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IRIS

Legal Observations
of the European Audiovisual Observatory

IRIS 2013-10

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Belpietro v. Italy

The European Court of Human Rights has delivered a new judgment against Italy for interfering with the freedom of expression and public statements related to the "war" between judges, prosecutors and the police in the context of combating the Mafia (see also Perna v. Italy (GC), see IRIS 2003-8/2). The judgment reflects a tension between the freedom of parliamentary speech on the one hand, and the restrictions and obligations on the media reproducing or publishing statements by politicians covered by their parliamentary immunity on the other hand (see also Cordova no.1 and no.2 v. Italy, see IRIS 2003-7/2).

The applicant in this case is Maurizio Belpietro, who at the relevant time was editor of the national daily newspaper Il Giornale. In court in Strasbourg he complained about his conviction for defamation after publishing an article by an Italian Senator, R.I. The article by the Senator was a robust opinion piece analysing the lack of results in combating the Mafia in Palermo. The Senator more particularly criticised the Italian judiciary and especially accused some members of the public prosecutors' office in Palermo of using political strategies in their fight against the Mafia. Two prosecutors, Guido Lo Forte and Giancarlo Gaselli considered some of the allegations in the Senator's article as damaging to their professional and personal reputations. They lodged a complaint for defamation against Senator R.I. and Belpietro. Regarding the liability of the editor of Il Giornale, the prosecutors relied on Article 57 of the Criminal Code, making the editor or assistant editor of a newspaper responsible for lack of control when publishing defamatory statements without a sufficient factual basis.

Separate proceedings were brought against Senator R.I. which ended in 2007 with a finding that there was no case to answer, on the grounds that the Senator had expressed his views in his capacity as a member of the Senate, and was thus shielded by his parliamentary immunity based on Article 68§1 of the Italian Constitution. The Senate accepted that the statements published by Senator R.I. were related to the exercise of his parliamentary functions. Belpietro however was sentenced to a suspended term of four months' imprisonment and he was ordered to pay substantial sums to each of the civil parties, adding to a total amount of EUR 110,000. The Court of Appeal of Milan considered some of the allegations against the members of the judiciary as defamatory of Lo Forte and Caselli.

Belpietro made an application to the Strasbourg Court, alleging that his conviction for defamation had amounted to a violation of his freedom of expression guaranteed by Article 10 of the Convention. After reiterating extensively the general principles of its relevant case law on the issue, including the balance that has to be found between the prosecutors' right to his reputation based on Article 8 and the newspaper editor's right to freedom of expression based on Article 10, the European Court is of the opinion that the Italian authorities did not breach Article 10 in finding Belpietro liable for publishing the defamatory article of Senator R.I. Although the Court recognises that the article concerned an issue of importance to society that the public had the right to be informed about, it emphasises that some of the allegations against Lo Forte and Caselli were very serious, without sufficient objective basis. Furthermore, the Court refers to the obligation of an editor of a newspaper to control what is published, in order to prevent the publication of defamatory articles in particular. This duty does not disappear when it concerns an article written by a member of parliament, as otherwise, according to the Court, this would amount to an absolute freedom of the press to publish any statement of members of parliament in the exercise of their parliamentary mandate, regardless of its defamatory or insulting character. The Court also refers to the fact that Senator R.I. had already been convicted in the past for defamation of public officials and to the fact that the newspaper had given a prominent place to the Senator's article in the newspaper. However, as the Court considers the sanction of imprisonment and the high award of damages as disproportionate to the aim pursued, it comes to the conclusion that solely for that reason the interference by the Italian authorities amounted to a breach of Article 10 of the Convention. The Court especially draws attention to the fact that a sentence of imprisonment (even if suspended) can have a significant chilling effect and that the conviction was essentially because of not having executed sufficient control before publishing a defamatory article. Therefore there were no exceptional circumstances justifying such a severe sanction. A unanimous Court concludes that Italy has violated Article 10 of the Convention, awarding Belpietro just satisfaction in terms of EUR 10,000 non-pecuniary damage and EUR 5,000 for costs and expenses.

• *Arrêt de la Cour européenne des droits de l'homme (deuxième section), Affaire* Belpietro c. Italie*, requête n° 43612/10 du 24 septembre 2013* (Judgment by the European Court of Human Rights (Second Section), case of Belpietro v. Italy, Appl. No. 43612/10 of 24 September 2013)
http://merlin.obs.coe.int/redirect.php?id=16712 FR

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European Court of Human Rights: Von Hannover no. 3 v. Germany

• *Arrêt de la Cour européenne des droits de l'homme (Cinquième section), affaire Von Hannover n° 3 c. Allemagne, requête n°8772/10 du 19 septembre 2013* (Judgment by the European Court of Human Rights (Fifth Section), case of Von Hannover no. 3 v. Germany, Appl. No. 8772/10 of 19 September 2013)
http://merlin.obs.coe.int/redirect.php?id=16720 FR

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The European Court of Human Rights has delivered a new judgment regarding a complaint by Princess Caroline von Hannover that the German courts had not sufficiently protected her right to privacy as guaranteed by Article 8 of the Convention, by giving too much weight to the right of the press as guaranteed by Article 5 of the German Constitution and Article 10 of the European Convention (see earlier also Von Hannover no. 1 v. Germany, IRIS 2004-8/2 and Von Hannover no. 2 v. Germany, IRIS 2012-3/1). This time the Princess of Monaco lodged an appeal in Strasbourg relating to the refusal by the German courts to grant an injunction prohibiting any further publication of a photograph of her and her husband. The photograph that was the subject of the litigation was published in the magazine 7 Tage in 2002. It was taken without the Princess' knowledge while on holiday and it illustrated an article about the trend among the very wealthy towards letting out their holiday homes. With reasoning similar to that of Von Hannover no. 2, the European Court could not find a violation of Article 8 of the Convention.

The European Court refers to its judgments in Axel Springer AG v. Germany and Von Hannover no. 2 v. Germany (see IRIS 2012-3/1) in which it set forth the relevant criteria for balancing the right to respect for private life (Article 8) against the right to freedom of expression (Article 10). These were: contribution to a debate of general interest; how well-known the person concerned was; the subject of the report; the prior conduct of the person concerned; the content, form and consequences of the publication; and, in the case of photographs, the circumstances in which they were taken. The Court refers to the findings by the German courts that, while the photograph in question had not contributed to a debate of general interest, the article with the litigious picture, however, reported on the current trend among celebrities towards letting out their holiday homes, which constituted an event of general interest. The article did not contain particular information concerning the private life of the Princess, as it focused on practical aspects relating to the Von Hannover's villa and its letting. The Court also referred to the fact that the Princess and her husband were to be regarded as public figures who could not claim protection of their private lives in the same way as individuals unknown to the public. The European Court concluded that the German courts had not failed to comply with their positive obligations to protect the right of privacy in its confrontation with the freedom of press. Therefore there had been no violation of Article 8 of the Convention.

Parliamentary Assembly: Resolution on National Security and Access to Information

The Parliamentary Assembly of the Council of Europe (PACE) adopted its Resolution 1954(2013) entitled "National security and access to information" on 2 October 2013.

The Resolution emphasises the importance of transparency, which includes access to information held by public authorities, for democracy and good governance as well as for the prevention of corruption.

The Resolution considers that well-defined national security interests are valid grounds for withholding information held by public authorities. At the same time it also emphasises that access to information is a "crucial component" of national security, as it enables the informed participation by citizens in the democratic process and government scrutiny.

In its Resolution, the Assembly welcomes the adoption of the "Global Principles on National Security and the Right to Information" ("the Global Principles") which are designed to provide guidance to legislators and officials in relation to establishing an appropriate balance between public interests in national security and access to information. The Assembly calls on member states of the Council of Europe to take these principles into account in their legislation and practice concerning access to information.

The Assembly stresses the importance of a number of principles including:

- Information held by public authorities should be freely accessible. Exceptions to this rule based on national security or other reasons must be provided by law, pursue a legitimate aim and be necessary in a democratic society;

- In order to prevent overly-broad exceptions to the rule of free access to information, access to information should be granted in situations where the public interest in the information "outweighs the authorities' interest in keeping it secret.";

- "Whistle-blowers" who have acted in good faith and followed procedures should be protected; and

- Public oversight bodies should have relevant expertise, powers of investigation and full access to protected information. Such bodies should also be independent from the executive.

Finally, the Assembly calls on all member states, which have not already done so, to sign and ratify the Council of Europe Convention on Access to Official Documents (see IRIS 2009-2/2).

• Parliamentary Assembly of the Council of Europe Resolution 1954(2013) National security and access to information, 2 October 2013.
http://merlin.obs.coe.int/redirect.php?id=16723 EN FR

• Committee on Legal Affairs and Human Rights. National security and access to information. Report Doc. 13293, 3 September 2013
http://merlin.obs.coe.int/redirect.php?id=16724 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: National Courts' Jurisdiction for Copyright Infringement in other Member States

On 3 October 2013, the Court of Justice gave a preliminary ruling in the Case of Peter Pinckney v. KDG Mediatech AG, C-170/12, regarding the jurisdictional rules set out in the Council Regulation (EC) No. 44/2001.

Mr Pinckney claimed to be the author of 12 songs which were recorded by the group Aubrey Small on a vinyl record. The record was then, without his consent, reproduced on compact discs by an Austrian company named Mediatech, which were subsequently sold by companies in the United Kingdom on their website. This website was accessible from Toulouse, France, where Mr Pinckney lived. He sued Mediatech before the Regional Court of Toulouse, where Mediatech questioned the jurisdiction of the court. After an appeal from the Court of Appeals of Toulouse, the case came before the Court of Cassation which requested a preliminary ruling with regards to the jurisdiction of the French courts.

The Court noted that, in addition to the general rule that attributes jurisdiction to the court where the defendant is domiciled, the Regulation contains a special jurisdictional rule in Article 5(3) for matters relating to tort, delict or quasi-delict. Jurisdiction to hear such actions is already established in favour of the court seized, i.e. the court of the place where the harmful event occurred or may occur subject to the following conditions: where "the Member State in which the court is situated protects the copyrights relied on by the plaintiff"; and where "the harmful event alleged may occur within the jurisdiction of the court seized". According to the Court, this place may vary according to the nature of the right alleged to be infringed and also depends on which court is best placed to ascertain whether or not the alleged infringement is well founded. It is, however, not required that the harmful activity is 'directed to' the Member State of the court seized.

The likelihood of such a harmful event occurring arises from the possibility that a reproduction of the copyrighted work can be obtained from a website which is accessible from the Member State of the court seized.

Hence, the Court held that "in the event of alleged infringement of copyrights protected by the Member State of the court seized, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible from the jurisdiction of the court seized." However, the jurisdiction of the court seized only extends to the damage caused in the Member State of the court seized.

• Judgment of the Court (Fourth Chamber) of 3 October 2013, Peter Pinckney v. KDG Mediatech AG, Case C-170/12
http://merlin.obs.coe.int/redirect.php?id=16721 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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General Court: Funding for France Télévisions Validated

On 16 October 2013, the General Court of the European Union validated the funding mechanism for France Télévisions set up by 2009 legislation reforming the public-sector audiovisual scene to compensate for the abolition of advertising on the public-sector group's channels after 8 pm. The compensation took the form of an annual budget subsidy and two taxes, one on advertising spots, and the other on electronic communications. In a decision on 20 July 2010, the European Commission found that the State aid in the form of a budget subsidy for France Télévisions was compatible with the requirements of the internal market, in accordance with Article 106 (2) of the TFEU. The company TF1 contested the decision, and appealed to the General Court of the EU for its cancellation, raising three arguments in support of its appeal. Firstly, the applicant held that the Commission had wrongly interpreted the connection between the

new taxes and the funding of France Télévisions. After closely-detailed examination, the Court found that the Commission had not been wrong in believing that no constraining connection could be established under French regulations between the new taxes and the aid granted to France Télévisions. In the absence of any such connection, the Commission was right to believe that the taxes were not an integral part of the aid and therefore did not constitute part of the mechanism. TF1 also held that, as a result of the new taxes, the funding mechanism would be contrary to Articles 49, 56 and 110 of the TFEU and to the rules of derived law. The Court rejected this argument also since, because the new taxes did not form part of the mechanism of the aid measure at issue, the Commission was not required to appreciate their compatibility with European Union law as part of its examination of the measure. As the Commission had emphasised in the disputed decision, its appreciation did not take into consideration the matter of the compatibility of the taxes, taken as separate measures, with European Union law. Indeed France is currently the subject of infringement proceedings regarding the compatibility of the tax on electronic communications with Article 12 of Directive 2002/20/EC on the authorisation of electronic communications networks and services. TF1's final argument in support of its appeal was that there was a risk of over-compensation in the mechanism for funding France Télévisions, but the Court, recalling the Commission's mention of the possibility of such a risk in the justification for its decision, felt that the Commission had expressed "clearly and comprehensibly" in its appreciation that there was no risk of over-compensation in the present case. TF1 also claimed that it was unable to contest the decision since it did not have at its disposal the documents on which the Commission had based its considerations, but the Court did not allow the request for these documents to be produced. The applicant also criticised the Commission's analysis, which it claimed did not take account of France Télévisions' economic efficiency in carrying out its public-service mission: compensation that was not strictly intended to remunerate the performance of public-service missions but rather to smooth over the effects of bad management would reinforce France Télévisions' market position and thereby distort competition in a way that was contrary to the interests of the Union. The Court nevertheless recalled that the economic efficiency of an undertaking in carrying out its public-service mission could not be used as an argument to contest the Commission's appreciation of the compatibility of State aid with the internal market. The Court found that the Commission had not committed any legal error in its decision, and rejected the appeal brought by TF1 in its entirety. This judgment comes just as the French Parliament has decided, by voting in legislation on the independence of the public-sector audiovisual scene, to maintain daytime advertising after 2015 (see IRIS 2013-10/23).

• *Arrêt du Tribunal de l'Union européenne (troisième chambre) du 16 octobre 2013, affaire T-275/11* (Judgment of the General Court of the European Union (third chamber) of 16 October 2013, case no. T-275/11)
http://merlin.obs.coe.int/redirect.php?id=16742 FR

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European Commission: Public consultation on Crowdfunding in the EU

On 3 October 2013, the European Commission launched a Consultation on crowdfunding in the European Union. The aim of the Consultation is to explore whether there is an added value of potential European level policy action to encourage the growth of crowdfunding.

Crowdfunding is an alternative form of financing a specific project or business, using open calls to the public usually through the Internet. Crowdfunding is generally facilitated by a web-based intermediary (so-called crowdfunding platform), which assist in publishing campaigns, reaching contributors and collecting funds. Crowdfunding can take a variety of different forms, such as: donations; rewards; pre-selling; lending and security-based investments.

Due to the economic crisis, financing became more difficult due to the reduction in the lending activity of banks. Therefore, the need to develop alternative sources of financing has grown. This growth is illustrated by the amount of money collected from crowdfunding. In 2012, a total amount of EUR 735 million was raised, an increase of 65 percentage points compared with the figures from 2011.

To maintain this increasing interest in crowdfunding, the Commission will explore whether the EU can contribute to the growth of this new, alternative form of financing and if there is a need for action. Action may consist of soft-law measures or legislative actions to stimulate growth, while ensuring an adequate level of protection for contributors. Safeguards are needed to ensure peoples trust and to prevent crowdfunding from becoming a monetary trend that fades away.

Crowdfunding has many benefits that suit the objectives of the European Commission. One of these advantages is encouraging entrepreneurship by bridging the financial gap for small firms and innovative projects. This is stipulated in the Entrepreneurship 2020 Action Plan, which aims to facilitate new and alternative forms of financing for start-up businesses and to increase the level of employment. Also, the European Council acknowledged the need to develop alternative sources of financing in cooperation with member states.

Nonetheless, crowdfunding can be risky. There is a risk of fraud, for example, where the money collected is not used for its stated purpose. However, it has been argued that the use of social media can reduce the possibilities of launching fraudulent crowdfunding campaigns. As well as this, pursuant to the E-Commerce Directive, platforms and project owners must identify themselves and must also identify the purpose of their activity.

Due to the advantages of crowdfunding, the Commission has set up a Consultation to determine whether EU-action would add value for the different types of crowdfunding. It also aims to map out applicable national rules and views of stakeholders on what would be an optimal legal framework. The consultation runs from 3 October 2013 until 31 December 2013 and is available on the website of the Commission.

• Consultation by the European Commission on Crowdfunding in the EU - Exploring the added value of potential EU action
http://merlin.obs.coe.int/redirect.php?id=16725 EN

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UNITED NATIONS

Committee on the Elimination of Racial Discrimination: New General Recommendation Combating Racist Hate Speech

The United Nations Committee on the Elimination of Racial Discrimination (CERD) adopted its 35th General Recommendation (GR) entitled "Combating racist hate speech" during its 83rd session in August 2013. The new GR contains a number of media-specific provisions, which will be detailed below after some background information about the GR has first been provided.

CERD is the body of independent experts entrusted with the task of monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). GRs focus on specific themes or Convention provisions and they are the leading source of interpretive guidance for the ICERD. The new GR is CERD's most explicit and detailed engagement with racist hate speech to date (for details of other GRs dealing with the topic, see para. 3 of GR No. 35).

The new GR is significant not only for its detailed engagement with racist hate speech, but also because it aligns ICERD's provisions on freedom of expression more closely with those of other international legal standards (eg. Article 19 of the International Covenant on Civil and Political Rights). ICERD has traditionally had an outlier status among international human rights treaties in respect of freedom of expression because of its heavy reliance on the criminalisation of (certain types of) expression in order to combat racism. The new GR recognises that ICERD is a living instrument and that it must be better synchronised with other treaties and informed by contemporary understandings of racist hate speech - its causes, manifestations and impact.

In keeping with this line of thinking, the new GR explores a range of strategies against racist hate speech other than the criminalisation of expression, i.e., civil and administrative law measures (para. 8). It acknowledges that there is inherent differentiation within the notion of "racist hate speech", which means that different remedies and responses are appropriate. It emphasises the need to examine contextual factors, such as content/form, climate, position/status of speaker, reach, objectives (para. 15), when determining what sort of remedies or responses are best suited to combating particular types of racist hate speech. The multiple and differentiated measures envisaged by the Convention for combating racist hate speech include teaching, education, culture and information (Article 7, ICERD; paras. 8 and 9, GR No. 35).

It is against this background that the GR's media-specific provisions have been crafted. The GR stresses that "informed, ethical and objective media, including social media and the Internet, have an essential role in promoting responsibility in the dissemination of ideas and opinions" (para. 39). States should therefore put in place "appropriate legislation for the media in line with international standards" and "encourage the public and private media to adopt codes of professional ethics and press codes that incorporate respect for the principles of the Convention and other fundamental human rights standards" (para. 39).

It states that "media representations of ethnic, indigenous and other groups [...] should be based on principles of respect, fairness and the avoidance of stereotyping" (para. 40). The media should furthermore "avoid referring unnecessarily to race, ethnicity, religion and other group characteristics in a manner that may promote intolerance" (para. 40). It recognises that "local empowerment through media pluralism facilitates the emergence of speech capable of countering racist hate speech" (para. 41). For that reason, it advocates "facilitation of access to and ownership of media by minority, indigenous and other groups [...], including media in their own languages" (para. 41). It also "encourages self-regulation and compliance with codes of ethics by Internet service providers" (para. 42).

• United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No. 35 - Combating racist hate speech, Doc. No. CERD/C/GC/35, 23 September 2013
http://merlin.obs.coe.int/redirect.php?id=16726 EN FR

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NATIONAL

AT-Austria

New ORF Facebook Ban Temporarily Suspended

As *Österreichischer Rundfunk* (Austrian Broadcasting Corporation - ORF) announced in a press release on 20 September 2013, the *Verfassungsgerichtshof* (Constitutional Court - VfGH) has temporarily suspended a ban imposed by the *Bundeskommunikationssenat* (Federal Communications Board - BKS) on ORF's page on the Facebook social network and granted ORF's application for its appeal to have staying effect (see IRIS 2012-3/9 and IRIS 2013-1/6).

The court held that ORF had given comprehensible reasons why the immediate removal of the Facebook page would represent a "disproportionate disadvantage"; there was no compelling public interest in refusing to grant a stay of execution. ORF can therefore continue to use its page on the Facebook platform until a decision is reached in the main procedure.

The BKS imposed the ban on what it considered to be a "permanent forum", which is unlawful under Article 4f(2)(22) of the *ORF-Gesetz* (ORF Act). It considered that ORF was operating such a forum even if it used the Facebook infrastructure to do so.

The BKS had previously banned ORF from using Facebook on the basis of Article 4f(2)(25) of the *ORF-Gesetz*, which prohibits links to social networks and other forms of cooperation with them. The Constitutional Court held that this part of the provision breached ORF's rights under Article 10 of the European Convention on Human Rights (ECHR) and therefore repealed it as unconstitutional (see IRIS 2013-8/10).

• *Pressemitteilung des ORF vom 20. September 2013* (ORF press release of 20 September 2013)
http://merlin.obs.coe.int/redirect.php?id=16728 DE

• *Pressemitteilung des ORF vom 17. September 2013* (ORF press release of 17 September 2013)
http://merlin.obs.coe.int/redirect.php?id=16729 DE

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Federal Communications Board on Labelling of Split-Screen Advertising

In a decision of 23 July 2013, the Austrian *Bundeskommunikationssenat* (Federal Communications Board - BKS) clarified the requirements for the proper labelling of split-screen advertising on television.

In the case at hand, the television broadcaster PULS 4 had broadcast two split-screen advertising spots that were spatially separated from the programme material (in this case: written programme announcements), with the word "*Werbung*" (advertising) appearing directly next to the broadcaster's logo in the top left-hand corner of the screen.

The regulatory body, *KommAustria*, had considered this to be a breach of the labelling requirements as laid down in Article 43(1) of the *Audiovisuelle Mediendienste-Gesetz* (Audiovisual Media Services Act - AMD-G). It was true that, according to Article 43(2) AMD-G, the required separation of advertising from editorial content could, in principle, be achieved by means of the division of the screen, without any additional separation by optical or acoustic means. In this particular case, however, the word "*Werbung*" had appeared in the editorial part of the screen. This was misleading because the part of the screen that was not devoted to advertising had been labelled as "*Werbung*". Since the average viewer would therefore not have been able to easily identify which content the word "*Werbung*" was referring to, the spatial division of the screen had not separated editorial and advertising content sufficiently clearly.

In the appeal proceedings, the BKS came to the opposite conclusion. It considered that the advertising was clearly recognisable in the sense of Article 43(1) AMD-G. Proper account had also been taken of the requirement for clear spatial separation of content in accordance with Article 43(2) AMD-G.

Taking into account the average viewer and the key benchmarks, according to which, on the one hand, there should be no risk of the viewer confusing advertising with editorial content and, on the other, the viewer should be able to easily recognise the advertising as such, it was obvious which part of the split screen had contained advertising in this case.

In view of the overall layout of the screen and the fact that the advertising had taken the typical form

of advertising spots, it had to be assumed that, in both cases, it would have been clear to the viewer which part of the screen had been devoted to advertising. There had therefore been no risk of confusion between the advertising and editorial content. In this respect, the BKS also did not think that any harm had been caused by the appearance of the word "*Werbung*" in the part of the screen that had not actually been used to show the advertising.

• *Entscheidung des BKS vom 23. Juli 2013 (GZ 611.001/0001-BKS/2013)* (BKS decision of 23 July 2013 (GZ 611.001/0001-BKS/2013))
http://merlin.obs.coe.int/redirect.php?id=16727 DE

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Regulatory Agency Proposes Limitation of Advertising in Public Service Broadcasting

The *Regulatorna agencija za komunikacije* (Communications Regulatory Agency) published a draft Codex Amending the Codex on Commercial Communications (Official Gazette of BiH, No. 98/11 and 94/12) in the summer of 2013.

According to Article 1 of the draft, Article 21 of the Codex should be changed and should read as follows:

- "Advertising spots and teleshopping for public radio and television services will last maximally four minutes per one hour in television programmes and maximally six minutes per hour in radio programmes."

According to Article 2 of the draft, the amended Codex shall enter into force eight days after its publication in the Official Gazette of Bosnia and Herzegovina and shall be applied as of 1 January 2014.

The draft was harshly criticised by national public service broadcasters. Namely, if implemented, some 2,000 employees currently working in BHRT, a country-wide public broadcaster, plus two entity public broadcasters RTFBiH and RTRS, would lose their jobs due to the expected decrease of revenue from advertising. The yearly income derived from advertising amounts to BAM 8 to 10 million (˜ EUR 4 to 5 million).

The reform has been supported by the commercial broadcasters who claim it will improve the dual system of broadcasting in Bosnia and Herzegovina, which complies with European media standards. International representatives criticised the draft and suggested that a new study on the effects of this reform should be conducted before the Codex should enter into force.

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Reports on the Activity of the Council for Electronic Media in 2012

On 12 September 2013, the National Assembly adopted two decisions for information purposes regarding two reports of the Council for Electronic Media (CEM), which cover the period from 1 January 2012 to 30 June 2012 and the period from 1 July 2012 to 31 December 2012 respectively.

The CEM is obliged under the provisions of Article 86(1) of the Constitution of the Republic of Bulgaria and Article 39(1) of the Radio and Television Act to submit to the National Assembly a report on its activity for the first half of each current year not later than 31 October in the same year and for the second half of the last preceding year not later than 31 March in the current year for consideration by the Parliament.

The reports contain information about the activity of the CEM with regard to the grants of radio and television programme licences and registrations for networks both for analogue and digital broadcasting. Moreover, the reports provide information about the grant of television broadcasting licences for the establishment of programmes within nationwide coverage distributed via electronic communications networks for digital terrestrial television. The obligation to submit the report to the National Assembly and the latter's adoption by decision serves the purpose to have transparent and open procedures within the CEM.

In the reporting period the CEM has adopted "Methodology Guidelines" with regard to the characteristics of prohibited surreptitious commercial communication and product placement as a commercial communication form in media service providers' programmes.

According to the reports, in 2012, the CEM has carried out a second administrative reform - the Law on Civil Servants has been implemented in the administrative services of the Council in compliance with the amendments contained in Article 22 of the Radio and Television Act (IRIS 2012-8/12).

• Стенограми от пленарни заседания. ТРИДЕСЕТ И ПЕТО ЗАСЕДАНИЕ. София, четвъртък, *12* септември *2013* г. (Parliamentary discussion on the CEM's reports)
http://merlin.obs.coe.int/redirect.php?id=16703 BG

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Amendments Proposed for Law on Public Service Broadcaster

Along with amendment proposals for commercial radio television organisations (see IRIS 2013-10/13), another draft law is aimed at harmonising the Law regulating the public service broadcaster Ραδιοφωνικό l364301305μ361 Κύπρου (RIK - Cyprus Broadcasting Corporation) with the provisions of the Audiovisual Media Services Directive (2010/13/EU). In addition to the audiovisual media services of RIK, the amendments also concern radio regulation.

The amendments regulate the following

- Categories of goods and services, for which television advertising is prohibited during specific timeframes.

- Rules about the insertion and the content of advertisements on radio and goods and services prohibited from advertising during specific timeframes.

- Rules about protection of minors from harmful content in programmes and specific regulation of advertisements aimed at minors.

- Rating, warning and labelling of the category of programmes onscreen.

- Principles governing the content of programmes and commercial communication.

- Fair treatment and representation of issues and persons in view of sexual orientations.

- Rules about the participation of persons under 15 years old in RIK's programmes.

- Programmes on electronic and casino gambling.

- Prohibition of medical and food advice to individuals in television and radio programmes without the interested persons' prior medical examination.

Details are also provided to describe the meaning of a balanced schedule as regards different categories of content. A balanced relation of different categories is required from RIK as a public service organisation. The focus is placed on the number of hours that should be scheduled for information, cultural and entertainment programmes on radio and on television. The relevant regulations, defining the RIK's remit as a public service organisation (KDP 616/2003) are to be abrogated by the proposal.

The powers of the Radio Television Authority in relation to RIK are specified and broadened by the proposal.

The draft law furthermore requires RIK to maintain special capital reserves, amounting to at least 10% of its annual budget in order to face situations emerging from unexpected fluctuations in income and expenses as well as for adequate responses to special events or situations as a public service organisation.

• Επίσημη 325306367μ365301 ΄371364361, *04/09/2013, pp. 1189-1213* (Official Gazette, 4 September 2013, pp. 1189-1213)
http://merlin.obs.coe.int/redirect.php?id=16704 EL

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Extensive Amendments Proposed for Act on Radio Television Organisations

A bill sent to the House of Representatives by the government proposes extensive amendments to the Law on Radio and Television Organisations that regulates commercial services of broadcasters. The bill was long expected in order to adjust the Act to aspects of the new media - i.e. a fully digital environment - and to further harmonise the Act with the Audiovisual Media Services Directive 2010/13/EU (AVMSD).

According to the Explanatory Memorandum attached to the proposal, better harmonisation with the AVMSD is sought, in particular with relation to Articles 2(4), 4(8), 5(1)(d), 6, 9(1)(f), 10(1), 11(1), 11(2), 11(3)(c), 13, 18, 19, 23-25 and 27. A table listing the correspondence of Articles of AVMSD and of the Act is provided with the Explanatory Memorandum.

Changes foreseen in the proposal are in particular:

- New types of licences will be added in Article 14 of the Act in order to cover all forms of audiovisual media services.

- Providers of audiovisual media services under Cypriot jurisdiction will need authorisation by the regulator (Cyprus Radio Television Authority) in case they wish to include in their services programmes that are produced by an organisation from a State abroad, not being under Cypriot jurisdiction.

- The duration of licences for television services will be one year - instead of ten, as formerly - while the seven year duration for radio licences (that have not yet switched over to digital transmission) would remain unchanged.

- A new Article 25a will regulate the details for the withdrawal of authorisations of providers of audiovisual media services.

- Broader and better protection will be sought for minors in terms of minors as both viewers and participants in programmes. Moreover, new provisions will

be inserted foreseeing measures against discrimination, terrorism, xenophobia, pedophilia and protection of the environment.

- Fair treatment of political parties and candidates will be stipulated. Political communication will be regulated and extended to cover municipal and local elections as well.

Further to the above amendments, the bill foresees the abolishment of the Radio Television Advisory Committee, in which professional and other social and scientific bodies, the audiovisual media service providers and government services were represented in order to coordinate aspects of media law in a non-binding manner. The reason given is that "the Committee was unable to function".

The Code of Journalistic Ethics appended to the "Regulations - Normative Administrative Acts, KDP 10/2000" will be abrogated and most of its provisions as other provisions in the Regulations will be incorporated into the Act on Radio and Television Organisation.

• Επίσημη 325306367μ365301΄371364361, *04/09/2013, pp. 1081-1188* (Official Gazette, 4 September 2013, pp. 1081-1188)
http://merlin.obs.coe.int/redirect.php?id=16704 EL

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Rhineland-Palatinate Administrative Court of Appeal Finds "*Hasseröder Männercamp*" Product Placement Inadmissible

In a ruling of 22 August 2013 (case no. 2 A 10002/13.OVG), the *Oberverwaltungsgericht Rheinland-Pfalz* (Rhineland-Palatinate Administrative Court of Appeal - OVG) decided that the depiction of a brand of beer before and during the live broadcast of a football match on the Sat.1 television channel had constituted unlawful product placement in the sense of Article 7(7)(3) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV).

During the broadcast of a UEFA Europa League match, in which the use of product placement had been mentioned, TV broadcaster Sat.1 had twice switched to the so-called "*Hasseröder Männercamp*". During subsequent conversations between the presenter and an expert (a former football manager), "*Hasseröder*" beer had been mentioned repeatedly. The brewery's logo had also been visible many times on beer bottles and other objects in the studio.

As the lower-instance court, the *Verwaltungsgericht Neustadt an der Weinstraße* (Neustadt an der Weinstraße Administrative Court) had found the product placement admissible in this case (see IRIS 2013-2/17).

However, the OVG disagreed, ruling that the beer brand had been given excessive prominence during the broadcast. A product was given "excessive" prominence in the sense of Article 7(7)(3) RStV if, depending on its type, frequency or duration, its placement could not be justified by the programme's editorial requirements or the need to portray reality.

In the OVG's opinion, the pre- and post-match interviews with the expert had not, in themselves, been linked to the presentation of the brewery's products. Since it had been a deliberate editorial ploy to bring the expert out of a so-called "men's evening" in order to interview him, the inclusion of beer bottles or isolated sweatshirts with the relevant logo could have been justified. However, the "men's evening" scenario could not justify the extensive presence of the brewery logo on beer bottles that had clearly been deliberately placed, sweatshirts, beer glasses, a wall visible in the background and an ice bucket.

The court added that the plaintiff could not legitimately claim that the "*Männercamp*" (men's camp) organised by the brewery had been a real-life event. It had been an artificially created event deliberately devised for advertising purposes and could not therefore be considered a vehicle for admissible product placement. In this respect, the OVG made it clear that broadcasters and advertisers could not themselves create "reality" in a way that justified product placement in order to circumvent legislative provisions designed to limit the effects of advertising.

• *Pressemitteilung des Oberverwaltungsgerichts Rheinland-Pfalz zum Urteil vom 22. August 2013* (Press release of the Rhineland-Palatinate Administrative Court of Appeal on the ruling of 22 August 2013)
http://merlin.obs.coe.int/redirect.php?id=16732 DE

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Berlin-Brandenburg Administrative Court of Appeal Denies Right to Information on MPs' Use of Spending Allowance

In a decision of 12 September 2013, the *Oberverwaltungsgericht Berlin-Brandenburg* (Berlin-Brandenburg Administrative Court of Appeal - OVG) ruled, in summary appeal proceedings instigated under Article 146 of the *Verwaltungsgerichtsordnung* (Administrative Court Procedural Code - VwGO), that the constitutional right to information enshrined in Article

5(1)(2)(1) of the *Grundgesetz* (Basic Law - GG) does not apply to MPs' use of their spending allowance.

The journalist had asked the *Bundestag* (lower house of parliament) administration for information about which MPs had used the allowance to buy more than five tablet computers or a smartphone. The *Bundestag* administration refused to disclose this information, referring to the free mandate described in Article 38(1)(2) GG, which prohibits such checks on MPs, as well as the unreasonable cost of providing such information.

The journalist successfully appealed this decision after submitting an urgent application to the *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG). The VG thought the free mandate represented an obstacle to state control, which by way of a reverse argument, meant that control should be exercised by the media. The right to information was therefore particularly important for the functioning of basic democracy and the parliament's reputation. Providing the information would not be unreasonably expensive. In so far as the *Bundestag* administration had claimed that it would have to search through various files of every individual MP, it was its own responsibility to take precautions to ensure that the relevant information could be issued without great expense. Unless it had taken such precautions itself, it could not claim that the cost was unreasonable.

The VG justified the urgency of the need to release this information by referring to the forthcoming *Bundestag* election and current debate on similar subjects in relation to members of the Bavarian *Landtag* (state parliament). The VG did not think that the right to the information could be based on Article 4 Paragraph 1 of the *Berliner Pressegesetz* (Berlin Press Act - BlnPrG), which was irrelevant because the *Land* of Berlin had no legislative power vis-à-vis the *Bundestag* administration. However, since federal law did not provide for such a right, despite the obligation to establish such a right, the right arose directly from Article 5(1)(2)(1) GG. The VG therefore followed the case law of the *Bundesverwaltungsgericht* (Federal Administrative Court), which bases the direct entitlement to information on the freedom of the press.

The OVG disagreed. Like the VG, it recognised the journalist's constitutional right to information. However, this right only justified a minimum standard of protection, which the courts had to uphold. Nevertheless, the courts should not also put themselves in the legislator's shoes by constantly weighing up these rights and developing and applying associated criteria. A violation of the duty to protect the freedom of the press, i.e. a breach of the ban on failing to provide the necessary level of protection, was only committed if a minimum standard of protection was not met. This was only possible if the refusal to disclose the information could not be justified by any legitimate private or public interests. In view of the free mandate enshrined in Article 38(1)(2) GG, there was a legitimate interest in this case. In addition, the right to "informational self-determination" (the right of the individual to decide what information about himself should be communicated to others and under what circumstances), derived from Article 2(1) in conjunction with Article 1(1)(1) GG, should also be taken into account, since the release of this information concerned MPs personally rather than in their role as mandate-holders. Besides, Article 12(2) of the *Abgeordnetengesetz* (Members of Parliament Act - AbgG) expressly did not require MPs to prove how they had used the allowance or to be punished if they used it inappropriately. The courts could not go against the legislator's judgment in this regard.

The OVG ruled that Article 1(1)(1) of the *Informationsfreiheitsgesetz* (Freedom of Information Act - IFG) applied in the case at hand, whereas it denied the right to information under Article 5(2) IFG. Under this provision, the applicant's interest in accessing information must not predominate if the information originates from documents relating to a third party's - in this case, MPs' - mandate.

The journalist was also unable to base his claim on Article 10 of the European Convention on Human Rights (ECHR). This rule, in principle, only protected the freedom of expression and the unhindered exchange of information between private individuals. However, the right to information derived from Article 10 ECHR by the European Court of Human Rights in individual cases was not applicable to the circumstances of the current case. It was also necessary to consider the difficulty of reconciling this with the legislator's assessment in Article 5(2) IFG, although this could not be resolved as part of the summary proceedings.

• *Beschluss des Oberverwaltungsgerichts Berlin-Brandenburg vom 12. September 2013 (Az. OVG 6 S 46.13)* (Decision of the Berlin-Brandenburg Administrative Court of Appeal of 12 September 2013 (case no. OVG 6 S 46.13))
http://merlin.obs.coe.int/redirect.php?id=16733 DE

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Schleswig-Holstein Administrative Court Lifts Facebook Fan Page Ban

In a ruling of 9 October 2013, the *Schleswig-Holsteinische Verwaltungsgericht* (Schleswig-Holstein Administrative Court - VG) lifted the decision of the *Unabhängiges Landeszentrum für Datenschutz* (Independent *Land* Data Protection Centre - ULD), prohibiting companies in Schleswig-Holstein from operating Facebook fan pages (case no. 8 A 218/11, 8 A 14/12, 8 A 37/12).

The ULD had banned the operation of Facebook fan pages on the basis of Article 38(5) of the *Bun-*

desdatenschutzgesetz (Federal Data Protection Act - BDSG) because it breached data protection law in several ways. Visitors to such fan pages were not provided with adequate information about the collection and use of their personal data, as required under Article 13(1) of the *Telemediengesetz* (Telemedia Act - TMG). As a result, no effective consent was given for the data to be collected and used, as required under Articles 4 and 4a BDSG. The fan pages also failed to grant the right of refusal, as required under Article 15(3) TMG. Companies were responsible for processing this data illegally if they made use of this technical infrastructure.

The VG did not say whether using personal data taken from Facebook fan pages infringed substantive data protection law. In any case, the companies, as fan page operators, were not "controllers" in the sense of Article 3(7) BDSG (see also Article 2(d) of Data Protection Directive 95/46/EC). Under this provision, the companies would have to collect, process or use personal data on their own behalf, or commission others to do the same. However, anyone who had no actual or legal influence over the use of the data could not be the "controller", according to the VG.

In view of the fundamental importance of this dispute, the VG allowed the decision to be appealed before the *Schleswig-Holsteinische Verwaltungsgericht* (Schleswig-Holstein Administrative Court of Appeal).

• *Pressemitteilung des Schleswig-Holsteinischen Verwaltungsgerichts zum Urteil vom 9. Oktober 2013 (Az. 8 A 218/11, 8 A 14/12, 8 A 37/12)* (Press release of the Schleswig-Holstein Administrative Court on the ruling of 9 October 2013 (case no. 8 A 218/11, 8 A 14/12, 8 A 37/12))
http://merlin.obs.coe.int/redirect.php?id=16734 DE

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Administrative Court of Appeal Approves Registration Data Comparison for Licence Fee Collection

In a decision of 10 September 2013 (case no. 4 ME 204/13), the *Niedersächsische Oberverwaltungsgericht* (Lower Saxony Administrative Court of Appeal - OVG) ruled that the comparison of registration data described in Article 14(9) of the *Rundfunkbeitragsstaatsvertrag* (Inter-State Agreement on the Broadcasting Licence Fee - RBStV) does not infringe the right to "informational self-determination" (the right of the individual to decide what information about himself should be communicated to others and in what circumstances), derived from Article 2(1) in conjunction with Article 1(1) of the *Grundgesetz* (Basic Law - GG).

Under Article 14(9) RBStV, all personal data is transmitted from the registration authorities to the broadcasters. This one-off comparison, carried out for the purposes of existing and initial registrations, includes data such as current and previous names, doctorates, marital status, dates of birth, and current and previous addresses of first and second residences, including full details of their location and moving-in dates.

In summary proceedings, the *Verwaltungsgericht Göttingen* (Göttingen Administrative Court - VG) had previously decided on 6 September 2013 that some aspects of the data transmission process constituted an excessive intrusion on the rights of the persons concerned and were therefore unconstitutional (case no. 2 B 785/131). The VG disagreed with the applicant's claim that the data comparison process resulted in a national register of licence fee payers. This was untrue because each broadcaster could only access the data of licence fee payers living in its broadcast territory. Also, the secure storage of the data and the obligation to delete it after it had been used satisfied the provisions of data protection law. However, the VG considered it unnecessary for the data comparison process described in Article 14(9) RBStV to include data on doctorates, marital status and previous first and second residences. This information was irrelevant as far as setting the licence fee was concerned. In this respect, the RBStV infringed the right to "informational self-determination".

The OVG disagreed, considering the data comparison process to be completely necessary and therefore justified. The information about doctorates (Article 14(9)(1)(4) RBStV), for example, was useful for the correct identification of the registered licence fee payer. The same applied to the information on marital status (Article 14(9)(1)(5) RBStV), which also helped, in cases where homes were jointly owned, to determine the owners' liability as joint licence fee payers under Article 2(3)(1) RBStV. If married couples with the same surname and address were registered, the *Land* broadcaster could assume that they lived together in the same home and that they should therefore share the same licence fee account. The information on marital status was therefore necessary. Finally, addresses of previous first and second residences, including all available information about their location (Article 14(9)(1)(7) RBStV) were also required so that registration data could be checked against existing licence fee accounts. For example, if there had been a change of address, it would then be possible to find out whether a newly-registered person and a previously registered licence fee payer were the same person.

The OVG therefore ruled that all the data was absolutely necessary for the collection of the licence fee and that the transfer of the data was not unconstitutional.

Before the OVG took this decision, the *Bayerische Verfassungsgerichtshof* (Bavarian Constitutional Court)

in particular had confirmed the legality of Article 14(9) RBStV in a ruling of 18 April 2013 (case no. Vf. 8-VII-12; Vf. 24-VII-12).

• *Entscheidung des Niedersächsischen OVG vom 10. September 2013 (Az. 4 ME 204/13)* (Decision of the Lower Saxony Administrative Court of Appeal of 10 September 2013 (case no. 4 ME 204/13))
http://merlin.obs.coe.int/redirect.php?id=16735 DE

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Berlin Administrative Court Bans Regional Advertising on National Channel

In a ruling of 26 September 2013 (case no. VG 27 K 231.12), the *Verwaltungsgericht Berlin* (Berlin Administrative Court - VG) decided that a broadcaster licensed to broadcast programmes nationwide was not permitted to replace the advertising on its channel with different regional advertisements. This was not covered by the national broadcasting licence under the terms of Article 20a of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement).

Television broadcaster ProSieben instigated the proceedings against the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg media authority - mabb), which had prohibited the broadcaster from replacing individual advertising spots with regional spots in order to acquire new advertising customers, particularly companies with regional distribution areas or sales structures. According to ProSieben, the broadcast of different regional advertising windows was covered by the national broadcasting licence granted by the mabb. If not, the broadcaster would be entitled to a corresponding extension of its licence.

The VG Berlin rejected the claim. ProSieben's plan to broadcast separate advertising was not covered by the national broadcasting licence, which only entitled the holder to broadcast the same TV channel throughout the country via satellite. Different regional advertising windows, however, would not constitute the same TV channel, since they would only be broadcast within individual *Bundesländer* or regions. According to the court, ProSieben could not base its case on the fact that public service broadcaster ARD broadcast regional advertising, since the ARD held a completely different type of licence. The broadcaster had no right to a corresponding extension of its broadcasting licence because there were no relevant legal grounds.

• *Pressemitteilung des Verwaltungsgerichts Berlin* (Press release of the Berlin Administrative Court)
http://merlin.obs.coe.int/redirect.php?id=16736 DE

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WDR Broadcasting Council Approves Original Live Streaming Services

On 19 September 2013, the *Rundfunkrat* (Broadcasting Council) of Cologne-based *Westdeutscher Rundfunk* (WDR) ruled that the original live streams of major sports events produced by WDR and made available via the online portal of the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (association of German public service broadcasters - ARD) at "sportschau.de" were covered by the relevant telemedia concept.

The Broadcasting Council did not consider the three-step test required under Article 11d-11f of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV) was necessary in this case. Its decision related to the obligation of public service broadcasters under Article 11f(4) RStV to submit new or amended telemedia services to the relevant regulatory body (see IRIS 2009-2/15; IRIS 2012-10/8) and to demonstrate that they fall under their public service remit (so-called three-step test). They must explain the extent to which the services meet the democratic, social and cultural needs of society (1st step), how much they contribute to media competition from a qualitative point of view (2nd step) and how much it costs to provide them (3rd step).

In order to avoid every single change to an existing service having to undergo a new three-step test, the test is only required if the general content or target audience of the service is significantly changed, or if the current budget is noticeably exceeded. In the present case, the test only concerned journalistic video material of individual sports events (such as the Olympic Games, World Athletics Championships, summer and winter sports events, the football World Cup and paralympic sports) transmitted via the Internet. Many of these sports events would not have been broadcast due to capacity limits if they had not been shown via the live online channel. Since other parties had not been interested in broadcasting them, the effects on the market had remained small.

The Broadcasting Council confirmed that the content offered did not represent a new or amended service and was covered by the telemedia concept of "sportschau.de". It had examined the overall legal situation, the possible effects of the service on the market and the related costs.

• *Pressemitteilung des WDR-Rundfunkrates zur Entscheidung vom 19. September 2013* (Press release of the WDR Broadcasting Council on the decision of 19 September 2013)
http://merlin.obs.coe.int/redirect.php?id=16731 DE

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Act Against Dubious Business Practices in Force

On 9 October 2013, the *Gesetz gegen unseriöse Geschäftspraktiken* (Act Against Dubious Business Practices), also known as the *Anti-Abzock-Gesetz* (Anti-Rip-Off Act), entered into force. It had been adopted by the *Bundestag* (lower house of parliament) on 27 June 2013 and the *Bundesrat* (upper house) on 20 September 2013 (doc. no. 638/13). The Act is designed to prevent the current practice of issuing mass cautions for copyright infringements, as well as dubious telephone transactions and debt collection methods. In future, paid subscriptions or competition entries concluded by telephone will only be legally binding if they are confirmed in writing, i.e. by e-mail, fax or letter. Fines for unauthorised telephone advertising were also increased from EUR 50,000 to EUR 300,000.

The Act also contains more consumer-friendly provisions concerning cautions issued regarding copyright infringements on the Internet. In future, for example, the party issuing a caution must explain in detail how it obtained the cautioned party's IP address. If a caution is issued without justification, the court costs and lawyer's fees must be reimbursed in full by the party that issued it. The amount in dispute is limited to a flat sum of EUR 1,000 under a revised version of Article 97a(3)(2) of the *Urheberrechtsgesetz* (Copyright Act - UrhG). The associated caution fees may not exceed approximately EUR 155. The use of a so-called "itinerant place of jurisdiction" is also largely banned under the revised Article 104a UrhG, according to which consumers can only be taken to court for copyright infringements in their place of residence. This should put an end to the practice used by numerous companies who were in practice free to issue cautions through whichever courts seemed most likely to give favourable decisions. Exceptions to the maximum amount in dispute and the place of residence principle may, in particular, be granted when infringements are committed on a commercial scale.

In this connection, reference should be made to court rulings issued in relevant file-sharing cases during summer 2013, which limited the amount in dispute on the basis of existing legal provisions before the entry into force of the *Anti-Abzock-Gesetz*. The view of the *Amtsgericht Hamburg* (Hamburg District Court) that an "ordinary" file-sharing case with no special circumstances could not involve a sum higher than EUR 1,000 was also adopted by other courts. The rightsholder's freedom to choose the place of jurisdiction was also considered inadmissible by various courts in cases where the only connection with the district of jurisdiction was the fact that a film or audio file could have been downloaded from the Internet in that district.

The courts had therefore already begun to take account of the legislator's intentions before these reforms had even entered into force.

• *Gesetz gegen unseriöse Geschäftspraktiken vom 1. Oktober 2013* (Act Against Dubious Business Practices of 1 October 2013)
http://merlin.obs.coe.int/redirect.php?id=16730 DE

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FR-France

Novel's Copyright Allegedly Infringed by a Television Series

In a decision of 2 October 2013, the Court of Cassation delivered a noteworthy decision recalling the party on which the burden of proof falls in cases of infringement of copyright. In the case at issue, the author of a novel claimed that several episodes of the television series *Plus Belle la Vie* broadcast in the summer of 2009 and the spring of 2010 on the channel France 3 used the theme, plot and main characters of his work. He therefore instigated proceedings for infringement of copyright against the company France Télévisions, in its capacity as the broadcaster, and the production companies of the series at issue. In a decision delivered on 6 July 2013, the Court of Appeal of Paris rejected the claims brought by the applicant that copyright had been infringed. It found that it was for the applicant to establish that the author of the second work had been in a position to have had knowledge of the first work. In the case at issue, the Court of Appeal therefore found that the author of the work had not produced proof that the producers and the broadcaster of the series could have had knowledge of his novel before writing their screenplay and filming the episodes that it was claimed infringed copyright. The applicant contested this outcome, and appealed to the Court of Cassation. In a much-awaited decision on the principle of the case, the Court stated on 2 October that, in the light of Articles L. 111-1, L. 111-2 and L. 122-4 of the Intellectual Property Code, taken in conjunction with Article 1315 of the Civil Code, "the author of an intellectual work enjoyed in respect of that work, by the mere fact of having created it and irrespective of any public divulgation, an exclusive, intangible right of ownership that was universally applicable. The copyright in such a work was infringed if it was reproduced, and the infringement stood unless the party contesting it demonstrated that the similarities noted in the two works were the result of a fortuitous encounter or reminiscences originating from a common source of inspiration". In doing so, the Court recalled that it was for the person alleged to have infringed the copyright to prove that he/she could not

have had any access to the other work. This overturns the decision of the court of appeal, which had inversed the rules on the burden of proof. The case has been referred to the Court of Appeal of Lyon.

• *Cour de cassation (1re civ.), 2 octobre 2013 - Norbert X. c. France Télévisions et a.* (Court of Cassation (1st civil chamber), 2 October 2013 - Norbert X. v. France Télévisions and others)
http://merlin.obs.coe.int/redirect.php?id=16739 FR

Amélie Blocman
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CSA Charges France Télévisions with Allowing Excessive Air-time for the Promotion of Works by their Presenters

On 9 October 2013, the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) announced that it had served an official warning on France Télévisions for having promoted books by the companies' presenters on a number of occasions during the summer. As the CSA pointed out, while it was possible to invite celebrities to present the goods or services they have been involved in, care needed to be taken to ensure that it did not become surreptitious advertising, which is prohibited by Article 9 of the Decree of 27 March 1992. The warning comes in response to the presentation on 14 July 2013 on France 2, during the broadcast of the programme *Stade 2*, of a book by one of the channel's star sport journalists. The journalist, commenting during the broadcast on the end of the day's stage in the Tour de France cycle race, had been invited to talk about his book. The cover of the book was displayed on air a number of times, and the cost and the name of the editor were also mentioned. The CSA found that these elements sufficed to establish that the work had had the benefit of excessive promotion, in disregard of Article 9 of the Decree. Its sanction follows on from an earlier case of excessive promotion of the book, as a result of which France Télévisions had received a warning; the book had already been promoted on the 1 pm newscast on Sunday, 30 June 2013, when the newscaster, after questioning the author-journalist about the day's stage in the cycle race, had referred to the publication of the book. He had presented it with much praise, showing the cover and a number of archive images illustrating examples taken from the book. Similarly, the presentation a week later, during the 8 pm newscast, of a recently published book by a humourist and journalist employed by the channel had also attracted a warning from the CSA. In the course of an interview, the author-presenter had been invited to talk about his career. The cover of the book had then been shown on the screen four times, and detailed information regarding the title, the editor, and its date of publication had been given. Given the tone used, the level of detail, and the repetition of the presentation of the works in all these sequences, the CSA found that the tolerable limits of promotion had been exceeded, tipping over into surreptitious advertising.

• *CSA, Assemblée plénière du 18 septembre 2013* (CSA, Plenary Assembly on 18 September 2013)
http://merlin.obs.coe.int/redirect.php?id=16737 FR

Amélie Blocman
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Adoption of Legislation Reforming the Public Audiovisual Sector

On 31 October 2013, the National Assembly definitively adopted new legislation and its implementing decree on the independence of the public audiovisual sector. As the texts were not adopted in exactly the same terms in both chambers when they were examined in July and early October 2013, and as it was decided to apply the accelerated procedure, a joint committee comprising seven members of the National Assembly and seven members of the Senate met on 15 October 2013 to propose a joint version. This was speedily approved by the Senate on 17 October 2013, and sent to the National Assembly for final adoption.

The prime purpose of these texts is to revert to the law as it stood before the 2009 reform, giving back to the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) the task of appointing the presidents of the public-sector audiovisual companies. Under the new legislation, the CSA becomes "an independent public authority with legal personality", and will be able henceforth "by a motivated decision" and "by a majority of its members" to terminate the terms of office of the current presidents of the public-sector audiovisual companies. The number of members of the CSA is also reduced, from nine to seven. The French President, who previously appointed three members, will now only designate the president of the institution. The Presidents of the National Assembly and the Senate will each designate three members, in accordance with a three-fifths majority opinion from the Parliament's Cultural Affairs Committees. The new law also aims to strengthen the economic regulatory power of the CSA, which may henceforth allow a pay channel to switch to free-view status, after having "carried out an impact study", and in the light of the economic and financial viability of such a change, particularly with regard to resources from advertising. The text adopted also validates the maintenance of daytime advertising on France Télévisions channels after 2015. Another change is that the CSA will be required to report annually on the development of concentration and diversity in the private audiovisual sector. Regarding production, channels that have provided most of the financing for a programme will henceforth be able to hold co-production rights.

The text also reorganises the CSA's powers of sanction, separating the stages of prosecution and investigation, in accordance with European requirements. The CSA will remain responsible for pronouncing sanctions, but it will only be able to do so if the case is referred to it by a rapporteur whose independence vis-à-vis the members of the CSA and the audiovisual sector is guaranteed by his/her status and the way in which he/she is appointed. This new procedure is particularly welcome, as the Conseil d'État decided to submit a "priority question on constitutionality" to the Council on Constitutionality on the compliance of Article 42 of the Act of 30 September 1986 with the guarantees provided by the Constitution, invoking the lack of separation within the CSA of the functions of proceedings and judgment in respect of the failure on the part of service editors to meet their obligations. The Conseil d'État did indeed find that this lack of separation disregarded the principles of independence and impartiality in the exercise of the powers of sanction arising from Article 16 of the Declaration of the Rights of Man and of the Citizen.

• *Texte élaboré par la commission mixte paritaire annexe au rapport - projet de loi relatif à l'indépendance de l'audiovisuel public* (Text drawn up by the joint committee appended to the report on the bill on the independence of the public audiovisual sector)
http://merlin.obs.coe.int/redirect.php?id=16740 FR

• *Conseil d'Etat, 7 octobre 2013* (Conseil d'État, 7 October 2013)
http://merlin.obs.coe.int/redirect.php?id=16741 FR

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Codicil to the Collective Agreement for the Cinema Sector Concluded in Favour of the Most Fragile Productions

After ten years of negotiation, it will at last be possible for the collective agreement on cinematographic production and advertising films to enter into force. During the night of 7/8 October 2013, all the production employers' organisations and the national union of technicians and workers in the cinematographic and television production industry (Syndicat National des Techniciens et Travailleurs de la Production Cinématographique et de la Télévision - SNTCPT) signed an agreement containing a codicil to the collective agreement. The codicil covers the waiver mechanism provided in respect of low-budget films, which was problematic as it had still not been set up, whereas the collective agreement was to enter into force on 1 October 2013. On 6 September 2013, the judge sitting in urgent matters at the Conseil d'État had suspended enforcement of the decision by the Minister for Employment extending the collective agreement until the arrangements provided for had actually been set up (see IRIS 2013-9/15), which has now been done. "This constitutes a big step forward, as the cinema was the one sector in France not covered by a collective agreement", the Minister for Culture declared.

The text of the agreement that has at last been negotiated and signed provides for special conditional arrangements for films with a forecast budget not exceeding EUR 3 million. Other arrangements are scheduled for films with a budget of less than EUR 1 million - specific negotiations are to be held in the next six months - and documentaries. For this category of films, the wages of technicians are to be fixed on an individual basis, subject to observance of the legal minimum wage. The codicil addresses the problems indicated in the report by Raphaël Hadas-Lebel (see IRIS 2013-5/26) as affecting the most fragile cinematographic productions. The report held that it would cease to be possible to make films with a budget of less than EUR 1 million if the text of 19 January 2012 were to be applied. The agreement also encourages the continuation of shooting films in France, as only films shot mainly in France - unless required otherwise by the scenario for artistic purposes - will be able to benefit.

The parties that were against the collective agreement and had referred the matter to the Conseil d'État for a full decision have agreed to withdraw their complaint if the other trade unions validate the codicil, which seems to be highly likely.

Amélie Blocman
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Under Threat, HADOPI Defends its Achievements

On 10 October 2013, the high authority for the broadcasting of works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet - HADOPI) presented the report of its activities in 2012-2013. This was of particular interest as the conclusions of the Lescure mission in May 2013 on Act II of the cultural exception recommended the transfer of its responsibilities to the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) (see IRIS 2013-6/19). During the Senate's examination of the bill on the independence of public-sector television in September there were even plans to validate the transfer immediately by means of an amendment. In the end, the Government appears to be waiting for this to be discussed in 2014 as part of a wide-ranging Act on creative work. At the time of presenting its activity report, HADOPI's president Marie-Françoise Marais recalled that the institution was "the first public authority dedicated to the protection of copyright and the circulation of works on the Internet. France is a pioneer in the field, and her choices are observed closely, both here and abroad". In just three years,

the HADOPI believes it has reached maturity in carrying out its missions. Thus, with regard to the "graduated response", the president felt that the educational approach adopted had paid off, since just 60 cases had been put in the hands of the public prosecutors (as the "ultimate recourse"), whereas more than two million initial recommendations and more than 200 000 second recommendations had been sent out. The results were less decisive as a result of encouragement for the development of the legal offer, the HADOPI's other mission. 71 on-line services (including 43 which were currently valid) had received the "PUR" label (indicating that the offer being proposed respected creators' rights) since its creation by a Decree of 10 November 2010. Lastly, the role of regulator of the technical protection measures became reality last year, as two opinions were delivered by the HADOPI's college, one on interoperability (see IRIS 2013-5/27), and the other on the benefit of exceptions. A third request for an opinion was currently being investigated; it "should make it possible to re-state the question of the content of the exception for making a private copy of audiovisual programmes in a context of diversification and the multitude of means of accessing these programmes", Ms Marais announced.

The tools placed at the HADOPI's disposal by the 2009 Act and its implementing decrees "have demonstrated their limits", according to the annual report, the fourth section of which is devoted to proposals for improvements. Regarding its mission of encouraging the development of the legal offer, the institution proposes extending to three years the period of time for which the "PUR" label is granted, making the conditions for its renewal less stringent, and attaching the label to services rather than to offers, as is current practice. Regarding the protection of works, the HADOPI would like to be able to receive referrals directly from originators (at present, only the sworn approved agents designated by the professional defence bodies, the copyright collecting agencies and the CNC are authorised to do so). It would also like to see an extension from the current six months to one year of the period during which the public prosecutors may notify acts of counterfeiting to the *Commission de protection des droits*, and the HADOPI given responsibility for sending its recommendations direct to Internet users (the IAPs currently do this), including an indication of the content of the works to which they refer. Lastly, the HADOPI would like to be able to extend its power of regulation regarding technical protective measures to include technical information measures and all types of protected works. It also proposes to allow individuals and associations to refer cases to it, and to broaden its corresponding powers of action in order to meet consumers' expectations. Pending a final decision on its fate, the HADOPI is therefore demonstrating that it intends to continue pursuing its missions. "In June 2014, the HADOPI will still be in existence!" was its president's comment at the end of the presentation.

• *HADOPI, rapport d'activité 2012-2013* (HADOPI, Report of Activities in 2012-2013)
http://merlin.obs.coe.int/redirect.php?id=16738 FR

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GB-United Kingdom

Ofcom Issues Determinations in Two ODPS Appeals

On 27 September 2013, Ofcom, the UK communications regulator, overturned two determinations by the Authority for Television On Demand (ATVOD) for editorial content.

Ofcom oversees providers of on demand programmes via the internet, On Demand Programme Service (ODPS) providers. Ofcom works in conjunction with two co-regulators: the ATVOD and the Advertising Standards Authority (ASA) for advertising content.

ATVOD makes determinations, appealable to OFCOM, regarding what constitutes an ODPS; whether or not a person is providing an ODPS; what constitutes a programme included in an ODPS; and whether someone providing an ODPS has contravened any of the regulatory requirements.

The appeal determinations in question were lodged by Playboy TVUK/Benelux in respect of Playboy TV and Demand Adult. Both Playboy TV UK/Benelux Ltd and Playboy Plus Entertainment are part of the Manwin Holding SARL group of companies.

Playboy TV UK/Benelux Ltd lodged representations with ATVOD that control of the services had passed to Canadian company, Playboy Plus Entertainment after ATVOD had found against PlayboyTV UK/Benelux for infringing ATVOD rules requiring UK-based "porn-on-demand websites to keep hardcore porn behind effective access controls which ensure that under 18s cannot normally see it. The UK company was later fined GBP 100,000 in relation to those breaches."

In overturning the ATVOD determinations, OFCOM found that Playboy TV UK/Benelux Ltd "no longer exercised "general control" over the selection and organisation of the programmes comprising the relevant video on demand services, having furnished further evidence that key parts of their operations were now being run from Canada." Thus, hard-core internet porn can continue to be provided to UK consumers "beyond the reach of British regulation." The GBP 100,000 fine stands, as "the UK company was the provider of the relevant services at the time the breach occurred."

• Appeal by Playboy TV UK/Benelux limited against a Notice of Determination by ATVOD that it was the provider of the service "Playboy TV" (www.playboytv.co.uk) as at 14 september 2012 [Published 27/09/2013]
http://merlin.obs.coe.int/redirect.php?id=16713 EN

• Appeal by Playboy TV UK/Benelux Limited against a Notice of Determination by ATVOD that it was the provider of the service "Demand Adult" (www.demandadult.co.uk) as at 14 September 2012
http://merlin.obs.coe.int/redirect.php?id=16714 EN

• Notice of Determination that Playboy TV UK/Benelux Limited is the provider of the service Demand Adult (www.demandadult.co.uk)
http://merlin.obs.coe.int/redirect.php?id=16715 EN

• Notice of Determination that Playboy TV UK/Benelux Limited is the provider of the service Playboytv.co.uk (www.playboytv.co.uk)
http://merlin.obs.coe.int/redirect.php?id=16716 EN

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Ofcom Considers Broadcast of Offensive Material not Justified by its Context

On 7 October 2013, Ofcom's decided that material broadcast on CBS Reality's Caught on Camera programme was offensive and not justified by its context. Ofcom derives its statutory authority to regulate the standards of television pursuant to the Communications Act 2003. One of Ofcom's duties pursuant to section 3(2)(e) of the Communications Act 2003 is to ensure that programmes broadcast on television adequately protect the public from the inclusion of offensive and harmful material.

Rule 2.3 of the Broadcasting Code requires broadcasters to ensure that broadcasted material that may cause offence is justified by the context.

The CBS Reality channel had for several years broadcasted a real-life crime entertainment show called Caught on Camera showing footage of real life situations of people behaving in a criminal manner.

On 22 June 2013 at midnight, CBS Reality broadcast an episode of Caught on Camera and its content included footage of two men fighting in a bridal shop, and another scene depicted a female driver using her car to push another car out of its parking space.

One sequence showed six incidences of violence by a child carer (nanny) towards an eleven-month-old boy.

The footage was preceded by a warning -"In the next video, a parent's worst nightmare- disturbing and graphic footage of a child being severely mistreated".

The images were accompanied by a narration of a dramatic-sounding nature, and melodramatic music. Many of the incidents were repeated several times including in slow motion, as stills, and each incident appearing on the screen simultaneously. Some of the incidences of violence were shown in red.

CBS Chellozone, the Ofcom licensee and owner of the CBS Reality channel, said in response to the allegation that the footage was unjustifiably offensive, that the programme was broadcast at midnight when the expected audience would be all adults. The programme was crime-focussed, and the footage was available on You Tube. A pre-broadcast warning had been aired, and was aired again during the broadcast. The narrator did explain that the child had no obvious injury, and the nanny had received a prison sentence. Caught on Camera was a format that they had been screening for several years.

Ofcom considered that the nature of showing violence towards a child increased the risk of the material being considered offensive even to an adult audience. It also considered whether the violence was depicted in the context of the overall show and its objectives. Caught on Camera was primarily an entertainment show, and as such the showing of violence towards a child moved away from the audience's expectations for that programme even allowing for the warnings. Repeated showing of the violence, plus the dramatic production values only increased the risk of causing offence. The repeated depiction of the violence and the gulf between the abuse of the child and other incidents being screened in the show exceeded the expectations of the audience, and was not in the context of the show. There was no justification for the repeated showing of the violence towards the child.

Ofcom considered it was insensitive and inappropriate to show such footage in a programme presenting real life crime in a dramatic and entertaining way. Ofcom concluded that there had been a breach of Rule 2.3.

• Ofcom's decision concerning Caught on Camera- CBS Reality - Ofcom Broadcast Bulletin Issue 239, page 9
http://merlin.obs.coe.int/redirect.php?id=16722 EN

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Banned Advertisement for Short-term Lender was 'Socially Irresponsible' says ASA

A radio advertisement for the short-term lender Pounds to Pocket was branded "socially irresponsible" by the Advertising Standards Authority (ASA) on 25 September 2013, and banned from being rebroadcast in its current form.

The ASA took action after a listener complained that the advertisement, which featured an alien character called Bert, trivialised the process of applying for credit and taking on debt.

The advertisement began with a voiceover saying: "Breaking news. Alien life forms are coming to Pounds

to Pocket for help with their finances." A character with a distorted 'alien' voice then stated, "Well I needed a loan quickly. So I looked on your internet and found I can apply for a loan anytime, anywhere."

CashEuroNet UK LLC, which trades under the name Pounds to Pocket, argued that the claim that the company offered loans "anytime, anywhere" was correct because its service was available 24 hours a day, seven days a week. They added that the advertisement directed listeners to their website as a source of further information about the service, and that it made clear that the credit taken on by the alien was essential, because 'Bert' said "I needed a loan quickly". It argued that a need to take out credit could, in no way, be seen as trivialising a decision to take on debt.

The ASA considered the advertisement under Section 1.2 of the UK Code of Broadcasting Advertising (BCAP), which makes clear that advertisements must be prepared with a sense of responsibility to the audience and society. It acknowledged that the advertisement was for short-term credit and that there would be circumstances when consumers might need a loan. But it said that the advertisement did not offer any explanation as to why 'Bert' had found it necessary to take out a loan - unlike other advertisements that the ASA had adjudicated on in recent times.

"We considered the use of an alien character removed the ad and the process of taking on debt, from reality which could disguise the seriousness and consequences of taking out credit," the ASA concluded. "We considered that the combination of the use of the alien, with the claim "pocket a loan today" and the lack of context about why the loan was needed depicted a casual attitude to borrowing money and that the ad trivialised the decision to take out credit. We therefore concluded it was socially irresponsible."

The ASA ruled that the advertisement should not be broadcast again in its current form.

• ASA Adjudication on CashEuroNet UK LLC
http://merlin.obs.coe.int/redirect.php?id=16717 EN

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IE-Ireland

Pirate Bay Blocked and Three-Strikes Protocol Continues

On 12 June 2013 the Irish High Court granted an injunction requiring six Internet service providers (UPC, Vodafone, Imagine, Digiweb, Hutchinson 3G and Telefonica) to block the website known as The Pirate Bay. This is the first time an injunction has been granted under the controversial copyright injunction law that was introduced in February 2012 (see IRIS 2012-4/31).

The Pirate Bay is already blocked by another Internet service provider (ISP), Eircom, without a court order. Four music companies (EMI, Sony, Warner and Universal), sought the order from the court. The ISPs did not oppose the application and indicated their willingness to submit to any appropriate order. The blocking order and related protocol is drafted in terms that do not require a new application to the court if The Pirate Bay changes domain names, IP addresses or URLs.

The court also ordered that the cost of implementing the blocking is to be borne by the ISPs. With respect to the costs of the proceedings themselves the court ordered that the ISPs should bear their own costs. However, one of the ISPs (Vodafone), who had a significant input into the preparation of the protocol related to the order, was awarded its costs up to the point when that protocol was agreed with the music companies.

At an earlier stage in the proceedings Digital Rights Ireland Limited (DRI), an organisation established to defend civil, human and legal rights in the digital age, sought to intervene in the case as an *amicus curiae* (see IRIS 2013-3/19). DRI, claimed that as a neutral party they could bring expertise to the court with respect to human rights and the public interest, that otherwise might not be raised by the parties to the case, who primarily will protect their own discreet interests.

The record companies opposed the application by DRI to join the case, and on 3 May 2013 the Irish High Court refused the application. The court held that DRI could not be regarded as a neutral party, in light of a campaign and blog postings that were undertaken by DRI's Chairman and solicitors, and related to the introduction of the injunction law. Also the court did not believe that, at this stage in proceedings, DRI had demonstrated circumstances that would warrant appointment as amicus curiae.

In separate proceedings, the Irish Supreme Court on 3 July 2013 upheld the earlier High Court decision (see IRIS 2012-8/29) that found that an enforcement notice, issued by the Data Protection Commissioner, directing ISP, Eircom, to cease the implementation of the three-strikes protocol on the grounds that it breached data protection and privacy law, was invalid.

The appeal focused on the technical legal issues of whether the music companies were entitled to judicially review the enforcement notice and whether the notice was invalid for failure to give adequate reasons. The Supreme Court decision means that Eircom can continue to implement the graduated response, known as the three-strikes protocol, which provides that the connections of persistent copyright

infringers are eventually terminated (see IRIS 2005-10/28, IRIS 2006-4/26 and IRIS 2010-6/34).

• EMI Records Ireland Ltd & ors v. UPC Communications Ireland Limited & ors [2013] IEHC 274
http://merlin.obs.coe.int/redirect.php?id=16709 EN

• EMI Records Ireland Ltd & ors v. UPC Communications Ireland Limited & ors [2013] IEHC 204
http://merlin.obs.coe.int/redirect.php?id=16710 EN

• EMI Records Ireland Ltd & ors v. Data Protection Commissioner [2013] IESC 34
http://merlin.obs.coe.int/redirect.php?id=16711 EN

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Recent Broadcasting Complaints Decisions

On 10 September 2013 the Broadcasting Authority of Ireland (BAI) released recent broadcasting complaints decisions. A total of seven complaints were considered in the period. At its meeting held in July 2013, the Compliance Committee upheld one complaint (in part) and rejected three. A further three complaints were resolved by the Executive Complaint Forum at meetings held in July and August 2013.

Under section 48 of the Broadcasting Act 2009, viewers and listeners can complain about broadcasting content which they believe is not in keeping with broadcasting codes and rules. All seven of the complaints dealt either in whole, or in part, with fairness, objectivity and impartiality in current affairs. With respect to the complaint that was upheld the Compliance Committee found that a pre-prepared statement, read by the presenter of the Neil Prendeville Radio Show on Cork96FM, was lacking in impartiality and objectivity.

The statement broadcast, which consisted of a monologue by the presenter outlining his personal views on various issues of public controversy and debate, including his views in relation to non-Irish nationals living in Ireland, was not counterbalanced by an adequate alternative perspective. The Committee held that while some alternate views were voiced by listeners that contributed to the programme this was not adequate to counterbalance the presenter's robust statement. The inadequacy of the alternative view was contrary to the requirements on fairness, objectivity and impartiality in news and current affairs content.

Two of the complaints rejected by the Compliance Committee related to a RTÉ Prime Time programme dealing with issues relating to the provision of Traveller accommodation in Ireland. The broadcast included a pre-recorded element that examined different perspectives on the issue and was followed by a studio discussion with a panel and audience contributors managed and mediated by the programme presenter.

The focus of the complaints related to the composition of the panel, the negative language and content of the programme, which - it was claimed - portrayed Travellers in a negative light, and a failure to give Travellers an adequate opportunity to participate in the discussion. In rejecting the complaints the Compliance Committee considered that a fair opportunity was afforded to all sides of the debate to air their opinions. While they acknowledged that the debate was clearly curtailed, curtailing debates due to time pressures is not uncommon, and the Compliance Committee having reviewed the programme, as aired, found that the handling of the topic, which was the focus of the programme, was fair.

Finally, it should be noted that all the broadcasts that were subjects to these complaints decisions, predated the introduction on 1 July 2013 of the new Code of Fairness, Objectivity and Impartiality in News and Current Affairs (see IRIS 2013-5/32).

• Broadcasting Authority of Ireland, Broadcasting Complaints Decisions, (September 2013)
http://merlin.obs.coe.int/redirect.php?id=16708 EN

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IT-Italy

Council of State Upholds RAI's Obligation to Provide Programmes Free-to-air to all Distribution Platforms

On 30 August 2013, the Third Chamber of the Council of State affirmed the judgment handed down by the Latium Administrative Court on 11 July 2012 (see IRIS 2012-8/31) concerning the encryption by RAI, the Italian public service media operator, of some of its programming and its refusal to supply them on a free-to-air basis with the satellite pay-tv operator Sky Italia.

For several years, Sky Italia users could view RAI's programmes via their Sky Italia decoder box. In September 2008, RAI, RTI, and TI Media, the three main Italian free-to-air television operators, set up a joint venture named Tivù. The latter's corporate mission is to retransmit programmes by its parent companies and third parties on its DTT and satellite networks employing a proprietary encoding protocol. In April 2009, RAI started encoding some programmes falling within its public service remit employing Tivù's encryption protocol. As Tivù's proprietary protocol is different from

the one employed by Sky Italia, Sky Italia users were effectively prevented from accessing RAI broadcasts through their Sky Italia decoder box.

In July 2009, the consumers' association Altroconsumo lodged a complaint with the Italian Communications Authority, AGCom, claiming that, by encrypting some of its programmes, RAI had failed to meet its obligations under the 2007-2009 Service contract, i.e. the agreement between RAI and the Italian ministry of economic development setting out RAI's public service remit. While AGCom, in its decision of 16 December 2009 no. 732/09/CONS, resolved to take no further action against RAI in view of the commitments offered by that broadcaster, both the Latium Administrative Court and the Council of State ruled that RAI had acted in breach of its obligations under Sections 26 and 31 of the 2007-2009 Service Contract.

Section 26 of the Service contract, entitled "Technological neutrality", required RAI to ensure the "gratuitous provision, at no extra cost to the user, of its public service programming through different distribution platforms [04046] without prejudice to specific commercial agreements". In the course of proceedings before the Council of State, AGCom argued that that provision only ensured free access to users, while RAI remained free to charge distributors, such as Sky Italia, as per the applicable commercial agreements. The Council of State rejected that contention. It took the view that since the wording "at no extra cost for the user" entitled users to freely watch RAI broadcasts, the wording "gratuitous provision" was meant to grant distribution platforms free access to RAI's programming. Moreover, the Council of State ruled that the technological neutrality goal of Section 26 and the universal access ethos of public service media called for the broadest possible dissemination of RAI's programmes through all available distribution platforms. In contrast, the commercial exploitation of RAI's programming advocated by AGCom could have prompted distribution platforms to charge users to recoup the costs incurred to gain access to RAI broadcasts. The Council of State also relied on Section 31 of the Service contract, which granted users that were unable to receive RAI broadcasts on DTT free-to-air access to RAI's programming simulcast via satellite and cable.

Finally, the Council of State ruled on Section 3 of the 2010-2012 Service Contract, which required RAI to promote Tivù. Italy's highest administrative court held that that provision amounted to an illegal state aid insofar as it compelled RAI, a state-funded company, to employ its resources for the benefit of Tivù's parent companies and commercial partners, thereby distorting competition. The Council of State added that Section 3 was also incompatible with Section 47(4) of the Consolidated Act on Audiovisual and Radio Media Services, which prohibits RAI from employing its public revenues to finance activities that are not related to its public service remit.

• Consiglio di Stato (Sezione Terza), sentenza n. 4336 del 30 agosto 2013 (Council of State (Third Chamber), judgment no. 4336 of 30 August 2013)
http://merlin.obs.coe.int/redirect.php?id=16719 IT

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LU-Luxembourg

Act on the Creation of a New Media Authority

On 27 August 2013 the *Loi du 27 août 2013 portant création de l'établissement public "Autorité luxembourgeoise indépendante de l'audiovisuel"* (Law of 27 August 2013 on the creation of the Independent Audiovisual Authority of Luxembourg, ALIA law) was formally adopted by the Grand-Duke of Luxembourg. The *Chambre des Députés* (parliamentary assembly) as well as the *Conseil d'Etat* (State Council) had both given their approval to the creation of the new authority in July 2013.

The ALIA Act, which was proposed in October 2012, (see IRIS 2013-1/28) was published on 9 September 2013 in the *Mémorial* (Luxembourg official journal) and will enter into force on 1 December 2013. Except for some structural changes to numbering and other minor modifications, the law corresponds to a large extent to the bill proposed by the Minister for Communication and Media. The ALIA Act establishes the Independent Audiovisual Authority of Luxembourg (ALIA) by amending three acts, most significantly, the Act of 27 July 1991 on Electronic Media (see IRIS 2011-2/31). It thereby effectuates a reform of the Luxembourg regulatory structures by replacing most of the current bodies with a single competent authority.

The new Chapter VII of the Act on Electronic Media - entitled "On supervision of the application of the law" - sets out the essential characteristics, institutional design and functions of ALIA (Articles 35-35sexies). The law establishes ALIA as an independent public body endowed with legal personality. It is financed by the state budget and composed of an Administration Council, an Advisory Assembly and chaired by a director. It is charged, inter alia, with the administration of the permits as well as the monitoring of compliance with the law and grand-ducal regulations by service providers. ALIA has the further task of ensuring access to audiovisual programmes for persons with a visual or hearing disability, encouraging service providers to promote and distribute European works and to develop codes of conduct regarding the presentation of inappropriate audiovisual commercial communication of unhealthy food and drinks accompanying or included in children's programmes. These

tasks reflect some of the aims of the EU's Audiovisual Media Services Directive.

The new key Art. 35sexies of the Act on Electronic Media outlines the sanctioning powers of ALIA. Each natural or legal person may complain to ALIA and allege the failure to fulfill statutory obligations or the non-respect of rules contained in grand-ducal regulations or the book of obligations attached to the permits of providers. ALIA may also initiate proceedings itself. Most importantly, it introduces for the first time, in the Act on Electronic Media, a graduated sanctioning system and defines the sanctions that ALIA may impose on service providers pursuant to a differentiated system including warnings, fines (of EUR 250-25.000), suspensions of transmission and withdrawals of permits. The decisions of ALIA in future will be published in the Luxembourg official journal and may be challenged before the administrative courts of Luxembourg.

In addition, the ALIA Act amends the *Loi du 20 avril 2009 relative à l'accès aux représentations cinématographiques publiques* (Act on access to public cinematographic performances) transferring to ALIA the responsibility for supervision of the classification scheme for cinematographic films and authorizing ALIA to re-classify films where appropriate. Finally, the *Loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat* (Act establishing the system of remuneration for civil servants) is altered to take into account the allowances and payment of the new personnel of ALIA.

• *Loi du 27 août 2013 modifiant la loi modifiée du 27 juillet 1991 sur les médias électroniques en vue de la création de l'établissement public «Autorité luxembourgeoise indépendante de l?audiovisuel» et modifiant 1) la loi modifiée du 22 juin 1963 fixant le régime des traitements des fonctionnaires de l'Etat et 2) la loi du 20 avril 2009 relative à l?accès aux représentations cinématographiques publiques.* (Act of 27 August 2013 on the creation of the Independent Audiovisual Authority of Luxembourg, ALIA Act)
http://merlin.obs.coe.int/redirect.php?id=16718 FR

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LV-Latvia

Electronic Media Council Suggests Amendments to Media Act

On 4 October 2013, the *Nacionālā elektronisko plašsaziņas līdzekļu padome* (NEPLP - National Electronic Mass Media Council), the Latvian media regulator, published its proposals for amendments to the Latvian Electronic Media Act (EMA). The NEPLP prepared the amendments within an internal working group established to implement the "National Strategy for the development of the electronic media within the years 2012-2017". As an executive body, NEPLP does not have legislative initiative rights. Hence, NEPLP submitted its proposal to the responsible Commission of Human Rights and Social Affairs of Saeima (Latvian Parliament) to be assessed and prepared as a legislative proposal.

The most extensive changes proposed provide the NEPLP with the rights to receive full information on media ownership and true beneficiaries. Such information would have to be submitted upon registration of a new electronic media service provider as well as in case of changes in media ownership. The proposal argues that this is necessary to improve media transparency in Latvia.

Furthermore, the proposal suggests that NEPLP be granted the merger control right in the case of media mergers. Currently, mergers between media are controlled by the Competition Council if they reach the merger notification criteria specified in the Competition Law. There is no special procedure for the review of media mergers. On the basis of criteria different from the Competition Law and including media diversity as well as public health and security, the mergers should be reviewed by the media regulatory authority. The NEPLP would accordingly have the right to prohibit the merger or allow it with the option to set up binding commitments. It would also have the right to impose a financial penalty in the amount of up to LVL 1,000 (˜ EUR 1,420) per day for a failure to notify the merger to the NEPLP.

The proposal also includes amendments to the NEPLP's powers to annul the broadcasting or retransmission licence. The rules are specified and shaped in a more proportional manner.

Another potentially far-reaching proposal is the requirement to provide Latvian subtitles for all television programmes in foreign languages. Currently, the broadcasters are free to choose how to provide the translation for programmes in foreign languages - be it by means of subtitling, dubbing, or recording. Only dubbed and recorded programmes are currently taken into account for the mandatory Latvian language quota applicable to national and regional terrestrial broadcasters. Moreover, subtitling is not allowed for the first channel of the public service broadcaster. The amendments aim to improve the knowledge of foreign languages within Latvian society and to provide equal translation terms for all foreign language broadcasts. Currently, the broadcasts in Russian language are mostly subtitled whereas other languages are dubbed.

The promotion of the Latvian language is also contained in the proposal to introduce new regulations for cable operators. The proposed amendments foresee that the cable operators should inform the NEPLP about the basic package of channels, which must be available for all subscribers. The act would also prescribe the main requirements for the channels, which

must be included in these basic packages (including public service broadcasting channels and national commercial broadcasters).

• *Likumu grozījumu sagatavošana* (Proposals for amendments to the Electronic Media Act)
http://merlin.obs.coe.int/redirect.php?id=16705 LV

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NL-Netherlands

Collecting Society VEVAM Cannot Claim Compensation from Cable Companies

On 4 September 2013, the District Court of Amsterdam found that the collecting society VEVAM has no legal basis to claim compensation from cable companies for film directors concerning cable retransmission.

VEVAM is a collecting society representing film directors. It acquires the director's rights and collectively exploits them. VEVAM sued cable companies Ziggo and UPC for compensation for cable retransmissions. RODAP, the collecting society for film producers, public and commercial broadcasting organisations and distributors (e.g. cable companies), joined the proceedings in support of Ziggo and UPC.

Up until 1 October 2012, so called *Kabelovereenkomsten* (Cable Contracts) had been in place between the Dutch cable companies and several collecting societies, including VEVAM. According to these Cable Contracts the cable companies were obliged to pay the collecting societies a monthly compensation per subscriber for the benefit of the different copyright holders. Negotiations concerning a new contract had been underway since December 2010, but eventually broke down. This was due to the fact that the cable companies no longer acknowledged VEVAM's claim to these rights. As such, the cable companies have not been paying any compensation to VEVAM since 1 October 2012. VEVAM consequently initiated summary proceedings against the two cable companies. VEVAM sought a court order for Ziggo and UPC to pay compensation retroactively from 1 October and to resume negotiations concerning the new Cable Contracts. .

VEVAM claimed that its position as a collecting society has a basis in the law, namely Article 26a of the Copyright Act (CA), as well as a contractual basis. Article 26a provides for compensation for simultaneous, unaltered and unabridged broadcasting and for mandatory collective management of these rights. The contractual basis concerns the fact that all film directors that join VEVAM transfer the rights to their works to VEVAM. In their contract with producers, directors also use a clause that excludes the rights exploited by VEVAM from transfer to the producers in accordance with article 45d CA.

The Court rejected VEVAM's argument that they have a legal mandate to collect the compensation for the cable retransmissions. It accepted the cable companies' claim that the broadcasters do not communicate the programmes to the public when they deliver them to the cable companies, due to the technological process that is currently used. As a result, the subsequent broadcasting of these programmes by the cable companies does not constitute a simultaneous, unaltered and unabridged broadcast. Consequently Article 26a does not apply, which means that VEVAM does not have a legal mandate to seek compensation for the cable retransmissions.

VEVAM's contractual claim was also rejected by the Court. It agreed with RODAP's claim that the rights that had been excluded from transfer to the producers, in accordance with 45d CA, only concern the rights that VEVAM exploits according to article 26a CA.

Lastly, the Court found that the film directors have a right to an equitable remuneration from the producers according to Articles 12 and 45d CA. Ziggo and UPC, however, do not have any obligations towards VEVAM. The Court thus rejected VEVAM's claim that, when negotiating, Ziggo and UPC had to take into account VEVAM's legitimate expectations and past payments to VEVAM.

• *Rechtbank Amsterdam, 4 september 2013, ECLI:NL:RBAMS:2013:5554, VEVAM tegen Ziggo/UPC & RODAP* (District Court Amsterdam, 4 September 2013, ECLI:NL:RBAMS:2013:5554, VEVAM v Ziggo/UPC & RODAP)
http://merlin.obs.coe.int/redirect.php?id=16747 NL

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RO-Romania

Audiovisual Media Licence Suspension upon Insolvency Proceedings

On 9 October 2013, the Romanian Ombudsman challenged an Emergency Decree before the Constitutional Court - namely the *Ordonanţa de urgenţă a Guvernului nr. 91/2013 privind procedurile de prevenire a insolvenţei şi de insolvenţă* (OUG - Government Emergency Decree no. 91/2013 on the procedures to prevent insolvency and on insolvency - OUG 91/2013). The Ombudsman claims that the Emergency Decree violates Articles 1(5) and 15(2) of the

Romanian Constitution and the prohibition of retroactive legislation. The OUG 91/2013 had been adopted by the Romanian Government on 2 October 2013 and published in the Official Journal of Romania no. 620 of 4 October 2013.

The OUG was harshly criticized by the President of Romania, by non-governmental civil rights organisatioins such as Reporters Without Borders, ActiveWatch and the *Centrul pentru Jurnalism Independent* (Center for Independent Journalism), the *Uniunea Judecătorilor din România* (Judges Union of Romania), as well as by Romanian media corporations, journalists and an opposition party. Two stipulations are subject to criticism: Articles 81(3) and 384(2) OUG. According to the critics, they might trigger discriminatory and abusive measures against audiovisual media companies facing insolvency.

The Romanian Prime Minister welcomed the action taken by the Ombudsman and also welcomed the diverse political opinions on the topic and the legal discussion.

The contested Article 81(3) foresees that, following the opening of the insolvency proceedings and until confirmation of the reorganisation plan, the audiovisual licence of the debtors is suspended. The licence granted under *Legea Audiovizualului nr. 504/2002* (Audiovisual Law no. 504/2002) will cease to be effective by the date of notification received from the *Consiliul Naţional al Audiovizualului* (National Council for Electronic Media - CNA). Article 81(3) OUG also requires the reorganisation plan to regulate the conditions for the future exercising of the right to broadcast, a specific programme plan, and that the conditions are formally approved by the CNA.

Article 384(2) provides that the Insolvency Code, meant to enter into force on 25 October 2013, would also take effect retroactively for media corporations currently subject to insolvency proceedings.

According to the critics, the OUG is discriminatory against audiovisual media in bad economic shape. They argue that the provisions of the OUG threaten media freedom and the public's right to information. The Audiovisual Law entails no rules on suspension of audiovisual licences. It only foresees withdrawals, extensions or, as a sanction, halving of licences.

• *Ordonanţa de urgenţă a Guvernului nr. 91/2013 privind procedurile de prevenire a insolvenţei şi de insolvenţă* (Government Emergency Decree no. 91/2013 on the procedures to prevent insolvency and on insolvency - OUG 91/2013)
http://merlin.obs.coe.int/redirect.php?id=16707 RO

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Modification and Completion of Law on Romanian Public Broadcaster

On 8 October 2013, the Romanian Senate (Upper Chamber of the Romanian Parliament) adopted by a large majority the *Proiectul de lege pentru modificarea şi completarea Legii nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune* (Bill on the modification and completion of Act no. 41/1994 on the organisation and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation). The decision of the Senate is final. The bill had been adopted by the Chamber of Deputies (Lower Chamber) on 24 September 2013 in the course of an emergency procedure (see IRIS 1998-8/16, IRIS 2000-4/18, IRIS 2003-8/25, and IRIS 2013-5/37).

The changes are meant to increase the funding offered by the state budget for the production and broadcasting of radio and TV progammes aimed at the international market. The new Act also enables Romanian public service broadcasters to set up private legal persons, to become associates of private legal entities, or to buy shares in existing firms and corporations.

The funds of the *Societatea Română de Radiodifuziune (SRR) and Societatea Română de Televiziune* (SRTV) designated for programmes in Romanian and other languages to be broadcast in foreign countries are used for the production and broadcasting of Radio Romania International and of TVR International. The funds are also used for Radio Chişinău, launched by the SRR on 1 December 2011, which covers about 70% of the territory of the Republic of Moldova with programmes in Romanian, using seven FM frequencies. The SRR intends to set up another radio station abroad, in other neighbouring countries with significant Romanian communities.

Moreover, the modification of Act 41/1994 fosters the intention of the SRTV to revive broadcasting its television programmes in the Republic of Moldova, which was interrupted during the ruling of the Communist Party (until 2009).

• *Proiectul de lege pentru modificarea şi completarea Legii nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune* (Bill on the moficiation and completion of the Law no. 41/1994 on the organisation and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation)
http://merlin.obs.coe.int/redirect.php?id=16706 RO

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

IRIS

Legal Observations
of the European Audiovisual Observatory

US-United States

Anti-Revenge Porn Bill and Right to Be Forgotten introduced in California

California has recently taken steps to extend its privacy protections. On 2 October 2013 Governor Jerry Brown signed legislation that criminalises so-called revenge pornography, where individuals post intimate pictures online that had been obtained with former consent solely for private use.

Under the old law, a victim could only obtain a remedy through a civil court judgment, which could be costly and time-consuming. To address this issue, the new law provides law enforcement with new tools to protect victims by making it a misdemeanour to distribute an image with the intent to cause serious emotional distress if the depicted person suffers serious emotional distress. The law, which takes effect immediately, carries a penalty of up to six months in jail and a USD 1,000 fine.

In September 2013, California also adopted legislation that gives minors under the age of eighteen "the right to be forgotten" by removing posts they have made on Internet websites, online services, online applications, and mobile applications. Under the new requirements, which must be implemented by 2015, service providers are required to offer minors the ability to remove their own posts via an online eraser button or other processes to obtain its removal. While the posts must be removed from display, they are not required to be removed from the service providers' servers.

• Senate Bill No. 255 (Act to amend Section 647 of the Penal Code, relating to crimes) of 1 October 2013
http://merlin.obs.coe.int/redirect.php?id=16701 EN

• Senate Bill 568 (Act to add Chapter 22.1 (Commencing with Section 22580) to Division 8 of the Business and Professions Code, relating to the Internet) of 23 September 2013
http://merlin.obs.coe.int/redirect.php?id=16702 EN

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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

Book List

Mouffe, B., Droit de la presse Bruylant, 2013 ASIN: B00DYNEC4K (Format kindle) http://www.amazon.fr/droit-publicit%C3%A9-ebook/dp/B00DYNEC4K/ref=sr_1_-3?s=books&ie=UTF8&qid=1373977579&sr=1-3&keywords=droit+audiovisuel
Mbongo, P., Liberté de la Communication Audiovisuelle au Début du 21e Siècle L'Harmattan, 2013 ISBN 978-2343008103
http://www.editions-harmattan.fr/index.asp

Baldi, P., Broadcasters and Citizens in Europe: Trends in Media Accountability and Viewer Participation Intellect, 2013 ISBN 978-1841501604
http://www.intellectbooks.co.uk/books/view-Book,id=4562/
Schulz, W., Valcke, P., Irion, K., The Independence of the Media and Its Regulatory Agencies: Shedding New Light on Formal and Actual Independence Against the National Context University of Chicago Press, 2013 ISBN 978-1841507330
http://press.uchicago.edu/ucp/books/book/distributed/I/bo15571080.htr
Wöller, W. P. G., Die rechtliche Behandlung von Produktplatzierungen im Fernsehen nach Inkrafttreten des 13. Rundfunkänderungsstaatsvertrags Verlag Dr Kovac, 2013 http://www.verlagdrkovac.de/3-8300-7210-4.htm
Kleist, Th., Scheuer, A., Roßnagel, A., Europäisches und nationales Medienrecht im Dialog: Recht - Politik - Kultur - Technik - Nutzung Nomos, 2013 ISBN 978-3-8487-0720-1
http://www.nomos-shop.de/Kleist-Ro%C3%9Fnagel-Scheuer-Europ%C3%A4isches-nationales-Medienrecht-Dialog/productview.aspx?product=21400