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

IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2014-3

INTERNATIONAL

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Lillo-Stenberg and Sæther v. Norway

The applicants in this case are Lars Lillo-Stenberg and Andrine Sæther, respectively a well-known musician and an actress in Norway, who complained about press invasion of their privacy during their wedding on 20 August 2005. The wedding took place outdoors on an islet in the Oslo fjord that was accessible to the public. Without the couple's consent, the weekly magazine Se og Hør subsequently published a two-page article about the wedding accompanied by six photographs. The pictures were obtained by hiding and using a strong telephoto lens from a distance of approximately 250 metres. The pictures showed the bride, her father and bridesmaids arriving at the islet in a small rowing boat, the bride being brought to the groom by her father and the bride and groom returning to the mainland on foot by crossing the lake on stepping stones. The couple brought compensation proceedings against the magazine and won at the first two instances, but finally the Supreme Court found against the couple, by three votes to two. It considered that they had married in a place that was accessible to the public, easily visible and at a popular holiday location. Furthermore the article was neither offensive nor negative. Relying on Article 8 (right to respect for private and family life), Lars Lillo-Stenberg and Andrine Sæther complained that their right to respect for private life had been breached by the Supreme Court's judgment.

The European Court starts from the premise that the present case requires an examination of the fair balance that has to be struck between the applicants' right to the protection of their private life under Article 8 of the Convention and the publisher's right to freedom of expression as guaranteed by Article 10. The Court confirms "that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof" and that "even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection of and respect for his or her private life". The Court again applies a number of criteria it considers relevant where the right of freedom of expression is being balanced against the right to respect for private life. The relevant criteria are: (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report?; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity/circumstances in which the photographs were taken; and (v) content, form and consequences of the publication. In the opinion of the European Court, both the majority and the minority of the Norwegian Supreme Court had carefully balanced the right of freedom of expression with the right to respect for private life, and had explicitly taken into account the criteria set out in the Court's case law that existed at the relevant time (notably Von Hannover (no. 2) and Axel Springer AG, see IRIS 2012-3/1). The Court considered that there was an element of general interest in the article about the applicants' wedding and that the article did not contain any elements that could damage their reputations. Since the wedding took place in an area that was accessible to the public, easily visible, and a popular holiday location, it was likely to attract the attention of third parties. Being well-known public figures in Norway, these circumstances certainly lowered their legitimate expectation of privacy, while on the other hand no pictures were published of the private marriage ceremony itself. Although the Court considers that "opinions may differ on the outcome of a judgment", it sees no sufficient, strong reasons to substitute its view for that of the majority of the Norwegian Supreme Court. Having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the Supreme Court did not fail to comply with its obligations under Article 8 of the Convention. The interference with the right of privacy of the applicants was sufficiently justified by the right to freedom of expression of the magazine Se og Hør.

• Judgment by the European Court of Human Rights (First Section), case of Lillo-Stenberg and Sæther v. Norway, Appl. No. 13258/09 of 16 January 2014
http://merlin.obs.coe.int/redirect.php?id=16901 EN

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European Court of Human Rights: Tierbefreier E.V. v. Germany

Tierbefreier E.V. is an association based in Germany that militates in favour animal rights. A court decision prevented the association from disseminating film footage, which was secretly taken by a journalist on the premises of a company performing experiments on animals for the pharmaceutical industry (C. company). The journalist used his footage to produce documentary films of different lengths, critically commenting on the way in which laboratory animals were

treated. His films, or extracts from them, were shown on different TV channels. Largely based on the journalist's footage, Tierbefreier produced a film of about 20 minutes, with the title "Poisoning for profit" and made it available on its website. The film contained the accusation that the legal regulations on the treatment of animals were being disregarded by C. company and closed with the statement that medicines were not being made safer by poisoning monkeys. On the request of C. company, relying on its personality rights, which encompassed the right not to be spied upon by the use of hidden cameras, Tierbefreier was ordered by a court injunction to desist from publicly showing the film footage taken by the journalist on the C. company's premises or to make it otherwise available to third persons. According to the German courts Tierbefreier could not rely on its right to freedom of expression, as the manner in which it had presented the footage did not respect the rules of the intellectual battle of ideas. Relying on Article 10 of the European Convention on Human Rights, Tierbefreier lodged an appeal before the Strasbourg Court, complaining that the injunction had violated its right to freedom of expression. The association further relied on Article 14 (prohibition of discrimination) in conjunction with Article 10, complaining that it had been discriminated against in comparison with the journalist and other animal rights activists who had merely been prohibited from disseminating specific films, but had been allowed to continue the publication of the footage in other contexts.

The European Court endorses the assessment that the injunction interfered with Tierbefreier's right to freedom of expression. But as it was prescribed by law, pursued the legitimate aim of protecting the C. company's reputation and was considered "necessary in a democratic society", the Court found no violation of Article 10 of the Convention. The Court observed that the domestic courts carefully examined whether a decision to grant the injunction in question would violate the applicant association's right to freedom of expression, fully acknowledging the impact of the right to freedom of expression in a debate on matters of public interest. The Court points out that there was no evidence however that the accusations made in the film "Poisoning for profit", according to which the C. company systematically flouted the law, were correct. Furthermore, Tierbefreier had employed unfair means when militating against the C. company's activities and they could be expected to continue to do so if allowed to make further use of the footage. The Court also referred to the German courts' findings that the further dissemination of the footage would seriously violate the C. company's rights, especially since the footage had been produced by a former employee of the C. company, who had abused his professional status in order to secretly produce film material within that company's private premises. The Court finally notes that the interference at issue did not concern any criminal sanctions, but a civil injunction preventing Tierbefreier from disseminating specified footage. It referred to the fact that Tierbefreier remained fully entitled to express its criticism on animal experiments in other, even one-sided ways. The Court considers that the German courts struck a fair balance between Tierbefreier's right to freedom of expression and the C. company's interests in protecting its reputation. Hence, there has been no violation of Article 10 of the Convention taken separately. As the German courts also gave relevant reasons for treating Tierbefreier differently from the other animal rights activists and the journalist with regard to the extent of the civil injunction, the European Court accordingly also finds that there has been no violation of Article 14 in conjunction with Article 10 of the Convention.

• Judgment by the European Court of Human Rights (Fifth Section), case of Tierbefreier E.V. v. Germany, Appl. No. 45192/09 of 16 January 2014
http://merlin.obs.coe.int/redirect.php?id=16927 EN

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EUROPEAN UNION

Advocate General: No Private Copying Levy for Downloading from an Illegal Source

In his opinion of 9 January 2014, the Advocate General of the Court of Justice of the European Union (CJEU), in Case C-435/12, considered whether reproductions from unlawful sources fall within the private copying exception of Directive 2001/29/EC (Copyright Directive). A related question considered by the Advocate General, is whether it is in line with the Copyright Directive to calculate the private copying levy based on reproductions from both lawful as well as unlawful sources.

According to Article 5(2) subsection (b) of the Copyright Directive, member states can exclude private copying for non-commercial purposes by natural persons from copyright infringement. The application of this exception must not, however, be in conflict with the normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the rightsholder. In light of this exception, the private copying levy was introduced. The goal of this levy is to ensure that rightsholders receive fair compensation for private copying of their works.

The Copyright Directive does not make an explicit distinction between works originating from a lawful or an unlawful source. This gave rise to the question of whether, in short, Article 5 of the Copyright Directive covers the reproduction of works that originate from an unlawful source. A Dutch Court of Appeals

referred this matter to the CJEU for a preliminary ruling. In the Advocate General's opinion, the fact that there is no explicit distinction between lawful and unlawful sources in the Copyright Directive cannot imply that the European legislator intended to extend the fair compensation to works obtained from unlawful sources. The reasoning behind this, is that such an interpretation would be incompatible with Article 5(5) of the Copyright Directive, i.e. that the exceptions provided for in this Article "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work".

Stichting Thuiskopie, the defendant in this case, argued that the private copying levy is the only instrument that effectively deals with the publication and distribution of copyrighted works through unlawful sources. It was therefore argued that the levy on works originating from unlawful sources actually contributes to the normal exploitation, as opposed to a rule that prohibits every reproduction from unlawful sources. In this regard, the Advocate General pointed out that Dutch legislation tolerates downloading protected works from unlawful sources, and only prohibits the uploading of such materials. The Advocate General believes this to be an indirect stimulation for the mass distribution of protected works through unlawful sources. According to the Advocate General, it would be better to prohibit the downloading of protected works, as this would take away the need for fair compensation in the first place.

The Advocate General's conclusion was that the private copying levy cannot cover the reproduction of protected works through unlawful sources. If it would fall within the scope of the private copying exception, the levy would rise disproportionately, which would bring about the risk of imbalanced rights between rightsholders and users of protected materials. According to the Advocate General's opinion a private copying levy can thus only be calculated based on reproductions from lawful sources.

• Opinion of Advocate General Pedro Cruz Villalón, 9 January 2014
http://merlin.obs.coe.int/redirect.php?id=16905 DE | EN | FR | CS | DA | EL | ES | ET | FI | HU | IT | LT | LV | MT | NL | PL | PT | SK | SL | SV | HR

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European Commission: Setting up of the European Regulators Group for Audiovisual Media Services

On 3 February 2014, the European Commission established a European Regulators Group in the field of audiovisual media services. The Group is comprised of leading representatives of national independent regulatory bodies and will advise the Commission on implementing the Audiovisual Media Services Directive (AVMSD) in a converged media environment.

Media convergence has created a number of regulatory challenges. Co-operation between independent regulatory bodies of member states and the Commission is therefore of great importance in finding best practice solutions to such challenges.

In its 2013 report, the independent High Level Group on Media Freedom and Pluralism recommended the creation of a network of national audiovisual regulatory authorities in order to share best practice and to set high quality standards (see IRIS 2013-2/3). Respondents to the public consultation on the independence of audiovisual regulatory bodies also considered cooperation between regulatory bodies to be essential in a converged media age (see IRIS 2013-5/4). The Council of the European Union, in its meeting on media pluralism in the digital environment in Brussels in November 2013, also highlighted the importance of cooperation and sharing of best practice among audiovisual regulatory authorities in ensuring an "open and pluralistic media landscape".

The European Commission Vice-President Neelie Kroes described the establishment of the Group as a "win-win outcome for audiovisual regulators and for the Commission: their independence is strengthened and everyone will work better together at a crucial time when we will be reviewing EU audiovisual rules in 2015."

The Group met on 4 March 2014 in Brussels for the first time, where it elected its chair and two vice-chairs and adopted the rules of procedure. Mr Olivier Schrameck – President of the French *Conseil Supérieur de l'Audiovisuel* was elected as chair, while Madeleine de Cock Buning, President of the Dutch *Commissariaat voor de Media* and Jan Dworak, President of the Polish *Krajowa Rada Radiofonii i Telewizji* were elected vice-chairs.

The ERGA will coexist with other cooperation networks whose objectives and mode of functioning are complementary, the largest of them being the EPRA. The group will also complement the work of the Contact Committee, which is composed of representatives of Member States, and was established by Article 29 AVMSD.

• Commission establishes a European Regulators Group for Audiovisual Media Services
http://merlin.obs.coe.int/redirect.php?id=16906 EN
• Council conclusions and of the representatives of the Governments of the Member States meeting within the Council, on media freedom and pluralism in the digital environment
http://merlin.obs.coe.int/redirect.php?id=16907 EN

• For more background information see EPRA Regulation News of 12 March 2014, "Inaugural Meeting of the ERGA"
http://merlin.obs.coe.int/redirect.php?id=16931 EN FR

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NATIONAL

AL-Albania

Regulatory Authority on Audiovisual Media Approves Broadcasting Code

On 27 January 2014 the Audiovisual Media Authority (AMA) approved the Broadcasting Code for audiovisual media operators. According to the regulator, the Code is meant "as a step to further complete the legal and sublegal framework for the monitoring and controlling of radio and television stations' activity."

The Broadcasting Code further specifies the guiding principles regarding content of audiovisual media laid out in the Act on Audiovisual Media No. 97/2013 approved in March 2013 (see IRIS 2013-8/9). More specifically, the Code tackles in detail the guiding content-related principles for audiovisual media, the right to privacy, the matter of public interest in audiovisual programmes, as well as news and current affairs programmes.

The Code devotes a special section to protection of minors by setting up rules on the usage of warning signals and on the way of coverage of children in audiovisual media. In addition, the Code lays out rules regarding the coverage of disabled persons in media.

The Code addresses the requirement to promote and progressively increase the inclusion of European works in audiovisual programmes, stating that European works and independent works should be viewed with priority in the broadcasting plan. Rules on the broadcasting of advertisements are another area addressed in the Code, referring mainly to specific products, time limits, and the way advertising spots are produced.

Finally, the Code specifies the set-up, the competencies and procedures that the Council of Complaints will have to follow. The Council of Complaints is meant to work as a body that examines complaints coming from the public on specific audiovisual programmes, serving as a mediator between the public and the media. According to the regulator, the approval of this Code enables AMA and the Council of Complaints to monitor and take specific measures against audiovisual operators that violate ethical rules in their programmes. The Council of Complaints has not been established yet, as its election requires a qualified majority within the AMA Council, which is pending upon election of missing members in the council from the parliament.

• *Deklaratë për media* (Press Release of January 2014)
http://merlin.obs.coe.int/redirect.php?id=16880 SQ

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Revision of Election of Members of Regulatory Authority Proposed

On 11 December 2013 the Deputy Chairman of the Parliamentary Commission on Education and Public Information submitted to the Parliament a proposal for the amendment of the Act no.97/2013 of 4 March 2013 "On audiovisual media in the Republic of Albania" (AML, see IRIS 2013-8/9). The amendment focuses on the change of Article 134 AML, which states that "the chair and members of the National Council of Radio and Television, appointed in accordance with the law no. 8410 dated 30 September 1998 (see IRIS 1999-2/16) on 'Public and Private Radio and Television in the Republic of Albania,' as amended, shall continue to hold their positions after this law enters into force, until the termination of their mandate set out in their original appointment. The term in office shall be calculated from the first day of their appointment. Vacancies in the Audiovisual Media Authority (AMA) shall be completed in accordance with the provisions of Articles 8 and 9 of this law."

The proposed amendment consists of two articles aiming to start procedures for the election of members and the chair of AMA and thus changing the provisions of Articles 8, 9, and 10 AML. The proposed amendment sparked a political debate with the parliamentary opposition claiming that this amendment aims to threaten continuity and independence of the regulator. The opposition demanded expert opinion from OSCE Representative on Freedom of the Media. The discussion on the amendment therefore has been postponed.

The proposed amendment came as no surprise, as, at the time of the revision of the AML in March 2013, the current ruling majority expressed their disagreement on the election of the regulatory authority members and the Steering Council of the public service broadcaster alike. The memorandum that accompanies the proposed amendment reflects this position, by stating that the current setup of the regulatory authority, preserving mandates of former members and the chair, elected under previous law, while the new law

imposes other criteria, cannot be implemented. In addition, the memorandum points out that AMA is currently unable to make decisions, claiming that only three of its members have regular mandates and that the current chair is acting without gaining a second term as a member, just prolonging her mandate as a chair.

• *Projektligj "Per disa ndryshime ne ligjin nr. 97/2013 Per Mediat Audiovizive ne Republiken e Shqiperise".(A. Peza)* (Proposal for the amendment of the law on audiovisual media, 11 December 2013)
http://merlin.obs.coe.int/redirect.php?id=16882 SQ

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AT-Austria

Supreme Court Rules That Blank Cassette Levy Applies to Hard Drives

In a decision of 17 December 2013, the *Oberste Gerichtshof* (Supreme Court - OGH) referred a legal dispute over the blank cassette levy on hard drives back to the first-instance court. It considered that the trial court had failed to establish whether and, if so, to what extent the remuneration system provided for in Article 42b(1) of the *Urheberrechtsgesetz* (Copyright Act - UrhG) - particularly in connection with the refunding of remuneration under Article 42b(6) UrhG - could be deemed "fair compensation" in the sense of Article 5(2)(b) of Copyright Directive 2001/29/EC. The OGH, particularly on account of technical advances and decisions taken by the Court of Justice of the European Union (CJEU) since decision 4 Ob 115/05y (Gericom), thought that the basic obligation to pay remuneration under Article 42b(1) UrhG now also applied to computer hard drives.

Under this provision, the author is entitled to equitable remuneration (blank cassette levy) if it is probable that, owing to its nature, a work which has been broadcast, made available to the public or recorded on a video or audio recording medium for commercial purposes will be reproduced for personal use by copying onto a video or audio medium in accordance with Article 42(2) to (7) UrhG, and if recording material is commercially available on the domestic market.

Recording material particularly includes unrecorded video or audio media suitable or designed for such reproduction. According to the OGH, the wording of Article 42b(1) UrhG includes computer hard drives unless they are only used for copying to a very small extent (see OGH decision 4 Ob 115/05y of 12 July 2005).

This provision is based on Article 5(2)(b) of the Copyright Directive, according to which a member state that provides for an exception to the reproduction right in respect of reproductions made for private use must ensure that the rightsholders receive fair compensation (see CJEU judgment C-462/09 of 16 June 2011 - Thuiskopie, see IRIS 2011-7/2). In its judgment of 21 October 2010 (C-567/08 - Padawan, see IRIS 2010-10/7), the CJEU ruled that "fair compensation" should be calculated on the basis of the reduction in income suffered by rightsholders as a result of the introduction of the private copying exception. According to recital 35 of the Copyright Directive, no obligation for payment may arise if the prejudice to the rightsholder is minimal.

In its decision 4 Ob 115/05y (Gericom), the OGH had considered that external or internal hard drives were regularly used to a significant extent in a way completely unrelated to the compensation paid for private copying and that no payment was therefore due under Article 42b(1) UrhG. In its latest ruling, however, it expressed doubt over whether rightsholders only suffered "minimal prejudice" as a result of the use of hard drives for unrestricted copying. It should be borne in mind that analogue storage media were disappearing from the market and gradually being replaced by digital media that were being used to copy protected works on an economically significant scale.

The simple fact that hard drives were also used for other purposes (multi-functionality) did not mean that no remuneration was due. According to CJEU case law, when deciding whether rightsholders were entitled to "fair compensation" in the sense of Article 5(2)(b) of the Copyright Directive, account should only be taken of revenue lost as a result of legal copying. However, these losses did not depend on whether and to what extent recording equipment was used for purposes other than those for which remuneration was due. Rather, the crucial factor was whether computer hard drives were actually used to store copyright-protected works to such an extent that the threshold of "minimal prejudice" in the sense of recital 35 of the Copyright Directive was exceeded. Even using just a tiny part of a hard drive's memory could result in an obligation to pay remuneration according to Article 42b(1) UrhG.

In view of the increasing storage capacities of computer hard drives, even if they were only partly used for such copying, the resulting prejudice could no longer be described as minimal. The same conclusion would apply if, for example, half of the hard drives in people's houses were not used at all to store content for which remuneration was due, provided they were used to a "relevant extent" from a general perspective.

• *Beschluss des OGH vom 17.12.2013 (4 Ob 138/13t)* (OGH decision of 17 December 2013 (4 Ob 138/13t))
http://merlin.obs.coe.int/redirect.php?id=16930 DE

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BE-Belgium

Court Confirms RTBF's Right to Publish Written Content on its Website

Since 2010, Belgian French-language newspaper publishers have been in dispute with the Belgian public service broadcaster RTBF, which they accuse of developing its online activities, more specifically by publishing written content on its website in addition to the audiovisual content that forms part of its public broadcasting remit. The newspaper publishers claim that this written content creates unfair competition, especially as it benefits from public funding in the form of the annual subsidy granted to the RTBF by the French Community of Belgium.

The publishers have brought three legal actions in total. Firstly, a complaint submitted to the European Commission in February 2011 is currently being investigated. Secondly, an application for a judicial review was lodged with the Council of State in April 2013 concerning the current RTBF management contract, which covers the 2013-2017 period. Thirdly, and most importantly, legal proceedings were instigated with Charleroi Commercial Court in September 2010.

Charleroi Commercial Court dismissed the publishers' case at the end of 2011. After the publishers appealed, Mons Appeal Court issued its decision on 20 January 2014, confirming the disputed rulings and, in turn, dismissing the publishers' case.

The publishers had argued, firstly, that the RTBF had acted outside its public service remit by publishing written content on its website. The Appeal Court noted, in response, that the notion of public service was changing and that a teleological interpretation of the statutory object of public-law corporations, including the RTBF, should be used rather than a literal one. Since the written content was incidental to the audiovisual content, it concluded that its publication exceeded neither the object nor the public service remit of the RTBF.

The publishers had also accused the RTBF of commercially exploiting this written content by receiving income from advertising shown alongside it on the Internet. Noting that the RTBF's current management contract explicitly allowed it to broadcast advertising not only on radio and television but also on the Internet, the Appeal Court rejected the publishers' argument. Since the written content was not illegal, neither was commercial exploitation of it.

Finally, the publishers had argued that the use of the RTBF's public subsidy for publishing written content online constituted new state aid that should have been notified to the European Commission. The Appeal Court rejected this argument: since the Internet activity was not a new activity in the sense of the TFEU but only a natural evolution of the relevant market, the aid did not need to be notified to the Commission.

The remaining question concerned the compatibility of the state aid granted to the RTBF with the provisions of the Treaty. However, Mons Appeal Court ruled that this question fell under the exclusive jurisdiction of the European Commission, to which the case had already been referred by the publishers and which was expected to issue a decision in the near future.

It seems that the publishers may appeal against the Mons Appeal Court judgment.

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BG-Bulgaria

Prohibition for Offshore Companies to Hold Broadcasting Licences

In January 2014, the Bulgarian Act on the Economic and Financial Relations with Companies Registered in Preferential Tax Regime Jurisdictions, the Persons Related to Them and Their Beneficial Owner (or as it has become well-known by its short title Act on Offshore Companies, the "Act") was promulgated in the State Gazette, issue No. 1 of 3 January 2014.

Article 3 point 20 of the Act provides that companies, which are registered in preferential tax regime jurisdictions, or any person related thereto shall be prohibited from establishing or acquiring direct or indirect shareholding in a legal person which applies for or has been granted a radio and television broadcasting licence under the Radio and Television Act.

This legal provision shall not apply where

1. the shares of a company are traded on a regulated market in a European Union Member State or a country that is a part of the European Economic Area, or other markets, included in the special legislation list including in particular the Social Security Code, the Act on the Public Offering of Securities or the Act on the Activities of the Collective Investment Undertakings and other collective investment undertakings, and where the actual owners and individuals are disclosed under the relevant special legislation;

2. the company registered in preferential tax regime jurisdictions is a part of an economic group whose parent company is tax-resident in the territory of a State,

with which the Republic of Bulgaria has concluded an effective double taxation agreement or an effective agreement on exchange of information;

3. the company registered in preferential tax regime jurisdictions is part of an economic group whose parent company or subsidiary is Bulgarian tax resident and its actual owners are disclosed or it is traded on a regulated market in a European Union Member State or a country within the European Economic Area;

4. the company participates directly or indirectly as a publisher of periodical products of the printing industry and has provided information about the actual owners in line with Article 4 of the Act on the Mandatory Deposit of Products of the Printing Industry. Where the exception under Article 4 has been applied on the basis of false data, the grant of broadcasting licences shall be refused or revoked.

The Act entered into force on 1 January 2014. Any person that lies within the scope of the prohibitions under the Act is required to bring his or her activities in compliance with the provisions of the Act within six months as of its entry into force. Following the expiry of this period and in case this obligation has not been fulfilled, licences shall be revoked.

• Закон за икономическите и финансовите отношения с дружествата , регистрирани в юрисдикции с преференциален данъчен режим , свързаните с тях лица и техните действителни собственици , В сила от *01.01.2014* г . Обн . ДВ . бр .*1* от *3* Януари *2014*463. (Act on the Economic and Financial Relations with Companies Registered in Preferential Tax Regime Jurisdictions, the Persons Related to Them and Their Beneficial Owner, State Gazette, issue No. 1 of 3 January 2014)
http://merlin.obs.coe.int/redirect.php?id=16883 BG

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CY-Cyprus

Recourse for Equal Treatment of Presidential Candidate Dismissed

On 13 January 2014, the Supreme Court of Cyprus rejected the appeal of a presidential candidate against the public service broadcaster for "not granting a candidate treatment equal to the three main candidates". The rejection was reasoned with the recourse's lack of purpose and the candidate's failure to prove a vested interest. The decision followed an injunction issued before the presidential elections in February 2013.

The plaintiff was candidate to the presidential elections. She filed a recourse against a decision of the Cyprus Broadcasting Corporation (3413613643713773063113753713723́377 Ίδρυμα Κύπρου - RIK), the public service broadcaster, for rejecting her written demand to be granted equal treatment to the three main presidential candidates i.e. the same amount of air time.

In its reply to the plaintiff's request, RIK had conceded that it would nevertheless cover her activities and offer her access to present her electoral programme. With her recourse, the candidate asked the Supreme Court to declare the broadcaster's decision as against the law, null and void.

According to the plaintiff, RIK violated Article 28 of the Cypriot Constitution on equality before the law and provisions of broadcasting law. Considering that the decision would damage her candidacy and affect the electoral result, she petitioned the Court to suspend RIK's omissions until a final verdict was issued. RIK responded that omissions can in principle not been suspended. Understanding the suspension as the granting of air time would not maintain the existing situation. It would rather change the situation drastically to the benefit of the plaintiff. Such a suspension would moreover upset and damage the broadcaster's pre-electoral programming and cause serious harm to the public interest.

In an intermediate decision issued on 30 January 2013, the Supreme Court referred to previous similar cases according to which a suspension of an action can be decided only to maintain the status quo, not to change it, in cases where the action is clearly in breach of the law. Additionally, a suspension is granted where it is clear that the implementation of a decision will cause irreparable damage to the plaintiff. Such a measure would not sustain the status quo; it would force the broadcaster to positive actions. For these reasons, the demand to issue an order against the broadcaster was rejected.

In its final verdict, the Supreme Court noted the principle that a case cannot be proceeded and can be erased if passed circumstances make the claim purposeless, unless damage was caused to the plaintiff. In this respect, it is up to the plaintiff to prove his or her vested interest in the case. Based on the above-mentioned and given that the pre-electoral period and activities have ended, while the plaintiff failed to provide specific reference to damages, the Court decided to dismiss the recourse.

• ΑΝΩΤΑΤΟ ΔΙΚΑΣΤΗΡΙΟ ΚΥΠΡΟΥ ΑΝΑΘΕΩΡΗΤΙΚΗ 3243313323213313373243373433313321, ΥΠΟΘΕΣΗ 321341. *128/2013, 13 /*3613737730536130137́371377305, *2014* (Supreme Court's decision of 13 January 2014 - Revisional Jurisdiction, Case 128/2013, Praxoula Antoniadou v. Radio Broadcasting Corporation)
http://merlin.obs.coe.int/redirect.php?id=16884 EL

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FFG Film Levy Consistent With Constitution

In a decision of 28 January 2014, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) confirmed that the provisions of the *Filmförderungsgesetz* (Film Support Act - FFG) concerning the film levy were in conformity with the Constitution.

The BVerfG explained, first of all, that the Federal Government was responsible for legislation on the collection of the film levy according to Articles 72 and 74(1)(11) of the *Grundgesetz* (Basic Law - GG). Opponents of the levy had argued that it fell under cultural legislation, for which the *Länder* were responsible. However, the BVerfG ruled that the Federation's legislative jurisdiction could not be dismissed on the grounds that the law had a cultural purpose as well as fulfilling economic objectives. This did not matter as long as the main purpose of the law was economic in nature. According to its objective regulatory provisions, the FFG was designed to support the German film industry and German film-making. It therefore concerned films as an economic asset, as well as the branches of industry that produced and exploited them.

The BVerfG added that, although Article 1(1)(1) FFG described the creative and artistic quality of German films as an objective of the Act, this did not alter the fact that the regulations were fundamentally economic in nature. The conditions of financial support were predominantly linked to the economic success of the film.

Federal legislation was also necessary to protect economic unity in the sense of Article 72(2) GG. There was no doubting the legislator's view that the regulations were necessary in order to safeguard (i) support for film-making regardless of location, (ii) the efficient consultation of the Federal Government with regard to the exercise of external competences in relation to film policy, (iii) film exploitation at fair market value and (iv) financing of film-making by means of a countrywide levy.

The BVerfG also considered that the FFG met the demands of financial legislation. The film levy was not a tax, but a special duty that was not dependent on the provision of a service. The reason for it was not simply to raise funds. The subgroups that paid it, i.e. cinema operators (Art. 66 FFG), programme providers and holders of video licensing rights (Art. 66a FFG) and television companies (Art. 67 FFG), as marketers of cinema films, formed a homogeneous group bound by a close interest in the purpose of the levy and held a certain responsibility to finance the film industry. Their close relationship to the industry and their responsibility to finance it were based on their common interest in the structure and success of the German film industry. The fact that the levy applied to three different subgroups between which there were not only certain differences but also a competitive relationship did not mean there was no homogeneity between them, since they all shared a common interest in the purpose of the levy.

The exclusion of companies that exploited music rights and of merchandising companies was justified, since they only exploited individual aspects of a film rather than the film as a whole and therefore only indirectly benefited from the film's success.

The BVerfG also held that the film levy provided for in Article 66 FFG was consistent with the Constitution even though, in the relevant year of 2004, the obligation of television companies to pay the levy had not been clearly defined. This situation had been rectified through the 2010 amendment to the FFG (see IRIS 2010-8/22). The backdating of the amendment was not unconstitutional because the backdated amendment had not resulted in any detrimental legal consequences.

The BVerfG also ruled that the Awards Commission of the *Filmförderungsanstalt* (Film Support Office) (Art. 7 FFG) had been legitimately elected. Although the level of personal legitimation was reduced, this was justified in view of the commission's creative and artistic expertise.

• *Urteil des BVerfG vom 28. Januar 2014 (2 BvR 1561/12, 2 BvR 1562/12, 2 BvR 1563/12, 2 BvR 1564/12)* (BVerfG ruling of 28 January 2014 (2 BvR 1561/12, 2 BvR 1562/12, 2 BvR 1563/12, 2 BvR 1564/12))
http://merlin.obs.coe.int/redirect.php?id=16910 DE

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Federal Supreme Court Allows Link between Product Sales and Competition in TV Advertisement

In a ruling of 12 December 2013 (case no. I ZR 192/12), the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that linking a competition to the sale of sweets in a television advertisement was admissible, provided the diligence requirement set out in Article 3(2)(3) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - UWG) did not apply, since the advertisement was aimed not only at minors.

The case concerned a TV commercial for a competition in which customers had to purchase the advertised sweets in order to take part. The advertisement

showed the presenter Thomas Gottschalk in a supermarket with two families with children. Customers who purchased five packets of the advertised sweets for around EUR 1 and sent in the till receipts were entered into a draw in which they could win one of 100 "gold bear bars" worth EUR 5,000 each.

The company that instigated the legal proceedings - a manufacturer of fruit gums, like the defendant - considered the advertisement to be anti-competitive because it exploited minors' commercial inexperience and made participation in the competition dependent on the purchase of goods. It claimed that this was an unfair commercial practice in the sense of Article 4(6) UWG. The plaintiff had been successful before the lower-instance *Landgericht Köln* (Cologne District Court, 8 February 2012, case no. 84 O 215/11) and *Oberlandesgericht Köln* (Cologne Appeal Court, 21 February 2012, case no. 6 U 53/12). In the opinion of the lower-instance courts, the advertisement could cause minors to make unnecessary purchases. Therefore, the decision should take into account the need for diligence under Article 3(2)(3) UWG and be based on the perspective of children and young people.

The first civil chamber of the BGH disagreed, overturned the appeal court judgment and dismissed the action. It was true that linking competitions to purchases could, in individual cases, be prohibited as an unfair commercial practice according to Article 4(6) UWG if the necessary professional diligence was not exercised. In this case, however, there was no unfair commercial practice. The diligence requirement under Article 3(2)(3) UWG did not apply because the products were equally popular with both children and adults. A competition linked to the sale of sweets was therefore, in the BGH's view, also likely to influence the purchasing behaviour of adults. The dispute should therefore be resolved on the basis of the average consumer's perspective.

On this basis, the television commercial in question did not breach the requirement for professional diligence. The cost of entering the competition was clearly stated and the defendant did not make misleading claims about participants' chances of winning.

Furthermore, the commercial did not infringe other provisions of competition law specially designed to protect children and young people. It did not contain a direct exhortation to children to purchase the goods in the sense of no. 28 of the Annex to Article 3(3) UWG and was also unlikely to unfairly exploit the commercial inexperience of minors in accordance with Article 4(2) UWG.

• *Pressemitteilung des BGH vom 12. Dezember 2013* (BGH press release of 12 December 2013)
http://merlin.obs.coe.int/redirect.php?id=16917 DE

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Federal Supreme Court Clears Parents of Liability for Filesharing by Grown-Up Children

In a ruling of 8 January 2014 (case no. I ZR 1169/12), the first civil chamber of the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that parents were not liable for copyright infringements committed by their grown-up children if they had no actual knowledge of the offences.

The plaintiffs, four major German record producers, had taken court action against the defendant. According to the charge, the defendant's 20-year old stepson had made around 3,750 music files available via online filesharing sites in 2006. The rightsholders had written to the stepfather, demanding lawyers' and caution costs of around EUR 3,500 on the grounds that he had failed to meet his obligation to monitor his son's activities.

Both the lower-instance *Landgericht Köln* (Cologne District Court, ruling of 24 November 2010 - 28 O 202/108) and *Oberlandesgericht Köln* (Cologne Appeal Court, ruling of 22 July 2011 - 6 U 208/10) had upheld the rightsholders' complaints. They had ruled that parents were obliged to monitor and instruct grown-up family members even if they were unaware of previous or future copyright infringements.

The BGH disagreed, ruling that these obligations only applied to Internet connection owners if they had concrete knowledge of the risk that an adult family member might commit an infringement, such as if a caution had previously been issued. A fundamental obligation to monitor and instruct children regardless of such concrete knowledge was in conflict with the particular relationship of trust that existed between family members. The fact that adults were responsible for their own actions also meant that parents should be able to let their grown-up children use an Internet connection without having to monitor or instruct them.

• *Pressemitteilung des Gerichtshofs Nr. 5/2014* (Federal Supreme Court press release no. 5/2014)
http://merlin.obs.coe.int/redirect.php?id=16918 DE

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Federal Administrative Court Finds Axel Springer's Takeover of ProSiebenSat.1 Acceptable Under Media Law

In a judgment of 29 January 2014 (case no. 6 C 2.13), the *Bundesverwaltungsgericht* (Federal Administrative Court - BVerwG) ruled that the plaintiff Axel

Springer AG's intended 2006 takeover of ProSiebenSat.1 Media AG was acceptable under media law and therefore decided in the last instance that the *Bayerische Landeszentrale für neue Medien* (Bavarian New Media Office - BLM) had been wrong to stop the takeover.

In 2005, the plaintiff had wanted to take over ProSiebenSat.1 Media AG (the sole shareholder in broadcasters Sat.1, ProSieben, Kabel 1, 9Live and N24) and indicated this intention to the relevant *Land* media authority, the BLM. After examining the situation, the *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media - KEK) of the *Land* media authorities decided that, in view of Axel Springer AG's strong position in the press sector and the audience share of ProSiebenSat.1 Media AG, the merger could result in a dominant market position in the television sector. The BLM therefore stopped the plaintiff from completing the intended takeover in 2006.

After its takeover plans had been rejected, the plaintiff lodged an administrative court action for a declaratory judgment declaring the decision to refuse permission under media law as unlawful. The *Bayerische Verwaltungsgerichtshof* (Bavarian Administrative Court) upheld this complaint on 15 February 2012 (case no. 7 BV 11.285, see IRIS 2012-4/15) in a decision now confirmed by the BVerwG. The legal threshold for a dominant market position is an audience share of 25%. ProSiebenSat.1 Media AG's market share of only around 17% after the deduction of programme windows and transmissions by third-party broadcasters was so far below the legal threshold that the plaintiff's activities in other media-relevant markets had not been sufficient to create a dominant market position. The further the broadcaster's audience share fell below the 25% threshold, the less it constituted a dominant market position, even taking into account activities in other media-relevant markets.

• *Pressemitteilung des Bundesverwaltungsgerichts Nr. 9/2014 (BVerwG 6 C 2.13) vom 29. Januar 2014* (Federal Administrative Court press release no. 9/2014 (BVerwG 6 C 2.13) of 29 January 2014)
http://merlin.obs.coe.int/redirect.php?id=16912 DE

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BVerfG Considers "Crazy Woman" Comment Not Protected by Freedom of Expression

In a ruling of 11 December 2013 (1 BvR 194/13), the 3rd chamber of the First Senate of the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) decided that the description of somebody as a "*durchgeknallte Frau*" ("crazy woman") on an Internet portal was not covered by the fundamental right to freedom of expression.

The complainant, a former district administrator and member of the Bavarian parliament, posed for *Playboy* magazine at the end of 2006. The photos were published in 2007.

The defendant in the original procedure had published the images on its website, along with a text containing the following commentary:

"*I tell you, you are the most frustrated woman I know. Your hormones are in such a mess that you no longer know what's what. Love, longing, orgasm, feminism, reason. You are a crazy woman, but don't blame your condition on us men.*"

In the original procedure, the complainant had applied for an injunction against the defendant's publication of various individual comments, including the description of her as a "crazy woman" (summarising the previous passages), as well as appropriate compensation. Although she had been successful in the first instance, her claim had been entirely rejected on appeal.

The politician appealed against this ruling to the BVerfG, claiming that her general personality rights enshrined in Article 2(1) in conjunction with Article 1(1) of the *Grundgesetz* (Basic Law - GG) had been breached. The BVerfG ruled firstly that the disputed decision had infringed the complainant's general personality rights by considering the use of the phrase "a crazy woman" lawful. When weighing the defendant's freedom of expression under Article 5(1)(1) GG against the complainant's general personality rights, the appeal court had overlooked the limitation of personal honour expressly mentioned in Article 5(2) GG. Since these judgements had no connection whatsoever with a public debate or with the complainant's behaviour, the court considered them purely speculative claims concerning the core of her personality as a private individual and as judgements concerning the most intimate part of her private life. These could not be justified by the freedom of expression.

The BVerfG considered that the appeal court had, in this case, failed to appreciate the extent of the intrusion on the complainant's personality rights. The decision was therefore lifted and the case referred back to the *Oberlandesgericht München* (Munich Appeal Court) for a new ruling.

• *Beschluss des Bundesverfassungsgerichts vom 11. Dezember 2013 (Az. 1 BvR 194/13)* (Decision of the Federal Constitutional Court of 11 December 2013 (case no. 1 BvR 194/13))
http://merlin.obs.coe.int/redirect.php?id=16911 DE

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LG Hamburg Orders Google to Filter Search Results

According to media reports, the *Landgericht Hamburg* (Hamburg District Court) issued a decision on 24 January 2014 (case no. 324 O 264/11), ordering the search engine provider Google Inc. to remove from its search results six secretly taken photographs showing the plaintiff engaging in sexual acts with prostitutes.

Third parties had taken the photographs illegally and first published them on the Internet in 2008. The person depicted had successfully taken court action to stop distribution of the images in 23 countries. Although he had also demanded several times that Google should prevent the distribution of the pictures, they continued to appear in Google search results.

Google pointed out that the search engine provider did not provide content itself, but only helped people to find it. Filtering search results was technically impossible on the one hand and contrary to the principle of Internet neutrality on the other. Moreover, filtering would only make it more difficult to find the photos. Only the original distributor could actually remove them.

The *Landgericht Hamburg* considered that the distribution of the images constituted an obvious breach of privacy, for which Google was jointly liable, since it had failed to filter the images out of its search results in spite of numerous requests. The court considered Google's claim that filtering was technically impossible to be unsubstantiated and therefore ordered the search engine provider to cease distributing the images, without specifying how this should actually be achieved.

Google has announced that it intends to appeal against the ruling.

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Cologne Appeal Court Limits Quotation Right Under Art. 51 UrhG For YouTube Excerpts

In a ruling of 13 December 2013 (case no. 6 U 114/13), the *Oberlandesgericht Köln* (Cologne Appeal Court - OLG) decided that the quotation right enshrined in Article 51 of the *Urheberrechtsgesetz* (Copyright Act - UrhG) did not cover all forms of critical debate concerning films. Distributing excerpts of a protected film for the purpose of blanket criticism was therefore contrary to copyright law.

The maker of a documentary film had launched an action against the operator of a YouTube channel, who had published a video on the YouTube platform, in which excerpts of the said film had been shown and briefly commented on.

As well as numerous points of dispute between the parties, particularly regarding the definition of an operator of a YouTube channel, the judgment deals essentially with the conditions in which the quotation right in Article 51 UrhG applies. In its defence, the YouTube channel operator referred to this quotation right. According to the OLG, the freedom to quote should not be exploited as a vehicle for publishing a work or parts thereof. It was therefore not sufficient to insert or add quotations in an unstructured way. Instead, quotations should be closely related to the ideas being expressed by the person using them.

Referring to the case law of the *Bundesgerichtshof* (Federal Supreme Court), particularly the "TV-Total" judgment of 20 December 2007 (case no. I ZR 42/05), the OLG pointed out that a quotation should, in principle, serve as the evidence or basis of the author's own remarks. Even in a debate about the content of a quoted work, blanket criticism of individual aspects of the work was insufficient.

A photograph of the film-maker had been posted alongside the uploaded video. The court did not rule whether the quotation right applied to this image. A quotation under Article 51 UrhG assumed that the quoted work had been published with the author's permission, which was not the case here.

The lower-instance *Landgericht Köln* (Cologne District Court) had issued a similar decision on 6 June 2013 (case no. 14 O 55/13).

• *Urteil des OLG Köln vom 13. Dezember 2013 (Az. 6 U 114/13)* (Cologne Appeal Court ruling of 13 December 2013 (case no. 6 U 114/13))
http://merlin.obs.coe.int/redirect.php?id=16913 DE

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Cologne Appeal Court Dismisses Tagesschau App Complaint

In a decision of 20 December 2013, the *Oberlandesgericht Köln* (Cologne Appeal Court - OLG) rejected a complaint from 11 newspaper publishers about the Tagesschau app (case no. 6 U 188/12), which it ruled was an admissible media service. The *Landgericht Köln* (Cologne District Court - *LG Köln*) had upheld the complaint in the first instance (ruling of 27 September 2012, case no. 31 O 360/11, see IRIS 2012-10/8).

The *LG Köln* had decided that the Tagesschau app was different from the "tagesschau.de" website and that it breached Article 11d(2)(3) of the *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting - RStV) on account of its press-like nature. The 6th civil chamber of the *OLG Köln* disagreed, ruling that the Tagesschau app was merely a mobile version of the "tagesschau.de" website, the content of which was identical.

Therefore, the Tagesschau app was covered by the three-step test carried out in 2010 and the approval subsequently granted to the website by the *Niedersächsische Staatskanzlei* (Lower Saxony State Chancellery). The approval process had included an examination of whether the website was "press-like" and it had been concluded, based on the use of content typically used in the media, such as moving images, interactive services, audio content and dynamic updates, that it was not.

The court had to abide by this legal assessment, since a new examination would call into question the results of the three-step test carried out in 2010 and mean that it could no longer have any effect.

In view of the fundamental importance of Articles 11d and 11f RStV regarding competition law, the court ruled that an appeal could be lodged with the *Bundesgerichtshof* (Federal Supreme Court).

• *Urteil des OLG Köln (Az. 6 U 188/12) vom 20. Dezember 2013* (Decision of the Cologne Appeal Court (case no. 6 U 188/12) of 20 December 2013)
http://merlin.obs.coe.int/redirect.php?id=16914 DE

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Nuremberg Appeal Court on Inadmissibility of Multiple Cautions

In its final judgment of 12 November 2013 (case no. 3 U 348/13), the *Oberlandesgericht Nürnberg* (Nuremberg Appeal Court - OLG) ruled that an application for an injunction against a company, and for reimbursement of the cost of issuing a caution following a breach of the obligation to publish legal information on an Internet platform (in this case, Facebook), was inadmissible under Article 8(4) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - UWG) if, taking all the circumstances into account, it represented an abuse of the law. The court considered that an abuse of the law was particularly committed if the only reason for issuing the caution and applying for an injunction was to generate a claim for reimbursement of expenses or of the costs of taking legal action against the contravening party.

In the case at hand, an IT company had, via a law firm, sent to other companies at least 199 cautions regarding breaches of the obligation to publish legal information, enshrined in Article 5 of the *Telemediengesetz* (Telemedia Act - TMG), in the space of eight days. One of the companies cautioned had refused to comply with the caution and had therefore been the subject of court proceedings. The court decided that the company issuing the cautions had abused the law if the multiple cautions issued bore no reasonable relation to the commercial activity of the company concerned.

In the OLG's opinion, an abuse of the law did not depend purely on the number of cautions issued. Rather, all the circumstances of the individual case should be taken into account. However, one of the indications that Article 8(4) UWG had been violated was the fact that the company issuing the cautions had, other than in two pending cases, failed to assert an injunction claim through the courts. Another indication of an abuse of the law was if the company issuing cautions had developed software that could be used to easily find cautionable service providers. If the company issuing cautions also had no significant economic interest in taking legal action for the breach of competition law, this was also a clue that the cautions represented an abuse of the law.

Regarding the question of economic interest, the court emphasised the weak financial position of the company that had issued the cautions. Its ordinary share capital had been EUR 25,000. Before the cautions were issued, the company had made a profit of EUR 41,000. Since issuing the cautions had allegedly cost EUR 53,000 in lawyers' fees, the court thought this alone pointed to the existence of an abuse of the law. In addition, 200 court procedures would have cost in the region of EUR 250,000. Consequently, the claims made were inadmissible under Article 8(4) UWG.

• *Endurteil des OLG Nürnberg vom 12. November 2013 (Az. 3 U 348/13)* (Final judgment of the Nuremberg Appeal Court of 12 November 2013 (case no. 3 U 348/13))
http://merlin.obs.coe.int/redirect.php?id=16915 DE

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Oldenburg Appeal Court Fines Newspaper's Online Service EUR 10,000

According to media reports, the *Oberlandesgericht Oldenburg* (Oldenburg Appeal Court - OLG) fined the online service of a major daily newspaper EUR 10,000 in a ruling of 10 December 2013. The portal had published video footage of a police operation in which the faces of the police officers involved had not been pixellated.

The videos showed a person being arrested during a police operation at a disco in Bremen on 23 June 2013. The police officers' faces were clearly visible. A temporary injunction was issued against the online service on 26 August 2013, ordering it to make the officers unrecognisable.

The online service announced that it had already removed the videos from its Internet platform on 5 August 2013. However, despite the threat of a fine, the film was still available, without any alterations, on the website on 19 September 2013. The *Landgericht Aurich* (Aurich District Court) therefore imposed a EUR 10,000 fine. The online service appealed against this decision and demanded the fine be reduced to EUR 2,000. The *Oberlandesgericht Oldenburg* rejected this appeal, considering the fine reasonable because publication of the video footage had infringed the privacy of five people and the online service had a large number of users.

The publication of the videos, especially on account of their topicality, represented a significant breach of privacy, since they had been watched by a large number of website users a short time after the incident occurred. It had been in the online service's specific interest to show the unaltered video of the police operation as soon as possible after the event. In the court's opinion, the URL title "polizeiattacke-in-bremen-das-ist-der-club" ("police-attack-in-Bremen-this-is-the-club") had also been deliberately designed to attract the interest of the website's users.

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New SWR Inter-State Agreement Enters Into Force

The new *Staatsvertrag über den Südwestrundfunk* (Inter-State Agreement on *Südwestrundfunk,* the public service broadcaster for the *Länder* of Baden-Württemberg and Rhineland-Palatinate - SWR-StV), entered into force on 1 January 2014.

The purpose of the new agreement is to guarantee a strong, properly functioning SWR in a digitised media world for a younger, trimedial audience. To this end, the agreement gives SWR greater flexibility to create its own business structure and develop multimedia forms of organisation.

SWR's new legal framework in particular makes provision for the clarification of its programming remit, the definition of which expressly mentions the Internet as a medium for the creation and distribution of broadcast services (Art. 3(1) SWR-StV). SWR services should be aimed at all sectors of the population and take particular account of the regional roots of broadcasting in both *Länder*. Regional identity will be strengthened through future SWR programming, with at least 30% of combined TV programming including separate simultaneous broadcasts for each *Land*.

Broader participation rights for SWR employees and governing bodies should also help guarantee SWR's journalistic independence. The Board of Directors will include one staff representative with full voting rights from each *Land*. The agreement also covers the introduction of a so-called editorial statute, which regulates the rights of programme staff to participate in programme-related affairs (Art. 38(2) SWR-StV).

Against the background of the request lodged by the *Länder* of Rhineland-Palatinate and Hamburg for a judicial review concerning the ZDF Inter-State Agreement to be carried out by the *Bundesverfassungsgericht* (Federal Constitutional Court), the SWR Broadcasting Council will no longer include representatives of the *Land* governments. Instead, it will contain one representative of Muslim associations (Art. 14(2)(5) SWR-StV) and one representative of the *Verband Deutscher Sinti und Roma* (Association of German Sinti and Romanies - Art. 14(3)(13) SWR-StV), and reflect closely the population structure of both *Länder*. The SWR-StV also confirms the fundamental incompatibility of holding political office at *Land*, federal or EU level with membership of the Broadcasting Council (Art. 13(3)(4) SWR-StV). The Board of Directors will also include three additional non-State representatives (Art. 20(1) SWR-StV).

These changes to the composition of SWR's governing bodies are designed to ensure a reasonable level of independence from the State. A minimum quota of female members was also introduced for both bodies (see Articles 14(6) and 20(2) SWR-StV for the Broadcasting Council and Board of Directors respectively). In order to bring about transparency, the Broadcasting Council should, in principle, now meet in public (Art. 17(4) SWR-StV). The debates held and decisions taken at public meetings must be published in an appropriate manner.

According to comments made by the Minister-Presidents of Baden-Württemberg and Rhineland-Palatinate, who signed the agreement, the new SWR-StV should therefore meet the requirements for an Inter-State Broadcasting Agreement that conforms to the Constitution, which are expected to be included in the judgment of the *Bundesverfassungsgericht*.

• *Staatsvertrag über den Südwestrundfunk* (Inter-State Agreement on *Südwestrundfunk*)
http://merlin.obs.coe.int/redirect.php?id=16916 DE

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FR-France

Tax on Editors and Distributors of Television Services Declared Partially Unconstitutional

In a decision of 6 February 2014, the Constitutional Council declared the tax payable by editors and distributors of television services partially unconstitutional. In 2012, the tax yielded EUR 295.49 million, which was allocated to the national centre for the cinema and moving images (Centre National du Cinéma et de l'Image Animée - CNC). On 6 November 2013 the Conseil d'Etat referred to the Constitutional Council a priority question on constitutionality (question prioritaire de constitutionnalité - QPC) raised by the company TF1 in respect of a dispute between the company and the tax authorities. The question concerned paragraph 1(c) of Article L. 115-7 of the Cinema and Moving Images Code, which provides that the basis for calculating this tax is to include, in addition to income from advertising, sponsorship and public funding, the "sums paid directly or indirectly by the operators of electronic communications to the taxpayers concerned, or to the parties ensuring their collection, in respect of shared-income telephone calls, connections to telematic services and the sending of text messages in connection with the broadcasting of their programmes, with the exception of programmes serving a major national cause or of general interest".

In support of its QPC, TF1 claimed that the tax failed to take account of the principle of equality in respect of public expenditure, since it was payable by editors of television services in respect of sums of money they did not receive, and that the rules for establishing the basis for the tax resulted in taxation that exceeded the contributory means of the taxpayers concerned and was therefore confiscatory. In accordance with its decision, and in the light of Article 13 of the 1789 Declaration of the Rights of Man and of the Citizen ("A general tax is indispensable 04046; it ought to be equally apportioned among all citizens according to their means."), and Article 34 of the Constitution (which prescribes the principle of equality in respect of taxation), the Constitutional Council noted that the disputed provisions did indeed require the editors of television services operating a television service received in mainland France to pay tax on revenue they might not receive. This meant that a taxpayer was being required to pay a tax based on an amount that included revenue it did not have, which was contrary to the Constitution. The Conseil d'Etat therefore deleted from paragraph 1(c) of Article L. 115-7 of the Cinema and Moving Image Code the phrase "or to the parties ensuring their collection", with the result that the editors concerned will now only pay tax on the amounts they actually receive. The declaration of unconstitutionality took effect on the date on which the decision was published, but it cannot be invoked in respect of tax already paid but not contested before that date.

• *Conseil constitutionnel, Décision n°2013-362 QPC- Société TF1* (Constitutional Council, Decision No. 2013-362 QPC - the company TF1)
http://merlin.obs.coe.int/redirect.php?id=16921 FR

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Contestation of Exploitation Licences for the Film *Nymphomaniac (Volumes 1 and 2)*

In two consecutive decisions delivered on 28 January 2014 and 5 February 2014, the administrative court of Paris, deliberating under the urgent procedure, suspended the exploitation licence issued by the Minister for Culture to Volumes 1 and 2 of Lars von Triers' film *Nymphomaniac*, which paints a psychological portrait of a young woman addicted to sex. Volume 1 was released in France on 1 January and Volume 2 on 29 January 2014. Under Articles 3 and 3-1 of the Decree of 23 February 1990, the exploitation licence issued by the Minister for Culture may be either unrestricted or combined with a ban on showing to anyone under 12, 16 or 18 years of age. The Classification Commission may also propose an "X" classification for films that are pornographic or constitute incitement to violence.

The exploitation licence for Volume 1 of the film, issued on 24 December 2013, carried a ban on showing to anyone under 12 years of age. An association for the defence of Judeo-Christian values contested the licence under the urgent procedure because of "numerous scenes of non-simulated sex". The association held that the condition of urgency, required under the urgent procedure, was met since the film was already being shown in cinemas and the release of Volume 2 of the film, scheduled on 29 January 2014, was likely to boost exploitation of Volume 1. In her defence, the Minister for Culture held that the condition of urgency was not in fact met, since the film was in its third week of screening. The judge in the administrative court, however, felt that releasing the film with its large number of scenes of non-simulated sex and its generally very dark nature, with no more than a ban on showing to anyone under the age of 12 years constituted an urgent situation, in view of the need to ensure the protection of minors. It was therefore irrelevant that the subject matter and general atmosphere of the film were already known to parents. The court went on to examine the condition requiring "the existence of serious doubt" regarding the legality of the exploitation licence allowing the film to be shown to minors over 12 years of age. Viewing of the film by the judge under the urgent procedure and the parties confirmed the presentation of particularly harsh

scenes and images relating a young woman's addiction to sex. It was found that *Nymphomaniac - Volume 1* should not be viewed by any young person with no substantial knowledge of cinema culture but that, in view of the subject matter and the conditions in which it was filmed, the film did not necessarily constitute either pornography or incitement to violence. Because of the nature of the subject matter and the director's aesthetic approach, the film could not be considered to fall into the category of films banned for showing to anyone under 18 years of age, despite numerous scenes of non-simulated sex. The judge therefore allowed the application for the suspension of performance of the licence issued, banning showing it to anyone under 16 years of age.

The exploitation licence issued on 27 January by the Minister for Culture for Volume 2 of the film, scheduled for showing two days later in more than 150 cinemas throughout the country, carried a ban on showing to anyone under 16 years of age. The applicant association contested this licence also, under the urgent procedure, recalling that Volume 2 was presented as the continuation, in an even harsher form, of Volume 1, and that because of the scenes of sadomasochism, torture and non-simulated sex it claimed to contain it ought to be banned for anyone under 18 years of age, as was the case in the USA and in Romania. In her defence, the Minister for Culture held that no error of appreciation had been committed, and considered that a film that included scenes of non-simulated sex or violence could not, on those grounds alone, be given an X rating since the originator had produced a work of aesthetic value, given the quality of the scenario. The Minister held that the film was the result of "a creative spirit and was therefore not of a pornographic nature". The judge under the urgent procedure found the required condition of urgency was met, because of the need to ensure the protection of minors. At the end of a detailed, descriptive examination of various scenes in which "sexuality was used for the purpose of manipulation", and after the film had been viewed by the judge and the parties in the case, the court concluded that, given its subject matter and the conditions under which it was filmed, the film did not constitute pornography or incitement to violence. Nevertheless, because of one scene of non-simulated sex in a particularly dark context with overtones of paedophilia and scenes of sadomasochism and extreme violence, the court found that *Nymphomaniac - Volume 2* should be included in the category of films not to be shown to anyone under 18 years of age. The judge therefore allowed the suspension of the contested licence for showing the films to minors over 16 years of age, but did not recommend an X rating.

• *Tribunal administratif de Paris (ord. réf.), N°1400340/9, 28 janvier 2014 - Association Promouvoir* (Administrative court of Paris (urgent procedure), no. 1400340/9, 28 January 2014 - association 'Promouvoir') FR

• *Tribunal administratif de Paris (ord. réf.), N°1400927, 1401449/9, 5 février 2014 - Association Promouvoir* (Administrative court of Paris (urgent procedure), nos. 1400927, 1401449/9, 5 February 2014 - association 'Promouvoir') FR

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Judge under the Urgent Procedure Orders Withdrawal of Extracts from a Dieudonné Video on YouTube

In a judgment delivered on 12 February 2014, the judge sitting in urgent matters at the regional court in Paris ordered the removal of two passages from the video entitled *2014 sera l'année de la quenelle* by humourist/polemist Dieudonné M'bala M'bala, shown on YouTube and judged as constituting a crime against humanity and incitement to racial hatred. The video has been duplicated by other users, including other video platforms, and has been viewed more than 3 million times. YouTube refused to remove the video unless the disputed content was declared illegal by the courts, and until the judgment was delivered merely posted a warning message to users: "The following content has been identified by the YouTube community as being potentially offensive or inappropriate. Viewer discretion is advised."

Dieudonné has been in the news for several months because of the numerous anti-Semitic utterances included in his performances and videos. In early January, for example, the Conseil d'Etat, deliberating under the urgent procedure, issued a preventive ban on his show entitled *Le Mur*, which was scheduled for performance in Orleans, Tours and Nantes, as it contained utterances considered as infringing human dignity. A number of other cases have been brought before the courts on the initiative of associations combating racism. In the case at issue, the union of Jewish students in France (Union des Etudiants Juifs de France - UEJF) and an international justice association (Action Internationale pour la Justice - AIPJ), under the urgent procedure, were calling for the removal of four disputed passages from a video being shown on YouTube, in which Dieudonné says "(04046) I was born in '66, so I wasn't born then, you know, and I don't know anything about gas chambers. If you really want, I could arrange a meeting with Robert" (referring to the negationist Robert Faurisson). The judge recalled that denying the existence of crimes against humanity fell within the scope of the provisions of Article 24 bis of the Act of 29 July 1881, even if it was presented in a disguised or dubitative form, or by insinuation. Taking into account "the more general context of their originator's public statements, some of which had resulted in court judgments against him", the judge found that it was clear from the wording, which was in fact unequivocal for the audience, that

he contested the reality of facts qualified as crimes against humanity within the meaning of Article 24 bis of the 1881 Act.

The second excerpt from the disputed video, allegedly constituting incitement to racial hatred, which is covered and sanctioned by Article 24 (8) of the 1881 Act, reproduced the text of the show entitled *Le Mur*, including the following text: "(04046) I was born in 1966 so what happened, who provoked who, who stole from who, and so on 04046 I've got a vague idea, but really (04046)". The court recalled that all that was required to constitute an offence was for the utterances, by their meaning or scope, to tend to stir up a feeling of hostility towards or rejection of a group of persons, in addition to an intentional aspect that could be reflected either by the actual words used or by the context in which they were used. The utterances at issue were found to have the effect of inciting a feeling of rejection of and hostility towards Jews. On the other hand, the court found that the term "snivelling associations" used in reference to the applicant parties did not constitute the offence, with the evidence required under the urgent procedure, of an insult justifying the removal of the utterances. Similarly, the fourth disputed passage, concerning criticism of the action of the Minister for the Interior who, according to Dieudonné, was anxious to please the "bankers" so that they would "put a crown on his head", was found not to constitute incitement to hatred or violence, because of the insufficiently explicit nature of the incitement to a feeling of hatred and rejection it might create.

Whereas Dieudonné claimed in his defence that it was a matter of humour, the court was of the opinion that the humour was merely a means of giving public expression to his convictions by "*testing the limits of the freedom of expression*", which were exceeded in the present case, and not the basis for a provocative comic sketch, for which a degree of excess could be admitted. The judge therefore ordered Dieudonné to remove the first two disputed passages, on pain of payment of EUR 500 per day of delay in doing so.

• *TGI de Paris (ord. réf.), 12 février 2014 - UEJF et AIPJ c. Dieudonné Mbala Mbala* (Regional court of Paris (urgent procedure), 12 February 2014 - UEJF and AIPJ v. Dieudonné M'bala M'bala) FR

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Freedom of Documentary Producer to Use Utterances of Interviewees for the Purposes of her Film

On 16 January 2014, the court of appeal of Douai overturned the judgment handed down in January 2012 by the regional court of Lille in the high-profile case of the documentary entitled *Le Mur* (not to be confused with Dieudonné's banned show!), which criticises the treatment of autism by psychoanalysis (see IRIS 2012-3/20). Three psychoanalysts had agreed, under the terms of an authorisation to use their images and their voices, to be filmed and interviewed for the three-part documentary. When the film was released, they had called on the courts to completely ban its showing, on the grounds that their interviews had been edited and used in such a way that they ceased to retain their original meaning. The regional court in Lille had upheld their claim in part, and found that the film was prejudicial to their image and their reputation since their true positions on the subject matter were considerably less clear-cut. The court had therefore ordered the removal of all the extracts from their interviews and the payment to the parties concerned of damages amounting to EUR 7,000 and EUR 5,000. The producer and the production company lodged an appeal, claiming that the utterances of the complainants had not been distorted in any way. In court, they emphasised the vital importance of a general debate on the ways of treating autism, and claimed that the order against them was not "proportionate" within the meaning of Article 10 of the European Convention on Human Rights. The court of appeal of Douai agreed with the court in Lille in refuting the role of the three psychoanalysts interviewed as co-authors of the film and consequently in refuting the assertion that any infringement of their moral rights had occurred. The document they had signed before filming did not give them any rights in respect of the choice of which passages of their interviews were to be used or left out, or of the duration or final content of the documentary.

The court went on to note that viewing the film highlighted the producer's ultimate intention to contest the methods used by the psychoanalysts in the treatment of autism; it was because the interviewees had been unaware of this at the time that they were now calling for the film to be banned. The three psychoanalysts had nevertheless freely agreed to the reproduction of extracts of their images and voices with no control over the final work, and they could not therefore object to the producer's expressing her personal opinion, even if they were not aware of her intention at the outset; such intention may indeed only have developed in the course of producing the documentary. The court emphasised that this involved the fundamental principle of respect for freedom of expression on the part of producers of cinematographic works and investigative journalists. As a result, only proof of fault, within the meaning of Article 1382 of the Civil Code, could constitute an abuse of this right if proof were furnished of the deliberate intention of the producer to cause damage to the persons being filmed by manifestly distorting their utterances and/or ridiculing them. Examining the utterances of the three applicants in the case, the court observed that as the extracts were short, viewers could not fail to be aware that they were incomplete, extremely simplified, and could not reflect the complete thoughts of the interviewees. Moreover, neither their images nor their

voices were distorted or accompanied by derogatory commentaries. On the second point, it was noted that the producer had not distorted the utterances, in as much as she had retained the circumspect expressions used, although they came over more forcefully in the film than in the original interviews. The producer could not therefore be held to be at fault, as she was free to add her own comments to the replies given by the interviewees. On the third point, the court observed that the replies given in the film did not always correspond to the questions that had actually been asked during the interviews, or had been taken out of context. The interviewees' thoughts had not however been distorted sufficiently so as to constitute fault, and the judgment was therefore overturned on this point. Consequently, the court allowed the disputed extracts to remain in the film, and ordered the interviewees jointly and severally to pay the producer and her production company EUR 5, 000 as reparation for the moral prejudice suffered and the discredit brought upon their work as a result of the court proceedings and the censure of certain passages pronounced in the initial proceedings.

• *Cour d'appel de Douai (3e ch.), 16 janvier 2014, Sophie Robert et SARL Océan Invisible productions* (Court of appeal of Douai (3rd chamber), 16 January 2014, Sophie Robert and Océan Invisible Productions SARL) FR

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GB-United Kingdom

Factors to be Considered by the Copyright Tribunal When Determining Interim and Final Royalty Awards Relating to a Minority Music Genre

On 17 May 2013 the United Kingdom Copyright Tribunal upheld the BBC's (British Broadcasting Corporation) decision to pay a monthly interim royalty of GBP 10,000 excluding VAT (Value Added Tax) to the Welsh music licensing body Eos-Yr Asiantaeth Hawliau Darlledu Cyfyngedig (Eos) pending the determination of a final licence fee. Subsequently, at the full hearing and the approved decision granted on 16 December 2013, the Copyright Tribunal held that the BBC were entitled to use the Performing Rights Society (PRS) Alliance Agreement as a starting point to calculate royalties. Although Welsh Music was a minority or niche music genre there was no responsibility on the BBC to support Welsh music over any other type of music. Music has a value when it is broadcast. The Copyright Tribunal considered that the base value for annual royalties was GBP 46,000 and this included undertaking a cross check by comparison with potential royalties that could be earned on commercial radio.

Although the cost of providing minority radio stations, such as the Welsh Language station BBC Radio Cymru, carried a higher cost per listener, the fact that it was a minority channel did not in itself merit awarding higher than normal royalties, as compared with more popular radio stations. However, the Copyright Tribunal did recognise that Welsh Language Music, as an indigenous-language music, required a degree of special treatment because of its unique qualitative contribution to culture. Whilst it retained such status that special treatment would apply. The Tribunal considered it was reasonable to award some uplift in annual royalty payment from GBP 46,000 to GBP 100,000, but not as much as the GBP 1.5 million sought by Eos.

The Copyright Tribunal exercised this unfettered discretion pursuant to sections 125(3) and 129 of the Copyright, Designs and Patents Act 1988 so as to confer licensing terms that are reasonable in the circumstances.

The background was that until 31 December 2012, the BBC licensed all its Welsh language music repertoire for its broadcasting services from the Performing Rights Society Limited (PRS) and the Mechanical-Copyright Protection Society Limited (MCPS). Artists were unhappy with changes to how revenues were being distributed and decided to transfer licensing of broadcasting rights and televising rights to Eos with effect from 1 January 2013.

The BBC and Eos entered into negotiations as to what the new royalty rates should be, but agreement could not be reached so the BBC applied, pursuant to Rule 35 of the Copyright Tribunal Rules for an order determining what would be a reasonable rate on an interim basis pending a full hearing of the substantive issues.

The BBC contended that GBP 10,000 per month exclusive of VAT was a reasonable figure as they did not wish to overpay and were concerned that if the final determination by The Copyright Tribunal was for a lower monthly royalty rate there was doubt that Eos would be able to repay the overpayment. Eos was seeking an interim award of GBP 27,083.33 per month exclusive of VAT.

Eos contended that the Copyright Tribunal had a "blue sky" discretion, and that the Tribunal could take account of any factors it considered relevant. Whereas, the BBC contended that the Tribunal should be guided by authorities when determining interim payments.

The Tribunal considered that it had a very wide discretion, but in exercising that discretion it had to exercise prudence and take account of the guidance offered by existing authorities. According to the Tribunal, it was reasonable to consider what would happen if it transpired that the interim award was too much, and monies had to be reimbursed to the BBC.

Eos admitted that it had a difficult financial position and that it was unlikely to have the funds to repay immediately any overpayment of royalties; further the

Tribunal foresaw the difficulty that Eos may have in recouping any overpayments from its members.

The Tribunal was of the view that maintaining a royalty payment of GBP 10,000 plus VAT per month until final determination was not likely to be detrimental to the Welsh music industry, and taking into account concerns about Eos's ability to repay any overpayment found that the BBC should continue to a pay a provisional sum of GBP 10,000 per month exclusive of VAT pending final determination. The December 2013 decision meant the interim award was higher than the final award, and the Tribunal asked the BBC to be pragmatic as to how it recovered the overpayment.

• Decision of The Copyright Tribunal CT121/13 The British Broadcasting Corporation v. Eos-Yr Asiantaeth Hawliau Darlledu Cyfyngedig (Eos), 17 May 2013
http://merlin.obs.coe.int/redirect.php?id=16908 EN

• Decision of The Copyright Tribunal CT121/13 The British Broadcasting Corporation v. Eos-Yr Asiantaeth Hawliau Darlledu Cyfyngedig (Eos), 16 December 2013
http://merlin.obs.coe.int/redirect.php?id=16909 EN

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UK Film Culture Test to Change and Also Improvements in Tax Relief for Film Makers

On 5 December 2013, the UK Finance Minister (Chancellor of the Exchequer) George Osborne, announced changes to the value of the tax relief which are again aimed at encouraging investment in the UK. The tax relief that will be available will be at 25% (up from 20%) on the first 20% of qualifying production expenditure subject to acquiring state aid clearance.

The tax relief changes were announced in the Chancellor's 2013 autumn statement and will be subject to State Aid approval and legislation approval within the Finance Bill in April 2014 after which the new terms will be implemented.

Moreover, the United Kingdom's current cultural test introduced in 2007 and used as a criteria to determine whether film production companies are eligible for UK Film tax relief, is to be revised to encourage greater film production. The cultural test is administered by the British Film Institute (BFI) on behalf of the responsible government department, the Department of Culture, Media and Sport (DCMS).

The maximum points to be scored will increase from 31 to 35, and the minimum score to be eligible for tax relief will increase from 16 points to 18. Although the overall score has increased, the rules have been relaxed so that it is easier to score the requisite points. Particularly, extra points will be awarded if, for instance, principal photography is completed in the UK and using British visual and special effects companies.

Further, the extent of the expenditure in the UK has fallen so only 10% of budget need be expended in the UK as opposed to 25%; this change is to encourage greater co production and more independent production.

In order to fulfill the language criteria it would not be necessary to have an English speaking actor so long as the actor speaks their lines in English, otherwise the actor can be from any country.

According to the BFI, the proposed changes to the cultural test are being considered by the European Commission and as yet there is no firm date for the their approval and implementation.

• Chancellor George Osborne's Autumn Statement 2013 speech
http://merlin.obs.coe.int/redirect.php?id=16929 EN

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British Board of Film Classification Publishes New Classification Guidelines

The British Board of Film Classification is the self-regulatory and co-regulatory body that classifies films, videos on all physical formats (including DVD and Blu-ray Disc) and certain video games, advertisements and trailers. On 13 January 2014, it published new Classification Guidelines after undertaking a large-scale public consultation involving more than 10,000 members of the public. This found a particular concern about the sexualisation of girls and pornography. There was also worry about the content of music videos and the ease of accessibility of online porn. Parents were concerned about risks to vulnerable adolescents including self-harm, suicide, drug misuse and premature access to sexual content.

Changes made to the Classification Guidelines include giving increased weight to the theme and tone of a film or video, particularly around the 12/12A and 15 levels (viewable by children only of that age or above). Increased attention will be paid to the psychological impact of horror, as well as of strong visual details such as gore. For example, in the 12 category (only viewable by children of 12 or more), though individual scenes may be disturbing, the overall tone may not be, and horror sequences should not be frequent or sustained. The consultation found that the public wanted the Board to be stricter on language at the U level (viewable by all) and more flexible about allowing very strong language at 15; the context of bad language, not just its frequency, was the most important factor in the perception of bad language by the

public. The new guidelines state that for films rated at U level there must be only infrequent use of very mild bad language; at 15 level there may be strong language and the context may justify the inclusion of very strong language. At the 15 level dangerous behaviour such as hanging, suicide and self-harm should not be portrayed in a way that dwells on detail that could be copied.

On the specific matter of music videos, the guidelines state that classification of a music video will take account of any elements that are of concern to parents, including glamorisation of behaviour that they consider inappropriate. Where music videos are short and self-contained, material may be less likely to be justified by context.

• British Board of Film Classification, 'BBFC Launch New Classification Guidelines', 13 January 2014
http://merlin.obs.coe.int/redirect.php?id=16900 EN

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Ofcom Report Reveals Parents Unaware of how to Keep Children Safe Online

One in eight parents are failing to take any action to protect their children online according to a new report by the UK broadcasting regulator Ofcom released on 15 January 2014.

The report, the first of three to be commissioned by the Department of Culture Media and Sport, asked parents of 5-15 year-olds how they kept their children safe in an online world. It concluded that 15% of parents either don't know how to activate such controls as family-friendly internet filters, or are unaware that they exist.

Children are increasingly participating in an online world, with the report revealing that the use of tablets has tripled in the last year amongst 8-11 year-olds and six in ten 12-15 year-olds now own a smartphone.

The Government has put pressure on UK Internet Service Providers to introduce network-level filters that screen pornography and inappropriate content for children, although this has proved controversial.

Ofcom suggests that service providers can help keep children safe online in a couple of ways - through filtering tools (for example those that can be applied to a child's device or on a particular network); and specific safety measures (age-verification tools, or privacy settings on social media sites). But it adds that while such filtering is valuable, parents must talk to their children about internet safety in order to ensure they stay protected.

The report found that while most parents are fairly confident in their children's use of the Internet, they are most concerned about with whom their child is in contact, rather than what kind of content they see. Nearly half of the 12-15s know someone who has suffered from online bullying, or who has found gossip about them or embarrassing photos being circulated.

Parents also felt at a disadvantage because they felt that their knowledge of the internet was rudimentary compared to their children. More than four in ten parents (44 %) with children aged between 8 and 11 say their child knows more about the internet than they do, rising to 63% for parents of 12-15 year-olds.

The study also found that 18% of 12-15 year-olds know how to bypass internet filters, while almost 50% can delete their browsing history and 29% can amend settings to conceal their activity.

• Ofcom Report on Internet Safety Measures, 15 January 2014
http://merlin.obs.coe.int/redirect.php?id=16899 EN

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IE-Ireland

Copyright Review Committee Recommends Forming a Copyright Council of Ireland

On 29 October 2013, the Copyright Review Committee published its final report entitled Modernising Copyright. The Minister for Jobs, Enterprise and Innovation had established the three-member Committee on 9 May 2011 to examine current Irish copyright legislation, identify potential barriers to innovation, and present reforms to remove these barriers while protecting rightsholders (see IRIS 2012-4/30).

Highlighted recommendations of the 180-page report include: broadening the jurisdiction of the District Court, the lowest court in the Irish court system, to include intellectual property cases up to a EUR 15,000 threshold; graduated civil sanctions for copyright law violators; providing a legal definition for "innovation"; creating an Irish definition of "fair use" distinct from the current US doctrine; expanding protections for photographers, including copyright licenses for metadata and digital watermarks; providing exceptions for individuals with disabilities to create accessible copies of copyrighted materials; and making a clear distinction between online linking and infringement.

However, the report's most transformative recommendation centres on the proposed creation of a Copyright Council of Ireland. The Committee hopes

that the creation of such a Council will encourage transparency in the creation of copyright policy and open dialogue among members of the copyright community. Given the rapid expansion of data accessibility in the digital era, such a body would help address evolving issues regarding the use and ownership of intellectual property. Forming the Copyright Council will, according to the report, ensure the protection of copyright and freedom of expression while encouraging innovation.

The Council will be similar to the Irish Press Council in that it will be an independent, self-funded organisation supported by legislative structures. Funding for the Council will come from members' subscription fees, gifts and donations, service fees, EU funding, and National Lottery funding. One unique aspect of the Council will be its broad membership base. Rather than only allowing select stakeholders to participate in the Council, the Committee recommends that membership consist of all interested parties from the Irish copyright community. Subscription fees will be graduated to further encourage membership diversity. A Chairperson and 13-member Board of Directors will lead the Council, which will act on consensus when possible.

Once founded, the Council will serve as the primary copyright policy organisation in Ireland. Its chief charge will be promoting awareness of the importance of copyright through education and legislative advisement. Additionally, the Council will advocate domestically and internationally for copyright policy developments. The Council will also research the social and cultural consequences of copyright law, provide policymakers with insight into technical issues, and draft potential copyright codes.

The Council will also implement a number of the Committee's primary proposals. Firstly, the Council will create and oversee a Digital Copyright Exchange to expand and simplify copyright and digital license administration. Participation in the Exchange will be voluntary for prospective rightsholders, but it will simplify the copyright registration process. Secondly, the Council will also establish a voluntary alternative dispute resolution service as a means of resolving copyright and intellectual property disputes before they reach the formal legal system. Finally, the Council will operate the Irish Orphan Works Licensing Agency. The use and management of orphan works have been a source of contention for copyright analysts. The Agency will provide domestic management of orphan works whose rightsholders cannot be found or identified. Under the proposed system, a person wanting to use an orphan work must seek a license from the Agency.

The report concludes with draft legislation, which would amend the Copyright and Related Rights Act 2000 to include the Committee's proposals.

• Copyright Review Committee, Modernizing Copyright: A Report Prepared by the Copyright Review Committee for the Department of Jobs, Enterprise and Innovation (Committee Report, 2013)
http://merlin.obs.coe.int/redirect.php?id=16902 EN

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IT-Italy

AGCOM Adopts a Regulation on Copyright Protection

On 12 December 2013, the Italian communications authority - AGCOM (Autorità per le garanzie nelle comunicazioni) gave final approval, by deliberation no. 680/13/CONS, to a regulation concerning the protection of copyright on electronic communication networks, pursuant to the Italian Audiovisual and Radio Media Services Code (legislative decree no. 177/2005, as amended in 2010: see IRIS 2010-2/25 and IRIS 2010-4/31) and to the E-Commerce Directive, following a public consultation launched in July 2013 by deliberation no. 452/13/CONS.

The approval of this regulation ends a process started in 2010, with three public consultations (in 2010, 2011 and 2013) and a workshop in May 2013 aimed at comparing the different models used at international level to protect online content from copyright infringement. AGCOM's intervention on the matter of copyright protection has been two-fold and takes into equal consideration both, firstly, the support of the legal offer of digital works and the promotion of education and information for the public, and secondly, enforcement proceedings in case copyright violations should occur. Within the framework of the so-called Transparency Directive (98/34/EC), the draft regulation was sent to the European Commission. During the standstill period (90 days), the European Commission delivered its observations, which have been taken into consideration in the adoption of the final text, on which the Commission has made no further comments and thus, positively closed the procedure.

The regulation is composed of five chapters: the first gives the definitions and outlines the aim and the scope of the regulation (which does not apply to peer-to-peer programmes aimed at a direct file-sharing activity or to end-users). The second part is centred on the measures proposed by AGCOM to boost the development and protection of the legal offer of digital works: AGCOM promotes the education of the users, especially youngsters, and encourages the legal fruition of online contents and the development of innovative and competitive commercial offers. With this aim, the regulation establishes a Committee for

the development and the protection of the legal offer of digital works, whose members are chosen from among the associations representing the interests of all involved stakeholders: consumers, authors, artists, producers, AVMS providers and ISPs, as well as representatives of Italian institutions in charge of matters related to copyright protection.

The third and the fourth chapters describe the enforcement proceedings in the case of copyright violations online or on audiovisual media services (or radio services). Proceedings are launched only after a complaint has been made by a rightsholder. All interested parties (e.g. service providers, uploaders, page/site owners) are then invited to participate and present relevant documentation. Where an actual infringement of the copyright law is attested in the online environment, AGCOM can adopt different measures depending on the location of the server hosting the content: in cases where the server is located in Italy, AGCOM may order the hosting provider to remove the digital work from the website; if the server is located outside Italy, AGCOM may intervene only towards mere conduit providers who may be ordered to disable the access to the website. With regard to AVMS providers, on-demand providers may be ordered to remove illegal content from their catalogues and linear service providers may be ordered to refrain from retransmitting illegal works in their future schedules. In cases of non-compliance with the orders, AGCOM can impose a fine from EUR 10,000 up to EUR 250,000, pursuant to Article 1, para 31, of the law no. 249/1997, establishing the Authority.

The regulation will enter into force on 31 March 2014.

• *Delibera no. 680/13/CONS "Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislativo 9 aprile 2003, n. 70", 12/12/2013* (Deliberation no. 680/13/CONS "Regulation on copyright protection on the electronic communication networks and proceedings pursuant to legislative decree 9 April 2003, no. 70", 12 December 2013)
http://merlin.obs.coe.int/redirect.php?id=16903 IT

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Court of Cassation Rules on Right to Image in relation to a Gay Pride Parade Television Feature

On 18 September 2013, the Third Civil Chamber of the Italian Supreme Court of Cassation handed down a significant ruling concerning the scope of a person's right to the protection of his or her image in the context of television features concerning public interest events, namely the gay pride parade held in Rome on 8 July 2000.

According to Article 96 of the Italian Copyright Act (ICA), a person's image cannot be displayed without his or her consent. Article 97(1) ICA, however, stipulates that no consent is required, inter alia, when the display of a person's image occurs in association with facts, events, or formal occasions of public interest or taking place in public (hereafter: public events). Article 97(2) ICA qualifies the above exception, providing that a person's image, in any event, cannot be displayed in a manner that may be harmful to his or her honour, reputation, or good name.

The judgment of the Court of Cassation ends a lengthy lawsuit between RAI, Italy's public service media provider, and a man whose image was displayed, without his consent, in a television feature by RAI showing a group of people at the Milan railway station that were about to board a train to join the gay pride parade in Rome. That person sued RAI for the unauthorised use of his image in a context that, allegedly, misrepresented the claimant's sexual orientation. The claimant averred that he only happened by chance to be at the train station on that particular occasion.

On 28 January 2004, the Court of first instance in Rome ruled in favour of the claimant, ordering RAI to pay EUR 20,658 in compensation and to cover the legal costs of the case. The Court of Appeal, on 30 July 2007, reversed the judgment of the Court of first instance, thus prompting the claimant to lodge an appeal with the Court of Cassation.

The legal analysis of the Court of Cassation essentially focused on two elements: the notion of public event, within the meaning of Article 97(1) ICA, and the display of a person's image that may be harmful to his or her honour, within the meaning of Article 97(2) ICA.

With reference to the first issue, while the Rome gay pride parade's characterization as a public event was uncontroversial, the question arose whether the gathering of participants at the railroad station of another city to catch the train to the above parade could also be regarded as a public event. The Court took the view that the notion of public event should be construed as comprising also the facts that are unquestionably connected to the public event, such as the crowd at the Milan train station, in view of its clear and immediate connection to the gay pride parade in Rome.

Subsequently, the Court examined whether the display of the claimant's image in the context of the contested television feature could be regarded as harmful to his honour, reputation, and good name. In this respect, the Court noted that firstly, the claimant was in fact only displayed very briefly, in the midst of an anonymous crowd of passengers, which merely constituted the background to the contested television broadcast. Secondly, the Court ruled that the gay pride parade and the sexual orientation it sought to celebrate were both legal in Italy and devoid of any inherent negative connotation. Thirdly, the Court added that those who enter a railway station must accept the risk of being identified abstractly in a crowd of passengers - one of the 'risks of life' that no one can avoid.

Accordingly, the Court dismissed the appeal and ordered the claimant to cover the legal costs of the case. However, in the final paragraph of its opinion, the Court ordered that the claimant's personal data be blacked out from the text of the ruling, so as to protect his right to privacy.

• *Corte Suprema di Cassazione, Terza sezione civile, Sentenza del 18 settembre 2013, 24110* (Supreme Court of Cassation, Third Civil Chamber, Judgment of 18 September 2013, no. 24110)
http://merlin.obs.coe.int/redirect.php?id=16904 IT

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LV-Latvia

Amendments to Electronic Media Law Concerning Public Remit Programmes

On 21 November 2013, Saeima (Latvian Parliament) adopted changes to the Electronic Media Law. The main reason for the changes was the fact that the two major Latvian commercial television stations LNT and TV3 (both owned by MTG group) had decided to leave free-to-air broadcasting as of 1 January 2014 and to be henceforth available via paid television only. In turn, this meant that in the primary terrestrial television distribution network (first multiplex) vacant channel slots would open. It was planned that the National Electronic Media Council (media regulating body - hereinafter Council) should make a tender for commercial broadcasters to fill up the vacancies within the realm of public remit.

Hence, the amendments provide new rules on how the Council may entrust part of the creation of public remit programmes to commercial broadcasters. The previous version of the Electronic Media Law provided that no more than 15 % of the public remit may be entrusted to commercial broadcasters broadcasting free-to-air programmes. The amendments abolish the qualification of free-to-air programmes. Now the public remit may be entrusted to any commercial broadcaster in accordance with the tender results. Moreover, if there are vacant places in the primary network of terrestrial television (not yet taken by public broadcasters), the Council must organise a tender for these vacancies. A priority must be given for tenders which ensure at least a 20 % proportion of European works are originally prepared in Latvian language. Furthermore, a contract on public remit with commercial broadcasters shall not exceed one year; a three year period may be provided for these programmes to be included in the primary network. The Council may foresee in the tender rules that the contents of private public remit programmes may be reviewed annually.

The Council applied the new amendments in practice by announcing the tender on fulfilling a part of the public remit on 14 November 2013. The tender results were approved on 16 January 2014, and as a result three relatively small commercial television broadcasters are now entrusted to fulfill a part of the public remit.

The amendments also equip the Council with new powers. The Council has to approve a list of television programmes, which are available in terrestrial digital broadcasting free of charge for end users. The criteria for the approval must be set out in the National Strategy for the Development of the Electronic Mass Media.

In addition, the must-carry rules are reworded. However, the substance has remained the same: must-carry rules comprise all public television broadcasting programmes. The rules also apply to national commercial television programmes, which are available free-to-air. For the retransmission of such programmes, the broadcasters may not request a retransmission fee from the cable or other retransmission operators - and vice versa. A new non-discrimination rule is introduced with the amendments: national commercial broadcasters must ensure a fair and non-discriminatory conduct vis-à-vis all operators who retransmit their programmes.

The amendments came into force on 30 November 2013, except for the must-carry rules entering into force on 1 January 2014.

• *Grozījumi Elektronisko plašsaziņas līdzekļu likumā* (Amendments to the Electronic Media Law, 21 November 2013)
http://merlin.obs.coe.int/redirect.php?id=16885 LV

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ME-Montenegro

New Law on Cinematography Aiming to Improve Film Industry

Montenegro is in process of introducing a new Law on Cinematography intended to provide additional funding to domestic film productions, improving respective copyright protection, and preserving national cinematographic heritage.

According to the Draft Law, one of the most important changes to the existing law would be the establishment of the Film Fund, which shall be financed from several sources; namely, shares of the annual profit of:

1. public service and commercial broadcasters with national coverage (1%);

2. cable, satellite and Internet access providers (2%);

3. organisers of games of chance and entertainment (1%);

4. operators of public communications networks (0.2%);

5. providers of on-demand audiovisual media services (3%).

The Ministry of Culture, in charge of regulating the institutional framework of the Montenegrin film industry, proposed that additional to the abovementioned funding, 5 % of each sold cinema ticket should go to the newly established Film Fund.

The ongoing public discussion has showed disagreement between Montenegrin filmmakers who strongly support the Draft and the institutions required to contribute to the Film Fund. Montenegrin Internet access providers rejected the Draft Law as unjustified and claim that the provision of Internet access does not automatically imply access to cinematographic works. Numerous other complains addressed to the Ministry during the public discussion period concerned the level of the proposed fees.

Article 12 of the Draft Law also establishes the Film Centre of Montenegro. The major task of this public institution is supposed to be the promotion of domestic films to the foreign public and the participation in international programmes.

According to UNESCO statistics, Montenegrin film production lags behind other South Eastern European countries. The newly proposed legislation is expected to improve the situation in this domain. The Draft Law on Cinematography will be on the agenda of Montenegrin Parliament in the first quarter of the 2014.

• *ZAKON O KINEMATOGRAFIJI. Cetinje, oktobar 2013.godine* (Draft Law on Cinematography)
http://merlin.obs.coe.int/redirect.php?id=16886 SR

• *IZVJEŠTAJ o javnoj raspravi o Nacrtu zakona o kinematografiji* (Public Discussion Report)
http://merlin.obs.coe.int/redirect.php?id=16887 SR

• UNESCO Statistics
http://merlin.obs.coe.int/redirect.php?id=16888 EN

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MK-"the Former Yugoslav Republic Of Macedonia"

Changes to Act on Audio and Audiovisual Services

After controversial debates over the new Закон за аудио и аудио - визуелни медиуми (Law on Audio and Audiovisual Services) in January 2014 (see IRIS 2013-7/19, IRIS 2013-8/28), the Macedonian Parliament adopted amendments to the audiovisual regulation, which excludes monitoring and regulation of web sites. This is expected to improve the situation of freedom of the media in the country.

One of the main critical issues concerned the question, which professional journalists' association would nominate a member of the Board of the regulatory authority, after a second professional association had been established as a result of political conflicts among different media representatives. An agreement was made, according to which both journalists' associations nominate one representative in the Broadcasting Council within the Agency for Audio and Audiovisual Media Services. Art. 4 of the Law on Audio and Audiovisual Services stipulates, "Both associations of journalists from Republic of Macedonia with the biggest number of members nominate one member of the Council each."

More clarity is brought in the process of terminating the mandates of the members of the previous regulatory authority and establishing a new Council within the Agency. The amendments now foresee a complete liquidation of the previous regulatory authority - the Broadcasting Council - and an election of new members by the Parliament. Art. 7 stipulates, "The Parliament of Republic of Macedonia shall publish an open call for nomination of members of the Agency's Council, according to Art. 14 of this Law, within 30 days after this Law has entered in force." However, the imprecise definition of a "journalist" is still part of the law. Now, this might exclude journalists, who do not work in conventional media from press conferences organised by the state institutions.

According to the Association of Journalists of Macedonia (AJM), the new amendments further worsen the situation of the freedom of media in the country. Bearing in mind that the Government, according to the Analysis of the Broadcasting Market for 2012 published by the Agency, is the biggest advertiser on the market, AJM believes that the Government's advertising activities will affect the right on objective information in the media.

Also the European Commission in the Annual Progress Report for 2013 expressed its concern about the Gov-

ernment's massive advertising activities and their influence on media freedom.

• Закон за изменување и дополнување на Законот за аудио и аудиовизуелни медиумски услуги од *22* јануари *2014* (Act on Audio and Audiovisual Services, 22 january 2014)
http://merlin.obs.coe.int/redirect.php?id=16926 MK

• European Commission's Country's Progress Report
http://merlin.obs.coe.int/redirect.php?id=16768 EN

• Реакција за измените на медиумските закони , Објавено во Четврток, *23.* Јануари *2014* (Press Release of the Association of Journalists of Macedonia, 23 January 2014)
http://merlin.obs.coe.int/redirect.php?id=16890 MK

Borce Manevski
Independent Media Consultant

Amendments to the Law on Film Activity

On 27 January 2014, the Закон за филмска дејност (Act on Film Activity), which entered into force on 1 January 2014, was amended in view of the funding of the State Film Agency. The Agency for Film, in addition to the funds from state budget will henceforth also be funded from other sources including: television programming services (TV broadcasters) at national, regional and local level; cable operators retransmitting television programming; Internet service providers; legal entities operating cinemas; legal entities operating in distribution, rental and sale of movies; and legal entities operating in organising games of chance and lotteries.

The Law has been specifically amended in matters of the fee that cable TV operators, Internet service providers and legal entities operating in the distribution, rental and sale of movies have to pay for the Agency for Film. The operators of public electronic communications networks, which retransmit television programming (cable operators) and the Internet service providers now will have to pay the Agency 1% (previously 2.5%) of their annual revenues, whereas those companies, which distribute, rent and sale films are obliged to pay the Agency for Film 2% (previously 3%) of their annual income. Besides the requests of broadcasters to be excluded from the obligation to dedicate 1.1% of their annual income to the Agency for Film, these provisions stayed unchanged. Representatives of the media industry and the civil sector previously demanded exclusion of those broadcasters which do not broadcast any film programming from the obligation to pay additional fees to the Agency for Film. The Parliament, however, did not follow their demands.

The amendments to the Law further specify that organisers of games of chance in betting agencies must pay fees to the Film Agency in the amount of 3% of the difference between the paid in and the paid out amount, which practically aligned this law with the Law on Games of Chances and Entertainment Games.

The funds that the Agency for Film collects will be used for the funding of film projects of public interest.

Amendments to Art. 13 of the Law on Film Activity specify the payment procedure of fees to the Agency for Film with specific deadlines.

• Закон за изменување и дополнување на Законот за филмската дејност (Act amending the Law on Film Activity, 27 January 2014)
http://merlin.obs.coe.int/redirect.php?id=16892 MK

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NL-Netherlands

Internet Service Providers XS4ALL and Ziggo Do Not Have To Block Access to The Pirate Bay Website

On 28 January 2014, the Court of Appeal in The Hague ruled that two internet service providers XS4ALL and Ziggo do not have to block their subscribers from accessing The Pirate Bay website.

BREIN, the Dutch association for the protection of the rights of the entertainment industry, requested the District Court to issue an injunction to block subscribers to XS4ALL and Ziggo from accessing The Pirate Bay website. The purpose of the injunction was to stop copyright infringements, based on Article 26d of the Copyright Act and Article 15e of the Neighbouring Rights Act. Under these Articles, the Court can issue an injunction to prevent copyright and other rights' infringements through the services of intermediaries, by ordering the intermediaries to cease the services used for the infringements. On 11 January 2012, the District Court of The Hague ruled that a large portion of the XS4ALL and Ziggo subscribers had committed copyright infringement by uploading protected works to The Pirate Bay website without the consent of the copyright owner. The District Court issued a court order to block the subscribers of XS4ALL and Ziggo from accessing The Pirate Bay website.

The judgment of the Court of Appeal overturned the judgment of the District Court. The Court considered that the number of illegal downloaders had increased, despite the blockage of The Pirate Bay website and that the blocking of access to the website was therefore unsuccessful in that it did not prevent newcomers to the website from downloading content from an illegal source. Also, it was noted that the decrease in visitors to the website had not led to a significant reduction of copyright infringements committed by subscribers of XS4ALL and Ziggo. According to the Court, therefore, the blocking of The Pirate Bay website had been ineffective in preventing illegal downloading.

The Court also held that the blocking of the website affects the freedom to conduct business of Ziggo and XS4ALL. The Court argued that the fact that the blocking is technically very easy to do and adds little or no extra cost, does not detract from the impact the blocking has on the freedom to conduct business. The blocking of the website constitutes an infringement of the freedom of businesses to act at their discretion and does not fulfil the intended purpose, i.e. the prevention of illegal downloading. The Court found therefore, that the infringement of the freedom to conduct a business was not justified under the principle of proportionality.

BREIN claimed that XS4ALL and Ziggo knowingly and structurally facilitated, and thus promoted, large-scale infringements of intellectual property by their subscribers when they did not block the access to The Pirate Bay website as ordered by the District Court. The Court of Appeal did not consider this claim to have any basis due to the fact that it held the ordered blocking as ineffective and disproportionate.

• *Gerechtshof Den Haag, 28 januari 2014, ECLI:NL:GHDHA:2014:88, Ziggo & XS4ALL/BREIN* (Court of Appeal The Hague, 28 January 2014, ECLI:NL:GHDHA:2014:88, Ziggo & XS4ALL v BREIN)
http://merlin.obs.coe.int/redirect.php?id=16928 NL

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Audiovisual Licence Not Renewed for Commercial TV station

On 30 January 2014, the *Consiliul Național al Audiovizualului* (National Audiovisual Council - CNA) decided not to renew the audiovisual licence of the commercial TV station Taraf TV, a music channel specialising in broadcasting party music and manele, an originally Turkish-derived music genre. The licence of Taraf TV had to be renewed before 15 February 2014 and needed for its renewal the votes of six members of the CNA in favour. Only five members voted for the extension of the licence (see IRIS 2012-6/31).

There is a controversial debate in Romania about the manele style, nowadays a mixture of Turkish, Greek and Arabic elements. Intellectuals oppose this large musical movement mostly because of its false grammar, simplistic lyrics, and its allegedly antisocial overall message. Most members of CNA found that the on-going broadcasting of manele breached audiovisual legislation by presenting women mimicking sex movements and in degrading situations along with minors surrounded by almost naked women. The Council also found that the TV station no longer broadcasts within the programme schedule licenced in July 2012. According to the monitors, Taraf TV only aired 1.19 % own productions instead of 15% declared and licenced.

The main shareholders of Taraf TV are the sons of a former Romanian politician and entrepreneur in the Romanian tabloid media. The shareholders declared they will appeal the CNA's decision. The decision was also criticised by the director of ActiveWatch, a media and human rights watchdog organisation. She described the decision of CNA as arbitrary, since it was not based on legal matters but on public taste related aspects instead.

At the same time, Taraf TV was fined with RON 15,000 (approximately EUR 3,300) for breaches of audiovisual legislation regarding protection of minors by showing the women half-naked and faking sexual conduct. Art. 39 (2) of the Audiovisual Law foresees that broadcasting TV or radio programmes that are likely to impair the physical, mental and moral development of minors are permitted only if, by selecting the time of the broadcast, or by any technical measure by means of encoding or as an effect of other systems of conditioned access, it can be assured that under normal conditions minors do not have access to the respective content. According to CNA's findings, Taraf TV also breached Art. 18 (b) and (c) and Art. 19 of the Audiovisual Code. These regulations require programmes containing sex scenes, inappropriate or vulgar language and behaviour, or persons in degrading situations must not be broadcast between 6.00 and 23.00. Due to these breaches, CNA also decided on 30 January to forbid broadcasting of 15 specific videos of manele before 23.00, which had already been aired by Taraf TV.

• *Extras din procesul verbal al şedinţei de joi, 30 ianuarie 2014* (Extract from the minutes of the meeting of 30 January 2014)
http://merlin.obs.coe.int/redirect.php?id=16893 RO
• *Comunicat de presă, Şedinţa din 30.01.2014 - sancţiuni* (Press release, the 30 January 2014 meeting - sanctions)
http://merlin.obs.coe.int/redirect.php?id=16894 RO

Eugen Cojocariu
Radio Romania International

New „Must-Carry" List for 2014

On 4 February 2014, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA) issued the list of TV stations included in the „must-carry" principle for 2014. The list was preceded by a dispute of the CNA members about the shortening of the „must-carry" list and by a recommendation of the *Consiliul Concurenţei* (Competition Council) to the CNA suggesting modifications of the „must-carry" legislation (see IRIS 2010-4/37, IRIS 2010-8/42, IRIS 2011-6/27, IRIS 2011-6/30, and IRIS 2012-4/36).

The 2014 „must-carry" list includes the national and regional channels of the public service broadcaster TVR along with TV5 Monde, a francophone channel, whose retransmission is mandatory due to international agreements. Furthermore, the list includes 31 commercial TV stations in the decreasing order of their 2013 measured audience shares. According to Art. 82 of the Audiovisual Law, a distributor has to include in his programme services („must-carry") all public service channels and private broadcasters under Romania's jurisdiction up to a limit of 25 % of the total number of the programme services distributed in the network. The private broadcasters are selected in decreasing order of their annual audience rating. Being subject to the must-carry list, the respective channels have to be distributed free of charge and technical or financial impediments. The regional and local TV service providers have to include in their offer at least two regional, respectively two local stations, in decreasing order of the measured audience shares.

Several CNA members campaigned for a shortening of the „must-carry" list and thus not to oblige the distributors to use up to 25 % of their offer for stations which often have hardly any audience. The CNA members' intentions, however, could not be implemented due to clear legal provisions.

In spite of that, the *Consiliul Concurenţei* (Competition Council) recommended on 3 February 2014 that the CNA review the „must-carry" principle. The *Consiliul Concurenţei* recommended to the CNA that the „must-carry" principle be applied in line with technological neutrality regardless of the way of retransmission, be it cable or satellite direct-to-home (DTH) and not only to cable operators, as it is done today.

The *Consiliul Concurenţei* also suggested that the „must-carry" status be given only to channels whose overall content is of public interest (public service channels and television services whose retransmission is prescribed by international agreements). This status may be granted to private channels only if they are deemed to be of general interest (cultural and information channels, etc.) and have an appropriate audience share. As a result, the number of channels in the „must-carry" list would be reduced (taking into account the forthcoming introduction of digital television), and the status would be granted within a competitive procedure. The suggestions, however, could not be implemented in the selection procedure as set out in Art. 82 of the Audiovisual Law.

• *Lista staţiilor în vederea aplicării principiului must carry, 04.02.2014* (List of stations to observe the „must carry" principle, 4 February 2014)
http://merlin.obs.coe.int/redirect.php?id=16895 RO

• *Lista staţiilor particulare în vederea aplicării principiului must carry* (List of private stations to observe the „must carry" principle)
http://merlin.obs.coe.int/redirect.php?id=16896 RO

• *Consiliul Concurenţei recomandă revizuirea principiul "must-carry"* (The Competition Council recommends to review the „must-carry" principle)
http://merlin.obs.coe.int/redirect.php?id=16897 RO

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RU-Russian Federation

Blocking Internet Allowed without Court Decision

On 30 December 2013 President Vladimir Putin of Russian Federation signed into law a bill adopted by the State Duma (parliament) on 17 December 2013, in a first reading, and on 20 December 2013, in the second and the third readings. The bill amends Article 15 of the Law on Information, Information Technologies and Protection of Information (see IRIS 2013-8/33) so as to allow the Prosecutor General and his deputies to order blocking websites containing content such as calls to unsanctioned public protests and to "extremist" activities.

The act now introduces the following procedure: without judicial approval the Prosecutor General or one of his deputies (currently - 15 deputies) will send a written demand to the governmental watchdog Roskomnadzor (see IRIS 2012-8/36). The latter immediately orders the communications operator and the hosting provider to take steps that will result in removal of the content believed to be illegal. The act also applies to information coming from abroad; a notice will then be sent in English. The communications operator is also bound to block the access to the content upon receipt of the Roskomnadzor order. The act establishes a procedure to resume access to the website in when the content is removed.

OSCE Representative on Freedom of the Media Dunja Mijatović expressed her concern about the bill on 20 December 2013.

• Федеральный закон Российской Федерации от *28* декабря *2013* г . *N 398-* ФЗ "О внесении изменений в Федеральный закон «Об информации , информационных технологиях и о защите информации " (Federal Law "On Amendments to the Federal Law of the Law on Information, Information Technologies and Protection of Information", No 398-FZ of 28 December 2013)
http://merlin.obs.coe.int/redirect.php?id=16923 RU

• Press release of the OSCE Representative on Freedom of the Media, 20 December 2013
http://merlin.obs.coe.int/redirect.php?id=16879 EN

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SK-Slovakia

Ministry of Culture Specifies Programme Loudness Regulation

On 1 January 2014, the Decree of the Ministry of Culture of the Slovak Republic No. 468/2013 laid down the specific requirements for loudness of programme services.

On 22 October 2013, the Slovak Parliament passed an Amendment (No. 373/2013 Coll. to Act. No 308/2000 Coll. on Broadcasting and Retransmission (see IRIS 2014-1/41). Among other things, the Amendment abolished the preceding system of measuring loudness of advertisement compared to the editorial content of the broadcasting. It authorised the Ministry of Culture to issue bylaws that will set the details for a new system compatible with the recommendation R 128 "Loudness normalisation and permitted maximum level of audio signals" of the European Broadcasting Union. This has been implemented by the Decree of 1 January 2014.

According to this Decree's principle, Radio broadcasters and local TV broadcasters are merely obliged to ensure that "no unjustified differences in volume level among particular parts of programme services will occur".

National TV broadcasters - other than local ones - must follow a more detailed set of rules. In accordance with the recommendation R 128, the integrated loudness level of each programme, advertising breaks (i.e. at least two consecutive advertising spots), optical-acoustic means used to separate advertising from editorial content and other parts of programme services shall be normalised to a level of -23.0 LUFS. If an individual advertising spot is broadcast, the target loudness level must be reached in each individual spot.

The permitted deviation from the target level shall not exceed ±0.5 LU. For programmes which can technically not be normalised to an exact target level (i.e. live programmes) the permitted deviation is set to ±1 LU. The momentary loudness level difference (-400 ms) between an advertising spot and a part of the editorial programme services of at least 30 seconds shall not exceed -15 LUFS whereas the short term loudness level (-3 s) shall not exceed -20 LUFS.

These requirements, however, do not apply to different language versions of programme services, audio descriptions and the original audio track of the programme broadcast simultaneously with the main Slovak audio track.

• *Vyhláška Ministerstva kultúry Slovenskej republiky z 18. decembra 2013 o technických požiadavkách na zvukovú zložku programovej služby* (Decree No 468/2013 Coll. 468)
http://merlin.obs.coe.int/redirect.php?id=16898 SK

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

Agenda

Information Influx

2-4 July 2014 Organiser: Institute for Information Law (IViR), University of Amsterdam Venue: Amsterdam http://informationinflux.org/

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

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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/