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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Ricci v. Italy

In its judgment in the case of Ricci v. Italy the European Court of Human Rights found that the suspended prison sentence of a TV presenter for disclosing confidential images violated Article 10 of the Convention. The Court is of the opinion that the nature and severity of the prison sentence constituted a disproportionate interference with the applicant's right to freedom of expression. The Court's judgment confirms that prison sentences for defamation of public persons or for making confidential information public, in principle amount to a breach of Article 10 of the Convention (see also ECtHR (GC) 17 December 2004, Cumpănă and Mazăre v. Romania, IRIS 2005-2/4 and ECtHR 24 September 2013, Belpietro v. Italy, IRIS 2013-10/1).

The case of Ricci v. Italy concerns a broadcast of the satirical television programme *Striscia la notizia* on Canale 5, of which Antonio Ricci is the producer and presenter. The programme contained intercepted images of a row between a writer and Gianni Vattimo, a philosopher, during the recording of a programme to be broadcast on RAI. Because Vattimo had not signed a document allowing it to be broadcast on RAI, the pieces of footage used were considered as confidential internal data. However Ricci had obtained access to the footage and he integrated them into a programme on Canale 5, meant to illustrate that the nature of television aimed at creating entertainment rather than informing the public. The RAI lodged a criminal complaint for fraudulent interception and disclosure of confidential communications by Ricci, in breach of Article 617 quater of the Criminal Code. Vattimo also joined the proceedings as a civil party. Ricci was ordered to pay the RAI and Vattimo damages and he was given a suspended prison sentence of four months and five days. However, the Court of Cassation declared the offence time-barred and quashed the Court of Appeal's judgment without remitting it. It upheld the order that Ricci was to compensate the civil parties and to pay RAI's legal costs. The civil courts later ordered Ricci to pay EUR 30,000 damages to Vattimo.

Although the European Court agrees with the Italian judicial authorities that Ricci's programme had breached Article 617 quater of the Criminal Code, it clarifies that the protection of the confidentiality of communications in a data-transmission system had to be balanced against the exercise of freedom of expression. As in many other recent cases, the Court

applies a balancing test between the right to privacy protected by Article 8 of the Convention (protection of confidential communication and reputation rights) and the right to freedom of expression guaranteed by Article 10. This balancing test leaves a broad margin of appreciation to national authorities, but nevertheless a set of criteria needs to be taken into consideration. The Court accepted Ricci's argument that the broadcast footage concerned a subject of general interest, namely the denunciation of the "real nature" of television in modern society. However other means were available to Ricci to broadcast this message, without involving any breach of the confidentiality of communications. According to the Court the programme was also aimed at ridiculing and stigmatising some individuals. Furthermore Ricci, as a media professional, could not have been unaware that disclosing the footage amounted to a breach of the confidentiality of RAI's communications. Accordingly, Ricci had not acted in accordance with the ethics of journalism. Therefore his conviction had not constituted, in itself, a violation of Article 10. Because of the nature and severity of the sanctions imposed on Ricci, however, the Court is of the opinion that the interference by the Italian authorities was disproportionate, referring to Ricci's sentence of imprisonment for four months and five days. Even though it had been a suspended sentence, which was later annulled by the Court of Cassation, that conviction must have had a significant chilling effect, while there were no exceptional circumstances justifying recourse to such a harsh sanction. Consequently, on account of the nature and quantum of the sentence imposed on Ricci, the Court comes to the conclusion that the interference with his right to freedom of expression was not proportionate to the legitimate aims pursued. The Court for that reason finds a violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l'homme (Seconde section), affaire Ricci c. Italie, requête n°30210/06 du 8 octobre 2013* (Judgment by the European Court of Human Rights (Second Section), case of Ricci v. Italy, Appl. No. 30210/06 of 8 October 2013)
<http://merlin.obs.coe.int/redirect.php?id=16748>

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European Court of Human Rights: Delfi AS v. Estonia

On 10 October 2013, the European Court of Human Rights found that one of Estonia's largest news portals on the Internet, Delfi, is not exempt from liability for grossly insulting remarks in its readers' online comments. The news portal was found liable for violating the personality rights of the plaintiff (a captain of industry), although it had expeditiously removed

the grossly offending comments posted on its website as soon as it had been informed of their insulting character. The European Court, in a unanimous decision, found no violation of Article 10 ECHR.

The European Court accepted the Estonian authorities' approach that Delfi's news portal is to be considered as a publisher, rather than as an internet service provider (ISP). The consequence is that, as a publisher, Delfi could not rely on the specific provisions of the Directive 2001/31/EC on Electronic Commerce (Art. 14-15) and the Estonian Information Society Services Act (Sections 10-11) exempting internet service providers, including host-providers, from liability in cases where they expeditiously remove or disable access to content emanating from third parties, as soon as they obtain knowledge or become aware of the illegal nature of the information. The E-Commerce Directive and the Estonian Act also guarantee that no general obligation to monitor should be imposed on the internet service providers, nor a general obligation to seek facts or circumstances indicating illegal activity. The general principle is indeed that expeditious removal upon (notified) knowledge of illegal content exempts the ISP from liability. The reason why Delfi could not rely on the ISP liability exemption is that the news portal had integrated the readers' comments into its news portal and that it had invited the users to post comments, having also an economic interest in exploiting its news platform with the integrated comment environment. Because Delfi was considered a provider of content services, rather than a provider of technical services, it should have effectively prevented clearly unlawful comments from being published. The European Court did not challenge this finding by the Estonian courts, restricting its supervisory role to ascertaining whether the effects of the non-treating of Delfi as an ISP were compatible with Article 10 of the Convention.

The Court found that the interference with Delfi's right to freedom of expression was prescribed by law and was necessary in a democratic society to protect the rights of others. This finding was based on a set of arguments. The Court considered that Delfi should have anticipated that the users' comments could go beyond the boundaries of acceptable criticism and that therefore it should have taken steps in order to avoid being held liable for an infringement of other persons' reputations. Next, the Court is of the opinion that the word-based technical filter that was installed to delete vulgarities, threats or obscene expressions, was shown to be insufficient. Also the notice-and-take-down facility according to which anyone, by simply clicking on a button designed for that purpose, could notify inappropriate comments to the administrators of the portal, had not prevented the grossly insulting comments from being published on the platform. The Court is of the opinion that Delfi exercised a substantial degree of control over the comments published on its portal, although it did not make as much use of this possibility as it could have done. As Delfi allowed comments by non-registered users, and

as it would appear disproportionate to put the onus of identifying authors of the offensive comments on the injured person, the Court is of the opinion that Delfi must be considered to have assumed a certain degree of responsibility for these comments and that it should have prevented defamatory or insulting statements from being made public. The Court refers to the danger that information once made public on the internet will remain and circulate forever. Finally the Court noted that Delfi was ordered to pay EUR 320 in non-pecuniary damages, being by no means a disproportionate sanction for a professional media platform such as Delfi. Based on these elements and "in particular the insulting and threatening nature of the comments" the Court came to the conclusion that the Estonian courts' finding that Delfi was liable for the defamatory comments posted by readers on its Internet news portal was a justified and proportionate interference with Delfi's right to freedom of expression.

• Judgment by the European Court of Human Rights (First Section), case of Delfi AS v. Estonia, Appl. No. 64569/09/07 of 10 October 2013

<http://merlin.obs.coe.int/redirect.php?id=16749>

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European Court of Human Rights: Ristamäki and Korvola v. Finland

In 2008 Juha Arvo Mikael Ristamäki and Ari Jukka Korvola were convicted of defamation. Ristamäki is an editor working in the news service of a national Finnish broadcaster, while Korvola was his direct superior at the time. The reason for the conviction of the two journalists was the broadcast of a current affairs programme criticising the lack of co-operation between the authorities concerning a specific investigation into economic crime. It was revealed that the tax authorities had refused the request of the National Bureau of Investigation to conduct a tax inspection of the functioning of two companies. Reference was made in that connection to K.U., a well-known Finnish businessman who, at the time, was standing trial for economic offences. The public prosecutor initiated criminal proceedings against Ristamäki and Korvola. He maintained that Ristamäki, by editing the programme, and Korvola by allowing its broadcast, had intentionally made false insinuations about K.U. such that their conduct had been conducive to causing suffering to the latter, subjecting him to contempt and causing him damage. The Helsinki District Court convicted Ristamäki and Korvola of defamation pursuant to Chapter 24, section 9, subsection 1, point 1, of the Penal Code. They were sentenced to 30 day-fines each, amounting to approximately EUR 2,000

and they were ordered to pay K.U. EUR 1,800 for suffering and EUR 1,500 in legal costs. The Court of Appeal and later the Supreme Court dismissed the appeals by the journalists.

The European Court disagrees with the findings of the Finnish courts. The Court refers to its reasoning in *Axel Springer AG and Von Hannover no. 2* (see IRIS 2012-3/1) and to the relevant criteria to be applied when balancing the protection of one's reputation (Article 8) with the freedom of expression (Article 10). The Court emphasises that the TV programme was clearly aimed at disclosing a malfunctioning of the administration in two specific cases that both involved influential persons. Both of these persons, including K.U., were mentioned in the programme rather as examples, as the major part of the programme focused on the tax authorities. The unsuccessful criminal investigation of economic crime, and the unwillingness of the tax authorities to contribute to this investigation, was a matter of legitimate public interest. The facts set out in the programme at issue were not in dispute and they were presented in an objective manner, in a non-provocative style and without exaggeration. There is no evidence, or indeed any allegation, of factual misrepresentation or bad faith on the part of the journalists. Neither are there any indications that details of the programme or the photograph of K.U. were obtained by subterfuge or other illicit means: the programme was based on information given by the police authorities and K.U.'s photograph was taken at a public event. From the point of view of the general public's right to receive information about matters of public interest, and thus from the standpoint of the media, there were justified grounds for reporting the matter to the public. The Court observes that the domestic courts did not, in their analysis, attach any importance to the journalists' right to freedom of expression, nor did they balance it in any considered way against K.U.'s right to reputation. It is not clear in the reasoning of the domestic courts what pressing social need in the present case justified protecting K.U.'s rights over the rights of the journalists. In the Court's opinion the reasons relied on by the domestic courts, although relevant, were not sufficient to show that the interference complained of was "necessary in a democratic society". Having regard to all the factors of the case, and notwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the Finnish courts failed to strike a fair balance between the competing interests at stake. There has therefore been a violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights (Fourth Section), case of *Ristamäki and Korvola v. Finland*, Appl. No. 66456/09) of 29 October 2013
<http://merlin.obs.coe.int/redirect.php?id=16750>

EN

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EUROPEAN UNION

Advocate General: Website Block Obligation for Access Providers Approved

In his opinion of 26 November 2013, the Advocate General of the Court of Justice of the European Union (CJEU), in Case C-314/12, considered that a court injunction requiring an Internet access provider to block certain websites that infringed copyright did not breach EU law.

In the dispute between Austrian access provider *UPC Telekabel* and the companies *Constantin Film Verleih GmbH* and *Wega Filmproduktionsgesellschaft GmbH*, the Austrian Supreme Court had referred the matter to the CJEU for a preliminary ruling. The essential question concerned the interpretation of Article 8(3) of Directive 2001/29/EC ("Copyright Directive"), under which injunctions may be issued against intermediaries whose services are used by a third party to infringe a copyright or related right. In the case at hand, the website *kino.to* was the service being used to infringe copyright. However, the injunction was issued against *UPC Telekabel*, which merely provides access to the Internet and, thereby, to *kino.to*. In the Austrian court proceedings, a temporary injunction had been issued against the access provider, requiring it to block the website, even though *UPC Telekabel* had no legal connection with *kino.to* and did not provide it with Internet access or storage space. In previous CJEU case law, injunctions issued under Article 8(3) of the Copyright Directive had always been issued against the access provider of the infringing party, not that of the user of an illegal service.

In the Advocate General's opinion, the wording, context, meaning and purpose of Article 8(3) of the Copyright Directive suggested that it applied to the access providers of website users. The legislator required strict, effective regulation for the protection of copyright. If an operator of illegal services could not be prosecuted, for example if it was based outside Europe, the need for effective protection could require the access provider to take responsibility, even if it had no legal or actual connection with the illegal service.

A court blocking order was limited by the fundamental rights of the parties concerned. Generally speaking, and unless specific measures were ordered (so-called "*Erfolgsverbot*"), blocking orders could not be imposed. However, the Advocate General thought a blocking order was not necessarily disproportionate even if the blocking measures required considerable investment on the part of the access provider and yet were easy for users to circumvent. Incidentally, national courts should consider all the specific circumstances of each individual case and weigh up the fun-

damental rights of each party. As part of this weighing process, account should be taken of the possibility that more access providers would be required to act in the future. If such action would cost so much that it would jeopardise the business model of the access providers concerned, consideration should be given to requiring rightsholders to share these costs. Priority should continue to be given, however, to the enforcement of copyright against the operators of the illegal website or its access provider.

• Opinion of Advocate General Pedro Cruz Villalón of 26 November 2013 (case C-314/12)

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SL SV

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Council of the EU: Creative Europe Programme Approved

On 11 December 2013, the European Commission's Creative Europe programme was formally adopted by the European Parliament and the Council. This new programme aims to strengthen Europe's cultural and creative sector by increasing the budget by 9% compared to the current level. This means that over the next seven years (2014-2020) the total budget will amount to EUR 1.46 billion.

The European Commission proposed the new programme to support and improve the cultural and creative industry in Europe. The programme will enable artists and other cultural professionals to operate beyond Europe and reach new audiences. In order to achieve this cross-border approach, the programme will provide funding for 250,000 artists and cultural professionals, 800 European films, 2,000 European cinemas and 4,500 book translations. The programme will also support projects with similar objectives such as the European Capitals of Culture, European Heritage Label, European Heritage Days and five European prizes.

The focus on cross-border cooperation in Europe also contributes to the safeguarding of cultural and linguistic diversity. Studies have shown that only 13% of Europeans go to concerts produced by other European countries and 4% attend theatre productions from different European countries. By improving the ability to reach broader audiences, the Commission aims to tackle market fragmentation and create more social cohesion.

In addition to these cultural advantages, Creative Europe will also enable the European economy to grow and create new jobs. Up to 4.5% of the Gross Domestic Product (GDP) is amassed by the cultural and

creative sectors and accounts for nearly 4% of employment. This indicates the importance of culture to the economy. Raising the cultural budget to EUR 1.46 billion over the next seven years is therefore an important step towards improving the European economy. In addition, increasing the budget of the Creative Europe programme will also contribute to the retention of Europe's position as world leader in exports of creative industry products. Investments in this industry are necessary in order to prevent Europe from being superseded by other countries.

The new programme will replace the current Culture, MEDIA and MEDIA Mundus programmes and consists of three strands: a Culture sub-programme, a Media sub-programme and a cross-sectoral strand. The first sub-programme will provide funding for performing and visual arts, heritage and other cultural practitioners. The Media sub-programme will support cinema and the audiovisual industry. Lastly, the cross-sectoral strand consists of a Financial Guarantee Facility, which enables small businesses to access bank loans, and provides funding for policy cooperation and experimental projects bridging different cultural and creative sectors.

All 28 member states can apply for funding from Creative Europe. In addition to this, European Free Trade Association countries, European candidate and potential candidate countries and neighbourhood countries can also apply for funds from the Creative Europe programme. However, Non-European countries have to pay for an 'entry-ticket' in order to participate. Individuals cannot apply directly for funding from the new programme. Nevertheless, around 250,000 artists and cultural and audio-visual professionals will be supported under the programme, so these individuals will be reached indirectly.

The Creative Europe programme entered into force on 1 January 2014.

• Regulation (EU) No 1295/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC

<http://merlin.obs.coe.int/redirect.php?id=16752>

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• Creative Europe Website

<http://merlin.obs.coe.int/redirect.php?id=16753>

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European Commission: "Distribution" Section of French Tax on Television Services Validated

On 21 November 2013, the European Commission val-

idated the arrangements for the “distribution” section of the French tax on television services (“TST-D”), which finances almost 40% of the annual budget of the National Centre of the Cinema and the moving image (*Centre National du Cinéma et de l’Image Animée* - CNC). Introduced in 2007 and codified in Articles L. 115-6 et seq. of the Cinema and Moving Image Code, the tax is a contribution made by television editors and distributors, including telecom operators, in favour of audiovisual creation. Its tax base was extended in the 2012 Finance Act to include the operator’s entire turnover from subscriptions, not merely the part corresponding to television. This was done to counteract the practice of certain operators, which consisted of isolating television services within their triple-play subscriptions in order to substantially reduce their taxable base. The reform had been suspended, however, because of a disagreement between France and the European Commission. Further to the judgment delivered by the Court of Justice of the European Union on 27 June 2013, in which it found that the tax on electronic communications operators did not contradict Community principles (see IRIS 2013-7/3), the modernisation of the arrangements for the tax on television services will be able to enter into force at last. As soon as the reform is applied in the 2014 budget year, it will make it possible to take into account all the modes of accessing television services, including via the Internet. “This is an important step forward in favour of cinematographic and audiovisual creation, validating the fundamental elements of the cultural exception by bringing them up to date. This principle of the parties upstream of works being shown that benefit from them having to contribute to their financing is thus adapted to the digital era”, said the Minister of Culture Aurélie Filippetti in a press release. By a quirk of timing, the channel TF1 raised a priority question on constitutionality in an appeal before the administrative court claiming the repayment of EUR 1.9 million paid in 2011 in tax by editors and distributors of television services. On 6 November 2013, the Conseil d’État sent TF1’s priority question on constitutionality to the Constitutional Council, which found that Article L. 115-6 c) of the Cinema Code was contrary to the principle of equality with regard to the payment of taxes (Article 13 of the 1789 Declaration of the Rights of Man and of the Citizen). It remains to be seen whether the Constitutional Council will declare the provision unconstitutional, which might then alter the economy of the tax. The Council has three months to issue its decision.

• *Communiqué de presse du ministère de la Culture et de la Communication, 21 novembre 2013* (Press release by the Ministry of Culture and Communication, 21 November 2013)
<http://merlin.obs.coe.int/redirect.php?id=16803>

FR

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European Commission: State Aid for Films According to the New Cinema Communication

State aid for European films and other audiovisual works may from now on cover all aspects of the creation process. This is the main change introduced by the 2013 Cinema Communication that was adopted by the European Commission on 15 November 2013. This document replaces the 2001 Cinema Communication that expired on 31 December 2012, after having been renewed three times: in 2004, 2007 and 2009 respectively (see IRIS 2004-4/6, IRIS 2007-7/4 and IRIS 2009-3/3).

In principle, aid granted by a member state that does or may distort competition is considered to be incompatible with the internal market. However, Article 107(3)(d) of the Treaty on the Functioning of the European Union allows for aid that promotes culture and heritage conservation. According to Article 108 of the Treaty, the Commission needs to review national state aid systems. The 2001 Cinema Communication set out the criteria used to assess national support schemes for film productions with the aim of providing legal certainty to all the stakeholders involved. The new Communication responds to changes in the film industry that have emerged since then. For example, new digital technologies affect digitization and make storytelling possible over multiple platforms and formats. This is now explicitly addressed. The Commission consulted film professionals and member states for comments on the text.

The new Communication applies to a wider range of activities than just film production. Scriptwriting, development, film distribution and promotion as well as cinemas may be supported. Apart from this, aid for specific production activities is not allowed. This means the money cannot be reserved for separate parts of the budget. The applicable aid intensity for the production of a film continues to be limited to 50% of the overall budget. This norm will also apply to distribution and promotion activities. However, in principle there is no limit set for aid to scriptwriting or development. Co-productions funded by more than one member state can now receive aid of up to 60% of the production budget. Commercially difficult works, such as documentaries or films by first-time directors, are excluded from these limits.

The Commission acknowledges that territorial spending conditions may be necessary to preserve national infrastructures for film production. New to the 2013 Communication is that such obligations should remain proportionate to the actual aid. Member states may demand a minimum level of production activity in their territory, which shall not exceed 50% of the production budget. In the case of aid awarded in the form of grants, the maximum territorial spending obli-

gation should be limited to 160% of the aid amount. As before, the overall maximum is an obligation of 80% of the production budget. The last revision to be noted is that the new Communication introduces the need for the preservation of film heritage. Member states should encourage aided works to be deposited for preservation and non-commercial use throughout the Union.

The Communication entered into force on 16 November 2013. New state aid measures are now assessed according to the criteria set out therein. Member states should bring their existing schemes into line with the new Communication within two years.

• Communication from the Commission on State aid for films and other audiovisual works (2013/C 332/01)

<http://merlin.obs.coe.int/redirect.php?id=16754>

DE EN FR

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• Memo of the European Commission, State aid: Commission adopts new film support rules - frequently asked questions, 14 November 2013

<http://merlin.obs.coe.int/redirect.php?id=16756>

EN

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European Commission: Consultation on Copyright Review

On 5 December 2013, the European Commission issued a public consultation on the review of EU copyright rules. The consultation is part of the review process that the European Commission announced in 2011.

The background of the consultation lies in the opportunities and challenges posed by new forms of distribution and use of content in the digital realm. For, as the consultation explains, legislators must ensure that the copyright framework remains appropriate for the new environment. In this context, the European Commission has previously identified relevant issues in its "Communication on Content in the Digital Single Market" (COM (2012)789 final, see IRIS 2013-2/4). Now, based on these issues, the consultation aims to assess whether the system of rights, limitations and enforcement needs to be adapted.

To that end, stakeholders are invited to express views on issues such as territoriality in the Internal Market; harmonisation; limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and the efficiency and legitimacy of enforcement. The stakeholders are representatives of all stages in the value chain, including right holders, intermediaries, end users and institutional users such as libraries. Responses are welcome until 5 February 2014.

The questionnaire contains questions under six main headings:

- 'Rights and functioning of the Single Market' covers 5 sub topics. These topics include the (territorial) scope of exclusive rights involved in digital transmission; the feasibility of a registration system for works at EU level; and the appropriateness of the current copyright protection term.

- 'Limitations and exceptions in the Single Market' first asks general questions concerning the optional character and territorial scope of the current exceptions. Other general questions consider the need for new limitations and more flexibility in the existing framework. Also, the question of fair compensation is addressed. Next, the section aims to identify problems with the use of works in specific contexts. It does so by taking into account the perspective of users, service providers and right holders. The contexts are off-premises access to content in libraries and archives, teaching, research, use by disabled people, text and data mining and user-generated content.

- 'Private copying and reprography' touches on the scope and application of the relevant exceptions in the digital environment. Furthermore, problems regarding cross-border transactions and indiscriminate application of private copying levies are examined.

- 'Fair remuneration of authors and performers' raises concerns about inadequate remuneration as regards online exploitation and asks about preferred remuneration mechanisms.

- 'Respect for rights' contains questions on enforcement in cases of infringement with a commercial purpose; the role of intermediaries in the current legal framework; and a balance between respect for copyright and fundamental rights such as privacy.

- 'A single EU Copyright Title' investigates the desirability of total harmonisation and replacement of national copyright laws.

The consultation responses will contribute to a decision in 2014 on whether to initiate legislative reform proposals.

• Public Consultation on the Review of the EU Copyright Rules

<http://merlin.obs.coe.int/redirect.php?id=16790>

DE EN FR

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NATIONAL

AT-Austria

BKS Criticises Advertising Logos Shown With Football Scores

In a recently published decision of 11 September 2013, the Austrian *Bundeskommunikationssenat* (Federal Communications Board - BKS) ruled on the distinction between sponsor references and product placement.

In the case at hand, the Austrian public broadcaster *Österreichischer Rundfunk* (ORF) had displayed the logo of the Austrian daily newspaper “*Kurier*” to the right of the match clock on several occasions during a football match when the match score had been shown.

The regulator, *KommAustria*, had considered the appearance of the advertising logo as a sponsor reference prohibited under Article 17(1) of the *ORF-Gesetz* (ORF Act), which bans the use of sponsor references during programmes. In its appeal, ORF argued that graphics showing match scores and statistics were part of the action and clearly constituted match-related information. Logos had been shown ever since captions had first been displayed on television. There was no difference between a logo shown on an interview wall or clothing and one that was included along with match information in the television picture. ORF therefore contested the classification of the logo as a sponsor reference. It added that, according to BKS case law, a sponsor reference had to take the form “presented by X” or contain some other reference to the programme. In the present case, there was no such connection.

In the appeal proceedings, the BKS upheld *KommAustria*'s decision. Referring to recital 91 of the EU Audiovisual Media Services Directive (2010/13/EU), which it considered to be applicable to the Austrian provision, the BKS confirmed that the logo constituted a sponsor reference. Recital 91 stated that, in product placement, the reference to a product was built into the action of the programme. Although sponsor references could be shown during a programme, they were not part of the plot.

In the opinion of the BKS, the logos shown by ORF as part of an additional “graphic overlay” above the pictures of the match did not form part of the action that constituted the subject of the programme. It was therefore irrelevant that the logo appeared at the same time as the information relating to the football match (time, score, goalscorers). Although, like the

“*Kurier*” logo, such additional information was part of the programme, it was not part of the action depicted by the programme.

For these reasons, ORF's appeal against *KommAustria*'s first-instance decision was dismissed.

• *Entscheidung des BKS vom 11. September 2013 (GZ 611.009/0004-BKS/2013)* (BKS decision of 11 September 2013 (GZ 611.009/0004-BKS/2013))

<http://merlin.obs.coe.int/redirect.php?id=16791>

DE

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BG-Bulgaria

The Constitutional Court Annulled the Lustration Provisions in the Radio and Television Act

Through its Decision No 8 of 11 October 2013 in constitutional case No 6 of 2013 the Constitutional court of the Republic of Bulgaria has declared that Article 26, point 3 and Article 59 (2), point 3 of the Radio and Television Act are unconstitutional and incompatible with the international treaties to which Bulgaria is a party.

The proceedings were instituted on 16 January 2013 on an initiative from 57 Members of the 41st National Assembly (i.e. the previous composition of the National Assembly). In the petition instituting proceedings it is alleged that the contested dispositions of Article 26, point 3 and Article 59 (2), point 3 of the Radio and Television Act are inconsistent with the principle of the rule of law (Article 4 (1) of the Constitution), the principle of the supremacy of the Constitution (Article 5 (1) of the Constitution), the principle that all citizens shall be equal before the law (Article 6 (2) of the Constitution), and that these provisions also restrict the free choice of occupation and place of work in violation of Article 48 (3) of the Constitution. According to the petitioners the contested provisions of the Radio and Television Act establish explicit prohibition for a specific category of persons who had occupied specific public service posts in the past to be currently employed at certain public service positions. In that regard the Court held, that belonging to structural bodies of the former State Security may not serve as a ground on which a restriction of the constitutional rights may be based nor as a ground for the above-mentioned restriction to be employed at certain public service positions, since the nature of the latter restriction is discriminatory.

Besides, the contested provisions of the Radio and Television Act according to the petitioners are incompatible with the generally recognised international law

provisions and with the international treaties, to which Bulgaria is a party, since they constitute disproportionate human rights restriction within the meaning of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). According to the petitioners these provisions are in breach of Article 14 of the ECHR, Article 2 (2) and Article 5 of the International Covenant on Economic, Social and Cultural Rights, Article 25, c) and Article 26 of the International Covenant on Civil and Political Rights, Article 1, points 1 and 2, Articles 2 and 3, b) of the Convention No 111 concerning Discrimination in Respect of Employment and Occupation of the International Labour Organisation, Articles 20 and 21 of the EU Charter of Fundamental Rights, the European Social Charter and the Universal Declaration of Human Rights.

The contested provisions of the Radio and Television Act violate the principle that all citizens shall be equal before the law (Article 6 (2) of the Constitution). Inasmuch as any lustration constitutes extraordinary and isolated legislative means to restrict rights, based on facts from the past about a group of people, it is inadmissible under Article 6 (2) of the Constitution of the Republic of Bulgaria.

The contested provisions constitute disproportionate human rights restriction within the meaning of the ECHR and the case-law of the European Court of Human Rights (the Court) in Strasbourg. In its settled case-law the Court holds that the introduction of lustration provisions restricts human rights, guaranteed under the ECHR (*Sidabras and Dziautas vs Lithuania - Applications Nos 55480/00 and 59330/00*; *Rainys and Gasparavicius vs Lithuania - Applications Nos 70665/01 and 74345/01*; *Zdanoka vs Latvia - Application No 58278/00*). The contested provisions are incompatible with Article 1, points 1 and 2, Articles 2 and 3, b) of the Convention No 111 concerning Discrimination in Respect of Employment and Occupation of the International Labour Organisation (promulgated in the State Gazette No 35 of 2 May 1997). By implicitly prohibiting discrimination in the area of employment and occupation, in the Convention it is provided that, "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination". It is even more unacceptable to associate the established restrictions with the realisation of the disposition of the Article 40 (1) of the Constitution according to which the press and the other mass information media shall be free and shall not be subjected to censorship. It is unacceptable in modern democratic states to guarantee any freedom by means of legislative restrictions of the constitutional rights of the citizens. The Decision of the Constitutional court has been promulgated in the State Gazette No 91 of 18 October 2013. Three among the twelve judges of which the Constitutional Court is composed delivered a "dissenting opinion" by voting in favour of the lustration provisions in the law.

This is the second occasion on which the Constitutional Court has the opportunity to deliver a decision with regard to these legal dispositions. At the time when the Radio and Television Act was adopted in 1998 the lustration provisions in the law were contested by Decision No 10 of 25 June 1999 of the Constitutional Court of the Republic of Bulgaria in constitutional case No 36 of 1998 where the Court has ruled that those texts are not incompatible with the Constitution. Fifteen years later the collaborators with the services of the former State Security have been rehabilitated in the mass media sector.

• Решение № 8 от 11 октомври 2013 г. по конституционно дело № 6 от 2013 г. на Конституционния съд на Република България (Decision No 8 of 11 October 2013 in constitutional case No 6 of 2013 the Constitutional court of the Republic of Bulgaria)
<http://merlin.obs.coe.int/redirect.php?id=16766>

BG

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Declaration of the Media Regulatory Body Regarding the Coverage of Refugees Issue in the National Electronic Mass Media

At its regular meeting on 5 November 2013, the Council for Electronic Media (CEM) have discussed the results of its focused monitoring of the electronic mass media coverage of the reception of refugees in the country. In general, there is timely, versatile and professional provision of information with regard to the refugees issue for the benefit of the audience; however isolated cases of hate speech and of the use of illegal and morally questionable qualifications have been detected such as the use of the words "cannibals", "mob", "despicable primates", etc.

Besides undertaking all the necessary actions according to its competences and relying on Recommendation No R (97) 20 on "hate speech" adopted by the Committee of Ministers of the Council of Europe, on this occasion CEM points out that the freedom of expression does not include any forms of expression which incite racial hatred, xenophobia, anti-Semitism and all forms of intolerance. In practice that means that any opinion may be disclosed in public, but it should not be expressed in a manner that may affect another's dignity or ethnic or religious belonging.

CEM is of the position that such hate speech is the eventual outcome not of the mass media representatives but of their interlocutors, who are often politicians, however the legal liability rests with the media itself and the television presenters and reporters are under the obligation to take all the necessary steps in order to protect the affected persons (see IRIS 2013-9/5). Another issue of importance is that the presenters in some of the mass media are simultaneously also politicians. This is a sign of a specific conflict of

interest case and opens an opportunity for broad public debate.

• Декларация на Съвета за електронни медии относно отразяването на темата за бежанците в електронните медии (Declaration of the Media Regulatory Body Regarding the Refugees Issue Coverage in the National Electronic Mass Media, 5 November 2013)

<http://merlin.obs.coe.int/redirect.php?id=16662>

BG

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CH-Switzerland

New Agreement on Cinematographic Coproduction with Luxembourg

As part of the bilateral discussions held during the 64th Cannes Festival, Switzerland and Luxembourg signed a new agreement on cinematographic coproduction on 15 May 2011. The agreement, which entered into force on 1 August 2013, provides an official framework for audiovisual projects involving Swiss and Luxembourgish partners. It also aims to encourage economic and cultural exchanges between the two countries. The agreement is in addition to the treaties concluded by Switzerland with France, Germany, Austria, Italy, Belgium and Canada to promote the production of audiovisual projects by making it possible to gather funds on an international scale.

The agreement between Switzerland and Luxembourg makes it possible to recognise cinematographic coproductions in any genre (fiction, documentary, animation) with financing shares of between 20 and 80% of the final cost of the work and proportionate technical and artistic contributions. The agreement also recognises cofinanced films, on condition that the minority financial participation is no more than 10% of total production costs, that the project is carried out on the territory of one of the two States parties, and that both States parties support the film's production by allocating selective financial aid.

In order to be able to take advantage of the coproduction agreement, a cinematographic work must obtain recognition from the competent authorities of both States within one month of completing filming. Applications for recognition should be sent to the competent authorities of both countries (in Switzerland, the Federal Culture Office (*Office Fédéral de la Culture*) before filming starts. Coproduced films must be made by production companies with good technical and financial organisation that are also able to demonstrate recognised professional experience. In addition, indoor filming should be carried out for preference in studios established on the territory of one of the two States parties. Filming carried out in a natural

environment may nevertheless be undertaken on the territory of a member state of the European Union, a member State of the European Free-Trade Association (EFTA), or any other State participating in the coproduction.

The coproductions recognised by the new agreement between Switzerland and Luxembourg automatically have the benefit of the advantages granted in each of the States parties as a result of provisions concerning the cinematographic industry. The recognition of a film may, however, be dependent on conditions and charges in order to ensure compliance with the provisions of the coproduction agreement. Switzerland and Luxembourg also undertake to promote cultural diversity, particularly through education programmes and participation in film festivals. They also undertake to promote the reciprocal distribution and promotion of the two countries' cinematographic works.

• *Accord de coproduction entre la Suisse et le Luxembourg du 15 mai 2011* (Coproduction agreement of 15 May 2011 between Switzerland and Luxembourg)

<http://merlin.obs.coe.int/redirect.php?id=16824>

DE FR IT

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More Freedom for SSR's Internet Offer

The Federal Council (the Swiss government) has modified, with effect from 1 June 2013, the concession granted to the Swiss radio and television broadcasting company (SSR) to allow it to develop its activities on the Internet. The measure was adopted after negotiations between SSR and newspaper editors with a view to concluding a collaboration agreement in the field of Internet (see IRIS 2012-9/13) had broken down. The Federal Council then maintained the principle of not allowing SSR to use advertising or sponsoring on its Internet sites, and expressed its intention to allow the public-service broadcaster greater freedom regarding the content of its on-line offer. The revision of the concession granted to SSR reflects the wishes of the Swiss government on this point.

The new regulations enable SSR to put audio and video content, images or graphic items and texts not exceeding 1000 characters on-line on demand, without restrictions. For news, sport and local and regional information, texts may only exceed 1000 characters if they are related to a broadcast and are published no more than 30 minutes before the broadcast is aired. However, the concession does not state specifically how long content may remain on-line after broadcasting; the Federal Council nevertheless requires a degree of proximity in terms of time. Also, if texts have some connection with a broadcast, that broadcast must be referred to clearly.

In addition, 75% of texts published no more than 30 days earlier must be directly associated with audio and video content; the percentage is calculated on the basis of the overall reporting offer produced by SSR, not including user-generated content or the services provided by SSR (EPG, on-line shop, programme announcements, etc). Games and chat-rooms are only authorised if they have a direct link with a broadcast in terms of time and topic. Lastly, the ban on on-line shopping allowing members of the public to buy, sell or swap products still stands.

The new concession also liberalises the regime of live broadcasting on the Internet (original broadcasts or live video streaming): it now authorises the broadcasting of public events without requiring either notification to be sent to the Federal Communication Office (*Office Fédéral de la Communication* - OFCOM) or simultaneous television broadcasting ("simulcasting"). The only original broadcasting allowed is of political, economic, sports and cultural events organised by third parties that are of significant importance for the whole country or for any one language region. Original broadcasts are assimilated to television programmes and may therefore contain advertising and sponsoring, as well as reporting services produced by SSR (commentaries, interviews, etc).

• *Concession octroyée à SRG SSR idée suisse du 28 novembre 2007, modifications entrées en vigueur le 1er juin 2013* (Concession granted to SRG SSR idée suisse on 28 November 2007; amendments entered into force on 1 June 2013)

<http://merlin.obs.coe.int/redirect.php?id=16801>

DE FR IT

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DE-Germany

Federal Supreme Court Upholds NDR Screenplay Scandal Rulings

In a decision of 3 September 2013 (case no. 5 StR 187/13), the 5th Criminal Division of the *Bundesgerichtshof* (Federal Supreme Court - BGH) rejected the appeals lodged by the defendant against rulings in the so-called "NDR screenplay scandal" as unfounded.

The ruling of the *Landgericht Hamburg* (Hamburg District Court) of 8 October 2012 is therefore legally valid. In the proceedings before the *Landgericht Hamburg*, which attracted huge public interest, the former chief editor of *Norddeutscher Rundfunk* (North German Broadcasting Corporation - NDR) had received a suspended sentence of one year and ten months for taking a bribe (Art. 332 of the *Strafgesetzbuch* (Criminal Code - StGB)), fraud (Art. 263 StGB) and embezzlement (Art. 266 StGB). Her husband, a screenwriter,

who was found guilty of abetment, and a film producer, found guilty of offering a bribe (Art. 334 StGB), were both fined.

As chief editor, the defendant had used, in NDR productions, screenplays that she or her husband had written under a pseudonym. Since she was an ARD employee, she should only have received half the fee under internal NDR rules. The film producer knew about the use of the misleading pseudonyms. In order for the bribery offences to be confirmed, the chief editor had to be classified as a "public official", which the District Court ruled was the case in accordance with a landmark decision of the BGH concerning the former sports chief of *Hessischer Rundfunk* (Hessian Broadcasting Corporation - hr).

• *Pressemittteilung des BGH zum Beschluss vom 3. September 2013 (Az. 5 StR 187/13)* (Federal Supreme Court press release concerning the decision of 3 September 2013 (case no. 5 StR 187/13))

<http://merlin.obs.coe.int/redirect.php?id=16792>

DE

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Federal Administrative Court: League Manager Game Not "Gambling" in the Sense of Inter-State Gambling Agreement

In a ruling of 16 October 2013 (case no. 8 C 21.12), the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) decided that the "Super-Manager" fantasy league game, which was advertised and organised online, did not constitute gambling in the sense of the *Glücksspielstaatsvertrag* (Inter-State Gambling Agreement - GlüStV).

The *Regierungspräsidium Karlsruhe* (Karlsruhe regional council) had previously banned the plaintiff from organising and advertising the game. After the organiser's appeal against this ban had been rejected by the *Verwaltungsgericht Karlsruhe* (Karlsruhe Administrative Court) on 18 October 2010 (case no. 3 K 3226/09), the *Verwaltungsgerichtshof Baden-Württemberg* (Baden-Württemberg Administrative Court) lifted the ban on appeal and ruled that the game did not fall under the scope of application of the *Glücksspielstaatsvertrag* (decision of 23 May 2012 - case no. 6 S 389/11). The appeal against this decision by the *Land* of Baden-Württemberg has now been rejected by the BVerwG.

Participants in the "Super-Manager" fantasy league game could pay EUR 7.99 to select a football team comprising 18 Bundesliga players. They could adjust their team before each set of Bundesliga matches, received points after each match day depending on their players' performances, and could compete against other managers and their teams in several

leagues. The most successful managers could win prizes, with EUR 100,000 awarded to the overall winner, known as the “Super-Manager”.

In view of these rules, the BVerwG thought the fantasy league game did not constitute gambling in the sense of Article 3(1)(1) GlüStV because in gambling, not only was winning due to chance, but it was also dependent on a stake being put down. In the present case, however, the EUR 7.99 was only a participation fee and had no impact on participants’ chances of winning. Rather, these depended on whether the players they had selected actually played and how well they performed. A broader application of the concept of gambling defined in Article 3(1)(1) GlüStV could also be ruled out. In particular, the GlüStV limited gambling in order to combat addiction and crime and to protect young people and gamblers. This could only be justified under constitutional law if it was a suitable, necessary and reasonable means of achieving these objectives. Since, under the rules of the “Super-Manager” game, no additional money had to be paid during the game in order to make up for any losses suffered, the court thought there was only a small risk, which could be countered through less stringent means. Since commercial law in particular was sufficient to achieve this, banning the game was disproportionate.

• *Pressemitteilung des BVerwG zum Urteil vom 16. Oktober 2013 (Az. 8 C 21.12)* (BVerwG press release on the decision of 16 October 2013 (case no. 8 C 21.12))

<http://merlin.obs.coe.int/redirect.php?id=16794>

DE

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Publication of Information About Celebrity’s Daughter Was Admissible

In a currently unpublished decision of 5 November 2013, the *Bundesgerichtshof* (Federal Supreme Court - BGH) ruled that the publication of the first name, age and parentage of the children of well-known celebrities can be disclosed in certain circumstances.

The court action concerned a report in the “*Viel Spaß*” magazine about the (adopted) children of a famous television presenter. The presenter’s adopted daughter had asked the magazine not to publish the fact that she was the presenter’s child; her request was initially upheld in both lower-instance courts.

Following the defendant’s appeal, the BGH explained firstly that publication of this information constituted an infringement of the right to informational self-determination protected under Articles 2(1) and 1(1) of the *Grundgesetz* (Basic Law - GG) and Article 8(1) of the European Convention on Human Rights. After

carefully weighing the freedom of the press against the right to privacy of the children concerned, the Supreme Court found that the details of the adoption (first name, age and parentage of the plaintiff), which had taken place in 2000, had been made known to the general public in the press a few years previously, and were still available on the Internet. The inclusion of this information in the report therefore did not constitute a serious infringement of the plaintiff’s general right to privacy. Ruling that the freedom of the press and the public’s right to information took priority in this case, the BGH quashed the appeal court’s decision and dismissed the action.

• *Pressemitteilung des BGH zum Urteil vom 5. November 2013 (Az. VI ZR 304/12)* (Federal Supreme Court press release concerning the decision of 5 November 2013 (case no. VI ZR 304/12))

<http://merlin.obs.coe.int/redirect.php?id=16793>

DE

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No Volume-Based Speed Caps for Flat-Rate Internet Customers

In a ruling of 30 October 2013, the *Landgericht Köln* (Cologne District Court) decided that *Deutsche Telekom AG* was not allowed to cap transmission speeds when fixed-network Internet customers who had paid a “flat rate” subscription fee exceeded data limits. An action had been brought by the *Verbraucherzentrale Nordrhein-Westfalen* (North Rhine-Westphalia consumer advice centre), which is authorised as an eligible institution under Articles 3 and 4 of the *Unterlassungsklagengesetz* (Injunctions Act - UKlaG) to bring actions concerning the use of invalid general terms and conditions.

The court held that a clause in the service description that was supposed to apply to contracts concluded after 2 May 2013 for certain “Call&Surf Comfort” tariffs was invalid because it created an unreasonable disadvantage under the terms of Article 307(1) and (2)(2) of the *Bürgerliches Gesetzbuch* (Civil Code - BGB). The clause was also “surprising” in the sense of Article 305c(1) BGB.

The relevant clause of the general terms and conditions was not exempt from the review of subject-matter required under Article 307(3)(1) BGB, as *Deutsche Telekom* had argued. It did not describe the kind, extent or quality of the main service due, but limited or amended the main service promised elsewhere in the service description.

The clause restricted essential contractual rights in such a manner that there was a risk that the purpose of the contract would not be achieved, in the sense of Article 307(2)(2) BGB, as a result of which

an unreasonable disadvantage was found. According to the court, the purpose of this contract was based on an interpretation of the term “flat rate”. At least in the fixed-network market, this was understood to mean a fixed price paid by the customer for Internet access at a certain broadband speed without any restrictions or hidden costs. The disadvantage was unreasonable because the substantial reduction in speed to less than 10% of the agreed minimum speed violated the balance between the value of the service and the price paid, jeopardising the purpose of the contract from the customer’s perspective. The court did not think the number of customers who would actually be affected by the restriction on the basis of their average monthly data consumption was relevant. Nevertheless, it expressly pointed out that such a bandwidth limit could affect not only so-called “power users”, but a large number of other customers, particularly those who streamed television programmes and films.

The clause was also “surprising” and therefore invalid in the sense of Article 305c(1) BGB, firstly because it was incompatible with the overall concept of the contract and contradicted the relevant advertising claims, which meant it was an unusual clause. Secondly, the provision was found under the heading “Data volumes”, which made no mention of any speed caps. Since the average customer would not have expected such an unusual clause, it should have been emphasised typographically.

• *Urteil des LG Köln vom 30. Oktober 2013 (Az. 26 O 211/13)* (Decision of the Cologne District Court of 30 October 2013 (case no. 26 O 211/13))

<http://merlin.obs.coe.int/redirect.php?id=16795>

DE

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Düsseldorf Appeal Court Exempts Hidden Allegations from “Stolpe Ruling”

In a judgment of 16 October 2013, the *Oberlandesgericht Düsseldorf* (Düsseldorf Court of Appeal - OLG) decided that the so-called “Stolpe ruling” does not apply to hidden allegations.

The dispute in the case at hand concerned what the plaintiff claimed was a negative impression created by reading “between the lines” of a report on an insolvency procedure. As far as these “hidden statements” were concerned, an injunction could only be granted against allegations under Articles 823(1) and 1004(1)(2) of the *Bürgerliches Gesetzbuch* (Civil Code) in conjunction with Articles 1(1) and 2(1) of the *Grundgesetz* (Basic Law) if a distinction was made between the communication of individual facts from which readers could draw their own conclusions and

an actual hidden statement in which the author, through the interplay of open statements, created an additional factual statement or forced readers to draw a particular conclusion. According to the OLG, only in the latter case could a hidden statement be equated with an open statement by the author and therefore justify an application for an injunction. However, in view of the freedom of the press, an injunction could not be granted if the reader drew his own, non-compelling conclusions from the facts reported.

The OLG referred to the so-called “Stolpe ruling” of the *Bundesverfassungsgericht* (Federal Constitutional Court), under which an injunction could be granted against ambiguous statements even if only one of a range of possible meanings infringed the privacy of the person concerned. In order that the chilling effect of court sanctions did not excessively infringe the freedom of expression, the *Bundesverfassungsgericht* had, at the same time, given the author the opportunity to clarify his statement in a declaration to the person concerned. Any claim to a future injunction was therefore excluded on account of the subsequent removal of the risk of a repeat infringement.

In the case at hand, however, the *OLG Düsseldorf* adhered to the traditional case law of the *Bundesgerichtshof* (Federal Supreme Court - BGH), according to which, where “hidden statements” were concerned, the aforementioned distinction had to be drawn between the open communication of individual facts, from which the reader independently drew his own conclusions, and the interplay of open statements that forced readers to draw a particular conclusion. The principle behind the Stolpe ruling only applied in the latter case. Since, in the present case, readers had not been forced to conclude that an insulting statement had been made, the freedom of the press was worthier of protection than the plaintiff’s general right to privacy.

• *Urteil des OLG Düsseldorf vom 16. Oktober 2013 (Az. I-15 U 130/13)* (Ruling of the Düsseldorf Court of Appeal of 16 October 2013 (case no. I-15 U 130/13))

<http://merlin.obs.coe.int/redirect.php?id=16796>

DE

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Cologne Appeal Court Grants Right to Information in File-Sharing Case

According to media reports, in a decision taken in a file-sharing case on 7 October 2013, the *Oberlandesgericht Köln* (Cologne Appeal Court - OLG) granted a rightsholder’s right to information held by an Internet access provider (case no. 6 W 84/13). In the case concerned, the rightsholder had asserted a claim to information under the terms of Article 101(9) of the

Urheberrechtsgesetz (Copyright Act - UrhG) in order to issue a warning to a file-sharer whose IP address it had previously tried to trace.

According to the court, a right to information arose if there was a sufficient degree of certainty to exclude reasonable doubt. Absolute certainty in the scientific sense was unnecessary. In this case, the court did not think there was “reasonable doubt”, since it had been verified firstly that the investigation software had functioned perfectly and secondly that the investigator appointed by the rightsholder had given a sworn declaration that it had traced the IP address concerned. In the court’s opinion, it could also be sufficiently verified, with the aid of the hash value used to identify the file, that the rightsholder’s works had been shared.

In its decision of 20 January 2012 (case no. 6 W 82/11), for example, the OLG Köln had considered the undoubted reliability of investigation software to be a condition of the right to information under Article 101(9) UrhG. This could not be established through the plaintiff’s sweeping statements, but only if the software had been checked by independent experts.

• *Beschluss des Oberlandesgericht Köln vom 7. Oktober 2013 (Az. 6 W 84/13)* (Decision of the Cologne Appeal Court of 7 October 2013 (case no. 6 W 84/13))

<http://merlin.obs.coe.int/redirect.php?id=16797>

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Düsseldorf Administrative Court Confirms Border-Region Cable Network Rules

In two parallel procedures, the *Verwaltungsgericht Düsseldorf* (Düsseldorf Administrative Court - VG) ruled, in its decisions of 27 September 2013 (case nos. 27 K 5549/12 and 27 K 5665/12), that the provision of Article 18(4) of the *Landesmediengesetz Nordrhein-Westfalen* (North Rhine-Westphalia Media Act - LMG) had not become inapplicable or redundant as a result of the switch to digital terrestrial broadcasting technology (DVB-T).

According to Article 18(4) LMG, the *Landesanstalt für Medien Nordrhein-Westfalen* (North Rhine-Westphalia Media Authority - LfM) must ensure that analogue cable networks in border-region transmission zones carry a channel that is easy to receive by terrestrial means across the border.

The VG considered that both plaintiffs - *Norddeutscher Rundfunk* (North German Broadcasting Corporation - NDR) and the Dutch public service broadcaster *Nederlandse Publieke Omroep* (NPO) - were entitled to be included by the LfM.

The amendment of the rules governing international frequency allocation - known as regional “allotments” instead of the previous “assignments” that had depended on the broadcaster’s location - did not affect the applicability of Article 18(4) LMG. As before, there was a terrestrial “overspill”, which was referred to in Article 18(4) LMG. Neither the wording of the provision nor its origins suggested that it did not apply to channels that could be received by digital terrestrial means. On the contrary, even though various amendments had been made to the LMG in relation to digital technology, the legislator had left the provision unchanged, which suggested that it remained applicable. The aim and object of the provision, namely the protection of adjacent communication zones beyond political borders and national administrative areas, suggested that programmes that could be received digitally should be included in analogue cable networks.

Regarding which reception methods should be taken into account when investigating which programmes could be received using the “average aerial”, it was - as the LfM’s constitution confirmed - roof aerials that should be considered, rather than portable aerials, as the LfM had argued. The LfM was therefore required to recalculate the relevant transmission zones.

The VG ruled that an appeal against its decision could be lodged with the *Oberverwaltungsgericht* (Administrative Court of Appeal) of North Rhine-Westphalia in Münster.

• *Urteil des VG Düsseldorf vom 27. September 2013 (Az. 27 K 5549/12)* (Ruling of the Düsseldorf Administrative Court of 27 September 2013 (case no. 27 K 5549/12))

<http://merlin.obs.coe.int/redirect.php?id=16798>

DE

• *Urteil des VG Düsseldorf vom 27. September 2013 (Az. 27 K 5665/12)* (Ruling of the Düsseldorf Administrative Court of 27 September 2013 (case no. 27 K 5665/12))

<http://merlin.obs.coe.int/redirect.php?id=16799>

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Facebook Obligated to Re-Open Page Belong- ing to TV Series Fan

On 28 November 2013 the regional court in Paris delivered a noted judgment, ordering Facebook to re-open an “unofficial” fan page for the TV series *Plus Belle la Vie* (“PBLV”), blocked by the delegated producer in 2012. There have been more than two thousand episodes of this series (a record on French television), broadcast every evening on France 3 since 2004, attracting large audiences both on TV and on

social networks. The creator and administrator of the “pblvmarseille” Internet site, an unofficial site devoted to the series, launched the “PBLV Marseille” page on Facebook in 2008. In 2012, she discovered that the producer of the series and holder of the brand names “Plus Belle la Vie” and “PBLV”, with whom she maintained regular relations, had asked Facebook, which had agreed, to merge her unofficial page (which had 605 200 fans at the time) with the official page of the production company. She felt that the production company had appropriated the fans of her page without notifying her, and had the company and Facebook France summoned to appear in court so that she could obtain a court order to have her page reinstated and the prejudice she had suffered made good. The production company argued that the unofficial page was likely to create confusion in the public’s mind and that its creator was guilty of free-riding, and claimed EUR 8,000 in compensation.

The judges began by recalling that, under Article L. 713-2 of the Intellectual Property Code and Article 5 of Directive 2008/95/EC to approximate the laws of the member states relating to trade marks, “the owner of a trade mark is entitled to bar any third party, in the absence of consent being given, from using for business purposes a sign identical to the trade mark for products or services identical to those for which it is registered”. They went on to note that it was not proven that the disputed page had been created for commercial purposes with the aim of distributing goods or services on the market. The presence of the logo and name of the series on the page was also deemed insufficient proof of a commercial purpose, as was the organisation of competitions and games by the site’s creator, since it was not proven that a charge was made for participation or that she had gained any economic advantage. Even though the disputed Facebook page had a very large number of fans, it was not possibly to state categorically that the production company’s trade marks were used on the page for “business purposes”. In the absence of proof that the creator and administrator of the unofficial “PBLV Marseille” Facebook page had used the trade marks for business purposes or had gained any direct or indirect advantage from their use, the court found that the production company that owned the trade marks of the series could not prevent their use. Furthermore, the blocking by the company Facebook France of access to the disputed page, undertaken in application of the Act of 21 June 2004 on confidence in the digital economy, was not held to be at fault. The request on the part of the company that owned the trade marks may have appeared justified to the company Facebook France, which was required to intervene rapidly. Since it was not in fact justified, the court ordered Facebook to reinstate the “PBLV Marseille” page as it existed before it was closed down, and imposed a fine of EUR 500 for each day of delay.

Furthermore, noting firstly that the production company was aware of the existence of the Facebook page at issue, as it had approached its creator and thanked

her for her support, and secondly how many fans the page had, which was a gauge of the human investment involved, the court found the production company’s initiative, resulting in the closure of the page, unfair. It awarded the page’s creator and administrator EUR 10,000 for the resulting moral prejudice caused. No doubt the many fans of the television series present on social networks will welcome this decision.

• *Tgi de Paris (3e ch. 4e sect.), 28 novembre 2013 - Laurence C. c. Telfrance Série et Facebook France* (Regional court of Paris (3rd chamber, 4th section), 28 November 2013 - Laurence C. v. Telfrance Série and Facebook France)

FR

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Prisoner Claims Ban on Showing Images of his Escape

On 8 November 2013 the judge at the regional court in Nantes delivered a decision under the urgent procedure in a rather unusual case. A well-known criminal who had escaped from prison on 13 April 2013 using explosives, after having taken four prison warders hostage (he was recaptured the following month) had discovered that the television channel M6 was preparing for broadcast a number of images filmed by prison video surveillance cameras when he escaped, as part of a news report on prisons and the violence that is omnipresent in them. He therefore had the television channel summoned to appear in court under the urgent procedure on the basis of Article 9 of the Civil Code, in order to prevent the images from being used. This was because he held that broadcasting them without first obtaining his consent constituted an infringement of his right to the use of images of him, all the more so in that they were covered by the confidentiality of the court’s investigation, and that a prison was not a public place. In his decision, the judge was careful to recall the principle according to which banning the showing of an audiovisual work to the public constituted in itself an exceptional infringement of free speech that could only be envisaged in extremely serious cases. In accordance with Article 10 of the European Convention on Human Rights (ECHR), showing the image of a person, even if it was in circumstances independent of his/her professional activities, was lawful as long as it was for the purpose of illustrating an article or report on a topical event in which that person was involved. The judge recalled that the prisoner’s escape had been extensively covered in the media and therefore constituted a news item. Moreover, showing the applicant’s image constituted a pertinent illustration in a news report on violence in prisons, in which escape stories were an appropriate example. The court therefore found that showing these images constituted legitimate information for the public on a subject of general interest.

The prisoner was therefore not justified in invoking his right to prevent the use of images of him; it was irrelevant that the programme was not devoted to him exclusively, and that the images had been recorded in a place not open to the public, while he had been committing a crime for his own personal ends. This was all the more true in that, as the European Court of Human Rights had noted, Article 8 of the ECHR could not be invoked to complain of damage to one's reputation which would foreseeably result from one's own actions, particularly in the context of a crime. Lastly, it was noted that neither the television channel nor the producer were bound by the confidentiality of the investigation. The applicant had therefore not demonstrated in the present case the existence of a manifestly unlawful disturbance or imminent damage that he would be entitled to have stopped. The judge therefore rejected his application, and found for the remainder that, by choosing to make use of a procedure that was reserved for urgent matters in order to claim a measure of exceptional gravity on the basis of arguments that were bound to fail, the applicant had abused his right to take legal action. He was therefore ordered to pay a civil fine of EUR 2,000. The news report and the disputed images were therefore broadcast on M6 on 10 November 2013 as scheduled.

• *TGI de Nanterre (ord. réf.), 8 novembre 2013 - R. Faïd c. Sté M6 et a.* (Regional court of Nanterre (under the urgent procedure), 8 November 2013 - R. Faïd v. the company M6 and others) FR

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Streaming Sites to Be Blocked and Dereferenced

On 28 November 2013, the regional court in Paris ordered the five main Internet access providers (IAPs) in France to block access to sixteen streaming sites “in the Allostreaming galaxy” and four search engines to dereference them. The decision is the result of a wide-ranging legal offensive launched in 2011 by the main syndicates and associations of rightsholders in the audiovisual, cinema and video fields, acting on the basis of Article L. 336-2 of the Intellectual Property Code, instituted by the “HADOPI” Act of 12 June 2009, according to which “in the presence of an infringement of copyright or a related right caused by the content of an on-line service of communication to the public, the regional court, deliberating if necessary under the urgent procedure, may, at the request of the rightsholders (..) or professional defence bodies, order any measures aimed at preventing or halting such infringement of copyright or a related right in respect of any person who might contribute to remedying the situation”.

The judge began by noting that these sites operating in the Allostreaming network were breaking the

law since they offered content that was exclusively, or very nearly so, dedicated to showing films or television series in the form of streaming without the authorisation of the rightsholders. The applicant organisations had also established the impact of illegal downloading and streaming on their professional activity in terms of the decreased volume of their turnover. The judgment also noted that the five IAPs at issue, representing more than 92% of French subscribers, made it possible for their subscribers to access the disputed sites, and that, in their capacity as intermediary within the meaning of Article 8.3 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, they were in a position to contribute to remedying the infringements of copyright and related rights, since they had the possibility of preventing their subscribers accessing the content proposed on the sites at issue.

With regard to ways of implementing the blocking measures being requested, the court found that these “should only respond to what appeared to be necessary in order to preserve the rights at issue”. In this respect, the limit imposed on the freedom of speech of the operators of the sites at issue was justified by the need to implement effective means of combating the infringement of creators' rights being committed by these sites. The rights of Internet users, for their part, were not being limited disproportionately since they were able to access the films and series at issue in a lawful manner. Nor could the principle of the IAPs' freedom to conduct a business be held up to oppose instituting the measures being called for. The judgment therefore ordered the IAPs to implement every suitable and effective measure in order to prevent access to the sites at issue from anywhere in France, including blocking the sites.

The court then examined the application for the dereferencing of the sites, directed at the four browsers at issue (Google, Microsoft, Yahoo! and Orange). It noted that they did indeed act in the capacity of intermediary within the meaning of the Directive, and that Article L. 336-2 of the Intellectual Property Code applied to them. Thus, by using algorithms to collect and index pages and domain names, they contributed to providing access to unlawful content - which technology was used to effect the unlawful access (downloading or streaming) was irrelevant. It was also noted that for their part the operators of the sites at issue had agreed to their sites being indexed, and had the possibility of removing themselves from the process, and could promote it. The court therefore allowed the applications to have the said sites dereferenced, leaving the browsers at liberty to decide which measures they considered suitable. These measures, and the blocking by the IAPs, must be applied within fifteen days of the date of notification of the decision, for a twelve-month period.

The applicant rightsholders, concerned that the sites at issue might circumvent the provisions of the judgment, for example by changing their domain names

or by creating mirror sites, called on the judge to allow the main features of the judgment to evolve, using a tool to update the court's injunctions. The court found, however, that given the current state of the legislation, there was no way of checking the judgment was being complied with, either directly or through the intermediary of a public agent. Should the circumstances of the dispute evolve, the judge invited the applicant parties to refer the matter to the courts again, under the urgent procedure, to update the measures that had been ordered.

The judgment was welcomed by the professional organisations in the cinema industry, which stressed that the judgment "acknowledged that the proceedings to oblige the IAPs and the browsers to cooperate with the rightsholders were founded".

• *TGI de Paris, 28 novembre 2013 - Association des producteurs de cinéma, Syndicat de l'édition vidéo numérique et a. c. Yahoo, Bouygues Telecom, Free, Google et autres* (Regional court in Paris, 28 November 2013 - Association of cinema producers, syndicate of digital video editors, and others v. Yahoo, Bouygues Telecom, Free, Google, and others)

FR

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Audiovisual Handling of War Situations - CSA Adopts New Recommendation

On 20 November 2013, the audiovisual regulatory authority (*Conseil Supérieur de l'Audiovisuel* - CSA) adopted a recommendation on the handling of war situations by audiovisual communication services. Last February, the CSA launched a consultation on the subject with the main audiovisual groups and journalists, after France Télévisions had broadcast particularly distressing images of the war in Mali. The new recommendation repeals the two previous recommendations, one on the conflict in the Middle East (2003) (see IRIS 2003-4/15), and one directed at all television and radio services on international conflicts and their potential repercussions in France (2004) (see IRIS 2005-2/23). For all broadcasts handling war conflicts, the CSA recommends compliance with three major principles. Firstly, protection of the dignity of the human person, particularly that of hostages, when their image or any other element permitting their identification is used by their kidnappers. Editors must also refrain from presenting violence and human suffering in a manifestly indulgent manner when broadcasting images of people who have been killed or injured and the reactions of their family and friends. The CSA's second principle involves scrupulous observance of the stipulations of the Geneva Conventions and their Additional Protocols on the protection of prisoners of war and civilians in times of war, and the CSA also recommends respecting public order and

the honesty of information. Thus in the event of uncertainty regarding the information being broadcast, journalists are invited to exercise caution, for example by using the conditional tense, quoting the source and the date, and rectifying the information without delay should this become necessary. They must also treat with "rigour and balance" international conflicts likely to intensify tensions and antagonism among the populace or result in attitudes of rejection or xenophobia. Lastly, the CSA recommends observance of the principles regarding the protection of persons, inviting the audiovisual services to systematically broadcast a specific warning before any particularly harrowing sounds and/or images, in order to protect the most vulnerable members of the populace from their potential impact. More generally, the CSA calls for observance "with constant vigilance" of the rules laid down in its recommendation of 7 June 2005 on indicating programme classifications in respect of young people, and in its deliberation of 20 December 2011 on the protection of young people and the code of ethics for programmes on on-demand audiovisual media services.

The National Union of Journalists (*Syndicat National des Journalistes* - SNJ) immediately condemned the CSA's initiative, claiming that it was "trying to interfere in journalists' ethics". "Under cover of respect for human beings and the protection of young people, the text is an attempt to regulate the editorial coverage of the audiovisual channels, both public and private, of wars, conflicts and even acts of terrorism." The SNJ believes that the CSA is exceeding its powers, and has announced that it is "considering an appeal to the Conseil d'État".

• *Recommandation n°2013-04 du 20 novembre 2013 relative au traitement des conflits internationaux, des guerres civiles et des actes terroristes par les services de communication audiovisuelle* (Recommendation no. 2013-04 of 20 November 2013 on the treatment of international conflicts, civil wars and acts of terrorism by audiovisual communication services)

<http://merlin.obs.coe.int/redirect.php?id=16802>

FR

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Streaming Copyright Material Over Cable is Ok; Streaming it Over Mobile Telephony Networks is Not

In an ongoing legal dispute involving two prior judgments and a reference to the Court of Justice of the European Union (CJEU), in the latest instalment, ITV, Channel 4 and Channel 5 have won the right to prevent an online streaming service provider from retransmitting the TV programmes they show to users

of mobile devices via any "mobile telephony network". The decision is dated 7 October 2013.

The March 2013 ruling of the CJEU states, "The concept of 'communication to the public' ... covers a retransmission of the works included in a terrestrial television broadcast where the retransmission is made by an organisation other than the original broadcaster, by means of an internet stream made available to the subscribers of that other organisation who may receive that retransmission by logging on to its server, even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver."

The service was provided by TVCatchup, a website enabling "eligible members of the public to watch live television using the internet". It is a UK company, providing "an online streaming service to users for personal, private and domestic use only, within the personal residence of the individual user, to qualified members who may only access the website from the area within which the broadcast was intended to be viewed⁰⁴⁰⁴⁶"

The broadcasters argued that the site streams material to which they own the rights without their permission.

Generally, UK copyright laws state that the unauthorised communication of rightsholders' content to the public is an act restricted by copyright in certain circumstances, namely, if a broadcast or film is made available to the public via an "electronic transmission" in a broadcast that is accessible by the public "from a place and at a time individually chosen by them". This is so by virtue of the Copyright and Related Rights Regulations 2003, implementing Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

However, section 73 of the Copyright, Designs and Patents Act sets out an exception from the separate rights that broadcasters enjoy permitting "the unlicensed re-transmission of broadcasts transmitted over cable networks by ITV, Channel 4 and Channel 5 and other listed 'qualifying services' by others within the area in which the original transmissions are received, subject to compliance with the wider copyright rules relating to the reproduction and making available of their content."

By the Order of 7 October 2013, Lord Justice Floyd ruled that TVCatchup may only communicate material insofar as it is permitted under section 73 CPDA; further, he ruled that TVCatchup may not make "04046transient copies of films made by the broadcasters within the "buffers of [its] servers", unless the section 73 defence applies."

• Judgment of the Court (Fourth Chamber), *ITV Broadcasting Ltd and Others v TVCatchup Ltd*, Case C-607/11, 7 March 2013

<http://merlin.obs.coe.int/redirect.php?id=16757> DE EN FR

CS	DA	EL	ES	ET	FI	HR	HU	IT	LT	LV
MT	NL	PL	PT	SK	SL	SV				

• *ITV and Others v TVCatchup Limited Order*, 7 October 2013, High Court, Chancery Division

<http://merlin.obs.coe.int/redirect.php?id=16758> EN

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English Courts Clarify Law on Image Rights

The Honourable Mr Justice Birss of the High Court, London gave judgment on 31 July 2013 in a court action between the pop star Rihanna and the United Kingdom clothing store Topshop which confirmed in English law that there is no legal concept of image rights, which is found in certain legal jurisdictions such as the USA. Image (or Personality) Rights is the right of an individual (or a legal entity) to have control over the commercial exploitation of their name, likeness, or other unequivocal facet of their identity; for example if a photographic image of a well-known performer appeared on a T-shirt sold in the USA for commercial gain, then the performer's consent would need to be sought, as well as compensation paid regardless of the fact that the performer did not own the copyright in the photograph used. Mr Justice Birss clarified the English law by stating that there was no legal concept of Image Rights in English law.

Even so the judge found in favour of Rihanna against the clothing retailer, Topshop, for using an image of her on a T-shirt giving the impression that it was official merchandise authorised by the singer and approved by her, by applying the legal concept of passing off which is a form of misrepresentation whereby the public could be confused by the representation, believing it to be one thing when it was another; in this case official Rihanna merchandise even though her "R" logo did not appear.

The background is that Rihanna had previously endorsed Topshop through publicity events and selling her merchandise in their shops. However, separate from such arrangement Topshop had purchased photographs from a photographer taken of Rihanna during the video shooting of her song 'We Found Love'.

One of the images appeared on a line of T-shirts produced by Topshop and sold in 2011 and early 2012. The photographer owned the copyright in the image.

However, Topshop had not sought the permission of Rihanna nor her management for the use of her image in the context of that T-shirt.

In the light of the previous relationship with Topshop it gave the impression that the T-shirt was official merchandise and endorsed by Rihanna, which was not the case.

The Honourable Mr Justice Birss in his judgment said that in English law there was no legal concept of image rights. However, Rihanna had proven her case as one of passing off whereby a substantial number of customers were likely to have bought the T-shirt in the belief, albeit falsely, that the product had been authorised by Rihanna.

The judge considered that the actions by Topshop represented damage to Rihanna's goodwill and it was for her to determine what garments the public thought had received her endorsement.

Mr Justice Birss did not suggest that there had been any bad faith on the part of TopShop, but given their previous relationship with Rihanna he considered that confusion in the marketplace would arise as to whether the product was thought to have had been officially endorsed. Topshop feel that no confusion has arisen, and are considering an appeal.

The case has clarified the matter of image rights in English law and that famous people cannot stop the use of photographs of themselves for use on a product, but that they can prevent passing off of products where they are sold or promoted in a certain way that may lead the public to believe the product has the official endorsement of the person.

• Robyn Rihanna Fenty(1) Roraj Trade LLC(2) Combermere Entertainment Properties LLC(3) v. Arcadia Group Brands Limited (t/a Topshop)(1) Topshop/Top Man Limited(2) High Court of Justice, Chancery Division, Intellectual Property [2013]EWHC2310 (Ch)
<http://merlin.obs.coe.int/redirect.php?id=16762>

EN

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Ofcom Considers Broadcast of Material as Potentially Harmful and Unfair

Ofcom's decision of 23 October 2013, considered that material broadcast on ITV's daytime programme 'This Morning' constituted unjust and unfair treatment by revealing a person's identity, and not giving the person a right of reply.

One of Ofcom's duties under section 3(2)(e) of the Communications Act 2003 (The Act) is to ensure that programmes broadcast on television adequately protect the public from the inclusion of offensive and harmful material. Also, under section 3(2)(f) of the Act there is a duty to protect persons from (i) unfair treatment in programmes included in a TV broadcast; and (ii) unwarranted infringements of privacy resulting from the activities relating to a TV broadcast.

Ofcom's responsibilities under the Act are implemented through the Broadcasting Code ("the Code"). Rule 2.1 of the Code states that "Generally accepted standards must be applied to the contents of television ...so as to provide adequate protection for members of the public from the inclusion in such services of harmful and /or offensive material".

Rule 7.1 states that "Broadcasters must avoid unjust and unfair treatment of individuals or organisations in programmes."

On 8 November 2012, 'This Morning' ran a feature about child sex abuse allegations against people in public office, and included the Prime Minister, David Cameron, being interviewed by the programme's presenter Philip Schofield who presented the Prime Minister with a list of names of persons who had been identified from a search of social media suggesting that they may be implicated in child sex abuse. The names were written on a piece of card and handed by Mr Schofield to Mr Cameron. Inadvertently, the card was caught on camera so the names could be seen although they were not legible.

On 2 November 2012, the public sector broadcaster BBC on its flagship news programme had a feature suggesting that a "leading Conservative figure from the (Margaret) Thatcher years" had been involved in sex allegations at a children's care home. Although not specifically named, Lord McAlpine, who had been a leading member of the Conservative Party, was wrongly suggested to be the person guilty of the offence arising from speculation on social media sites. The allegations against him were false. This Morning fuelled the speculation about Lord McAlpine by identifying named parties from social media sites.

Once it was apparent that Lord McAlpine was innocent, ITV and BBC issued apologies.

Whilst it was very unlikely that any member of the public would take offence about the interview with Mr Cameron, the presentation of the card to him was sensationalist. Also, the questions asked linked Lord McAlpine to the sex abuse allegations, especially following BBC's Newsnight feature. ITV's presentation was based on cursory internet research and Lord McAlpine was not afforded a right of reply, contrary to good editorial practice, and constituted a breach of Rule 2.1 of the Code. Ofcom considered that there had been a breach of Rule 7.1 of the Code whereby a broadcaster must satisfy themselves that material facts have not been presented, disregarded or omitted in a manner unfair to a person or organisation. ITV presented the facts as if Lord McAlpine were on the list of alleged sex offenders and that speculation had been dressed as fact; this was potentially harmful to Lord McAlpine and also unfair as he had no right of reply.

Apart from having the Ofcom decision upheld, Lord McAlpine awarded £125,000.00 libel damages against ITV.

- Ofcom's decision concerning ITV's This Morning - Ofcom Broadcast Bulletin Issue 240, page 22

<http://merlin.obs.coe.int/redirect.php?id=16763>

EN

- Ofcom's decision about BBC2's Newsnight- Ofcom Broadcast Bulletin Issue 240, page 48

<http://merlin.obs.coe.int/redirect.php?id=16763>

EN

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Copyright Protection Extended in UK from 50 to 70 years for Performers in Sound Recordings

As from the 1st November 2013, the UK government has implemented new regulations, The Copyright and Duration of Rights in Performances Regulations (the Regulations), in order to implement Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. In accordance with the new Regulations, copyright protection is extended for sound recordings and performers rights in such recordings, from 50 years following publication of a sound recording, to 70 years.

The 50 years rule is contained in section 13 of the Copyright, Designs and Patents Act 1988 (1988 Act). This section originally read that copyright in a sound recording performance lasted for a period of 50 years from the end of the calendar year in which it is made, or if it is released before the end of that period, 50 years from the end of the calendar year in which it is released. Regulation 6 of the Copyright and Duration of Rights in Performances Regulations substitutes 70 for 50 years.

Section 13(2) of the 1988 Act originally defined the release of a sound recording as being when (a) it is first published, broadcast or included in a cable programme service, or (b) in the case of a film or film sound-track, the film is first shown in public; but in determining whether a work has been released, no account shall be taken of any unauthorised act.

The Regulations introduce a so called "use it or lose it" clause whereby performers and/or musicians can recover their performance rights in sound recordings that are not being commercially exploited. Regulation 9 of the Regulations allows the performer or musician to serve written notice on the producer, and if within 12 months from the notice date the producer does not exploit the recording by issuing sufficient quantities to the public or make available to the public via electronic transmission then the relevant performing rights revert to the notice server.

Regulation 9(9) allows the performer to apply to the civil court for an order for unpaid royalties to be paid and these have to be paid in full by the producer,

who cannot make any deductions or withhold any payments, even if they are allowed to do so pursuant to any agreement that they had with the performer.

Regulation 9(3) ensures that the producer or their licensee pay to the royalty collecting society 20% of the gross revenue received from physical sales (e.g. CDs) and electronic transmissions (e.g. downloads) of sound recordings to the public. This money is to be distributed to all performers and musicians who performed on a particular sound recording.

The amendments made by the Regulations to section 13 of the 1988 Act should be contrasted with section 12 of the 1988 Act whereby the copyright in the musical work expires at the end of 70 years from the end of the calendar year in which the author dies. Regulation 5 harmonises the length of the copyright term for co-authorship works, where a work is produced by the collaboration of the author of a musical work and the author of a literary work, such as a musical, where the works are created to be used together. Regulation 5 amends section 12(8) of the 1988 Act so co-authors will be treated the same as joint authors with the 70 years period being calculated from the death of the last person to die if both co-authors are identified, or from the death of the author whose identity is known. If Regulation 5 revives a copyright that would have previously been deemed expired under previous law, then anything agreed regarding use of the sound recording prior to 1 November 2013, but implemented post 1 November 2013 will not be regarded as an infringement of the revived copyright (Regulation 21 of the Regulations).

- The Copyright and Duration of Rights in Performances Regulations 2013 -2013 No. 1782

<http://merlin.obs.coe.int/redirect.php?id=16761>

EN

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BBC Trust Highly Critical of BBC Worldwide's Acquisition of Lonely Planet

On 7 November 2013, the BBC Trust published its review into BBC Worldwide's acquisition and ownership of Lonely Planet.

In 2007 BBC Worldwide (the BBC commercial arm) acquired 75% of Lonely Planet, the publisher of travel guides; it acquired the remaining 25% in 2011. The total price was £132 million and it invested £20 million during its ownership. In 2013 Lonely Planet was sold for £52 million, a substantial loss. The BBC Trust required the BBC Executive to commission a report on lessons learned, and this has now been published.

The report made a number of highly critical findings. The forecasts on which the acquisition had been made

were too optimistic, especially in relation to Lonely Planet's unproven online business, and the forecast for earnings of a margin of 30% was highly optimistic. BBC Worldwide seemed to have been carried away with deal momentum, and there had not been enough downside analysis of the effect of a faster than expected decline in book sales and of not achieving very optimistic online forecasts. The negative public reaction to the deal, on the grounds that it created unfair competition, should have been anticipated and better dealt with. Integration with BBC Worldwide was too slow, and the task of migrating the business to other platforms, especially online and tv, was substantially under-estimated. There was inadequate scrutiny of the financial performance of Lonely Planet. During its ownership, there was a bias towards positive reporting, despite signs that all was not well. There was also a lack of accountability for the management and integration of Lonely Planet.

The strategy to move content online and then to monetise it through advertising was delayed, and this had a negative impact on the ability to generate advertising revenue. BBC Worldwide was required to work counter-intuitively through producing content for the BBC rather than marketing and selling BBC content. There was no team experienced in online travel and e-commerce that might have resulted in Lonely Planet adopting a different model such as that of TripAdvisor.

Recommendations for the future are that all information relating to investment proposals should be widely and transparently shared, that the BBC and BBC Worldwide should work more closely together, and that once investment decisions are taken there needs to be clarity about, and accountability for, the operational and financial performance of the investment. Better and more regular key performance indicators are needed. Once an investment is made, the BBC must stand behind it in the face of negative external comment. BBC Worldwide needs better and more informed scrutiny and oversight by the BBC. The remit of BBC Worldwide has now been changed so that another acquisition of this kind probably could not happen. Similar purchases by other media companies also incurred substantial losses.

• BBC Trust: 'Lonely Planet: A Review of BBC Worldwide's Acquisition and Ownership', 7 November 2013
<http://merlin.obs.coe.int/redirect.php?id=16751> EN

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Schedule Set Out for the Digital Switchover

In June and September 2013, two co-ministerial deci-

sions were published containing the date of the definitive national switch-off of analogue signals (1 October 2014) and the dates of switch-off for each of the thirteen allotments throughout the country. These dates for switchover were decided after public consultation organized by the telecoms regulator, EETT. This consultation also concerned a tender that is to be held in the coming weeks concerning the rights of use of four frequencies for national television stations as well as one frequency for each of the thirteen allotments for regional television stations.

Digital transition is progressing amongst existing analogue television stations functioning without a licence (see IRIS 2013-5/31). In November 2013, a law was passed by the Greek Parliament that allows existing broadcasters to contract with network providers who have obtained rights to use digital frequencies, even if those content providers do not hold a digital licence.

Objections to this situation had been raised during the consultation organized by EETT and have increased during the latest parliamentary discussion.

• Κο371375'367 Υπουργική Απόφαση 27294/796/346150: Οριστική παύση των εκπομπών τηλεοπτικής ευρυεκπομπής με αναλογικό τρόπο (346325332 322' 1500, 20.6.2013) (Decision 27294/796/346150: Definitive switch-off of analogue terrestrial television) EL

• ΚΥΑ 46157/1815/346.150 Τροποποίηση απόφασης καθορισμού ημερομηνιών διακοπής εκπομπών τηλεοπτικού προγράμματος με αναλογική τεχνολογία (346325332 322' 2421, 27.9.2013) (Definition of dates of switch-off of analogue terrestrial television) EL

• Υπουργική Απόφαση 45858/1799/346150: Περιορισμός του αριθμού των προς παροχή δικαιωμάτων χρήσης ραδιοσυχνότητας επίγειας ψηφιακής ευρυεκπομπής Εθνικής και Περιφερειακής κάλυψης και καθορισμός του είδους της διαγωνιστικής διαδικασίας σύμφωνα με το άρθρο 23 300361301. 3 του 335. 4070/2012 (346325332 322' 2359, 20.9.2013) (Decision 45858/1799/346150: Definition of rights of use of digital terrestrial television frequencies and definition of the tendering procedure) EL

• ΚΥΑ 15715/9.8.2013 Εγκώρηση φάσματος επίγειας ψηφιακής ευρυεκπομπής στη «335325321 ΕΛΛΗΝΙΚΗ 341321324331337346351335331321, ΙΝΤΕΡΝΕΤ ΚΑΙ ΘΗΛΕΟΡΑΣΗ 321.325.» (335325341331344 321.325.). (346325332 322' 1500, 20.6.2013) (Definition of frequencies of digital terrestrial television frequencies to be allocated to public television) EL

• Άρθρο 18 Νόμου 4208/2013 Ρυθμίσεις Υπουργείου Υγείας και άλλες διατάξεις (346325332 Α' 252/18.11.2013) (Possibility for existing broadcasting to contract with network providers) EL

• Κείμενο και Απαντήσεις της Δημόσιας Διαβούλευσης αναφορικά με τον Περιορισμό του Αριθμού των Δικαιωμάτων Χρήσης Ραδιοσυχνότητας Επίγειας Ψηφιακής Ευρυεκπομπής και τη Διαδικασία Χορήγησης τους (Public consultation on the definition of digital frequencies and of the procedure of allocation)
<http://merlin.obs.coe.int/redirect.php?id=16765> EL

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Amendment of Hungarian Constitution regarding Political Advertising

On 22 November 2012, the Hungarian National Assembly adopted the new Act XXXVI of 2013 on the Electoral Procedure (hereinafter “the new Electoral Procedure”), which lays down amended rules regarding political advertising during campaign periods for national parliamentary, municipal, and European Parliamentary elections.

According to Article 32 (3) of Act CLXXXV of 2010 on Media Services and Mass Media (hereinafter “the Media Law”) political advertisements may only be disseminated in compliance with the relevant rules of the new Electoral Procedure. Political advertisements are programmes released - be it in return for payment or for free - with the objective of promoting or engendering support for a political party, a political movement or the government, or seeking to promote the name, objectives, activities, slogans or emblems of either aforementioned organisation or public body (Article 203 (55) Media Law). The Media Law further stipulates that political advertisements may not be disseminated in the media outside of election campaign periods with the exception of communications related to an already scheduled referendum.

The new Electoral Procedure defines the campaign period as the time lasting from the 50th day before the day of the election to the conclusion of balloting.

The most significant provisions concerning political advertisements were laid down in Article 147 of the new Electoral Procedure. Firstly, the relevant provisions prescribe general principles. Thus, all media service providers are required to broadcast the political advertisements of organisations that nominate candidates or of independent candidates under equal terms. In the case of candidates nominated jointly by more than one organisation, the nominating organisations are entitled to jointly order political advertisements. The media service provider is further required to broadcast the political advertisement free of charge, it may not request or accept any remuneration for the broadcasting.

Furthermore, the legislator sets out some particular provisions. For instance, there is maximum duration time for political advertisements. Advertising videos by organisations with a national list may only be broadcast by public service media during the fifty day campaign period. The altogether 600 minutes of available broadcasting time should hence be provided by the public service media, which distributes this time proportionally between nominating organisations. The 600 minutes of advertising time may of

course be freely divided between public radio stations and public television channels, which are compelled to allocate this vast broadcasting time for free.

Pursuant to the original bill adopted by the legislator in November 2012, commercial media were barred from broadcasting political advertisements, both during and outside the campaign period. Hence, according to the original plans of the two-thirds majority, citizens would only have obtained information that is crucial for democratic decision-making from the public service media and not from commercial broadcasters.

The President of the Hungarian Republic exercised his right of constitutional veto against these particular provisions of the new Electoral Procedure, however, noting that they constitute an undue restriction of the freedoms of speech and press enshrined in Article IX of Hungary’s constitution as well as of the citizens’ right to information. In its decision No. 1/2013. (I. 7.) dated 4 January 2013, the Constitutional Court affirmed the President’s view and annulled the provisions which required that political advertisements may only be disseminated for free and exclusively in public service media.

Following the Constitutional Court’s decision, the National Assembly adopted the fourth amendment of the Fundamental Law, which lifted all the provisions that the Constitutional Court had previously ruled unconstitutional straight into the constitution. These changes became effective on 1 April 2013. Hence new Electoral Procedure’s previously discussed provisions - which are also currently in force - became constitutional (see IRIS 2013-4/16).

This approach was subject to harsh attacks from the opposition and the wider society. In response, the National Assembly adopted another amendment of the Fundamental Law, which has been effective since 1 October 2013. The current text of the Constitution’s Article IX (3) seemingly changed the provisions that had previously - while they were just bills - been found unconstitutional. Pursuant to the effective text, however, media providers are still required to disseminate political advertisements for free during campaign periods, though the public service media’s exclusive broadcasting rights for such commercials have been removed from the books.

Though the restriction of political advertisement to public service media, which was one of the provisions that the Constitutional Court had previously found unconstitutional, has been removed from the package of problematic new rules. The effect of the restrictions is not altered; since commercial media providers can only broadcast political advertisements for free. This is in conflict with the commercial media’s basic operating principle basing on selling advertising time.

Furthermore, the respective provisions of the Constitution and the new Electoral Procedure have not been aligned with one another, so there are likely to be

further legal amendments before the elections scheduled for 2014.

• *Alkotmánybíróság, határozat száma: 1/2013. (I. 7.) AB határozat. 04/01/2013* (Constitutional Court's Resolution of No. 1/2013 I. 7. AB of 4 January 2013)

<http://merlin.obs.coe.int/redirect.php?id=16347>

HU

• *Magyarország Alaptörvényének negyedik módosítása (2013. március 25.)* (Fourth Amendment to the Fundamental Law of Hungary of 25 March 2013)

<http://merlin.obs.coe.int/redirect.php?id=16822>

HU

• *Magyarország Alaptörvényének ötödik módosítása (2013. szeptember 26.)* (Fifth Amendment to the Fundamental Law of Hungary of 26 September 2013)

<http://merlin.obs.coe.int/redirect.php?id=16823>

HU

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Open Access in Italy

On 7 October 2013, the Italian Parliament approved the Law 112/2013 concerning the valorization of culture. Through Section 4 of this Law, the Italian Parliament aims to align its national law with the European Open Access policies emerging in the EU FP7 and in the EU Horizon 2020, as well as those expressed in the EU Commission's Recommendation of 17 July 2012 on access to and preservation of scientific information and Commission's Communication "Towards better access to scientific information: Towards better access to scientific information: Boosting the benefits of public investments in research".

In the Italian context, the principles of open access (hereafter OA) have so far been based on voluntary initiatives. Over the past few years many universities and research institutions have placed repositories which are based on different approaches: in some cases they collect and make available the entire scientific production. In others, the articles are archived but not made publicly accessible. Some Italian research institutions and universities have adopted OA policies (e.g. Telethon, Cariplo and University of Trieste) that strongly support OA and particularly the 'Green Road'.

The OA aims can be achieved following two main routes: through the creation of new OA business models for scientific publishing, known as the 'Gold Road', and through the establishment of repositories where all scientific and scholarly publications are to remain freely accessible, known as the 'Green Road'. Authors that opt for Gold OA choose to publish their articles in OA journals that provide free immediate OA to all articles on the publisher's website. Authors choosing the 'Green Road' publish in subscription journals and, upon acceptance for publication, they make their

peer-reviewed final draft freely accessible online by self-archiving or depositing the article in an institutional or disciplinary repository.

Considering in detail the contents of the new law, some obligations are imposed on the State research funding and managing bodies, such as research institutions and universities:

1. The mentioned subjects shall take the necessary measures for the implementation of OA to "articles" published in periodical collections (at least biannual), which are outcomes of publicly funded research

2. OA publication shall regard publicly financed works as works that are at least 50% financed by the public. The Italian legislator has incorporated both the OA models: gold and green road. The law requires research institutions to adopt policies that promote open access that can be pursued both following the golden road and the green road.

3. Following the green road, the work must to be stored in OA archives, no later than 18 months from the first publication for scientific, technical and medical disciplines, and 24 months for the humanities and social sciences.

• Legge 7 ottobre 2013, n. 112 (Law of 7 October 2013, no 112)

<http://merlin.obs.coe.int/redirect.php?id=16783>

IT

• Decreto-legge 8 agosto 2013, n. 91 (Decree Law 8th August 2013, no 91)

<http://merlin.obs.coe.int/redirect.php?id=16784>

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Amendments to Copyright Law for improvement of Author's Rights Protection

In October 2013, the amendments of Закон за заштита на авторските и сродните права (Law on Protection of the Copyright and Neighbouring Rights) have been adopted by the Macedonian Parliament. Their purpose is to improve the protection of copyrights and related rights in the country. Shortcomings in the text of the Act and its implementation have been detected both by the implementation authorities as well as by the licensed collecting societies. The EU Commission in its Country's Progress Report for 2013 noted: "The law on Copyright and Neighbouring Rights is not aligned with the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty.

The exclusion of phonogram rights and several disputes impeded the work of the two licensed collective rights management societies.”

According to the exposé of the Ministry of Culture to the Parliament, the system for collective management of copyrights had experienced implementation shortcomings in practice, especially with remuneration for the broadcasting of audio and audio-visual content. As a countermeasure the Ministry of Culture created an instrument for its direct access in the tariffs setting process between the copyright management organisations and the users of material subject to copyrights. The global network of authors' societies (*Confédération Internationale des Sociétés d'Auteurs et Compositeurs* - CISAC) raised concerns about the amendment. “Above regulation is disregarding the private nature of the rights at stake and arbitrarily precludes the legitimate possibility of the creators to determine the economic conditions for the use of their works. It also deprives users concerned from the necessary economic flexibility in adjusting their business models in accordance with the CMO's demands via free negotiations”, reads CISAC's open letter to the Macedonian Government.

Part of the incorporated new legislation (Art. 135) envisages an obligation for the broadcasters to install and run special software i.e. a so called “system for electronic evidence”, which will register all broadcast copyrighted content. The Law on Broadcasting obliges the broadcasting companies to broadcast domestic music for which they must pay the copyright licence. According to the broadcasting companies, they are put into position against their will to broadcast and pay for something they are not interested in broadcasting. CISAC and its local Macedonian member, ZAMP, see a possibility for improvement of the reporting process about the usage of copyrighted materials by the broadcasters. However, they propose an “industry driven approach” for implementation of the software solutions, rather than interventions by the Ministries of Culture and Information Society in the tariffs setting.

• Закон за заштита на авторските и сродните права (Law on Protection of the Copyright and Neighbouring Rights)
<http://merlin.obs.coe.int/redirect.php?id=16821>

MK

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Dutch Court Rules on Copyright on Format for Documentary Series

On 31 July 2013, the District Court of Amsterdam decided on the question of whether or not the format of

a documentary series called “*Hollandse Meesters in de 21e eeuw*” (“Dutch Masters in the 21st century”, hereafter: ‘Dutch Masters’) was protected by copyright law.

The plaintiff collaborated with X on a series of filmed portraits, which consisted of 15-minute episodes displaying the methods used by an artist, the use of his materials and the artist's ideas on art. The artist was filmed in his workshop and each episode had a different director. The plaintiff had an agreement with Interakt, a series producer, in which Interakt made a commitment to produce the series and to contribute to the development costs. The series was shown in several Dutch museums, was broadcast by regional broadcaster RTV-Noord Holland and twenty episodes have been released on DVD.

The plaintiff sought a declaratory judgment that the plaintiff - along with X - is the copyright owner of the format of Dutch Masters and that Interakt infringed the rights of the plaintiff by continuing the exploitation of the Dutch Masters series without the consent of the plaintiff. It was argued by the plaintiff that the format was her own original creation. The plaintiff argued that the originality did not only lie in some individual elements of the format, but also in the global impression of those elements combined. In support thereof, the plaintiff claimed that she came up with the title and that it was her idea to use different famous directors to film in the artists' workshops, to present a portrait and to show how artists perform their work.

Interakt, on the other hand, argued that the format did not meet the requirement of originality and therefore could not be protected by copyright. It argued that since each episode was guided by the different views of the various directors, the episodes differed in, inter alia, style, structure, tempo, atmosphere, scenery and context. Interakt further argued that with the exception of the title, there was no coherence between the episodes and there were no recurring elements. It argued therefore that the format of Dutch Masters does not show any original element that distinguishes it from other similar programme formats.

The court considered that an idea has to be concretised and shaped to a sufficient extent in order to avail itself of copyright protection. It found that the plaintiff did not sufficiently substantiate the original and concrete elements that would make the format of Dutch Masters subject to copyright protection. Therefore, it concluded that the format of Dutch Masters is not protected by copyright law and rejected the plaintiff's claim.

• Rechtbank Amsterdam, 31 juli 2013, ECLI:NL:RBAMS:2013:6970 (Hollandse Meesters) (District Court of Amsterdam, 31 July 2013, ECLI:NL:RBAMS:2013:6970 (Hollandse Meesters))
<http://merlin.obs.coe.int/redirect.php?id=16764>

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Constitutional Court Declares Insolvency Code Unconstitutional

On 29 October 2013, the Romanian Constitutional Court decided that the *Ordonanța de urgență a Guvernului nr. 91/2013 privind procedurile de prevenire a insolvenței și de insolvență* (Government Emergency Decree no. 91/2013 on the procedures to prevent insolvency and on insolvency - OUG) is unconstitutional. The decision of the Court, which is final and generally binding, suspended the effects of the entire OUG. The document had been adopted by the Romanian Government on 2 October 2013 and entered into force on 25 October 2013 (see IRIS 2013-10/35).

The OUG was harshly criticised by the President of Romania, by several non-governmental organisations for civil rights, by the Judges Union of Romania, and many Romanian media corporations, journalists and an opposition party because of two stipulations which were seen as possibly triggering discriminatory and abusive measures against audiovisual media companies in insolvency (Articles 81 (3) and Article 384 (2)).

The Romanian Ombudsman challenged the OUG on 9 October 2013 before the Constitutional Court. He alleged the Emergency Decree breached Article 1 (5) and Article 15 (2) of the Romanian Constitution with regard to the mandatory observance of the Constitution, its supremacy and the supremacy of the laws, the predictability, availability and stability of the laws, the legal security for the beneficiaries of the laws, and, respectively, to the fact that the law must not be retrospective.

The Constitutional Court agreed with the two criticisms issued by the Ombudsman, but enlarged the list of violations of the Constitution. The Constitutional Court decided that the entire Government Emergency Decree violates the fundamental law. The Court considered that the OUG breaches Article 115 (4) and (6) of the Constitution. According to Article 115 (4) the Government can adopt Emergency Decrees only in extraordinary situations. Furthermore, according to Article 115 (6) the Emergency Decrees can not be issued in the field of the constitutional law and cannot impact the state's fundamental institutions, the civil liberties, rights and obligations enshrined in the Constitution, the people's electoral rights and cannot establish measures of forcible transfer of assets to public ownership.

The Court also found the lack of clarity and predictability of the legal document to directly infringe the right to information provided by the Article 31 of the Constitution and freedom of expression provided by Article 30 of the Constitution. Another con-

stitutional article breached by the OUG is Article 135 (2) a), which requires the State to ensure freedom of trade and protection of fair competition. At the same time, the Constitutional Court considered that the document does not comply with the norms of legislative procedure.

- Decizia nr. 447 din data de 29.10.2013 referitoare la excepția de neconstituționalitate a dispozițiilor Ordonanței de urgență a Guvernului nr. 91/2013 privind procedurile de prevenire a insolvenței și de insolvență (Decision no. 447 of 29 October 2013 with regard to the exception of unconstitutionality of the provisions of the Government Emergency Decree no. 91/2013 on the procedures to prevent insolvency and on insolvency)

<http://merlin.obs.coe.int/redirect.php?id=16779>

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Rejection of Liberalisation of Alcohol Advertisement Rules

On 12 November 2013, the Chamber of Deputies (Lower Chamber of the Romanian Parliament) with large majority rejected the Draft Law for the modification of Article 13 of the *Legea nr.148/2000, privind publicitatea, cu modificările și completările ulterioare* (Law no. 148/2000 on the advertising, with further modifications and completions). The decision of the Deputies is final. The Draft Law had been rejected by the Senate (Upper Chamber) on 4 June 2013 (see also IRIS 2006-6/33).

The Draft Law intended to modify Article 13 (1) by extending the legal permission of advertisements for alcoholic beverages previously allowed under strict conditions in print media, radio and television. New possibilities would have included outdoor advertisement such as video displays on streets, in public transportation vehicles, and in any other public place. The Draft Law also intended to introduce a new paragraph (3) to Article 13 stipulating that advertisement for alcoholic beverages through outdoor TV displays will be allowed only between 10 p.m. and 6 a.m for reasons of minor protection. The legislative initiator considered that outdoor TV advertisement can be easily controlled and allows producers of smaller beverages to advertise their products at affordable prices due to the fact that classical TV advertisement is too expensive.

The Legislative Council had issued a positive opinion on the Draft Law considering that the liberalisation allows an open competition between the producers of alcoholic beverages producers and that the document is in line with the rules on the European Single Market, the Common Agricultural Policy and the Policy on Consumers' Protection.

On the other hand, the Government issued a negative opinion on the Draft Law. The Government considered

the alcohol consumption as a real public health problem in Romania, which has a high rate of mortality due to diseases triggered by alcohol consumption. Accordingly, any new advertising platform for alcoholic beverages was found deeply unfavourable for the public health and against the actions taken in the field by the European Union and the World Health Organisation.

- Propunere legislativă pentru modificarea art.13 din Legea nr.148/2000, privind publicitatea - forma inițiatorului (Draft Law for the modification of art.13 of the Law no. 148/2000 on the advertising - as initially submitted)

<http://merlin.obs.coe.int/redirect.php?id=16771>

RO

- Avizul Consiliului Legislativ (Opinion of the Legislative Council)

<http://merlin.obs.coe.int/redirect.php?id=16772>

RO

- Punctul de vedere al Guvernului (Opinion of the Government)

<http://merlin.obs.coe.int/redirect.php?id=16773>

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Rejection of Audiovisual Law Modifications

On 5 November 2013, the Romanian Senate (i.e. Upper Chamber of the Parliament) rejected the Draft Law on the modification and completion of the Audiovisual Law no. 504/2002 at the request of the President of Romania, with a large majority.

The Draft Law included an obligation of the broadcasters to air weekly at least 120 minutes of programmes with cultural and educational content, excepting the period from 1 to 7 a.m. Furthermore, news channels would have had to air weekly at least 30 minutes of cultural and educational shows per week, excepting the same period (1 a.m. to 7 a.m.). The decision of the Senate was final, to reject the Draft Law (see IRIS 2009-2/29, IRIS 2010-1/36, IRIS 2011-4/31, IRIS 2011-7/37, IRIS 2013-3/26, and IRIS 2013-6/27).

The request of the President to review the Law was sent to the Parliament on 5 January 2012. The Draft Law had been adopted by the Chamber of Deputies (Lower Chamber) on 15 February 2011 and by the Senate on 7 December 2011. The Chamber of Deputies had rejected the review request. The President had asked for the review because he considered the imposed conditions and limitations on the content of programmes as inappropriate and a limitation of media freedom.

Meanwhile, the Romanian Senate rejected another Draft Law on the completion of the Audiovisual Law with a large majority on 6 November 2013, which would have made broadcasting of explicit content between 6 a.m. and midnight illegal. Under Article 90 of the Audiovisual Law this would have entailed immoral, indecent or obscene aspects of the life of a person, violent attitudes and gestures, scenes with violence and strong language, erotic and vulgar scenes, physical

exposure in erotic ways, exposure of intimate stories and other matters beyond the limit of decency. The Draft Law proposed in a new Article 95 the withdrawal of the audiovisual licence in cases of repeated violations of Article 90.

The initiator of the Draft Law argued that TV stations offer all day long shows full of inappropriate, violent, vulgar and indecent content because of their fixation with audience ratings. According to the initiator, sanctioning the violations mentioned above would be beneficial especially for minors, who are not able to differentiate between appropriate and inappropriate content.

- Legea pentru modificarea și completarea Legii audiovizualului - forma adoptată de Camera Deputaților (Law on the modification and completion of the Audiovisual Law - form adopted by the Chamber of Deputies)

<http://merlin.obs.coe.int/redirect.php?id=16776>

RO

- Propunerea legislativă pentru completarea Legii audiovizualului nr. 504/2002 - forma inițiatorului (Draft Law on the completion of the Audiovisual Law no. 504/2002 - as initially submitted)

<http://merlin.obs.coe.int/redirect.php?id=16777>

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Rejected Modifications of the Public Broadcasters Law

On 28 October 2013, the President of Romania sent back to the Parliament the *Proiectul de lege pentru modificarea și completarea Legii nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune* (Draft Law on the modification 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). The Draft Law had been adopted by the Chamber of Deputies (Romania's Parliament Lower Chamber) on 24 September and by the Senate (Upper Chamber) on 8 October 2013 (see also IRIS 1998-8/16, IRIS 2000-4/18, IRIS 2003-8/25, IRIS 2013-5/37, and IRIS 2013-10/36).

The President argued that two of the three possibilities provided by the Draft Law for the economic development and extension of the public radio and TV activities in Romania and abroad are vague. The Law does not stipulate clear association criteria, neither for the acquisition of shares in order to set up private legal persons nor for the acquisition of shares of existing companies. The criteria have to be clear, especially because these operations will be made with funds from the state budget. The legal framework therefore has to be predictable, added the President. At the same time, the Romanian Government considered that the actions of the President endanger and block the intentions of the Romanian public television, TVR, to resume its activity in the Republic of Moldova,

interrupted by the former Communists, which ruled until 2009.

Meanwhile, the Romanian Senate rejected on 6 November 2013 another Draft Law on the modification of the Law No. 41/1994. According to the draft document, the licence fee for the audiovisual public media would have been cut. Senate's decision was final. According to Art. 40 of the Law No. 41/1994, with further modifications and completions, the public audiovisual sector is financed almost entirely through licence fee, advertisement and funds from the state budget (with strict destinations, such as the broadcasts for abroad, the costs associated with the terrestrial transmitters, the technical development of the public audiovisual companies, as well as the operation of orchestras and choirs, only for the radio). The Romanian Government issued a negative opinion on the Draft Law, stating that the monthly licence fee collected from the households and firms in Romania is one of the smallest in Europe and is, in fact, a tax paid for the right to be informed correctly. Without the licence fee, the public broadcasters will no longer be able to fulfill their legal mission: to offer impartial informative programmes, cultural programmes, along with good quality entertainment. The licence fee, at the same time, guarantees the independence of the public media from the state subsidies and allows them to accomplish their public mission, considered the Government. The Draft Law which intended to cut the licence fee for the Romanian public media services was triggered mainly by the very poor financial management of the public television, which accumulated huge debts to the state budgets and to its creditors. The licence fee represents almost 50% of the annual revenues of the Romanian public audiovisual sector.

• Propunere legislativă pentru modificarea art. 40 din Legea nr.41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune - forma inițiatorului (Draft Law on the modification of the Article 40 of the Law no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation - as initially submitted)

<http://merlin.obs.coe.int/redirect.php?id=16774>

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CNA Modifies the Decision on Broadcasting Licences

On 7 November 2013, the *Consiliul Național al Audiovizualului* (National Audiovisual Council - CNA) adopted the Decision No. 614 on the modification and completion of CNA's Decision No. 277 of 6 June 2013 on the procedure for the granting, the modification, or the extension of the validity and the transfer of a licence and of the audiovisual authorisation decision, except for terrestrial digital system

broadcasting, along with the conditions with regard to broadcasting of local programmes, the rebroadcasting or the release of other broadcasters' programmes (see IRIS 2002-7/28, IRIS 2005-5/24, IRIS 2005-8/29, IRIS 2006-9/30, IRIS 2012-10/23, IRIS 2013-5/38 and 2013-10/35). The Decision no. 614/2013 was published in the Official Journal of Romania no. 693 of 13 November 2013.

According to the CNA, the modification of the Decision No. 277/2013 intends to clarify the procedures and the conditions for the renewal of audiovisual licences for the broadcasting of radio or television programmes.

Article 4 (1) c) of the Decision No. 277/2013 was repealed. It foresaw the necessity for a terrestrial broadcasting licence application to comprise a so called technical opinion issued by the National Authority for the Management and Regulation in Communications (ANCOM)

Two new paragraphs were introduced after Article 4 (6) of the Decision No. 277/2013 with regard to the application file. The new paragraph (7) stipulates: If the application file is incomplete or documented in an unsuitable form, the Licences and Authorisations Bureau will require the applicants to complete the file and inform them which documents are missing. The paragraph also stipulates the conditions and deadlines for submission and completion of the application. Paragraph (8) foresees a rejection of the licence application in case of failure to comply with deadlines for submission or completion.

Article 20 regulating the licence extension was also modified in the introductory part of paragraph (2) and (4). Paragraph (2) now stipulates that the extension request has to be submitted to the CNA at least 60 days before the expiry of validity of the licence and shall be accompanied by more documents in original; the previous period accounted for 30 days. Paragraph (4) provides that the Council will decide whether to extend the validity of the audiovisual licence at least ten days before expiry of the licence. The previous wording of the paragraph did not contain a period for the Council to take the decision.

Paragraph (3) of Article 20 was amended with a paragraph (31) repeating the submission and deadline procedure details for the extension application.

• Decizie nr. 614 din 7 noiembrie 2013 pentru modificarea și completarea Deciziei Consiliului Național al Audiovizualului nr. 277/2013 privind procedura de acordare, modificare, prelungire a valabilității și de cedare a licenței și a deciziei de autorizare audiovizuală, cu excepția celor pentru difuzare în sistem digital terestru, precum și condițiile privind difuzarea de programe locale, retransmiterea sau preluarea de programe ale altor radiodifuzori (Decision no. 614 of 7 November 2013 on the modification and completion of the CNA's Decision no. 277 of 6 June 2013 with regard to the procedure for the granting, the modification, or the extension of the validity and the transfer of a licence and of the audiovisual authorisation decision, except for terrestrial digital system broadcasting, along with the conditions with regard to broadcasting of local programmes, the rebroadcasting or the release of other broadcasters' programmes)
<http://merlin.obs.coe.int/redirect.php?id=16775> **RO**

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Radio Romania International

CNA Recommendation on Seismic Activity Media Coverage

On 29 October 2013, the *Consiliul Național al Audiovizualului* (National Council for Electronic Media - CNA) issued a Recommendation regarding media coverage of seismic activity in Romania. The Recommendation was issued based on the analysis of news and current affairs programmes and of talk-shows aired by audiovisual media in Romania dealing with the intensifying seismic activity in Romania. Romania is the country most exposed to earthquakes in the European Union. In modern times Romania has had earthquakes damage with severe consequences in 1802, 1838, 1940, and 1977.

Taking into account the history of earthquakes in Romania, the effects of moderate and strong earthquakes and, mainly, the sensitivity of the Romanian public to this topic, the CNA recommended that the audiovisual media service providers do not spread panic through its journalistic coverage of seismic activity in Romania and abroad.

CNA reiterated that Article 75 (1) of the *Codul Audiovizualului* (Audiovisual Code) stipulates that the reports about disasters and collective tragedies must comply with decency and discretion without inducing public panic. CNA recommended that broadcasters releasing programmes about earthquakes in Romania reserve airtime for the public education about emergency measures that citizens should take in the event of an earthquake, along with the location of the shelters provided by local authorities.

CNA also recommended to broadcasters to avoid repeated and unreasonable dissemination of archival footage with strong negative emotional impact illustrating the effects of previous earthquakes as well as the screen display of titles increasing the emotional impact of the topic. According to the Recommendation, presenters of news programmes must avoid emotional involvement and present the facts in a neutral, objective and balanced way without limiting the

journalistic approach to spectacular aspects and to include data and information offered by studies, research and specialists in this field.

• Recomandare privind mediatizarea activității seismice din România (Recommendation with regard to the media coverage of the seismic activity in Romania of 29 October 2013)
<http://merlin.obs.coe.int/redirect.php?id=16780> **RO**

Eugen Cojocariu
Radio Romania International

SK-Slovakia

Amendment of Broadcasting Act

On 22 October 2013, the Slovak Parliament passed an Amendment (No. 373/2013 Coll. - hereinafter "Amendment") of Act. No 308/2000 Coll. on broadcasting and retransmission (hereinafter "Act"). The Amendment was signed by the President on 11 November 2013 and entered into force on 1 January 2014.

Among other changes it entitles the broadcasters to broadcast not only in Slovakian, but also in other languages of the European Union. According to the official explanation of the amendment, the necessity of this change arose from the consultations with the European Commission and their concerns regarding the previous legislation. Transmission of programmes in languages other than Slovakian (or Czech language, which is by official authorities considered as understandable for Slovaks) was allowed only with Slovak subtitles in case of television or a preceding or subsequent Slovak version of the programme in case of radio.

Under the new legislation, the Council for Broadcasting and Retransmission may grant licenses for broadcasting in one or more official languages of the European Union other than Slovakian. However, the Council may grant such licence on regional or local level only if a sufficient offer of broadcasting in Slovak language exists in the given geographic area. This instrument shall provide the possibility for broadcasters to transmit information in other languages but at the same time protect the rights of Slovak citizens to receive information of local or regional character in their official language.

The Amendment also reduces the European independent production quota for public service broadcasters from previously 20 % to now 15 %. The new quota must however be reached with at least 10 % of recent European independent production (previously there was no exact quota for recent works). The official grounds of the Amendment declare that in order

to fulfil the legal quota of independent productions the public service broadcaster was “forced” to acquire works of low quality. Decrease of the share shall allow public service broadcasters to provide European content of higher quality.

The Amendment also concerns the provisions on accessibility of audiovisual media services for people with disabilities. Although broadcasters formally declare that they meet current quotas, professional organisations of disabled people complained that these quotas actually are either not reached at all or reached in an insufficient quality. In order to facilitate the process of supervision the new legislation obliges the broadcasters to provide more detailed reports on broadcasting of such programmes. As a response to the complaints, new provisions exclude programmes primarily containing music and commercial communication from the total time used for the computation of accessibility quotas. Closed and live subtitling now legally have to “correspond to the plot of the programme”, which allows the Council to also monitor the quality and not only the quantity of subtitling.

Furthermore, the Amendment abolishes the current system of measuring loudness of advertisement compared to the rest of the broadcasting and authorises the Ministry of Culture to issue bylaws that will set the details for a new system compatible with the recommendation R 128 “Loudness normalisation and permitted maximum level of audio signals” of the European Broadcasting Union.

• Zákon, ktorým sa mení a dopĺňa zákon č. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách v znení neskorších predpisov a ktorým sa menia a dopĺňajú niektoré zákony (Amendment No 373/2013 Coll. of Act. No 308/2000 Coll. on broadcasting and retransmission)

<http://merlin.obs.coe.int/redirect.php?id=16781>

SK

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New Film Incentives Strategy

On 22 October 2013 the Slovak Parliament passed an Amendment (No. 374/2013 Coll., hereinafter “Amendment”) of Act. No 516/2008 Coll. on funding of the audiovisual sector (hereinafter “Act”). The Amendment was signed by the President on 11 November and will enter into force on 1 January 2014.

The main purpose of the Amendment is to increase the international competitiveness of the Slovak audiovisual industry by attracting international audiovisual productions to the Slovak Republic with cash rebates. While the present system of contributions for the domestic audiovisual sector remains the same, the new support scheme offers 20 % cash rebate of “just” expenditures made in connection with a film project that

meets criteria laid down by the Act. “Just” expenditures are payments for goods and services to businesses established in Slovakia or revenue being taxed in Slovakia made after obtaining the “certificate on the registration of the film project” (hereinafter only “certificate”) from the Audiovisual Fund (hereinafter only “Fund”) office.

Only cinematographic works of fiction, documentary and cartoon, or works for television broadcasting meeting criteria of a “culture test”, or with co-production status according to the European Convention on Cinematographic Co-production are eligible for the certificate. Details regarding the culture test, the minimum length and the minimum budget of film projects are to be laid down by the bylaw of the Ministry of Culture.

The producer or the co-producer authorised by the rest of co-producers of the film project, or a person in contractual relationship with producer or co-producers of the film project are entitled to apply for the certificate. An applicant who is bankrupt or in liquidation, against whom execution procedures are in progress, whose financial relations with the public bodies are not fully settled, who breached the prohibition of illegal employment, or who has not submitted accounts for the financing from the audiovisual fund cannot obtain the certificate. The applicant must not be member of the board, member of the supervisory commission, the director of the Fund, or a person with a close relationship to the director. To apply for the certificate the applicant must pay a non-refundable administrative fee of EUR 1,000.

If the film project successfully meets all criteria the applicant will obtain the certificate valid for three years. Having finalised the production the holder of the certificate can apply for a cash rebate. The Fund may reject an application with a valid certificate only if the applicant fails to present any of the necessary documents verifying the actual payments along with other confirmations from various public authorities.

The law explicitly states that there is no legal claim to the cash rebate. If the Fund does not reject the application it will issue a “confirmation of the total amount of just costs.” Any financial support from public bodies will be deducted from this total amount. With this confirmation the Fund issues a proposal contract valid for thirty days. In this proposal, the Fund commits to provide 20 % of the confirmed just costs whereas the applicant guarantees that the production will meet the given criteria (genre, minimum length, budget, compliance with culture test) after its public release.

- Zákon, ktorým sa mení a dopĺňa zákon č. 516/2008 Z. z. o Audiovizuálnom fonde a o zmene a doplnení niektorých zákonov v znení neskorších predpisov a ktorým sa menia a dopĺňajú niektoré zákony (Amendment No 374/2013 Coll of Act. No 516/2008 Coll. on funding of the audiovisual sector)

<http://merlin.obs.coe.int/redirect.php?id=16767>

SK

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US-United States

Google Books Legal without Compensating Authors

On 14 November 2013, the United States Court of Appeals for the Second Circuit recently dismissed a long-running lawsuit filed against Google for scanning copyrighted books for its Google Books project without compensating the authors. The Court found that Google's actions are protected as fair use under 17 U.S.C. § 106 of the Copyright Act because the copying at issue promotes the Act's purpose of promoting the progress of science and useful arts while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders.

The Court found that Google's use of the copyrighted work was transformative, thereby satisfying the key characteristic of the fair use defense. In order to be transformative the use must not merely supersede or supplant the original creation but must instead add something new with a further purpose or different character by altering the first with a new expression, meaning, or message. The Court found that Google's use of the works to provide snippets of text to act as pointers directing users to a broad selection of books is a new and efficient way for readers and researchers to find books and transformed the text of the books into data for research such as data and text mining. The Court also concluded that Google's actions did not supersede or supplant the authors' books because Google only provides snippets of the text, does not sell the books or run ads alongside them, and takes security measures to prevent users from viewing a complete copy of the book. It explained that the copying will actually benefit the authors by creating new audiences and sources of income.

The Court also upheld Google's right to provide full digital copies to libraries because it serves several important educational purposes. By doing so, it allows researchers, students, teachers, scholars, data scientists and underserved populations like disabled people to access the works. It noted, for example, that Google Books has already become such an important

tool for researchers and librarians that it has been integrated into the educational system and is taught as part of the information literacy curriculum to students at all levels.

Google hailed the decision in a statement affirming that "Google Books is in compliance with copyright law and acts like a card catalog for the digital age - giving users the ability to find books to buy or borrow". The executive director of the Authors Guild expressed their disappointment with the decision and confirmed that they will appeal.

- Decision of the United States District Court (Southern District of New York) of 14 November 2013 (05 Civ. 8136 DC)

<http://merlin.obs.coe.int/redirect.php?id=16770>

EN

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KZ-Kazakhstan

Respublika as a Continuous Media Outlet

In November 2012 the City Prosecutor of Almaty filed a petition with a district court to close 18 media outlets, including 10 websites. It should be noted that in Kazakhstan all websites are to be registered as mass media because they are covered under the statute "On the mass media."

In the petition the prosecutor asked that all of the outlets, along with "any other [unnamed] means of periodic or continuous public dissemination of the produce of the mass outlet 'Respublika' are recognized as a unified mass media outlet 'Respublika' ". He also sought that the court shuts down the "unified mass media outlet 'Respublika'", including all 18 sub-outlets in the petition.

The prosecutor acknowledged that the media listed in the petition have different owners and publishers and are formally independent from each other. Despite that, he argued that the online resources and newspapers were de facto a form of dissemination of one and the same mass media outlet - Respublika. While a series of stories therein were aimed at incitement of social animosity, they also had elements of propaganda of the violent takeover of state power and of undermining state security, which contradicts the law.

Altogether four stories were given as evidence, together with an expert opinion provided by the Ministry of Justice. The expert opinion found evidence of incitement of social animosity and propaganda of the violent takeover of state power. The prosecution also argued that the verdict in the trial of an opposition

political activist Vladimir Kozlov pointed “in a conceptual way” that the material published was intended to incite social animosity.

In this case, Mr. Kozlov was convicted in 2012 of social hatred and calls for violent overthrow of the government and undermining national security in particular in his appeals to the oil workers on strike in the city of Zhenausen in 2011. The verdict to imprison him for 7.5 years was criticized by Human Rights Watch. As Kozlov was an ally of the key oppositional oligarch Mukhtar Ablyazov and also ran some of the opposition media, the media were basically blamed for the same crimes he was convicted of.

The prosecution observed that recently mass media have begun to use “a combined form of public dissemination of mass information (such as print and online)”. Therefore any restrictions should affect the “whole entirety of objects that serve as means and form of public dissemination of mass information.”

The prosecution also pointed out that, despite closure in the past of several newspapers, Respublika managed to continue dissemination of its materials via other resources that either had the word Respublika in the title or were written by the same journalists and editors or had the same design elements. It also sent the message to the audience that a new outlet continued the policy of Respublika. As proof the prosecution introduced two stories published in 2005 and 2009.

The prosecution believed that this proved the singular nature of the different media and substantiated the need to ban all media that could possibly be associated to this group now and in the future.

The defendants pointed out that many of the media under the prosecutor’s petition were not reviewed by the experts nor alleged to have been shown to violate the law. Some of them never published the four stories claimed to be illegal but they were still threatened with closure. There was no ban to republish newspaper stories online. One defendant argued that the petition violated the International Covenant on Civil and Political Rights. Other defendants claimed that as they were registered businesses in other countries they were not subject to the jurisdiction of Kazakhstan courts. The defendants claimed that the law did not speak of a “united mass media outlet,” and the prosecution simply attacked the opposition media that dared to criticize the government.

On 25 December 2012 the District Court in Almaty issued a ruling which repeated the arguments of the prosecution and also found links (including family links) among the owners, founders and a “unified editorial office” of Respublika and Kozlov. Many of the editorial offices were or are at the same address.

It found precedent in the ruling in the Kozlov criminal case for the civil case under its review. The expert opinion of the Ministry of Justice was upheld and the court noted that the Ministry provided an expert

opinion in the Koslov case which was accepted by the relevant court.

The court then banned all 18 media outlets as part of the unified media outlet Respublika, which would also include any other means of periodic or continuous dissemination of the product of this outlet. The Ministry of Information and Ministry of Communication were authorized to implement the decision.

The decision was upheld on appeal on the 22 February 2013 by the City Court. Interestingly enough, the decision on appeal does not even quote the arguments of the appellants (Respublika). On 6 June 2013 it was affirmed by a higher appeals court - the Cassation Collegium of the Almaty City Court. On 28 November 2013 Supreme Court made a resolution denying a further appeal to review the case.

On 29 November 2012 the OSCE Representative on Freedom of the Media, Dunja Mijatović, expressed concern that legal proceedings initiated against several media outlets in Kazakhstan might severely undermine media pluralism in the country.

• Дело No 2-8197/12 копия 25 декабря 2012 года г .420473474460402413 (Decision of the Medeus district court of Almaty of 25 December 2012 on a case # 2-8197/12.)

<http://merlin.obs.coe.int/redirect.php?id=16977>

RU

• Resolution by the judges of the review collegium on civil and administrative cases of the Supreme Court of Republic of Kazakhstan, 28 November 2013, on a case # 3463-5254-13.

RU

• Press release of the OSCE Representative on Freedom of the Media, “OSCE representative concerned over threat to media pluralism in Kazakhstan”, 30 November 2012

<http://merlin.obs.coe.int/redirect.php?id=16978>

EN

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Agenda

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