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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: *Delfi AS v. Estonia*

In IRIS 2014-1/2 it was reported that the First Section of the European Court of Human Rights found no violation in the case of *Delfi AS v. Estonia* (ECtHR 10 October 2013), which concerns the liability of an Internet news portal for offensive comments that were posted by readers below one of its online news articles. The Chamber's judgment, however, did not become final, as on 17 February 2014 the panel of five judges, in application of Article 43 of the Convention, decided to refer the case to the Grand Chamber of the European Court of Human Rights.

In its judgment of 10 October 2013, the European Court found that one of Estonia's largest news portals on the Internet, Delfi, was not exempt from liability for grossly insulting remarks in its readers' online comments. The news portal was found liable for violating the personality rights of the plaintiff, although it had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. In particular, the domestic courts rejected the portal's argument that, under EU Directive 2000/31/EC on Electronic Commerce, its role as an Internet society service provider or storage host was merely technical, passive and neutral, finding that the portal exercised control over the publication of comments. The First Section of the European Court was unanimously of the opinion that the finding of liability by the Estonian courts was a justified and proportionate restriction on the portal's right to freedom of expression, in particular, because the comments were highly offensive, while the portal failed to prevent them from becoming public and allowed their authors to remain anonymous. Furthermore the award of damages (EUR 320) imposed by the Estonian courts was held to be not excessive.

The panel of five judges has decided however, upon requests from Delfi AS, that the case raises a serious question affecting the interpretation or application of the Convention, or concerns a serious issue of general importance, on which the Grand Chamber is now to deliver a final judgment. In its request for referral, Delfi argued that EU law, as well as other international reports and policy documents of the Council of Europe, reflect the principle that in order to safeguard the right to freedom of expression and information on the Internet, there should be no obligation for Internet service providers to proactively monitor user generated content. Delfi was supported in its request

for a referral to the Grand Chamber by a coalition of media-organisations, NGOs and civil society organisations advocating for freedom of expression on the Internet. The hearing in the case before the 17 judges of the Grand Chamber will take place on 9 July 2014.

• Decision by the Panel to refer the case of *Delfi AS v. Estonia*, Appl. No. 64569/09/07 of 10 October 2013, to the Grand Chamber (Hearing on 9 July 2014), 17 February 2014

EN

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European Court of Human Rights: *Pentikäinen v. Finland*

In a judgment of 4 February 2014, the European Court found that a Finnish press photographer's conviction for disobeying the police while covering a demonstration did not breach his freedom of expression. The applicant, Mr Pentikäinen, is a photographer and journalist for the weekly magazine *Suomen Kuvalehti*. He was sent by his employer to take photographs of a large demonstration in Helsinki. At a certain point, the police decided to interrupt the demonstration which had turned violent. It was announced over loudspeakers that the demonstration was over and that the crowd should leave the scene. After further escalation of violence, the police considered that the event had turned into a riot and decided to seal off the demonstration area. When leaving, the demonstrators were asked to show ID and their belongings were checked. However, a core group of around 20 people remained in the demonstration area, including Mr Pentikäinen, who assumed the order to leave the area only applied to the demonstrators and not to him, doing his work as a journalist. He also tried to make clear to the police that he was a representative of the media, referring to his press badge. A short time later the police arrested the demonstrators, including Mr Pentikäinen. He was detained for more than 17 hours and short time later the public prosecutor brought charges against him. The Finnish courts found the journalist guilty of disobeying the police, but they did not impose any penalty on him, holding that his offence was excusable.

In Strasbourg Mr Pentikäinen complained that his rights under Article 10 (freedom of expression) had been violated by his arrest and conviction, as he had been prevented from doing his job as a journalist. The European Court recognised that Mr Pentikäinen, as a newspaper photographer and journalist, had been confronted with an interference in his right to freedom of expression. However, as the interference was prescribed by law, pursued several legitimate aims (the protection of public safety and the prevention of disorder and crime) and was to be considered necessary

in a democratic society, there was no violation of his right under Article 10 of the Convention. The European Court especially referred to the fact that Mr Pentikäinen had not been prevented from taking photos of the demonstration and that no equipment or photos had been confiscated. There was no doubt that the demonstration had been a matter of legitimate public interest, justifying media reporting on it, and Mr Pentikäinen was not prevented from doing so. His arrest was a consequence of his decision to ignore the police orders to leave the area, while there was also a separate secure area which had been reserved for the press. It was also doubtful whether Mr Pentikäinen had made it sufficiently clear to the police when being arrested that he was a journalist. Furthermore, although Mr Pentikäinen was found guilty of disobeying the police, no penalty had been imposed on him and no entry of his conviction had been made on his criminal record. The Court also considered that the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the other people and that the conduct sanctioned by the criminal conviction was not his journalistic activity as such, but his refusal to comply with a police order at the very end of the demonstration, when the latter was judged by the police to have become a riot. The European Court concluded therefore, by five votes to two, that the Finnish courts had struck a fair balance between the competing interests at stake and accordingly came to the conclusion that there had been no violation of Article 10.

According to the separate dissenting opinion of two judges it has not been substantiated why it was necessary in a democratic society to equate a professional journalist, operating within recognised professional limits in covering the demonstration, with any of the people taking part in the demonstration and to impose drastic criminal restraints on him. The dissenting judges criticised sharply the imposition of restrictions on a journalist's freedom of expression through his arrest, detention, prosecution and conviction for a criminal offence simply because he had the courage to do his duty in furtherance of the public interest. According to the dissenting judges, the case reveals a one-sided attitude on the part of the Finnish authorities, one likely to create a "chilling effect" on press freedom.

• Judgment by the European Court of Human Rights (Fourth Section), case of Pentikäinen v. Finland, Appl. no. 11882/10 of 4 February 2014 <http://merlin.obs.coe.int/redirect.php?id=16947>

EN

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EUROPEAN UNION

Court of Justice of the European Union: Case Nils Svensson and Others v Retriever Sverige AB

On 13 February 2014, the Court of Justice of the European Union (CJEU) delivered a preliminary ruling after a request from the the *Svea hovrätt* (Svea Court of Appeal) in Sweden.

The national proceedings relate to a case between three journalists (the "applicants") and Retriever Sverige AB (Retriever Sverige), a Swedish company operating a website that provides its clients with lists of clickable Internet links to articles published by other websites.

The applicants had written articles that were published in a Swedish newspaper as well as on that newspaper's website (where the articles were freely accessible). Retriever Sverige's website included clickable Internet links (hyperlinks) redirecting users to the articles in which the applicants held copyright. The applicants initiated proceedings under the Swedish Act on Copyright in Literary and Artistic Works (1960:729) against Retriever Sverige claiming compensation on the ground that Retriever Sverige had made unauthorised use of their articles, by making the article available to its clients through hyperlinks.

By a judgment of 11 June 2010, the court of first instance rejected their application as the court found that the (reference) linking did not constitute a relevant exploitation of the copyright of the articles in question. The applicants then appealed to the Svea Court of Appeal which decided to refer four questions to the CJEU.

The first three questions were answered jointly and essentially concerned the issue of whether Article 3(1) of Directive 2001/29/EC (InfoSoc Directive) must be interpreted as meaning that providing clickable links to protected works on a website, which are freely available on another (initial) website, constitutes an act of communication to the public.

The CJEU considered that the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of Article 3(1) the InfoSoc Directive. Moreover, the 'act of communication' such as that made by the manager of a website by means of clickable links is aimed at all potential users of the site managed by that person, was found to be directed to an indeterminate and fairly large number of recipients. Such communication was held to be made to a 'public' accordingly.

According to the CJEU the decisive factor in determining whether the authorisation of the copyright holders was required for a communication to the public by making the article available to its clients through hyperlinks was whether the communication was to a 'new' public.

The CJEU went on to hold that, "where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication." Under such circumstances there is no 'new' public and authorization of the copyright holders is not required for a communication to the public.

The CJEU added that this conclusion could not be questioned even if the work would appear in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site. The CJEU makes no distinction with regard to the nature of the linking used.

On the last question the CJEU considered that the objective of the InfoSoc Directive would inevitably be undermined if the concept of communication to the public were construed as including a wider range of activities than those referred to in Article 3(1) of the InfoSoc Directive; a Member State must refrain from exercising the right granted to it by Article 20 of the Berne Convention. Therefore the CJEU found that the InfoSoc Directive precludes a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.

It is now for the Svea Court of Appeal to apply the criteria established by the CJEU on the national case.

• Judgment of the Court (Fourth Chamber), Nils Svensson and Others v Retriever Sverige AB, Case C-466/12, 13 February 2014
<http://merlin.obs.coe.int/redirect.php?id=16949>

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Council of the EU: Adoption of the Directive on Collective Management on Copyright and Multi-territorial Licensing of Online Music

On 20 February 2014 the Council of the EU today

adopted a directive on collective management of copyright and multi-territorial licensing of online music.

In accordance with the current system in the online music sector, online service providers who want to obtain licenses for cross border music services must be granted licenses from separate collective management organisations in each EU member state. This lack of a digital single market is problematic in that it prevents consumers from having "the widest possible access" to digital music repertoires.

In light of the development of the Digital Agenda for Europe, the Single Market Act recognises the need to evolve towards cross-border models for licensing in an Internet age. The new directive aims to coordinate national rules concerning access to the online music sector by enhancing the workings of collective management organisations and by increasing transparency. Also, the accumulation of online music licences will enable online service providers to acquire multi-territorial licenses from collective management organisations. This will lead to more choice and variety for consumers in music downloads as well as in their choice of 'streamed' music. It also encourages collective management organisations to provide individual licences for innovative online services. Developing cross-border solutions to access online music will also contribute to the fight against online infringements of copyright.

Union directives that protect copyright and related rights and give a high protection to rightsholders, provide a framework in which the exploitation of content protected by those rights can take place. The exploitation of that content such as music, books, films, and related services require the licensing of rights. In most cases, rights-holders must choose between the individual or collective management of their rights, unless member states provide otherwise in accordance with Union law. Management of copyright includes the granting of licenses to users, the auditing of licensees, the monitoring of the use of rights, the collection of revenues and their distribution. They facilitate remunerations to rightsholders for uses which they would not be in a position to control or enforce themselves. This includes licensing in cross-border markets which is becoming increasingly important.

The new provisions must be integrated into domestic law within 24 months after its entry into force.

• Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

<http://merlin.obs.coe.int/redirect.php?id=16951>

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NATIONAL

AL-Albania

Regulatory Authority on Audiovisual Media Demands Withdrawal of Broadcasting of TV Spot

On 27 February 2014, the Audiovisual Media Authority (AMA), the Albanian regulatory authority, issued a statement that demands that audiovisual operators should immediately stop broadcasting an advertising spot of the mobile phone company Vodafone for its offer regarding 3G Internet connection and network.

According to the regulator, this advertising spot directly influences children and minors, targeting them and leading them to buy the mobile phone and the 3G connection that Vodafone is offering in Albania. The regulator claims that advertising with such content violates the principles laid down in Art. 42 of the Law no. 97/2013 on Audiovisual Media and in point 8.4 of the Broadcasting Code. According to Art 42 of the Law no. 97/2013, "audiovisual commercial communications shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, and shall not expose minors to situations that are dangerous for them."

Point 8.4 of the Broadcasting Code states that "advertising should not urge minors to buy or receive products and services, either through directly asking parents or other relatives to get these products or services, or by exploiting children's position vis-a-vis parents, teachers, or other persons close to them."

In this context, the AMA asked the operators that have broadcast this spot to refrain from further broadcasting it, with a warning that the regulator will be forced to use the sanctions that the law specifies if they refuse to take action as recommended by the AMA.

• *Njoftim për media, 27/02/2014* (Press Release of the Audiovisual Media Authority, 27 February 2014)
<http://merlin.obs.coe.int/redirect.php?id=16932>

SR

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Federal Court Rules That Source Must Be Revealed After Drug Dealer Report

The *Bundesgericht* (Federal Court) has ordered a journalist at the *Basler Zeitung* to disclose to the public prosecutor's office the name of a cannabis dealer profiled in one of her articles. In October 2012, the journalist had published a lengthy article entitled "*Zu Besuch bei einem Dealer*" (Visiting a dealer) in the printed and online versions of the *Basler Zeitung*. Another article headed "*Schmuggelware aus Holland*" (Smuggled goods from Holland) had appeared on the same page of the newspaper, dealing more generally with cannabis consumption in Switzerland and the political debate on the state-controlled sale of cannabis, which the Basel government had recently rejected.

The main article described a visit to the flat of a slim, blond man, given the pseudonym "Roland" by the journalist. He was at the bottom of a long chain of dealers and funded his own drug habit by selling drugs. "Roland" favoured the legalisation of cannabis because it would enable him to buy a better quality product. He had been selling grass, hashish and pollen to customers known to him for ten years. He earned approximately CHF 2 per gram that he sold, totalling around CHF 12,000 per year.

Under Swiss law, dealers in soft drugs such as hashish are subject to harsher penalties if they make substantial profits - over CHF 10,000 according to case law (Art. 19(2) of the *Betäubungsmittelgesetz* - Narcotics Act). Although the Swiss *Strafgesetzbuch* (Criminal Code - StGB) allows professional journalists to protect the content and sources of their information, Article 28a(2)(b) StGB lists around two dozen types of offence for which source protection can be broken in order to aid criminal investigations. As well as murder and other serious crimes, these include violations of Article 19(2) of the Narcotics Act.

According to the Federal Court, the Swiss legislator decided that, in principle, the public interest in the prosecution of such offences outweighs the need to protect editorial confidentiality. The obligation to divulge "Roland's" identity was also proportionate in view of the circumstances. It was true that the alleged offence was less serious than the other offences listed in Article 28a(2)(b) StGB. However, it was not insignificant, since several people had bought drugs from "Roland" and he was part of a large-scale dealing organisation.

In these circumstances, there needed to be substantial public interest in the newspaper report if the protection of sources was, by way of exception, to take precedence. According to the Federal Court, this

would be the case, for example, if serious abuses in politics, business or public administration had been uncovered. This was not the case here. The description of the Basel cannabis scene contained in the newspaper report hardly brought to light such a serious abuse. Rather, a long-term offender had been given a free advertising platform on which to promote his drugs business and play it down as a virtually "normal" occupation. The report could even be interpreted as an invitation to its readers to generate additional income easily by copying "Roland".

The Federal Court therefore confirmed the order of the Basel public prosecutor's office, under which the journalist had no right to withhold evidence and was obliged to disclose the relevant information. Representatives of the *Basler Zeitung* have told the media that the Federal Court's decision will be challenged before the European Court of Human Rights (ECtHR).

• *Urteil des Bundesgerichts vom 31. Januar 2014 (1B_293/2013)* (Federal Court ruling of 31 January 2014 (1B_293/2013))

<http://merlin.obs.coe.int/redirect.php?id=16959>

DE

• *Zeitungsartikel „Zu Besuch bei einem Dealer“ vom 9. Oktober 2012* (Newspaper article "Visiting a dealer", 9 October 2012)

<http://merlin.obs.coe.int/redirect.php?id=16960>

DE

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CY-Cyprus

The Appointment of the Regulator's Members Comes into Force with a Letter of Notification

The Second Instance (Revisional) of the Supreme Court decided that the appointment of a member of the Cyprus Radio Television Authority entered into force with the notification letter addressed to the appointee. Thus, the absence of that member from the deliberation process that ended up with the sanctioning of ANT1 channel for breaches of the law made the composition of the Authority unlawful; as a result, the Court cancelled the Authority's decision against ANT1.

The facts of the case are as follows: a member of the Radio Television Authority resigned in July 2005 but was reappointed by the Council of Ministers on 22 December 2005. The decision was notified to the interested person on 13 January 2006 and published in the official gazette on 22 March 2006. On 1 February 2006, the day of the decision against ANT1, the member was present in the meeting but withdrew from it. ANT1's appeal against the decision for unlawful composition of the Authority was rejected by the first instance of the Supreme Court on the grounds that after the member's resignation, his absence could not

affect it. The second instance of the Supreme Court noted, that, at the time, the facts related to the reappointment and the events that had followed were not known to the first instance Court.

The Authority's argument was that the withdrawal of the member from the meeting at which it was decided to fine the broadcaster was justified because his appointment was published at an ulterior date. The appointment enters into force after its publication in the official gazette, argued the Authority. Conversely, the appellant claimed that the appointment started on the date of its notification to the member and its publication was not a necessary element to complete the act. Thus, the member should have taken part in the meeting and be properly updated on previous meetings of the deliberation process.

In examining the case, the Court noted that, even in the case of a law requiring the publication of the act, and given its individual nature, the publication is not a component element of the act. Also, the Constitutional provision regarding the publication of the decisions of the Council of Ministers giving them leave to use the discretion of the Council to consider whether this publication is useful or desirable, instead of the necessity for the completion and the substance of the act. The appointment of members of the governing councils of semi-governmental organisations is an individual act and its publication is simply informative, about an already expressed will of the body.

Considering the above, the Court decided that the respective person became a member of the Radio Television Authority before the date of the latter's decision of 1 February 2006 and with his absence the body's composition was not lawful. As a result, the Court decided that the Authority's decision is cancelled.

• ΑΝΩΤΑΤΟ ΔΙΚΑΣΤΗΡΙΟ 332345340341337345, ΔΕΥΤΕΡΟΒΑΘΜΙΑ ΔΙΚΑΙΟΔΟΣΙΑ (321375361370365311301367304371372 367 Εφεση 321301. 220/2009) 9 Δεκεμβρίου 2013 (Decision of the Supreme Court (case 220/2009) of 9 December 2013)

<http://merlin.obs.coe.int/redirect.php?id=16933>

EL

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Supreme Court Limits Forfeiture of Copyright Claims

In a ruling of 6 February 2014, the First Civil Chamber of the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that copyright claims are not, in principle, forfeited if rightsholders do not assert their rights over a period of many years (case no. I ZR 86/12).

The plaintiffs had filed for an injunction and compensation against a broadcaster. The dispute concerned the use of images filmed by cameraman Herbert Ernst showing Peter Fechter's attempted escape from the GDR, which the defendant had broadcast in programmes such as the *Berliner Abendschau* on 13 August 2010. The plaintiffs claimed that Herbert Ernst had granted them the rights to use the footage concerned. After the regional court had rejected their initial claim, the plaintiffs' appeal was also dismissed. The appeal court ruled that any claims by the plaintiffs had been forfeited because the footage concerned had already been broadcast repeatedly without the rightsholders asserting any claim under copyright law.

At the plaintiffs' request, the Federal Supreme Court partially quashed the appeal ruling and referred the case back to the appeal court for a new hearing and decision. Forfeiture of the claim for injunctive relief against the broadcast of 13 August 2010 was out of the question, since such relief only applied to future rights infringements. Only claims relating to past infringements could be forfeited. Regarding compensation for the unauthorised use of the footage, a forfeiture claim was possible. Since the footage had been used for decades without any complaint being made, the defendant could be confident that it would not be asked to pay compensation. However, the legal concept of forfeiture could not lead to the shortening of the three-year limitation period. Therefore, the only claims that were forfeited were those that fell outside the limitation period triggered by the institution of legal proceedings in 2011. The plaintiffs' claims for injunctive relief and compensation for use of the images since 1 January 2008 were therefore still valid.

The Supreme Court did not consider the plaintiffs' claims to be diminished by the fact that the broadcast footage was documentary in nature rather than a personal intellectual creation. Although the footage and still images were not protected as cinematographic and photographic works respectively, the individual images were protected under Article 72(1) of the Copyright Act (UrhG). According to the court's interpretation, this covered the right to exploit the individual images in film form.

The appeal court must now verify whether the plaintiffs hold the right to exploit the disputed film images.

• *Pressemitteilung des BGH zur Entscheidung vom 6. Februar 2014 (Az. I ZR 86/12)* (Federal Supreme Court press release concerning the decision of 6 February 2014 (case no. I ZR 86/12))
<http://merlin.obs.coe.int/redirect.php?id=16953>

DE

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Hamburg Regional Court Prohibits RedTube Warnings

In a decision of 19 December 2013, the *Landgericht Hamburg* (Hamburg Regional Court - LG) issued a temporary order, preventing the company "The Archive AG" from continuing to issue warnings, in their current form, to RedTube users (see also IRIS 2014-1/19).

On the one hand, the warnings influenced the relationship between RedTube and its customers, thereby violating the streaming portal's right to carry on its trade. On the other, the warnings in their current form were unlawful because their wording was too vague. For example, they simply demanded that users refrain from watching a film, the rights to which were held by "The Archive AG". The warnings also asked recipients to promise not to stream the film from a site that was not obviously illegal. However, since such an activity was lawful under Article 44a(2) of the Urheberrechtsgesetz (Copyright Act - UrhG), the defendant, which had sent the original warnings, could not make such a demand.

However, the LG Hamburg did not state whether the warnings should be classified as an abuse of the law and whether users' IP addresses had been obtained legally. It also specifically omitted to comment on the unanswered question as to the legality or otherwise of streaming content made available illegally in the light of Article 44a(2) UrhG.

The ruling only prohibits "The Archive AG" from continuing to issue the aforementioned warnings in their current form. It does not exclude new warnings per se, as long as they no longer demand that users refrain from using any streaming service, but are limited to those that are clearly illegal.

• *Beschluss des Landgerichts Hamburg, Az.: 310 O 460/13* (Ruling of the Hamburg Regional Court, case no. 310 O 460/13)
<http://merlin.obs.coe.int/redirect.php?id=16955>

DE

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Munich Regional Court Finds YouTube's Use of GEMA Blocked Content Messages Unlawful

According to media reports, the *Landgericht München* (Munich Regional Court - LG) issued a ruling on 25 February 2014, banning Google subsidiary YouTube from continuing to use its blocked content messages. In doing so, it granted a request for an injunction submitted in the first instance by the

Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (society for musical performance and mechanical reproduction rights - GEMA).

One of the messages displayed when users try to download certain videos says (in German): “Unfortunately, this video is not available in Germany, as it may contain music for which GEMA has not granted the necessary music rights. We apologise for this.” The LG München thought that this gave a distorted picture of the legal dispute between the defendant and GEMA. The wording was detrimental to GEMA and denigrated it by suggesting that it was responsible for blocking the videos. However, it actually only blocked a very small number of videos. By using the current wording of the blocked content messages, the defendant deliberately misled its users and caused ill-feeling towards GEMA. The text also hid the fact that GEMA and YouTube were in competition with one another. However, the defendant claimed that the messages were not meant to be cheap propaganda, but to provide clearer information to users. The court suggested that there would be no problem with a message worded as follows, for example: “Unfortunately, this video is not available in Germany, as it may be protected under copyright law.” Future infringements are subject to a fine of EUR 250,000.

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Saarbrücken Regional Court Lays Down Examination and Blocking Obligation for Domain Name Registrars in Relation to Copyright Infringements

In a ruling of 15 January 2014 (case no. 7 O 82/13), the *Landgericht Saarbrücken* (Saarbrücken Regional Court) ruled that a domain name registrar is obliged, if it has received a clear report of a copyright infringement, to examine and, if necessary, block the website concerned.

A German storage media manufacturer had filed an action against an internationally active domain name registrar. In return for payment, the registrar registers and manages top-level domains, including “.com”, both directly and via resellers from all over the world.

In August 2013, the plaintiff claimed that a music album to which it owned the rights had been illegally made available for download on one of these domains. It asked the registrar to put a stop to the copyright infringement.

When the registrar refused to provide a cease and desist declaration, the regional court issued a corresponding temporary injunction in August 2013. Under

the injunction, the storage media manufacturer is entitled to injunctive relief: the plaintiff can prohibit the registrar from enabling third parties to copy and/or make available a copyright-protected music album using special music software or a file-sharing program (BitTorrent search engine or tracker) via the URLs concerned. By registering the relevant domain, the registrar bore secondary liability because it had played a sufficient part in enabling the domain’s owner and users, as well users of the so-called tracker, to commit copyright infringements using this domain.

The registrar lodged a protest and argued that access to the copyright-protected content was not dependent on the registration of a particular domain name. Rather, users could view the website and its content by entering the IP address directly. The registrar could not influence the content of or the services offered via the website. Furthermore, an obligation to examine the website was unreasonable. Finally, its registration activities were in the public interest.

However, the court confirmed the temporary injunction. If the storage media manufacturer could prove to the registrar, setting a deadline, that it held the exclusive copyright under Articles 85, 16, 17 and 19a of the *Urheberrechtsgesetz* (Copyright Act) for the territory of the Federal Republic of Germany, and that a clear infringement had been committed, the registrar would be obliged to examine the website and take appropriate action by that deadline. In this case, the registrar would, as far as was technically and economically reasonable, be obliged to stop the work being made available illegally on the domain responsible for the infringement and on other domains registered with it.

• *Urteil des LG Saarbrücken vom 15.1.2014 (Az. 7 O 82/13)* (Ruling of the Saarbrücken Regional Court of 15 January 2014 (case no. 7 O 82/13))

<http://merlin.obs.coe.int/redirect.php?id=16954>

DE

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ES-Spain

Civil Provincial Court of Madrid Clears YouTube of Liability

The *Audiencia Provincial Civil* (Civil Provincial Court) of Madrid ruled on 31 January 2014 that YouTube was not liable for content uploaded by users that infringed copyright (case no. 11/2014). In the first instance, the Madrid *Juzgado de lo Mercantil* (Commercial Court) had, on 20 September 2010, rejected an action for damages against YouTube brought by TV broadcaster

Telecinco, which had claimed that its copyright had been breached when its film material had been illegally posted on YouTube (see IRIS 2010-10/27). The broadcaster's appeal against this decision has now been rejected by the Civil Provincial Court.

The first-instance court had ruled that YouTube was not liable because the Google subsidiary was acting as a hosting provider and had no control over the content that users placed online via its sites. According to the case law of the Court of Justice of the European Union, the applicability of the E-Commerce Directive (2000/31/EC) depended on whether the Internet Service Provider (ISP) only played a passive role by offering its service exclusively for use by its users. Telecinco considered that YouTube was operating as a content provider and was therefore playing more than a passive role. The plaintiff argued that this was demonstrated, for example, by the fact that YouTube had acquired various copyright licences and had actively intervened by publishing terms and conditions that all users had to accept. Its classification of the most popular videos in different categories also pointed to its active involvement in the content it provided. However, the court rejected these arguments and ruled that none of these factors represented active participation by YouTube. In particular, the acquisition of the licences mentioned did nothing to suggest that the portal operator was a sufficiently active participant in its service.

The plaintiff argued, in the alternative, that even if it was a passive service provider, the exceptions provided for in Articles 12 *et seq.* of the E-Commerce Directive regarding the liability of service providers did not apply to YouTube if it was actually aware that copyright infringements were being committed. Since YouTube had been informed of the infringements, it could no longer plead ignorance. The court also dismissed this argument. The existence of some kind of notification to a portal operator did not, on its own, prove that the latter was aware of infringements, since it could be inaccurate or incomplete. YouTube could not permanently monitor all uploaded videos. In this case, Telecinco's letters to YouTube did not contain sufficiently detailed information to enable YouTube to identify the content that had infringed the broadcaster's rights.

The plaintiff can make a final appeal against the ruling to the Supreme Court.

• *Sentencia n°11/2014, Audiencia Provincial Civil de Madrid, 14 de enero de 2014* (Judgment n°11/2014, Civil Provincial Court of Madrid, 14 January 2014)

<http://merlin.obs.coe.int/redirect.php?id=16957>

ES

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Reform Plans for Spanish Copyright Law

The Spanish government (*Consejo de Ministros*) announced plans to comprehensively reform intellectual property law in a press release issued on 14 February 2014. The plans include the introduction of ancillary rights for newspaper publishers.

The reforms package aims, firstly, to create a more effective framework for the activities of collecting societies. The system should also be made more transparent, according to the cabinet. Accounting and registration obligations will therefore be introduced. Remuneration models must, in future, be fair and non-discriminatory. Collecting societies will be urged to create licensing models that include central licensing offices for users, commonly known as one-stop shops (*ventanilla única*).

Sanctions for infringements will be introduced in the form of heavy fines, while in extreme cases an interim director may be installed within the collecting society concerned, or its operating licence may be withdrawn.

In order to improve copyright enforcement, the reform plans include an amendment of civil procedure law. To this end, rightsholders will be entitled to information to help them identify providers of content in breach of copyright. The *Sección Segunda de la Comisión de Propiedad Intelectual* (state body for the monitoring of copyright law, which is part of the Ministry of Education, Culture and Sport) will be given particular powers, including the authority to have a website blocked by petitioning a court. All measures will be limited to the service provider's demands and end users will not be prosecuted.

The rules on private copying and the use of excerpts for teaching and research purposes will also be adapted to modern technological standards.

The reforms will also limit the quotation and review rights of news aggregators and search engines in order to ensure fair remuneration for the activities of newspaper publishers and journalists.

The reforms will also help to implement Directive 2011/77/EU on the term of protection of performers' rights and Directive 2012/28/EU on orphan works. The government's plans were submitted to parliament in the form of a draft bill.

• *Referencia del Consejo de Ministros, 14 de febrero de 2014* (Spanish government press release of 14 February 2014)

<http://merlin.obs.coe.int/redirect.php?id=16956>

ES

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FR-France

Court of Cassation Confirms Production of *Dilemme* Reality TV Programme Does Not Constitute Unfair or Parasitic Competition in Respect of Endemol

On 26 November 2013, the Court of Cassation put an end to the proceedings between the production company Endemol, the “inventor” of the audiovisual format of locked-in reality TV, and the company run by its former employee, ALJ Production, which launched the *Dilemme* programme. Endemol claimed that the programme, broadcast from May to July 2010 on the channel W9, adopted the essential features, both technical and aesthetic, of its own audiovisual formats and programmes, thereby creating confusion in the public’s mind. The company instigated proceedings against its competitor on the grounds of unfair and parasitic competition. In its decision on 12 September 2012, the court of appeal had overturned the judgment against ALJ Productions for unfair competition (see IRIS 2012-9/20). Endemol thereupon appealed to the Court of Cassation.

The Court of Cassation recalled that the court of appeal had received an application for the awarding of compensation on the two-fold grounds of unfair competition resulting from the adoption of the essential elements of formats of programmes produced by the company Endemol, and parasitic acts. It found that the court of appeal had not neglected to observe the requirements of Article 1382 of the Civil Code as it had considered whether there was a risk of confusion between the broadcasts at issue. Secondly, the Court of Cassation found that the court of appeal had exercised its sovereign power of appreciation of the evidence submitted to it, and that it was not obliged to concur with the parties in the details of their arguments. Thus it had judged that neither Alexia Laroche-Joubert, a former employee of Endemol and head of the defendant production company, nor her former employees or service providers, nor the company itself, which had done no more than make use of the skills and personal experience of its founder, were guilty of unfair competition. The court of appeal also found that the similarities noted between the formats were intrinsically linked to the locked-in reality TV genre, and corresponded to the usual codes of the profession in this field, such that the alleged elements did not make it possible to identify the formats as Endemol claimed, which would create confusion, or to establish the unlawful diversion of skills. The Court of Cassation went on to note that various elements established an overall impression that was specific to the *Dilemme* programme, and that ALJ Productions had produced evidence of justification of the expense and intellectual effort it had put into produc-

ing the programme; indeed the company had registered six formats with SCAM (Société Civile des Auteurs Multimédias). The court of appeal had found that this showed that the company had not placed itself in Endemol’s wake and obtained undue advantage from either its notoriety or its investments. Its decision was thus justified at law, and the appeal was therefore rejected. The Court of Cassation thus confirmed definitively that the production of the reality TV format *Dilemme* did not constitute an act of unfair or parasitic competition with regard to Endemol.

• *Cour de cassation (ch. com.)*, 26 novembre 2013 - *Endemol Production* (Court of Cassation (commercial chamber), 26 November 2013 - Endemol Production)

<http://merlin.obs.coe.int/redirect.php?id=16961>

FR

Amélie Blocman
Légipresse

Broadcasting of Legal Reality TV Programme Banned under Urgent Procedure

On 27 February 2014, the court of appeal of Paris ordered Arte to stop broadcasting the bi-media programme *Intime Conviction*, thereby upholding the decision of the judge deliberating under the urgent procedure the day before. The programme began with a television film, broadcast on 14 February 2014, telling the story of a fictional character, a medical examiner named Paul Villers, who was suspected of having murdered his wife. The Franco-German channel achieved its second-highest audience rating of the year that evening. The second stage of the programme was the scheduled showing, between 10 February and 2 March 2014, on a dedicated website, of a number of videos giving a day-by-day account of the proceedings in the court of assizes. The videos showed not only actors but also legal professionals and nine jurors selected in advance by the producers. Internet viewers could consult the file compiled by the producers and, after each hearing, express their opinions as to the guilt or innocence of the accused, and react on social networks. The assize court “verdict” and that of Internet viewers was to be broadcast on 2 March 2014.

Dr Jean-Louis Muller was acquitted of the murder of his wife in October 2013, after twelve years of legal proceedings. Recognising himself in the character of Paul Villers, he instigated proceedings under the urgent procedure against both the company producing the programme and the channel Arte. He claimed that the programme intruded on his privacy and caused him serious prejudice by questioning the acquittal verdict, and called for broadcasting of the programme to be stopped and for payment of EUR 100, 000 in damages, on the basis of Articles 9 and 1382 of the Civil Code. The judge under the urgent procedure found that intrusion of privacy was sufficiently established, and therefore ordered broadcasting of the programme

to stop and EUR 30, 000 to be paid to the applicant in damages as compensation for the prejudice suffered. The companies appealed against the decision. In view of the urgency of the matter (the programme was being broadcast at the time), the court delivered its decision the following day. It recalled the principle according to which audiovisual creation could certainly draw inspiration from actual events or base characters on living persons, but could not, without their agreement, encroach on their privacy unless the work to be produced clearly presented such elements as being totally fictional. In the case at issue, the court noted the “great similarities” between the television film and the case in which the applicant had been judged (the character in the film, like Dr Muller, was a medical examiner, had two sons who were in the same place as Dr Muller’s sons when the shot was fired, and his wife had been disfigured by a kick from a horse and had suffered from depression as a result, he was said to have threatened his partner with a hunting rifle, similar messages were left by the deceased wives, etc.). It was true that a number of totally fictional scenes had been added, but they were minimal or at any event not sufficient to prevent confusion. The court added that it had been widely reported in the press that the story of Paul Villers was based on that of the applicant. Although a number of facts concerning the applicant’s private life had been divulged when he appeared in the court of assizes, they could not lawfully be used since the disputed programme was a work of fiction and not a documentary or an informative item. Nor could the production companies invoke the concept of a need to inform the public, since it was not an informative work and the educational value of the programme did not require it to be based on real, recent events. The court concluded that invasion of the applicant’s privacy was sufficiently proven. It was not necessary to seek the liability of the defendant companies on the basis of Article 132 of the Civil Code, as this would be covered by the case of defamation to be brought before the ordinary courts. The court found that in view of the quantity of established facts and the publicity they had been given during the campaign to promote the programme, the measures imposed by the judge under the urgent procedure “were strictly proportionate to the infringement committed”, and that such measures alone were sufficient to put a stop to the manifestly unlawful disturbance currently suffered by the applicant. In addition to banning the showing of the programme, the court awarded EUR 30, 000 to the applicant in compensation for the prejudice suffered. A good many commentators have deplored “the disproportionate nature of the court’s decision, totally counter to previous jurisprudence”, fearing that this decision could lead to a curbing of creative freedom. Proceedings on the merits of the case have also been instigated, with a court hearing scheduled for 18 June 2014. To be continued⁰⁴⁰⁴⁶

• *Cour d’appel de Paris (pôle 1; ch. 2), 27 février 2014, Maha Productions et Arte France c/ J.-L. Muller* (Court of appeal of Paris (centre 1, chamber 2), 27 February 2014, Maha Productions and Arte France v. J.-L. Muller)

<http://merlin.obs.coe.int/redirect.php?id=16969>

FR

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Sexist Comments at Olympic Games in Sochi - Warning Issued to France Télévisions

On 12 March 2014, the audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA) issued a “firm” warning to the France Télévisions group further to comments made by sports commentators during the Olympic Games in Sochi. The group attracted the wrath of viewers because of a number of comments proffered by a former champion and a journalist who were both reporting on the figure skating events. A number of the utterances at issue referred to the physical appearance of the female skaters, such as “The costume’s quite an eye-ful - and so is she”, “Valentina has loads of charm, rather like Monica Bellucci, perhaps with a bit less bust, but even so”. According to Article 43-11 of Act No. 86-1067 of 30 September 1986, as amended in 2009, the national programme companies are to “implement action in favour of social cohesion and cultural diversity, countering discrimination of all kinds, sexist prejudice, violence directed at women, violence committed within couples, and promoting equality between men and women”. Since its new chairman, Olivier Schrameck, took over in early 2013, the CSA has constantly reiterated its intention to step up its involvement in combating gender inequalities and defending the image of women. A working party within the CSA is especially dedicated to “Women’s Rights”, and the CSA recently intervened when sexist comments were made about women’s football during an entertainment programme on a public-sector channel. In response to a number of complaints from viewers during the Olympics, the CSA found that “the content and dubious nature of the utterances made during the Olympic Games were totally out of order; some even went so far as to reflect sexist prejudices”. It recalled that the public-service channels had an obligation to set an example in promoting the image and place of women. As it has done on previous occasions, the CSA also drew the television group’s attention to the contradiction between on the one hand its action on the subject and on the other the content of utterances made on some of its programmes. During the days of programming between 3 and 9 March 2014 entitled *En Avant Toutes*, for example, France Télévisions proclaimed the need to commit, as both a company and one of the media, to women’s struggle to have their rights respected⁰⁴⁰⁴⁶ In the light of this, and of these contradictions, the CSA therefore sent “a firm warning” to the public-sector group - this is the first-level

warning, before official notice to comply is sent. In the case of a further occurrence after formal notice has been sent, the CSA may pronounce sanctions, such as the reading out of a communiqué on the air, or a fine of up to 3% of the group's turnover. Draft legislation on gender equality tabled by the Minister Ms Najat Vallaud-Belkacem, and adopted by the National Assembly on its first reading on 28 January 2014, provides for an amendment to Article 3-1 of the Audiovisual Communication Act of 30 September 1986, requiring the CSA to "ensure respect for women's rights in the field of audiovisual communication. To that end, it shall ensure that men and women are represented fairly in programmes of audiovisual communication services, and also look to the image of women portrayed in these programmes, combating stereotypes, sexist prejudices, degrading images, violence against women and violence committed within couples. In doing so it shall pay particular attention to the programmes of audiovisual communication services directed at children and young people." The text of the Act also lays down specific provisions for the national programme companies to be called upon to contribute to "combating sexist prejudices and violence against women, by broadcasting programmes on these subjects". Public-sector television will have to provide the CSA with indicators of quality and quantity regarding the representation of women and men in their programmes, and these will be published annually. The text will return to the Senate in spring for a second reading.

• *Décision du Conseil supérieur de l'audiovisuel (CSA), 17 Mars 2014* (Decision of the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA), 17 March 2014)
<http://merlin.obs.coe.int/redirect.php?id=16962>

FR

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GB-United Kingdom

Court of Appeal Allows Pay-tv Wholesale Charges Appeal

The Court of Appeal has allowed an appeal by British Telecommunications (BT) against the decision of the Competition Appeal Tribunal overturning the decision of Ofcom to require BSkyB to offer BT Sky Sports channels at a regulated rate (see IRIS 2013-1/23). The Ofcom decision would have made Sky Sports 1 and 2 available to BT, a major competitor of Sky, at substantially lower rates than the previous wholesale price, and would have assisted BT in its attempts to challenge Sky's dominance of the pay-tv sports market. The Court held that the Tribunal had failed to investigate the level of discounts BSkyB claimed to give rivals for its sports channels.

The first issue concerned Sky's appeal against the Tribunal's decision. Sky maintained that, under the Communications Act 2003, Ofcom had no jurisdiction to consider these matters in the wholesale pay-tv market but could only consider matters relating to competition between providers of services to the public. The Court rejected this appeal, holding that the legislation must be interpreted widely and includes the provision of services to the public at both levels, and so it was within the powers of Ofcom to impose a wholesale must-offer condition in Sky's licence.

The second issue was the appeal by BT against the Tribunal's finding that Ofcom had been wrong in its decision that Sky had failed to negotiate with competitors in relation to wholesale prices. The Tribunal had not addressed Ofcom's finding that the Sky rate-card was in itself an impediment to fair and effective competition, nor had the Tribunal addressed Ofcom's findings in relation to the competition concerns raised by Sky's methods of discounting. The Tribunal had not given satisfactory reasons for failing to deal further with the rate-card price and penetration discount method issues. These defects amounted to an error of law requiring the decision of the Tribunal to be set aside.

The case has thus been returned to the Competition Appeal Tribunal for a new decision based on more extensive findings and conclusions.

• *British Telecommunications plc v Office of Communications, Sky Broadcasting, The Football Association Premier League, and Virgin Media inc.*, [2014] EWCA Civ 133, 17 February 2014
<http://merlin.obs.coe.int/redirect.php?id=16945>

EN

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App Advertisement inappropriately Scheduled and Offensive

The adjudication by the Advertising Standards Authority (ASA), dated 19 February 2014, concerns a television advertisement for a mobile app, called "Nude Scanner 3D". It had been placed by Jesta Digital GmbH t/a Jamster.

It was shown during six episodes of a programme called "Hollyoaks." The advertisement portrayed a "clothed woman holding an umbrella. A hand appeared which held a mobile phone. The phone then 'scanned' the woman which revealed her naked with her breasts and crotch blurred [pixelated] out. The naked image then rotated, showing the woman from the waist up." There was a voice-over saying that this was a way of playing a practical joke (a "prank") on one's friends.

The advertisement had been cleared by Clearcast with an “ex-kids restriction”, i.e., clearing the advertisement but with the caveat that it could not be broadcast during children’s programmes.

The ASA did not find that that the advertisement would encourage “anti-social” behaviour - BCAP Code rules 1.2 (Responsible advertising) 4.9 (Harm and offence) and 5.4 (Children).

However, it did find in favour of the complainants in respect of: (a) the claims that the advertisement was inappropriately scheduled (using evidence derived from the Broadcasters’ Audience Research Board (BARB); and (b) the advertisement was “likely to cause serious or widespread offence” and so the ASA concluded that it “should not have been broadcast at any time, including during programmes of particular appeal to children.” - BCAP Code rules 4.1 and 4.2 (Harm and offence) 32.1 (Scheduling of television and radio advertisements) and 32.3 (Under-16s).

The adjudication concluded that the advertisement “must not appear again in its current form.” and that the company should ensure that “future advertising was not demeaning to women and contained nothing that was likely to cause serious or widespread offence.”

• Adjudication by the Advertising Standards Authority (ASA), 19 February 2014
<http://merlin.obs.coe.int/redirect.php?id=16943>

EN

David Goldberg

deejee Research/ Consultancy

Ofcom Decision on Privacy in ‘Fictional’ Drama

In a decision published on 17 February 2014, the Office of Communications (Ofcom) upheld in part a complaint by an individual in which she claimed that her privacy had been breached through the broadcasting of a fictional drama by the broadcaster ITV that closely mirrored the circumstances of her father’s murder.

‘Mrs A’, as she is referred to in the decision to guard against further intrusions of her privacy, submitted the complaint to Ofcom in response to the airing on ITV of the television detective show “Scott & Bailey” on 22 May 2013. The plot of the episode in question was striking in its resemblance to the events of the death of Mrs A’s father, and she had had numerous conversations and encounters with people who had recognised this fact. ITV admitted that the plot details were based on real life crimes including those of the murder of Mrs A’s father but denied that this constituted a breach of the Broadcasting Code.

Ofcom deemed that the two sections of the Broadcasting Code engaged in this case were Practice 8.6

and Practice 8.19. Practice 8.6 requires broadcasters to obtain consent “(i)f the broadcast of a programme would infringe the privacy of a person or organisation...unless the infringement of privacy is warranted”.

And 8.19 states that potential distress should be reduced for surviving victims or relatives when examining past events, “(t)his applies to dramatic reconstructions and factual dramas, as well as factual programmes.” Emphasis is placed on informing such people in advance of broadcast.

Ofcom acknowledged the unique circumstances of the case in that the “Scott & Bailey” is intended to be a drama with some real life inspirations, but not a “dramatic reconstruction” in the strictest sense of Practice 8.19.

Ofcom held that Practice 8.6 was not violated because while ITV had not gained Mrs A’s permission the circumstances dictated that the infringement of her privacy was warranted as far as the Practice was concerned.

ITV in turn accepted that under Practice 8.1 a basic infringement of privacy had taken place but in response to Ofcom’s Initial Preliminary view argued that Practice 8.19 should not be applied to fictional dramas as the wording was clear and designed for dramatic reconstructions.

In its Revised Preliminary View and, ultimately, its final Decision Ofcom upheld the complaint of Mrs A in part; while ITV was not required to seek permission under 8.6, it had not taken requisite action to mitigate the suffering of victims and families under 8.19. Ofcom noted again the unique circumstances of the case which involved some deliberate and some coincidental convergences between the events portrayed in the drama and the real life circumstances of Mrs A’s father; they also emphasised the need to balance the editorial freedom of creative broadcasting with the privacy of others.

• Decision of Ofcom, 17 February 2014
<http://merlin.obs.coe.int/redirect.php?id=16946>

EN

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New UK Defamation Act

Since the Defamation Act 2013 (the Act) received Royal Assent in Parliament on the 25th April 2013, on the 1st January 2014 saw the implementation. As flagged in a previous IRIS article (see IRIS 2013-7/16), the Act has addressed various criticisms of the existing defamation laws by shifting the emphasis more in

favour of the publisher than the subject of a publication.

As previously reported, the Act introduces the defence of statutory truth replacing justification (see Section 2 of the Act). The new defence succeeds even if one of the imputations is not substantially true; provided that the imputation(s) found not to be substantially true do not cause any serious harm to the claimant's reputation.

Section 3 of the Act abolishes the common law defence of fair comment, replacing it with the defence of honest opinion. The Act sets out the necessary criteria for this defence to succeed.

A public interest defence is depicted at Section 4 of the Act. Effectively, the so-called Reynolds defence has been partially abolished by the Act setting new criteria:

- the statement complained of was, or formed part of, a statement on a matter of public interest; and
- the defendant reasonably believed that publishing the statement complained of was in the public interest.

The Reynolds defence had more exacting standards such as a standard of reasonable journalism and the publisher acted both fairly and reasonably in gathering and publishing the information.

However, the Act does codify the neutral reportage part of the Reynolds defence (see section 4(3) of the Act).

Previous references to peer-reviewed scientific or academic journals is addressed at Section 6 of the Act whereby a qualified privilege defence will exist provided an independent review is conducted by the editor or person(s) with suitable expertise.

Comment or a review of a scientific or academic statement carries a privilege, provided that the review includes a fair and accurate copy or extract of the reviewed statement.

Rules protecting website operators are addressed at Section 5 of the Act; a defence is available action to the site's host when something is posted by a third party. However, for this defence will be defeated:

- if the claimant cannot identify (sufficient for the purposes of bringing proceedings) the third party who posted the statement.
- the claimant has given the host site operator notice of complaint in relation to the statement.
- the operator failed to respond to the notice of complaint in accordance with any provisions contained in the Regulations.

If malice is shown by the operator the defence is also defeated. The defence is available where the website's operator moderates material posted on it by others.

The United Kingdom limitation period for bringing a defamation claim is one year from publication. The Act curtails the potential for creating fresh claims from repeat publications, so that "any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication" (see Section 8(3) of the Act).

The Act prevents "libel tourists", unless the publisher is domiciled inside the European Union, Iceland, Norway and Switzerland the claimant must satisfy the court "04046 that of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement" (see Section 9(2) of the Act). Whether the claimant has a reputation within England and Wales requiring protection will be a factor.

The Act removes the presumption of defamation trials being heard before a jury and cases will be before judge alone, unless the court's discretion deems otherwise.

Section 12 of the Act gives the court can give directions as to the timing and manner of the defendant publishing the court's judgment.

• Defamation Act 2013
<http://merlin.obs.coe.int/redirect.php?id=16555>

EN

Julian Wilkins
Blue Pencil Set

IE-Ireland

New Television Content Provision Contract Signed

On 27 February 2014 the Broadcasting Authority of Ireland (BAI) signed a ten-year television content provision contract with UTV Ireland Limited. The contract creates a new general entertainment channel, to be known as UTV Ireland, which will be based in Dublin. The programme schedule will initially include news and current affairs, and a range of acquired documentary, drama and film content.

The application for a licence under Section 71 of the Broadcasting Act 2009 was lodged by UTV Ireland in November 2013. Negotiations with the BAI began on

6 February and the contract is the result of that process. Contracts granted under Section 71 are for content only and do not carry an automatic right to carriage on a platform. However, the contract does enable the contractor to negotiate carriage of the service, and its prominence on the Electronic Programme Guide (EPG), with the platform provider.

The programme service obligations associated with section 71 extend only to compliance with statutory Codes and Rules and with the European Audiovisual Media Services (AVMS) Directive requirements relating to European and Independent Production works (see IRIS 2013-7/17, IRIS 2013-5/32, IRIS 2012-7/28, IRIS 2010-1/29 and IRIS 2012-9/9). Unlike public service broadcasters and licensed commercial broadcasters, content-provision service providers are not required to pay a levy to the BAI. However, an annual fee of EUR 2,000 plus Value Added Tax, applies for the duration of the contract. It is expected that the new service will commence broadcasting in January 2015.

• Broadcasting Authority of Ireland, BAI Signs Content Contract with 'UTV Ireland', 27 February 2014
<http://merlin.obs.coe.int/redirect.php?id=16941>

EN

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Internet Content Advisory Group Established

On 29 November 2013, the Minister for Communications, Energy and Natural Resources announced the establishment of an Internet Content Advisory Group. The Group consists of experts in the fields of child safety and online behaviour, as well as legal, technical and industry experts, and a student representative. It will consider emerging issues in the area of online content and its general impact on the lives of children and young people.

The Group has been asked to comment on the July 2013 report of the Joint Oireachtas Committee (Irish Parliament Committee) titled 'Addressing the Growth of Social Media and tackling Cyberbullying'. They have also been asked to make specific recommendations to the Minister in relation to:

- whether the existing national regulatory and legislative frameworks around electronic communications, Internet governance and the sharing and accessing of content online remain relevant;

- whether other existing policy responses by the State remain sufficient in relation to dealing with any of these issues; and

- what the most appropriate relationship should be between Internet service providers, online service

providers, the State and citizens in relation to accessing age-appropriate Internet content and in relation to bullying and harassment online.

The Group issued a consultation paper on Internet Content Governance and invited submissions from the general public. The paper focused upon a number of general areas including the public concerns in relation to bullying, harassment and access to age-inappropriate content. Existing regulatory and policy approaches were outlined and views were sought on their adequacy and the need for a State role in regulating Internet content. Public comment on the sufficiency of current awareness and education resources and supports for digital literacy and online safety were also sought.

The consultation process closed on 18 March 2014 and the submissions received are being considered by the Group in preparation of their report to the Minister. It is expected that the Group's report will be delivered by 30 May 2014.

• Internet Content Advisory Group, Consultation Paper on Internet Content Governance, 24 January 2014

<http://merlin.obs.coe.int/redirect.php?id=16939>

EN

• Joint Oireachtas Committee Report, Addressing the Growth of Social Media and tackling Cyberbullying, 19 July 2013

<http://merlin.obs.coe.int/redirect.php?id=16940>

EN

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Supreme Appeal Court Finds Google Executives Not Liable for Violent Video

In a ruling of 17 December 2013, the Italian Supreme Court of Appeal, following a lengthy legal dispute, found Google not liable for the distribution of an insulting video on the Google Video platform. The full text of the judgment is now available.

The video, filmed on a mobile phone, showed several youngsters bullying and making fun of a mentally handicapped classmate. The young people responsible had been identified with Google's help and sentenced to community service in an earlier procedure.

Three of the four Google executives accused had received a six-month suspended prison sentence for privacy breaches in 2010 (see IRIS 2010-6/35). However, in December 2012, the Milan Appeal Court had overturned the first-instance ruling and acquitted them.

The Supreme Court of Appeal has now come to the same conclusion, taking into account the case law of the Court of Justice of the European Union. It

ruled that Google Video should be classified as a hosting provider, since the platform merely provided storage space for videos uploaded by third parties and did not contribute to the content of the disputed videos. According to Article 17 of Legislative Decree no. 70, adopted in 2003 in order to transpose E-Commerce Directive 2000/31/EC, a hosting provider was not obliged to monitor the information disseminated via its service, nor actively search for rights infringements. The information obligations contained in the same provision, which applied when a provider became aware of rights infringements, were an expression of the balance between the freedom of the service provider and the protection of those whose rights may have been breached. These information obligations were designed, *inter alia*, to help identify people who had uploaded illegal videos.

In the court's opinion, this meant that only the person who had uploaded a video could be held liable for any rights infringements. A hosting provider was not liable as long as it deleted or blocked access to the content as soon as it became aware of its existence.

• *Corte di Cassazione, sez. III Penale, sentenza 17 dicembre 2013 – 3 febbraio 2014, n. 5107* (Ruling of the Supreme Court of Appeal of 17 December 2013 (case no. 5107/14))

<http://merlin.obs.coe.int/redirect.php?id=16958>

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Two Articles of Dutch Law Incompatible with the New European Regulatory Framework for Electronic Communications

On 29 January 2014, the District Court of The Hague found that Dutch law is not allowed to force cable operators to offer their channel packages for sale to third parties. The Court found article 6.14a of the Dutch Media Act (MA) and article 6a.21a of the Dutch Telecommunications Act (TA) to be incompatible with the new European regulatory framework for electronic communications. The new regulatory framework aims to provide a harmonised structure for the regulation of electronic communication services and networks.

Following the ruling of the European Court of Justice of 7 November 2013, three Dutch cable operators UPC Nederland, Ziggo and Zeelandnet asked the District Court to declare articles 6.14a MA and 6a.21a TA non-binding under Dutch law, due to their incompatibility with the new regulatory framework and the Treaty on the Functioning of the European Union (TFEU) (see IRIS 2014-3/37). The Court of Justice ruled that article

2(c) of the Framework Directive must be interpreted as meaning that a service consisting of the supply of a basic package of radio and television programmes via cable, the charge for which includes transmission costs as well as payments to broadcasters and royalties paid to copyright collecting societies in connection with the transmission of programme content, falls within the definition of an 'electronic communications service' and consequently, within the substantive scope of the new regulatory framework. Article 6.14a MA regulates the resale of channel packages to third parties. Article 6a.21a TA allows the *Autoriteit Consument en Markt* (Authority Consumers and Market - ACM), the Dutch national regulatory authority, to obligate companies having a significant market power in the provision of programme services to offer programme services and associated facilities for resale at wholesale level to end users.

The District Court ruled that the contested provisions cannot be regarded as audiovisual policy, considering that the provisions are intended to force cable operators to offer standard packages for resale. Therefore, the Dutch State cannot rely on the exception in Article 1 (3) of the Framework Directive, which states that the Framework Directive as well as the Specific Directives are without prejudice to measures taken at community or national level to pursue general interest objectives, in particular relating to content regulation and audiovisual policy. According to the Court, this forced resale will not result in greater choice regarding content for the consumer.

The Court stated that the State seeks to encourage competition of the cable operators with these provisions, while the European competition law framework is created to promote competition and serve consumer interests. According to the Court, there is no place for a separate role for the national legislator next to the ACM under the new regulatory framework. The Court noted that the national regulatory authority saw no reason to intervene in the Dutch television market and the Trade and Industry Appeals Tribunal confirmed this position.

The Court concluded that the contested provisions were in contravention of the new regulatory framework. The obligations imposed by the contested provisions should be imposed in accordance with the new regulatory framework by the national regulatory authority and not by the national legislator. Pursuant the contested provisions, the ACM may not decide whether the obligation that is to be imposed is appropriate. According to the Court, this is also in conflict with the provisions of the new regulatory framework.

• *Rechtbank Den Haag, 29 januari 2014, ECLI:NL:RBDHA:2014:1004, UPC Nederland & Zeelandnet/Staat der Nederlanden & Tele2* (District Court The Hague, 29 January 2014, ECLI:NL:RBDHA:2014:1004, UPC Nederland & Zeelandnet/Dutch State & Tele2)

<http://merlin.obs.coe.int/redirect.php?id=16948>

NL

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RO-Romania

President Lodges a Complaint of Unconstitutionality concerning the new Financing Rules on Production and Broadcasting of Programmes abroad

On 26 February 2014 the Romanian President, Traian Băsescu, sent to the Constitutional Court of Romania a complaint of unconstitutionality of the *Legea pentru modificarea și completarea Legii nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune* (Law on the modification and completion of the Law no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation/SRR and of the Romanian Television Corporation/TVR). The above-mentioned Law was adopted by a large majority by the Romanian Senate (upper Chamber of the Parliament) on 11 February 2014 and by the Chamber of Deputies (lower chamber) on 17 December 2013. The Law had first been approved in 2013, but it had been sent back to the Parliament on 28 October 2013 by the President of Romania. The Parliament reviewed the Law and partly agreed with the requests of the President, but Mr Băsescu complained to the Constitutional Court about the new form of the document (see IRIS 2014-1/38).

According to the modified and completed Law adopted on 11 February by the Senate, Art. 42 (1), the financing of the production and broadcasting of programmes abroad, including through private legal persons set up by SRR or TVR or in which the SRR and TVR are associates/shareholders, as well as for the development of these activities, is done through State budget allocated funds, run through the budgets of the two institutions. A new paragraph, (11), was introduced after the Art. 43 (1), making provision for the extension/development of their activity outside Romania; SRR and TVR can set up, with the advisory opinion of the Culture and Mass-Media Standing Committees of the Romanian Parliament, private legal persons, with or without profit, can become associates in such entities or can acquire shares of an existing company, under the law provisions.

The Romanian President considers that the provisions of the Law breach Art. 1 (5) of the Romanian Constitution, because they are not accurately formulated and do not observe the criteria of clarity, precision and predictability. He considers that becoming an associate of an entity means, in fact, acquiring shares of that company, which is not in accordance with the third way provisioned by the Law, to acquire shares of an existing company. In the opinion of the President, the text triggers confusion. The Law is unclear with regard to the criteria of association or of shares acqui-

sition, which is very serious, due to the fact that the financing of those operations would be made with State budget money. The President also considers that the advisory opinion of the Culture and Mass-Media Standing Committees of the Romanian Parliament is not sufficient and that the overall text is unclear, which could trigger difficulties in putting it into practice.

• *Sesizare de neconstituționalitate asupra Legii pentru modificarea și completarea Legii nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune* (Intimation on the unconstitutionality of the Law on the modification and completion of the Law no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation)

<http://merlin.obs.coe.int/redirect.php?id=16935>

RO

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Government Decision with regard to the License Fees for the Digital TV Multiplexes

On 12 February 2014 the Romanian Government adopted Decision no. 86/2014 regarding the granting of licenses to use radio frequencies in the terrestrial digital TV system. The Decision was published in the Official Journal of Romania no. 133/24.02.2014, Part I (see IRIS 2009-9/26, IRIS 2010-3/34, IRIS 2010-7/32, IRIS 2010-9/35, IRIS 2011-4/33, IRIS 2013-6/30).

The Decision contains provisions for the conduct of the selection procedure and the conditions for granting licenses for the use of radio frequencies in the digital terrestrial system, as well as for determining the amount of the license fees for different types of multiplexes.

All five national multiplexes allocated to Romania will be granted through simultaneous competitive selection by the *Autoritatea Națională pentru Administrare și Reglementare în Comunicații* (the National Regulatory Authority for Communications - ANCOM), the telecom watchdog. The license fee for each multiplex will be EUR 300,000. One multiplex, in the UHF band (174-216 MHz), is intended to cover 90% of the population and 80% of the territory until 31 December 2016, and will carry, free to air, in transparent, non-discriminatory and competitive conditions, after 17 June 2015 (the deadline for the digital switchover in Romania) the public television's channels as well as commercial analogue terrestrial TV channels, according to the Audiovisual Law no. 504/2002, with further modifications and completions. The other four multiplexes, three in the UHF band and one in the VHF band (470-790 MHz) are meant to be granted to commercial TV services broadcasters.

The regional multiplexes will be also granted by the ANCOM through a competitive selection procedure. The license fees depend on the regions covered. The

license fee for the regional multiplex for the capital city Bucharest region will be EUR 12,000; for big Romanian zones, such as Constanța, Craiova, Ploiești, Galați, Brașov, Timișoara, Arad, Oradea, Cluj-Napoca and Iași it will be EUR 10,000. The license fee will be EUR 8,000 for smaller zones than those mentioned above, such as Calafat, Reșița, Drobeta-Turnu Severin, Petroșani, Râmnicu Vâlcea, Buzău, Sibiu, Deva, Târgu Mureș, Gheorgheni, Piatra-Neamț, Bacău, Suceava, Bistrița, Sighet, Satu Mare and Focșani. The regional multiplex license fee will be of EUR 4,200 for even smaller zones.

The license fee for the granting of a multiplex for county seat towns goes from EUR 8,000 for the big cities to EUR 6,000 for smaller cities.

The participation in the selection procedure is subject to the fulfilment of qualifying criteria and to the submission of a bank guarantee in accordance with the specification. The winners of the rights to use radio frequencies have to send to ANCOM, within 90 calendar days after the announcement of the winners of the competitive selection procedure, a copy of the payment of the license fee due. Failure to observe the period for payment specified above, entails the forfeiture of rights acquired in the selection procedure and the execution of the letter of guarantee.

• (Hotărârea nr. 86/2014 privind acordarea licențelor de utilizare a frecvențelor radio în sistem digital terestru de televiziune (Government Decision no. 86/2014 with regard to the granting of licenses to use radio frequencies in terrestrial digital TV system))
<http://merlin.obs.coe.int/redirect.php?id=16936>

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SK-Slovakia

Council Publishes Commentary on Election Campaigns in Electronic Media

On 15 March 2014 the presidential elections took place in Slovak republic. Therefore at the beginning of February the Council for broadcasting and retransmission of Slovak republic (hereinafter "Council") published on its website a commentary that summarizes and interprets the relevant legal provisions concerning the election campaign in electronic media.

The Council in its paper reminded the media that the broadcasting of any political advertising is prohibited outside the official election campaign time (21 days before election). This ban does not however apply to the broadcaster that broadcasts exclusively over the Internet (hereinafter "Internet broadcaster") as well as to the provider of an on-demand audiovisual media service (hereinafter "on-demand provider").

The public service broadcaster is obliged to (unlike commercial broadcaster who may) reserve slots in its programme service for the "political campaign" of each candidate who enforces his claim at least five days prior to the beginning of the election campaign. Public service and commercial broadcasters shall reserve a maximum of one hour of their broadcasting time per candidate with an overall limit of 10 hours. With regard to the interpretation of the term "political campaign", the Council refers to its previous decisions which state that the term "political campaign" shall include not only the traditional (paid) TV and radio spots but also discussions specifically created for the upcoming election where candidates present their main campaign themes. However, news and current affairs programmes that are aired at same time (day and hour) and same manner (debate, number of presenters etc.) during the election campaign as they are aired outside of the official election campaign do not constitute a political campaign. They thus fall outside the assigned hourly limits. The hourly limits do not apply to Internet broadcasters and on-demand providers (they may broadcast an unlimited amount of political campaigns including paid spots).

According to the legislation, a political campaign must be readily recognizable and separated from other broadcasting by an announcement specifying "paid political advertising". The Council however referred to its previous decisions that imply that the obligation to use the "paid political advertising" announcement shall apply only to the traditional (paid) election TV or radio spots. For political campaigns in the form of debates it is sufficient if they are separated by means that clearly indicate their connection to the election campaign.

Political campaigns broadcast by public service broadcasters are free of charge, whereas commercial broadcasters may reserve their broadcasting time for political campaigns in return for remuneration. The remuneration, access to the reserved time as well as the actual format of the debates must be based on the principles of fairness and equality. The Council in the commentary emphasizes that equality with regards to the remuneration means the exact same payment conditions for each candidate. The principles of fairness and equality with regard to political campaigns apply to any subject of regulation disregard its type, i.e., TV and radio broadcasters, Internet broadcasters as well as on-demand providers. Each subject of the regulation is obliged to respect the election moratorium which starts 48 hours prior to the election. It is forbidden to publish election polls three days prior to the election and during the actual vote.

• *Komentár k zákonnej úprave vysielania v čase vol'by prezidenta SR* (Commentary on the relevant legal provisions concerning the election campaign in electronic media)
<http://merlin.obs.coe.int/redirect.php?id=16937>

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Legislative Increase of the Assigned Collected Revenues of Regulatory Authority

On 12 December 2013, the Slovak Parliament adopted the Act no. 473/2013 Coll. on the budget of the Slovak Republic for 2014. The Act among other things cut the budget of the Council of Broadcasting and Retransmission (hereinafter “Council”) by 18%. At the same time the Act increased the prescribed revenues of the Council (these form income of the state budget) to EUR 340,000 which represents a 100% increase over the revenues prescribed in year 2013. The revenues of the Council are primarily formed of the fines imposed to the subject of regulation (audiovisual media service providers, cable and satellite operators etc.).

In mid-February, representatives of the International Press Institute (hereinafter „IPI”) sent a formal letter to the chairman of the Council and along with representatives of the Association of commercial TV and radio broadcasters met in person with the chairman of the Council. Both representatives stated that it remains unclear why the Ministry of Finance expects revenues of the Council to increase so dramatically. They both fear that these dramatic increases of the prescribed revenues could force the Council to issue greater numbers of fines in increasing amounts in order to prevent additional budget cuts in future. IPI is particularly concerned that the likely targets of “new” fines could be broadcasters that share unwelcome news coverage or political opinions.

Both at the meeting, as well as in his formal answer, the chairman of the Council stated that any decrease of the expenses in this year’s or future years’ budgets of the Council will have to be realised within the activities of the Council and that increased sanctioning activity of the Council would not change anything. The chairman informed IPI and the broadcasters that during the adoption of the Council’s budget at the Slovak parliament in December 2013, the Council informed the members of the parliament about the improbability of reaching the prescribed revenues. Furthermore, the Council notified the Ministry of Finance, the Ministry of Culture as well as Slovak media about this matter.

• *Zakon z 12. decembra 2013 o štátnom rozpočte na rok 2014* (Act no. 473/2013 Coll. on the budget for 2014)
<http://merlin.obs.coe.int/redirect.php?id=16952>

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Contradictory Judgments With Respect to the Accessibility Quotas

On 19 March 2014, the Supreme Court (“Court”) confirmed a decision of the Council for Broadcasting and Retransmission of the Slovak Republic (“Council”) in which the Council had imposed a fine of 3,319 Euro on a major commercial TV broadcaster for failing to reach the prescribed quota of the total transmission time for programmes accompanied with open or closed subtitles or accompanied by translation into deaf sign language or broadcast in deaf sign language. This judgment was delivered despite the fact that a different decision of another chamber of the same court from 23 January 2014 exists, where the Court cancelled the Council’s decision that imposed a fine of 3,319 Euro on the same broadcaster and for the same type of violation.

At the time of the adoption of these decisions the relevant legislation (Act on Broadcasting and Retransmission) did not explicitly prescribe in what timeframe the broadcasters are obliged to reach the assigned quotas. However, the Council argued that broadcasters are obliged to send reports on the given quotas each month. The Council referred to the provision of the Act on digital Broadcasting (this is a different Act than the Act on Broadcasting and Retransmission), which states that if the Act does not prescribe another time unit for the portion of transmission time the time unit “one month” shall be used. Furthermore, the Council stressed that the purpose of the quota is to make the audiovisual media services accessible to people with a visual or hearing disability. A longer time unit, e.g. one year, would allow a more disproportionate scheduling of transmitting these programmes (e.g. most of the programmes would be broadcast during the “slow” months such as summer holidays etc.) in contrast to the shorter time unit. Therefore, acknowledging the longer time unit would go against the purpose of the legal provision on quotas.

On the other hand, the Broadcaster argued that when the law is unclear about an aspect that directly influences a broadcaster’s obligation, it is the regulatory authority’s duty to interpret this aspect in favor of the broadcaster (in dubio pro mitius). Therefore, enforcing the broadcaster to reach the quota each month is excessive and unlawful. In both above mentioned cases the broadcaster failed to reach the quota in certain months. However, the average of the year for the prescribed quota was fulfilled.

In its first decision, the Court agreed with the broadcaster’s argument and confirmed that the law did not clearly prescribe the relevant time unit. With respect to the provision of the Act on digital Broadcasting the Court pointed out that this provision uses the term “portion of the transmission time”, which is in other parts of this Act affiliated only with the licence require-

ments of an applicant for a TV license (the wording of the “quota obligation” refers only to the percentage of the programmes). In such a case it is necessary to interpret the law in favour of the broadcaster, what the Council has not done in his decision.

The latter decision of the Court (adopted by another chamber) agreed with the Council’s arguments and stressed that the primary mission of the Council is to enforce the public interest in the exercise of the right to information, of freedom of expression and the right of access to cultural values and education. The Court emphasized that the purpose of the given quota is to provide the access to the audiovisual media services for people with a visual or hearing disability. In order to be effective, this access has to be continuous. Thus, the Court finds that the Council’s interpretation is reasonable and lawful and in line with the purpose of the legal obligation.

It is certainly worth mentioning that the legal uncertainty, which arises from the unclear wording of the legal provision, was noticed by the legislator (Ministry of Culture). Therefore, the amendment of the Act on Broadcasting and Retransmission (for more details see IRIS 2013-2:1/36) explicitly constituted the time unit to reach the assigned quotas to “one month”.

• *Najvyšší súd, 19.3.2014* (Decision of the Supreme Court, 19 March 2014)

<http://merlin.obs.coe.int/redirect.php?id=17302>

SK

• *Najvyšší súd, 23.01.2014* (Decision of the Supreme Court, 23 January 2014)

<http://merlin.obs.coe.int/redirect.php?id=17303>

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Agenda

GIRLS JUST WANNA HAVE FILM! What place for women in today's film industry?

17 May 2014 Organiser: European Audiovisual Observatory
Venue: Cannes REGISTRATION FORM (Free access to Film Market, Festival and Press accreditations) Press contact in Cannes: alison.hindhaugh@coe.int Tel: + 33 (0) 3 684352743

Book List

Code thématique Larcier- droit de la presse écrite et audiovisuelle Larcier, 2014 ISBN-13: 978-2804431860 <http://www.larciergroup.com/>

Castendyk, O., Fälle zum Medienrecht C.H.Beck, 2014 ISBN-13: 978-3406597671 <http://rsw.beck.de/rsw/default.asp>
Fechner, F., Medienrecht. Lehrbuch des gesamten Medienrechts unter besonderer Berücksichtigung von Presse, Rundfunk und Multimedia UTB GmbH, Stuttgart, 2014 ISBN-13: 978-3825241483 <http://www.utb.de/>
Smartt, U., Media and Entertainment Law Routledge, 2014 ISBN 978-0415662703 <http://www.routledge.com/>
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