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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Perinçek v. Switzerland

On 17 December 2013, the European Court of Human Rights ruled by five votes to two, that Switzerland violated the right to freedom of expression by convicting Doğu Perinçek, chairman of the Turkish Workers' Party, of publicly denying the existence of the genocide against the Armenian people. On several occasions, Perinçek had described the Armenian genocide as "an international lie". The Swiss Courts found Perinçek guilty of racial discrimination within the meaning of Article 261bis of the Swiss Criminal Code. This Article punishes inter alia the denial, gross minimisation or attempt at justification of a genocide or crimes against humanity, publicly expressed with the aim of lowering or discriminating against a person or a group of persons by reference to race, ethnic background or religion in a way that affects the human dignity of the person or group of persons concerned. According to the Swiss Courts, the Armenian genocide, like the Jewish genocide, was a proven historical fact, recognised by the Swiss Parliament, while Perinçek's motives in denying this historical fact were of a racist tendency and did not contribute to the historical debate. Relying on Article 10 of the European Convention, Perinçek complained before the Strasbourg Court that the Swiss authorities had breached his right to freedom of expression.

First the European Court found that Perinçek had not committed an abuse of his rights within the meaning of Article 17 of the Convention. The Court underlined that the free exercise of the right to openly discuss questions of a sensitive and controversial nature was one of the fundamental aspects of freedom of expression and distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime. The Court emphasized that the limit beyond which comments may engage Article 17 lay in the question of whether the aim of the speech was to incite hatred or violence, aiming at the destruction of the rights of others. The rejection of the legal characterisation as "genocide" of the events of 1915 was not such as to incite hatred against the Armenian people.

Next, from the perspective of Article 10 of the Convention, the Court agreed with the Swiss courts that Perinçek could not have been unaware that by describing the Armenian genocide as an "international lie", he was exposing himself, being on Swiss territory, to a criminal sanction "prescribed by law". The Court also found that the aim of the application of Article 261bis of the Swiss Criminal Code was to protect the rights of others, namely the honour of the relatives of victims of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards.

The crucial question was whether the prosecution and conviction of Perinçek was "necessary in a democratic society". The Court was of the opinion that the discussion about the Armenian "genocide" was of great interest to the general public and that Perinçek had engaged in speech of a historical, legal and political nature which was part of a heated debate. Accordingly, this limited the margin of appreciation of the Swiss authorities in deciding whether the interference with Perinçek's freedom of expression was justified and necessary in a democratic society. Essential for the Court is that it is still very difficult to identify a general consensus about the qualification of the Armenian "genocide". Only about 20 States out of the 190 in the world have officially recognised the Armenian genocide. Furthermore the notion of "genocide" is a precisely defined and narrow legal concept, difficult to substantiate. Historical research is by definition open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths. In this connection, the Court clearly distinguished the present case from those concerning the negation of the crimes of the Holocaust, committed by the Nazi regime. The Court therefore took the view that Switzerland had failed to show how there was a social need in that country to punish an individual for racial discrimination on the basis of declarations challenging the legal characterisation as "genocide" of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. The European Court also referred to the General Comment nr. 34 of the United Nations Human Rights Committee on Article 19 ICCPR, opposing "general prohibitions on expression of historical views". According to the UN HRC "laws that penalise the promulgation of specific views about past events, so called "memory-laws", must be reviewed to ensure they violate neither freedom of opinion nor expression".

In conclusion, the Court expressed its doubt that Perinçek's conviction had been dictated by a "pressing social need". It pointed out that it had to ensure that the sanction did not constitute a kind of censorship that would lead people to refrain from expressing criticism as part of a debate of general interest, because such a sanction might dissuade persons from contributing to the public discussion of questions that are of interest for the life of the community. The Court found that the grounds given by the national authorities in order to justify Perinçek's conviction were insufficient and that the domestic authorities had overstepped their narrow margin of appreciation in this case in respect of a matter of debate of undeniable public interest. The Court considered the criminal conviction of Perinçek, for denial that the atrocities perpetrated against the Armenian people in 1915 and

following years constituted genocide, was unjustified. Accordingly there has been a violation of Article 10.

• *Arrêt de la Cour européenne des droits de l'homme (deuxième section), affaire Perinçek c. Suisse, requête n°27510/08 du 17 décembre 2013* (Judgment by the European Court of Human Rights (Second Section), case of Perinçek v. Switzerland, Appl. No. 27510/08 of 17 December 2013)
http://merlin.obs.coe.int/redirect.php?id=16834 FR

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European Court of Human Rights: Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria

In a new judgment on the right of access to public documents, the Strasbourg Court has further clarified and expanded the scope of the application of Article 10 of the Convention. The applicant in this case is an NGO, the Austrian association for the preservation, strengthening and creation of an economically sound agricultural and forestry land ownership (OVESSG). In 2005 the association twice requested the Tyrol Real Property Transaction Commission, which is responsible for approving agricultural and forest land transactions, to provide OVESSG with the decisions the Commission had issued over a certain period of time, eventually in an anonymised form. OVESSG indicated that it would reimburse the resulting costs. However, the association's requests were refused on the ground that they did not fall within the scope of the Tyrol Access to Information Act. Moreover, even if the request did fall within its scope, pursuant to the Act an authority did not have the duty to provide the requested information if doing so would require so much resources that its functioning would be affected and would jeopardise the fulfilment of the Commission's other tasks. The association's complaints to the Administrative Court and the Constitutional Court were rejected. OVESSG then complained in Strasbourg that its right to receive information, guaranteed by Article 10 of the Convention, had been violated.

The Court considers that the refusal to give OVESSG access to the requested documents amounted to an interference with its rights under Article 10, as the association was involved in the legitimate gathering of information of public interest with the aim of contributing to public debate. As it was accepted that the refusal was prescribed by law, based on the Tyrol Access to Information Act, and that it pursued the legitimate aim of the protection of the rights of others, the Court had next to decide whether the refusal to grant access to the documents was justified, which means, in the terms of Article 10§ 2,being necessary in a democratic society. The Court refers to the development in its case law regarding Article 10 and access to information. It recalls that it has held that the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion. However, the Court noted that it had recently advanced towards a broader interpretation of the notion of the freedom to receive information and thereby towards the recognition of a right of access to information. The Court also refers to its case-law stating that the most careful scrutiny was called for when authorities enjoying an information monopoly interfered with the exercise of the function of a social watchdog (see Társaság a Szabadságjogokért v. Hungary, (IRIS 2009-7/1) and Youth Initiative for Human Rights v. Serbia, (IRIS 2013-8/1)).

The Court finds that the Tyrol Real Property Transaction Commission had not given sufficient reasons to justify its refusal to grant OVESSG access to the requested documents. The European Court observes that in contrast with similar authorities in other regions in Austria, the Tyrol regional authority had chosen not to publish its decisions and thus, by its own choice, held an information monopoly. The unconditional refusal by the Tyrol Real Property Transaction Commission thus made it impossible for OVESSG to carry out its research in respect of one of the nine Austrian Länder, namely Tyrol, and to participate in a meaningful manner in the legislative process concerning amendments to real property transaction law in Tyrol. The Court therefore concludes that the interference with the applicant association's right to freedom of expression and information cannot be regarded as having been necessary in a democratic society. In a 6-1 vote it found a violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights (First Section), case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, Appl. No. 39534/07 of 28 November 2013
http://merlin.obs.coe.int/redirect.php?id=16835 EN

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Council of Europe: Ministerial Conference on Freedom of Expression and Democracy in the Digital Age

The Council of Europe Conference of Ministers responsible for Media and Information Society, entitled, 'Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibilities', was held

on 7-8 November 2013 in Belgrade, Serbia. The previous ministerial conference on similar issues ('A new notion of media?') was held in Reykjavik in 2009 (see IRIS 2009-8/2).

Participating ministers in the Conference adopted a Political Declaration and three Resolutions, entitled:

1. Internet Freedom

2. Preserving the essential role of media in the digital age

3. Safety of journalists

The Political Declaration recalls the importance of freedom of expression ("and its corollary media freedom") and privacy (including data protection) and recognises that these rights and freedoms face new threats and challenges in an online environment. Several threats are specifically mentioned, e.g.: the abuse of growing technological capabilities for electronic mass surveillance; online hate speech and intolerant discourse, and killings of, physical attacks on, and other forms of harassment of, "journalists and other media actors who carry out journalistic activity or perform public watchdog functions". The Declaration also recalls the need for a differentiated regulatory approach to an increasingly diverse range of media - a central premise of the Reykjavik Conference, as subsequently developed in the Council of Europe's Committee of Ministers' (CM) Recommendation CM/Rec(2011)7 to member states on a new notion of media (IRIS 2011-10/4).

The Political Declaration invites the CM, "to take appropriate steps to implement the actions proposed" in the three Resolutions.

Resolution No. 1 explains the importance of the Internet for human rights and society and the relevance of (in particular) the Council of Europe's human rights standards governing, e.g. "Internet governance principles, network neutrality and the universality, integrity and openness of the Internet". It invites the Council of Europe to pursue a number of action lines: the continued development of a multi-stakeholder approach to "Internet freedom"; the promotion of media diversity and pluralism online; the speedy completion of a compendium of existing human rights for Internet users; increased efforts to protect the right to privacy and personal data, especially of young people; the continued combating of online hate speech and incitement to violence and terrorism; the promotion of media and digital literacy programmes, taking gender and diversity dimensions into account; the exploration of ways of fostering online participation of vulnerable and disadvantaged persons or groups; engagement with private actors in respect of their human rights duties and responsibilities on the Internet, etc.

Paragraph 13(v) of the Resolution drew particular attention and debate during the final plenary session of the Conference. It invites the Council of Europe to: "examine closely, in the light of the requirements of the European Convention on Human Rights, the question of gathering vast amounts of electronic communications data on individuals by security agencies, the deliberate building of flaws and 'backdoors' in the security system of the Internet or otherwise deliberately weakening encryption systems". The United Kingdom delegation made a statement dissociating the UK from the paragraph because it "may have the effect of unduly constraining the scope of the work that the Council of Europe is invited to carry out".

Resolution No. 2 centrally concerns the need to safeguard the democratic - and in particular, public watchdog - tasks ascribed to journalists and the media, as performed by a growing range of actors. It sees media self-regulation, independence, ethics, diversity and pluralism as key features of the enabling environment for media in the digital age. As such, it also invites the Council of Europe to take specific forms of action to strengthen those features, including the close examination of "the state of media concentration, transparency of media ownership and regulation and their impact on media pluralism and diversity, and [to] consider the need for updating European standards in this respect in the digital age".

Resolution No. 3 articulates the urgent need to prioritize countering the "alarming" patterns of threats to freedom of expression and the safety of journalists throughout Europe. Participating Ministers therefore "resolve to take all appropriate steps" to ensure the protection of journalists, including in terms of preventive measures and effective investigations. The Resolution is cognizant of, and seeks to engage with, existing Council of Europe and other international initiatives sharing the same objectives, e.g. the UN Plan of Action on the Safety of Journalists and the Issue of Impunity and the UN Human Rights Council's Resolution 21/12 on the safety of journalists. The existence of relevant positive State obligations is recalled. Envisaged action lines seek cooperation between various Council of Europe bodies and stress the importance of: elaborating guidelines to protect the broad range of actors carrying out journalistic or public watchdog functions; implementing standards and best practices effectively; addressing specific gender-related challenges and threats faced by female journalists.

The delegation of the Russian Federation entered an interpretive statement on the adoption of the Conference's final documents in which it, amongst other things, set out its objections to the granting of "any legal status" to specific groups such as "bloggers, human rights defenders, whistle-blowers or other 'persons performing journalistic activities or public watchdog functions', as well as to the so-called 'new media'". The statement also insists on the closeness of the relationship between the rights of Internet users and their obligations.

• Political Declaration and Resolutions, Council of Europe Conference of Ministers responsible for Media and Information Society, 'Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibilities', 8 November 2013, Belgrade, Serbia
http://merlin.obs.coe.int/redirect.php?id=16854 EN FR

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NATIONAL

AT-Austria

BKS Bans ORF World Ski Championships App

On 11 November 2013, the Austrian *Bundeskommunikationssenat* (Federal Communications Board - BKS) decided that an app launched by the Austrian public broadcaster *Österreichischer Rundfunk* (ORF) dedicated to the Alpine World Ski Championships in Schladming was illegal. The app enabled users to access data about the championships via mobile devices.

In line with the first-instance decision of the *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria), against which ORF had appealed, the BKS ruled that the app constituted a "service specifically for mobile devices". Under the list of prohibited activities in Article 4f(2)(28) of the *ORF-Gesetz* (ORF Act - ORF-G), ORF is not allowed to provide such a service.

The BKS also found, contrary to ORF's claim, that the app represented an editorial or journalistic service in the sense of Article 3(5)(2) ORF-G, since the selection of parts of existing ORF services to which it provided access via mobile devices was based on an editorial decision. This was also the case if some of the services were included in their entirety, since this also required editorial staff to make considered decisions as part of a creative process.

The service had been specifically created for mobile devices because users of ORF's regular online service could not access such a compact collection of information on the World Ski Championships. It therefore constituted an additional service. Since it was not merely an existing service that had been adapted for mobile use, the legislator had wanted to prohibit ORF from offering it, in the interests of publishers.

• *Bescheid des BKS vom 11. November 2013 (GZ 611.812/0001-BKS/2013)* (BKS decision of 11 November 2013 (GZ 611.812/0001-BKS/2013))
http://merlin.obs.coe.int/redirect.php?id=16877 DE

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BKS on Programme-Specific Advertising in ORF Media Library

In a decision of 11 November 2013, the Austrian *Bundeskommunikationssenat* (Federal Communications Board - BKS), following a request from the Austrian public broadcaster *Österreichischer Rundfunk* (ORF) to amend the concept for its media library, commented on the definition of sponsorship in non-linear media services.

The procedure followed a complaint by the lower-instance *Kommunikationsbehörde Austria* (Austrian Communications Authority - KommAustria) about ORF's plans to amend its marketing concept. KommAustria had found, on the one hand, that ORF sold advertising slots that were not tied to particular programmes (i.e. the advertisers had no influence over when their advertisements were broadcast). However, ORF also wanted to enable advertisers to book advertising slots linked to specific programmes. According to KommAustria, this form of marketing constituted sponsorship in the sense of Article 1a(11) *ORF-Gesetz*, which should be interpreted as including, in addition to traditional sponsorship, all commercial communications marketed in direct and indirect connection with the main programme content. Since Article 17(3) *ORF-Gesetz* prohibited the sponsorship of news and political information programmes, the relevant part of ORF's request should be rejected.

In the appeal procedure, the BKS only partially agreed with KommAustria's ruling. The possibility of booking specific advertising slots alone could not justify the assumption that an advertiser taking up such an option was actually engaging in a form of sponsorship. In traditional linear television, it was also possible and admissible to book advertising slots during news programmes, although it should be noted that this was often due to the high viewing figures of such broadcasts. Although a direct content-related link could indicate sponsorship, the BKS thought that a blanket ban on programme-specific advertising was excessive and/or premature. The *ORF-Gesetz* did not provide any justification for such a ban on all forms of commercial communication linked to news programmes.

For these reasons, ORF should be allowed to sell advertising slots specifically in connection with on-demand news and political information programmes,

as long as there was no connection of any kind between the content of the commercial communication and that of the on-demand service.

• *Entscheidung des BKS vom 11.11.2013 (GZ 611.998/0004-BKS/2013)* (BKS decision of 11 November 2013 (GZ 611.998/0004-BKS/2013))
http://merlin.obs.coe.int/redirect.php?id=16857 DE

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BG-Bulgaria

Reduction of Public Television State Funding in 2014

The State budget subsidy for the national public service media provider, Bulgarian National Television ('BNT'), has been reduced by nearly BGN 5 million (EUR 2.5 million) for 2014 as compared to 2013 figures. In 2014, BNT shall receive BGN 65.15 million from the State as compared to the sum of BGN 70.13 million in 2013. Under point 3 of Article 70 (3) of the Radio and Television Act ('RTA') the budget of the public television is funded by means of a State budget subsidy.

The Members of the Bulgarian Parliament have passed in plenary session the reduced amount of the BNT State funding notwithstanding the protest of the public media representatives during the sitting of the Culture and Media Committee, which is one of the Standing Committees of the 42nd National Assembly. The BNT representatives did not convince the Assembly with their argument of urgently needing at least the funding level of 2013 in view of the high costs of the forthcoming digitisation process and the production of own television content.

The immediate effect of that reduction was that BNT has suspended its participation in the Eurovision Song Contest in order to save the required participation fee, the amount of which has been increased by 100% as compared to 2005 (the year in which Bulgaria took part for the first time in the contest). In the light of the expenses involved in this project and the forthcoming reduction in the 2014 budget, the suspension of participation in Eurovision is said to be the initial step in a series of savings that will have to be made.

The 2014 State Budget Act of the Republic of Bulgaria was adopted by the National Assembly on 9 December 2013 and was promulgated in the State Gazette No. 109 of 20 December 2013.

• Закон за държавния бюджет на република България (2014 State Budget Act)
http://merlin.obs.coe.int/redirect.php?id=16837 BG

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Federal Court Orders SRG to Broadcast Advertising Spots Critical of SRG

Swiss public service broadcaster Schweizerische Radio- und Fernsehgesellschaft (SRG) must broadcast television advertising spots that criticise SRG after the Bundesgericht (Federal Court) upheld a complaint by the Verein gegen Tierfabriken (VgT) that the broadcaster had refused to show such a spot.

In 2011, SRG subsidiary publisuisse SA had only authorised the first version of a spot produced by the VgT. It lasted seven seconds and showed the organisation's logo and Internet address, along with the text "www.VgT.ch - was andere Medien totschweigen" ("www.VgT.ch - hushed up by other media"), which was also read aloud. This version was broadcast 18 times during advertising breaks on SRG channel Schweizer Fernsehen in return for a payment from the VgT. However, a revised version of the spot with the new wording "was das Schweizer Fernsehen totschweigt" ("hushed up by Schweizer Fernsehen") was rejected. Publisuisse described this version as harmful to its business and image, and broadcasting it would have violated Article 10 of its General Terms and Conditions.

In 2012, the broadcasting regulator Unabhängige Beschwerdeinstanz für Radio und Fernsehen (Independent Radio and Television Complaints Authority - UBI) approved of SRG's actions by five votes to two. The rejected spot accused Schweizer Fernsehen of concealing information relevant to animal welfare and deliberately suppressing important issues. This was likely to damage the reputation of Schweizer Fernsehen (see IRIS 2012-6/12, IRIS 2010-3/10, IRIS 2009-10/2, IRIS 2001-7/2, IRIS 1998-1/8).

However, in the Federal Court's opinion, the mere fear that a spot might harm SRG's reputation was not a sufficient reason to refuse to broadcast it. Switzerland's highest court upheld a complaint by the VgT against the UBI's decision. The refusal to allow the VgT to advertise on the SRG channel infringed the VgT's constitutional rights. As a privileged licensee, SRG was not as free as private broadcasters where advertising was concerned. Any company that carried out state responsibilities and financed these through

additional activities (advertising) had to respect fundamental rights. SRG was obliged to maintain a neutral, objective position and should "also allow certain criticism of itself".

In the dispute over access to advertising slots, SRG enjoyed less autonomy than in editorial matters, since it was clear to the public that advertising spots represented the opinion of external third parties. An intrusion on the VgT's freedom of expression could only be justified if, for example, there was a legal basis for it. The General Terms and Conditions of publisuisse were not a sufficient basis. Swiss law included various provisions under which it was possible or necessary to reject unlawful advertising spots. For example, the Federal Court noted that SRG, like other broadcasters, had to ensure "that advertising does not infringe national or international law". However, SRG had not explained to what extent the disputed VgT spot infringed the existing provisions of the Radio- und Fernsehgesetz (Radio and Television Act - RTVG), Zivilgesetzbuch (Civil Code - ZGB; protection of privacy) or Bundesgesetz gegen unlauteren Wettbewerb (Unfair Competition Act - UWG).

Since there was no legal basis for or prevailing public interest in the decision not to broadcast the spot, SRG (or its subsidiary publisuisse) should have accepted the version of the spot submitted by the VgT. If the VgT continued to insist on the broadcast, SRG should conclude an advertising contract under which the VgT should pay SRG for the necessary airtime.

- *Entscheid des Bundesgerichts vom 16. November 2013 (2C_-1032/2012)* (Decision of the Federal Court, 16 November 2013 (2C_-1032/2012))
http://merlin.obs.coe.int/redirect.php?id=16863 DE
- *Entscheid b.651 der Unabhängigen Beschwerdeinstanz für Radio und Fernsehen vom 22. Juni 2012* (Decision b.651 of the Independent Radio and Television Complaints Authority, 22 June 2012)
http://merlin.obs.coe.int/redirect.php?id=16864 DE

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Appeal Court Fines Facebook User for Death Threat

According to media reports, on 25 November 2013, the *Zürcher Obergericht* (Zurich Appeal Court) imposed a fine, payable in 45 daily instalments, on a 23-year old man who had threatened to take revenge against his 290 Facebook friends because none of them had wished him a happy birthday.

The Appeal Court ordered the Facebook user to pay 45 daily instalments of CHF 10 for attempting to cause fear and alarm among the general public. Under the relevant Article 258 of the *Schweizerisches Strafgesetzbuch* (Swiss Criminal Code - StGB), any person who causes fear and alarm among the general public by threatening or feigning a danger to life, limb or property is liable to punishment.

The court considered the group of 290 Facebook friends as constituting the "general public" in the sense of Article 258 StGB. According to established case law, the term means that the threatening or feigning of danger must be directed not just at a defined group such as the person's family or circle of friends. However, the defendant's message was deliberately aimed at a large number of readers and not at a limited group of friends in the traditional sense. His Facebook friends inevitably included a large number of distant contacts.

The court added that, by sending the message, the defendant had relinquished control over its further distribution. He had at least tacitly accepted the possibility that his message would cause fear and alarm to third parties. His action was punishable even if he had never intended to carry out his threat, according to the court's legal secretary.

As well as the fine, the defendant must pay around CHF 12,700 to cover the cost of the psychiatric report drawn up on his psychological state, in addition to the other court costs.

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CZ-Czech Republic

Pre-Election Broadcasting in Czech Television

In 2013, the Director General of Czech TV issued a Directive that provides guidelines concerning Czech TV's coverage of the period prior to the Czech national parliamentary elections of 25 and 26 October 2013. The Directive provides television stations with general rules for appropriate broadcasting of shows of political interest.

The Directive emphasises, among other things, the principle of „graduated equality", which should be taken into account for the broadcasting of shows covering the election campaign. This principle is based on the results of pre-election opinion-polls. The frequency of occurrence of candidates in political debates is affected by their ranking according to research on public opinion. Further guidelines are indicated concerning public opinion polls and other types of research on public opinion. The Directive stipulates the obligations of television stations to inform about political parties and candidates, and about the time and manner of presenting political discussions.

The Czech Pirate Party, which was unsuccessful in the election, filed a complaint with the Supreme Administrative Court, which challenged the selection procedure of guests in the special edition of Czech TV programmes before the elections, including electoral research. The Supreme Administrative Court rejected this point of the complaint, as well as others, because Czech TV complied with the requirement of diversity of information about candidates in §16(4) of the Election Act. The Procedure of Czech TV in the pre-election broadcasting was legitimate, in accordance with the principle of graduated equality.

The Supreme Administrative Court in its decision held that it considers the principle of graduated equality was correct and Czech TV clearly seeks to meet the requirements of adequacy in determining the temporal proportions among candidates in view of their political and social importance. The Supreme Administrative Court found that restrictions on the number of speakers of parties and movements in the most watched election debates are in line with the principle of graduated equality.

The Court also examined the contracts concluded between Czech TV and pre-election survey agencies. Both the contracts and the research methodologies were in line with statistics standards. The pre-election surveys used by Czech TV had been an appropriate tool to obtain statistical information on the current electoral potential.

The principle of graduated equality does not mean that all parties must have equal air time. Czech TV's considerations in the selection of participants for the most important discussions were neither arbitrary nor discriminatory, but on the contrary based on comprehensible reasoning and relevant data.

• *Usnesení Nejvyššího správního soudu ČR č. Vol 142/2013* (Decision of the Supreme Administrative Court of the Czech Republic)
http://merlin.obs.coe.int/redirect.php?id=16838 CS

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BVerfG Confirms Court Control over Copyright Remuneration

In a decision of 23 October 2013, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) rejected constitutional complaints about Article 32 of the *Urheberrechtsgesetz* (Copyright Act - UrhG). Article 32 UrhG enables the courts to control the fairness of remuneration for the granting of copyright for the use of a work by entitling authors to request a change to the level of remuneration.

The claimant, a publishing firm, complained about this provision after being ordered to pay translators' fees in two procedures before the *Bundesgerichtshof* (Federal Supreme Court - BGH). In the BGH's view, the contractually agreed level of remuneration had been underestimated.

The BVerfG considered the provision of Article 32 UrhG to be in conformity with the Constitution. It was true that Article 12 of the *Grundgesetz* (Basic Law - GG) protected authors' freedom to determine for themselves, in an individual contract, how remuneration should be paid for use of a copyright-protected work and how much should be paid. However, since authors often found themselves in a weak negotiating position vis-à-vis publishing companies or other users of rights, there was good reason to create laws to guarantee equitable remuneration and thereby give the courts control over the level of remuneration. In this respect, the property guarantee enshrined in Article 14(1) GG favoured authors. Like Article 11(2) UrhG, it required equitable remuneration to be paid to authors. This guarantee was also laid down in international and European law.

The BVerfG recognised that Article 32 UrhG considerably restricted private autonomy and therefore also impaired the security of long-term planning and the reliability of contract content. However, the rule did not deprive rights users of all room to negotiate, but merely imposed a minimum level of remuneration. Nor was the rights users' position excessively harmed by the fact that the onus was always on the author to prove any claim that remuneration was unreasonable. Furthermore, legal certainty could be created by means of joint remuneration agreements under Article 36 UrhG. If such an agreement were in place, the corresponding remuneration was irrefutably presumed to be equitable under Article 32(1)(1) UrhG.

The BVerfG countered the claimant's argument that, to be consistent, the legislator should also have made provision for rights users to exercise control over prices, by ruling that, in view of the structural differences between authors and rights users, remuneration could, in principle, never be excessive.

The constitutional complaint was also rejected in so far as it disputed the retrospective application of Article 32 UrhG, which was adopted in 2002, under Article 132(3) UrhG. According to the BVerfG, this retrospective application was limited to a 13-month period and was necessary in order to avoid the existence simultaneously of contracts that entitled authors to demand a change to the level of remuneration and contracts that did not.

• *Beschluss des BVerfG vom 23. Oktober 2013 (Az. 1 BvR 1842/11; 1 BvR 1843/11)* (Decision of the Federal Constitutional Court, 23 October 2013 (case no. 1 BvR 1842/11; 1 BvR 1843/11))
http://merlin.obs.coe.int/redirect.php?id=16860 DE

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BayVGH Overturns KJM's Teletext Ban

In a ruling of 19 September 2013 (case no. 7 B 12.2358), the *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court - BayVGH) overturned a decision of the *Bayerische Landeszentrale für Medien* (Bavarian New Media Authority - BLM), prohibiting a media company from operating its (entire) erotic teletext service on pages 600-900 between the hours of 6 a.m. and 10 p.m.

The ban had been imposed following an examination of the service by an inspection team appointed by the *Kommission für Jugendmedienschutz* (Commission for the protection of young people in the media - KJM). The inspection team, which drafted the actual decision, had concluded that the service was harmful to the development of minors in the sense of Article 5(1) in conjunction with Article 5(3) and (4) of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on the protection of young people in the media - JMStV).

According to the minutes of their meeting, the KJM experts responsible for determining the admissibility of services under Article 14 JMStV examined the inspection team's evaluation of the content of the teletext service and decided to impose the ban "after a discussion".

The BayVGH ruled that this process infringed the obligation to explain the reasons for a ban, enshrined in Article 17(1)(2) and (3) JMStV. The mere reference to a discussion of the results of the preliminary examination did not provide the factual and legal grounds for the decision.

Similarly, no distinction had been made between the different examinations of the service. Although there was no reason why the KJM experts should not adopt the inspection team's recommendations or draft decision as their own, they should do so clearly and unambiguously, which they had failed to do in the present case. This was necessary for legal protection reasons. Otherwise, the parties concerned would not know the reasons for the decision, and would therefore not be able to contest it before a court.

Regardless of this, however, the ban was also disproportionate because it did not represent the slightest possible intrusion, as required under Article 20(4) JMStV in conjunction with Article 59(3) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV). Finally, it was unclear why it had not been possible to ban only the 136 objectionable pages rather than all 300. The teletext service in question was not a single, self-contained whole and did not need to be treated and evaluated as such.

• *Urteil des Bayerische Verwaltungsgerichtshofs vom 19. September 2013 (Az. 7 B 12.2358)* (Ruling of the Bavarian Administrative Court, 19 September 2013 (case no. 7 B 12.2358))
http://merlin.obs.coe.int/redirect.php?id=16859 DE

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OLG Hamm Rules that YouTube Fatal Accident Video Does not Need to be Deleted

In its decisions of 7 August 2013 and 23 September 2013, the *Oberlandesgericht Hamm* (Hamm Appeal Court - OLG) ruled that the YouTube video platform is not obliged to delete videos concerning a fatal traffic accident that name the person responsible.

The plaintiff in the proceedings had caused a traffic accident in 2008, in which two people were killed. In 2009, he received a suspended one-year prison sentence, a EUR 5,000 fine and a one-month driving ban.

The accident was the subject of numerous media reports. Unknown users collected these reports and created a number of videos about the accident. These videos, which were published on YouTube, mention the plaintiff's name and address at the time, and show his face. The plaintiff therefore took court action against YouTube, requesting the deletion of the videos.

The OLG Hamm rejected this request on the grounds that, in the necessary weighing up of the fundamental rights of the respective parties, the right to freedom of expression and the public right to information took precedence over the plaintiff's general rights to privacy and rehabilitation. Although it was true that the probationary period had expired more than two years previously, there were several reasons why the request for the videos to be deleted could not be accepted.

Firstly, as the offender, the plaintiff should expect the public to show an interest in his crime. In view of the disastrous consequences of the accident, the prominent position of the plaintiff and the link with a foreign country, there was particular public interest in the case. The plaintiff was a German diplomat in Russia, where the accident happened. It had therefore been a newsworthy event. When the material had been uploaded in 2010, it had been a topical news

report, which had helped to serve the public's basic, pre-eminent right to information.

The suggestion in the video that the plaintiff had been drunk when the accident occurred also could not justify a claim for it to be deleted. Firstly, the allegation had not been proven false, and secondly the "layman's principle" applied, under which a claim should not be presumed to be true if it was made in a report by a layman rather than by professional media. Incidentally, due diligence had been exercised in so far as the video mentioned exactly the same reasons for suspicion as the media, and the plaintiff had not denied them.

Although it was no longer a topical news report, the video should continue to be available for download. Here, the OLG applied the principle that it should be possible to store reports that were lawful when they were published in archives from which they could be downloaded, provided there were no particular circumstances in the individual case that meant they should be deleted. There were no such circumstances in this case. It was clear, even to a layman, that the report was old. It was also significant that the plaintiff had since changed his name and address.

• *Beschluss des OLG Hamm vom 23. September 2013 (Az. 3 U 71/13)* (Decision of the Hamm Appeal Court, 23 September 2013 (case no. 3 U 71/13))
http://merlin.obs.coe.int/redirect.php?id=16861 DE

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Use of Image for Third-Party Advertising Breaches Own Image Rights

Ruling on an appeal, on 5 November 2013 (case no. 15 U 44/13), the Oberlandesgericht Köln (Cologne Appeal Court - OLG) decided that an actress's own image rights can be breached if a picture from a film is used in an electrical chain store's advertising brochure without the necessary permission.

The OLG therefore confirmed the ruling of the Landgericht Köln (Cologne District Court - LG) of 20 February 2013 (case no. 28 O 431/12). An action had been brought after a picture of the actress appeared in an electrical chain store's advertising brochure. A double-page spread in the brochure showed three television sets, the screens of which contained a still image from a film in which the character played by the plaintiff was visible. The image also contained the film title and the words "Available on DVD and Blu-ray".

The actress had complained that this use of her image was unlawful. She had only given permission for her image to be used to promote the film, not to advertise third parties and their products and services. The defendant, however, had claimed that the plaintiff's image had, in view of the layout of the brochure pages and the advertised products, only been used to advertise the DVD and Blu-ray editions of the film.

The LG Köln disagreed and ruled in the actress's favour. If the image from a film had primarily been used to advertise another product (in this case, television sets), it could not be assumed that the actress had given her permission. In this case, the actress was entitled to an injunction against the company concerned under Articles 823 and 1004 of the Bürgerliches Gesetzbuch (Civil Code - BGB) in conjunction with Articles 22 and 23 of the Kunsturhebergesetz (Artistic Copyright Act - KUG), to information under Article 242 BGB and to compensation under Articles 823 and 249 BGB. The OLG agreed with the LG's decision: the use of her image for advertising purposes infringed the actress's general privacy rights, in particular her own image rights which, in addition to the non-material aspects of the privacy rights, included the right to determine whether and how her own image was commercialised and, in particular, used for advertising purposes. The fact that the television sets pictured in the advertising brochure appeared with product and price information pointed unmistakably to the promotional nature of the presentation of these products.

The publication and distribution of the image without the plaintiff's permission was also prohibited under Article 23(1) KUG, according to which such publication and distribution was only permitted if it met a legitimate public right to information. Advertisements that - as in the present case - only served the business interests of a company using an image in its advertising did not fulfil such a right. Even if an exemption under Article 23(1)(1) KUG were admitted, the plaintiff's right to privacy would, in the weighing up process, take precedence over the public's right to information, which had been asserted by the defendant.

The LG had rightly ordered the defendant to disclose information, since details of the type, length and scope of the commercial use of the image were needed in order to calculate a fictitious royalty payment. The plaintiff was entitled to demand a fictitious royalty payment for unjust enrichment under the terms of Article 812(1)(1)(2) BGB.

The OLG therefore fully rejected the electrical chain store's appeal. No further appeals were allowed.

• *Urteil des OLG Köln vom 5. November 2013 (15 U 44/13)* (Ruling of the Cologne Appeal Court, 5 November 2013 (15 U 44/13))
http://merlin.obs.coe.int/redirect.php?id=16862 DE

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Düsseldorf District Court Rejects Claim Based on Fraudulent-Filesharing Caution

In a decision of 8 October 2013, the *Amtsgericht Düsseldorf* (Düsseldorf District Court - AG) ruled that a claim based on an out-of-court settlement was unenforceable because it had been preceded by a fraudulent-filesharing caution and its enforcement was incompatible with the defence of bad faith.

At the rightsholders' request, a law firm specialising in copyright had informed the defendant that her Internet connection had been used to make 537 copyright-protected music files available for download. As the connection owner, she was obliged to reimburse the legal prosecution costs even if she had not committed the copyright infringements herself. With the amount in dispute normally valued at EUR 10,000 per file, a substantial sum was due, since legal costs of EUR 2,998.80 were applicable for only ten music files.

The law firm asked the defendant to provide evidence to show who had committed the copyright infringements using her connection. It then offered to accept an out-of-court settlement of EUR 4,000 and explained that, if the offer was accepted, the rightsholders would waive any further claims and withdraw their request for the name and address of the person directly responsible. The defendant subsequently signed the settlement agreement, which had been formulated in advance by the law firm. Since the defendant later refused to pay the sum of EUR 4,000 stipulated in the settlement agreement, the law firm instigated court proceedings against her.

The AG Düsseldorf dismissed the action on the grounds that it was incompatible with the defence of bad faith enshrined in Articles 853 and 823(2) of the *Bürgerliches Gesetzbuch* (Civil Code - BGB) and Article 263 of the *Strafgesetzbuch* (Criminal Code - StGB), which should officially be taken into account as a particular form of an abuse of rights. It was legally incorrect, for example, to claim that the connection owner was liable regardless of guilt, since disturbance liability was always based on a failure to exercise due diligence. Moreover, the amount in dispute alleged in the letter was inconsistent with higher-court case law, according to which, where only disturbance liability was concerned, the value of a claim was lower than if the defendant had committed the crime himself. Furthermore, the amount in dispute did not increase in a linear fashion, as the plaintiff had claimed in the caution. Interpretations of the law constituted "facts" in the sense of Article 263 StGB if the impression was deliberately given that they represented a widely accepted legal opinion, especially as people who were not legal experts tended to have a high level of trust in lawyers' statements. The false claim that the defendant's legal position was hopeless represented a form of deception that had misled the defendant about her legal situation, causing her to sign the settlement agreement, under which she would have suffered a financial loss.

Since the law firm's deception had also caused intentional damage contrary to public policy, the defendant was entitled, under Article 826 BGB, to demand that the plaintiff release her from her obligations under the settlement, which in turn meant that the claim could not be enforced under Article 242 BGB.

• *Urteil des Amtsgerichts Düsseldorf, Az. 57 C 6993/13, 08. Oktober 2013* (Ruling of the Düsseldorf District Court, case no. 57 C 6993/13, 8 October 2013)
http://merlin.obs.coe.int/redirect.php?id=16858 DE

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ES-Spain

Constitutional Court Uphold Rights to Personal Image and Honour of a Disabled Person

The Spanish Constitutional Court (TC) has ruled on 16 December 2013, that the rights to personal image and honour of a disabled person should prevail over the right to information claimed by a television broadcaster in relation to a programme in which a disabled person was ridiculed. The programme, which was broadcast on Tele5 (Mediaset's Spanish chain), invited a person with mental and physical disabilities, i.e. the plaintiff, to be interviewed. During the course of the interview, the plaintiff was asked personal questions of a sexual nature and was generally made fun of by the interviewer. Afterwards, the interview was made available on the programme's website.

The initial proceedings in the first instance, which were upheld by the Court of Appeal, declared that the plaintiff's right to image and honour had been infringed. The Supreme Court, however, held that the public's right to information was prevalent over the plaintiff's right to personal image and honour due to the fact that the plaintiff had agreed to the interview. The State Attorney, on the basis of article 49 of the Spanish Constitution, which contains a mandate to protect persons with disabilities, filed an appeal before the Constitutional Court (the Court in Spain responsible for making the final decision in cases regarding human rights controversies).

The TC held that the image rights of a person can only be used by a third party where the person concerned has given his or her express consent, i.e. in this instance to the broadcasting of the interview, and to the interview being made available on the internet.

The Court argued that in this case, due to the disability of the plaintiff, the requirement for such consent should have been more strictly applied. Furthermore, the right to information could not prevail in this case due to the fact that the programme and the interview lacked the necessary public interest and public importance element. Not only did the interview lack newsworthy value, it was also performed exclusively with the purpose of ridiculing the individual by highlighting his obvious signs of physical and mental disability. The Court concluded that Tele5 abused the vulnerability of the interviewee with a clear and reprehensible intention to mock his physical and mental conditions; thus violating not only his right to honour and reputation, but also his right to dignity. Tele5 were ordered to compensate the plaintiff by paying him EUR 15,000, a significantly lower amount than the EUR 300,000 initially claimed by the plaintiff.

This decision has been commended by the *Comité Español de Representantes de Personas con Discapacidad* (Spanish Committee of Representatives of Disabled Persons- CERMI) which is a platform for representation, defense and action of disabled people, who value the decision as an added legal protection to the personal and social image of people with disabilities.

• *Tribunal Constitucional, Sentencia 208/2013 de 16 de diciembre de 2013* (Constitutional Court, judgment 208/2013 of 16 December 2013)
http://merlin.obs.coe.int/redirect.php?id=16853 ES

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Creation of National Commission for Markets and Competition

The *Comisión Nacional de los Mercados y la Competencia* (national commission for markets and competition - CNMC) was created by Act No. 3/2013, which was adopted on 4 June 2013. The commission combines functions involving the smooth running of the markets and sectors which until now have been controlled by various authorities with responsibility for the sectors of energy, the telecoms market, competition, the railways, the postal sector, airports, and the audiovisual media. These attributions have earned it the nickname of "super-regulato"r (*superregulador*).

The Council of the CNMC is its decision-making body for the functions of arbitration, provision of advice, promotion of competition, and settlement of differences attributed to the CNMC. It has ten members, appointed by the Government on proposals from the Minister for the Economy and Competition. The Parliament, by means of a resolution adopted by an absolute majority, is able to veto a proposed nomination within a period of one month. The terms of office of members of the Council shall be six years, and they may not be re-elected. Membership of the Council will be renewed partially every two years.

The Directorate of Telecommunications and the Audiovisual Sector is the department within the CNMC responsible for regulating, supervising and checking the smooth running of the markets for electronic communications and audiovisual communication. For the audiovisual communication market, the CNMC has been attributed the following functions:

- ensuring observance of the obligations on the quotas for European works on the part of national television service providers, and the financing for production of works of this type;

- ensuring transparency in audiovisual communication;

- ensuring respect for the rights of children and handicapped people;

- ensuring supervision to ensure that audiovisual content complies with current legislation and the codes of auto-regulation;

- ensuring respect for the codes of auto-regulation in respect of audiovisual content checking their compliance with the legislation in force;

- ensuring respect for the obligations and limitations on commercial audiovisual communications;

- ensuring respect for obligations regarding the acquisition of exclusive rights for audiovisual content, the unencrypted broadcasting of content included on the list of events of general interest, and the sale and purchase of exclusive rights for Spanish football competitions;

- checking compliance with the public-service mission entrusted to public-service media bodies at the national level, and the sufficiency of the public resources allocated to them;

- ensuring the freedom to receive in Spain audiovisual media services whose editors are established in a member State of the European Union;

- adopting measures aimed at guaranteeing the application of Spanish legislation in the case of a supplier of audiovisual services directed at Spain would be established in another European Union member State in order to circumvent the Spanish rules;

- deciding on the non-promotional nature of the public-service or charitable messages;

- exercising the other functions conferred on it by both the Act and the Decree.

The Ministry of Industry, Energy and Tourism nevertheless inherits certain functions which previously belonged to the commission for the telecommunications market (*Comisión del Mercado de las Comunicaciones*), which ceased to exist when the new Act

was adopted, including taxes on telecoms activities and notifying suppliers of audiovisual media services. For its part, the Presidential Ministry is responsible for adopting the list of events of general interest.

In the field of electronic communications and audiovisual communication, the CNMC carries out its duties by virtue of the provisions of *Ley 32/2003, de 3 noviembre, General de Telecomunicaciones* (Act No. 3/2013 and General Act No. 32/2003 of 3 November 2003 on telecommunications; see IRIS 2004-1/21 and IRIS 2003-6/25), and *Ley 7/2010, de 31 de marzo, General de la Comunicación* (General Act No. 7/2010 of 31 March 2010 on audiovisual communication; see IRIS 2012-8/20 and IRIS 2010-4/21), and the implementing regulations for these Acts. It should be noted that Act No. 7/2010 on audiovisual communication originally provided for the creation of an independent regulatory authority - the *Consejo Estatal de Medios Audiovisuales* (National Council for the audiovisual media - CEMA); however, the present Government decided not to create this council but to replace it by the "super-regulator".

• *Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia* (Act No. 3/2013 of 4 June 2013 creating the national commission on markets and competition)
http://merlin.obs.coe.int/redirect.php?id=16871 ES

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New Provisions on Extended Collective Licence for Archives

On 15 November 2013, amendments to the Finnish Copyright Act (404/1961) came into force. Among the amendments, section 25(g) of the Act, on renewed transmissions of television programmes stored in archives, was updated and extended. The section was also renamed to refer to the re-utilisation of programmes and publications stored in archives ("Arkistoidun ohjelman ja lehden uudelleen käyttäminen"). Other amendments to the Act concern the term of protection for fixations of performances and producers of phonograms as well as the use of orphan works (16(f)§ comes into force on 29 October 2014).

According to paragraph 1 of the new section 25(g), a broadcasting organisation may make a copy of a television or radio programme stored in its archives and of a work included in the programme, and use it for communication to the public. This re-utilization is made possible by virtue of an extended collective licence as provided in section 26. The work must have been included in a television or radio programme produced or commissioned by the broadcasting organisation and transmitted before 1January 2002. According to paragraph 2, publishers may, by virtue of the extended collective licence, make a copy of a work and use it for communication to the public, if the work has been included in a newspaper or periodical by the publisher before 1 January 1999. According to paragraph 3, the provisions of subsections 1-2 shall not apply to a work of which the author has prohibited the use of.

The new section 25(g) is intended to facilitate the re-utilisation of archives in mass use since individual agreements are often impossible to conclude afterwards or would require excessive investments; the materials and right-holders are numerous. However, the new provisions aim to enable re-utilisation only for organisations themselves (i.e. broadcasting organisations or publishers who have made the initial investments) and not for other commercial or non-commercial exploiters.

In its previous form, section 25(g) provided a similar possibility of an extended collective license only for a new transmission of a television programme stored in archives. No licences existed - allegedly due to the limited scope of the provisions. As regards broadcasting organisations, section 25(g) was updated in order to cover radio programmes and communication to the public via communications networks, including via the Internet (on-demand or otherwise). Similar provisions have already been implemented in other Nordic Countries (Denmark, Sweden, Norway). However, in addition, the amendments to the Finnish Copyright Act include the possibility of digitization and re-utilization of archives for publishers (section 16(d) on use of archives by the National Library of Finland; e.g., Finnish newspapers are digitised for online use).

The provisions still need to be accompanied by negotiations and licensing. According to section 26 of the Copyright Act, provisions regarding extended collective licences apply when the use of a work has been agreed upon between the user and the organisation which is approved by the Ministry of Education and which represents, in a given field, numerous authors of works used in Finland. A licensee authorised by virtue of an extended collective licence may, under the terms determined in the licence, also use a work in the same field whose author the organisation does not represent. In the case of media archives, all relevant right holders, including producers, should be represented. The InfoSoc Directive (2001/29/EC) is without prejudice to arrangements in the Member States concerning management of rights such as extended collective licences (recital 18).

• *Tekijänoikeustoimikunnan mietintö - Ratkaisuja digiajan haasteisiin, Opetus- ja kulttuuriministeriön työryhmämuistioita ja selvityksiä 2012:2* (Report of the Copyright Commission - Solutions to challenges of the digital age, Reports of the Ministry of Education and Culture 2012:2)
http://merlin.obs.coe.int/redirect.php?id=16874 FI

• *Laki tekijänoikeuslain muuttamisesta, 763/2013, 8 November 2013*
(Act amending the Copyright Act, 763/2013, 8 November 2013)
http://merlin.obs.coe.int/redirect.php?id=16875 FI

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Conseil d'Etat Cancels Approval of Canal Plus' Purchase of Direct 8 and Direct Star

In two decisions issued on 23 December, the Conseil d'Etat has cancelled the authorisations issued by the *Autorité de la concurrence* (Competition Authority) and the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority - CSA) for Canal Plus's purchase of the channels Direct 8 and Direct Star. The background to the story is that on 23 July 2012, after thorough investigation, the Competition Authority authorised the operation, on condition that the parties abided by their undertakings aimed at reducing the potential for the purchase giving rise to competition issues (see IRIS 2012-8/26). Canal Plus' competitors, the channels TF1 and M6, contested the authorisation before the *Conseil d'Etat* and called for it to be cancelled on the grounds of the Authority having exceeded its powers. They were also calling for the voiding of the deliberation of 18 September 2012 by which the CSA had given its approval for the operation (see IRIS 2012-9/21).

The *Conseil d'Etat* upheld the claim. Beginning by examining the Competition Authority's decision, it declared this to be not only irregular in its form but also partly illegal in its content. In accordance with Articles L. 430-7, L. 461-1 and L. 461-3 of the Commercial Code, any such decision authorising concentration has to be adopted by the Competition Authority sitting in collegial formation, which it did not in the case at issue. On the merits of the case, TF1 held that the Competition Authority had committed an error of appreciation by accepting one of Canal Plus's undertakings intended to prevent the blockage of markets for the rights to repeat broadcasts of French films without encryption: the Group had undertaken to refrain from acquiring the broadcasting rights for both pay television and unencrypted viewing for more than twenty French films per year. The Conseil d'Etat nevertheless upheld TF1's arguments that, despite these undertakings, Canal Plus was able to capitalise on its near-monopoly in the markets for broadcasting rights for French films on pay television in order to attain a dominant position in the markets for broadcasting rights for second- and third-window unencrypted showing of films, thanks to leverage consisting of linking the acquisition of exclusive rights for broadcasting on pay television and for the second- and third-window unencrypted broadcasting. Contrary to the claim of the Competition Authority, however, Canal Plus' undertaking would not have deprived the company of the ability to bring such leverage into play. It was noted, furthermore, that Canal Plus will be encouraged to implement such leverage, enabling it to obtain attractive content likely to be programmed on the channels acquired, which would have the effect of erecting substantial barriers to entering the markets for unencrypted second- and third-window broadcasting rights for French films. The Competition Authority had therefore committed an error of appreciation in considering that the undertaking at issue was such as to prevent the anti-competition effects of the operation connected with blocking the markets for rights to French films for unencrypted second-and third-window broadcasting. Nevertheless, in view of the reasons for the cancellation, the *Conseil d'Etat* has decided that this should be deferred until 1 July 2014, and that it would only apply in the future.

Regarding the request for the CSA's deliberation approving the operation to be cancelled, the *Conseil d'Etat* pointed out that the CSA had reasoned on the basis of both the undertakings adopted by Canal Plus and the decision of the Competition Authority. If the decision were to be cancelled, the CSA's deliberation would be deemed illegal as a result. However, only a partial cancellation has been pronounced. The CSA's re-examination should cover this point only, taking account of the new corrective measures the Competition Authority may adopt. The cancellation is not however likely to call into question the actual principle of approval. It is therefore now up to the Competition Authority to re-examine the concentration operation between now and July and determine what new undertakings will be required.

• *Conseil d'Etat, 23 décembre 2013, Métropole Télévision n°363978*
(Conseil d'Etat, 23 December 2013, Métropole Télévision, No. 363978)
http://merlin.obs.coe.int/redirect.php?id=16865 FR
• *Conseil d'Etat, 23 décembre 2013, Métropole Télévision, n°363702*
(Conseil d'Etat, 23 December 2013, Métropole Télévision, No. 363702)
http://merlin.obs.coe.int/redirect.php?id=16866 FR

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New Methods and Constitutional Details for CSA Sanctions Procedure

The Decree of 19 December 2013 on the sanctions procedure implemented by the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority - CSA)

in application of Article 42-7 of the Act of 30 September 1986, has been officially published. This text follows on from the adoption of the Act of 15 November 2013 on the independence of the public-sector audiovisual scene, and reducing the sanctioning powers of the CSA by separating the stages of prosecution and investigation of cases (see IRIS 2013-10/23). Under the new legislation, the CSA remains competent to pronounce sanctions, but it will now only be able to do so in response to a referral by a rapporteur whose independence from the CSA college and the audiovisual sector is guaranteed by his/her status and the arrangements laid down for his/her appointment. The Decree lays down the conditions for implementing each stage in the procedure: notification of complaints by the rapporteur; timeframe for the parties to produce documentary evidence; hearing reports, possibility of protecting the procedure by applying business confidentiality; how to hold hearings; and how the CSA is to reach its decision.

This new procedure has been introduced at the same time as the Constitutional Council pronounced on the constitutionality of Article 42 of the Act of 30 September 1986, in its version resulting from the Act of 9 July 2010, which sets the limits on the CSA's power to serve notice. According to this text, the CSA has the power to serve notice on editors and distributors of audiovisual communication services and the operators of satellite networks requiring them to comply with the obligations imposed on them by legislation and the regulations. In the case at issue, notice had been served on an audiovisual service editor because of discriminatory statements made on the air; in its defence, it claimed that Article 42 of the 1986 Act did not guarantee within the CSA the separation of the powers of prosecution and investigation on the one hand and the powers of sanction on the other, thereby contravening the principles of independence and impartiality required by Article 16 of the 1789 Declaration of the Rights of Man. In a decision delivered on 13 December 2013, the Constitutional Council deemed the argument incorrect. It noted that a notice served by the CSA could not be regarded as the commencement of the sanction procedure provided for in Article 42-1, but only as a preliminary. It was only subsequently, if it failed to comply with a notice served in application of Article 42, that an editor could be subjected to one of the sanctions pronounced by the CSA (suspension of editing, broadcasting or distributing the service(s) in a programme category, part of a programme, etc), under Article 42-1 of the Act of 30 September 1986. In the case at issue, it had not been this provision that was referred to the Constitutional Council. The "Wise Men" found that the service of notice did not constitute a sanction in the nature of a punishment, and therefore declared the disputed Article 42 in compliance with the Constitution.

• *Décret n°2013-1196 du 19 décembre 2013 relatif à la procédure de sanction mise en œuvre par le Conseil supérieur de l'audiovisuel en application de l'article 42-7 de la loi n°86-1067 du 30 septembre 1986 relative à la liberté de communication* (Decree No. 2013-1196 of 19 December 2013 on the sanctions procedure implemented by the CSA in application of Article 42-7 of Act No. 86-1067 of 30 September 1986 on the freedom of communication)
http://merlin.obs.coe.int/redirect.php?id=16867 FR

• *Conseil constitutionnel (n°2013-359 QPC), 13 décembre 2013 - Sté Sud Radio Services et a.* (Constitutional Council (No. 2013-359 QPC), 13 December 2013 - the company Sud Radio Services and others)
http://merlin.obs.coe.int/redirect.php?id=16868 FR

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The CSA Proposes Clearer, Simpler Regulation of On-Demand AVMS

On 23 December 2013, the *Conseil Supérieur de l'Audiovisuel* (audiovisual regulatory authority - CSA) delivered a report on application of Decree No. 2010-1379 of 12 November 2010 on on-demand audiovisual media services (on-demand AVMS) to the Prime Minister and to the Ministry of Culture. The CSA took the opportunity to draw up a report on the text and give details of its application, and then made a number of proposals aimed at clarifying and simplifying the regulation of on-demand AVMS and at creating a favourable environment for these services. Totally in line with the conclusions of the Lescure mission (see IRIS 2013-6/19), and in order to improve the competitiveness of these services, the CSA is calling for changes in media chronology, shortening the window for broadcasting pay-per-view video on demand (VoD) to three months (compared with the current four) and the window for broadcasting subscription video on demand (SVOD) to 24 months (compared with the current 36). Although the latter is not yet particularly developed in France, that could change with the announced arrival of Netflix. The CSA also recommends limiting the freeze on rights to four weeks (two weeks before broadcasting and two weeks afterwards). Channels are currently entitled to request that films being show again on television should be taken out of VoD catalogues for several months, which explains why only 63% of feature films are offered as VOD within six months of being first screened, much to the public's disappointment. The CSA makes another noted proposal in its report by calling for a clarification of the status of the new Internet stakeholders with which the on-demand AVMS are in competition. Video-sharing platforms are in fact excluded from the definition of an on-demand AVMS if they host user-generated content. For several years these platforms have been developing partnerships with audiovisual editors and content suppliers, with which they share the income generated by advertising. They sometimes edit certain services directly (such as Dailysport edited by Dailymotion), or in some cases serve as a distributor of on-demand

AVMS. An example is YouTube, which launched a number of exclusive themed channels (YouTube's "original channels") in France in 2011. Quite often, the Internet access providers also develop their own offer of VOD and SVOD. A video-sharing site may be qualified as a host within the meaning of the LCEN for content put online by private users, and as an editor within the meaning of the Act of 30 September 1986 on audiovisual communication for an audiovisual service. As for activity as a distributor of audiovisual communication services, this is recognised by the Act but not by the Directive on audiovisual media services. The Directive only recognises the qualification of supplier of services, which corresponds to that of an editor under French law. The Lescure mission proposed applying the regime of distributor of audiovisual services provided for in French law to certain stakeholders (IAPs, manufacturers and distributors of connected terminals, app stores, and even video-sharing sites). The implications of these qualifications are multiple and complex. In its report, the CSA therefore calls for a clarification of the scope of the Directive SMAV when it is re-examined, so that distributors of services within the meaning of French law can be incorporated in it, and that the two European Directives can be coordinated appropriately. Also, as the Lescure Report advocated, the CSA is asking for an impact study to be carried out in order to determine the new stakeholders to which a status of distributor of services should be applied and the consequences of such qualification. Lastly, it calls for the introduction of a regime of voluntary agreements in favour of on-demand AMSs as a complement to the regime of declarations which would be required of all services. It now remains to be seen what the French Government will make of these proposals.

• *Rapport au Gouvernement sur l'application du décret n°2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande (SMAD)* (Report to the Government on application of Decree No. 2010-1379 of 12 November 2010 on on-demand audiovisual media services)
http://merlin.obs.coe.int/redirect.php?id=16869 FR

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Report on Financing Cinematographic Production and Distribution in the Digital Era

On 8 January, at the Conference on Diversity in Cinema (Assises pour la Diversité du Cinéma) organised by the National Centre of Cinematography and the Moving Image (Centre National du Cinéma and de l'Image Animée - CNC), cinema professional René Bonnell presented a 190-page report on financing cinematographic production and distribution in the digital age. After drawing up a thorough statement of the economy of the sector and the situation of relations between its various stakeholders, the report goes on to present the prospects for the various markets, for the cinematographic industry (cinemas, video, TV, operation, Internet), and for supplying the support fund. It ends with a list of fifty specific measures and the desirable strategic guidelines for adapting the financing and development system for the cinema to the digital era.

These measures mainly involve a more balanced sharing of risk, based on greater transparency (more frequent reporting and auditing) and control of production costs (presenting estimates in a different way, adaptation of controlled financing according to practices). Attention was drawn in particular to the inflated amounts paid to stars, amounts which are sometimes totally unrelated to the economic potential of the films concerned. On the financing of production, the report advocates reorienting pre-financing (pre-purchase by television channels, SOFICA, public support) and the contribution of additional capital through crowdfunding, an alternative production model that incorporates distribution. On the distribution of films on the various markets, Mr Bonnell proposes bringing the window for SVOD to 18 months (instead of the current 36) subject to two conditions intended to balance the competition among national and foreign operators for VoD: on the one hand the extension of the video tax on foreign operators (this has already been voted), and on the other the entry into force across Europe of the principle of charging VAT at the rate in the consumer's country. Recalling that media chronology is linked to the mechanisms for pre-financing films, the report recommends that the mechanism should only apply to those films which benefit from them. For the others (one film in three), producers should be able to negotiate the various ways their films are to be used, according to their own timeframe. Abandoning the freeze on VOD rights is also advocated. The Minister for Culture and Communication has announced the imminent setting up of a number of working parties in line with the main points raised in the report, including media chronology. On completion of the corresponding work and consultation, the measures will be adopted by means of an inter-professional agreement, regulations, or legislation.

• *Le financement de la production et de la distribution cinématographiques à l'heure du numérique, rapport de René Bonnell, Décembre 2013* (Financing for cinematographic production and distribution in the digital era, report by René Bonnell, December 2013)
http://merlin.obs.coe.int/redirect.php?id=16870 FR

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

GB-United Kingdom

RT Breached Impartiality Requirements in Programme on Syria

Ofcom, the UK communications regulator, has determined that RT (formerly known as Russia Today) breached the requirements of due impartiality in 'Syrian Diary' broadcast on 17 March 2013. RT is a global news and current affairs programme produced in Russia, broadcasting on UK satellite and digital-terrestrial channels. The programme was made by journalists from Rossiya 24, owned and controlled by the State-owned All-Russia State Television and Radio Broadcasting Company.

Ofcom's Broadcasting Code requires that due impartiality be preserved on matters of political or industrial policy and matters relating to current public policy. Where presenters or reporters present a 'personal view' programme, they may express their own views, but alternative viewpoints must be adequately represented. The Code applies to all Ofcom licensees, including international channels broadcasting in the UK.

This edition of 'Syrian Diary' was expressed to be an account of the personal experiences and the personal views of Rossiya 24 journalists in Syria. The contributions were highly critical of the Syrian opposition groups (for example, 'their brutality knows no limits') and there was extensive use of interviews of Syrians, which again were all critical of the opposition (eg 'what they do is not for the people. They are killing us and our children'). The interviews were linked by rolling footage showing executions, devastation, brutality and killings reportedly perpetrated by opposition groups. There were three brief clips of Western leaders supporting the opposition, but these were inserted between comments about, and images of, atrocities claimed to have been committed by opposition groups.

RT claimed that the programme was clearly labelled as a personal view, and its subject was not the Syrian conflict but the impact on Syrian citizens. It also claimed that the programme presented an alternative view to the 'Western consensus' and that different viewpoints had been put forward in other programmes.

Ofcom noted that the Code does not prohibit broadcasters from criticising one side in a conflict or challenging orthodox views, so long as impartiality is preserved. The programme clearly related to a matter of public policy. It presented a relentlessly negative picture of the Syrian opposition whilst not questioning the policies, motives and actions of the Syrian Government; nor did it acknowledge that the opposition is comprised of disparate groups with different aims and activities. There were no contributions from the more moderate opposition groups. The context of the presentation of the clips of foreign leaders undermined any value they might have had in representing alternative viewpoints. It was not clearly a 'personal view' programme, despite being labelled as such, as it was not an individual statement but consisted of several journalists putting forward views consistent with one political viewpoint. Even if it had been a 'personal view' programme, alternative viewpoints were not adequately represented in it. The Code does not permit due impartiality to be preserved only across the whole of the service's programmes, but only permits it to be preserved through several editorially linked programmes presenting different viewpoints, for example through a 'season' of programmes.

In view of this decision, and other recent findings relating to RT, Ofcom has called it to a meeting to discuss compliance with due impartiality obligations.

• Ofcom, 'Standards Cases: In Breach: Syrian Diary', Broadcast Bulletin 244, 16 December 2013
http://merlin.obs.coe.int/redirect.php?id=16836 EN

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IE-Ireland

Recent Broadcasting Complaints Decisions

On 20 December 2013, the Broadcasting Authority of Ireland (BAI) released recent decisions on six broadcasting complaints. At its meeting held in November 2013, the Compliance Committee upheld (in part) one complaint and rejected four. A further complaint had been resolved by the Executive Complaint Forum at its October 2013 meeting.

Under section 48 of the Broadcasting Act 2009, viewers and listeners can complain about broadcasting content that they believe is not in keeping with broadcasting codes and rules. All six of the complaints dealt either in whole or in part, with fairness, objectivity and impartiality in current affairs programmes. With respect to the complaint that was upheld, the Compliance Committee found that a segment of a current affairs television broadcast that dealt with the issue of abortion, lacked fairness.

The segment featured an interview between the programme presenter and a journalist from an Irish newspaper, and discussed the results of an opinion poll on the proposed Protection of Life during Pregnancy Bill (Abortion Bill) that was published in the newspaper. During the segment, the journalist described the

criticism of the poll as 'nonsense', 'absurd' and 'regrettable'. These remarks were not challenged by the presenter. The Compliance Committee decided that in the absence of an alternative voice, there was an onus on the presenter to challenge the comments of the journalist. Therefore, the presenter's failure to challenge the journalist's remarks resulted in this segment of the programme lacking the necessary fairness.

A further three complaints considered in the period also related to RTÉ, the national public service broadcaster's handling of the Abortion Bill, in three successive weekly editions of the current affairs programme, 'The Week in Politics', broadcast in July 2013, as the bill progressed through the legislative process in the Irish parliament. In each case, the programmes included both a pre-recorded report and a panel debate moderated by the programme presenter. The focus of the panel debates was predominantly on party political issues arising from the passage of the bill through parliament. The complaint claimed that as the programmes featured a total of nine, of what he describes as 'pro-legislation' panellists and no 'anti-legislation' panellists, it lacked fairness, objectivity and impartiality.

The Compliance Committee decided that the handling of the debates during the programmes and the range of views evident in relation to the bill, in the pre-recorded items broadcast, meant that the broadcasts were not contrary to the requirements for fairness, objectivity and impartiality in news and current affairs. Finally, it should be noted that the new Code of Fairness, Objectivity and Impartiality in News and Current Affairs (see IRIS 2013-5/32) entered into force on 1 July 2013.

• Broadcasting Authority of Ireland, Broadcasting Complaints Decisions, December 2013
http://merlin.obs.coe.int/redirect.php?id=16831 EN

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Further Copyright Blocking Injunctions Granted

On 2 December 2013, the Irish High Court granted an injunction requiring five Internet service providers (UPC, Vodafone, Digiweb, Hutchinson 3G and Telefonica) to block access to Kickass Torrents (Kat), a popular file-sharing site used by Internet users to download music and movie files. This is the second time an injunction has been granted under the controversial copyright injunction law that was introduced in February 2012 (see IRIS 2012-4/31 and IRIS 2013-10/29).

None of the Internet service providers (ISPs) objected to the blocking injunction being granted. A number of other ISPs including Eircom, Meteor, Magnet, Sky and Imagine Telecommunications are reported, in the media, to have indicated that they were prepared to voluntarily block access to Kickass Torrents provided that the court made a blocking order to that effect, against any other ISP. The orders were sought by the Irish subsidiaries of music companies Sony, Universal and Warner.

• Carolan M., "Music firms entitled to orders to require internet providers to block music site", Irish Times, 3 December 2013
http://merlin.obs.coe.int/redirect.php?id=16832 EN
• Healy T., "Internet firms ordered to block file-share sites", Irish Independent, 3 December 2013
http://merlin.obs.coe.int/redirect.php?id=16833 EN

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Commercial Digital Terrestrial Television Licensing Process will not be Reopened

On 7 January 2014 the Broadcasting Authority of Ireland (BAI) announced its decision not to reopen the licensing process for a commercial Digital Terrestrial Television (DTT) service. The decision was made following an analysis of current market conditions which was undertaken by Oliver and Ohlbaum Associates, on behalf of the BAI, together with the consideration of a number of potential business models for commercial DTT and a consultation process with broadcasters and other interested parties.

The Broadcasting Commission of Ireland (BCI) - the predecessor of the BAI - began a licensing process for three commercial DTT multiplexes in 2008. This attracted three applications but the process proved unsuccessful as all of the original applicants withdrew from commercial discussions. The process ended in 2010 and was not reactivated. The government then prioritised a Public Service Broadcasting multiplex, and Saorview, the free-to-air DTT service, was launched in 2011 utilising the single public service multiplex.

The BAI are required by section 131(4) of the Broadcasting Act 2009 to endeavour to arrange for the establishment, maintenance and operation of three national television multiplexes, capable of being transmitted by digital terrestrial means to the whole community of the State. In order to discharge its statutory duties with regard to commercial DTT, the BAI commissioned consultants to evaluate the prospects for a commercial digital terrestrial television (DTT) service in Ireland.

The Oliver and Ohlbaum Associates evaluation report, also published on 7 January 2014, found that market conditions in Ireland do not create a favourable backdrop for launching completely new commercial TV services in Ireland. In exploring the prospects for

commercial DTT the review considered a number of possible business models, including a free service, a pay service and a service operated as part of a triple play bundle. The evaluation also found that the future viability of Saorview is questionable. The evaluation report and its findings have been forwarded to the Minister for Communications, Energy and Natural Resources for consideration of the policy implications for commercial DTT services in Ireland and the potential impact in respect of diversity and plurality in Irish media.

• Broadcasting Authority of Ireland, BAI Publishes Review of Potential for Commercial DTT in Ireland
http://merlin.obs.coe.int/redirect.php?id=16829 EN

• Broadcasting Authority of Ireland, Prospects for commercial digital terrestrial television in the Republic of Ireland (Oliver and Ohlbaum Associates), August 2013
http://merlin.obs.coe.int/redirect.php?id=16830 EN

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MK-"the Former Yugoslav Republic Of Macedonia"

New Law on Film Activities Fostering Film Productions in Macedonia

The Закон за филмска дејност (Act on Film Activities - LFA) entered into force on 1 January 2014. It aims to support and intensify the film activities in the country and to create positive conditions for further development of the film infrastructure.

The Agency for Film will be the main State body, which will directly support the film activities and will work in accordance with a four-year Strategy for Development of Film Activities in the Republic of Macedonia. The Head of the Agency as well as the members of the Managing Board will be directly appointed by the national Government.

The Agency will have an obligation to fund various projects that are of national interest for the country. According to Articles 11 and 12 LFA, the Agency for Film will be primarily funded from the general State budget, but the text of the law does not foresee a specific figure or even an approximate amount of how much of State funds will flow through the Agency's budget. On the other hand, another mechanism should provide additional funding:

1. licensed TV broadcasters will be obliged to pay 1.1% of their gross income for the previous year to the Agency for Film;

2. cable-TV operators will pay likewise 2.5 %of their gross income;

3. internet service providers likewise 2.5%;

4. legal entities organising gambling activities likewise 1.3%;

5. legal entities publicly showing films likewise 5%;

6. legal entities distributing, lending, or selling films likewise 1.3%.

The non-governmental organisation Media Development Centre (MDC) suggests a reduction in broadcasters' financial obligations: "We suggest to the Government not to impose any new taxes on the electronic media and to fund the Film Agency from the State budget." MDC fears that "due to the previous experiences with the Government's advertising, this could deepen the Government's control over the media in Macedonia". The political advertising was also noted as a concern in the EU Country's Progress Report for 2013: "There are continued concerns about government advertising spending, which is claimed by many to be directed only towards pro-government media, giving them a significant financial advantage." Also, the text of the law does not make a distinction between the different types of TV broadcasters, so according to the representatives from MDC, those TV channels that do not broadcast any film programming, like music, news or other non-film genre channels, should be excluded from the obligation.

The Association of Private Electronic Media of Macedonia (ZPMM) is concerned that the law could overburden the media companies, taking into account the still existing financial obligations: "The fees we pay to the collective rights management associations together with the obligation to pay part of our annual gross income to the Agency for Film will reach more than 5 or 6 per cent, if not even more, of our total gross income.". ZPMM announced that commercial broadcasters are considering an appeal against the act in the Constitutional Court.

• Закон за филмска дејност , Службен весник на РМ ,461400. *82* од *05.06.2013* година (Act on Film Activities, Official Gazette no. 82, 5 June 2013)
http://merlin.obs.coe.int/redirect.php?id=16839 MK

• The former Yugoslav Republic of Macedonia 2013 Progress Report, European Commission, SWD(2013) 413 final, 16 October 2013
http://merlin.obs.coe.int/redirect.php?id=16768 EN

• ЗАКОНОТ ЗА ФИЛМСКА ДЕЈНОСТ ПРЕД УСТАВЕН СУД (The reaction of ZPMM on the Act on Film Activities)
http://merlin.obs.coe.int/redirect.php?id=16840 MK

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NL-Netherlands

Professional Soccer Players Cannot Claim Image Rights Relating to the Broadcast of Soccer Matches

On 10 December 2013, the Court of Appeal in Amsterdam found that soccer players have no claim to image rights relating to the broadcast of their professional soccer matches. This confirms the judgment of the District Court of Amsterdam on 24 February 2004.

Every player and club in the professional soccer business in the Netherlands, is a member of the Royal Dutch Soccer Union (KNVB). The clubs receive payment from the broadcasters and television stations for the right to broadcast match reports or parts of the match. The trade union for professional soccer players (VVCS), claimed that they had not received any payment for the broadcasting of matches and match reports since 2000.

VVCS argued that the soccer players therefore had a right to compensation based on article 21 of the Copyright Act (CA). Article 21 states that the communication to the public of images without consent of the person portrayed is unlawful where the person portrayed has a legitimate interest in opposing communication of his/her image to the public. The District Court of Amsterdam considered whether the players gave their (explicit or tacit) consent to the KNVB for the broadcasting of the match. In its decision, the District Court concluded that this consent was in principle contained in the employment contracts of players in the professional soccer business.

The Court of Appeal considered the Supreme Court judgment Cruijf v Tirion of 14 june 2013. In that case, the Supreme Court found with regard to article 21 CA, that a person whose image is portrayed without having been commissioned by or on behalf of the persons portrayed may oppose communication to the public of the image without his/her consent, where the person has a legitimate interest, to which the right of expression and freedom of information under the circumstances must yield.

According to the Court of Appeal, the opposition of the use of the players' image rights was particularly based on considerations of a commercial nature. VVCS claimed that the absolute right of the soccer players to commercial exploitation of their image right is a legitimate interest and therefore outweighs the right to freedom of expression. The Court did not agree with this reasoning due to the fact that professional soccer players receive compensation, in the form of a fixed salary, for their participation in competitions where the recordings are created and broadcasted. It is, however, important that the images that are broadcast relate to the activities of those involved as part of a team as this portrayal will not affect the commercial exploitation potential of the players.

The Court also found that there had been no agreement or acknowledgment by the clubs that the players would have been entitled to financial arrangements based on an attributable image right in addition to their income/salary.

• *Gerechtshof Amsterdam, 10 December 2013, ECLI:NL:GBAMS: 2013:4501, KNVB c.s./VVCS* (Court of Appeal Amsterdam, 10 December 2013, ECLI:NL:GBAMS: 2013:4501, KNVB c.s. v VVCS)
http://merlin.obs.coe.int/redirect.php?id=16856 NL

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'Undercover in the Netherlands' - Broadcast Held to Fall Within the Public Watchdog Role of the Media

On 4 December 2013, the District Court in Amsterdam ruled that the broadcasting of a programme by Dutch television show 'Undercover in Nederland' (Undercover in the Netherlands), which detailed the dangers of finding sperm donors on the Internet, fell within the responsibility of the media to spread information and ideas of public interest and to execute its vital role of public watchdog.

The Court further stated that there was no need to consider the question of whether women who use the Internet to find sperm donors could be seen as a vulnerable group of "victims" that need protection, since they are considered to belong to a public that needs to be well informed about the relevant facts and circumstances involving the decision to do business with a sperm donor on the Internet. The programme in question focused on the particularities of the plaintiff in the present case. The plaintiff had offered his services as a sperm donor over the Internet from 2009 until mid-2011. During this time, he came into contact with several prospective mothers. A standard agreement between the plaintiff and the prospective mothers took place in which the plaintiff was not financially compensated for his sperm. In the agreements, the plaintiff guaranteed that he was in good health. The plaintiff, however, failed to disclose the fact that he had been diagnosed with Asperger syndrome (AS) in 2008, which is regarded as a hereditary health condition.

'Undercover in Nederland' recorded and showed an interview with the plaintiff with a hidden camera. During the interview, the plaintiff was asked questions about his health condition by an undercover employee of the show who pretended to be a prospective mother. The plaintiff made guarantees of his health by

showing his blood results to the undercover reporter. However, the plaintiff did not mention his diagnosis of AS when the reporter questioned him on whether there were any hereditary diseases in his family. While leaving the interview, the plaintiff was confronted with the camera. The plaintiff was made unrecognisable in the broadcast through the use of pixilation and by the distortion of his voice. As well as this, his name was never mentioned. The plaintiff, however, claimed that there was an unjustified interference with his right to respect for his private life.

In evaluating the balance of the competing rights at issue in this case, the judge considered that the act of donating sperm can be regarded as an activity that falls within the respect for private life. On the other hand the plaintiff was not recognizable in the portrayal. The media company (SBS) only broadcasted information that was necessary to inform the public of the fact that a sperm donor, plaintiff, who was not disclosing the fact that he suffers from Asperger syndrome, was actively operating on the internet. As well as this, the hidden camera was used to attain further evidence for this allegation. The judge stated that there was sufficient evidence to determine that the plaintiff did indeed suffer from this syndrome. Due to the aforementioned facts, the judge ruled that SBSs' interest in informing the public outweighed the plaintiff's respect of private life.

• *Rechtbank Amsterdam, 04/12/2013, C/13/531572* (District Court in Amsterdam, 4 December 2013, C/13/531572)
http://merlin.obs.coe.int/redirect.php?id=16855 NL

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PT-Portugal

Portuguese Supreme Court's Decision on the Absence of Licensing for the Use of Extra Speakers

On 16 December 2013, the Portuguese Supreme Court of Justice published a decision (Ruling no. 15/2013, File no. 124/11.9GAPVL.G1 -A.S1, 3rd Section, dated 13 November) which states that additional speakers connected to a television in commercial public spaces, with the intention of amplifying the sound, do not constitute a new use of the work and therefore do not require further permission of authors. According to the decision, the use of autonomous sound expansion devices on radio or television is not a re-transmission of the broadcast work, meaning that it does not require an extra authorization and consequently it is not a crime of usurpation, as laid down in articles 149º, 195º and 197º of the Author's Right and Related Rights Code. Part of the court's reasoning is that there is a distinction between "communication" and "reception". While this practice is not of "reception-transmission", the principle of freedom of reception prevails as it is the terminus of the transmission process and necessary authorisations take place at the earlier stages for broadcasting. This is, according to the Portuguese Supreme Court of Justice, an activity of "reception-amplification" which guarantees that what is broadcast remains the same, without copyright violations.

In short, this case derives from an appeal from a first instance decision (of the Tribunal da Relação de Guimarães), since there were two contradictory decisions on the subject. On the one hand, a decision (first instance decision of the Court placed in Guimarães city - Process no. 124/11.9GAPVL.G1, dated 7 January 2013), considered that the cafe owner was not infringing the law by using three speakers connected to a TV set when a music channel was being broadcast. According to the Court, it was a matter of reception and it did not require authorization from authors. A police inspection of the cafe, however, led to the seizure of the equipment and to criminal procedures against the owner based on the absence of authorization for broadcasting protected works. On the other hand, the Public Attorney's appeal was also based on a contrary decision (first instance decision of the Court placed in Guimarães city - Process no. 974/07-2, dated 2 July 2007), from the same court, on a similar issue. In this case, the court considered that a crime of usurpation had occurred due to the fact that the defendant did not just receive the broadcast signal but modeled and directed it through the use of four sound speakers.

The decision from the Supreme Court of Justice represents a major departure from previous decisions of other courts and it is an Acórdão de Fixação de Jurisprudência (a type of decision with the role of creating precedent) due to its character of providing non-binding interpretative guidelines for lower courts.

The Portuguese Society of Authors (Sociedade Portuguesa de Autores) has publicly announced its disagreement with the SC decision; it argues that this ruling is opposed to certain EU directives, which have been implemented into national law in Portugal, and to the jurisprudence of the Court of Justice of the European Union.

• *Acórdão do Supremo Tribunal de Justiça n.º 15/2013 (Proc. n.º 124/11.9GAPVL.G1 -A.S1 — 3.ª Secção) publicado no Diário da República, 1.ª série — N.º 243 — 16 de dezembro de 2013* (Supreme Court of Justice Ruling no. 15/2013, File no. 124/11.9GAPVL.G1 -A.S1, 3rd Section, published in the oficial news bulletin no. 243, 1st. Series, 16 December 2013)
http://merlin.obs.coe.int/redirect.php?id=16876 PT

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RO-Romania

Modifications of Public Broadcasters Law

On 18 December 2013, the Romanian Government issued the *Ordonanţa de Urgenţă nr. 110/2013 pentru completarea Legii nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune, cu modificările şi completările ulterioare* (Emergency Decree no. 110/2013 on the completion of Law no. 41/1994 on the organisation and operation of the Romanian Radio Broadcasting Corporation (RRBC) and the Romanian Television Corporation (RTC), with further modifications and completions). According to the Emergency Decree, the permanent offices of the Senate and Chamber of Deputies of the Parliament are allowed to appoint an interim Director General of public radio or television for a period of 60 days, if the plenum of the Parliament cannot meet the quorum legally required to appoint the Boards of Administration of the public radio and TV broadcasters (TVR; see IRIS 1998-8/16, IRIS 2000-4/18, IRIS 2003-8/25, IRIS 2013-5/37, and IRIS 2013-10/36).

Two new paragraphs will be introduced after Art. 46 (7) of the Law no. 41:

"(8) If the plenum of the Romanian Parliament cannot meet the quorum required by law, the permanent offices of the Senate and Chamber of Deputies appoint an interim General Director of the company for a period of 60 days." and

"(9) Notwithstanding the provisions of Art. 30 (2) throughout the interim period, the interim Director General conducts current administrative activities of the company."

The Emergency Decree was meant to solve the problem of TVR's management. TVR's Board of Administration was dismissed on 10 December 2013, after the rejection of TVR's 2012 activity report. Due to a political deadlock within the parliamentary majority, the Government decided to issue the Emergency Decree, to avoid a blocking of the appointment of the management of the public media institutions. In the meantime, the ruling majority succeeded in appointing an interim Director General with a large majority; a famous Romanian writer, political scientist, and TV producer. He will be in office until a new Board of Administration and a new President and CEO of TVR are appointed by the Parliament.

Meanwhile, the Chamber of Deputies (Lower Chamber of Parliament) adopted on 17 December 2013 a modified form of the *Proiectul de lege pentru modificarea şi completarea Legii nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune* (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 was meant to increase state budget funding for the production and broadcasting of radio and TV programmes addressing foreign countries as well as for the option of Romanian public broadcasters to set up private legal persons, to become associates of such entities, or to buy shares of existing firms and corporations. The Draft Law had been adopted by the Parliament but was returned to the Parliament by the Romanian President. After the disputed provisions have been clarified, the President will no longer have the right to reject the Draft Law, but he could still challenge the Law before the Constitutional Court.

According to the new draft adopted by the deputies, Art. 42 (1) stipulates as follows:

"The funding needed for production and broadcasting of radio and television transmissions to foreign countries will be provided by state budget. The same applies for legal entities established by or in which the RRBC and the RTC respectively are associates or shareholders as well as for the development of this activity."

Art. 43 will have a new paragraph (2):

"In order to extend and develop specific activities in the country or abroad, the RRBC and the RTC may establish, with consent of the standing parliamentary Committees on Culture, private legal persons, with or without profit, may become associated in such entity, or, where appropriate, may purchase shares of an existing company."

- *Ordonanţa de Urgenţă nr. 110/2013 pentru completarea Legii nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune, cu modificările şi completările ulterioare* (Emergency Decree no. 110/2013 on the completion of the Law no. 41/1994 on the organisation and operation of the Romanian Radio Broadcasting Corporation and the Romanian Television Corporation, with further modifications and completions)
http://merlin.obs.coe.int/redirect.php?id=16847 RO
- *Proiectul de lege pentru modificarea şi completarea Legii nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune - forma adoptată de Camera Deputaţilor* (Draft Law on the modification and completion of the Law no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation - the form adopted by the Chamber of Deputies)
http://merlin.obs.coe.int/redirect.php?id=16848 RO

Eugen Cojocariu
Radio Romania International

Draft Proposals for Modification and Completion of Audiovisual Law

Several Romanian Members of Parliament issued

two Draft Laws for the modification and completion of*Legea Audiovizualului nr. 504/2002 cu modificările şi completările ulterioare* (Audiovisual Law no. 504/2002 with further modifications and completions - see IRIS 2002-7/28, IRIS 2010-1/36, IRIS 2011-4/31, IRIS 2011-7/37, IRIS 2013-3/26, IRIS 2013-6/27).

The first Draft Law, initiated by 107 deputies and senators, handed under ordinary procedure to the Chamber of Deputies (lower Chamber), is meant to complete the Audiovisual Law to offer protection to persons who are deaf and those who have a hearing disability.

According to the first Draft Law, after Art. 41 of the Audiovisual Law, a new Art. 42 will be introduced, according to which persons who are deaf or have a hearing disability have the right of access to audiovisual media services, depending on the broadcasters' technological possibilities. The television programme services with national coverage have to daily interpret at least 30 minutes of news programmes, debates and analysis on current political and economic issues using both sign language and subtitling. The television programme services with national coverage have to interpret using sign language and to offer, at the same time, subtitles for their programmes of major importance, either in whole or in summary. The programmes dedicated to persons who are deaf and persons with a hearing disability will have to be clearly marked both visually and verbally.

Because of their more reduced technological capacities, programme services with local coverage can choose if they will offer sign language interpretation and subtitles, or if they will offer only one of these technical possibilities. Accordingly, the local stations have to interpret daily at least 30 minutes of news programmes, debates and analysis on current political and economic issues using either sign language or subtitling. The broadcasters with local coverage will also have to interpret using sign language or subtitles for their programmes of major importance, in whole or in summary.

According to the second Draft Law, the modification of Art. 86 of the Audiovisual Law is meant to precisely transpose the Audiovisual Media Service Directive 2010/13/EU and to ensure free access to events of high public interest for broadcasters. The existing form of Art. 86 foresees that (1) any broadcaster established in the European Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public exclusively transmitted by a broadcaster under Romanian jurisdiction, in order to be enabled to produce short news items, and (2) the broadcaster under Romanian jurisdiction that has acquired exclusive rights to an event of high interest to the public is required to provide access under the provisions of paragraph (1) for one broadcaster in each EU member state.

The existing stipulations are considered ambiguous under Art. 15(2) of Directive 2010/13/UE. They are restricting or limiting the access to events of major importance to a single broadcaster per member state. This is considered a violation of the right to freedom of information. The Draft Law foresees in a new Art. 86 of the Audiovisual Law that (1) any broadcaster under the jurisdiction of Romania or another EU member state has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public exclusively transmitted by a broadcaster under Romanian jurisdiction, with a view to making short news items, in compliance with Art. 85, and (2) for the broadcasters under the jurisdiction of the same EU member state as the broadcaster that has obtained exclusive rights to the event, the access necessary for the production of short news items has to be provided to the respective broadcaster.

• *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=16841 RO

• *Propunerea legislativă pentru modificarea art. 86 din Legea audiovizualului nr. 504/2002 - forma inițiatorului* (Draft Law on the modification of Art. 86 of the Audiovisual Law no. 504/2002 - as initially submitted)
http://merlin.obs.coe.int/redirect.php?id=16842 RO

Eugen Cojocariu
Radio Romania International

Senate Rejects Modification of Cinematography Government Decree

On 6 November 2013, the Romanian Senate (Upper Chamber of Parliament) rejected the Draft Law on the modification of the *Ordonanţa Guvernului nr. 39/2005 privind cinematografia* (Government Decree no. 39/2005 on Cinematography) with a large majority (see IRIS 2003-2/23). The final decision will be taken by the Chamber of Deputies (Lower Chamber).

According to the Draft Law, Article 17 of the Government Decree no. 39/2005 on Cinematography, modified by Law no. 328/2006, would be repealed. Art. 17 decrees that the public Romanian Television TVR contributes 15% of its advertisment income to the *Fondul cinematografic* (Cinematography Fund) on a yearly basis to support national cinematography film production. At the request of producers, TVR has the option to finance film production directly with up to 50% of the mentioned sum, under the condition of notice to the *Centrul Naţional al Cinematografiei* (National Cinematography Centre - CNC).

The Draft Law was intended to correct what the sponsors claimed to be a discriminatory treatment of the public broadcaster. According to Art. 13 (1) b) of the Government Decree no. 39/2005, modified through the Law no. 328/2006, all the television providers

(public and commercial) were already obliged to contribute 4% of their advertisement incomes to the Cinematography Fund, which meant that TVR would contribute to the Cinematography Fund twice (15% and 4% of advertisement income).

The Romanian Government issued a negative opinion on the Draft Law, considering that the repeal of Art. 17 would deplete the financial means of the Cinematography Fund, since there had just been another reduction: the obligation of gambling operators to contribute 4 % of their profit to the Cinematography Fund had just been repealed.

TVR has big financial problems due to mismanagement. The Draft Law would have partially helped the public broadcaster to recover from its difficult financial situation. TVR is funded by a licence fee, its own incomes (mainly advertising) and state subsidies.

• *Propunerea legislativă pentru modificarea Ordonanţei Guvernului nr. 39/2005 privind cinematografia - forma iniţiatorului* (Draft Law on the modification of the Cinematography Government Decree no. 39/2005 - as initially submitted)
http://merlin.obs.coe.int/redirect.php?id=16844 RO

Eugen Cojocariu
Radio Romania International

SE-Sweden

The Swedish Broadcasting Commission Proposes List Of Major Events

According to Section 5:9 of the Swedish Radio and Television Act (RTL), which implements Directive 2010/13/EU on Audiovisual Media Services, the Swedish Government may adopt draft regulations on events that are considered as being of major importance for Swedish society (list of major events). Such events must be broadcast on free television to which a substantial proportion of the public has access As far as the notion 'substantial part of the public' is concerned, the Swedish Broadcasting Commission (SBC) considers this criterion to be fulfilled if a television programme service can be received by at least 85% of the population.

In February 2013, the Swedish Government assigned the SBC with the task of submitting a proposal on how a list of major events could potentially be drafted. The mandate also included obtaining opinions from stakeholders. A list of major events must ultimately be approved by the European Commission, which, amongst others, will examine whether the list complies with EU law.

The SBC's report was delivered on 15 November 2013 and included the following proposal for a list of major events:

a) The Summer and Winter Olympic Games;

b) The FIFA World Cup for men and women: qualifying games and final tournament matches with Swedish participation, and semi-finals and finals;

c) The UEFA European Football Championship for men and women: qualifying games and final tournament matches with Swedish participation, and semi-finals and finals;

d) The FIS Nordic World Championship;

e) The IAAF World Athletics Championships;

f) The IIHF Ice Hockey World Championship for men: matches with Swedish participation, and semi-finals and finals;

g) Vasaloppet; and

h) The Nobel Banquet.

From the report it can be concluded that most stakeholders are not supportive of the adoption of a list of major events. These stakeholders believe that the market functions well already and that such a list is unnecessary. Conversely, the stakeholders in favour of a list consider that it could be an insurance against major events being broadcast on pay television channels in the future.

It remains to be seen how and if the report will lead to any actions by the Swedish Government.

• List of major events (translation of the draft report), Swedish Broadcasting Authority
http://merlin.obs.coe.int/redirect.php?id=16852 EN

Erik Ullberg and Michael Plogell
Wistrand Advokatbyrå

SK-Slovakia

Fine for Promotion of Marihuana Dismissed

The Supreme Court ("Court") overruled the decision of the Council for Broadcasting and Retransmission of the Slovak Republic ("Council") with its ruling of 30 October 2013, imposing a fine of EUR 500 on a provider of audiovisual on-demand services for the open promotion of marihuana usage. The Court's decision became final on 27 November 2013.

The provider (also publisher of Slovakia's largest tabloid) disseminated an interview with a young hip hop artist about his comment on "thanking the green magical herb for inspiration" during his acceptance speech at the major Slovak musical awards (covered

by national media). During the interview, it was made clear that "the magical herb" in question is marihuana. The young artist stated that although marihuana is not for everyone it is "blessing" for others and claimed that marihuana is much safer than the widely tolerated alcohol.

The provider argued that he was merely covering a public event and statements that were made in the context thereof. Such media coverage must be considered as information in the public interest and thus highly protected under the freedom of speech and media.

The Council stated in its decision that the topic of the interview itself did not constitute a violation of valid legislation. The Council, however, contested the manner in which the interview was conducted. Particularly the humorous comments of the reporter that trivialised and justified the statements of the artist. The Council therefore assumed that the provider did not only inform but rather openly promoted illegal narcotics.

In its appeal, the provider stressed that the Council did not fully take into account all the presented arguments. The Council did not sufficiently analyse the context of the interview and thus misinterpreted the comments of the reporter even though the provider referred to the decisions of the European Court of Human Rights to support the significance of the context analysis in cases involving freedom of speech and media. According to the provider, the interview was a legitimate effort to find out whether the young artist tried to start a public debate on a relevant subject or whether he was simply trying to draw attention to himself.

The Court agreed with the objections raised in the appeal. Although the Court did not express its opinion on whether the programme actually promoted illegal narcotics, it, however, stated that the Council ignored relevant arguments raised by the provider. The Council analysed the interview only with respect to Slovak legislation and omitted to interpret the case according to the standard of Article 10 of the European Convention on Human Rights. Overall, the Court considered the reasoning of the decision biased and formalistic and thus unlawful. Therefore, the Court overruled and returned the decision to the Council for a new procedure.

• *Najvyšší súd, 6Sž/3/2013, 30.10.2013* (Decision of the Supreme Court of 30 October 2013, 6Sž/3/2013)
http://merlin.obs.coe.int/redirect.php?id=16873 SK

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

New Telecom and Postal Regulatory Authority

On 27 November 2013, the Slovak Parliament passed the Act No. 402/2013 Coll. on the Regulatory Authority for Electronic Communications and Postal Services (hereinafter "Act"). The Act was signed by the President and entered into force on 1 January 2014.

The Act merges two preceding regulatory authorities: the Telecommunications Regulatory Authority of the Slovak Republic and the Postal Regulatory Office. The new regulatory authority takes over all competences of the preceding authorities and acts as universal successor of all rights and obligations. The objective of the merge is the lowering of costs. According to the Act's official reasoning, projected savings for the first three years of the new regulatory authority in charge amount to more than 1.1 million EUR.

The new regulatory authority is constituted as independent body outside of the regular governmental structure with funding separated from the general state budget. The new regulatory authority is presided over by a chairman, who is elected and dismissed by the National Council upon proposal of the Government. The chairman, in times of absence, is deputised by the vice-chairman who is also appointed and dismissed by the Government. The term of office for the chairman and vice-chairman is six years with limitation to two consecutive terms.

Subjects of regulation may appeal against decisions of the regulatory authority through a two tier system. The first tier is the review by the regulatory authority itself. In case of a rejection, there is an appeal to the Najvyšší súd Slovenskej republiky (Supreme Court of Slovakia) as the second tier.

The independence and professional integrity of the chairman and vice-chairman is supervised by a designated parliamentary committee. The committee may (upon request or on its own account) start proceedings to protect public interests or to prevent conflicts of interest. The committee is entitled to impose fines and, in case of severe offenses, its decision may lead to the dismissal of the chairman and vice-chairman. In this case, the committee's decision requires approval by the parliament with a 60% majority. The chairman and vice-chairman may appeal against the decision of the committee to the Ústavný súd Slovenskej republiky (Constitutional Court of Slovak Republic).

• *Zákon z 27. novembra 2013 o Úrade pre reguláciu elektronických komunikácií a poštových služieb a Dopravnom úrade a o zmene a doplnení niektorých zákonov* (Act No. 402/2013 Coll)
http://merlin.obs.coe.int/redirect.php?id=16851 SK

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

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

IRIS

Legal Observations
of the European Audiovisual Observatory

US-United States

Court Vacates Key Provisions of FCC's Net Neutrality Order

On 14 January 2014, a Federal Court vacated key provisions of the Federal Communication Commission's ("FCC") Net Neutrality Order ("Order") that was passed in December 2010. The Order imposed disclosure, anti-blocking, and anti-discrimination requirements on broadband providers ("providers") in an attempt to prevent them from blocking or degrading the quality of their end-user subscribers' access to websites. The Court affirmed the FCC's general authority to regulate the Internet by encouraging the deployment of broadband infrastructure on a reasonable and timely basis but found that the anti-blocking and anti-discrimination requirements contravene specific prohibitions contained in the Telecommunications Act of 1996 ("Act").

Under the Act, the types of regulations that are permitted to be imposed on an entity depend on whether it is deemed a telecommunications service or information service. The Court thus explained that since the FCC designated providers as information service providers in 2008, the deciding question was "whether the Order obligates providers to act as telecommunication carriers." The Court found that language of the anti-discrimination and anti-blocking mandates mirrors the language of the statutory requirements imposed on telecommunications carriers. Specifically, it pointed to the anti-discrimination mandates to "furnish [04046] communication service upon reasonable request" and hold themselves out "to serve the public indiscriminately," and the anti-blocking mandates to provide a minimum level of access for free and not "make any unjust or unreasonable discrimination".

While it struck down key provisions, the Court also explained in dicta that there may be sufficient grounds for upholding the anti-blocking provision because "it leaves sufficient room for individualized bargaining and discrimination terms so as not to run afoul of the statutory prohibitions on common carrier treatment" such that a provider may consistent with the rule "still act as [an information service provider]". However, it did not rely on this argument because it was not relied on by the FCC.

• United States Court of Appeals for the District of Columbia Circuit, 14 January 2014, No. 11-1355
http://merlin.obs.coe.int/redirect.php?id=17307 EN

Jonathan Perl
Locus Telecommunications, Inc.

Agenda

Book List

Code thématique Larcier- droit de la presse écrite et audiovisuelle Larcier, 2014 ISBN-13: 978-2804431860 http://www.larciergroup.com/
Castendyk, O., Fälle zum Medienrecht C.H.Beck, 2014 ISBN-13: 978-3406597671 http://rsw.beck.de/rsw/default.asp
Fechner, F., Medienrecht. Lehrbuch des gesamten Medienrechts unter besonderer Berücksichtigung von Presse, Rundfunk und Multimedia UTB GmbH, Stuttgart, 2014 ISBN-13: 978-3825241483 http://www.utb.de/
Smartt, U., Media and Entertainment Law Routledge, 2014 ISBN 978-0415662703 http://www.routledge.com/
Fosbrook, D., Laing, A. C., The Media and Business Contracts Handbook Bloomsbury Professional, 2014 ISBN 978-1780434797 http://www.bloomsburyprofessional.com/