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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Węgrzynowski and Smolczewski v. Poland ... 3

EUROPEAN UNION

Court of Justice of the European Union: Amazon v. Austro-Mechana ... 3

European Commission: "Connected Continent", an Initiative to Realise a Single European Telecoms Market ... 4

European Commission: EU and EBU Agree to Extend Cooperation in Strengthening Public Service Media ... 5

NATIONAL

BG-Bulgaria

CEM Issues Declaration on Hate Speech ... 5

CY-Cyprus

Law Proposal to Ban Advertising on Public Broadcasting Service ... 6

Law Proposal for Banning Exit Polls and their Media Coverage ... 7

CZ-Czech Republic

New Statute of the State Cinematography Fund Approved ... 7

DE-Germany

Federal Supreme Court Clarifies Monitoring Obligations of *Rapidshare* File-Hosting Service ... 8

Federal Supreme Court Confirms Copyright Protection of Literary Figures ... 8

Berlin Administrative Court Denies Journalist's Right of Access to Doping Study ... 9

"Lookalike Advertising" Illegal Even Without Physical Resemblance ... 9

Distribution System via Press Wholesalers Established in Competition Law ... 10

FR-France

Ban on Horror Film for Under-16-Year-Olds Contested ... 10

Collective Agreement for the Cinema Industry - Partial Suspension of Extension Order ... 11

GB-United Kingdom

Regulator Rejects Complaint where Sky Sports Refused to Carry Advertisement for Rival Service ... 12

Ofcom Fines Noor TV for Material Likely to Encourage the Commission of Crime ... 12

Soap Scene Ruled too Violent for the Time it was Broadcast; Research Commissioned ... 13

Ofcom Fines Broadcaster for Failing to Respect Religious Beliefs ... 13

GR-Greece

Parliament Adopts Law to Establish New Public Service Broadcaster ... 14

NL-Netherlands

Smart TV's in Breach of Dutch Data Protection Act ... 15

RO-Romania

National Film Institute Established ... 15

RS-Serbia

Obstacles in Digital Switchover Due to Tenders for Analogue Licenses ... 16

US-United States

FTC Updates Guidance for Distinction of Paid from Natural Search Results ... 17

Hollywood and China's State-Owned Film Distributor Resolve Tax Dispute ... 17

BG-Bulgaria

End of the Analogue Television Broadcasting ... 17

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COUNCIL OF EUROPE

European Court of Human Rights: Węgrzynowski and Smolczewski v. Poland

The European Court of Human Rights (ECHR) has recently clarified the application of freedom of expression when conflicting with personality rights in the environment of online news media and digital archives. The case concerns the complaint by two lawyers that a newspaper article damaging to their reputation - which the Polish courts, in previous libel proceedings, had found to be based on insufficient information and in breach of their rights - remained accessible to the public on the newspaper's website. They complained that the Polish authorities, by refusing to order that the online version of the news article should be removed from the newspaper's website archive, breached their rights to respect for their private life and reputation as protected by Article 8 of the European Convention on Human Rights.

In its judgment, the Court emphasises the potential impact of online media, stating that the Internet is "an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information". The Court stresses the substantial contribution made by Internet archives to preserving and making available news and information and it reiterates that news archives "constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. While the primary function of the press in a democracy is to act as a "public watchdog", archives have a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported". According to the Court the internet "is not and potentially never be subject to the same regulations and control" as the traditional media. The Court, however, also recognises that "the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press". Therefore it accepts that the policies governing reproduction of material from the printed media and the Internet may differ, taking also into consideration technology's specific features in order to secure the protection and promotion of the rights and freedoms at issue.

Turning to the particular circumstances of the case, the Court is of the opinion that the newspaper was not obliged to completely remove from its Internet archive the article at issue, as was requested by the two lawyers. The Court firmly states "that it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations" and it also refers to the legitimate interest of the public to have access to the public Internet archives of the press, as being protected under Article 10 of the Convention. The Court is of the view that the alleged violations of rights protected under Article 8 of the Convention should be redressed by more adequate remedies available under domestic law and it refers to the observation by the Warsaw Court of Appeal in the present case, that it would have been desirable to add a comment to the article on the website informing the public of the outcome of the civil proceedings in the earlier libel case regarding the printed version of the article. The Court observes that in the proceedings at the domestic level the applicants did not submit a specific request for the information to be rectified by means of the addition of a reference to the earlier judgments in their favour. It follows from the Court's judgment that a rectification or a reference to the judgment in the libel case about the printed version of the article at issue, would have been a pertinent and sufficient interference with the rights of the newspaper in order to secure in its online archives the effective protection of the applicants' rights. Hence, the Court accepts that the Polish authorities complied with their obligation to strike a balance between the rights guaranteed by Article 10 and Article 8 of the Convention. The requested limitation on freedom of expression for the sake of the applicants' reputation in the circumstances of the present case would have been disproportionate under Article 10 of the Convention. Therefore the Court comes to the conclusion that there has been no violation of Article 8 of the Convention.

• Judgment by the European Court of Human Rights (Fourth Section), case of Węgrzynowski and Smolczewski v. Poland, Appl. No. 33846/07 of 16 July 2013
http://merlin.obs.coe.int/redirect.php?id=16695 EN

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EUROPEAN UNION

Court of Justice of the European Union: Amazon v. Austro-Mechana

On 11 July 2013, the Court of Justice of the European Union (CJEU) issued its decision in a case concerning

the payment of equitable remuneration on recording devices. The case was initiated when the Austrian collecting society Austro-Mechana brought an action before the Handelsgericht Wien against Amazon for the payment of equitable remuneration on recording devices sold during the 2002-2004 period. The tribunal granted an interim order to produce accounts for the fair determination of the due amount while it reserved its decision on the claim for payment. The order was upheld on appeal, as a consequence of which Amazon brought the case before the Oberster Gerichtshof, the court of final resort. The Oberster Gerichtshof stayed proceedings and referred four questions to the CJEU concerning the Directive 2001/29/EC (Copyright Directive).

The first of these questions asked whether Article 5(2)(b) precludes the indiscriminate application by a member state of a private copying levy on the first placing on the market in its territory, for commercial purposes and for consideration, of recording media suitable for reproduction, while providing for a right to reimbursement of the levies paid in the event that the final use of those media does not meet the required criteria. The CJEU held that such indiscriminate application is not precluded, provided that practical difficulties justify it, and the right to reimbursement is effective and does not make repayment of the levies paid excessively difficult. On the contrary, such a levy would not reflect the 'fair balance' to be struck between the interests of the rightsholders and those of the users.

The second question posed by the referring Court was whether Article 5(2)(b) precludes the establishment of a rebuttable presumption of private use of recording media in the case of the marketing of such media to natural persons. The Court again answered in the negative, subject to a number of conditions: i.e. a) the media must be marketed to natural persons; b) the practical difficulties of determining whether the purpose of the use of the media in question is private justify the establishment of such a presumption, and; c) the presumption established does not result in the imposition of the private copying levy in cases where the final use of those media clearly does not fall within the case referred to in that provision.

In its third question, the referring Court asked whether the right to compensation should be excluded if half of the funds received are paid to social and cultural institutions set up for the benefit of those entitled. The Court stated that such a right to compensation cannot be excluded under the present conditions, provided that the social and cultural institutions actually benefit those entitled, and the arrangements for their operations are not discriminatory.

Finally, the fourth question was whether the obligation to pay a private copy levy can be excluded when a comparable levy has already been paid in another member state. The Court held that such an obligation may not be excluded, yet, a person who has previously paid that levy in a member state that does not have territorial competence may request its repayment in accordance with its national law.

• Case C 521/11, Amazon v. Austro-Mechana, 11 July 2013
http://merlin.obs.coe.int/redirect.php?id=16677 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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European Commission: "Connected Continent", an Initiative to Realise a Single European Telecoms Market

On 11 September 2013, the "Connected Continent: Building a Telecoms Single Market" legislative package was launched by European Commission President Jose Manuel Barroso in his 2013 State of the Union speech. The aim of this development is to create one genuine single market for electronic communications in Europe. This development comes after the 2013 Spring European Council call for measures to create a Single Telecoms Market. The Council concluded that there is no genuine single market in the European Union (EU) for electronic communications due to the fact that the Union is fragmented into distinct national markets. The Commission recognises that the Union is therefore losing out on an important source of potential growth.

The legislative package for the "Connected Continent" is part of the Digital Agenda for Europe (DAE), which is the first of seven flagship initiatives under Europe 2020. Europe 2020 is the strategy of the European Union for the coming decade, which aims to address the weaknesses of its current growth model and to realise a new, smart, sustainable and inclusive model. According to its website, the DAE "aims to reboot Europe's economy and help Europe's citizens and businesses to get the most out of digital technologies".

The main objective of the "Connected Continent" is to realise the freedom to provide and to consume (digital) services for everyone, wherever one is in the EU. With due consideration of the global financial crisis, the European Commission intends to create new sustainable digital jobs and industries, to reinforce Europe's competitiveness and to drive innovation. In order to attain those objectives, the Commission will focus on the following points:

1. "Simplification of regulation for companies;

2. More coordination of spectrum use, so that we see more wireless broadband, more 4G investment, and the emergence of pan-EU mobile companies with integrated networks;

3. Standardised fixed-access products, encourages more competition between more companies and facilitates increasing provision of pan-EU services;

4. Protection of Open Internet, guarantees for net neutrality, innovation and consumer rights;

5. Pushing roaming premiums out of the market through a "carrot and stick" approach, in order to say goodbye to roaming premiums in 2016 or earlier;

6. Consumer protection: plain language contracts, with more comparable information, and greater rights to switch provider or contract."

In order to achieve these goals, the legislative package pushes the telecoms sector completely into the internet age and removes barriers so that the 28 distinct national telecoms markets can become one single market. The legislative package takes into account the 2009 Telecoms Framework Directive and builds on all the work that has been done in the previous 25 years with regard to reform of the telecoms market.

• Commission proposes major step forward telecoms single market
http://merlin.obs.coe.int/redirect.php?id=16682 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Connected Continent: a single telecom market for growth & jobs
http://merlin.obs.coe.int/redirect.php?id=16699 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Legislative package Connected Continent
http://merlin.obs.coe.int/redirect.php?id=16683 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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European Commission: EU and EBU Agree to Extend Cooperation in Strengthening Public Service Media

On 30 August 2013, the EU and the European Broadcasting Union (EBU) agreed to extend their cooperation in strengthening public media in the countries of the European Neighbourhood.

The European Commission and the EBU signed an agreement on 6 April 2013 for a 24-month project to strengthen public service media in the enlargement countries. The project addresses the objectives set out in the Memorandum of Understanding signed on 24 July 2012. On 30 August 2013, Commissioner for Enlargement and European Neighbourhood Policy, Štefan Füle, met with EBU President Jean-Paul Philippot and Director General Ingrid Deltenre in Brussels to review this cooperation.

The Commissioner acknowledged that the EBU has proven to be an important ally in promoting freedom of expression and the role of independent public service media in modern European democracies. The Commissioner stated: "[w]e now aim to expand our cooperation by extending support for the action plan in the accession countries and through a Memorandum of Understanding to strengthen public service media in the EU's Neighbourhood countries,"

President Phillippot in return was pleased that the European Commission recognised the EBU's work in supporting reform, training and capacity-building for public service broadcasting in and around Europe. According to President Phillippot "[i]ndependent and sustainable Public Service Media promote freedom of expression and values which are essential for well-informed democracies". President Phillippot also stated that "the EBU is looking forward to expanding its work in partnership with the Commission not only in the accession countries but also in other EU-neighbouring countries."

The issue of freedom of expression in the media and the role of public broadcasters is a key policy area for the European Commission in the Enlargement countries as well as in the broader European neighbourhood. Both the EU and the EBU share the same principles and the same policy goals of free and independent media and public service broadcasters in partner countries.

Particular attention is paid by the European Commission to the reform efforts of publicly-owned broadcasters in Neighbourhood countries and the EBU has the necessary expertise and experience to help public broadcasters with these reforms.

• Memorandum of understanding on a partnership between the European Union and the European Broadcasting Union on enabling the democratic role of public service media in countries covered by the EU enlargement policy, 24 July 2012
http://merlin.obs.coe.int/redirect.php?id=16679 EN

• Press Release: EU and EBU ready to cooperate on strengthening public media in European Neighbourhood, 30 August 2013
http://merlin.obs.coe.int/redirect.php?id=16680 EN FR

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NATIONAL

BG-Bulgaria

CEM Issues Declaration on Hate Speech

On 13 August 2013, the Council for Electronic Media (hereinafter CEM) adopted a Declaration on the ba-

sis of Article 32(2) of the Radio and Television Act (RTA). In this Declaration, the Members of the CEM request the Bulgarian journalists community to dissociate themselves from the expression of hostile statements and hate speech in accordance with Bulgarian media law. The Declaration goes beyond the issue of how journalists report in their own wording and focusses on the way Bulgarian media report about statements of third persons that could be considered hate speech.

The CEM also addresses electronic media, calling on them to pay due respect to the principles embodied in Art. 10 of the RTA, which prohibits incitement to hatred on grounds of nationality, political or ethnic belonging, religious beliefs, race or sex. The CEM's Declaration arose due to several recent cases of intolerant, discriminatory and hostile statements not being properly covered in Bulgarian media: Journalists often pass over these statements and/or do not distance themselves in the appropriate manner (see IRIS 2012-7/10).

The right of non-discrimination, the protection of private honour and dignity of any citizen and various groups of society, is of paramount importance for any democratic society and it shall be protected to the same degree as the right to freedom of opinion and expression.

Taking into account the complexity of balancing those rights, the Members of the CEM trust in the professionalism of Bulgarian journalists, which will safeguard them from sanctions as provided in the RTA.

• Декларация за решително дистанциране от изказвания , които биха могли да се квалифицират като враждебна реч , *13.08.2013* (Declaration for Decisive Dissociation from Expression of Statements that may be considered Hate Speech of 13 August 2013)
http://merlin.obs.coe.int/redirect.php?id=16662 BG

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CY-Cyprus

Law Proposal to Ban Advertising on Public Broadcasting Service

The Cypriot Parliament is discussing a law proposal aiming at stopping all forms of advertising on Ραδιοφωνικό Ίδρυμα Κύπρου (RIK - Cyprus Broadcasting Corporation), the sole public service broadcaster transmitting four radio and three television stations. The proposal was submitted in May 2013 by the ruling party Δημοκρατικός Συναγερμός (DISY - Democratic Rally). If the law is adopted, no radio or television advertising would be allowed in RIK's prorgrammes as of 1 January 2014.

The proposed act would amend the περί Ραδιοφωνικού Ιδρύματος Νόμος (Chapter 300A on Cyprus Broadcasting Corporation - laws dating from the British colonial rule are called chapters and not laws). A new Article 45 would be added that reads as follows: "Notwithstanding any provision of the present law and regulations issued thereof, the transmission of radio and television advertising and political advertising by the corporation is prohibited, starting on 1 January 2014". There is no reference in the proposed amendment as to whether the prohibition affects both paid and free of charge advertising, or advertising of the RIK's own programmes. While political advertising is also prohibited, it is not clear whether free airtime offered by the public broadcaster to political parties and candidates would be banned as well.

According to the explanatory memorandum attached to the proposal, the prohibition "was deemed necessary because the Corporation [the RIK] is funded by means of a public subsidy amounting to a value sufficient to cover its operational and any other of its needs". Because of this subsidy, "no other income from the transmission of any form of advertising, on payment or any other consideration is required", states the memorandum.

During the discussion at the parliamentary Committee of Internal Affairs, the matter was received with mixed feelings by other political parties as well as by advertising agencies and broadcasting organisations. The Σύνδεσμος Διαφήμισης Επικοινωνίας Κύπρου (SDEK - Cyprus Communication Agencies Association) recommended that these issues be left to operate within the free market without any state interference. It later issued a statement whereby it reiterated this position and referred to the advantageous position of the subsidised public broadcaster vis-a-vis the commercial broadcasters. The SDEK suggested not only the cutting down of the public subsidy, but also suggested measures that the public broadcaster should take in order to alleviate "its extravagant expenses" and its "aggressive competition" with the private broadcasters, which are struggling to survive.

The law proposal was brought before the Plenary of the House of Representatives on 11 July 2013, but its final discussion was postponed.

• Ο περί Ραδιοφωνικού Ιδρύματος Κύπρου *(*3443013773003773003773713673043713723773023*)* Νόμος του *2013.* *(*340301 ΄377304361303367 375 ΄377μ377305*)* (Law proposal for the ban on advertising in public service broadcasting (Official Gazette, 27/06/2013, appendix VI, pp. 830-832))
http://merlin.obs.coe.int/redirect.php?id=16663 EL

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Law Proposal for Banning Exit Polls and their Media Coverage

In June 2013, a deputy of the Cypriot party Κίνημα Οικολόγων Περιβαλλοντιστών (KO340 - Ecological and Environmental Movement) submitted a law proposal to the Cyprian Parliament aiming at prohibiting exit polls during election days and their dissemination on radio and television. The prohibition on exit polls and their coverage applies to all elections, be they at municipal, national or European level.

The public broadcaster and all other radio and television broadcasters are banned from screening or transmitting the results of any exit polls that directly or indirectly refer to elections. Offenders risk a fine of up to EUR 1,000, imprisonment of up to six months, or both.

According to the explanatory memorandum attached to the proposal, exit polls and their media coverage are considered problematic in view of undue influence as could be seen "in particular after the closing of the ballots in the presidential elections of 17 February 2013". They proved unreliable because they diverged from the actual results of the ballot, while partial results of the exit polls were used during the election by campaign teams in order to influence the will of the electorate, claims the deputy of the KO340 faction, which is the smallest parliamentary group, with just one seat in the Cypriot parliament.

• *Ο περί της Απαγόρευσης Διεξαγωγής και Προβολής Δημοσκοπήσεων Εξόδου (Exit Poll) Νόμος του 2013.* (340301΄377304361303367 νόμου του 372. Γιώργου Περδίκη βουλευτή του Κινήματος Οικολόγων 340365301371362361373373377375304371303304΄311375) (Law proposal aiming at prohibiting exit polls during election days and their dissemination on radio and television (Official Gazette (325300΄371303367μ367325306367μ365301΄371364361), 7/08/2013, pp. 874-877))
http://merlin.obs.coe.int/redirect.php?id=16664 EL

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CZ-Czech Republic

New Statute of the State Cinematography Fund Approved

On 28 August 2013, the government of the Czech Republic approved the new Statute of the *Státního fondu kinematografie* (SFK - State Cinematography Fund).

The SFK was created on 1 January 2013 pursuant to the Act No. 496/2012 Coll. on audiovisual works and promoting cinema and amending certain laws (see IRIS 2013-2/15). The SFK is the successor of the State Fund for the Support and Development of Czech Cinematography, which was technically, procedurally and legally obsolete.

The Act defines the purpose of the SFK, which is the support of cinematography. Support is provided in two ways: "film incentives" and the general category "promotion of cinematography". The Statute of the SFK regulates and defines details of the award procedure, the main criteria and other procedural aspects. The Statute was notified to the European Commission on 5 August 2013. Following the approval of the European Commission and of the Czech Government, applicants may submit their projects online. The SFK will be used for financial support for the creation, production, distribution and promotion of new Czech films as well as technological development and projects involving publishing, education activities and film festivals.

One types of film subsidy is the category "film incentives". This means of support by tax refunds started in March 2013. The available amount of CZK 500 million (˜ EUR 19.4 million) has been fully and completely allocated for specific projects that are already being implemented.

For the support category "promotion of cinematography" CZK 132 million (˜ EUR 5.1 million) is available in 2013. Some CZK 30 million (˜ EUR 1.2 million) has so far been spent on feature productions since those had not been supported in 2012 due to a lack of funds. In 2012, the fund held no more than CZK 102 million (˜ EUR 4 million), the lowest amount since 2005 and about half of what the fund held the year before.

The new audiovisual law now uses private sources e.g. by obliging broadcasters to contribute to the SFK. In 2014, the SFK has to cope with a minimum amount of CZK 235 million (˜EUR 9.1 million) in the category "Promotion of cinematography" and CZK 500 million (˜ EUR 19.4 million) for the category "film incentives".

The competent authorities vary depending on the category of film subsidy. The so-called Council of the Fund, appointed by the Czech Parliament, decides on grants in the general category "Promotion of cinematography". The Council's decision is supported by a preliminary non-binding expert analysis of all applications for film subsidy. Support in the category "film incentives" is granted by the Commission of Experts appointed by the Minister of Culture. The financial resources of both categories cannot be transferred and are rigorously separated from each other.

• *Statut Státního fondu kinematografie* (Statute of the State Cinematography Fund)
http://merlin.obs.coe.int/redirect.php?id=16694 CS

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DE-Germany

Federal Supreme Court Clarifies Monitoring Obligations of *Rapidshare* File-Hosting Service

In a decision of 15 August 2013, the *Bundesgerichtshof* (Federal Supreme Court - BGH) further clarified the extent of the duty of care of a file-hosting service provider and, in addition to the liability privileges enshrined in Articles 7(2) and 10 of the *Telemediengesetz* (Telemedia Act - TMG) and Articles 14(1) and 15(1) of the E-Commerce Directive (2000/31/EC), demanded that hosting service providers be subject to a partly-proactive monitoring obligation.

The ruling follows an action brought by the *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (Society for musical performing and mechanical reproduction rights - GEMA) against the *Rapidshare* file-hosting service. Although the GEMA had issued a caution about a large number of music titles stored by *Rapidshare*, the provider had not completely removed them.

In its ruling, the BGH firstly confirmed its previous case law: in accordance with Article 7(2) TMG, the service provider did not have a general obligation to monitor data that it merely stored. However, depending on the circumstances of the individual case, a monitoring obligation might apply.

Service providers who stored information provided by users had a duty of care to take reasonable measures to identify certain types of illegal activities.

In this case, *Rapidshare's* business model had not been designed from the outset to facilitate infringements of the law, since the service could also be used for lawful purposes. It could not therefore be expected to monitor everything without specific cause.

However, for a number of reasons, the service provider was obliged to monitor stored data once it had been cautioned about an infringement of the law, since *Rapidshare*, through its own activities, was increasing the risk of its service being used illegally. For example, the claim that certain files had been downloaded 100,000 times, which *Rapidshare* used to advertise its hosting service, was only possible if the content concerned was highly attractive and illegal. The fact that the service could be used anonymously made it even more appealing for illegal use. The additional awarding of points to users, depending on the number of downloads, could also be seen as further evidence that mass infringements were being promoted.

It was therefore necessary to consider the extent to which the file-hosting provider was required to monitor content when asked to do so. In previous case law, the BGH had noted that, in principle, the service provider should be expected to monitor a reasonable number of relevant collections of links to certain designated content. In the instant case the BGH also explained that, with a large number of over 4,800 musical works, the hosting provider should be expected to regularly monitor collections of links. In this respect, a hosting provider could be required to use a word filter, at least.

Rapidshare was also obliged to find out about other illegal links via general search engines. The reference to general preventive measures that had been taken (17-person "abuse team", MD5 filter, deletion interfaces for rightsholders) could not, on its own, exonerate the defendant.

• *Urteil des BGH vom 15. August 2013 (Az. I ZR 79/12)* (BGH ruling of 15 August 2013 (case no. I ZR 79/12))
http://merlin.obs.coe.int/redirect.php?id=16700 DE

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Federal Supreme Court Confirms Copyright Protection of Literary Figures

In its decision of 17 July 2013, the *Bundesgerichtshof* (Federal Supreme Court - BGH) ruled that the copyright protection afforded under the *Urheberrechtsgesetz* (Copyright Act - UrhG) to books and stories, for example, also applied to literary characters. In the case at hand, the court decided that the children's character "Pippi Longstocking" created by Astrid Lindgren was copyright protected as a "work of language" in the sense of Article 2(1)(1) UrhG. The combination of external features and specific personality traits justified the protection of a fictional character.

The decision was based on the following facts. In January 2010, the defendant, a retail operator, had advertised carnival costumes using photographs of a girl and a young woman who looked like the literary figure Pippi Longstocking. The persons pictured both wearing red wigs with pigtails, T-shirts and socks with red and green stripes. The images appeared in brochures, on posters and on the defendant's website.

The plaintiff, who owned the exploitation rights for Astrid Lindgren's artistic creations, argued that the defendant's advertising had breached its copyright over the Pippi Longstocking character and therefore demanded compensation equivalent to the cost of a fictitious licence fee of EUR 50,000.

The BGH confirmed, in principle, that the literary figure Pippi Longstocking was protected by copyright if

there was an unmistakeable association with the character's external features and personality traits. However, according to the judges in Karlsruhe, there had been no copyright infringement in this case. Copyright in such a figure was not breached if only a few external features were used, since it was the combination of appearance, personality, abilities and behaviour that was protected by copyright. External characteristics such as hairstyle, freckles and clothing were not enough on their own. This applied even if, as in this case, the similarity to the literary figure was clearly visible.

The court therefore rejected the appeal. It did not comment on any claims that the defendant might have had under competition law and referred the case back to the court of appeal for a new hearing and decision.

• *Pressemitteilung des BGH vom 18. Juli 2013 (Az. I ZR 52/12)* (BGH press release of 18 July 2013 (case no. I ZR 52/12))
http://merlin.obs.coe.int/redirect.php?id=16685 DE

Cristina Bachmeier
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Berlin Administrative Court Denies Journalist's Right of Access to Doping Study

In a summary procedure, the *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG) decided on 5 September 2013 (case no. VG 27 L 217.13) to refuse a request to inspect a study commissioned by the *Bundesministerium des Innern* (Federal Interior Ministry - BMI). It ruled that press information rights did not include such extensive access to official documents.

A journalist from a daily newspaper had contacted the *Bundesministerium des Innern* and, as a member of the press, asserted a claim to receive information under Article 4(1) of the *Berliner Pressegesetz* (Berlin Press Act - BerlPrG), which obliges the authorities to disclose to journalists any information they need to fulfil their public remit. The same information rights are granted to broadcast journalists under the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement).

The BMI refused to allow the journalist to access the study "*Doping in Deutschland von 1950 bis heute*" (Doping in Germany from 1950 to the present day), which is over 800 pages long. The VG Berlin confirmed the BMI's decision since, in principle, Article 4(1) BerlPrG only covers information about concrete factual or legal matters. A journalist would therefore need to ask specific questions, which the authority would then have to answer. However, the right to information did not include a comprehensive right to view files or documents in their entirety. The journalist's request to view the study could not be interpreted as a concrete question about the study's contents, since the authority could have answered such a question by summarising the contents and thereby fulfil its obligation under Article 4(1) BerlPrG without granting full access to the study.

Insofar as the journalist's application for a temporary order was based on Article 1(1) of the *Informationsfreiheitsgesetz* (Freedom of Information Act - IFG), the court ruled that the urgency requirement under Article 123(1) of the *Verwaltungsgerichtsordnung* (Administrative Court Code of Procedure - VwGO) was not met. Although in accordance with Article 1(2) the claim under the IFG expressly covered the right of inspection and access to information, Article 7(5)(2) IFG gave the authorities a one-month period in which to process such requests, a period that had still not expired when the decision was taken.

• *Pressemitteilung des VG Berlin vom 5. September 2013* (Press release of the VG Berlin (Berlin Administrative Court) of 5 September 2013)
http://merlin.obs.coe.int/redirect.php?id=16684 DE

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"Lookalike Advertising" Illegal Even Without Physical Resemblance

In a ruling of 14 August 2013, the *Landgericht Köln* (Cologne District Court - LG) decided that advertising using a double of a famous person can be inadmissible even if there is no similarity between the facial features and external appearance of the double and the famous person. The famous person may be recognisable thanks to other details that characterise the person concerned.

The complaint concerned a TV commercial for the defendant, a furniture store, which included a scene from a TV quiz show in which a presenter wearing glasses and a dark suit had asked a contestant the "all-important question" in front of a studio audience. The set had been illuminated with blue light and dramatic music had been played, representing clear parallels with the quiz show "*Wer wird Millionär?*" (Who Wants to be a Millionaire?), which was presented by the well-known presenter Günther Jauch. Striking features such as the studio layout, lighting and music, as well as the format of the quiz, had all matched those of the programme. Jauch had publicly announced in mid-2011 that he no longer wished to take part in advertising. The presenter shown in these commercials bore no close resemblance whatsoever to him.

The LG Köln upheld the complaint. Under Article 22(1) of the *Gesetz betreffend das Urheberrecht an Werken*

der bildenden Künste und der Photographie (Act on copyright in works of art and photography - KUG), images of a person could only be distributed with the consent of the person concerned. The character portrayed in the commercial represented such an image of the TV presenter. Physical resemblance was unnecessary in this case. At least if the person concerned was very famous, they could be recognised through the imitation of certain attributes associated with them. In view of Günther Jauch's fame as the only presenter the quiz show "*Wer wird Millionär?*" had ever had, such imitation had been carried out in this case.

In addition, the images could not be considered as photographs of current events that could be published without consent in accordance with Article 23(1)(1) KUG, since their publication did not meet any protected public interest. The commercials were exclusively designed to serve the economic interests of the company concerned. In any case, the plaintiff's right to protection outweighed that of the defendant, particularly since the use of the plaintiff's image gave the impression that he identified himself with the advertised product.

The defendant was ordered to withdraw the commercial and to pay an appropriate fictitious licence fee in accordance with Article 812(1)(1)(2) of the *Bürgerliches Gesetzbuch* (Civil Code - BGB), since economic value was inherent in the use of the image. The plaintiff's announcement that he would no longer take part in advertising was irrelevant, since the licence fee represented compensation for the infringement of his rights rather than proof that he had given his consent.

• *Urteil des LG Köln vom 14. August 2013 (Az. 28 O 118/13)* (Ruling of the Cologne District Court of 14 August 2013 (case no. 28 O 118/13))
http://merlin.obs.coe.int/redirect.php?id=16686 DE

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Distribution System via Press Wholesalers Established in Competition Law

On 7 June 2013, the *Bundesrat* (upper house of parliament) adopted the *Achtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen* (Eighth Act Amending the Restraints on Competition Act - 8. GWB-ÄndG) (see IRIS 2012-4/100), which entered into force on 30 June 2013.

Under the new version of the GWB, the ban on anti-competitive agreements does not apply to industry agreements between press publishing houses and press wholesalers. However, a condition of this exemption is that, under the agreements, press wholesalers distribute newspapers and magazines to retailers in a comprehensive, non-discriminatory manner.

In addition, the 8. GWB-ÄndG is supposed to broaden merger opportunities for small and medium-sized press companies through its merger control provisions. To this end, the legal turnover threshold for press merger controls is increased under Article 38(3) GWB. The multiplication factor for the turnover threshold is reduced from 20 to 8. According to the explanatory memorandum, these changes are designed to help press companies to safeguard their economic bases and remain competitive, especially vis-à-vis other media genres. The legislator believes that the relaxing of merger controls will particularly benefit small and medium-sized newspaper publishers.

In future, merger controls by the *Bundeskartellamt* (Federal Cartel Office) will only apply if the two companies' combined worldwide turnover exceeds EUR 62.5 million, rather than the previous threshold of EUR 25 million. As far as domestic turnover is concerned, thresholds of EUR 3.125 million for one company and EUR 625,000 for the other are applicable.

• *Achte Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen vom 26. Juni 2013* (Eighth Act Amending the Restraints on Competition Act of 26 June 2013)
http://merlin.obs.coe.int/redirect.php?id=16687 DE

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FR-France

Ban on Horror Film for Under-16-Year-Olds Contested

In 2010, the commission for the classification of cinematographic works proposed banning under-16-year-olds from watching the film *Saw 3D Chapitre Final*, the final chapter in a series of successful horror films, with the warning that the film "includes a large number of particularly realistic torture scenes and a high level of brutality, indeed even savagery". Following this proposition, and in application of Article 3 of the Decree of 23 February 1990, the Minister for Culture and Communication granted the film a screening certificate on condition that it was not to be shown to anyone under the age of 16 and that it carried the proposed warning. An association for the defence of Judeo-Christian values in society then called on the courts to cancel the decision, holding that the film should have been banned for under-18s as provided for in Article 3-1 of the Decree in respect of works "including scenes of non-simulated sex or great violence". The administrative court rejected the application for cancellation of the ministerial decision, whereupon the applicant association appealed. In a decision

handed down on 3 July 2013, the administrative court of appeal in Paris noted that the film *Saw 3D Chapitre Final* included many extremely violent scenes in which a number of characters, subjected to "games" developed by a psychopathic killer, are killed under particularly atrocious conditions. However, neither the subject of the film nor its narrative treatment showed traces of any glorification of violence and torture of any kind, and the court found that the film did not constitute an incitement to violence. The court noted that the scenes of violence, which were not uninterrupted, were filmed using the codes specific to "gore"-type horror films, resulting in a deliberately "burlesque" spectacle. The extremely explicit representation of the brutality inflicted and the murders committed, involving large quantities of blood, was deemed to be compensated for in part by the improbability of the situations or - at the very least - their unrealistic nature, and indeed by a certain type of humour, all of which tended to arouse disgust rather than real fear in anyone watching the film. The court also found that, in view of the degree of maturity and critical distance that minors over the age of 16 were capable of exercising in respect of such a work, the film did not infringe the requirements for the protection of children and young people or respect for human dignity sufficiently to justify including making the screening certificate dependent on banning showing the film to anyone under the age of 18. The court therefore found that the Minister for Culture and Communication had not committed an error of appreciation in the present case by deciding to grant a screening certificate to the film at issue on condition that the film would not be shown to anyone under the age of 16, and that it would be accompanied by a very firm warning.

• *Cour administrative d'appel de Paris, 3 juillet 2013 - Association Promouvoir* (Administrative court of appeal, Paris, 3 July 2013 - Association "Promouvoir") FR

Amélie Blocman
Légipresse

Collective Agreement for the Cinema Industry - Partial Suspension of Extension Order

On 6 September 2013, the Conseil d'Etat, deliberating under the urgent procedure, partly suspended implementation of the order issued by the Ministry of Labour on 1 July that extended the national collective agreement for the cinema industry signed in January 2012 by the unions of employees and the association of independent producers (Association des Producteurs Indépendants - API, whose members are Gaumont, Pathé, UGC, and MK2). According to the decree, the agreement, which determines the remuneration to be paid to workers and technicians in the cinema industry (feature films and publicity films), was to be extended to the entire profession on 1 October 2013 (see IRIS 2013-7/12). Before that date, the impact of the collective agreement for comparatively fragile film productions was to be measured more accurately, and details in regard to applying the "waiver clause" were to be worked out. The appendix to the agreement makes provision for a five-year transition period and, under certain conditions, for producers of full-length fiction films with a budget of less than EUR 2.5 million and documentaries of less than EUR 1.5 million to benefit from a waiver allowing salaries reduced by 10-50%, depending on the type of job, within a limit of 20% of the annual total for their films. A number of associations and unions of film producers have however called for the extension decree to be cancelled, and have appealed to the Conseil d'Etat sitting in urgent matters to suspend enforcement provisionally.

The applicants in the proceedings claimed that the collective agreement had not been signed by a representative organisation, contrary to the requirements of Article L. 2261-19 of the Employment Code. The Conseil d'Etat noted that the disputed agreement had been signed by just one employers' organisation, namely the API, whose membership consists of four production companies that in recent years have been responsible for producing no more than about 1% of all French-initiative films and as a result represent only about 5% of the sector's employees. The court, under the urgent procedure, concluded that there was serious doubt as to the legality of the disputed decree with regard to the condition of representation that was required in order to extend a collective agreement. The applicants also claimed that the compulsory application of the collective agreement would have the effect of hiking-up the cost of film production, posing an immediate threat to the production of a good number of films, particularly those with an overall budget that was closely related to the total payroll figure. The Court noted on the one hand that there was provision in the collective agreement itself for a waiver mechanism in favour of low-budget films (those with a budget of less than EUR 2.5 million, or EUR 1.5 million for short films and documentaries), but on the other that the waiver arrangement, which provided for a joint commission to examine applications to apply the waiver, had not been set up by 1 October 2013. The condition of urgency was therefore deemed to be met, in view of the financial impact of the collective agreement on the production of low-budget films. The Conseil d'Etat judge sitting in urgent matters therefore suspended performance of the decree issued by the Ministry of Labour extending the collective agreement in as much as it makes the agreement compulsory for all film productions falling within the scope of the waiver arrangement, until such time as the arrangement provided for has actually been set up. The collective agreement will therefore be applicable from 1 October 2013 to all films with a budget of more than EUR 2.5 million. The Ministers for Culture and Labour have called for all the social partners to continue negotiating in order to conclude, before 1 October 2013,

the necessary amendment, pending the final outcome of the main proceedings brought by the non-signatory parties.

• *Conseil d'Etat (ord. réf.), 6 septembre 2013 - Association des producteurs de cinéma et a.* (Conseil d'Etat (decision under the urgent procedure), 6 September 2013 - API association of film producers, and others)
http://merlin.obs.coe.int/redirect.php?id=16693 FR

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GB-United Kingdom

Regulator Rejects Complaint where Sky Sports Refused to Carry Advertisement for Rival Service

Ofcom, the UK communications regulator, rejected on 20 June 2013 a complaint of undue discrimination made by British Telecommunications (BT) about the refusal of British Sky Broadcasting (BSkyB) to carry an advertisement for BT's new sports channels on Sky Sports. The Communications Act 2003, s.319, requires Ofcom to secure that there is no undue discrimination between advertisers, and this is implemented through its Code on the Prevention of Undue Discrimination between Broadcast Advertisers. BSB had refused to carry the advertisement because it does not itself retail the BT channels. It claimed that to carry the advertisement would pose risks to its own sports channels and brands and the investment it had made in them as BT could run advertisements making derogatory comparisons with them, and the advertisements would reduce the clarity and effectiveness of Sky's own advertising. BT argued that ordinary commercial motives could not be a legitimate basis for discrimination.

Ofcom emphasised that the rule, which had originated in 1954, had to be interpreted against the background of a changed media landscape with a wide range of opportunities for advertising. Sky's refusal did constitute discrimination as it was differentiating between advertising its own services and those of BT, and also between BT and ESPN, another sports broadcaster retailed by BSkyB whose advertisements it does carry. Ofcom then assessed whether the discrimination was 'undue'. It considered that ordinary commercial motives can be a legitimate aim, and these could include brand protection and the protection of revenue against a rival channel in the same genre. The same considerations did not apply to ESPN, which is retailed by BSkyB.

The regulator then considered the proportionality of the refusal. BT had argued that it would be possible to negotiate specific conditions that would alleviate BSkyB's concerns about brand and revenue protection, and indeed it had offered not to denigrate Sky Sports channels or to run more advertisements than those for ESPN. However, Ofcom considered that it was more important to assess whether there were other channels that an advertiser could access at limited additional cost. It considered that failure to access Sky Sports would have only a limited impact on BT's planned advertising campaign as it has opportunities to advertise on general entertainment channels.

• Ofcom, 'Refusal to broadcast advertisements for BT Sport channels', 20 June 2013
http://merlin.obs.coe.int/redirect.php?id=16674 EN

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Ofcom Fines Noor TV for Material Likely to Encourage the Commission of Crime

In a decision of 21 August 2013 Ofcom (Office for Communication) has imposed a financial penalty on the broadcaster Al Ehya Digital Television Limited for breaches of the terms of its licence related to the broadcasting of material likely to incite crime or disorder, and also material lacking the requisite degree of responsibility when handling religious content.

The infringement arouse from the programme entitled Paigham-e-Mustafa broadcast on 3 May 2012 at 11:00h on the channel Noor TV. Noor TV is a satellite channel that focuses on Islam and is broadcast in numerous languages and is available across Europe, Africa, the Middle East and Asia as well as the UK.

The specific violation came about during the aforementioned programme when the presenter Allama Muhammad Farooq Nizami was answering general questions on Islam and in the course of this, and in response to a specific question, stated that it was either acceptable or the duty of a Muslim to kill those who disrespected the Prophet Muhammad. Ofcom considered that this clearly breached Rule 3.1 of the Broadcasting Code relating to the promotion of crime and disorder, and furthermore violated Rule 4.1 as it was clearly a religious programme and failed to attain the level of responsibility required.

Ofcom considered a number of factors in the weighing of the appropriate penalty including the seriousness of the offence and the continuing poor compliance record of the licensee in question. In this light a fine of GBP 85,000 was levied and an order given that the terms of Ofcom's decision be broadcast on the channel.

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

• Ofcom's decision, Sanction 88(13), 21 August 2013
http://merlin.obs.coe.int/redirect.php?id=16675 EN

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Soap Scene Ruled too Violent for the Time it was Broadcast; Research Commissioned

On 27 August 2013, Ofcom found the long-running soap on UK TV, Hollyoaks, which is broadcast on Channel 4 each weekday evening, in breach of its Code. The cast contains characters who are mainly between 16 and 35 years old and the principal target audience is teenagers and young adults.

There was a complaint from one viewer about one scene. It depicted one of the main characters being killed, having been being pushed into the path of a fast train. The concern was raised that this scene was unsuitable for viewing before the watershed, in particular because it would have been expected to have been watched by children.

Ofcom considered that the nature of the characters' behaviour, the time broadcast and the likely audience, raised concerns under the following Rules of the Broadcast Code, namely, Rule 1.3: "Children must...be protected by appropriate scheduling from material that is unsuitable for them" and Rule 1.11: "Violence, its after-effects and descriptions of violence, whether verbal or physical, must be appropriately limited in programmes broadcast before the watershed...and must also be justified by context."

Ofcom concluded that the episode was in breach of Rule 1.3 because 'cumulatively the violent content in this sequence exceeded viewers' expectations for a drama transmitted long before the watershed when young children were available to view and in this case were watching in large numbers'. In addition Ofcom concluded that the episode was in breach of Rule 1.11 because 'the cumulative effect of the violence in the final scene was not sufficiently limited for this time of the evening, nor was it justified by context given that a significant number of younger children were viewing and available to view.'

Finally, Ofcom issued a Note to Broadcasters: Violence in pre-watershed programmes, reminding all television broadcasters of the 'need to ensure that all material broadcast pre-watershed which features violent scenes is appropriately limited.' Because Ofcom feels that there has been a lack recently of detailed studies into 'viewer's attitudes to violence on television' it has commissioned new, independent research on the subject. The results will be published 'as soon as possible' in 2014.

• Ofcom Broadcast Bulletin, Issue 236 27 August 2013
http://merlin.obs.coe.int/redirect.php?id=16676 EN

David Goldberg
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Ofcom Fines Broadcaster for Failing to Respect Religious Beliefs

In a decision on 23 August 2013, Ofcom (Office of Communications) considered whether Takbeer TV Limited (TTVL) was in breach of its obligations to act responsibly regarding the content of religious programmes and to ensure a particular religion or religious denomination was not subjected to religious abuse pursuant to the Broadcasting Code. Ofcom derives its statutory authority to regulate the standards of television and radio pursuant to the Communications Act 2003. One of Ofcom's duties under section 3(2)(e) of the Communications Act 2003 is to ensure that programmes broadcast on television and radio adequately protect the public from the inclusion of offensive and harmful material. In order to implement Ofcom's responsibilities pursuant to Communications Act 2003, Ofcom has a Broadcasting Code that has been drafted so as to be compatible with the Human Rights Act 1998.

Rule 4.1 of the Broadcasting Code states: "Broadcasters must exercise the proper degree of responsibility with respect to the content of programmes which are religious programmes."

Rule 4.2 states: "The religious views and beliefs of those belonging to a particular religion or religious denomination must not be subject to abusive treatment "

TTVL on the 9th June and 12th July 2012 broadcast a programme called Global Khatm E Nabuwat. During the two broadcasts, which included a phone-in with the general public, various attacks were made on the Ahmadiyya religion and Ahmadi community by the public contributors, some panelists, and - in one instance - even the presenter gave support for the attack on this religion.

Ofcom investigated the content of the two programmes and found that there had been breaches of Rules 4.1 and 4.2 of the Broadcasting Code, including a failure to properly monitor and moderate the public calls, and for the presenter not showing impartiality.

Ofcom had regard to its statutory sanctions that came into effect on 1 June 2011 and included reference to paragraph 1.10 of the Sanctions Procedures, whereby Ofcom may impose a sanction if it considers that a broadcaster has seriously, deliberately, repeatedly or recklessly breached a relevant requirement.

TTVL had previously breached its obligations pursuant to the Broadcasting Code and Ofcom considered the current complaints to be of a very serious nature. TTVL had previously said it would improve its procedures to ensure compliance with Rules 4.1 and 4.2 of the Broadcasting Code, but this had not prevented the breaches on the 9 June and 12 July broadcasts.

TTVL said it was a community religious channel run by volunteers and six, paid technical staff, one of whom was also the programme controller. It was not clear from TTVL's representations who, if anyone, was responsible for quality control. It transpired that the "delayed calling system", which provides a short time lapse so as to intercept abusive contributors to a live, broadcast had not worked. Ofcom considered this to be negligence on TTVL's part.

Ofcom recognised that TTVL had co-operated with its enquiry and also that the TV company was in poor financial health. However, that had to be balanced against the seriousness of the breaches, that there had been previous complaints and, despite assurances, there had been no improvement in quality control, and also its failure to issue a public apology after the transmissions. Ofcom was concerned that future breaches could arise.

Ofcom imposed a financial penalty of GBP 25,000 (under section 237(3) of the Communications Act Ofcom can impose a fine of up to GBP 250,000 or 5% of qualifying revenue, whichever is the greater), TTVL had to broadcast Ofcom's findings, and Ofcom will also visit TTVL's premises to monitor content and review the broadcaster's compliance procedures.

• Ofcom's Decision of Sanction against Takbeer TV Limited ("TTVL" or "the Licensee") in respect of its service Takbeer TV (TLCS-1030), Sanction 91(13), 23 August 2013
http://merlin.obs.coe.int/redirect.php?id=16678 EN

Julian Wilkins
BluePencilSet

GR-Greece

Parliament Adopts Law to Establish New Public Service Broadcaster

On 19 July 2013, Act no. 4173 on New Greek Radio, Internet and Television was adopted by the Greek Parliament. The act establishes a new public service broadcaster to replace the former public service broadcaster ERT, which was shut down by the government on 11 June 2013 (see IRIS 2013-6/24). This law is very similar to the one drafted one year ago by a special committee of experts presided over by N. Alivizatos, professor of Constitutional Law in the Athens Faculty of Law (see IRIS 2012-5/25).

A Supervisory Council has been established to ensure that the new public service broadcaster is independent of the Government. The main tasks of this Council are: to set up a five-year strategic operating plan for the broadcaster; to deliver a favourable opinion on the budget; to promote sound corporate governance and to make the final decision with regard to the selection of the CEO and the members of Board.

Both members of the Supervisory Council and those of the Board are selected by a special selection committee comprised of private or public companies or organisations with international experience in executive staff selection. This selection committee must publish open calls for positions and, concerning the Supervisory Council, draw up a list of the ten candidates who obtain the highest scores. This list must then be submitted to the Minister responsible for Public Broadcasting, who will make the final selection of the seven members of the Supervisory Council. As far as members of the Board are concerned, separate procedures for the selection of CEO members and for the four members of the Board are set out in the legislation. The Supervisory Council will make the final selection with regard to the CEO and Board members based on the candidates who have obtained the highest score.

Meanwhile, the Greek Government and the special administrator are trying to set up the new public broadcaster, in accordance with the decision of the Council of State which has ordered that all measures, including the recruitment of the necessary staff, must be taken as quickly as possible. On 11 July 2013, a transitional channel called Greek Public Television began broadcasting programmes consisting mainly of documentaries. On 11 August 2013, the names of 557 candidates who have applied to work for the Greek Public Television network were announced.

However, the application of the new law and the implementation of governmental decisions have been hampered by the large number of journalists and technicians of the former ERT who continue to occupy the central buildings of the former public service broadcaster television and continue their own broadcasts via the internet.

• *Ν΄377μ377302 4173/2013,* Νέα Ελληνική 3413613643713773063113753΄371361, Ίντερνετ και Τηλεόραση (346325332 321΄ *169/26.7.2013)* (Act 4173/2013 "New Hellenic Radio, Internet and Television", ΦΕΚ 321΄ 169/26.7.2013)
http://merlin.obs.coe.int/redirect.php?id=16697 EL

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NL-Netherlands

Smart TV's in Breach of Dutch Data Protection Act

On 2 July 2013, the Dutch data protection agency (CBP) published a report stating that TP Vision, a manufacturer of Smart TVs, is in breach of the Dutch Data Protection Act (Wbp). This report is a final version following a provisional report that had previously been sent to TP Vision in March of 2013 in order for them to put forward their views on the findings.

TP Vision makes Smart TVs for Philips and is the only manufacturer of such TVs in the Netherlands. Smart TVs are televisions with internet access possibilities/capabilities. Users can watch shows on-demand, rent movies, use apps and visit websites through a built-in browser. In its report, the CBP acknowledged that since Smart TVs are a fairly new phenomenon, there is still little awareness of the risks that are present when using the online functionalities of Smart TVs.

For each Smart TV TP Vision collects data in relation to user habits such as: when users watch TV; their favourite programmes and apps; which programmes are being recorded; which videos are being rented; and which shows they view on-demand. According to the CBP this is personal data, because it gives an extensive/probing account of users' TV habits and interests. In accordance with the Wbp therefore, users need to be asked permission before this data is collected and must be informed about its intended use.

Using the collected data, TP Vision offers viewers personalised viewing suggestions and intends to offer personalised advertisements in the future.

There is a lack of clear and accessible information concerning the identity of TP vision and the processing of personal data via the Philips Smart TVs. It is insufficiently clear which cookies are being placed and read by TP Vision and which personal data is being collected and how long it is being stored. TP Vision tried to rectify this by adding this information to the Terms of Use Agreement, Privacy Statement and Cookie Policy. However, according to the CBP the information is inconsistent and still not sufficiently accessible to the public. It is also insufficiently clear that registering customer data with Philips is not obligatory.

Due to the fact that the cookies used by TP Vision are not functional (i.e. technically necessary) cookies, the Wbp provides that there is need for informed consent by the user for the placing of such cookies. For cookies that collect viewing habits, unambiguous consent (*ondubbelzinnige toestemming*) is required due to the fact that it concerns the processing of personal data. The consent needs to be based on a free, specific and informed expression of intent. Due to the lack of clear and accessible information, the received consent is considered invalid. No consent is asked for with regard to the use of advertising cookies and analytical cookies registering app and website use.

The CBP has acknowledged TP Vision's claim that they have made efforts to comply with the Wbp and have partially ended the breach/violation since receiving the preliminary report, namely by providing information on how long the personal data is being stored.

The CBP further states that it will continue to monitor TP Vision's compliance with the Wbp and will take appropriate enforcement action if it finds that TP Vision is still in breach of the Act.

• *College bescherming persoonsgegevens - Onderzoek naar de verwerking van persoonsgegevens met of door een Philips smart tv door TP Vision Netherlands B.V.* (CBP's report on TP Vision, July 2013)
http://merlin.obs.coe.int/redirect.php?id=16691 NL

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RO-Romania

National Film Institute Established

On 26 June 2013, the Romanian Government adopted the *Ordonanţa de Urgenţă nr. 72/2013 privind reorganizarea unor instituţii publice aflate în subordinea Ministerului Culturii* (Emergency Decree no. 72/2013 on reorganisation of public institutions subordinated to the Ministry of Culture), which establishes the *Institutul Naţional al Filmului* (National Film Institute - INF).

According to the Decree, the *Arhiva Naţională de Filme* (National Film Archives), the *Studioul de Creaţie cinematografică* (Cinematographic Creation Studio) and the *Studioul Video Art* (Video Art Studio - formerly Editura Video) will be merged into INF, and subordinated to the Ministry of Culture of Romania.

According to a Draft Government Decision on the establishment and the functioning of the INF, which will complement the Emergency Decree no. 72/2013, the INF will also include the *Cinemateca Română* (Romanian Cinematheque) and the Film Restoration Laboratory.

The INF will be the legal storage facility for cinematographic films of all kinds: film, film materials and documents on the history of the national and worldwide cinematography (including original scripts, posters, photos, music scores, books and other publications,

film reviews, technical equipment with historical, documentation and technical value, primary or intermediary film materials, and positive copies of foreign films, etc.). The INF will carry out the duties of the three former institutions. The merged INF will then focus on the evidence, the collection, conservation, restoration and the valorisation of the cinematographic heritage. The INF is also intended to support features, documentaries and short films, TV series, along with co-productions and to provide services for foreign partners.

The INF can set up branches of the Cinemateca Română throughout the country, in order to support the cinematographic culture of the people. In Romania and abroad, the Institute will have to buy film copies, documents and other objects of significant cultural, documentary, scientific, technical or artistic value, including those held by private collectors. The INF has to organise film festivals and events in Romania and abroad. The new body also will have to document Romania's cinematography by means of publishing books and other works.

The INF is taking over the 84,500 square metre premises of the National Film Archives in Jilava, near Bucharest, and three cinemas (Eforie, Union and Studio) in Bucharest. The INF will be funded from its own revenues and by state budget subsidies.

• *Ordonanța de Urgență nr. 72/2013 privind reorganizarea unor instituții publice aflate în subordinea Ministerului Culturii. Publicat in Monitorul Oficial, Partea I nr. 388 din 28 iunie 2013* (Emergency Decree no. 72/2013 on reorganisation of public institutions subordinated to the Ministry of Culture. Official Journal, Part I n. 388 of 28 June 2013)
http://merlin.obs.coe.int/redirect.php?id=16667 RO

• *Proiect de Hotărâre de Guvern privind organizarea și functionarea Institutului Național al Filmului* (Draft Government Decision on the establishment and functioning of the National Film Institute)
http://merlin.obs.coe.int/redirect.php?id=16668 RO

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RS-Serbia

Obstacles in Digital Switchover Due to Tenders for Analogue Licenses

On 7 August 2013, the Council of the Републичке радиодифузне агенције (Republic broadcasting agency of Serbia - PPA) rejected tenders for licences for terrestrial analogue national coverage television broadcasting. The tender itself was issued on 30 April 2013 for a network left vacant after the national commercial broadcaster TV Avala had lost its licence in October 2012 due to its failure to pay the licence fees. The tender for an analogue license was criticised for being detrimental to Serbia's efforts to switchover to digital terrestrial broadcasting till June 2015.

The main problem of the digitisation of broadcasting in Serbia, ever since it was first contemplated in 2006, is the lack of frequencies. The reason for that is the excessive number of analogue terrestrial broadcasters. Due to the lack of available frequencies, the state initially opted for the analogue broadcasting to be switched off and digital signal switched on without any simulcasting period. The deadline for the switchover was originally set for 4 April 2012.

However, that deadline was postponed and the fact that certain frequencies were left vacant after some stations were shut down, in turn allowed a gradual switch-off of the analogue signal on a region-by-region basis and a limited simulcast via an experimental digital network. That network has been in operation since 23 March 2012, but suffers from a limited scale and low transmission power from merely 15 locations.

The Ministry of Foreign and Internal Trade and Telecommunications (MTT), the Public Agency for Electronic Communications (RATEL) and the digital network operator Public Enterprise "Broadcasting Equipment and Communications" (ETV), had reached a high degree of agreement about the need to expand the experimental network to the extent that it would allow for a proper simulcast. Revoking the license of TV Avala has made it technically possible, since the shutting down of that national-coverage television station has for the first time left the necessary frequencies vacant. ETV planned to air a digital signal from 35 instead of 15 locations and thus could have covered some 80% of the Serbian population. RATEL even prepared the draft rulebook envisaging that the vacant frequencies formerly held by TV Avala be reassigned for expanding the experimental digital network, which was subject to public consultations held between 21 March and 5 April 2013.

At these consultations, only the RBA opposed such use of vacant frequencies. While it was widely expected that the MTT would adopt the new rulebook under RATEL's draft, the RBA clearly made its move first and issued the call for tenders. The MTT reiterated that the tender was issued in compliance with the procedural provisions. Nevertheless, the MTT regretted that the tender had caused considerable damage, since the vacant frequencies could have been used for speeding up the digital switchover.

Finally, none of the applicants for the analogue licenses reached the necessary majority vote of the nine members of the PPA. It is now expected that the MTT will finally reassign the vacant frequencies to the digital network.

• Дозвола за мрежу К *5* није додељена . Петак , *09.* Авг *2013.* (Press release issued after the session of the Council of the RBA held on 9 August 2013)
http://merlin.obs.coe.int/redirect.php?id=16669 SR

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US-United States

FTC Updates Guidance for Distinction of Paid from Natural Search Results

On 24 June 2013, the consumer protection staff of the Federal Trade Commission ("FTC") updated guidelines, which it established for search engine companies ("Companies") to ensure that consumers can easily distinguish paid search results from natural search results.

The FTC issued its initial guidelines in 2002 in order to explain that "failing to clearly and prominently distinguish advertising from natural search results could be a deceptive practice" in violation of Section 5 of the Federal Trade Commission Act, which defines a deceptive act as "a material practice that misleads a significant minority of reasonable consumers." The update was prompted by a consumer complaint that search engines are violating Section 5 by failing to disclose that advertisements are inserted into search engine result lists.

The FTC found that: "for the most part [04046] many search engine companies do attempt some disclosure." However, it also concluded that there has been a "decline in compliance with the letter's guidance" since the 2002 guidelines because the current disclosures may not be sufficiently clear. The FTC therefore affirmed that the principles of the original guidance still apply. The advised industry players have to include visual cues, labels, or other techniques in order to effectively distinguish between advertisement results. The business of online searches also has to continue to evolve according to the guideline principles regardless of the precise form that search engines may take, now or in the future.

As in the 2002 guidelines, the FTC affirmed that the Companies may use any method to clearly and prominently distinguish advertising from natural search results as long as it is noticeable and understandable to consumers. The FTC's consumer protection staff sent a letter explaining the new guidelines to "general-purpose search engines AOL, Ask.com, Bing, Blekko, DuckDuckGo, Google, and Yahoo!" and "17 of the most heavily trafficked search engines that specialise in the areas of shopping, travel, and local business, and that display advertisements to consumers."

- Press release of the FTC of 25 June 2013
http://merlin.obs.coe.int/redirect.php?id=16670 EN
- Guideline update of 24 June 2013
http://merlin.obs.coe.int/redirect.php?id=16671 EN
- Guidelines for search engine advertising of June 2002
http://merlin.obs.coe.int/redirect.php?id=16672 EN

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Hollywood and China's State-Owned Film Distributor Resolve Tax Dispute

The Motion Picture Association of America ("MPAA") announced that a deal has been reached with China's state-owned film distributor ("China") to end a year-long dispute over a 2% increase in the Value Added Tax applied to China.

The China Film Group withheld box-office payments totalling more than USD 150 million owed to Hollywood since October/November 2012 in the belief that the studios should cover the cost of the tax. However, MPAA President Chris Dodd announced that the year-long impasse was resolved because "the Chinese government has addressed the matter and all money due will be paid in full. The agreement, which is expected to be officially released in the late summer of 2013, was acknowledged by a spokesman for China who said: "We implement rules according to the national policy."

- MPAA press release, 13 August 2013
http://merlin.obs.coe.int/redirect.php?id=16673 EN

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BG-Bulgaria

End of the Analogue Television Broadcasting

On 30 September 2013, the analogue broadcasting of television signals was terminated in Bulgaria. The simultaneous emission of analogue and digital signals, which has lasted for a six months period, has thus been brought to an end.

A network has been established for the broadcasting of public television programme services - BNT1, BNT2 and BNT HD -, which reaches 96.2 % of the country's population.

Another two networks have been established for the broadcasting of the commercial television programme services. The first of these networks, which reaches 96.2 % of the country's population, is used for broadcasting free of charge (seven television programme services) including the national television programme services, which have previously been distributed via networks for analogue terrestrial broadcasting - in particular bTV and Nova television as well as bTV Lady, Ring.bg, Diema Family, TV 7, and News 7. The second network, which in technical terms has the capacity to broadcast up to eight television programme

services, reaches more than 85 % of the countries' population and is used for the broadcasting of the programme service Bulgaria on Air.

The process of transition to digital terrestrial television broadcasting has raised significant problems with regard to the incapacity to receive television programme services because of the limited coverage. The digital signal did not reach part of the audience, which can receive television programme services only by terrestrial means.

According to the data provided by the multiplex operators, the established networks cover a high percentage of the Bulgarian territory as compared to other European states with similar geographic and demographic characteristics. Based on a total number of 5,289 settlements (towns and villages) in Bulgaria, the digital networks cover as follows:

- as regards 3,538 towns or villages - above 90 % coverage of the population,

- as regards 1,009 towns or villages - from 30 to 90 % coverage of the population,

- in 225 towns or villages there is coverage of the population from 10 to 30 % and

- as regards 124 towns or villages the digital signal covers less than 10 % of the population.

- 393 settlements in total remain out of the scope of the digital television broadcasting signal, including 337 settlements with population of less than 200 people.

Based on those data it may be summed up that about 279,836 Bulgarian nationals remain out of the scope of the digital television broadcasting, 100,000 people of whom are receiving terrestrial television programme services.

• В изпълнение на План за въвеждане на наземно цифрово телевизионно радиоразпръскване *(DVB-T)* в Република България *(*обн.424422, бр. *75* от *27.08.2013* г.*)* от *30.09.2013* г. бе преустановено наземното аналогово телевизионно радиоразпръскване (Announcement of the end of the analogue television broadcasting)
http://merlin.obs.coe.int/redirect.php?id=17298 BG

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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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