14. Mai 2013 (Az. VI ZR 269/12)* (BGH decision of 14 May 2013 (case no VI ZR 269/12))
http://merlin.obs.coe.int/redirect.php?id=16550 DE

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

Culture Committee Adopts Amended Film Support Act

The Culture Committee of the German *Bundestag* (lower house of parliament) adopted an amendment to the *Filmförderungsgesetz* (Film Support Act - FFG) at its final meeting on 15 May 2013. Under the main provision of the amendment, the *Filmförderungsanstalt* (Film Support Office - FFA) will continue to collect film contributions after the current arrangement expires on 31 December 2013. The amendment also contains a number of changes to the film support criteria.

The collection of film contributions by the FFA remains indispensable, according to the explanatory memorandum of the bill (see IRIS 2010-8/22, IRIS 2011-3/14,

IRIS 2011-4/17). The film contributions, paid to the FFA by cinema operators, video companies and television broadcasters according to Articles 66 *et seq*. FFG, will continue to be levied until 30 June 2016. The success of the contribution system is illustrated by the high viewing figures recorded by films supported by the FFA. For example, in the German-language film sector, FFA-funded films accounted for 94% of viewers of all German productions.

A cut in the level of support for documentary and children's films, which had been discussed during the amendment process, was avoided following comments by the *Produzentenallianz* (Producers' Alliance) and the *Arbeitsgemeinschaft Dokumentarfilm* (Association of Documentary Film-Makers). Furthermore, the time limit for reaching the minimum number of viewers to qualify for reference funding was extended from 2.5 to 3 years. Under Articles 22 *et seq.* FFG, reference funding is available to subsidise the production of a new film if a supported film achieves a certain level of success.

An important change to the funding concept is the obligation to produce barrier-free versions of funded films (see IRIS 2012-7/15). The previous provision of Article 15 FFG was not deemed sufficient, since the production of a barrier-free version was only one of many possible ways of meeting the funding criteria. Now, therefore, an absolute obligation to produce a barrier-free version has been introduced. This is also designed to support the German government's national action plan to implement the UN Convention on the Rights of Persons with Disabilities.

The bill's adoption by the Culture Committee follows intensive negotiations between all the parliamentary parties. The unanimous decision should not only ensure that the amendment gets through the *Bundestag's* legislative process, but should also send out a strong signal for the retention of the film support system and the levying of film contributions. A comprehensive review of the FFG is expected to take place during the next legislative period (September 2013 to September 2017).

• *Pressemitteilung des Deutschen Bundestages vom 15. Mai 2013* (Press release of the German *Bundestag* (lower house of parliament) of 15 May 2013)
http://merlin.obs.coe.int/redirect.php?id=16518 DE

• *Gesetzentwurf der Bundesregierung vom 19. Februar 2013* (Federal Government bill of 19 February 2013)
http://merlin.obs.coe.int/redirect.php?id=16519 DE

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

ARD and Producers' Alliance Agree Cooperation Guidelines

On 10 May 2013, the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (association of German public service broadcasters - ARD) and the *Allianz Deutscher Produzenten - Film & Fernsehen e.V.* (alliance of German film and television producers - *Produzentenallianz*) agreed a set of cooperation guidelines for fully financed commissioned documentary productions (see IRIS 2010-2/14; IRIS 2010-10/25). Both parties believe that the guidelines considerably improve contractual conditions for producers. The guidelines are based on the agreement concluded between the *Produzentenallianz* and *Zweites Deutsches Fernsehen* (ZDF) in October 2012 (see IRIS 2012-10/10).

The guidelines contain the following provisions:

- Producers will receive a 16% share in the gross proceeds from foreign, pay-TV, cinema and DVD sales. Synchronisation costs and a 35% lump sum for processing will be deducted from the gross proceeds. Details on the distribution of proceeds from on-demand services are yet to be agreed.

- Exploitation rights that are not used by the broadcaster concerned within five years can be transferred back to the producer if it can show that it can exploit the production. In such cases, the broadcaster retains non-exclusive broadcasting and clip rights. Clip rights allow broadcasters to use and exploit the production as often as they like by including clips in other productions. The rule applies retrospectively to all productions broadcast for the first time since 1 July 2011. Outside of German-speaking territories, producers can also exploit productions before the five-year deadline if they can show that they can exploit them. With both types of exploitation by producers, the broadcasters receive a share of the proceeds.

- Options for claiming production costs have been improved in numerous ways for producers. For example, overheads allowances have been increased and new job descriptions and positions included in the estimated overall costs (e.g. casting costs or camera assistants).

- If material or formats have been developed by a producer and shared with the broadcasters, the production must be carried out with the producer concerned (producer tie-up).

- Disputes over the application of the guidelines may be referred to the joint clearing house previously set up.

The guidelines apply to complete productions lasting 15 minutes or longer.

Apart from the retrospective application of the clause on producer exploitation, the guidelines apply to contractual cooperation from 1 March 2013 onwards. They are due to expire on 30 June 2016. The ARD and *Produzentenallianz* will meet again one year before this deadline to negotiate the renewal and possible amendment of the guidelines.

• *Eckpunkte für die vertragliche Zusammenarbeit zwischen den Mitgliedern der Allianz Deutscher Produzenten - Film & Fernsehen e.V. und den ARD-Landesrundfunkanstalten* (Guidelines for contractual cooperation between the members of the *Allianz Deutscher Produzenten - Film & Fernsehen e.V.* (alliance of German film and television producers) and the ARD members)
http://merlin.obs.coe.int/redirect.php?id=16549 DE

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

DK-Denmark

Reintroduction of Ban against Product Placement

On 21 May 2013, the *Lov om ændring af lov om radio- og fjernsynsvirksomhed og lov om TV 2* (Act amending the Broadcasting Act and the Act on TV2) has been adopted. In addition to other amendments, it reintroduces the ban on product placement in Danish media.

There has always been a significant political opposition against product placement in Denmark. Even before the Directive for Audiovisual Media Services (AVMSD) was implemented into Danish law, product placement was formally banned completely. Practice, however, to some extent condoned product placement in programmes that were produced abroad.

With the implementation of the AVMSD in 2009, product placement was allowed, but only to a limited extent. Only a year later, in 2010, the rules were further liberalised so that they fully corresponded to the rules of the AVMS Directive.

Due to a political agreement reached in 2012, the rules are now again changed so that the previously existing ban is reinstated. Thus, product placement is - as a main rule of Danish audiovisual law - not allowed in programmes of Danish television or on-demand audiovisual media services. The prohibition on product placement is not considered to be contrary to the AVMS Directive as this is a minimum harmonisation Directive allowing member states to enact more detailed or stricter rules in the areas covered by the Directive.

Despite the reinstated ban, it is still possible to show programmes purchased from abroad containing product placement (except for children's programmes or news and current affairs programmes). This enables Danish broadcasters to transmit foreign programmes such as American films containing product placement. Likewise, the national public service broadcasters DR and TV 2 - who are obliged under the Danish Broadcasting Act to financially engage in the financing of films and documentaries - may still show films and documentaries produced with the financial support of national film funding even though they may include product placement. These exceptions will be determined in more detail by an executive order.

The ban on product placement does not affect the rules on product sponsorship (provision of goods or services free of charge, such as production props or prizes), which were also introduced in the course of the implementation of the AVMSD. Under these rules, product sponsorship having benefits of significant value are subject to the same requirements on allowable genres, informing viewers, etc., that formerly had been applied to product placement.

Another amendment is the new rule that the State-owned public service enterprise DR can no longer make use of sponsorship. Hence, DR cannot enter into sponsorship agreements with commercial companies if the sponsoring has the form of cash, etc. However, as mentioned in the previous paragraph, DR may still enter sponsorship agreements in the form of product sponsorship, i.e., where no cash is exchanged.

As there may be exceptional circumstances (such as collection shows etc.) where it might be appropriate for DR to be able to make use of programme sponsorship, the new rules authorize the Minister for Culture to issue more detailed rules regarding such exceptions.

• *Lov om ændring af lov om radio- og fjernsynsvirksomhed og lov om TV 2, 21/05/2013* (Act amending the Broadcasting Act and the Act on TV2, adopted on 21 May 2013)
http://merlin.obs.coe.int/redirect.php?id=16479 DA

Søren Sandfeld Jakobsen
Aalborg University

FR-France

Participants in *Temptation Island* are not "Performers"

On 24 April the Court of Cassation delivered a notable decision. It was the first time the Court had deliberated on whether participants in a reality TV programme (in this case *Temptation Island*) could claim recognition as performers. 53 former participants in the programme were claiming just this, together with the payment of the corresponding social contributions. The court of appeal had turned down their

claims, so they took their case to the Court of Cassation. Article L. 212-1 of the Intellectual Property Code states that protection as a performer is afforded to any person who "represents, sings, recites, declaims, plays or performs in any other way an intellectual work, on the sole condition that the interpretation is of a personal nature".

The participants in the programme claimed that there was nothing to prevent the artistic interpretation consisting of a more or less free improvisation guided by a film crew following a narrative outline and an imposed basic screenplay. The Court of Cassation nevertheless found that it was not contradictory that the court of appeal had noted that they had no role to play or text to speak, that they were merely asked to be themselves in and express their reactions to the situations confronting them, and that the artificial nature of the situations and their sequence did not suffice to give them the quality of actors. Having thus shown that their work had not involved any interpretation, the court of appeal had been right in deciding that they could not be acknowledged as performers.

The applicants had also claimed the requalification of the "rules for participants" between them and the production company as an employment contract, and called for the production company to be ordered to pay various amounts in back pay and damages. As it had already done in previous cases, the Court of Cassation confirmed that the participants were bound to the production company by an employment contract. In the present case, this featured the existence of work carried out in subordination to TF1 production company for the purpose of producing a television series. This work consisted of the participants taking part, for a period of time and in a place totally separate from normal events in their personal lives, in imposed activities and expressing their anticipated reactions, which differentiates this from a mere recording of their everyday lives. The decision marks the final stage in a long series of disputes on these two points of law.

• *Cour de cassation (1re ch. civ.), 24 avril 2013 - Erwan X. et a. c. TF1 Production et a.* (Court of Cassation (1st civil chamber), 24 April 2013 - Erwan X. and others v. TF1 Production and others)
http://merlin.obs.coe.int/redirect.php?id=16527 FR

Amélie Blocman
Légipresse

Presentation of Bill on the Independence of the Public Audiovisual Sector

It was one of François Hollande's campaign promises. At the meeting of Ministers on 5 June 2013, the Minister for Culture and Communication submitted a draft framework law and draft legislation on the independence of the public audiovisual sector with a view to re-establishing the legislation in force before the reform of the audiovisual sector in 2009 (see IRIS 2009-4/14), by giving the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) once again the power to appoint the CEOs of the public-sector audiovisual companies (France Télévisions, Radio France and Audiovisuel Extérieur de la France). The ordinary bill also reforms the composition of the CSA and the method for appointing its members in order to better ensure its independence. The number of members would be seven instead of nine, and the President of France would appoint only the CEO. The Presidents of the two chambers of Parliament would each appoint three members, in accordance with an opinion voted by a three-fifths majority of their respective committees with responsibility for cultural affairs. The new procedure would therefore call for a broad consensus on the choice of members. Lastly, the CSA's procedure for sanctions would be brought up to date in order to separate the investigation of cases, in the hands of a rapporteur, from the stage of decision-making by the authority's members. This would bring the procedure more into line with the requirements of jurisprudence in this field. Based on the model of the competition authority (Autorité de la Concurrence), the bill gives an independent rapporteur the task of instigating proceedings; the rapporteur would be appointed by the Vice-President of the Conseil d'Etat, according to the CSA's opinion, for a renewable four-year period. The rapporteur would decide totally independently whether the facts brought to his/her attention justified application to the members of the CSA for them to pronounce a sanction.

The Minister also announced a second set of legislative measures for next year, in keeping with the recommendation of the Lescure report (see previous article), including the regulation of audiovisual content broadcast on the Internet, terrestrial broadcasting, the taxation of the resale of digital channels, financing for audiovisual creation, and regulations for advertising on television. The purpose of the first "Audiovisual Assizes" held in Paris on 5 June in conjunction with the CSA was to discuss these plans for reform.

• *Communiqué de presse du gouvernement français, indépendance de l'audiovisuel, 5 juin 2013* (Press release of the French government, independence of the audiovisual sector, 5 June 2013)
http://merlin.obs.coe.int/redirect.php?id=16525 FR

Amélie Blocman
Légipresse

Relations between Producers and Television Channels - Towards Revised Regulations?

The Senate's Committee on Culture, Education and Communication has asked a working party to draw up an inventory of the state of audiovisual production

in France and to consider ways in which the current regulations could be improved. These current regulations are based on the principle of broadcasting quotas and the contribution of service editors to production, while promoting independent production. After 27 hearings and meetings with more than 70 persons, Senator Jean-Pierre Plancade has now published his report. As he emphasises, "in the field of audiovisual production, it is industrial policy that should come to the assistance of our cultural exception". However, former Minister for Culture, Catherine Tasca believes that "today, maintenance of the status quo is under threat"; her name is attached to the decrees that currently govern relations between the channels and the production companies. Set up in 2001 to protect and boost independent production, these "Tasca" decrees are seriously questioned in the report. The first section of the report gives a comprehensive description of the framework of legislation and regulations from a historical point of view, in the light of the impact it has on the sector, and in the light of current technological evolution.

The working party goes on to propose three areas for reform. Firstly, it recommends revising the definition of independent production by re-establishing the channels' entitlement to hold coproduction shares in independent works, but limiting this to the works they finance in a significant fashion (more than 30%). The channels could thus be co-owners of the rights in the programmes they co-produce. The report goes on to reduce the independent production quota (variably, according to differing points of view). Currently, the channels are only allowed to produce 25% of their programmes through their own subsidiaries, and are obliged to call on independent production companies. The final set of recommendations covers introduction of the principle of an obligation of continuous exploitation of audiovisual works, encouraging the unfreezing of broadcasting rights for terrestrial and non-terrestrial frequencies (cable, satellite, ADSL) through the drafting of a code of professional use and the institutionalisation of the role of the mediator for the circulation of works, and also by laying down a strict obligation of continuous exploitation of audiovisual works on digital media.

While these recommendations appear to satisfy the channels, production professionals are more sceptical, as shown in the discussions held in Paris on 5 June at the first "Audiovisual Assizes". The Minister for Culture launched a process of concertation so that proposals and an inter-professional agreement may be reached by the end of November. The aim is to "modernise the system" of relations between producers and the television channels, particularly with a view to improving the broadcasting of works on any media.

• *Production audiovisuelle : pour une politique industrielle au service de l'exception culturelle - Rapport d'information de M. Jean-Pierre Plancade, fait au nom de la commission de la culture, de l'éducation et de la communication du Sénat n°616 (2012-2013) - 30 mai 2013*
(Audiovisual production: for an industrial policy in the service of the cultural exception - Information report by Jean-Pierre Plancade on behalf of the Senate's Committee on Culture, Education and Communication (no. 616, 2012-2013) - 30 May 2013)
http://merlin.obs.coe.int/redirect.php?id=16526 FR

Amélie Blocman
Légipresse

Lescure Mission: 80 Proposals on Digital Cultural Content

After eight months' work and nearly a hundred hearings, Pierre Lescure submitted a report containing no fewer than 711 pages and 80 proposals on cultural policy (including photography and publishing as well as the audiovisual scene, the cinema, and music) in the age of digital content to the President of the Republic and to the Minister for Culture Aurélie Filipetti on 13 May 2013. The key phrase in the report refers to acknowledging the supremacy of digital exploitation of these works. The proposals include a recommendation to maintain, but in a lighter form, the "graduated response" arrangements instituted in 2009 by the "HADOPI" Act in a bid to combat piracy. The idea is to reinforce the educational stage, to abolish the sanction of suspending Internet access (which has never been implemented), and to decriminalise the sanction (which could take the form of a fine of EUR 60, possibly increased in the event of a second offence).

Another substantial proposal is to abolish the high authority for the broadcasting of works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Works and la Protection des Droits sur Internet - HADOPI) and transfer its missions to the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) "in order to include the protection afforded by copyright in a global policy of regulation of the digital cultural offer". Similarly, it is recommended that regulation of the technical measures for protection be put in the hands of the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA), which should be given the means to actually be able to do so (powers to take up a matter and investigate on its own initiative). To strengthen the legal offer, the report recommends greater flexibility in media chronology to make video on demand available sooner after the first screening of a film. The report supports remuneration for private copying, commenting that "there is no call to question the foundations of the current system", and proposes laying down the corresponding scales by decree and introducing a tax on "connected devices" that could ultimately compensate rightsholders for private copying. The report recommends making collective manage-

ment compulsory for unavailable works in all the cultural sectors, and for all educational use made of the works, whether or not they are covered by the legal exception, and studying the introduction of collective management for neighbouring rights for streaming and subsequently downloading, and instructing the royalties collection and distribution societies to manage the remuneration due for on-line use. Regarding taxation, the report recommends acknowledging the principle of "technological neutrality" when Directive 2006/112/EC is revised, in order to get rid of the distortions in competition caused by different VAT rates for physical and on-line products.

The government must now draw up the timeframe for implementing the provisions of the regulations and legislation associated with the proposals it decides to adopt, and embark on inter-professional negotiations for their implementation. Watch this space!

• *Mission « Acte II de l'exception culturelle », Contribution aux politiques culturelles à l'ère numérique, Pierre Lescure* (Mission on "Act II of the cultural exception": Contribution to cultural policies in the digital age, Pierre Lescure)
http://merlin.obs.coe.int/redirect.php?id=16524 FR

Amélie Blocman
Légipresse

GB-United Kingdom

Supreme Court Decides that Internet Browsing Does Not Infringe Copyright, but Refers the Issue to the European Court of Justice

On 17 April 2013, the UK Supreme Court overturned earlier decisions of the High Court and the Court of Appeal and decided that reading or viewing copyrighted material online does not require the permission of the rightsholders, despite that fact that a temporary copy is made in the computer's cache and screen.

The case was brought by an association of public relations professionals who use on-line monitoring or search services; a company sends them monitoring reports with the opening words of an article, selected text, and a hyperlink. This requires a licence from the publishers of the newspapers involved as a permanent copy is transmitted by e-mail. However, the lower courts decided that a licence would also be required where a customer simply views a report on the company's website without downloading it as this also involves making a copy.

Section 28A of the Copyright, Designs and Patents Act 1988 was added to the Act to implement provisions in the 2001 Information Society Directive, Article 5.1 of which exempts temporary acts of reproduction which are 'transient or incidental' and 'an integral and essential part of a technological process' for transmission between third parties or for a lawful use. The reproduction must have no independent economic significance.

The Supreme Court considered the case law of the European Court of Justice, and concluded that the Article does in principle apply to browsing, as was made clear from the recitals to the Directive. Browsing is part of the process of transmission; the Article also extends to lawful use of the work, which includes browsing by an end-user. All the other conditions of the Article are satisfied by browsing. In particular, storage of the copy is simply to permit viewing, rather than downloading or other forms of copying, and thus temporary and transient. There is no discretionary decision by the user about how long the copy should be retained, unlike, for example where a decision has to be made to delete it. Moreover, in English and EU law it has never been an infringement of copyright simply to view or read an infringing article. If it was, anyone browsing who came across copyrighted material would incur civil liability.

Given the implications of the decision for many millions of people across the EU, the Court decided to make a reference to the European Court of Justice on whether the technical features at issue in the case satisfy the exemption in the Directive.

• Public Relations Consultants Limited v The Newspaper Licensing Agency and others, [2013] UKSC 18, 17 April 2013
http://merlin.obs.coe.int/redirect.php?id=16540 EN

Tony Prosser
School of Law, University of Bristol

Ofcom Decision on Biditis Ltd

On 22 February 2013 Ofcom (Office of Communications), the UK broadcasting regulator, published its decision to fine broadcasting Licensee Biditis Ltd GBP 30,000 for a number of breaches of the Broadcasting Code.

The case concerns the activities of Al-Alamia TV, owned by the licensee Biditis Ltd, which is a satellite broadcaster based in London and broadcasting at various times to southern Europe and the Middle-East. Al-Alamia hosted a beauty contest, Miss Arab London 2011 and broadcast an accompanying television series of the same name on 7, 14, 21, and 29 October 2011. The breaches of the Broadcasting Code arose from this programme. The broadcast was responsible for breaches of rules 2.13 and 2.14 relating to phone and text voting for the results of the contest, and also 9.4, 9.5, 9.8, 9.9, 9.10 and 9.14 concerning various instances of product placement.

As regards the phone and text voting, a number of errors had been made by the television company around the correlation of votes and the timing of the invitation to vote, which meant viewers had been substantially misled. Biditis admitted that despite the telephony voting being through PRS (premium rate services) it lacked the third party verification required by Ofcom, under the broadcaster's Licence Conditions, in order to operate a premium rate service. The Licensee is given a broad scope to implement such a verification system within the outlines of Ofcom's Licence Condition 6(A)(3)(b).

Concerning the instances of product placement, the Miss Arab London 2011 series had involved four businesses that were shown during the programme and were visited by the contestants in pre-recorded segments. Despite the fact that the businesses were all listed as sponsors of the series, thus making them subject to Ofcom's product placement rules, there was no indication of this. The Broadcasting Code requires a neutral logo at the beginning, end, and after each commercial break to indicate to viewers that product placement is taking place during the programme. Al-Alamia had failed to include the required product placement logo at appropriate times to satisfy said rules. Additionally, the Licensee failed to demonstrate the editorial necessity of the inclusion of the businesses in the series, and Ofcom found that the commercial references appeared to significantly influence the programme content and compromised the broadcaster's editorial independence.

The Licensee, Biditis Ltd, accepted the substance of the regulator's conclusions in each instance but argued in its representation that the fine of £30,000 was disproportionate to the seriousness of the breaches and the harm caused to the viewers. Ofcom disagreed, citing a number of factors in its justification of the penalty, including the seriousness of the breach, the resultant profit for the Licensee, the duration/frequency of violations, any steps to prevent or remedy the breaches, and that the proportionality of the fine related to the size/turnover of the Licensee. Ofcom pointed to a number of precedents where broadcasters had fines imposed along a similar scale for breaches of proportionate magnitude. These included a £275,000 fine imposed upon ITV2 Ltd for violations relating to telephone voting, and a £100,000 sanction of Life Media Limited for breaches of the product placement rules.

• Notice of Sanction: Miss Arab London 2011 Al-Alamia TV, 7, 14, 21 and 29 October 2011. Ofcom Broadcast Bulletin, Issue 2254 March 2013
http://merlin.obs.coe.int/redirect.php?id=16537 EN

Oliver O'Callaghan
City University London

Television Advertisement Lacked 'Social Responsibility'

On 8 May 2013, the UK Advertising Standards Authority published an adjudication finding that a broadcast advertisement was not socially responsible.

The UK Code of Broadcast Advertising (BCAP Code) contains an Article (1.2.), which states that 'Advertisements must be prepared with a sense of responsibility to the audience and to society'.

29 complaints were received by the Advertising Standards Authority (ASA) regarding an advertisement for a so-called "pay day loan".

The advertisement, in the name of a company trading as 'Cash Lady' was fronted by singer Kerry Katona who had financial problems in her past.

Ms Katona's message was 'We've all had money troubles at some point, I know I have. You could see your bank and fill in loads of forms, but is there an easier way to get a loan; check out www.cashlady.co.uk, with cash lady it's simple to apply for up to £300. It's dead fast too. If you're approved, the money goes straight into your account. So if you need extra cash go to www.cashlady.co.uk. Fast cash for fast lives. That's www.cashlady.co.uk.'

The complaints argued that the advertisement was irresponsible because it focused on Kerry Katona's financial crisis and encouraged people in similar situations to borrow money and indeed encouraged people to borrow the money to live 'fast' lives.

PDB UK, Cash Lady's parent company, argued that Ms Katona had been selected to front the advertisement precisely because viewers would be able to relate to her because of her publicised financial problems; that the ad was not "irresponsible" because her bankruptcy per se had not been mentioned; and the reference to the 'fast life' was a comparison between the procedures involved in going to a bank to borrow money and applying to Cash Lady.

The ASA's adjudication was that the ad breached BCAP Code rule 1.2 (Social responsibility) because 'some viewers, made vulnerable by financial problems and who may also have had restricted access to credit, may have inferred from the advice given by KK [Kerry Katona] that the Cash Lady loan was advisable for those already having financial difficulties' and that 'some viewers would understand the claim to mean that the payday loan would help to fund a celebrity style lifestyle'.

The ASA adjudication concluded that the advertisement 'should not appear in its current form' and Cash Lady was informed 'to take care with the overall presentation of information of its loans'.

• ASA Adjudication on PDB UK Ltd: PDB UK Ltd t/a Cash Lady
http://merlin.obs.coe.int/redirect.php?id=16501 EN

David Goldberg
deeJgee Research/ Consultancy

Ofcom Rules on British Election Coverage

On 21 March 2013, the UK broadcasting regulator Ofcom ruled that independent candidates will not get the automatic right to their own party election broadcasts, despite the majority of political parties and broadcasters responding to the consultation believing that they should.

But Ofcom will support the Electoral Commission to raise this issue with the British Government in future, in the hopes that the law will be changed in future to widen the access to make such broadcasts.

The regulator carried out its wide-ranging consultation over party political/referendum broadcasting, and election coverage between November 2012 and January 2013. This not only looked at independent candidates' rights to party election broadcasts (PEBs) but the kind of election coverage the new generation of local TV stations, due to come online this year, should be required to transmit - balancing the desire of the Government for such services to carry such broadcasts, while ensuring not too heavy a burden is put on such new services.

A majority of respondents agreed with the regulator's proposal that independent candidates should be eligible for PEBs under certain conditions. But Ofcom finally concluded that there was ambiguity in the law, and followed the Electoral Commission's view that independent candidates did not qualify for such broadcasts. Ofcom's current Party Political and Referendum Rules state that the relevant broadcasters (excluding the BBC and S4C who are governed by separate proposals) can only carry party political broadcasts (PPBs) and/or PEBs produced by political parties registered with the Electoral Commission. This reflects section 333 of the 2003 Communications Act, and section 37(a) of the Political Parties, Elections and Referendums Act 2000 (PPERA), which states that: "A broadcaster shall not include in its broadcasting services any party political broadcast made on behalf of a party which is not a registered party".

Instead the regulator decided that it would maintain the 'one-sixth' threshold (that is PEBs are allocated to non-major parties if a party stands candidates in at least one sixth of seats in 'first-past-the-post' elections such as general elections). "However, we state our support for the steps being taken by the Electoral Commission to raise this issue with Government, so that a change in the law may be made at the appropriate opportunity," Ofcom concluded.

In the consultation, Ofcom said that major parties in Great Britain will now be offered one party political broadcast (PPB) in each of the following three periods: Autumn; Winter; and Spring, with parties in Northern Ireland will be offered one or two PPBs in the period 1 September to 30 March (excluding December). Ofcom ruled that no PPBs should be broadcast during election or referendum periods.

Meanwhile the new generation of local TV stations due to broadcast this year in the UK will be obliged to screen PEBs for local elections, with those based in London also having to carry broadcasts for the London Assembly and mayoral elections. Ofcom decided against requiring the stations to screen local tailor-made PEBs however which could put a burden on fledgling TV stations and ruled they can broadcast the same party political and referendum broadcasts as their national commercial rivals.

Maintaining that its guidance on election coverage and due impartiality remained fit for purpose the regulator did suggest editorial techniques for ensuring impartiality such as seeking alternative viewpoints from a range of sources, and making clear that a broadcaster has sought alternative views and that views are challenged by presenters and reporters within programmes.

• A review of the Ofcom Rules on Party Political and Referendum Broadcasts and Proposed Ofcom Guidance for broadcast coverage of elections
http://merlin.obs.coe.int/redirect.php?id=16541 EN

Glenda Cooper
The Centre for Law Justice and Journalism, City University, London

GR-Greece

Crisis over the Public Service Broadcaster

On 11 June 2013, the Greek government decided to close down the public service broadcaster "Elliniki Radiofonia Tilieorasi S. A." (a company owned by the Greek State and employing more than 2600 employees). On the same evening, Simos Kedikoglou, spokesman and deputy-minister responsible for the media, characterised ERT as a "typical example of unique lack of transparency and incredible waste" and attributed its sudden close to the fact that there was no room for delay. At 23:10h, all three national channels of ERT went black and seven national radio channels were turned off.

Many reactions to this sudden decision, coming from national, European and international organisations, condemned the government's decision. Even those

who promote structural reforms in Greece agreed that the action taken by the government was not acceptable.

As far as legal texts are concerned, the government took a co-ministerial decision containing five points: (a) abolition of ERT, (b) interruption of transmission of radio and television signals and of operations of websites owned by ERT, (c) transference of all assets and liabilities to the State, (d) inaction of all frequencies until a new public service broadcaster is established and (e) revocation of all work contracts. With a second co-ministerial decision, provisions for the nomination of a special administrator responsible for the liquidation of ERT during this transitional period were issued. Furthermore, a draft-bill regarding the new public service broadcaster was presented by the government and is to be submitted to the Parliament. This text is almost the same as the one elaborated one year ago by a special committee of experts presided over by N. Alivizatos, professor of Constitutional Law in the Athens Faculty of Law (see IRIS 2012-5/25). However there are changes altering the original text, i.e. the procedure aimed at guaranteeing an independent selection of the members of Supervisory Body is not followed for their first nomination.

On Monday 17 June, a major breakthrough in this period of crisis was the publication of a special ruling (Temporary Injunction) of the President of the Council of State (High Administrative Court), which was hailed as overturning the first co-ministerial decision. According to the ruling, the enforcement of the co-ministerial decision is suspended "exclusively with regard to its b) and d) items" (interruption of transmission of radio and television signals and of operations of websites owned by ERT and inaction of all frequencies until a new public service broadcaster is established). Competent ministers should take "necessary organizational measures for the resumption of radio and television signal transmissions as well as the operation of websites owned by a public service broadcaster until the activation of a new broadcaster(04046)".

A legal explanation of his decision came three days later with the publication of Decision 236/2013 of the Committee of Suspension (3253003713043013773003671321375361303304377373΄311375) of the Council of State, composed of the President of the Court and four Councilors. Judges considered firstly that it is imperative to rationalise the organization of public service broadcasting through the creation of a new organism in order to serve the requirements of the Constitution, the democratic, social and cultural needs of society and the need to preserve media pluralism. This is why they rejected the idea that moral or economic damage to ERT's staff could justify the suspension of the entire co-ministerial decision.

Furthermore, the High Administrative Court mentioned the irreversible damage caused by the two aforementioned items of the co-ministerial decision, given that the public service broadcaster, having to serve the public interest and other constitutional purposes, must observe the principle of continuous operation that governs Public Administration. According to the majority of this Committee of the High Court (four judges), only b) and d) items of the co-ministerial decision are suspended, but all measures, including the recruitment of necessary staff for the transition, must be taken as quickly as possible.

However one judge underpinned the fact that the abolition of the legal entity of the ERT without the simultaneous creation of a new equivalent institution capable of ensuring the rights and obligations as a public service administrator, could cause damage to the applicants as employees charged with the execution of a public service. For this reason and in view of the principle of continuity in public services, this dissenting judge voted for the suspension of the entire decision.

Finally, on 21 June 2013 the Finance Ministry announced that it has already instructed the Bank of Greece to pay two monthly salaries to permanent workers of the former ERT as a first installment towards the total compensation and that it is in the process of identifying 2.000 posts necessary for the functioning of the transitional body.

• Α301371370. *ΟΙΚ.02/11.6.2013:* Κατάργηση της δημόσιας επιχείρησης «3253737336737537137 2΄367 Ραδιοφωνία – 344367373365΄377301361303367, Ανώνυμη Εταιρεία (325341344 – 321.325.)», (346325332 322' *1414/11.6.2013)* (Decision No. ΟΙΚ.02/11.6.2013 Abolishing public company "Greek Radio - Television, SA (ERT -A.E.).")
http://merlin.obs.coe.int/redirect.php?id=16510 EL

• 321301371370μ. 377371372. *03/12.6.2013:* Τροποποίηση της 305300' 361301371370μ. 337331332. *02/11.06.2013* κοινής απόφασης του Υφυπουργού στον Πρωθυπουργό και του Υπουργού Οικονομικών *(*346325332 322' *1423/12.6.2013)* (Decision 03/12.6.2013: Modification of the co-ministerial decision concerning the special administration of ERT)
http://merlin.obs.coe.int/redirect.php?id=16511 EL

• Νέα Ελληνική 3413613643713773063113752΄371361, Ίντερνετ και Τηλεόραση (Draft bill on New Greek Public service Broadcaster)
http://merlin.obs.coe.int/redirect.php?id=16512 EL

• Προσωρινή Διαταγή της *17.6.2013* του Προέδρου του Συμβουλίου της 3253003713723013613043652΄371361302, επί της από *12.6.2013* αίτησης αναστολής της ΠΟΣΠΕΡΤ (Injunction of the President of Council of State after a petition for temporary legal protection of syndicat of ERT's employees, 17 June 2013)
http://merlin.obs.coe.int/redirect.php?id=16513 EL

• Απόφαση Επιτροπής Αναστολών *236/2013* της *20.6.2013* επί της από *12.6.2013* Αιτήσεως Αναστολής της ΠΟΣΠΕΡΤ (Decision of the Committee of Suspensions after a petition for temporary legal protection of syndicat of ERT's employees, 20 June 2013)
http://merlin.obs.coe.int/redirect.php?id=16514 EL

Alexandros Economou
National Council for Radio and Television, Athens

IE-Ireland

Broadcasting Authority Launches Community Broadcasting Support Scheme

On 10 April 2013 the Broadcasting Authority of Ireland (BAI) launched its Community Broadcasting Support Scheme 2013. The Scheme is open to licensed community television and community radio stations, and awards funding grants enabling stations to evaluate and review the operation and effectiveness of their services.

Evaluations funded by the Scheme can either concentrate on external issues; for example, aiding community stations to take a closer look at the communities that they are licensed to serve, or address internal issues, such as supporting stations with organisational, development and governance issues. Applicants for funding must also identify how the proposed evaluations reflect one or more strategic policy themes of the BAI Sectoral Learning and Development Policy, which was launched in 2012.

The total fund allocation for the operation and funding of the Scheme in 2013, will be EUR 30,000. This represents the third year in a row that the fund allocation has been reduced from the previous year. Fund allocations in previous years amounted to: EUR 65,000 in 2010, EUR 40,000 in 2011 and EUR 36,000 in 2012.

Funding of this nature has been made available, through similar schemes, to licensed community radio stations since 1998, and was extended in 2009 to include applications from licensed community television stations. The BAI currently licenses 25 community and community of interest radio stations, and three community television stations.

- Broadcasting Authority of Ireland (BAI), BAI Launches 2013 Community Broadcasting Scheme, (10 April 2013)
http://merlin.obs.coe.int/redirect.php?id=16473 EN
- Broadcasting Authority of Ireland (BAI), Community Broadcasting Support Scheme 2013 - Information Booklet, (April 2013)
http://merlin.obs.coe.int/redirect.php?id=16474 EN
- Broadcasting Authority of Ireland (BAI), BAI Sectoral Learning and Development Policy, (April 2012)
http://merlin.obs.coe.int/redirect.php?id=16475 EN

Damien McCallig
School of Law, National University of Ireland, Galway

NL-Netherlands

Establishment of the Authority Consumer and Market

On 1 April 2013, the *Onafhankelijke Post en Telecommunicatie Autoriteit* (Independent Post and Telecommunications Authority - OPTA) officially merged with the *Nederlandse Mededingingsautoriteit* (Dutch Competition Authority - NMa) and the *Consumentenautoriteit* (the Consumer Authority - CA), to create a new organisation called *Autoriteit Consument en Markt* (the Authority Consumer and Market - ACM). Prior to the merger, the three organizations that each had responsibility for the supervision of different parts of the market: the NMa oversaw cartel formations and price agreements, the OPTA supervised the telecommunications and postal sector, and the CA monitored breaches of consumer law. The aim of the merger of these three organizations is to increase the effectiveness and efficiency of market monitoring by making it possible to respond flexibly to market developments, such as globalization. As well as this, the benefits of the merger are expected to result in better use of already available knowledge, expertise and information, which will benefit the quality of supervision.

The ACM will focus on three main issues: consumer protection; sector-specific market supervision; and monitoring of competition. The organization has an extensive and diverse range of tasks, which involve responding to various changes in the environment resulting from economic and technological developments, as well as that new European and national rules and regulations. On April 2, the ACM launched its new website which sets out the priorities of the ACM for (the remainder of) 2013, namely:

- The stagnation in the Dutch housing market;

- The affordability of care: the high input costs of medicines and devices;

- Sustainability and competition;

- Prevention of unfair competition by governments;

- Broadband Internet for everyone;

- Strengthening competition in the mobile telecommunications;

- More transparency for consumers;

- Protection against aggressive marketing (by telephone);

- A secure Internet;

- One invoice for energy;

- Improving the functioning and integration of the energy market;

- An affordable and reliable supply of energy.

These priorities are partly based on ongoing programmes that have already been initiated by OPTA, the NMa and the CAand partly on activities that the ACM will initiate this year. From 2014 onwards, the ACM will publish an ACM Agenda every two years in which the organization will set out its priorities for the two-year period. The ACM Agenda for the years 2014 and 2015 will be published in autumn 2013.

• *Besluit van 13 maart 2013, houdende vaststelling van het tijdstip van inwerkingtreding van de Instellingswet Autoriteit Consument en Markt* (Decision of 13 March 2013 laying down the date of entry into force of the Institutional Act of the ACM)
http://merlin.obs.coe.int/redirect.php?id=16498 NL

• *Wet van 28 februari 2013, houdende regels omtrent de instelling van de Autoriteit Consument en Markt (Instellingswet Autoriteit Consument en Markt)* (Institutional Act of 28 February 2013)
http://merlin.obs.coe.int/redirect.php?id=16499 NL

Rosanne Deen
Institute for Information Law (IViR), University of Amsterdam

RO-Romania

Approval of Emergency Ordinance for the Modification of Audiovisual Law

The *Camera Deputaţilor* (Chamber of Deputies, Lower Chamber of the Romanian Parliament) approved on 23 April 2013 the Government's Emergency Ordinance no. 25 of 10 April 2013 for the modification and completion of the Audiovisual Law no. 504/2002. The Romanian Senate (Upper Chamber) will have the final decision (see inter alia IRIS 2010-1/36, IRIS 2011-4/31, IRIS 2011-7/37, and IRIS 2013-3/26).

The Emergency Ordinance intends to boost the development of the Romanian audiovisual market by fostering and encouraging local TV production, investments in local programmes and other developments and economic activities for the benefit of the market. The Act is intended, at the same time, to fight against corruption in the field of purchasing mass-media advertising airtime and against the non-transparent and anticompetitive system in the advertising sector, which affects the activity of TV stations and the right of the public to receive correct and good quality information.

According to the Emergency Ordinance's new Article 29.1, which is intended to eliminate the intermediaries from TV advertisement sales, any price offers for TV advertising will have to be previously confirmed in writing by the broadcaster. Any discount, irrespective of its nature, has to be clearly marked on the bill.

The Emergency Ordinance envisages strict rules for the purchase of TV advertising airtime, which can be made by an intermediary only in the name and on behalf of the final beneficiary. The payment of the advertisement's broadcasting will have to be made directly to the broadcaster by the final beneficiary of the ads. The intermediaries cannot receive any other payment or service other than those paid by the final advertisement's beneficiary of the services provided, nor any material advantage from the broadcaster.

Furthermore, the Emergency Ordinance stipulates in the modified Article 56 that the audiovisual licences can be awarded only to applicants who do not have debts to the State budget. The sole exception is applicants who have been granted facilitation or a rescheduling for the payment of the debts.

Another restriction introduced into Article 56 (1) regards the transfer of audiovisual licences. They can be transferred to third parties only

- with the approval of the National Audiovisual Council,

- not before at least one year after the broadcasting commencement, and

- the new holder has to accept all the obligations incurred under the licence.

At the same time, the previous and the new licence holder have to prove they do not have debts incurring to the State budget. The Emergency Ordinance is in line with a Decision adopted on 28 March 2013 by the National Audiovisual Council, for the modification of the Audiovisual Code, which obliges the broadcasters to inform the Council about any changes in licence-relevant information and that any modification of the licence cannot be made during the period of one year after the start of the audiovisual services.

The Emergency Ordinance was harshly criticised by the International Advertising Association România (IAA România), the Union of Advertisement Agencies of Romania (UAPR) and by the American Trade Chamber in Romania (AmCham România). They considered the Emergency Ordinance has a negative impact on the competitive media advertisement field. The organisations accused the State of undue interference with private commercial relations. The attempt to eliminate the intermediaries from the advertisement market would have negative impacts on the business and on the investment climate in Romania.

• *Ordonanţă de Urgenţă nr. 25 din 10 aprilie 2013 pentru modificarea şi completarea Legii audiovizualului nr. 504/2002* (Emergency Ordinance no. 25 of 10 April 2013 for the modification and completion of the Audiovisual Law no. 504/2002)
http://merlin.obs.coe.int/redirect.php?id=16486 RO

• *Form adopted by the Chamber of Deputies of the Draft Law on the approval of the Emergency Ordinance no. 25 of 10 April 2013 for the modification and completion of the Audiovisual Law no. 504/2002* (Form adopted by the Chamber of Deputies of the Draft Law on the approval of the Emergency Ordinance no. 25 of 10 April 2013 for the modification and completion of the Audiovisual Law no. 504/2002)
http://merlin.obs.coe.int/redirect.php?id=16487 RO

Eugen Cojocariu
Radio Romania International

Rejection of Changes to the Romanian Cinematography System

On 14 May 2013, the *Camera Deputaţilor* (Chamber of Deputies, Lower Chamber of the Romanian Parliament) rejected the Draft Law on the modification and completion of the Government's Ordinance no. 39/2005 with regard to cinematography. The decision was final (see IRIS 2009-1/106).

The rejected Draft Law was intended to correct some deficiencies of the existing Act, which had been claimed by many film producers. It was initiated in 2010 by a group of eight senators and adopted by the Upper Chamber on 17 May 2010.

One of the main deficiencies to be abolished would have been the loss of film producers' rights in case financial credits granted by the Fondul Cinematografic (Cinematography Fund) are not paid back in time. If the credit can not be paid back within ten years, the Centrul Naţional al Cinematografiei (National Cinematoghraphy Center - CNC) receives the films' exploitation rights and becomes the owner of the supported films. On the other hand, the film makers complained that too big a part of the Cinematography Fund is used for festivals and activities merely accessory to film production. Another weak point of the Law was considered to be the inefficient way in which the script contests are organised, without a real anonymous form regarding the authors' name, with subjective marks and without any warrant that a good script will lead to a good film. A fourth weak point was considered the fact that the Ministry of Culture also subsidizes film production in their own cinema studios, which is considered an unfair competition for the CNC.

The initiators of the modification and completion of the Government's Ordinance no. 39/2005 proposed several measures in order to correct the alleged deficiencies of the Act: the transformation of credits given by the Cinematography Fund into direct financial support for the film production, with the CNC as co-producer; the establishment of precise criteria for Cinematography Fund allocation; the main element of the subsidy application file will be no longer the script, but the director's cut. The projects will be only marked with „admitted"/„rejected" for subsidies; the cinema studios belonging to the Ministry of Culture will be transformed in studios exclusively for debut films and young directors, with the strict observation of the cinematography legislation.

In this context, the Ministry of Culture released a Draft Government Emergency Ordinance for public debate, which is intended to reorganise public institutions under its control. According to the Draft, the Video Art Studio will be reorganised by merging it with the Arhiva Naţională de Filme (National Film Archive, under the control of the CNC) and with the Bucharest Cinematography Creation Studio, which ceases to exist. This newly-merged public institution will be the Institutul Naţional al Filmului (National Film Institute). It will be subordinated to the Ministry of Culture and financed by way of State budget subsidies or their own income.

On the other hand, the Romanian Government adopted on 30 April 2013 a Memorandum according to which the Sahia Film Cinematography Studio and the Animafilm Cinematography Studio, both of which are under the control of the Ministry of Culture, will be merged in order to improve the film production process and to reduce the debts by unifying the film production.

• *Proiect de lege pentru modificarea şi completarea Ordonanţei Guvernului nr. 39/2005 privind cinematografia* (Draft Law on the the modification and completion of the Government Ordinance no. 39/2005 with regard to the cinematography)
http://merlin.obs.coe.int/redirect.php?id=16538 RO

• *Forma adoptată de Senat a Proiectului de lege pentru modificarea şi completarea Ordonanţei Guvernului nr. 39/2005 privind cinematografia* (The form adopted by the Senate of the Draft Law on the the modification and completion of the Government Ordinance no. 39/2005 with regard to the cinematography)
http://merlin.obs.coe.int/redirect.php?id=16482 RO

• *Ordonanţă de urgenţă privind reorganizarea unor instituţii publice aflate în subordinea Ministerului Culturii - proiect* (Draft Emergency Ordinance with regard to the reorganisation of some public institutions under the control of the Ministry of Culture)
http://merlin.obs.coe.int/redirect.php?id=16483 RO

• *Memorandum cu tema: Stabilirea unor măsuri privind reorganizarea societăţilor comerciale din domeniul cinematografiei aflate sub autoritatea Ministerului Culturii* (Memorandum with regard to some measures for the reorganisation of the cinematography commercial societies under the authority of the Ministry of Culture)
http://merlin.obs.coe.int/redirect.php?id=16484 RO

Eugen Cojocariu
Radio Romania International

Draft Decision to Install Ad Duration Counter Rejected

On 16 May 2013, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA) rejected by 8 votes to one the Draft Decision to oblige media service providers to install and display a counter for TV advertising.

The president of the CNA issued the proposal to install counters that are displayed simultaneously with the

advertisement directly on the TV screen. The counter is supposed to enable viewers to control whether the media service providers comply with the quantitiatve advertising rules of the Audiovisual Media Services Directive 2010/13/EU and the national media law, specifically the maximum amounts of hourly advertisments. The counters were supposed to count down the hourly maximum along with the screening of the advertisement.

The President argued that the CNA receives 25 to 30 complaints weekly, most of them alleging breaches of the quantitive advertising rules. In turn, the members of the Council stated that the obligation to install and display ad duration counters would not only be an over-regulation of the field. It would also confuse the public and trigger the necessity to repeatedly explain what the counter on TV screens means. This would make the CNA's activities unduely complicated.

Furthermore, the majority of the CNA's members noted that breaches of the TV ad duration rules are scarce. The advertising duration on most TV stations rarely reaches 12 minutes per hour. Even the big commercial TV stations struggle to exploit the maximum duration due to the economic crisis.

According to the Audiovisual Law the commercial televisions are allowed to air 12 minutes of ads per hour. Public media service providers are allowed to have eight minutes of ads per hour. Self-promotion (for their own programmes and for auxiliary products directly derived from these programmes), social announcements, sponsoring announcements and product placement are not included in these duration limits.

• *Report Propunerea ca publicitatea TV să fie cronometrată pe ecran a fost respinsă de CNA - Agen'ia Mediafax 16 mai 2013* (Draft Decision to count the TV advertisment on the screen was rejected by the CNA, Mediafax News Agency 16 May 2013)
http://merlin.obs.coe.int/redirect.php?id=16489 RO

Eugen Cojocariu
Radio Romania International

Strategy for the Digital Switchover

On 14 May 2013, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA) unanimously issued an opinion in favour of the Government's Draft Decision for the approval of the TV digital switchover and the Strategy for the nationwide implementation of digital multimedia services (see IRIS 2009-9/26, IRIS 2010-3/34, IRIS 2010-7/32, and IRIS 2011-4/33). Originally, the digital switchover was supposed to be accomplished by 1 January 2012, but in August 2012 the Romanian Government decided to postpone the transition for three years, due to the economic crisis (see IRIS 2010-9/35).

According to the Strategy, the state owned radiocommunications provider *Societatea Naţională de Radiocomunicaţii* (National Radiocommunications Society - SNR) will receive by way of a non-competitive selection procedure one of the five multiplexes designated for the TV digital switchover. The SNR will be obliged to air the two main programmes of the public television TVR (TVR1 and TVR2), along with several commercial TV stations currently broadcasting via analogue terrestrial.

The CNA had already issued an opinion in favour of the same subject on 25 October 2012, asking for two specific amendments: the obligation for SNR to air through the first digital multiplex more private TV stations, not only the public channels TVR1 and TVR2, and a 20 days term of coexistence of the analogue and digital transmissions of TVR2 during the transition towards digital, in order not to affect the supply to the viewers.

The transition towards digital will have to be implemented no later than 17 June 2015. Romania can implement at national level four digital terrestrial multiplexes in the UHF (ultra high frequency) band and one in the VHF (very high frequency) band, using the DVB-T2 standard. Additional digital terrestrial multiplexes could be allocated at regional/local level, according to the technical possibilities.

The minimal technical conditions for the implementation of the UHF band multiplex awarded to SNR are: the use of the DVB-T2 transmission standard, the reception coverage of 40% of the population until 1 July 2014, 70% until 17 June 2015, and 90% of the population along with 80% of the territory until 31 December 2016.

According to the Audiovisual Law no. 504/2002, the transmission has to be „free to air", under transparent, competitive and non-discriminatory conditions for both public and private TV stations.

Any analogue terrestrial transmission will cease after 17 June 2015. Until then the SNR will ensure the simulcast of the first channel of the public television TVR1.

The remaining four national multiplexes (three in the UHF band and one in the VHF band) will be awarded by the national telecommunications regulating authority Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii (National Authority for Administration and Regulation in Communications - ANCOM) in a competitive selection procedure. The same applies to regional and local multiplexes.

Lastly, the Strategy foresees a public information campaign about the digital switchover starting 1 August 2013.

• *Strategia de tranziție la TV digitală a fost avizată de CNA: SNR va transmite TVR și posturi private - Agenția Mediafax 14 mai 2013* (Report about the approval by the CNA; Mediafax News Agency of 14 May 2013)
http://merlin.obs.coe.int/redirect.php?id=16485 RO

Eugen Cojocariu
Radio Romania International

• О внесении изменений в Указ Президента Российской Федерации от *24* июня *2009* г. *N 715* "Об общероссийских обязательных общедоступных телеканалах и радиоканалах" и в перечень, утвержденный этим Указом (Decree of the President of Russian Federation of 20 April 2013, No. 367 "On amending the Decree of the President of Russian Federation of 24 June 2009, No. 715 " "On National Mandatory Free Television Channels and Radio Stations" and the list approved by this Decree")
http://merlin.obs.coe.int/redirect.php?id=16471 RU

Andrei Richter
Faculty of Journalism, Moscow State University

RU-Russian Federation

Decree on Must-Carry Channels Amended Again

On 20 April 2013 the Russian president Vladimir Putin signed a decree effectively changing the composition of the country's first DTT multiplex. (see IRIS 2011-7/41, IRIS 2009-10/25 and IRIS plus 2013-1).

This multiplex will now no longer carry a regional channel and will be entirely federal, with the 10th slot being allocated to the TV company "TV Tsentr" (TV Center).

TV Center is an open stock company with over 99 percent of the stock in the hands of the City Government of Moscow (which is legally not a municipality, but rather a subject of the Russian Federation, or a province), the chair of the board of the company is the Mayor. In December 2012 the company won a slot on the second multiplex; its fate is now unclear.

According to an interview in Rossiyskaya gazeta daily with Yulia Bystritskaya, the director-general of the company, this change in the composition of the first multiplex comes as a result of a relevant petition from the City Government to the President.

As to a regional TV channel that was originally to be created as part of the first multiplex by the State-run communications company Russian Television and Radio Broadcasting Network (RTRS), it is to be replaced now by regional multiplexes in the provinces. The main State broadcaster VGTRK was tasked by the decree to establish regional channels on the basis of its provincial bureaux with the possible input of bona fide regional companies. RTRS will provide dissemination of the signal of the regional multiplexes. By the same decree the President also tasked the Government with the licensing of such regional multiplexes as well as with other "necessary measures."

SK-Slovakia

Violation of the Rules on Protection of Minors in Video on Demand

On 19 February 2013, the Supreme Court ("Court") confirmed a fine imposed on a provider of audiovisual on-demand services (VoD) by the Council for Broadcasting and Retransmission of the Slovak republic ("Council"). The fine of EUR 100 refers to the failure to label programmes and videos in the VoD catalogue with proper visual symbols indicating the appropriate age group of minors.

The service in question is the online catch-up TV service for the Slovak major TV channel "joj". The videos contained extracts from the reality show "Hotel Paradise". These videos were however promoted by the VoD service provider as scenes "you will not see on TV". The videos contained mostly shots of contestants taking a shower including techniques such as slow motion and close ups to their private parts etc.

After receiving a complaint, the Council recorded videos with the BB FlashBack Standard Player - a simple software that records everything (audio and video) that takes place on the display of the computer. This monitoring revealed that videos were not classified according to any of the existing categories (7+, 12+, 15+, 18+) according to the obligatory unified labelling system. During the monitoring procedure, the service provider claimed that videos were "properly" labelled and challenged the credibility of the Council's recordings. He also contested the Council's competence to record programmes provided within Internet-based services (the law does not explicitly state such competence for Council). According to the service provider, only public notaries are entitled to certify anything that occurred on the Internet.

The Council argued that the service provider did not provide any facts indicating that videos had been properly labelled. Although the software used for the recording is quite simple it does record the actual images on the screen of the computer and the recordings were made personally by the employees of the

office of the Council. The Council also stated that it is true that the law - contrary to what it stipulates in respect of broadcasters -does not contain an obligation for on-demand providers to archive and provide recordings of their services to the Council. This however would not constitute a legal obstacle for the Council to secure the recordings of these services through other means, when needed. This competency implicitly results from the Council's remit to monitor and enforce the VoD providers' compliance with their legal obligations.

The Council stated that the videos in question should have been labelled as not suitable for minors under fifteen (15+) due to the intensive level of full-nudity display. This classification was considered sufficient due to the "bonus" character of these videos; the videos were created specifically for the "extra" fan section in the catalogue..

Another video that contained a "full" strip dance of a male contestant for another female contestant that was accompanied with loud cheers of the others was considered despite of its "bonus" character as not suitable for minors under eighteen (18+). Since all of these videos were not labelled with any of the unified labelling system's symbols, the Council imposed a fine of EUR 100. The low amount of the imposed fine results from the strict approach of Slovak Courts that demand that the fines for the first violation shall in general not exceed the minimum fine set by law.

The Court fully supported the Council's decision and its reasoning.

• *Najvyšší súd, 4Sž/21/2012, 19.02.2013* (Decision of the Supreme Court of 19 February 2013)
http://merlin.obs.coe.int/redirect.php?id=16539 SK

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

Violation of Human Dignity in Reality Show

On 19 February 2013, the Supreme Court ("Court") confirmed the decision of the Council for Broadcasting and Retransmission of the Slovak republic ("Council") imposing a fine of 25,000 EUR on a major Slovak commercial TV broadcaster for violating human dignity in TV broadcasting.

In March 2012, the Council received a number of complaints regarding the reality show called "Extreme Families" that followed stories of atypical families. The complaints were aimed specifically at the story of the family with a disabled son, who sometimes had to be subtitled to be understood.

The broadcaster promoted "Extreme Families" as a show presenting unusual characters and families, which helps to solve various life situations (e.g., the main storyline in the abovementioned case was finding a wife for the son).

However, the authentic performances of the show's participants were accompanied by highly satirical and ironic commentaries of the "voice from the screen". After the evaluation of this programme, the Council came to the conclusion that the actual purpose of these comments was to mock the participants in order to shock viewers and thus raise the audience share.

In addition to the "positive" context of the show, the broadcaster also argued with the concept of a "scripted-reality show". To prove the fact that the participants took part in the reality show voluntarily and their performance was only acting, the broadcaster suggested summoning members of the respective family as witnesses. The broadcaster claimed that all participants had signed contracts in which they agreed to follow the instructions of the production team. Furthermore, however "real" the performance of the participants might have appeared to the viewers, it still would have to be considered as "acting performance" (which rules out the possibility of individual's human dignity violation).

The Council, however, concluded that the basic human right to respect the human dignity of the individual is irrevocable. This human right cannot be waived by contractual consent. The Council also stated that it is irrelevant if, and to what extent, the participants followed the production's instructions since they appeared and performed on the show as real people (with real names, in real locations, with real characteristics) and thus cannot be treated as artists performing as fictional characters.

In its final evaluation, the Council rated the programme as a blatant violation of an individual's human dignity. The extent of the violation was severely aggravated by the fact that the harmed individual is a person with permanent disabilities and significantly lowered capacity to defend himself.

Before the court, the broadcaster argued that the Council was exceeding its authority by setting itself up as "moral authority". The Council replied that the ban of a straight-forward light-entertainment programme beyond public interest can be assessed as a light or at most moderate interference with the freedom-of-expression principle. On the contrary, the preservation of human dignity is of higher importance. The Supreme therefore affirmed the decision of the lower courts.

• *Najvyšší súd, 4Sž/20/2012, 19.02.2013* (Supreme Court's decision of 19 February 2013)
http://merlin.obs.coe.int/redirect.php?id=16491 SK

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

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

US-United States

Cloud Services Held to Infringe Copyright

On 14 May 2013, a New York federal court ruled that cloud-based services MP3Tunes.com and Sideload.com ("Websites") infringed the copyrighted works of record labels and music publishers by allowing users to upload music from third-party websites and transfer the music to storage lockers. The Websites, which have since filed for bankruptcy, boasted a catalog of more than 400,000 recordings by 40,000 artists.

Under the Digital Millennium Copyright Act ("DMCA"), Internet Service Providers ("ISP") like the Websites are required to remove copyrighted works that are posted without authorization if they receive notice from a copyright holder - but are not required to affirmatively monitor content. The heart of the dispute was over whether the Websites had sufficient notice of the infringing activities by virtue of being aware of a reasonable suspicion of the infringing activities of its users. In cases where an ISP does not have direct knowledge of specific infringing activities, an ISP will be deemed to have sufficient notice if he is subjectively aware of facts that would have made the specific infringement objectively obvious to a reasonable person but consciously avoids further inquiries that a reasonable person would make ("red-flag" knowledge).

The Court concluded that the infringing activities of the Website's users were "objectively obvious to a reasonable person" because the Websites received emails notifying them of specific and identifiable instances of possible infringement, yet consciously avoided confirming the accuracy of the claims.

The trial now moves on to a determination of damages.

• U.S. District Court - Southern District of New York, Capitol records v. mp3tunes, Case 1:07-cv-09931-WHP-FM
http://merlin.obs.coe.int/redirect.php?id=17306 EN

Jonathan Perl
Locus Telecommunications, Inc.

Agenda

The Transposition of the EU Audiovisual Media Services Directive in National Law – A Comparative Study

3 July 2013 Organiser: Faculté de Droit, d'Économie et de Finance de l'Université du Luxembourg Venue: Luxembourg http://www.europaforum.public.lu/fr/calendrier/2013/07/uni-midi-directive-medias/index.html

Book List

Neuhoff, H., Rechtsprobleme der Ausgestaltung des Auftrags des öffentlich-rechtlichen Rundfunks im Online-Bereich Nomos, 2013 ISBN 978-3848700639 http://www.nomos-shop.de/Neuhoff-Rechtsprobleme-Ausgestaltung-Auftrags-%C3%B6ffentlich-rechtlichen-Rundfunks-Online-Bereich/productview.aspx?product=20198

Dix, A., Informationsfreiheit und Informationsrecht 2012: Jahrbuch 2012 Lexxion, 2013 ISBN 978-3869652269 http://www.lexxion.de/en/verlagsprogramm-shop/details/2986/26/informationsrecht/informationsfreiheit-und-informationsrecht-jahrbuch-2012.html

Eisele, J., Computer- und Medienstrafrecht Beck Juristischer Verlag, 2013 ISBN 978-3406646737 http://www.beck-shop.de/Eisele-Computer-Medienstrafrecht/productview.aspx?product=11511970

Lousberg, Ch., Petit, N., Droit européen de la concurrence - Institutions et procédures Larcier, 2013 ISBN 9782804445218 http://editions.larcier.com/titres/123865_-2/droit-europeen-de-la-concurrence.html

Gallezot, G., Twitter - Un monde en tout petit ? Editions l'Harmatten, 2013 ISBN 978-2-343-00253-8 http://www.editions-harmattan.fr/index.asp?navig=catalogue&obj=livre&no=39644

Akrivopoulou, Ch., Digital Democracy and the Impact of Technology on Governance and Politics: New Globalized Practices Information Science Reference, 2013 ISBN 978-1466636378 http://www.amazon.co.uk/Digital-Democracy-Technology-Governance-Politics/dp/1466636378/ref=sr_1_-184?s=books&ie=UTF8&qid=1363000870&sr=1-184

Cummings, A. S., Democracy of Sound: Music Piracy and the Remaking of American Copyright in the Twentieth Century OUP USA, 2013 ISBN 978-0199858224 http://www.oup.com/us/catalog/general/subject/HistoryAmerican/Cultur

Stivachtis, Y., The State of European Integration Ashgate; 2013 Kindle edition http://www.amazon.co.uk/State-European-Integration-ebook/dp/B00BL0P2WE/ref=sr_1_-249?s=books&ie=UTF8&qid=1363001761&sr=1-249

Rupp, M. Die grundrechtliche Schutzpflicht des Staates für das Recht auf informationelle Selbstbestimmung im Pressesektor Saarbrücker Schriften zum Öffentlichen Recht, Bd. 8 Hrsg. Christoph Gröpl, Annette Guckelberger, Rudolf Wendt ISBN 978-3-935009-55-3 http://www.verlag-alma-mater.de/index.php/unsere-buchangebote/product/view/1/79