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IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2013-8

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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:
Susanne Nikoltchev
Editorial Board:
Francisco Javier Cabrera Blázquez, Editor (European Audiovisual Observatory)
Michael Botein, The Media Center at the New York Law School (USA) • Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) • Andrei Richter, Faculty of Journalism, Moscow State University (Russian Federation) • Peter Matzneller, Institute of European Media Law (EMR), Saarbrücken (Germany) • Harald Trettenbrein, Directorate General EAC-C-1 (Audiovisual Policy Unit) of the European Commission, Brussels (Belgium) • Tarlach McGonagle, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands)
Council to the Editorial Board:
Amélie Blocman, Victoires Éditions
Documentation/Press Contact:
Alison Hindhaugh
Tel.: +33 (0)3 90 21 60 10;
E-mail: alison.hindhaugh@coe.int

Translations:
Michelle Ganter, European Audiovisual Observatory (co-ordination) • Brigitte Auel • Katharina Burger • France Courrèges • Paul Green • Katherine Parsons • Marco Polo Sàrl • Stefan Pooth • Erwin Rohwer • Nathalie Sturlèse
Corrections:
Michelle Ganter, European Audiovisual Observatory (co-ordination) • Francisco Javier Cabrera Blázquez, 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
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INTERNATIONAL

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European Court of Human Rights: Youth Initiative for Human Rights v. Serbia

In its judgment of 25 June 2013, the European Court of Human Rights has recognised more explicitly than ever before the right of access to documents held by public authorities, based on Article 10 of the Convention (right to freedom of expression and information). The judgment also emphasised the importance of NGOs acting in the public interest.

The case concerns an NGO, known as Youth Initiative for Human Rights, that is monitoring the implementation of transitional laws in Serbia with a view to ensuring respect for human rights, democracy and the rule of law. The applicant NGO requested the intelligence agency of Serbia to provide it with some factual information concerning the use of electronic surveillance measures used by that agency in 2005. The agency at first refused the request, relying on the statutory provision applicable to secret information. After an order by the Information Commissioner that the information at issue should be disclosed under the Serbian Freedom of Information Act 2004, the intelligence agency notified the applicant NGO that it did not hold the requested information. Youth Initiative for Human Rights complained in Strasbourg about the refusal to have access to the requested information held by the intelligence agency, notwithstanding a final and binding decision of the Information Commissioner in its favour.

The European Court is of the opinion that as Youth Initiative for Human Rights was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression as guaranteed by Article 10 of the Convention. The Court recalls that the notion of "freedom to receive information" embraces a right of access to information. Although this freedom may be subject to restrictions that can justify certain interferences, the Court emphasises that such restrictions ought to be in accordance with domestic law. The Court is of the opinion that the refusal to provide access to public documents did not meet the criterion as being prescribed by law. It refers to the fact that the intelligence agency indeed informed the applicant NGO that it did not hold the information requested, but for the Court it is obvious that this "response is unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency's initial response". The Court comes to the conclusion that the "obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner" was in defiance of domestic law and tantamount to arbitrariness, and that accordingly there has been a violation of Article 10 of the Convention. It is interesting to note that the Court reiterates in robust terms that an NGO can play a role as important as that of the press in a democratic society: "when a non-governmental organisation is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press". Finally, as a measure under Article 46 of the Convention, the Court ordered the Serbian State to ensure, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the intelligence agency of Serbia to provide the applicant NGO with the information requested.

• Judgment by the European Court of Human Rights (Second section), case of Youth Initiative for Human Rights v. Serbia, Appl. nr. 48135/06 of 25 June 2013
http://merlin.obs.coe.int/redirect.php?id=16645 EN

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

European Court of Human Rights: Nagla v. Latvia

Once again the European Court of Human Rights has found a breach of Article 10 of the Convention in a case of protection of journalistic sources. The Court is of the opinion that the Latvian investigating authorities failed to adequately protect the sources of a journalist of the national television broadcaster Latvijas televīzija (LTV), Ms Nagla. The journalist's home was searched and data storage devices were seized following a broadcast she had aired informing the public of an information leak from the State Revenue Service (Valsts ieņēmumu dienests - VID) database. Almost three months after the broadcast of the programme on LTV, Ms Nagla's home was searched, and a laptop, an external hard drive, a memory card, and four flash drives were seized with the aim of collecting information concerning the data leaks at VID. The search warrant was drawn up by the investigator and authorised by a public prosecutor. Relying on Article 10 of the European Convention, Ms Nagla complained that the search of her home meant that she had been compelled to disclose information that had enabled a journalistic source to be identified, violating her right to receive and impart information.

According to the Court the concept of journalistic "source" refers to "any person who provides information to a journalist", while "information identifying a source" includes, as insofar as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist". While recognising the importance of securing evidence in criminal proceedings, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources. The Court confirms that a search conducted with a view to identifying a journalist's source is a more drastic measure than an order to divulge the source's identity, and it considers that it is even more so in the circumstances of the present case, where the search warrant was drafted in such vague terms as to allow the seizure of "any information" pertaining to the crime under investigation allegedly committed by the journalist's source, irrespective of whether or not his identity had already been known to the investigating authorities. The Court reiterates that limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court. It also emphasises that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist's freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse. The scarce motivation of the domestic authorities as to the perishable nature of evidence linked to cybercrimes in general, cannot be considered sufficient in the present case, given the investigating authorities' delay in carrying out the search and the lack of any indication of impending destruction of evidence. The Court finds that the investigating judge failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist's freedom of expression, including source protection. Because of the lack of relevant and sufficient reasons, the interference with Ms Nagla's freedom to impart and receive information did not correspond to a "pressing social need", hence there was a violation of Article 10 of the Convention.

• Judgment of the European Court of Human Rights (Fourth Section), case of Nagla v. Latvia, Appl. nr. 73469/10 of 16 July 2013
http://merlin.obs.coe.int/redirect.php?id=16646 EN

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

Committee of Ministers: Recommendation on Gender Equality and Media

On 10 July 2013, the Committee of Ministers of the Council of Europe adopted a Recommendation on gender equality and media. The Recommendation stresses the fundamental importance of gender equality for the full enjoyment of human rights and as an essential component for democracy. In the past, the Committee of Ministers of the Council of Europe has accorded much importance to the equal participation of women and men in society, as can be seen for example in the Declaration (1988) on equality of women and men and the Declaration (2009) 68 titled "making gender equality a reality". However, this is the first recommendation that focuses on gender equality in the field of media.

According to the Committee of Ministers, gender equality means equal visibility, empowerment, responsibility and participation of both women and men in all spheres of public life, including the media. More specifically, there is a gender dimension to media pluralism and diversity of media content. In this regard the Committee of Ministers stresses that the media has a central position in shaping society's perceptions, ideas, attitudes and behaviour, and that the media should therefore reflect the reality of women and men, including their diversity.

In its recommendation, the Committee of Ministers refers to some examples of gender inequality in the media, e.g. the under-representation of women in media ownership, in information production and journalism, in newsrooms and management posts, the still existing sexist stereotypes, the lack of counter-stereotypes and the pay-inequalities (glass-ceiling) with regard to women.

Therefore, the Committee of Ministers does not only address member states in this recommendation but also media organisations. It calls on media organisations to develop self-regulatory measures, internal codes of conduct, and standards that promote gender equality. The Committee of Ministers emphazises the important role of public service media in serving all communities in society, especially within the modern media system. The influential position of public service media calls for scrutiny when it comes to gender equality. In particular, gender equality should be borne in mind with regard to participation, access, content and the way in which such content is treated and presented.

The Committee of Ministers, in its recommendation, mentions earlier recommendations that urge member states to adopt measures in order to promote gender equality as a fundamental human right, such as the Recommendation (2007)17 on gender equality standards and mechanisms, which advocates in particular

for gender equality in the media. The current recommendation calls for the adoption of such measures in light of the new multidimensional media environment.

The appendix contains several guidelines on how to effectively implement policies and strategies to ensure that gender equality goals are met in media. It is recommended that equality policy and legislation is subject to reviews and evaluations by member states in order to ensure that the measures are carried out.

• Recommendation on gender equality and media, 10 July 2013
http://merlin.obs.coe.int/redirect.php?id=16656 EN FR

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

Parliamentary Assembly: Resolution on Popular Protest and Freedom of Assembly, Media and Speech

The Parliamentary Assembly of the Council of Europe (PACE) adopted its Resolution 1947 (2013), entitled "Popular protest and challenges to freedom of assembly, media and speech", on 27 June 2013.

The Resolution comes in response to a recent spate of popular protests in European countries and elsewhere, in particular, protests that started peacefully, but degenerated into violence and elicited action by law-enforcement authorities that was "at times disproportionate" (para. 2). The Resolution points out that "freedom of assembly and association, including unorganised and non-authorised protest, is an essential right in a democracy" and accordingly protected by Article 11 of the European Convention on Human Rights.

The Resolution's titular reference to the media is fleshed out in a number of media-specific provisions in the text. For instance, the Resolution recalls that "citizens are entitled to objective and full information and it is for the authorities to guarantee conditions conducive to the effective exercise of media freedom and freedom of expression", in accordance with the case-law of the European Court of Human Rights (para. 8). Although the Resolution does not mention any specific cases, the Court's Dink v. Turkey judgment of 14 September 2010 (para. 137) is a relevant example. The Resolution goes on to underline, "in particular", "the need to clarify the issues of ownership and independence of the media" (para. 8).

The Resolution also invites member states of the Council of Europe to "ensure media freedom, put an end to harassment and arrests of journalists and the searches of media premises and refrain from imposing sanctions on media outlets covering popular protests, in line with [PACE] Resolution 1920 (2013) on the state of media freedom in Europe" (see IRIS 2013-3/2) (para. 9.5).

More generally, member states are urged, where appropriate, to "take the necessary measures to bring their legislation into line with Council of Europe standards and the case law of the European Court of Human Rights, including as regards freedom of expression, of the media and of assembly" (para. 9). A number of recommendations that do not relate specifically to the media are made in this connection, e.g. the investigation of the use of excessive or disproportionate force by law-enforcement officials and the sanctioning of those responsible (para. 9.2), and the reinforcement of human rights training for members of security forces, judges and prosecutors (para. 9.3).

The Resolution closes with an invitation to the Secretary General of the Council of Europe to "consider drawing up guidelines on the respect of human rights in the policing of demonstrations" (para. 10).

• "Popular protest and challenges to freedom of assembly, media and speech", Resolution 1947 (2013), Parliamentary Assembly of the Council of Europe, 27 June 2013
http://merlin.obs.coe.int/redirect.php?id=16622 EN FR

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

Parliamentary Assembly: Request for Monitoring of Hungary - Media Provisions

The Parliamentary Assembly of the Council of Europe (PACE) adopted its Resolution 1941 (2013), entitled "Request for the opening of a monitoring procedure in respect of Hungary", on 25 June 2013.

The context of the adoption of the Resolution is very specific and it is set out in the first paragraph. The PACE "takes note of the report on the request for the opening of a monitoring procedure in respect of Hungary, which was prepared following the motion for a resolution on "Serious setbacks in the fields of the rule of law and human rights in Hungary" (Doc. 12490)". It also "takes note of the opinion of the Bureau of the Assembly which did not support the opening" of such a procedure. It "supports the fact that the ongoing dialogue continues between the European Commission for Democracy through Law (Venice Commission) and the Hungarian Government".

Beyond the immediate political context of these institutional texts and initiatives, the PACE is "deeply concerned about the erosion of democratic checks and balances as a result of the new constitutional framework in Hungary" (para. 6). It states that the "new framework has excessively concentrated powers, increased discretion and reduced accountability

and legal oversight of numerous government institutions and regulatory bodies in Hungary" (para. 6). It refers to "assessments of the constitution and several cardinal laws by the Venice Commission and Council of Europe experts", which "raise a number of questions with regard to the compatibility of certain provisions with European norms and standards, including with the case law of the European Court of Human Rights" (para. 11).

The PACE calls on the Hungarian authorities to "continue the open and constructive dialogue with the Venice Commission and all other European institutions" (para. 11), and also to address certain aspects of particular legislative acts, i.e., those dealing with freedom of religion and the status of churches; elections of members of the Parliament; the Constitutional Court; the judiciary and the media (para. 12).

The provisions that specifically regard Hungarian media legislation read as follows:

"12.5.1. abolish registration requirements for print and online media;

12.5.2. separate, functionally and legally, the Media Council from the Media Authority;

12.5.3. ensure that, by law, all decisions of the Media Council or Media Authority can be appealed before a court of law, both on substantial and on procedural grounds".

The concluding paragraph of the Resolution refers to the "serious and sustained concerns" about the extent to which Hungary is complying with its obligations "in relation to the functioning of democratic institutions, the protection of human rights and respect for the rule of law" (para. 14). Nevertheless, the PACE "decides not to open a monitoring procedure in respect of Hungary but resolves to closely follow the situation in Hungary and to take stock of the progress achieved in the implementation of this resolution" (para. 14).

• "Request for the opening of a monitoring procedure in respect of Hungary", Resolution 1941 (2013), Parliamentary Assembly of the Council of Europe, 25 June 2013
http://merlin.obs.coe.int/redirect.php?id=16659 EN FR

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

EUROPEAN UNION

Court of Justice of the European Union: Appeals from UEFA and FIFA Rejected

On 18 July 2013, the Grand Chamber of the Court of Justice of the European Union (CJEU) dismissed the appeals made by the Union des associations européennes de football (UEFA) and the Federation internationale de football association (FIFA) to set aside the judgment of the General Court of the European Union in the case T-55/08 UEFA v. Commission [2011] and the case T-385/07 FIFA v. Commission [2011] (see IRIS 2011-3/3). The Grand Chamber upheld the decisions of the General Court and the European Commission regarding the compatibility with Community law of measures taken by the UK and Belgium on the basis of Article 3a(1) of the Television without Frontiers Directive (TWFD).

Article 3a(1) TWFD (now replaced by Article 14 of the Audiovisual Media Services Directive) allows member states to draw up lists of events which, because of their major importance for society, are prohibited from being broadcast on an exclusive basis in such a way as to deprive a substantial proportion of the public in that member state of the possibility of following such events by live coverage or deferred coverage on free television. FIFA and UEFA disagreed with the inclusion of all final stage matches of the World Cup and the EURO, arguing that not all of those matches could be considered to be of major importance to the general public in the UK and Belgium.

The CJEU dismissed the appeals in their entirety. In an argument similar to that issued by the General Court, the Grand Chamber observed that Article 3a(1) TVWFD creates obstacles to important rights and freedoms, the right to property and the freedom of competition being among those rights. The Grand Chamber however confirmed that these obstacles are justified by the right to information and ensuring wide public access to free television coverage of important events. The CJEU further observed that member states have a significant margin of discretion in determining which events are considered to be of major importance to society, while the Commission's role in that regard is limited.

To a certain degree, the Court agreed with the argument put forward by FIFA and UEFA, i.e. that the World Cup and the EURO must indeed be regarded as events which are divisible into different matches or stages, not all of which are necessarily capable of being characterised as events of major importance to the general public of a given member state. Thus, member states must explain why these tournaments are regarded as being of major importance to society in their entirety. Nevertheless, the Grand Chamber agreed with the General Court in its finding that all matches in the final stages of the World Cup and the EURO championships attract sufficient attention to constitute events of major importance.

• Judgment of the Court of Justice of the European Union, Grand Chamber, case C-201/11, 23 August 2013
http://merlin.obs.coe.int/redirect.php?id=16647 DE EN FR
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• Judgment of the Court of Justice of the European Union, Grand Chamber, case C-204/11, 23 August 2013
http://merlin.obs.coe.int/redirect.php?id=16650 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
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• Judgment of the Court of Justice of the European Union, Grand Chamber, case C-205/11, 23 August 2013
http://merlin.obs.coe.int/redirect.php?id=16653 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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

Court of Justice of the European Union: Rules on Italy's Stricter Hourly Advertising Limits for Pay-Tv Broadcasters

On 18 July 2013, the Second Chamber of the Court of Justice handed down its judgment in the Case C-234/12, Sky Italia v. AGCom. According to Italian law, pay-tv broadcasters are subject to a 14% hourly advertising limit and free to air broadcasters are subject to an 18% hourly advertising limit. In the proceedings before the Latium Administrative Court concerning a fine imposed on Sky Italia for the breach of the 14% threshold, the Court of Justice was requested to provide a preliminary ruling as to whether Directive 2010/13/EU (the Audiovisual Media Services Directive (AVMSD)) and EU primary law should be interpreted as precluding the Italian asymmetric hourly advertising limits for pay-tv operators (see IRIS 2012-7/29).

The Court, at the outset, noted that Article 4(1) of the AVMS Directive permits member states "to lay down more detailed or stricter rules and, in certain circumstances, different conditions, in the fields covered by that directive". Accordingly, the provision, in Article 23(1) of the AVMS Directive, of a 20% limit for broadcasters without distinction did not pre-empt member states "from imposing different television advertising time-limits depending on the pay-tv or free-to-air nature of the broadcasters".

Subsequently, the Court examined whether the general principle of equal treatment should be interpreted as precluding asymmetric rules for pay-tv broadcasters. It is worth reiterating that in her opinion (see IRIS 2013-6/3), Advocate General Kokott 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 whether the main aim of those provisions was the protection of consumers (as contended by the Italian Government and RTI, Italy's largest free-to-air broadcaster) or allowing free-to-air broadcasters to secure a broader share of advertising revenues (as argued by the referring court and by Sky Italia).

The Court instead took the view that the situation of pay-tv and free-to-air broadcasters had to be considered in the light of the balance struck between the protection of consumers from excessive advertising and the financial interests of television broadcasters. In this respect, the Court noted that free-to-air broadcasters' dependence on advertising revenues placed them in an objectively different situation vis-à-vis advertising limits relative to pay-tv broadcasters, which could also rely on subscription fees. Also, free-to-air television viewers were in an objectively different situation in comparison to pay-tv viewers, who "have a direct commercial relationship with their broadcaster and pay to enjoy television programmes". Accordingly, the Court held that, in seeking a balanced protection of the interests of viewers and broadcasters, the Italian legislature could set different advertising limits for pay-tv and free-to-air broadcasters without infringing the principle of equal treatment.

However, the Court noted that the Italian asymmetric rules could constitute a restriction of the freedom to provide services under Article 56 TFEU. While the Court accepted that the protection of consumers against abuses of advertising constituted an overriding reason in the public interest that could justify such a restriction, it did not review compliance by the Italian rules with the principle of proportionality, leaving that assessment to the referring court.

Finally, the Court turned to the issue of whether the principle of freedom of expression and, in particular, the protection of media pluralism precluded the contested provisions. According to the referring court, Italian asymmetric advertising rules were capable of distorting competition by strengthening RTI's dominant position on the market for television advertising. Although the Italian Communications Authority had published an in-depth sector inquiry on the television advertising market in the course of the proceedings (see IRIS 2013-2/31), the Court of Justice found that the order for reference contained insufficient information for it to enter a preliminary ruling. The Court thus dismissed that question as inadmissible.

The fate of Italy's stricter advertising rules is thus in the hands of the Latium Administrative Court, which will determine whether those rules are suitable for protecting consumers against abuses of advertising and do not go beyond what is necessary for that purpose.

• Judgment of the Court (Second Chamber) of 18 July 2013, Sky Italia Srl v. Autorità per le Garanzie nelle Comunicazioni, Case C-234/12
http://merlin.obs.coe.int/redirect.php?id=16624 DE EN FR
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Amedeo Arena
University of Naples "Federico II", School of Law

European Parliament: Adoption of the Revision of the Public Sector Information Directive

After eighteen months of negotiations between the European institutions, the European Parliament adopted on 13 June 2013 the revision of Directive 2003/98/EC on the re-use of public sector information (hereafter the PSI Directive). The Council formally adopted the amending Directive on 20 June 2013. The European Commission had proposed the revision of the PSI Directive as a part of its Open Data Strategy on 12 December 2011.

The amending Directive has extended the scope of the PSI Directive to three categories of cultural institutions (museums, libraries and archives) and to research institutions. Public service broadcasters as well as their subsidiaries remain outside the scope of the PSI Directive due to the fact that most of the materials they hold are third parties' copyright protected and because of their special status and competence to organise their commercial exploitation. As a consequence, the revised PSI Directive will apply to audiovisual archives (including film heritage institutions) as long as they are not subsidiaries of public service broadcasters.

The original PSI Directive, as well as its amending Directive, do not regulate access to public sector information but rather builds on existing access regimes as defined by national laws and regulations. It harmonises, however, the conditions of the re-use of public documents that are accessible according to national rules. In particular, only documents produced by public bodies, in the performance of their public tasks and which are not protected by third parties' IPRs, are subject to the rules on re-use. Other exclusions might apply, such as the non-accessibility (and therefore non re-usability) of documents for reasons linked to public security, business secret or personal data. The conditions of re-use designated by the revised PSI Directive relate to:

- Format under which documents should be communicated (new Article 5(1) of the PSI Directive);

- Rules on charges, including a possibility for cultural institutions to charge above marginal costs (new Article 6(1) of the PSI Directive);

- Possibility for public bodies to set up licences with encouragement for member states to promote the use of open licences (new Article 8(1) of the PSI Directive)

- Rules on transparency and discovery of the information (new Articles 7 and 9 of the PSI Directive);

- Possibility for cultural institutions to conclude public-private partnerships for digitisation of cultural resources despite the general prohibition of exclusive arrangements (new Article 11 (2a) of the PSI Directive).

Member states must implement the provisions of the amending Directive into their national laws and regulations before 18 July 2015.

• Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information, Official Journal of the European Union, 27 June 2013, L175/1

http://merlin.obs.coe.int/redirect.php?id=16609 DE EN FR CS DA EL ES ET FI HR HU IT LT LV MT NL PL PT SK SL SV

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

NATIONAL

AL-Albania

New Legislation on Audiovisual Media in Albania

On 4 March 2013, the Albanian Parliament approved Law 97/2013 "On Audiovisual Media in the Republic of Albania" after several years of discussion and stagnation. This law aims to harmonise Albanian media legislation with the Audiovisual Media Services Directive (2010/13/EU - AVMSD) of the European Union and in order to respond to the realities of the audiovisual media sector. Both political wings reached consensus on the law, with the exception of the election procedure regarding the members of regulatory authorities.

Among others, the law replaces the regulatory authority *Këshilli Kombëtar i Radios dhe Televizionit* (KKRT - National Council of Radio and Television) with the *Autoriteti i Mediave Audiovizive* (AMA - Authority of Audiovisual Media). The authority will continue to be comprised of seven members, elected from the Parliament for a five-year term with the right to be re-elected for a second mandate. The election procedure did not change in comparison with the previous law. Members of Parliament from the opposition and ruling majority respectively take turns in shortlisting expert candidates proposed by relevant associations and civil society. The seventh member, who is also the chairperson of AMA, is also elected by way of shortlisting among four candidates, by a simple majority in the Parliament. The same formula applies to *Këshilli Drejtues i Radio Televizionit Shqiptar* (KDRTSH - Governing Council of the Albanian public service broadcaster) which is composed of 11 members.

The law adds new competences to the regulator's functions. Those are the issuing of digital broadcasting licenses and authorisations, the preparation of instructions and regulations on usage of the public broadcaster's infrastructure, the mediation of disagreements between operators, and the preparation of studies and research in the audiovisual media sector. Almost five months after approval of the law, the members of the AMA and KDRTSH still have not all been elected due to other priorities in the Parliament and the general Parliament elections that took place in June 2013.

In terms of harmonisation of the new law on audiovisual media with the AVMSD, the law regulates for specific matters such as the promotion of European works and independent works. The law stipulates that national operators have to devote most of their broadcasting time to European works, and at least ten percent of their time to independent works. Furthermore, ten percent of the budget has to be invested in independent Albanian and European works (see Arts. 13, 16, 17 AVMSD).

The law is also very detailed regarding the specifications of advertising, including the new forms of advertising enabled by technological changes, such as interactive, split-screen, hidden, or virtual advertising. The law also regulates political advertising, institutional advertising, direct sales, commercial communications, product placement and sponsorship of audiovisual media services (see Art. 19 ff. and Arts. 10 and 11 AVMSD).

The new law furthermore requires the AMA to draft audiovisual media services codes serving the audiovisual media service providers as ethical guidelines for the broadcast content. This function was meant to harmonise the diversity of programming with the need to protect special groups such as minors. The law also introduces specific technical regulations for such cases (see Art. 27 AVMSD).

In further accordance with the AVMSD, the law envisages the compilation and implementation of a list of events of major importance and the ways in which they should be covered by freely accessible media (cf. Art. 14 AVMSD).

• *Ligji nr. 97/2013, datë 04.03.2013 "Për mediat audiovizive në Republikën e Shqipërisë* (Act no.97/2013 of 4 March 2013 "On audiovisual media in the Republic of Albania")
http://merlin.obs.coe.int/redirect.php?id=16637 SQ

Ilda Londo
Research Coordinator, Albanian Media Institute

AT-Austria

Constitutional Court Lifts ORF Facebook Ban

In a decision of 26 July 2013 (case no. G 34/2013-10), the Austrian *Verfassungsgerichtshof* (Constitutional Court - VfGH) lifted the so-called "Facebook ban" as was enshrined in Article 4f(2)(25) of the *ORF-Gesetz* (ORF Act), prohibiting the Austrian public broadcaster *Österreichischer Rundfunk* (ORF) from using social networks for competition reasons, on the grounds that it was unconstitutional.

Previously, the Austrian communications authority, KommAustria, had ruled that ORF's provision of a Facebook page infringed the ORF Act (see IRIS 2012-3/9). After an unsuccessful appeal to the supreme broadcasting authority, the *Bundeskommunikationssenat* (Federal Communications Board - BKS), the ORF filed an action with the Constitutional Court and the *Verwaltungsgerichtshof* (Administrative Court - VwGH). The latter had dismissed the action as unfounded in a decision of 22 October 2012 (see IRIS 2013-1/6).

The VfGH ruled that a ban on the use of social networks in connection with the ORF's own daily online news reporting breached the broadcaster's constitutional right to freedom of expression and broadcasting. Article 10(1) of the European Convention on Human Rights (ECHR) covered advertising as a protected form of expression. It was true that the ban in question pursued a legitimate objective as laid down in Article 10(2) ECHR, in so far as it was meant to protect the ORF's private competitors in the broadcasting market and to prevent distortion of competition. However, in order to achieve this objective it was not necessary to prohibit the ORF from using social networks in general. In this respect, the provision of Article 4f(2)(25) of the ORF Act overstepped the boundaries of Article 10(2) ECHR.

Nevertheless, the VfGH stressed that the provision disputed by the ORF should not be abolished as unconstitutional. In particular, the ORF was still banned from operating its own social network since, in view of its special position vis-à-vis its private competitors in the broadcasting market, such a measure was necessary and therefore not unconstitutional.

• *Entscheidung des VfGH vom 26. Juli 2013 (Az. G 34/2013-10)* (VfGH decision of 26 July 2013 (case no. G 34/2013-10))
http://merlin.obs.coe.int/redirect.php?id=16625 DE

Tobias Raab
Institute of European Media Law (EMR), Saarbrücken/ Brussels

BG-Bulgaria

Election of CEM Members in Accordance with the National Assembly's Quota

The rotation of the composition of the Council for Electronic Media (CEM), the Bulgarian broadcasting regulatory authority, in accordance with the quota of the National Assembly's members has been delayed for a year. The upcoming need to elect the General Director of the public television broadcaster has made a new composition of the CEM urgently necessary.

On 27 June 2013, the National Assembly adopted the Rules of Procedure for the nomination of candidates, submission of documents, hearings of the candidates and election of a member of the CEM in accordance with the National Assembly's quota. According to the procedure there are several stages:

1. Nomination of candidates and submission of documents of the candidates to become a member of the Council for Electronic Media on the National Assembly's quota,

2. Public disclosure of the documents,

3. Hearings with the nominated candidates with regard to their vision about their work in the Council,

4. Election of the member.

It is the first time that the National Assembly has established such a transparent and competitive procedure. It was established in the aftermath of the scandalous nomination of the member of the National Assembly Mr Delyan Peevsky as Chairman of the State Agency for National security, which has provoked spontaneous and numerous civil protests in the capital city, Sofia.

Two nominations were publicly revealed on the National Assembly's website, in particular that of the former member of the National Assembly from the Bulgarian Socialist Party Mr Ivo Atanassov and that of the well-known media expert Mr Radomir Tcholakov.

On 12 July 2013, the Culture and Media Committee, which is one of the Standing Committees of the National Assembly, held a public hearing with the participation of members of the National Assembly and representatives of non-governmental organisations that supported certain candidates. in addition, journalists took part in this hearing.

On 17 July 2013, following plenary debates, the National Assembly elected Mr. Ivo Atanassov as the member of the Council for Electronic Media on the basis of Article 86 (1) of the Constitution of the Republic of Bulgaria and Articles 24 and 29 (1) of the Radio and Television Act.

• Решение за приемане на Процедурни правила за издигане на кандидатури , представяне на документи , изслушване на кандидати и избор на член на Съвета за електронни медии от квотата на Народното събрание (Decision for the Adoption of Rules of Procedure for the nomination of candidates, submission of documents, hearings of the candidates and the election of the Member of the Council for Electronic Media on the National Assembly's quota, promulgated in the State Gazette, No. 57 of 29 June 2013)
http://merlin.obs.coe.int/redirect.php?id=16594 BG

Rayna Nikolova
New Bulgarian University

CY-Cyprus

Temporary Licences to AVMS Providers to Be Extended by up to One Year

In June 2013, the Act amending the Act on Radio and Television Stations (L. 7(I)/1998) was adopted by the House of Representatives (L. 46(I)/2013, Official gazette, 14.06.2013, pp. 297-300). Its purpose is to enable the Radio and Television Authority to extend temporary licences, granted in 2011 to broadcasting organisations and AVMS providers, by up to one year. The licences geanted so far were due to expire on 30 June 2014. The extension was necessary in view of an outstanding implementation of the Act for full harmonisation with the relevant European Directives, according to which permanent licences will be granted.

Temporary licences were issued in 2011 following the transposition of the Audiovisual Media Services Directive (2010/13/EU) into Cypriot Law. This created a new audiovisual legal framework that included broadcasting organisations and other providers of audiovisual media services. The temporary licences replaced the licences for analogue transmission in view of the digital switchover that took place on 1 July 2011 (see IRIS 2011-5/11). Their initial period of validity was due to expire on 30 June 2012. A new amending act was adopted in 2012 (L. 88(I)/2012) extending the licence to 30 June 2013.

In addition, the 2012 amending act provided for an exception allowing legal persons governed by public law to be granted a licence no matter whether they comply with the provisions of the law or not. Such an organisation was CYTA, a semi-governmental telecommunications company. The exception enabled CYTA to offer audiovisual media services on its network CYTANET. In particular, the provision on capital dispersion that does not allow ownership by any person of more than 25% of the capital share, was overcome

by means of the aforementioned exception in accordance with the amending law. Thus, CYTA could continue the transmission of video on demand services and live sports events on its network.

The 2013 amending law L. 46(I)/2013 not only extended the validity of the temporary licences, but also maintained the exception mentioned above and created the new title for the Broadcasting Act reading: „Acts on Radio and Television Organisations of 1998 to 2013".

• *L. 46(I)/2013* (Amending Act on Radio and Television Organisations, L. 46(I)/2013, Official gazette, 14.06.2013 pages 297-300)
http://merlin.obs.coe.int/redirect.php?id=16595 EL

Christophoros Christophorou
Political analyst

Digital Network Operator's Financial Straits Threaten Private Broadcasters

In July 2013, two years after the switchover to digital television (see IRIS 2011-5/11), private television broadcasters were threatened that they would go off-air because of financial straits of the network operator Velister Ltd. Velister is a consortium of the major Cyprus broadcasters and two internet and cable television services providers (see IRIS 2010-9/16).

After a long period of consultation between the authorities, the broadcasters and Velister Ltd, according to media reports, the Council of Ministers decided in early August 2013 to examine the possibility of granting Velister an extension of up to five years for the payment of its dues to the State. The modalities will be negotiated between the Director of Electronic Communications and the interested parties; an eventual extension is expected to alleviate the pressure of Velister on the broadcasters raising higher fees for the access to the digital network.

The roots of the problem can be traced back to August 2010, when Velister won an ascending multiple round auction for the second digital network (one was granted to the public broadcaster Cyprus Broadcasting Corporation - RIK). The final bid of EUR 10 million is likely to have been too high for a small market such as that of Cyprus. While Velister has already paid the major part of its dues to the State, it faces financial difficulties regarding the amount of the fee. The problems have been aggravated by the financial crisis and an income considerably lower than expected, since only 14 broadcasters are on Velister's platform, which is well below the number initially projected.

Efforts by Velister to seek modification of its contract with the authorities failed because of the eventual legal measures that participants in the auction of 2010 could take. Hence, it decided to substantially raise the network access fees for broadcasters instead. In addition, Velister issued an ultimatum to take off-air those failing to pay their dues by mid-July 2013, even though this threat was not carried out in the end. Other possible solutions included the possibility of operating only one digital network hosting both the public service and private broadcasters or generating income by shifting the transmission of Euronews and the Greek public television ERT from RIK to Velister. However, it was pointed out that the transmission conducted by RIK is based on interstate agreements that would be breached by these approaches.

The further increase of network access fees would pose problems for the survival for small broadcasters, whereas the effect on major channels could be minimal because they are both partners in, and clients of, the network operator Velister Ltd. This prompted the introduction of more efforts on behalf of the government and political forces to ensure and safeguard pluralism in digital broadcasting services.

However, the Council of Ministers' decision possibly to extend the payment period of Velister's dues is called into question by observers and the major opposition party. According to their position, the deferment is in conflict with the legal obligations of the network operator as set down in the agreement with the government.

Christophoros Christophorou
Political analyst

DE-Germany

BGH Bans Advertising Aimed at Children in Online Role-Playing Game

According to media reports, the *Bundesgerichtshof* (Federal Supreme Court - BGH), in a ruling of 17 July 2013 (case no. I ZR 34/12), upheld an action brought by the *Bundesverband der Verbraucherzentrale* (Federation of German Consumer Organisations - vzbv) and prohibited the software firm Gameforge from advertising game accessories sold in connection with its online role-playing game "Runes of Magic". The vzbv had already cautioned Gameforge in 2010 and had brought actions in the lower courts. However, these had been dismissed by both the *Landgericht Berlin* (Berlin District Court) and the *Kammergericht Berlin* (Berlin Supreme Court - KG), which had rejected the appeal against the first-instance ruling on 31 January 2013 (case no. 24 U 139/10).

"Runes of Magic" is an online fantasy role-playing game based on the free-to-play model. Although the software required to play the game is available free

of charge, additional equipment for the game's characters must be paid for. Gameforge advertised this under the slogan "Grab the opportunity and give your arms and weapons a certain something". The slogan appeared during the game with the use of a link that took the player directly to a website where game accessories could be purchased.

The BGH decided that this slogan represented an unfair commercial activity, since it appealed directly to children to buy these accessories. It was irrelevant whether the advertising appeared "in-game", or elsewhere on the Internet. An invitation to obtain further information about products was acceptable. However, a direct exhortation to purchase was a different matter altogether. Unlike the KG Berlin, the BGH considered the slogan a direct exhortation to children to purchase, which infringed Article 3(3) of the *Gesetz gegen den unlauteren Wettbewerb* (Act Against Unfair Competition - UWG). This was demonstrated by the direct link from the slogan to the sales platform on which the accessories could be purchased, as well as the possibility of paying not only by credit card but also by Short Message Service (SMS), with the cost charged to the customer's mobile phone bill. The slangy wording of the slogan was also designed to appeal to young people. The protection of children and young people required a certain level of restraint, even on the Internet, according to the BGH.

• *Urteil des Bundesgerichtshofs vom 17. Juli 2013 (Az. I ZR 34/12)* (Ruling of the Federal Supreme Court of 17 July 2013 (case no. I ZR 34/12)) DE

Tobias Raab
Institute of European Media Law (EMR), Saarbrücken/ Brussels

FR-France

Streaming: CSA Pronouncement in Dispute between France Télévisions and Playmédia

On 23 July 2013, the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) delivered its decision in the dispute between France Télévisions and the company Playmédia, which edits the Play TV site broadcasting (live and via streaming) nearly 70 television channels with unlimited access, without requiring registration. The public-sector television group, which wishes to promote its own Internet broadcasting service Pluzz, called for a ban on Play TV rebroadcasting its channels (France 2, France 3, France 4, France 5 and France Ô), which it claimed was "siphoning off" the group's advertising content without having concluded any contractual agreement. The company Playmédia has signed agreements with a number of the private channels it broadcasts (BFMTV, iTélé, etc) to pay over to them a proportion of its advertising revenue. TF1 and M6 for their part have refused to allow their programmes to be rebroadcast. To justify its entitlement to broadcast the public-sector channels, Playmédia referred to the provisions of Article 34-2 of the Act of 30 September 1986, which introduced a "must-carry" obligation requiring the distributors of audiovisual services to "make available to their subscribers free of charge the services" of France Télévisions. In its decision, the CSA notes that while the company Playmédia does indeed have the status of a service distributor, having subscribers is nevertheless a decisive condition in order to be subject to the must-carry obligation. Playmédia does not have any subscribers, however, as access to its service is free of charge. The CSA has given Playmédia until the end of 2013 to stop rebroadcasting France Télévisions' channels on its Play TV site. The CSA notes that "this should be enough time for Playmédia to bring its activities into line, and to make it possible in the meanwhile to extend the conditions required for broadcasting public-sector programmes, so as to include an appropriate contribution as compensation from the beneficiary of such broadcasting". Having been invited in this way to conclude a commercial agreement with France Télévisions in order to be able to continue rebroadcasting the public-sector group's programmes on its site, Playmédia announced that it was satisfied with this decision, stating that an "appeal notwithstanding, Play TV would comply with the recommendations that had been made by setting up a subscription system". France Télévisions has taken note of the CSA's decision, in which it "considers it is important that, before the end of 2013, the company Playmédia should put an end to its offer of rebroadcasting services edited by the company France Télévisions". The public-sector group declared that it "intends to continue with the legal proceedings already instigated against this company to obtain a conviction for this violation of intellectual property rights and the parasitic behaviour associated with it".

• *CSA, décision n°2013-555 du 23 juillet 2013 relative à un différend opposant les sociétés Playmédia et France Télévisions* (CSA, Decision No. 2013-555 of 23 July 2013 concerning a dispute between the companies Playmédia and France Télévisions)
http://merlin.obs.coe.int/redirect.php?id=16628 FR

Amélie Blocman
Légipresse

Illegal Downloading: Penalty of Refusing Internet Access Abolished

By a decree issued on 8 July 2013, in accordance with the recommendations of the Lescure report submitted to the Government in May (see IRIS 2013-6/19), the Minister for Culture abrogated Article R. 335-5-III of

the Intellectual Property Code (Code de la Propriété Intellectuelle - CPI), thereby abolishing the penalty of refusing Internet access to anyone failing to secure their access to the network and as a result having allowed illegal downloading (see IRIS 2010-10/30, IRIS 2010-9/24, IRIS 2010-1/23, IRIS 2009-7/20, IRIS 2008-10/15 and IRIS 2008-7/16).

The offence of "gross negligence" and the corresponding penalty were instituted by the Act of 12 June 2009, which set up 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). The first stage of the "graduated response" instituted by the Act involves sending an e-mail warning the Internet user that his/her Internet access has been used for illegal downloading or sharing of works. If a further occurrence is noted after this initial warning, HADOPI's committee for the protection of rights is allowed to send the subscriber a further warning by e-mail and also a letter by registered mail (200,000 such e-mails have been despatched since October 2010). If a further occurrence comes to the committee's notice, it may decide to pass the matter on to the Public Prosecutor, who may in turn decide to bring legal proceedings against the Internet user, and may pass the matter on to the courts accordingly. Whereas the HADOPI has sent more than two million messages to Internet users carrying out illegal downloading since October 2010, the sanction of cutting off Internet access has only been implemented once: on 3 June 2013, the magistrates court in Montreuil found against an Internet user who had "failed to secure access to on-line services of communication to the public without legitimate reason, and committed gross negligence" (covered and punished by Articles R. 335-5, L. 335-7-1(2), L. 331-25, and L. 335-7-1(1) and (3) of the CPI). The Internet user was ordered to pay a fine of EUR 600 as the principal penalty, and his access to the Internet was also suspended for 15 days as an additional penalty; he was also banned from subscribing to a contract of the same type during that period.

Under the terms of the Decree of 8 July 2013, in future it will only be possible to issue a fine in the fifth category (EUR 1,500) in the event of an Internet user committing gross negligence by failing to secure his/her Internet access. A sanction of one year's suspension may nevertheless still be imposed, as an additional penalty, on anyone prosecuted for infringing copyright, punishable by three years' imprisonment and a fine of up to EUR 300,000 under Article L. 335-7 of the CPI. The Decree of 8 July 2013 "is part of a much wider movement to shut down the HADOPI," emphasised Minister for Culture Aurélie Filipetti; she announced that there would be a legislative text by "the end of 2013 or early 2014 (04046) that would incorporate the HADOPI in the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA), which would then be responsible for applying these new measures. The CSA will also aim to combat commercial sites carrying out illegal downloading and providing the public with access to files which may or may not be protected by copyright".

• *Décret n°2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L. 331-21 du code de la propriété intellectuelle* (Decree No. 2013-596 of 8 July 2013 abolishing the additional penalty of suspending access to an on-line service of communication to the public in connection with the information transmission methods provided for in Article L. 331-21 of the Intellectual Property Code)
http://merlin.obs.coe.int/redirect.php?id=16626 FR

• *Tribunal de Police de Montreuil, 3 juin 2013 - Min. public et la Hadopi c. M.X.* (Montreuil magistrates court, 3 June 2013 - Public Prosecutor and HADOPI v. Mr X.) FR

Amélie Blocman
Légipresse

Legal Deposit of Films with the CNC must be in both Digital and Photochemical Format

In a decision issued on 28 June 2013, the Conseil d'État has given more details of how the legal deposit of films with the national centre for the cinema and animated images (Centre National du Cinéma and de l'Image Animée - CNC) is to function. In the present case, two unions of film producers contested in the courts the provisions of Article 13 of the Decree of 19 December 2011, which introduced an Article R. 132-28-1 into the Heritage Code requiring, for cinematographic documents, that two copies be deposited with the CNC - one digital copy, and one photochemical copy (i.e. on 35 mm film).

Contesting the requirement to deposit a fragile and expensive silver-emulsion copy of their films, which are in fact produced exclusively in digital format, the unions were calling for the Decree of 19 December 2011 to be cancelled, arguing that it was vitiated with regard to the provisions of Article L. 132-1 of the Heritage Code (which details the conditions and methods of making legal deposits that it is for the body with regulatory powers to lay down). In its decision of 28 June 2013, the Conseil d'État recalled that it was not for the CNC to bear the cost resulting from the obligations connected with the legal deposit of a work; the responsibility lay with the persons who produced the cinematographic documents. It held that the body with regulatory powers was entitled to determine the forms in which the cinematographic works were to be deposited, in order to ensure optimum conservation. However, the Conseil d'État held that, by providing that digital cinematographic works were to be deposited in photochemical format, the body with regulatory powers had not misjudged the competence accorded to it by Article L. 132-1 of the Heritage Code. Furthermore, the fact that the criticised Decree created an obligation that was a source of expense did not have the effect of creating a form of taxation.

Lastly, the Conseil d'État held that producers who had an original photochemical copy of their document and those who subsequently had to produce one at their own expense were not in the same situation, and the principle of equality did not prevent their obligations under the disputed Decree being different. Furthermore, noting that almost all cinematographic documents were nowadays being produced in digital format, the Conseil d'État concluded that the obligation to deposit a document in photochemical format in fact placed a similar burden on all cinema producers. As a result, the claim that the principle of equality was being flouted was rejected and the applicants were found to have no grounds for requesting that the disputed Decree should be cancelled.

• *Conseil d'Etat (10e sous-sect.), 28 juin 2013 - Association des producteurs de cinéma et a.*, (Conseil d'État (10th sub-section), 28 June 2013 - Association des Producteurs de Cinéma and others) FR

Amélie Blocman
Légipresse

GB-United Kingdom

Ofcom Decision on Local Television Services

A series of decisions released by Ofcom (Office for Communications) on 23 July 2013 has changed the way local programming, particularly news, will be provided by 'Channel 3' independent/commercial broadcast licensees across the United Kingdom.

The decisions follow the announcement by the Secretary of State for Culture Sport and Media, Maria Miller, not to block the applications for renewal of the local television licences of the current holders; effectively giving ten-year extensions.

In response to a consultation with the licensees concerning a number of issues related to the provision of local television, Ofcom concurred on a number of points and rejected others.

Firstly, in England the provision of ITV would be on a more local basis achieved by increasing the number of regions from eight to 14. The cost of doing so would be offset by reducing the required minutes of local news content from 30 minutes per night to 20 minutes. The largest two regions - London and North-West England - are not included in this reduction.

In Scotland Ofcom will require a greater provision of local television service in the Border region. This will be achieved by an additional 90 minutes of regional programming supplementary to the 30 minutes of news, and also the obligation for separate broadcasts in two Border regions so that English viewers can watch their own local services.

In Wales the 30 minutes of nightly news will remain but a reduction will be allowed in daytime broadcasts in line with the English regions.

In Northern Ireland UTV's request for a reduction in minutes of regional non-news programming was rejected and the licensee will be required to maintain the current level of service.

Simultaneously Ofcom announced that no changes will be made to the obligations under licensing of 'Channel 5'.

• Ofcom - Channel 3 and Channel 5: Statement of Programming Obligations - Amendments to obligations for Channel 3 and Channel 5 ahead of a new licensing period, 23 July 2013
http://merlin.obs.coe.int/redirect.php?id=16610 EN

Oliver O'Callaghan
City University London

Ofcom Fines TV Channel for Broadcasting 'Duty to Kill' Speech by Islamic Scholar

On 5 July 2013, Ofcom (the Office of Communications) fined a British TV channel more than GBP 100,000 after it aired a lecture by an Islamic scholar who said Muslims had a 'duty to kill' anyone who insulted the Prophet Mohammed.

The Manchester-based DM Digital channel was found to be in breach of Rule 3.1 of the Broadcasting Code which says that "material likely to encourage or incite crime or lead to disorder must not be included in TV or radio services".

DM Digital broadcast the programme "Rehmatul Lil Alameen" on 9 October 2011. It featured a live lecture in Urdu by an Islamic Pir (a religious scholar) who discussed the shooting of Punjab governor Salman Taseer, who had been a critic of Pakistan's blasphemy law, which carries a potential death sentence for anyone who insults or is judged to have blasphemed against the Prophet Mohammed.

The scholar can be heard telling his audience: " I hail those who made [Pakistan's blasphemy law] which states that one who insults the Prophet deserves to be killed - such a person should be eliminated." He adds that it is a "duty04046to kill those who insult Prophet Mohammed".

Ofcom concluded that a "reasonable interpretation" of the scholar's remarks was that he was personally advocating that all Muslims had a duty to attack or kill apostates or those perceived to have insulted the Prophet.

DM Digital accepted there had been a breach of Rule 3.1 but said in representations that it was a live lecture, the scholar had never expressed such views be-

fore and it had taken a 'robust' view by reporting the matter to the police.

The channel was fined GBP 85,000 and was also ordered to broadcast a statement publicizing Ofcom's findings and was banned from repeating the programme. In considering whether DM Digital's licence should be revoked because of the seriousness of the breach, the regulator took account of Articles 9 and 10 of the 1998 Human Rights Act (relating to freedom of thought and expression) and decided it would be disproportionate to revoke the licence at this time. But due to previous compliance issues, the regulator added that it was putting DM Digital on notice, and planned to visit the channel in order to improve its understanding of compliance as well as continue to monitor it closely.

The channel was also criticised for two other programmes which Ofcom said offered a "one-sided" view of political violence in Karachi and singled out remarks by the channel's chief executive, Dr Liaqat Malik, for criticism.

The programmes, broadcast on 25 Nov 2011 and 4 Dec 2011, made allegations about the governing party in the Sindh Province, the Muttahidi Qaumi Movement (MQM), NATO and the US Government without offering alternative viewpoints. Added to that Dr Malik expressed views on the coalition government of Pakistan, a matter of political and industrial controversy in Ofcom's view.

For breaches of Rule 5.4 (excluding expressions of the views of the person providing the service) and Rule 5.5 (due impartiality), the channel was fined GBP 20,000.

• Ofcom's Findings on Rehmatul Lil Alameen and POAF
http://merlin.obs.coe.int/redirect.php?id=16619 EN
• Sanctions: Rehmatul Lil Alameen, 5 July 2013
http://merlin.obs.coe.int/redirect.php?id=16620 EN
• Sanctions: POAF, 5 July 2013
http://merlin.obs.coe.int/redirect.php?id=16621 EN

Glenda Cooper
City University London

Changes To Copyright Law relating to Orphan Works

On 25 April 2013, Section (clause) 77 of the Enterprise and Regulatory Reform Act 2013 was given Royal Assent (came into effect) .It introduces a new section 116A to the Copyright, Designs and Patents Act 1988 which provides a framework from which further regulatory provisions will derive in order to regulate the status and exploitation of orphan works. An orphan work is where the author or creator of the copyright cannot be identified, found, or it remains uncertain whether the material remains within copyright.

The key provisions arising from Section 116A are as follows:

- a work will not be an orphan work unless a diligent search is made to try and identify and locate the real copyright owner.

- the definition of diligent search will be defined in regulations yet to be drafted.

- any license by one party to another to use or exploit an orphan work cannot be on an exclusive basis.

- The person or body given authority to grant a licence of an orphan work cannot also have the benefit of a licence.

A consultation period will follow and as a consequence of that consultation draft regulations will be prepared. The timetable for consultation, the extent of consultation and the ultimate implementation of regulations has yet to be determined.

Further it should be noted that the EU Directive on Orphan Works (2012/28/EU, see IRIS 2012-10/1), yet to be transposed into British law, will apply to institutions like public libraries, education establishments, museums and archives. Institutions may only use the orphan work to achieve their public interest mission and may only charge fees that reflect the cost of copying the material, or making it available to the public. In other words orphan works cannot be exploited commercially, whereas the provisions pursuant to the Enterprise and Regulatory Reform Act 2013 does allow for such exploitation.

Another feature arising from the Enterprise and Regulatory Reform Act 2013 is a new section 116B to the Copyright, Designs and Patents Act 1988 which allows collecting agencies, for instance the Performing Rights Society, who neither own the work or have the permission of the work's author to license a work. This scheme is known as the extended collective licensing. There will be an opt out whereby it will not be compulsory for this process to be used. The rationale behind the provision is to increase the opportunity for copyrighted work or even eventually orphan works to be licensed and to increase the commercial opportunities amongst the various collecting agencies.

• Enterprise and Regulatory Reform Act 2013
http://merlin.obs.coe.int/redirect.php?id=16618 EN

Julian Wilkins
BluePencil Set

Points-Based Cultural Tests for Tax Relief Introduced

On 13 August 2013 the Cultural Test (Television Programmes) Regulations 2013 came into force. The Regulations introduce points-based "cultural tests" for three genres of television programmes: dramas, documentaries and animation.

The purpose is to determine whether a programme may be certified as a "British programme" by the Secretary of State under Part 15A of the Corporation Tax Act 2009 (as inserted by the Finance Act 2013).

Certification as a British programme is a condition of eligibility for television tax relief under that Act. If so, a maximum tax credit will be available to the UK production company of 25% of UK core expenditure.

The tests and points pertain to the setting; content; language; and British cultural aspects of the programme, where certain work on the programme is carried out, and the residence or nationality of the personnel involved in the making of the programme.

A project will pass the cultural test if it is awarded at least 16 out of a possible 31 points. However, there must be a distribution of the points amongst the various heads otherwise a project could pass the test only on the grounds of language, the location of the work and personnel.

• Cultural Test (Television Programmes) Regulations 2013
http://merlin.obs.coe.int/redirect.php?id=16611 EN

David Goldberg
deeJgee Research/ Consultancy

New Proactive Approach to Seek Out Child Pornography

On 18 June 2013, the UK Culture Secretary announced an agreement with the internet industry that the self-regulatory Internet Watch Foundation will actively seek out images of child abuse on the internet.

The Internet Watch Foundation (IWF) was established in 1996 by the internet industry. It receives reports from internet users of sexually abusive images of children, and provides for the industry a 'notice and take-down' service, which alerts internet service providers and hosting companies of such content so that it can be removed. The Culture Secretary arranged a summit of major internet service providers (Virgin Media, BskyB, and TalkTalk), search engines (including Google and Yahoo), mobile operators and social media companies (including Facebook and Twitter). It was agreed that the IWF would take a proactive approach and seek out illegal images of child abuse on the internet. In doing so it will work closely with the Child Exploitation and Online Protection Centre (CEOP). This is within the department of the Serious Organised Crime Agency, part of the UK police service specialising in combatting child pornography.

The four leading internet service providers agreed to provide a GBP 1 million to help fund the new proactive approach and to help tackle the creation and distribution of child sexual abuse material online. All the companies present signed a 'zero tolerance' pledge on child sexual abuse imagery. It was also agreed that all providers will introduce 'splash pages' so that when someone tries to access a page blocked by the IWF they will see a warning message stating that the page may include indecent or illegal content.

The effect will be that IWF will no longer have to wait until illegal material is reported. It estimates that there are a million images of child abuse online yet it receives only 40,000 reports each year. The work with CEOP will also facilitate more effective prosecution of offenders.

Progress was also reviewed on a number of other means to protect children; it was noted that the four main service providers are now offering an active choice on parental controls to all new customers; that the main Wi-Fi providers will offer family-friendly Wi-Fi in public places; the major service providers are committed to delivering home network parental controls by the end of the year; and that customers are being told of such controls through e-mails and their bills. Further meetings will be help in future to ensure that further progress is made.

• Department for Culture, Media and Sport, 'Tacking illegal images - new proactive approach to seek out child sexual abuse content', Press Release 18 June 2013
http://merlin.obs.coe.int/redirect.php?id=16658 EN

Tony Prosser
School of Law, University of Bristol

GE-Georgia

Amendments to Broadcasting Law

On 12 July 2013, the Georgian Parliament overturned the presidential veto on the bill providing amendments to the law on broadcasting, which envisages measures for more financial transparency of broadcasters, reforming the rule of composition of public TV's board of trustees and transforming Adjara TV's status into that of a public broadcaster.

The presidential objections concerning the bill, originally passed by the Parliament on 31 May 2013, mainly concerned a provision that envisages giving the legislature the right to disband the Georgian Public Broadcaster's (GPB) board of trustees in the case of GBP's budget problems or failure to fulfill its content-related programming priorities.

Also, while according to existing rules, the President selects three candidates for each of the 15 seats in the board and then the Parliament approves one of those three candidates for each seat, the adopted amendments envisage reducing the number of board members to nine, who will take their seats for a six-year term. The amendments also exclude the President from the process of selecting board members. Three members, according to the new rules, shall be nominated by the parliamentary majority faction, three by the parliamentary minority factions and independent deputies. Two members of the board are to be selected by the Public Defender (ombudsman) through competition; one other will be nominated by the local legislative body of Adjara Autonomous Republic.

The adopted bill shall reform Adjara TV, making it into a public broadcaster and legally and financially affiliate it with the Georgian Public Broadcaster. The bill offers to allocate funds for Adjara TV's operations from GPB's budget; the amount of funding should be at least 15% of GPB's annual budget.

According to the bill GPB's annual budget should be not less than 0.14%, instead of the current 0.12%, of the country's GDP for the previous year.

The bill envisages measures for making broadcasters' finances transparent by obligating broadcast license holders to fill in and make public their property declarations.

The bill also obligates cable providers to transmit all Georgian television channels with news programs. Since June 2012 this rule was enforced but only for 60 days before the national elections. Although it was no longer legally binding, after the October 2012 elections the rule de facto remained in place.

The bill was reviewed by an expert of the Office of the OSCE Representative on Freedom of the Media.

• Analysis of proposed amendments to the Law of Georgia "On Broadcasting"
http://merlin.obs.coe.int/redirect.php?id=16592 EN

• [U+10DB][U+10D0][U+10E3][U+10EC][U+10E7][U+10D4][U+10D1][U+10DA][U+10DD][U+10D1][U+10D8][U+10E1]
[U+10E8][U+10D4][U+10E1][U+10D0][U+10EE][U+10D4][U+10D1]"
[U+10E1][U+10D0][U+10E5][U+10D0][U+10E0][U+10D7][U+10D5][U+10D4
[U+10D9][U+10D0][U+10DC][U+10DD][U+10DC][U+10E8][U+10D8]
[U+10EA][U+10D5][U+10DA][U+10D8][U+10DA][U+10D4][U+10D1][U+10
[U+10E8][U+10D4][U+10E2][U+10D0][U+10DC][U+10D8][U+10E1]
[U+10D7][U+10D0][U+10DD][U+10D1][U+10D0][U+10D6][U+10D4]
(Act No 833 On Amendments to the Law of Georgia on Broadcasting)
KA

Andrei Richter
Faculty of Journalism, Moscow State University

HR-Croatia

New Rules on Fee Amounts and Manners of Payment

On 10 July 2013, the Council for Electronic Media adopted new Rules on the amounts of licence fees and the manners of payment (see IRIS 2006-5/25) after concluding consultations with stakeholders and the public.

The prior obligation to pay a concession fee was based solely on the number of inhabitants living in the area of coverage, and ranged from HRK 2,600 (circa EUR 350) to HRK 150,000 (circa EUR 19,990) for radio broadcasters and from HRK 5,200 (circa EUR 700) to HRK 450,000 (circa EUR 59,960) for television broadcasters.

The new Rules envisage that the amount of an annual concession fee consists of a fixed and a variable part.

- The fixed part of the fee is to be paid in the amount of HRK 500 (circa EUR 70) per 50,000 inhabitants, whereby that amount also represents the minimum amount of an annual concession fee.

- The variable part of the fee is 0.15% of the aggregate gross annual revenue accrued in the preceding year by media service providers in the course of providing television and radio and other media services from the sums exceeding the amount of HRK 5,000,000 (EUR 667,430).

Non-profit radio and television broadcasters have to pay 50% of the fixed part as well as 50% of the variable part of the relevant stipulated concession fee.

• *Vijeće za elektroničke medije - Pravilnik o visini i načinu plaćanja naknada* (Rules on Fee Amounts and Manners of Payment, Official gazette 93 - 19 August 2013) HR

Nives Zvonarić
Agency for Electronic Media (AEM), Zagreb

HU-Hungary

New Criteria for Nomination and Appointment of Media Authority's President

On 5 July 2013, the Hungarian Parliament adopted an amendment to Act CLXXXV of 2010 on Media Services and Mass Media. The amendment, which came

into effect on 1 August 2013, modified the preconditions for nominating and appointing the President of *Nemzeti Média és Hírközlési Hatóság* (National Media and Infocommunications Authority - NMHH). According to the Act, the President of the NMHH - as the convergent authority monitoring the infocommunications and media sector - at the same time becomes the nominee for chairperson of the Media Council, which issues decisions involving the monitoring of media services and the media market. Therefore the amendment also has a direct impact on the monitoring of the media system as such. To become the Chairperson of the Media Council, the NMHH's president must be endorsed by a two-thirds majority in Parliament.

Previously, the Parliament modified the rules on the nomination of the president of the NMHH's president's nomination in March 2013. The objective of the March amendment was to implement the terms of the agreement between the Council of Europe and the Hungarian government into media law. The said agreement aimed to bring some critical aspects of the Hungarian media laws into line with the expectations put forth by the Council of Europe. A crucial element of the agreement and the resulting March amendment was the adoption of stricter professional selection criteria regarding candidates for the NMHH presidency. In addition to a higher education degree in either law, economics or the social sciences, candidates must have at least five years of experience "related to the public monitoring of media services or press products or the public monitoring of infocommunications", or, alternatively, must have a scientific degree related to media or infocommunications and at least ten years of experience in higher education.

The law had to be applied earlier than expected. After a serious illness, the NMHH's President, Annamária Szalai, who had been appointed for a nine-year term in 2010, passed away in April 2013. The search for a new NMHH President began with the recently-narrowed professional requirements set out in the law.

The NMHH President therefore needs to be appointed by the President of the Republic pursuant to a corresponding proposal by the Prime Minister. The Council of Europe also recommended the involvement of civil and professional organisations in the selection process. Pursuant to the law's text, the Prime Minister merely needs to "consider" the suggestions of such organisations, but is by no means bound by these suggestions.

The regulations fail to specify a final deadline for the nomination process. This deficiency fostered the current scenario: several organisations authorised by the law have suggested candidates who meet the professional criteria, whereas the Prime Minister has not to this day nominated a candidate. Hence, the law is open to delaying tactics depending on the political suitability of the candidates.

In May 2013, the Minister of public administration and justice took legal actions and asked the Constitutional Court for an interpretation of the March amendment. In his inquiry, the minister expressed his doubts as to whether the Parliament had the authority to adopt professional requirements concerning the President of the NMHH, an authority designated as an autonomous regulatory body in the Hungarian Constitution. The Minister also requested the Court to rule on the scope of the legislator's margin of appreciation regarding the regulation of selection criteria. Finally, he asked the Court to interpret the substance of the professional selection criteria prescribed by the law, asking specifically whether previous experience as a lawyer or a judge working on media issues may be considered public monitoring activity, and whether membership in the Parliament's media affairs committee may qualify as such. The Court found that the latter issues fell outside its competence of constitutional review. Regarding the Parliament's margin of appreciation, it found that detailed professional criteria for the NMHH presidency may be set out by law.

Subsequently, the Parliament adopted a law that transfers the authority to enact decrees from the NMHH President to the Vice-President whenever the President had failed to do so prior to the termination of his/her term of office. The president's authority to enact decrees pertains exclusively to the area of infocommunications and does not extend to the media sector. As far as infocommunications are concerned, however, the law on electronic infocommunications currently features a list of 30 items that circumscribe the scope of the president's authority to enact decrees. Presumably, the transfer of the mentioned competence to the vice-president was meant to provide for a longer viability in situations when the NMHH operates without a President.

The President of the Republic, however, did not sign the amendment, but sent it back to Parliament for reconsideration. In his assessment, the amendment violated the Fundamental Law's provision that in terms of his/her authority to enact decrees, the head of an autonomous regulatory body - such as the NMHH - may not be "substituted by a deputy whom he/she had previously nominated by decree".

It was hereafter that the Parliament adopted the amendment of the media law that overrode the previous agreement with the Council of Europe and softened the professional criteria for the selection of the NMHH's president. Firstly, in the future any type of higher education degree will suffice to meet the legally specified criteria. The amendment also extended the range of relevant experience in public monitoring to include the positions of the current and previous media and infocommunications authority's leaders and professional staff. Related judicial and other legal activities, as well as membership in current or previous media monitoring boards is sufficient. This has significantly expanded the range of potential candidates.

On 14 August 2013, the prime minister nominated Monika Kalas as President of the NMHH.

• *2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról* (Act CLXXXV of 2010 on Media Services and Mass Media (consolidated version))
http://merlin.obs.coe.int/redirect.php?id=16638 HU

• *KIMIXX-AJFO/96812013* (Motion of the Government to the Constitutional Court regarding the interpretation of the Media Act)
http://merlin.obs.coe.int/redirect.php?id=16598 HU

• *2013.06.25. Közlemény az Alaptörvény 23. cikk (2) bekezdésének értelmezéséről* (Announcement of the Constitutional Court regarding the interpretation of the Media Act)
http://merlin.obs.coe.int/redirect.php?id=16599 HU

Gábor Polyák
Mertek Media Monitor

IE-Ireland

Review of Funding for Public Service Broadcasting Published

On 18 July 2013, the Broadcasting Authority of Ireland (BAI) published its review of funding for the public service broadcasters, RTÉ and TG4, for the next five year period. As part of the review, the BAI made recommendations relating to the future levels and use of public funding including the processes required to ensure funding is adequately and appropriately accounted for.

The BAI is required under section 124(8) of the Broadcasting Act 2009 to carry out a review of the adequacy, or otherwise, of public funding to enable public service broadcasters to meet their public service objectives. Such a funding review must be completed at least once every five years. As part of the review process the BAI considered the broadcasters detailed costed plans for the five year period and a commissioned report from a firm of consultants, Crowe Horwath.

The review recognised that, in order to ensure investment in programme output, RTÉ will require an increase in public funding. The BAI recommends that there should be no increase in licence fee funding. Any increased funding is conditional on further cost reductions by RTÉ, with the increase channelled, where possible, through the independent production sector. The review also recommends a re-balancing between the proportions of public and commercial funding of RTÉ. In relation to TG4 the BAI recommends that funding be maintained at current levels.

Among other key recommendations is a proposed change in the setting of advertising limits across all broadcasters. Currently three separate methods are in place to determine the limits of advertising minutage (see IRIS 2010-1/29). Arising from the review, it is recommended that the responsibility for advertising limits for all broadcasters should rest with the BAI with a provision, if considered necessary, that the consent of the Minister be required for any adjustments in the case of RTÉ.

As required by the Broadcasting Act 2009 the report and recommendations were presented to the Minister for Communications, Energy and Natural Resources for consideration by Government. The Minister and Government have responded positively to the review and the BAI has begun the process of preparing an implementation plan to progress the recommendations.

• Broadcasting Authority of Ireland (BAI), Five-year Review of Public Funding: Authority Recommendations, June 2013
http://merlin.obs.coe.int/redirect.php?id=16612 EN

• Crowe Horwath, Final Report to the BAI: Review of Funding for Public Service Broadcasters, 23 May 2013
http://merlin.obs.coe.int/redirect.php?id=16613 EN

• Government Response to the Five-year Review of Funding for Public Service Broadcasters
http://merlin.obs.coe.int/redirect.php?id=16614 EN

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

New Broadcasting Guidelines on Referenda Coverage

On 8 August 2013, the Broadcasting Authority of Ireland (BAI) published BAI Guidelines in Respect of Coverage of Referenda (Guidelines). The Guidelines set out rules with which all Irish broadcasters must comply when covering the forthcoming referenda, on the abolition of Seanad Éireann (upper house of Parliament) and the creation of a new court of appeal. Both referenda are scheduled to take place on 4 October 2013.

Rule 27 of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs provides that broadcasters must comply with Guidelines and codes of practice on election and referenda coverage (see IRIS 2013-5/32). The Guidelines replace the BAI Broadcasting Code on Referenda and Election Coverage, issued in 2011 (see IRIS 2011-9/24), and are broadly in line with existing practice and the former Code.

The Guidelines also reflect the requirements set out in the Referendum Act 1998 (as amended) and s.41(6) of the Broadcasting Act 2009 by confirming that advertisements broadcast at the request of the Referendum Commission are not covered by the general prohibition on political advertising (see IRIS 2004-8/23). Party Political Broadcasts are permitted and broadcasters must ensure that the total time allocated, for such broadcasts, amounts to equal airtime being afforded to both sides of the debate.

Apart from the allocation of equal airtime for Party Political Broadcasts there is no requirement that absolute equality of airtime be allocated to opposing

sides of the referenda debates. The Guidelines require broadcasters to ensure that the allocation of airtime is equitable and fair to all interests concerned and is undertaken in a transparent manner; equal airtime is not the only measure of fairness.

Under the new Guidelines it is inappropriate for persons involved with referendum interests - including elected representatives, members of political parties, members of civil society groups and individuals that or who advocate or campaign for a particular outcome to a referendum - to present programmes during the campaign period. The campaign period began on 8 August 2013, the date the Guidelines came into effect, and ends at the close of referendum polling.

The moratorium period on coverage by broadcasters of a referendum remains unchanged and runs from 2 p.m. on the day before the referendum poll takes place and throughout the day of the poll itself until polling stations close (see IRIS 2011-5/26). The Guidelines confirm that the moratorium is not intended to preclude coverage, during this period, of legitimate news and current affairs but relates to content that may influence or manipulate voters during the moratorium period.

• BAI Guidelines in Respect of Coverage of Referenda, August 2013
http://merlin.obs.coe.int/redirect.php?id=15268 EN

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

MK-"the Former Yugoslav Republic Of Macedonia"

Second Draft of the New Media Legislation Set for Public Discussion

During the heated debate on the new media law (see IRIS 2013-7/19) the Government proposed two acts to the Parliament for adoption.

The first act, called *Zakon za mediumi* (Media Act), will regulate general issues of the media sector. The second one, called *Zakon za audio-vizuelni mediumski uslugi* (Act on Audio-visual Media Services), will focus more specifically on the audiovisual media services sector.

In spite of the submissions from civil society organisations, professional media associations and the international community, the proposed acts include a rather high level of media regulation including regulation of Internet content and print media. Both are currently the subject of basic regulation only (e.g. general and specific competition and copyright law).

In specific cases, the two proposed acts would regulate the sector originally devoted to self-regulation. They specify the obligations of the self-regulatory bodies and how they should react in case of breaches of Codes of Conduct. Critical voices see a loss of distinction between self-regulation and formal regulation.

Art. 2 of the *Zakon za mediumi* defines the professional field of a journalist in a rather narrow manner. The definition can be read in a way that does not encompass freelance journalists or representatives of civic journalism. This enables authorities to exclude those journalist from public events, just because they are not "journalists" in the sense of the law.

Art. 10 of the *Zakon za mediumi* stipulates rules on the organisation of journalists' work within the media outlets on a micro-management level and even regulates communication between reporters and the editor in chief. The Media Law obliges journalists to inform the editor-in-chief in accordance with a legally-stipulated internal communication procedure if they want to publish any information from protected sources. Critics fear that this could result in self-censorship, which could have a chilling effect on media freedom in Macedonia and put emphasis on Art. 16 of the Macedonian Constitution guaranteeing the journalist's right not to reveal their information source.

Art. 9 of the proposed text of the *Zakon za audio-vizuelni mediumski uslugi* diminishes the transparency of the media regulation authority's work. The Agency for Audiovisual Media is obliged to hold "at least four sessions open to the public within one year". This is an option to seal off from the public: according to the current legislation all sessions of the Agency are open to the public. This reduction of transparency contrasts with the regulatory power being extended by the draft act.

The civil society and the media professionals associations urged the Government to withdraw the acts on media in a joint statement: "The separation of the law (in two acts) is only a technical separation of provisions and not a substantial separation of the (regulatory) approach towards the printed and the electronic (online) media from the broadcasters." - reads the joint statement of the Association of Journalists of Macedonia, the Media Development Centre and the Macedonian Media Institute. The media professionals (the Association of Journalists of Macedonia) are also concerned about the reform of the media regulation authority: "The majority of its members will be nominated by political institutions, the Parliament and the Association of Units of Local Self-governments." With regard to the media regulation agency, the OSCE's comments on the Draft Act require bigger involvement of the civil sector: "One of the main concerns related to the provisions on the regulatory agency was that there was insufficient involvement of civil society in the appointment process. This concern remains, as there are no substantial amendments to the relevant

provisions." Both laws are expected to be adopted by the Parliament in autumn 2013.

• OSCE's Comments on the Second Draft of the Draft Law on Media and Audio-visual Media Services
http://merlin.obs.coe.int/redirect.php?id=16639 EN

• Став на ЗНМ, ССНМ, МИМ и ЦРМ за законат за медиуми (Joint statement of the Association of Journalists of Macedonia, the Media Development Centre and the Macedonian Media Institute)
http://merlin.obs.coe.int/redirect.php?id=16600 MK

• документи за прописот (Second draft text of the laws as well as the reactions from other relevant participants in the public debate)
http://merlin.obs.coe.int/redirect.php?id=16640 MK

Borce Manevski
Independent Consultant for Media and Public Relations

RO-Romania

New Act on Misleading and Comparative Advertising

Act no. 202/2013 (The Act) for the modification and completion of Act no. 158/2008 regarding misleading and comparative advertising came into force on 6 July 2013. The Act had been adopted on 29 September 2012 by the Romanian Senate (upper chamber of the Parliament) and on 5 June 2013 by the Chamber of Deputies. It was published in the Official Journal of Romania no. 399 of 3 July 2013, Part I.

The modified and completed law complies with Directive 2006/114/EC concerning misleading and comparative advertising. The Act intends to assure the legislative coherence, to establish the competent authorities and to set the time limit for the submission of complaints relating to misleading and comparative advertising.

The new Law distinguishes between those authorities that may receive complaints from businesses and individuals in cases of misleading and comparative advertising. It was considered necessary to achieve a clear distinction between regulations protecting consumers' interests (individuals) and those relating to relations between economic operators (businesses). Businesses can head to the MFP and the CNA; individuals file their complaints with the ANPC.

The *Autoritatea Naţională pentru Protecţia Consumatorilor* (National Authority for Consumer Protection - ANPC) has been designated as the competent authority for the enforcement of the provisions concerning misleading and comparative advertising. According to Art. 7 (1) Law no. 202/2013 merchants, associations and organisations having a legitimate interest may notify the *Ministerul Finanţelor Publice* (Ministry of Public Finances - MFP) or, if applicable, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA).

Both the ANPC and the MFP can make a finding of breaches of the legal provisions and can impose sanctions stipulated in Art. 7 (3) and (4).

The MFP or the ANPC can request a trader to provide the necessary evidence regarding the accuracy of his statements, indications or presentations made in the context of his advertisement announcement, as stipulated in Art. 9 (1) of Law no. 202/2013.

According to Art. 18 (1) of Law no. 202/2013, a traders' complaint against legal breaches in the field has to be submitted within 3 months of the date on which persons, associations or organisations having a legitimate interest, have become aware of the advertisement but no later than 6 months after its appearance. The Law also establishes time limits for consumers' complaints relating to comparative advertising: 4 months as from the date of appearance.

According to Art. 19 (2) of Law no. 202/2013, the MFP, the ANPC or the CNA can notify professional organisations having a self-regulation role. The above quoted institutions can ask a reasoned opinion from the professional organisations that have a self-regulatory role.

• Legea no. 202/2013 pentru modificarea şi completarea Legii nr. 158/2008 privind publicitatea înşelătoare şi publicitatea comparativă, Monitorul Oficial, Partea I nr. 399 din 3 iulie 2013 (Act no. 202/2013 for the modification and completion of the Law no. 158/2008 on misleading and comparative advertising)
http://merlin.obs.coe.int/redirect.php?id=16641 RO

Eugen Cojocariu
Radio Romania International

Recommendation on Programme Loudness

On 18 June 2013, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA) adopted a *Recomandare privind nivelul tăriei sonore în programele audiovizuale* (Recommendation on loudness in audiovisual programmes).

The Recommendation was issued because of the loudness irregularities within programmes, between programmes of the same channel and between different radio and television channels, which triggered numerous complaints from listeners and viewers.

The document is in line with the experience accumulated by different European states which put into practice the Recommendation EBU R 128-2011 on „Loudness normalisation and permitted maximum level of audio signals" adopted by the European Broadcasting

Union (EBU) (for the regulations in the Czech Republic, see IRIS 2013-7/8; for Bulgaria, see IRIS 2013-4/5; for Poland, see IRIS 2010-2/29).

The Council established a common measurement reference in order to preserve the original sound and its artistic value. At the same time, the technical equipment needed by the radio and TV stations is taken into account. The CNA recommended to the broadcasters, the distributors and the programme providers that the Integrated Loudness should be of -23 LUFS (the unit for subjective loudness levels relative to full scale). The LUFS is the synonym used in the EBU's Recommendation mentioned above for the LKFS (Loudness, K-weighted, relative to Full Scale), a loudness standard meant to enable normalisation of audio levels for the delivery of TV and other video contents. LKFS is standardised in ITU-R BS.1770, an ITU (International Telecommunication Union) Recommendation on the „Algorithms to measure audio programme loudness and true peak-audio level".

The CNA recommended that the broadcasters and the programme services providers under Romanian jurisdiction should annually recalibrate the transmitted alignment level according to the EBU's and ITU's norms, irrespective of the transmission medium used. The broadcasters and the providers have to notify the CNA as for the implementation of the Recommendation, along with any problems occurring during the installation process.

The Integrated Loudness of a programme, measured throughout a 24-hour period, will be set at a -23 LUFS and the True Peak Level will not be bigger than -1 dbTP (the unit for measurements of True Peak audio Level, relative to full scale). For programmes of up to two minutes long, the Programme Loudness will have the following recommended values: the Integrated Loudness of -23 LUFS; the Short Term Loudness (measured for a 3 seconds sequence of time) of maximum -20 LUFS; the True Peak Level up to -1 dbTP. For programmes longer than 2 minutes, the Integrated Loudness will be of -23 LUFS ± 1 LU, the True Peak Level up to -1 dbTP and the Loudness Range will be less than 20 LU and, if possible, bigger than 5 LU (the unit for subjective loudness differences, for example, relative to a specified target level such as -23 LUFS).

• Recomandare privind nivelul tăriei sonore în programele audiovizuale (Recommendation with regard to the Programme Loudness in the audiovisual shows)
http://merlin.obs.coe.int/redirect.php?id=16601 RO

Eugen Cojocariu
Radio Romania International

RS-Serbia

Denial of Access to Information Requires Profound Reasoning

On 23 May 2013, the Constitutional Court of Serbia decided that the mere fact that a document is classified and thus labeled as confidential is not sufficient to justify the denial of access to information under the Serbian law on freedom of access to information of public importance.

The Administrative Court had previously found that the request of a journalist filed with the government of the Republic of Serbia was rightfully denied. The journalist worked for TV B92's investigative TV series called "Insider" and requested to be allowed access to the records of the Government's Commission formed to investigate possible omissions in view of the late Prime Minister Zoran Djindjic's security and his assassination in 2003.

The report of the Commission, which said there were many such omissions, was released to the public. However, the documents providing the basis of the report (including the minutes of the Commission's sessions and investigative interviews) remained classified.

The records compiled and acquired in the course of the Commission's work have never been released and have never been used in the trial for the murder of the late Prime Minister. After the trial, the journalist of the "Insider" requested that all records of the Commission be declassified in the interest of the public. However, all she received from the then Government was the report that had been publicly available in the first place. Access to the minutes of the Commission's sessions and the records of the interviews was denied. The Government reasoned this denial by referring to the label "classified" on the documents. The journalist initiated the proceedings for the judicial review of the Government's decision, but the Administrative Court decided that the Government's denial of access was legitimate.

The Constitutional Court of Serbia found that it would be premature to decide that the journalist's right to the freedom of information was violated. It is entirely possible that the secrecy of the documents prevails over the freedom of information. However, the Constitutional Court ruled that the mere fact that a document is labelled "classified" is not sufficient to deny access by the public. The Administrative Court failed to examine whether the classification of the document as confidential is founded on a legitimate interest. Neither did the Court analyse whether the interest in confidentiality overrides the right of the public to know. These ommissions constituted a violation of

the journalist's right to a fair trial. Thus, the Constitutional Court has clearly found that the lack of the proper balancing test in the judicial and administrative decisions dealing with the right to the freedom of information amounts to the violation of the right to a fair trial. In the decision the Constitutional Court quotes extensively from the case law of the European Court for Human Rights and its judgments of 14 April 2009 (Társaság a Szabadságjogokért v. Hungary; see IRIS 2009-7/1) and of 26 May 2009 (Kenedi v. Hungary; see IRIS 2009-7/104).

Accordingly, these proceedings were referred back to the Administrative Court for a new decision.

• *Už-1823/2010, 23 May 2013* (Constitutional Court's decision of 23 May 2013 (Už-1823/2010))
http://merlin.obs.coe.int/redirect.php?id=16605 SR

Slobodan Kremenjak
Živković Samardžić, Belgrade

RU-Russian Federation

Constitutional Court on Defamation Online

On 9 July 2013, the Constitutional Court of the Russian Federation adopted a Resolution concerning the constitutionality of several paragraphs of Article 152 ("Defamation") of the Russian Civil Code. The case was raised by a citizen named Krylov who complained that the Civil Code does not oblige the Internet service providers (ISPs) to remove defamatory statements made by third parties.

The complaint arose from decisions of the courts of first and second instances in the Sverdlovsk region on the lawsuit of Mr Krylov against the regional ISP. The plaintiff demanded that the defendant remove remarks posted by an anonymous user on the "Surgutsky forum" website. He wanted his photograph, which accompanied the statement, to be removed as well. The remarks had earlier been found to be of a defamatory nature by the city court of Surgut.

The Sverdlovsk courts noted that the Civil Code provides that the refutation of defamatory statements is to be made by the person who disseminated them or a mass media outlet that disseminated them. As such a person was not found in that case, "Surgutsky forum" was not registered as a media outlet, nor the Internet-forum could be considered as illegal form of disseminating information, the claims were dismissed.

The Constitutional Court noted with concern that in cases like this the plaintiff can only obtain a court decision on the defamatory and untrue nature of information disseminated online, but has no other means of protection of his honour and dignity, or privacy, as would be available in the case of defamation offline. It gave a review of the constitutional and legal norms on freedom of expression and the right to protect one's reputation, as well as relevant national law, international covenants and soft law such as the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information of 1 June 2011.

The Constitutional Court ruled that the impossibility of finding the person responsible for defamatory statements shall not exclude the right of the defamed party to protect his/her reputation, e.g. by restoring the situation that existed prior to the violation of the right.

An imposition on the ISP of the obligation to remove the (defamatory) information declared by a court of law to be untrue shall not be considered as an excessive burden or as a disproportionate restriction of its rights. The obligation to comply means that the ISP should do so as soon as it learns about the relevant court decision that had entered into force. Such an action is not considered as putting the blame on the ISP, but only as a form of protection of reputation. If the relevant court decision was not enforced, then the court may consider imposing on the ISP the burden of paying moral damages to the plaintiff.

These rules relate also to the owners and administrators of websites.

As the norms of the Civil Code neither provide the possibility to demand that defamatory online statements be removed, nor introduce liability for refusal to do so, they contradict the constitutional provision (part 2 of Art. 45), which says: "Everyone shall be free to protect his rights and freedoms by all means not prohibited by law."

The Resolution was issued a week after President Vladimir Putin signed into law widespread amendments to the Civil Code (Part I) of the Russian Federation, including its Article 152 (see IRIS 2013-8/34). The new text of the Article reflects the position of the Constitutional Court.

• Постановление Конституционного Суда Российской Федерации по делу о проверке конституционности положений пунктов *1, 5* и *6* статьи *152* Гражданского кодекса Российской Федерации в связи с жалобой гражданина Е .422.432400413473476462460 (Resolution of the Constitutional Court of the Russian Federation on the case of the constitutionality test of paragraphs 1, 5 and 6 of Article 152 of the Civil Code of the Russian Federation in response to the complaint of citizen Ye. V. Krylov, Saint-Petersburg, 9 July 2013)
http://merlin.obs.coe.int/redirect.php?id=16634 RU

Andrei Richter
Faculty of Journalism, Moscow State University

Act to Counteract Video Piracy Online

On 2 July 2013, the President of the Russian Federation signed into law the Statute amending several statutes of civil law, procedural law and information law. The new Act introduces a number of measures aimed at boosting the ability of rightsholders to cease stop distribution of illegal video content via the Internet.

According to the Statute, a new Article was introduced into the Civil Code (Art. 1253.1) providing rules for liability of so called "internet mediators", i.e. those either providing technical transmission of the information on the Internet (internet providers) or providing the hosting of information on websites. An Internet provider shall not be liable for any infringements of intellectual property rights if he/she does not initiate transmission of the material, does not modify the material in the course of its transmission, and does not know that using such material is illegal. A hosting provider as well shall not be liable for any infringements if he/she does not know that using such material is illegal or ceases the illegal use of material as soon as he/she receives written notification from a rightsholder. Despite these immunities from liability, Internet mediators shall be obliged to block illegal content in cases specified by procedural law.

The Statute introduced a brand-new procedure for using injunctive remedies in cases of protection of intellectual property rights in video content (amendments to the Civil Procedure and Arbitrage Procedure Codes). A rightsholder who has a reasonable suspicion that his/her rights in audiovisual content are being violated on the Internet shall be entitled to apply for a court order prescribing the blocking of the video content on the infringing website. Such an order shall be granted as a preliminary measure prior to filing a lawsuit. If a rightsholder does not bring an action within the following 15 days, the court order expires.

In order to provide effective law enforcement practice some additional procedural rules were suggested. First, all disputes concerning the use of video content on the Internet shall be resolved in a single court - Moscow City Court (court of general jurisdiction). It means inter alia that the jurisdiction of arbitration (commercial) courts (those resolving disputes of an economic nature) is modified. Another important innovation is that a rightsholder shall have the right to appeal for the court order online; a special function shall be provided on the website of the Moscow City Court. Copies of court orders sanctioning the blocking of websites (or pages of websites) shall be hosted on the website of the Court and provided both to the claimant and to the Federal Service for Supervision in the Sphere of Telecoms, Information Technologies and Mass Communications (supervisory authority).

Another important innovation in the Statute is the introduction of the content-blocking procedure (amendments to the Statute "On information, informational technologies and protection of information"). A rightsholder, after obtaining the court order shall request the supervisory authority to order the blocking of illegal content on the Internet. The said body shall notify a hosting provider of a website containing illegal content. The latter shall inform the owner of website about the supervisory authority's notification. If neither the hosting provider nor the owner of the website reacts to the notification, the supervisory authority shall require Internet providers to block the illegal website or content. The supervisory authority's requests are obligatory for Internet providers.

The Statute entered into force on 1 August 2013.

• Федеральный закон Российской Федерации от *2* июля *2013* г. *N 187-* ФЗ г. Москва "О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам защиты интеллектуальных прав в информационно - телекоммуникационных сетях " (Federal Statute of 02 July 2013 # 187- ФЗ "On amending certain legislative acts of the Russian Federation regulating aspects of the protection of intellectual property rights in telecommunication networks")
http://merlin.obs.coe.int/redirect.php?id=16635 RU

Dmitry Golovanov
Moscow Media Law and Policy Centre

New Rules to Protect Privacy and Reputation

On 2 July 2013, the President of the Russian Federation signed into law the Federal Statute amending several provisions of the Russian Civil Code. This law was adopted as part of the civil legislation reform underway in Russia. Under the new law some aspects of non-material values protection are regulated in a slightly different way (including inter alia protection against defamation and protection of person's image, see IRIS 2013-8/32), and some brand-new provisions introduced (protection of privacy). The major focus of the Statute is the development of new legal mechanisms for the protection of non-material values.

An important innovation of the Statute is the development of the right to privacy. In addition to the Constitution, the new Article 152.2 of the Civil Code declares that the collection, keeping, dissemination and use of information about the private life of a person shall not be allowed without his/her consent. The Civil Code's provisions consider this regulation emphasizing that any use of information about the private life of a person is considered lawful when performed for pressing governmental, social or public needs. A special clause is devoted to the protection of the private life in artistic works. It shall be considered illegal to use information about the private life of a person if such use infringes on the lawful interests of such a person.

The Statute introduces a new version of Article 152 of the Civil Code concerning protection against defamation. One of its most significant new rules is the one providing that a person is protected not only from derogatory incorrect statements, but shall have the right to seek remedies against dissemination of any incorrect information about him/her. However, the difference is that the burden of proof of incorrectness in the latter situation shall rest upon person claiming for protection of his/her rights. Protection against the dissemination of incorrect information shall not necessarily give rise to compensation for moral damages for the affected party.

At the core of the Statute is the introduction of a diversity of specific remedies developed in order to strengthen the protection of non-material values. A person shall have the right to use both the usual civil law remedies and those specifically intended for the protection of non-material values. In particular, the latter include the power of a court to admit the infringing act on non-material values; the possibility of the publication of the court's decision admitting the infringing act; the prohibition by the court of activities infringing on non-material values.

In case of infringement of the reputation, privacy or right to use of one's image, a person shall be entitled to seek such remedy as the ceasing of dissemination of information inter alia by means of erasing such information as well as the termination of hard copies containing information (in cases when the erasing of information is not available). The Statute's provisions emphasize that termination of information carriers shall not imply any compensation for the of cost of such carriers to be paid to an owner of carriers. Also new is the right to claim the removal of defamatory information or image of such a person from the Internet. This person also has a specific right for the dissemination of refutation online in accordance with the procedures to be established by a court of law in each particular case.

The Statute shall enter into force on 1 October 2013.

• Федеральный закон Российской Федерации от 2 июля 2013 г. N 142- ФЗ " О внесении изменений в подраздел 3 раздела I части первой Гражданского кодекса Российской Федерации " (Federal Statute of 02 July 2013 # 142- ФЗ "On amending subsection 3 section 1 part 1 of the Civil Code of the Russian Federation")
http://merlin.obs.coe.int/redirect.php?id=16636 RU

Dmitry Golovanov
Moscow Media Law and Policy Centre

SK-Slovakia

Supreme Court Rules on Differentiation Between Sponsorship Announcements and Advertising

On 29 May 2013, the Supreme Court ("Court") confirmed the decision of the Council for Broadcasting and Retransmission of the Slovak Republic ("Council") imposing a fine of EUR 3,319 on a major Slovak commercial TV broadcaster for exceeding the advertising time limit of 12 minutes per broadcasting hour.

With its confirmed decision, and with other ones, the Council stated that the only criterion for the qualification of a spot as either sponsorship announcement or advertising is its purpose. If the spot contains promotional messages referring to the sponsor of the programme or his goods and services the purpose is promotion, regardless of the fact whether the spot also informs the viewer about the sponsor of the programme.

According to the Council, there is no legal exception for sponsorship announcements that would rule them out from the definition of advertising. Even if there was such an exception it would clearly contradict the provisions of the AVMSD by creating the possibility of exceeding the hourly advertising limit by selling advertising spots as sponsorship announcements. The broadcaster however refused this interpretation and claimed that even if the sponsorship announcement contains promotional references it must be assessed under the rules of sponsorship.

The Court fully supported the Council's reasoning and stated that the given spot did not merely inform the viewers about the sponsor of the programme but also emphasized the effects of the advertised product by using slogans such as "Acutil, memory in a pill", "Acutil will solve memory problems". According to the Court, broadcasting of such a spot was capable to promote consumption of the product and therefore must be qualified as advertising.

It must be noted, however, that there are several decisions of the Court (though different tribunals) annulling similar decisions and fully supporting the broadcasters' interpretation that sponsorship announcements must be assessed exclusively under the rules of sponsorship. Although legally bound by the opinion of the Court, the Council challenged the Court's interpretation in its further decisions and suggested the Court to initiate a preliminary ruling procedure at the Court of Justice.

• *Najvyšší súd, 6Sž/21/2012, 29.05.2013* (Decision of the Supreme Court of 29 May 2013 (6Sž/21/2012))
http://merlin.obs.coe.int/redirect.php?id=16643 SK

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

Supreme Court Prohibits Sensational Report About Suicide

On 27 June 2013, the Supreme Court ("Court") confirmed the decision of the Council for Broadcasting and Retransmission of the Slovak Republic ("Council") imposing a fine of EUR 5,000 on a major Slovak commercial TV broadcaster for violating human dignity in its programme.

In March 2012, the Council received a complaint regarding reports aired within the news programme called "Crime" concerning the tragic suicide of a middle-age man from a small town in Slovakia. In their complaint, the bereaved of the deceased man stated that they explicitly asked the broadcaster not to report about the tragic death.

Nevertheless, the broadcaster issued reported about the suicide. The reporter presented the story in a popular- and scandal-oriented fashion using formulations such as

- "Thirty-nine year old man was lying in the house in a pool of blood";

- "Dead body of thirty-nine year old Dusan was found by his brother who suddenly faced a view of horror";

- "Dusan's throat was cut all along including both wrists";

- "The whole room was allegedly covered in blood".

Speculations about the motives and the cause of death (schizophrenia, suicide) were also raised by the reporter.

During the legal investigation, the broadcaster claimed that most of the statements presented by the reporter were later confirmed by competent authorities. In the case of the speculations about the motives, the broadcaster pointed out that the Council does not have the competence to verify or designate as false facts stated in the media. According to the broadcaster, the public has the right to be informed about such events and any State authority's sanction in this matter would infringe the broadcaster's freedom of speech.

The Council, however, concluded that the question whether these statements were true or false is not essential in this case. Even correct statements may in some cases infringe an individual's right to privacy. Furthermore, at the time of airing the report, the broadcaster presented its mere speculations as facts, which is not in compliance with journalistic due diligence. Most importantly, the broadcaster failed to justify the disclosure of the information to the public with reasonable facts that prevailed over the right to privacy.

The Court fully supported the Council's reasoning and agreed that the information belonged in the private sphere of the decedent's family. Since the decedent was a private figure which did not engage in any public activities there was no public interest in the dissemination of this information. The Court also stated that even in a case where the public interest in disclosure and the right to be informed prevailed over the privacy of the persons concerned, reports based on unsupported speculations presented in such an expressive manner are not covered by the right to freedom of speech.

• *Najvyšší súd, 5Sž/26/2012, 27.06.2013* (Decision of the Supreme Court of 27 June 2013 (5Sž/26/2012))
http://merlin.obs.coe.int/redirect.php?id=16644 SK

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

Retransmission Without Broadcasters' Consent

On 19 June 2013, the Supreme Court ("Court") confirmed the decision of the Council for Broadcasting and Retransmission of the Slovak Republic ("Council") imposing a fine of EUR 100 on a major Slovak cable operator for providing TV channels without the consent of the respective broadcasters.

According to Slovak law, providers of retransmission services may provide TV channels only with the explicit consent of the respective broadcaster. In 2009, broadcasters of major Czech TV channels that are popular in Slovakia informed the Council of the revocation of their consent for the retransmission of their channels in Slovakia because of copyright issues.

Subsequently, the Council issued a caution to the largest cable operator for the ongoing transmission of Czech channels without the necessary consent. As this warning was ignored by the cable operator, the Council started a legal investigation. Together with the telecom office, the Council inspected the operator's distribution system. The inspection proved that the channels are within the operator's system. The operator did not object to the findings of the inspection. However, it submitted a report by an authorized

expert in the field of electronic communications. According to this report based on "technological circumstances", a cable operator is not the provider of the retransmission, but only the "distributor of a signal".

In its decision, the Council stated that the submitted report did not address technological questions but assesses legal issues instead. The Council reminded the operator that only a competent public authority (in this case the Council) is entitled to make a binding decision in such a legal case. The Council stressed that the operator is the only entity that enters the contractual agreement with the end-user, who is able to receive these channels using the operator's equipment and services exclusively. Since there is no other entity involved in the transmission process, the Council qualified the cable operator as the provider of the retransmission and accordingly imposed a fine.

Before the Court, the operator objected to the Council's findings with regard to the expert's report. According to the operator, it would have been the Council's obligation to ask the opinion of another expert in the field of electronic communications in case it disagreed with the submitted reported. The Court however fully supported the Council's reasoning. It agreed that no expert has the power to answer legal questions in a legally binding manner. The Court also fully agreed with the Council's opinion that the operator alone is the provider of the retransmission of the given channels.

Besides this specific matter, the retransmission of Czech channels in Slovakia remains far from being satisfactory. There are several satellite operators that provide Czech channels in Slovakia. These operators are however established outside of Slovakia in countries where there is no obligation to obtain the consent of the broadcaster for the retransmission. This gives foreign operators big advantages and distorts competition on the Slovak market. Some of the Slovak operators succeeded in "bypassing" their obligation by means of complicated contractual relations with different entities established abroad or by relocating the whole business outside of Slovakia. The effort to at least level the conditions for all market players by removing the obligation from Slovak law was unsuccessful so far, which is why the situation remains problematic.

• *Najvyšší súd, 6Sž/10/2012, 19.06.2013* (Decision of the Supreme Court of 19 June 2013 (6Sž/10/2012))
http://merlin.obs.coe.int/redirect.php?id=16642 SK

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

HR-Croatia

Act Amending the Electronic Media Act

On 15 July 2013, the Croatian Parliament has adopted the Act Amending the Electronic Media Act.

The new Act harmonises the Electronic Media Act with the General Administrative Procedure Act, the Act on Administrative Disputes, the Criminal Code, the Concessions Act and the Services Act, implements terminological alignment with the Lisbon Treaty (OJ C 306) and changes the definition of electronic publications.

It terminologically revises and amends the definitions of audiovisual programme, audiovisual commercial communication, advertising, surreptitious audiovisual commercial communication, sponsorship, teleshopping as well as product placement.

The new Act defines the status of non-profit providers of media services and electronic publications as well as non-profit producers of audiovisual and/or radio programmes and prescribes that it is not allowed to restrict the provision of encrypted services or associated services which originate from other European Union Member States or the free trade of conditional access modules.

Further it regulates the co-financing of programmes and content from the Fund for the Promotion of Pluralism and Diversity of Electronic Media (in addition to co-financing the former beneficiaries of the Fund) and the co-financing of non-profit providers of electronic publications, non-profit producers of audiovisual and/or radio programmes, non-profit providers of on-demand media services and non-profit providers of media services who have been licensed by the Council for Electronic Media for satellite, Internet, cable transmission and other legitimate forms of transmission of audiovisual programmes and/or radio programmes.

• *Zakon o izmjenama i dopunama Zakona o elektroničkim komunikacijama* (Act Amending the Electronic Media Act has been published in the Official Gazzette No. 94/13 of 22 July 2013)
http://merlin.obs.coe.int/redirect.php?id=17301 HR

Nives Zvonarić
Agency for Electronic Media (AEM), Zagreb

Agenda

Hearing on the promotion of European films and TV series on-line

18 November 2013 Organiser: European Commission Venue: Brussels
http://ec.europa.eu/digital-agenda/en/news/hearing-promotion-european-films-and-tv-series-line

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