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IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2014-5

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Editorial Informations

Publisher:
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Web Design:
Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com
ISSN 2078-6158

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Bayar (nos. 1-8) v. Turkey

In eight judgments of 25 March 2014 the European Court of Human Rights has once more found gross violations of the right to freedom of expression and information in Turkey. Each of the judgments concerns the criminal conviction for publishing declarations from an illegal armed organisation. The applicant in all of the eight cases is Hasan Bayar, the editor-in-chief of the Ülkede Özgür Gündem, a daily newspaper based in Istanbul. In 2004 the newspaper published a series of statements and articles expressing, in various ways, the positions of the PKK (the Kurdistan Workers' Party), as well as statements by its leaders. It also published appeals from prisoners to the Turkish Government to negotiate with Mr Öcalan, the PKK leader. Other articles described events linked to Mr Öcalan's incarceration. Some of the statements from the PKK or Congra-Gel or PJA, a branch of the PKK, concerned the political situation of the Kurds, the role of women in society and appeals for democratisation and peace. One article, reproducing declarations of the leader of Congra-Gel, protested against the visit of the Turkish Prime Minister to Iran. After the publication of each article, the public prosecutor charged Mr Bayar and the owner of the newspaper with spreading propaganda via the press, and publishing material from an illegal armed organisation. On each occasion Mr Bayar and the owner of the newspaper were convicted in application of the anti-terrorism act nr. 3713 and they were ordered to pay a fine. Mr Bayar appealed to the Court of Cassation against each of these decisions, arguing that his rights as guaranteed by Article 10 of the European Convention had been violated. However, all Mr Bayer's appeals were declared inadmissible.

The Strasbourg Court is of the opinion that Mr Bayer's right under Article 6 (right to a fair trial) was violated, as the Court of Cassation had wrongfully declared his appeals inadmissible. The European Court also found that Mr Bayer's right to freedom of expression under Article 10 was violated, as the Court saw no pertinent reason to justify Mr Bayer's conviction. The Court said that it was aware of the difficulties the fight against terrorism was confronted with, but it emphasised at the same time the importance of the right to freedom of expression, by notifying that the impugned articles did not encourage violence, armed resistance or insurrection and did not constitute hate speech. According to the Court this was crucial, and it could not find any pertinent and sufficient reasons to justify any of the interferences with the editor-in-chief's right to freedom of expression. Unanimously, the Court awarded Mr Bayer - in all the cases taken together - the total sum of EUR 6,133 (pecuniary damage), EUR 10,400 (non-pecuniary damage), and EUR 4,000 (costs and expenses).

• *Arrêts rendus le 25 mars 2014 par la Cour européenne des droits de l'homme (quatrième section) dans l'affaire* Bayar (n1 - 8) c. Turquie, *requêtes n^{os} 39690/06, 40559/06,48815/06, 2512/07, 55197/07, 55199/07, 55201/07 et 55202/07* (Judgments by the European Court of Human Rights (Fourth Section), case of Bayar (nos. 1-8) v. Turkey, Appl. nos 39690/06, 40559/06,48815/06, 2512/07, 55197/07, 55199/07, 55201/07 and 55202/07 of 25 March 2014)
http://merlin.obs.coe.int/redirect.php?id=17012 FR

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EUROPEAN UNION

Court of Justice of the European Union: Internet Service Providers may be ordered to block access to websites that contain IP infringing material

On 27 March 2014, the Court of Justice of the European Union (CJEU) gave its ruling in Case C-314/12, a case between UPC Telekabel Wien, on the one hand, and Constantin Film Verleih and Wega Filmproduktionsgesellschaft, on the other. The CJEU considered whether it is permissible to order an internet service provider (ISP) to block its subscribers' access to a website on which copyright protected films are made available to the public, without the rightsholders' consent.

Constantin Film and Wega are film production companies. They claimed that some of the films in which they hold the copyright and related rights were made available on a website for streaming or downloading without their consent. The Vienna Commercial Court granted an order according to which UPC is prohibited from providing its customers with access to the website at issue. This order "was to be carried out in particular by blocking that site's domain name and current IP ('Internet Protocol') address and any other IP address of that site of which UPC Telekabel might be aware."

UPC contested the order, stating that "its services were not used" to infringe a copyright or related right pursuant to Article 8(3) Copyright Directive, which is a requirement for injunctions to be granted against an ISP. The underlying argument was that UPC did not have any business relationship with the operators of the website, and it was not established that its own customers acted unlawfully. Moreover, UPC argued

that the blocking measures can be technically circumvented and are excessively costly.

In short, the Austrian Supreme Court presented four preliminary questions to the CJEU, of which two are particularly important. It first asked the question: when is a person deemed to be 'using the services of an intermediary' for the purposes of Article 8(3) Copyright Directive. Secondly, the Austrian Supreme Court asked whether it is compatible with Union law to grant an order to block access to a website in general terms, in light of the balance between parties' fundamental rights that must be made.

First, the CJEU noted that intermediaries are often in the best position to bring an end to infringing activities. The Court further stated that ISP's are inevitably actors in any transmission of infringing material over the internet; without granting access to the network, the transmission of such material is not possible. The Copyright Directive contains no indication that there must be a specific business relationship between the infringing party and the intermediary. Such a requirement would even be contrary to the purpose of that Directive, as it would reduce legal protection. According to the Court, there is also no need to show that the customers of the ISP actually accessed the infringing material. Thus, when infringing content is made available on a website, the person making it available is using the services of the internet service provider.

In considering the second question, the Court reiterated that, in any case, a fair balance must be struck between the applicable fundamental rights and principles of EU law. The fundamental rights involved in this case are the intellectual property rights, the freedom to conduct a business and the freedom of information of internet users. An important EU principle involved is the principle of proportionality. Although an order for an ISP to block access to a website restricts its freedom to conduct a business, the Court stated that it "does not seem to infringe the very substance" of that freedom.

A general order to prohibit access to a website leaves the ISP with the freedom to decide which specific measures should be taken. It gives the ISP the opportunity to choose measures that it believes are in line with its way of doing business. Therefore, intellectual property rights seem to outbalance the freedom to conduct a business under these circumstances. However, when giving shape to the measures, the ISP must ensure compliance with the fundamental right to information of its subscribers. The measures taken must be "strictly targeted". In short, this means that the measures must not limit the possibility of lawfully accessing the information available.

Furthermore, the Court acknowledged that blocking measures might not completely prevent the infringing activities. However, it considers it to be sufficient if the measures "have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult [...]." In this regard, it is interesting to consider the Dutch XS4ALL case (see IRIS 2014-3/37). In that case, a Dutch Court of Appeal stated that the ISPs concerned did not have to block access to The Pirate Bay, based on a contrary balancing of the fundamental rights involved. The blocking measures were deemed ineffective and disproportionate.

Thus, the fundamental rights of EU law do not preclude a court order that prohibits an ISP from providing its customers with access to a website on which infringing material is made available, when the measures to be taken by the ISP are not specified. Also, it is not required that the measures have the effect of a complete end to infringing activities.

• UPC Telekabel v. Constantin Film Verleih, Court of Justice of the European Union, Case C-314/12
http://merlin.obs.coe.int/redirect.php?id=17014 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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European Commission: State aid for video games compatible with EU rules

The United Kingdom's plan to grant tax relief to producers of video games is in line with the state aid rules of the European Union. In the UK there is a group of four corporation tax reliefs aimed at the creative industries. These reliefs increase the amount of allowable expenditure for a company, with the aim of stimulating cultural production. Film tax relief was introduced in April 2007 and two additional reliefs were introduced in April 2013, for animation and high-end television programmes. On 27 March 2014 the European Commission approved the introduction of aid for producers of video games.

Aid granted by member states that distorts or may distort competition by favouring the production of certain goods is incompatible with the internal market in so far as it affects cross-border trade. State aid is monetary advantage in any form whatsoever, for example a grant or tax relief. As an exception to the general prohibition on state aid, Article 107(3)(d) of the Treaty on the function of the European Union (TFEU) provides that aid to promote culture may be considered to be compatible with the internal market where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest. The Commission has the authority to review aid plans and demand abolishment if the aid does not meet the criteria of Art. 107 TFEU.

In this case, the Commission opened an investigation due to concerns that the aid instrument proposed by

the UK government was incompatible with the Single Market. There appeared to be no market failure in the games sector to produce British games and such games were already being produced without state aid. In that sense, the introduction of state aid would not be necessary. As well as this, the tax relief would only be available in relation to development expenditure used or consumed in the UK. Limiting the expenditure qualifying for the tax relief to goods or services used or consumed in the UK is discriminatory and incompatible with the internal market. Lastly, the tax relief plan included a cultural test to ensure that the aid would only support games with cultural content. The Commission was worried that this test was not sufficiently restrictive.

After the Commission opened the investigation, the UK removed the territorial spending obligation. Moreover, the UK was able to demonstrate that the proposed cultural test ensures that the aid supports only culturally relevant games, and that without this support the number of these British or European games would decline. The Commission therefore concluded that the measure promotes culture without unduly distorting competition in the internal market.

The UK government estimates that the tax relief will provide around £35 million of support a year to the sector. It will come into effect from 1 April 2014.

• European Commission, State aid: Commission approves UK video games tax relief plan Brussels, Press release, IP/14/33, 27 March 2014
http://merlin.obs.coe.int/redirect.php?id=17001 DE EN FR

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European Parliament: Resolution on a fully converged audiovisual world

On 12 March 2014, the European Parliament (EP) adopted its Resolution on "Preparing for a Fully Converged Audiovisual World". Reference is made to the European Commission (EC) Green Paper on "Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values" of 24 April 2013 (IRIS 2013-6/5). The Resolution contains a number of observations, comments and recommendations concerning the values, definition, relevance, aims, role, and legal recognition of audiovisual convergence and its intricacies.

After setting out all the relevant European and international regulatory and standard-setting texts in its Preamble, the Resolution offers a variety of definitions and explanatory comments on inter alia audiovisual, horizontal, vertical, functional and technical convergence. Subsequently, specific remarks are made on convergent markets, access and findability, safeguarding diversity and funding models, infrastructure and frequencies, values, and the regulatory framework.

Regarding convergent markets, the EP notes several opportunities and pitfalls. The EP stresses the need to align the rights and obligations of broadcasters with those of other market players by means of a horizontal, cross-media legal framework.

In relation to access and findability, the EP stresses the importance of inter alia, net neutrality, non-discriminatory, transparent and open access to the internet for all users and providers of audiovisual services, and diverse and findable cultural and audiovisual works.

With regard to diversity and funding models, the EP calls on the Commission to determine how refinancing, funding and production of quality European audiovisual content can be secured and to examine respectively the unequal treatment of linear and non-linear services as regards quantitative and qualitative bans on advertising. The Commission is called upon to remove regulation in quantitative advertising provisions for linear audiovisual content. The EP emphasizes that new advertising strategies that use new technologies to increase their effectiveness raise the issue of consumer protection in relation to their private and their personal data. With this in mind, the EP highlights the need to come up with a set of consistent rules to apply to these strategies. Furthermore, the EP emphasizes that the public sector must continue to be shielded from the constraints of advertising-based financing.

On infrastructure and frequencies, the EP focuses on open and interoperable standards and urges industry actors to work together on a common framework for media standards. The EP notes that emerging self-regulation initiatives have a crucial role to play in establishing uniform standards for user technologies and for developers and producers. The development of a technology mix that makes efficient use of both broadcast and broadband technologies and intelligently combines broadcasting and mobile communications ('smart broadcasting') is advocated. The EP also stresses that broadband internet networks need to be developed further, particularly in rural areas, and calls on the member states to rectify this problem by means of short-term investment campaigns.

When it comes to values, the EP notes and regrets the Green Paper's lack of a specific reference to the dual nature of audiovisual media as a cultural and economic asset. The EP reiterates values such as media pluralism, cultural diversity and the protection of minors. The Commission is called upon to continue its efforts to safeguard press freedom and to step up its efforts to enforce youth and consumer protection provisions. These types of protection, along with data protection, are highlighted as absolute objectives of regulation and must apply uniformly to media and communications providers throughout the EU. The Commission and member states alike are called

upon to promote the production of European audiovisual works and to enhance and expand the existing range of activities aimed at imparting digital media skills.

The EP considers, with regard to the regulatory framework, the balance between removing barriers to media innovation while not losing sight of the normative aspects of a democratic and culturally diverse media policy. Keywords used by the EP are flexibility, user-friendliness and accessibility, technology-neutrality, transparency and enforceability. The Commission is called upon to conduct an impact assessment so as to look into whether the scope of the AVMS Directive is still relevant and to examine to what extent the linearity criterion is preventing the regulatory objectives of Directive 2010/13/EU from being attained in many areas of the converged world. Deregulation is recommended for the areas of Directive 2010/13/EU in which the aims of the legislation are not being achieved. It recommends instead that European-level minimum requirements for all audiovisual media services should be put in place. Also, the Commission is called upon to examine whether copyright law needs to be adapted in the light of cross-border accessibility and technology neutrality.

This Resolution has been forwarded to the Council and the Commission.

• Resolution: European Parliament, on Preparing for a Fully Converged Audiovisual World
http://merlin.obs.coe.int/redirect.php?id=16997 DE EN FR
CS DA EL ES ET FI HR HU IT LT LV MT NL PL PT SK SL SV

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NATIONAL

AT-Austria

Internet forum operators must disclose user data

In a decision of 23 January 2014, the Austrian *Oberste Gerichtshof* (Supreme Court - OGH) ruled that a website's operators were obliged under Article 18(4) of the *E-Commerce-Gesetz* (E-Commerce Act - ECG) to disclose to the party concerned the e-mail addresses of users who had posted insulting comments about him. The court rejected the defence of editorial confidentiality.

The defendant operates an online discussion forum on its Internet site. The plaintiff, a politician, had demanded that the forum operator disclose the e-mail addresses of four of its users who had written unlawful comments about him. He had also asked for these remarks to be removed. The defendant deleted the comments, but refused to disclose the information requested on the grounds of editorial confidentiality.

Arguing that some of the claims made in the postings were contrary to criminal law, the politician asked the court to order the defendant to reveal the identity of the users concerned.

The OGH shared the lower-instance courts' view that the defence of editorial confidentiality under Article 31(1) of the Austrian *Mediengesetz* (Media Act) was inapplicable. This provision guarantees the protection of journalists' sources.

The court held that the mere operation of an online forum that was not moderated and on which all user comments were published did not constitute any form of journalistic activity.

The OGH also considered that legitimate claims must be enforceable. The plaintiff's right to take action against the website operator, to which the defendant had referred, was therefore insufficient, since the perpetrator could simply switch to another Internet site and continue infringing the plaintiff's rights. This would merely force the injured party to institute further legal proceedings. The defendant was therefore obliged to disclose the e-mail addresses.

• *Beschluss des OGH vom 23. Januar 2014 (Gz. 6Ob133/13x)* (Supreme Court decision of 23 January 2014 (case no. 6Ob133/13x))
http://merlin.obs.coe.int/redirect.php?id=17017 DE

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Competition regulatory authority rejects complaint of Neterra

Neterra EOOD (hereinafter 'Neterra') has brought proceedings before the Bulgarian Commission for Protection of Competition (hereinafter 'the Commission') asserting that a breach of the Bulgarian Law on Protection of Competition (hereinafter 'the Law') has been committed by bTV Media Group EAD (hereinafter 'bTV'). It is contended that this breach is in the form of ungrounded refusal of bTV to provide services aimed to hinder the activities of Neterra as well as in the application of different conditions with regard to the

same types of contracts and with regard to particular partners whereupon these are placed in an unequal situation as competitors.

Neterra carries out activities regarding the provision of web TV or, in other words, Internet television through the site www.neterra.tv to territories outside of Bulgaria's borders. To that end, Neterra uses IP protocol for the transfer of television content to the end user. From a technologic point of view, the service constitutes a digital signal, which is distributed by satellite or by optic fibre and then is sent through IP protocol to a decoding server, afterwards is transferred to a streaming server, and at the end it reaches the end customer through the global network. According to Neterra, the service offered differs from the IPTV service, since it is accessible to any Internet user. The customers have the option to choose their preferred form of watching television:

a) Live – meaning watching TV in real time, or

b) VoD (Video on Demand) – recorded programmes, which are kept on a streaming server and which may be accessed at any time.

On 8 March 2013 Neterra received from bTV a written notification that within a one month period bTV shall terminate their bilateral contract. Neterra claims that the respondent company misuses its dominant position on the (wholesale) market for distribution of television programmes with the aim to restrict and distort competition at the lower and interrelated market for distribution of television programmes to end users; in particular at the sub-market for distribution of television programmes to end users outside the state territory, via the Internet, whereupon the claimant company is acting commercially. In the light of its significant market share and share of the (wholesale) market for distribution of television programmes for over five years, the television operator bTV exploits its 'advantage' to impose unilateral conditions on its customers – no matter whether cable, satellite, IP or Internet television, which distribute bTV's television content. In its capacity of copyrights and related rights holder, bTV has the right to define the territorial scope of distribution of the content inside and/or outside the borders of Bulgaria.

Having regard to the established facts and circumstances of the case, and to the based market and legal analysis, the Commission found that bTV has no dominant position on the market for the provision of rights for distribution of television programmes through platform-based operators and accordingly that there is no breach of the Law.

• Решение № АКТ -*189-12.02.2014,* Комисия за защита на конкуренцията (Decision n° A K442-189 of the Competition Authority, 12 February 2014)
http://merlin.obs.coe.int/redirect.php?id=16980 BG

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Amendments of Copyright and Related Rights Act

On 28 February 2014, the Bulgarian parliament approved the amendments to the Copyright and Related Rights Act, which were proposed by the Council of Ministers in August 2013. The final text of the law was published on 8 March 2014 in State Gazette issue 21/2014.

The main purpose of the bill was the transposition of Directive 2011/77/EU amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. During the discussions in the Parliament, many other amendments to the Act were proposed by the collective management societies and the artists which delayed the work of the involved parliamentary experts and resulted in the importation of another bill by a group of MPs. A consolidated version of the two bills was prepared in November 2013 but since there were some other priorities in the legislator's policies at the end of the year, the copyright bill was left behind.

Except the provisions of Directive 2011/77/EU for prolongation of the term of protection of some of the rights of the producers and the performers, the amendments include some new rules regarding the collective management societies.

The new law provides for each organisation that wants to be registered or re-registered as a collective management society for a category of rights, for which an earlier registered or re-registered organisation exists already, to sign an agreement for cooperation with the earlier organisation. The previous version of the law required such agreement only in case of new registration but not in the case of re-registration of such organisations that have been acting as collective management societies before March 2011 when the new registration procedure entered into force (see IRIS 2011-5/9). This gap in the law allowed the re-registration of two organisations dealing with the same category of rights which is contrary to the general purpose of the law amendments from 2011. The new rules of the law also provide for better transparency of the work of the registered or re-registered organisations - they are required to present to the Ministry of Culture detailed information about their members, the foreign collective management societies which are present in the territory of Bulgaria, the category of the rights with which they will deal and the type of rights which are assigned to them by the rightholders.

Many other proposals for amendments of the Copyright and Related Rights Act were discussed in the Parliament but since no consensus was achieved between the stakeholders most of them were left without voting.

The creative sector is waiting for other amendments of the law in order to solve the problems with the copyrights settlements in connection with the cable transmission and re-transmission, webcasting and simulcasting and mostly the rules for collecting levies for private copies, which have never been paid effectively in Bulgaria.

• Закон за изменение и допълнение на Закона за авторското право и сродните му права (Act for Amendments and Additions of the Copyright and Related Rights Act)
http://merlin.obs.coe.int/redirect.php?id=16979 BG

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BY-Belarus

Broadcast licensing system introduced by Presidential Decree

A new system of broadcast licensing introduced by a decree of the President of the Republic of Belarus enters into force on 1 January 2014. The decree signed on 7 October 2013 mostly makes additions to an earlier presidential decree "On licensing certain types of activity" of 1 September 2010.

It establishes a procedure that provides certain specific requirements. In particular, it obliges holders of a broadcasting licence to have: a certificate of registration as mass media outlets, as provided in the statute "On mass media" (see IRIS 2008-8/9); at least one full-time expert in the editorial staff who has a university degree in journalism, relevant working experience of at least 5 years, and who passed a special state "qualification exam"; as well as the technical ability to store all newscasts and other programming for at least a year.

It is decreed that the use of the broadcasting licence "in the aims that contradict interests of the Republic of Belarus" leads to its annulment. The "interests of the Republic of Belarus" are neither defined in the decree, nor in the statute "On mass media".

The OSCE Representative on Freedom of the Media issued a legal review of the decree which elaborates on these and other provisions concerning licensing of broadcasting in Belarus.

• Указ Президента Республики Беларусь « О внесении дополнений и изменений в некоторые указы Президента Республики Беларусь » *of 7 October 2013, # 456* (Decree of the President of the Republic of Belarus "On introduction of amendments and changes to some Decrees of the President of the Republic of Belarus" of 7 October 2013, # 456)
http://merlin.obs.coe.int/redirect.php?id=16972 RU

• Legal review of the Decree (#456) of the President of the Republic of Belarus "On introduction of amendments and changes to some Decrees of the President of the Republic of Belarus" of 7 October 2013, commissioned by the OSCE Representative on Freedom of the Media
http://merlin.obs.coe.int/redirect.php?id=16973 EN RU

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Provisions on access to information are now part of the law

Access to information is now part of the national law as it was adopted by the Chamber of Representatives of the National Assembly of the Republic of Belarus on 12 December 2013. It went into effect on 10 January 2014. The law takes the form of amendments to the 2008 law "On Information, Informatization, and the Protection of Information".

In particular, its Article 16 now has an expanded list of information that shall be available to citizens under any conditions.

Article 22-1 of the amended law lists categories of information that shall be made available through official websites of the state bodies. It also establishes that there shall be open meetings of national governmental collegial bodies, as well as that of local executive structures with the exceptions of cases when the planned discussion will be on issues that contain secret or confidential information. Amended Article 21 allows requesting information via email or any other electronic form.

The requested information may not be provided in a number of cases, and in particular if it was already disseminated in the mass media, or if other reasons are established in the national legal acts.

Article 18-1 of the amended law establishes the notion of so-called "service information", or confidential data about activity of governmental bodies or state legal entities. Its dissemination may harm the national security of Belarus, public order, human rights and liberties including reputation and privacy, as well as rights and lawful interests of legal entities that are not part of state secrets.

The Constitutional Court of the Republic of Belarus took a decision on 26 December 2013 which found provisions of the Law of the Republic of Belarus "On amendments and additions to the Law of the Republic of Belarus "On Information, Informatization, and the Protection of Information", and in particular provisions on service information, in conformity with the Constitution.

The OSCE Representative on Freedom of the Media issued a legal review of the draft law which elaborates

on these and other provisions concerning access to information in Belarus.

• Об информации , информатизации и защите информации (Law of the Republic of Belarus "On Information, Informatization, and the Protection of Information", No. 455- З , as amended on 4 January 2014)
http://merlin.obs.coe.int/redirect.php?id=16974 RU

• О соответствии Конституции Республики Беларусь Закона Республики Беларусь « О внесении изменений и дополнений в Закон Республики Беларусь « Об информации , информатизации и защите информации » (Decision of the Constitutional Court of the Republic of Belarus "On conformity of the Law of the Republic of Belarus "On amendments and additions to the Law of the Republic of Belarus "On Information, Informatization, and the Protection of Information" with the Constitution of the Republic of Belarus" of 26 December 2013, No. Р -886/2013)
http://merlin.obs.coe.int/redirect.php?id=16975 RU

• Comments on Amendments to the Draft Law of Belarus on Information, Informatization, and the Protection of Information, commissioned by the OSCE Representative on Freedom of the Media, 10 September 2013
http://merlin.obs.coe.int/redirect.php?id=16976 RU

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Sat.1 third-party transmission time: two urgent applications partially upheld

In two decisions of 5 March 2014 (5 L 753/13.NW and 5 L 694/13.NW), which have not yet been published in full, the 5th Chamber of the *Verwaltungsgericht Neustadt an der Weinstraße* (Neustadt an der Weinstraße Administrative Court) partially granted the applications of Sat.1 SatellitenFernsehen GmbH and N24 Media GmbH for temporary legal protection against the allocation of transmission time for independent third parties (so-called third-party transmission time) on the main Sat.1 channel. Sat.1 remains obliged, at least temporarily, to broadcast the third-party programmes in full. According to the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement), the broadcaster must allocate a total of 180 minutes of transmission time per week towards the programmes of independent third parties.

Both Sat.1 and N24 had asked for the staying effect of their appeals against the licensing decision of the *Landeszentrale für Medien und Kommunikation Rheinland-Pfalz* (Rhineland-Palatinate Media and Communication Authority - LMK) of 23 July 2013 to be reinstated. In its decision, the LMK had renewed the licence of Mainz-based firm News and Pictures Fernsehen GmbH & Co. KG for the first and second blocks of transmission time, and that of DCTP Entwicklungsgesellschaft für TV-Programm mbH for the third and fourth blocks. Both companies have been broadcasting their programmes since the licensing period began on 1 June 2013.

The main broadcaster Sat.1's principal argument was that, since the period following January to December 2012, its audience share had been below the threshold laid down in the Rundfunkstaatsvertrag, above which transmission time had to be granted to third parties. It claimed that it was therefore no longer obliged to provide and fund any third-party transmission time. However, the VG Neustadt held that, when assessing the obligation to provide third-party transmission time, the audience share when the procedure opened was the decisive factor. At that time, Sat.1 had exceeded the market share threshold.

N24, as co-applicant, claimed that a procedural error had been committed and, in particular, that the LMK's decision had been unlawful. At the same time, it claimed that it should be awarded the licence for the first and second transmission blocks itself under a temporary court injunction until a decision had been taken in the main proceedings.

The administrative court, which had already lifted the first licensing decision in this case in its rulings of 23 August 2012 (promulgated on 5 September 2012), reinstated the staying effect of the actions in both procedures, as far as the licence applications of News and Pictures Fernsehen GmbH & Co. KG for the first and second transmission blocks were concerned.

Since it had not been selected with the agreement of main broadcaster Sat.1, under the Rundfunkstaatsvertrag the strict selection criterion of "greatest possible contribution to diversity" should be applied. There had been significant errors in the selection process followed by the LMK, in particular in the establishment of the selection criteria.

Therefore, the selection and licensing of News and Pictures Fernsehen GmbH & Co. KG would probably be ruled invalid in the main proceedings. However, based on the weighing up of the relevant interests, News and Pictures Fernsehen GmbH & Co. KG would initially be allowed to produce its Sat.1 programme window for a transitional period until the end of May 2014, after which the licence would become temporarily ineffective. After that, in the interests of equal opportunities, all applicants for the first and second transmission blocks would have to wait for the LMK to issue a new licensing decision.

The court refused to grant a temporary licence to the applicant N24 for the first and second transmission blocks.

The court ruled that the licensing decision for the third and fourth transmission blocks could remain in force for the time being, since the broadcaster in this case had been selected through an agreement between the Land media authority and the main broadcaster. The errors in the selection procedure would probably therefore have no effect; the rights of Sat.1 and N24 had not been breached.

The rulings expressly leave some of the legal questions discussed by the parties unresolved. How-

ever, concerning a question crucial to the whole licensing procedure, the court decided that Sat.1 was still obliged to provide third-party transmission time. According to the court's decisions, the Rundfunkstaatsvertrag laid down a specific moment in time when the audience share should be measured: the audience share when the licensing procedure started remained valid for the entire licensing period, even if - as in this case - it fell below the legal threshold later in the licensing procedure.

The LMK has announced plans to appeal to the OVG Rheinland-Pfalz (Rhineland-Palatinate Administrative Appeal Court) against the VG Neustadt's decision in order to request the reinstatement of the immediate enforceability of the full transmission time allocations. Sat.1's programming deficits had been established in an ALM study, while alleged errors in the laying down of criteria for the allocation of third-party transmission time could be clearly disproved. In view of the need to protect diversity of opinion, it was not acceptable that the broadcaster should, contrary to its established obligation, make available only part of the required third-party transmission time.

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Judicial review applications against ZDF Inter-State Agreement largely successful

In a ruling of 25 March 2014, the *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) decided that the provisions of the *Staatsvertrag über das Zweite Deutsche Fernsehen* (Inter-State Agreement on Zweites Deutsches Fernsehen - ZDF-StV) on the composition of the supervisory bodies breached Article 5(1)(2)(2) of the *Grundgesetz* (Basic Law - GG) in several respects and were therefore unconstitutional. The ruling explained that the basic right of broadcasting freedom (Article 5(1)(2)(2) GG) required that a system should be established that ensured that the diversity of opinions was presented in broadcasting as broadly and comprehensively as possible. Under constitutional law, the requirements placed on the legislature for the institutional structure of the broadcasting corporations must follow the aim of ensuring diversity. The organisation of public broadcasting must satisfy the need for independence from State intervention, which was given concrete shape by the principle of ensuring diversity. The composition of the collegiate bodies must be aimed at including people with as wide a variety of perspectives and horizons of experience as possible, from all areas of the community. The legislature was not prevented from allowing representatives of the State to become members of the supervisory bodies. Ensuring diversity did not, per se, mean shielding a social sphere that was juxtaposed with the State. However, the share of members who were part of State authority or close to it should not exceed one-third of the statutory members of each body. According to the BVerfG, the influence of communication structures that were established by the State and structured along party lines should also be taken into account, as was currently apparent in the so-called "circles of friends". Whether a member was deemed part of State authority or close to it for the purposes of this threshold should depend on their function. The decisive criterion was whether the person had decision-making powers at State political level. Among these members, it was also necessary to ensure that the broadest possible variety of perspectives was represented.

According to the court, the ZDF-StV met these requirements only in part. According to Article 21 ZDF-StV, the share of Television Council members directly appointed as persons who were part of State authority or close to it was around 44%, while the corresponding figure for the Administrative Council, according to Article 24 ZDF-StV, was approximately 43%. In both cases, therefore, the proportion of members who were part of State authority or close to it exceeded the constitutional threshold of one-third. This meant that these members could form a blocking minority with regard to decisions that required a three-fifths majority of the statutory members. This infringed the principle of independence from State intervention in the broadcasting sector.

The court also stated that representatives of the executive could not have a controlling influence on the selection of the members who were separate from State authority. Article 21(3) in conjunction with Article 21(6) ZDF-StV, according to which the members detached from State authority appointed under Article 21(1)(g) to (q) ZDF-StV should be selected by the Minister-Presidents on the basis of a proposal consisting of three candidates, therefore only conformed with the Constitution if it was interpreted in this way. As was the current practice, the Minister-Presidents were therefore, in principle, bound by the lists of proposals submitted by the associations and organisations entitled to appoint members, and it was only possible to deviate from the lists if there were special legal reasons. In contrast, Article 21(1)(r) ZDF-StV did not meet the requirements for the appointment of members who were detached from State authority. These decisions were taken directly by the State executive. With regard to the Administrative Council, the BVerfG found that the members appointed pursuant to Article 24(1)(b) ZDF-StV were elected by a Television Council that was not sufficiently detached from State authority.

Furthermore, there were no sufficient incompatibility regulations for the members of either body who were detached from State authority. In addition, the independence of at least some of the Television Council

and Administrative Council members was not sufficiently safeguarded.

Moreover, the BVerfG thought there were no legislative provisions governing the transparency of the supervisory bodies' work.

Therefore, for the above reasons, the BVerfG ruled that Articles 21 and 24 ZDF-StV were incompatible with the Basic Law. They could be applied until new legislation was enacted. However, the Länder were obliged to enact such new legislation as has satisfied constitutional law by 30 June 2015 at the latest.

• *Urteil des Bundesverfassungsgerichts vom 25.03.2014 (Az. 1 BvF 1/11, 1 BvF 4/11)* (Ruling of the Federal Constitutional Court of 25 March 2014 (case no. 1 BvF 1/11, 1 BvF 4/11))
http://merlin.obs.coe.int/redirect.php?id=17018 DE

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Cologne District Court equates non-commercial use with private use under Creative Commons licences

In a ruling of 5 March 2014, the *Landgericht Köln* (Cologne District Court - LG) dealt for the first time with the meaning of the condition "no commercial use" attached to Creative Commons (CC) licences (case no.: 28 O 232/13).

The plaintiff, a photographer whose pictures were made available for public use under a "Creative Commons Licence Attribution-NonCommercial 2.0'', had launched court proceedings against Deutschlandradio after the broadcaster had made one of his photographs available to the public on its website "dradiowissen.de" in order to illustrate a programme. The LG Köln did not think the fact that Deutschlandradio was a public service broadcaster was relevant. In its opinion, since a commercial radio station should not be using these licences in any case, it should be assumed that the rightsholder had also wanted to stop public service broadcasters from using his work. Deutschlandradio should therefore be treated as a private radio broadcaster.

In addition, the court held that, given the lack of a binding definition, "non-commercial use" in the sense of a CC licence should only be interpreted as purely private use. Since the Deutschlandradio website was not purely private, it must be a commercial service and therefore could not use works covered by a Creative Commons Licence BY-NC 2.0.

However, this decision by the LG Köln contradicts the wording of the CC Licence conditions which, contrary to the court's assumption, define the concept of commercial use in paragraph 4(b). They prohibit uses that are "intended for or directed toward commercial advantage or monetary compensation". Equating non-commercial with purely private use, as the LG Köln has done, does not correspond with the CC Licence conditions.

Since Deutschlandradio has already announced its intention to appeal against the decision, it seems likely that the OLG Köln (Cologne Appeal Court), which would hear such an appeal, will clarify the matter further.

• *Urteil des LG Köln vom 5. März 2014 (Az. 28 O 232/13)* (Cologne District Court ruling of 5 March 2014 (case no. 28 O 232/13))
http://merlin.obs.coe.int/redirect.php?id=17003 DE

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Obstruction via typing-error domain can breach Unfair Competition Act

In a ruling of 22 January 2014, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided that the use of typing-error domains to intercept customers can constitute an infringement of the ban on deliberate obstruction of competitors enshrined in Article 4(10) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - UWG).

The operator of the domain "www.wetteronline.de", who operates an online weather service, had brought an action against the owner of the domain "www.wetteronlin.de". Users who had landed on the latter website due to a typing error had been taken to the website of a private health insurance company. The plaintiff argued that it had therefore been unfairly obstructed and that its right to use its own name had been breached. Its claim for an injunction to stop the typing-error domain being used, for the domain to be deleted and for compensation, had been upheld firstly by the *LG Köln* (Cologne District Court, case no. 81 O 42/11) on 9 August 2011 and then by the *OLG Köln* (Cologne Appeal Court, case no. 6 U 187/11) on 10 February 2012.

The BGH, which was responsible for hearing the defendant's appeal, confirmed the lower instance courts' view that the interception of customers infringed the ban on deliberate obstruction of competitors enshrined in Article 4(10) UWG, in so far as users who landed on the website found at the typing-error domain were not directly and clearly informed that they were not on the "www.wetteronline.de" website. However, the BGH rejected the application for the domain "www.wetteronlin.de" to be deleted, since the plaintiff had not been unfairly obstructed simply through the registration of the domain and it was possible that the domain could be used lawfully. The content of the website could be adapted, for example.

However, as regards the claim that the plaintiff's right to use its own name had been breached, the BGH overturned the Cologne Appeal Court's decision on the grounds that, in the judges' opinion, the title "wetteronline" was not sufficiently distinctive to warrant protection. Rather, it was a purely descriptive term that identified the plaintiff's area of business, i.e. "online" services concerning the "weather".

• *Urteil des BGH vom 22.1.2014 (Az. I ZR 164/12)* (Federal Supreme Court decision of 22 January 2014 (case no. I ZR 164/12))
http://merlin.obs.coe.int/redirect.php?id=17002 DE

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Berlin District Court rules that "keyselling" business model breaches Copyright

In a decision of 11 March 2014 (case no. 16 O 73/13), the *Landgericht Berlin* (Berlin District Court) ruled that the isolated sale of computer game product keys, known as "keyselling", breaches copyright.

The plaintiff runs an online shop, from which he sells computer game product keys that he has obtained from business partners in Great Britain and Poland. The defendant, who sells a computer game in Germany, sent a warning letter to the plaintiff on 12 December 2012 concerning his business practice relating to the game. The letter asked the plaintiff to stop reselling serial numbers of the game. In an action for a declaration of non-infringement, the plaintiff challenged the warning before the court.

The court held that the defendant had been entitled to caution the plaintiff. The plaintiff had infringed the defendant's reproduction right under Article 16 of the*Urhebergesetz* (Copright Act - UrhG) by enabling third parties to download the game from the Internet using a product key and thereby reproduce it themselves. The judges thought the plaintiff was wrong to argue that the reproduction right had been exhausted, since the exhaustion principle only applied to the form in which the product had originally been distributed. In the present case, the form in which the rightsholder had distributed the product had been changed. The exhaustion principle was therefore only relevant to the combination of the physical data carrier with the product key, and not to the separate sale of product keys.

Contrary to the plaintiff's argument, the CJEU's "UsedSoft" decision did not suggest anything different. Firstly, the "UsedSoft" decision concerned a case in which the rightsholder itself had distributed the product in an intangible form. Furthermore, the product had been a computer program which, according to the CJEU, was exclusively subject to the Software Directive 2009/24/EC. A computer game, on the other hand, was a so-called hybrid product and, not least on account of the film sequences that it contained, was also subject to the InfoSoc Directive 2001/29/EC, under which the exhaustion principle only applied to physical reproductions.

• *Urteil des LG Berlin vom 11. März 2014 (Az. 16 O 73/13)* (Decision of the Berlin District Court of 11 March 2014 (case no. 16 O 73/13))
http://merlin.obs.coe.int/redirect.php?id=17004 DE

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Consultation on amendment of Inter-State Agreement on Youth Protection in the Media

On 12 March 2014, the Broadcasting Commission of the Länder decided to launch an online consultation on the amendment of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on Youth Protection in the Media - JMStV). The online platform was launched on 24 March 2014 under the overall control of the Saxony State chancellery.

The main topic of the discussion paper is the increasing importance of social platforms with user-generated content (UGC). Since, according to the JMStV, operators of private blogs with UGC are telemedia providers, they must ensure that they comply with provisions on the protection of minors. For this reason, the proposed amendments aim to raise private individuals' level of responsibility for the distribution of UGC relevant to the protection of minors. At the same time, content providers will be offered the opportunity to use a voluntary age classification system for telemedia services. As long as they give accurate information when using such a system, they will benefit from privileged treatment and protection against prosecution for any alleged infringements.

Another subject of debate is the simplification of the age classification procedure for games and films on the Internet; the relevant authorities should improve their cooperation and use a standard classification system.

Finally, the updating of the JMStV should ensure that the financing of "jugendschutz.net" is put on a new, sustainable footing.

The public will therefore be involved in the amendment process and have until 19 May 2014 to comment on, add to and evaluate the amendments proposed by the Broadcasting Commission, as well as submit their own ideas and suggestions.

Once the consultation is concluded (in early June 2014), the State parliaments will hold their own hear-

ings. By the end of the year, a draft inter-state agreement will be written on the basis of the consultation results.

• *Diskussionspapier zur Änderung des Jugendmedienschutz-Staatsvertrags* (Discussion paper on the amendment of the Jugendmedienschutz-Staatsvertrag (Inter-State Agreement on Youth Protection in the Media - JMStV))
http://merlin.obs.coe.int/redirect.php?id=17019 DE

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FR-France

Definitive authorisation for purchase of D8 and D17 by Vivendi and Groupe Canal Plus?

On 2 April 2014, France's competition authority (*Autorité de la Concurrence*) re-authorised the purchase of D8 and D17 by Vivendi and Groupe Canal Plus, subject to a number of conditions. On 23 December 2013, the Conseil d'État had cancelled the Competition Authority's approval, granted in July 2012, of the purchase of the channels D8 and D17 by Groupe Canal Plus (GCP) (see IRIS 2014-2/18). Procedural reasons aside, the administrative judge found that one of the five undertakings Canal Plus had entered into - on acquiring rights in respect of French films - needed to be reinforced to take into account the competitive risk connected with the purchase of the second and third windows for unencrypted broadcasting. The operation was therefore re-referred in January 2014 to the competition authority, which re-examined it in the light of the current competitive situation. Further to a new analysis of competition, given the current situation and the comments made by the audiovisual regulatory body (*Conseil Supérieur de l'Audiovisuel* - CSA) and the electronic communication and postal services regulatory authority (*Autorité de Régulation des Communications Électroniques et des Postes* - ARCEP), the competition authority obtained a substantial improvement in the undertakings proposed regarding entitlement to acquire French films, the remainder of the corrective arrangements being maintained. For new French films, the parties have undertaken to refrain from pre-purchasing in any one calendar year the rights for broadcasting a film in both pay mode and unencrypted mode for more than twenty cinematographic works, and to devote the larger part of their investments to medium-budget ("mid-range") films, without being able to pre-empt the rights for a large number of large-budget films (a maximum of two films with an estimated cost of more than 15 million euros, three with an estimated cost of between 10 and 15 million euros, and five films with an estimated cost of between 7 and 10 million euros). This undertaking is substantially similar to the previous one made to the competition authority, but its scope is extended to all pre-purchases, thereby making it possible to cover all the broadcasting windows sold by the producers when organising the financing of their film. This undertaking also includes possible purchases by Groupe Canal Plus, once films have been produced, of the rights for their unencrypted broadcasting within 72 months of their first screening; this period of time corresponds to the three windows for unencrypted broadcasting. All the other undertakings entered into previously remain unchanged. All these undertakings have been agreed to by the parties for the period up to 23 July 2017. The authority has announced that it will make sure they are respected.

• *Autorité de la concurrence, Communiqué de presse, 2 avril 2014* (Competition Authority, Press release, 2 April 2014)
http://merlin.obs.coe.int/redirect.php?id=17005 FR

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Support for cinematographic and audiovisual production - recommendations by the Court of Auditors

On 2 April 2014 France's Court of Auditors (*Cour des Comptes*) published a report on support for cinematographic and audiovisual production. The Court has been checking whether the objectives of the policies for providing public financing for cinematographic and audiovisual production, which date back to 1950 and 1980 respectively, have been achieved, whether the results of the past ten years are in keeping with the increased resources implemented, and whether the support mechanisms are still appropriate. It noted that the general recent trend has been for a very substantial increase in public aid (+88% over the past ten years, an increase four times that of State spending), without calling revision of the model into question, and without the results obtained making it possible to attest to their complete relevance today. The Court has drawn up 21 recommendations, aimed more particularly, with regard to the general economy of the support system, at controlling the evolution of the amount of tax allocated to the national centre for the cinema and moving images (*Centre National du Cinéma et de l'Image Animée* - CNC), by compiling a multi-year trajectory of expenditure based on an evaluation of needs, and lessening the overlap of aid mechanisms. In the cinematographic production sector, the Court recommends capping payment of the top remunerations funded by public support and making ineligible for public funding those films which make use of the early payment of additional remuneration in the form of rights in respect of using a person's image. The rules on the number of days during which cinematographic works may not be shown on

television should also be made more flexible. On support for audiovisual production, the report encourages a tightening up of the qualification criteria for documentaries likely to receive aid and counted as part of the channels' obligations. Another recommendation covers the drawing up, in the form of an interprofessional agreement, of a standard estimate for the production of audiovisual works in which the producer's remuneration is indicated. Lastly, the Court recommends dropping the present defensive posture in the face of the upheavals in the international context, by refocusing aid for exports on more concentrated selective support, devoted to innovation and prospecting, and by making room for new editors of on-demand video services supplied on subscription.

• *Cour des comptes, « Les soutiens à la production cinématographique et audiovisuelle: des changements nécessaires », Rapport public thématique, 2 avril 2014* (Court of Auditors, "Les soutiens à la production cinématographique et audiovisuelle: des changements nécessaires", Public themed report [in French], 2 April 2014)
http://merlin.obs.coe.int/redirect.php?id=17008 FR

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CSA Annual Report lists 25 proposed amendments to legislation and regulations

The audiovisual regulatory body (*Conseil Supérieur de l'Audiovisuel* - CSA) published its annual report for 2013 on 14 April. Apart from a comprehensive panorama of the body's activity in the past year, and as required by law, the report presents a set of proposals for amendments to legislation and regulations. 2013 saw the submission of a number of major reports (including the Lescure Report; see IRIS 2013-6/19), and the Government is preparing new legislation on content creation; this report therefore constitutes the CSA's contribution to consideration of the future of audiovisual regulation. According to the report, its proposals "refer mainly to reinforcing the function of economic regulation carried out by the CSA, in line with the contributions made by the Act of 15 November 2013, and to associating the stakeholders on the digital scene in the fundamental objectives of the regulation of audiovisual communications. Such modernisation will necessarily involve adapting the European legal framework".

The first group of proposals concerns the digital perimeter of the audiovisual sector. The CSA is "convinced that audiovisual regulation is in need of a reform of the range of its scope and methods of action in order to accompany fully and effectively the digital transformation of the media", and therefore recommends involving the stakeholders in online communication around regulation. Thus, faced with the multiplication of operators of electronic communication services which have now become real audiovisual communication media and the fact that they are increasingly out of step with the services that are covered by regulation, the CSA proposes recognising "digital audiovisual services" as a separate category for regulation, and defining their main stakeholders; these include the distributors of such services as well as their editors. This adaptation should be based on their voluntary acceptance of a convention system which would include negotiating undertakings on diversity and pluralism in exchange for specific access to the market or to public aid. The second group of proposals covers the reform of on-demand audiovisual media services (AMS), for which the CSA recommends introducing a series of simplifications and some flexibility, including the creation of a scheme of graduated AMS, and a clarification of the notion of "service" separate from the mode of access used. The CSA also recommends differentiated adjustments to media chronology depending on whether the on-demand act is pay-per-view or by subscription, with time periods being graduated according to the existence of pre-financing, in order to ensure a competitive balance with television services.

In addition to all these proposals, the part of audiovisual regulations which deals with competition also needs to be brought up to date, to make the regulations "reactive, specific, and anticipatory". The CSA believes this requires legislative intervention in three main areas: managing available broadcasting wavelengths, the CSA accompanying the balanced development of audiovisual markets, and regulating relations between producers and editors. A third group of proposals refer to problem areas that are "non-systematic" but nevertheless require some improvements to be made to the Act of 30 September 1986. The CSA is in favour of terrestrial digital television services being included in access providers' offers, as a "crucial condition for the development of a universal, multi-platform, decentralised offer", and also of a series of amendments to the regulations aimed at adapting the support mechanism for creation to the digital era and promoting the development of the legal offer of online audiovisual content (these adjustments should be made by amending the "On-Demand AMS Decree" of 12 November 2010). A number of potential areas for considering ways to boost cinema exposure on television are also presented. In addition to all the proposals it makes, the CSA is advocating the codification of the Act of 30 September 1986 and more generally of audiovisual law, in order to improve both legal security and regulation.

• *Rapport annuel du CSA - 2013* (CSA Annual Report - 2013)
http://merlin.obs.coe.int/redirect.php?id=17007 FR

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France calls for European Strategy on Culture

France's Minister for Culture and Communication Aurélie Filippetti called a meeting of her European counterparts in Paris on 4 and 5 April, as part of the Chaillot Forum on the future of culture in Europe. France's President François Hollande, European Parliament President Martin Schulz, European Commissioners Michel Barnier (Internal Market) and Androulla Vassiliou (Culture and Education), and UNESCO Director General Irina Bokova were also present for a working session. More than 1 200 participants - creators and intellectuals from Europe and further afield, public decision-makers and professionals in the culture sector - joined the Ministers and European Commissioners to discuss the place of culture in Europe. The Minister felt that, as there would soon be a new Commission in place for the period from 2014 to 2019, the time had come for the European Union to adopt a real policy on culture in the digital era, and discussed with her counterparts the broad principles which should form the foundation for such a policy. For Europe, culture is a front-line political and economic issue (3.3% of GDP and 6.7 million jobs throughout Europe). The sector is, however, facing profound changes as a result of the digital revolution (new modes of access to works, changes in cultural and creative habits). Relations between creators, producers and distributors are changing, and the distribution of value is shifting towards new globalised distribution stakeholders, which largely escape European modes of regulation and financing. Even the conditions for creation are changing, particularly with regard to the methods for financing and for remunerating creators. The context raises a number of questions: How should the mechanisms which allow diversity of creation be developed? How can the role of copyright protection be ensured as a means of remunerating creators? How should the conditions for competition and the equitable application of taxation to the various stakeholders be defined? The French Minister called on the EU to make cultural creation in Europe, and cultural diversity, a priority by setting up support mechanisms, particularly for the audiovisual sector and the cinema. She would also like to see discussions on the modernisation of copyright in the digital era guided by the aim of strengthening the creative economy and the remuneration received by creators, including making sure that rights are respected, particularly by combating infringements of intellectual property, including piracy. In this respect, the Minister invited all the stakeholders in the creative digital ecosystem to get involved, in an effort to achieve consistency across all the applicable legislation. She also called on the EU to assist all the stakeholders in cultural content in their digital transition, by stimulating the creation of attractive content and the development of innovative services while ensuring a fair sharing of income.

A roadmap setting out about fifty specific proposals for action in every field was presented; the proposals include aligning the VAT rates applied in the physical and digital worlds, initiating dialogue on the issue of copyright licences, reaching an agreement with digital stakeholders on respect for intellectual property, accelerating the setting up of the fund to support cultural businesses provided for in the Creative Europe programme, the creation of a European Office for Artistic Distribution, etc. Building on the excellent reception received by France's conclusions and proposals, the work will now be continued within the European Union's institutions, more specifically at the meetings of the Council of Ministers for Culture scheduled for May and November 2014.

• *Ministère de la Culture et de la Communication, « Aurélie Filippetti engage avec les ministres européens et la Commission européenne la préparation d'une stratégie européenne pour la culture », Communiqué de presse, 4 avril 2014* (Ministry of Culture and Communication, "Aurélie Filippetti embarks, with the European Ministers and the European Commission, on preparation for a European policy on culture", Press release, 4 April 2014)
http://merlin.obs.coe.int/redirect.php?id=17006 FR

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GB-United Kingdom

Supreme Court requires broadcaster to be notified of evidence for police access to e-mails

During a criminal investigation of two military officers under the Official Secrets Act 1989 for passing information on the Cabinet security committee to the broadcaster BSkyB, the police sought disclosure of evidence from the broadcaster. This included copies of all e-mails between the officers and the broadcaster. After hearing the police and the broadcaster, the court issued a production order. However, a further application, based on secret information, was made by the police for further evidence; the broadcaster was not present before the court and objected to the application. On 12 March 2014, the Supreme Court held that it was unlawful to make such an order without the broadcaster having full access to the evidence and an opportunity to comment on it.

Police investigations are covered by the Police and Criminal Evidence Act 1984. This provides the power for a court to issue a search warrant on an application made ex parte, which means without the other parties being aware or present. However, the Act also creates a special regime for material acquired or created for the purposes of journalism and in the possession of the person who created it for journalism. For such

material, an application must be made to a more senior judge and it must be heard inter partes, that is, in the presence of any other affected parties. Nevertheless, the judge made the order in the absence of the broadcaster. The production order was then quashed by the High Court on the ground that it was procedurally unfair for the broadcaster to have had an order made against it without full access to the evidence on which the police's case was based and the opportunity to comment on or challenge that evidence.

The Supreme Court upheld the decision to quash the order. It held that normally applications for disclosure orders are held ex parte as they do not involve the determination of substantive legal rights. However, as an application for journalistic material would be likely to involve the journalist's legal rights in a highly sensitive and potentially difficult area; exclusion of one party is inconsistent with the nature of the inter partes hearing required in the case of such material, as was recognised in the Act. Equal treatment of the parties means that each should know what material the other is asking the court to take into account and should have a fair opportunity to respond to it.

• R. (on the application of British Sky Broadcasting Ltd) v. The Commissioner of Police of the Metropolis [2014] UKSC 17, 12 March 2014
http://merlin.obs.coe.int/redirect.php?id=16994 EN

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Court reporting in England and Wales: reforms on the way?

The English Law Reform Commission is conducting a wide-ranging review of the area of law known as "contempt of court". Basically, this relates to conduct that undermines or has the potential to undermine the course of justice.

One amongst several areas of inquiry by the Commission is "contempt by publication" - which aims to balance the right of a defendant to a fair trial with the right of the publisher to freedom of expression (Article 6 v. Article 10 of the European Convention on Human Rights). However, it is important that it is not just the substance of what is published that may be of concern. What also matters is if the procedures for dealing with this form of contempt may not be as fair and efficient as possible.

The Report on that issue was ordered to be published by the House of Commons on 25th March 2014. The main Recommendations are to:

- Ensure that court reporting postponement orders are all posted on a single publicly accessible website (a similar website currently operates in Scotland).

- Include a further restricted service where, for a charge, registered users could find out the details of the reporting restriction and could sign up for automated email alerts of new orders.

- Greatly reduce their risk of contempt for publishers, from large media organisations to individual bloggers, and enable them to comply with the court's restrictions or report proceedings to the public with confidence.

• Law Reform Commission - contempt of court
http://merlin.obs.coe.int/redirect.php?id=16999 EN
• CONTEMPT OF COURT (2): COURT REPORTING (Law Comm No 344)
http://merlin.obs.coe.int/redirect.php?id=17000 EN

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RT treated blogger fairly in broadcast

In a decision published on 3 February 2014, Ofcom determined that two RT news bulletins had not depicted blogger Mr Eliot Higgins (who has a pseudonym of Brown Moses) unfairly by referring to the footage appearing on his website of Syrian rebel forces carrying out a chemical weapons attack as unauthenticated, without mentioning that Mr Higgins had queried the video's veracity.

RT (formerly known as Russia Today) is a global news and current affairs channel produced in Russia; in the United Kingdom the channel is broadcast on satellite and digital terrestrial platforms. Mr Higgins has a blogging site and has built a reputation for monitoring the armed conflict in Syria.

Mr Higgins contended that RT had been unjust and unfair towards him. Ofcom determines whether a broadcaster's actions ensure that programmes they broadcast avoid unjust or unfair treatment of an individual or organisation as set out at Rule 7.1 of the Ofcom Broadcasting Code ("the Code").

Ofcom recognizes the importance of the right to freedom of expression and the need to allow broadcasters the freedom to report and broadcast matters of genuine public interest; in particular, the right to freedom of expression in accordance with the Human Rights Act 1998 and the European Convention on Human Rights ("the Convention").

Furthermore, Ofcom had to apply rule 7.9 of the Code, the most recent version taking effect on 21 March 2013, covering all programmes broadcast on or after 21 March 2013. The Code Guidance states at:

"7.9 Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that:

- material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and

- anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute."

On 18 September 2013, RT broadcast two news bulletins at 10am and 11am, both included a story on the Syrian conflict. The report included footage from three videos posted on Mr Higgins's website, allegedly showing the Syrian rebel opposition committing a chemical weapon attack in the Ghouta suburb of East Damascus on 21 August 2013. The Syrian Government and the opposition blamed each other for the attack. Mr Higgins, on his website, suggests that the footage "kinda seems dubious".

The RT reports refer to Mr Higgins as a staunch critic of President Bashar al-Assad. Also, in the two RT reports, the RT reporter suggests that the Syrian opposition had undertaken the attack. The RT reports were accompanied by an on-screen message describing the footage as unverified, and the caption "chemical doubts". RT's reporter and studio presenter also stated on various occasions that the authenticity of the two videos had yet to be verified.

However, each RT broadcast did not refer to Mr Higgin's own caveats on his website and blog that questioned the videos' authenticity. Mr Higgins considered that RT's failure to mention his own concerns misrepresented his involvement by suggesting that Mr Higgins was representing the footage as genuine, which was not the case. RT's failure not to refer to Mr Higgins's own concerns had, in his opinion, potentially damaged his reputation.

Ofcom accepted that to describe Mr Higgins as a "staunch" opponent of President al-Assad and his government was emotive, given the earlier comments made by Mr Higgins. However, the use of "staunch" was reasonable in the circumstances, and not unfair to Mr Higgins.

RT's failure to specifically refer to Mr Higgins's own words of "kinda seems dubious" was not unfair to him, given the number of qualifications used by RT during the broadcasts such as "Chemical doubts", "apparently", and "if indeed it's correct".

Ofcom considered that the RT reports did not suggest that the video's source, namely Mr Higgins's blog site, were representing the videos to be authentic or that they provided conclusive proof as to who had carried out the chemical attack. The RT reports were about the video footage and were not centered upon criticising Mr Higgins or his website. Ofcom did not consider that there was any obligation upon RT to reflect Mr Higgins's own concerns about the video's authenticity. As such, Ofcom considered that Mr Higgins had not been treated unjustly or unfairly in the news bulletins as broadcast.

• Ofcom broadcast bulletin, Complaint by Mr Eliot Higgins, p.62
http://merlin.obs.coe.int/redirect.php?id=16995 EN

Julian Wilkins
Blue Pencil Set

IE-Ireland

New Broadcasting Guidelines on Election Coverage

On 10 March 2014, the Broadcasting Authority of Ireland (BAI) published BAI Guidelines in Respect of Coverage of Local and European Elections. The Guidelines set out the rules and approach that should be adopted by all Irish broadcasters when covering the forthcoming local and European elections. Polling for both elections is scheduled to take place on 23 May 2014.

Rule 27 of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs provides that broadcasters must comply with Guidelines and Codes of practice on election and referenda coverage (see IRIS 2013-5/32). The Guidelines replace the BAI Broadcasting Code on Election Coverage, issued in 2011 (see IRIS 2011-5/26), and are broadly in line with existing practice and the former Code.

The Guidelines also give effect to various general requirements set out in the Broadcasting Act 2009. These include the section 39 requirements that broadcasters ensure that all news and current affairs is reported and presented in an objective and impartial manner without any expression of the broadcaster's own views on election candidates, parties or election.

Section 41(3) of the Broadcasting Act 2009 provides that a broadcaster shall not broadcast an advertisement which is directed towards a political end. However, in line with sections 29(2) and 41(3) they may broadcast Party Political Broadcasts provided that in the allocation of time for such broadcasts no political party is given an unfair preference and no charge is applied for such broadcasts.

There is no requirement that absolute equality of airtime be allocated to opposing parties or candidates during election debates. The Guidelines require broadcasters to ensure that the allocation of airtime is equitable and fair to all interests concerned and is undertaken in a transparent manner; equal airtime is not the only measure of fairness.

Broadcasters are specifically reminded that they are required to have in place appropriate policies and procedures for handling contributions and on-air references to social media. In the context of election coverage, broadcasters must ensure that all references

to social media are accurate, fair, objective and impartial. The Guidelines also encourage broadcasters to provide opportunities to cover the elections in the Irish language.

A moratorium period is maintained as a mechanism to ensure that fairness, objectivity and impartiality are achieved during this critical period in the election process and to allow voters a period for reflection before going to the polls. The moratorium period runs from two p.m. on the day before the poll takes place and throughout the day of the poll itself until polling stations close. Is not intended to preclude coverage of legitimate news and current affairs, during the moratorium period, but broadcasters should avoid content that may influence or manipulate voters' decisions during the moratorium.

The Guidelines, which are effective since 10 March 2014, apply to all broadcasters within the jurisdiction of Ireland and shall not apply to other services commonly received in Ireland but regulated in other jurisdictions.

• Broadcasting Authority of Ireland (BAI), Guidelines in Respect of Coverage of Local and European Elections, 10 March 2014
http://merlin.obs.coe.int/redirect.php?id=16992 EN

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Recent broadcasting complaints decisions

On 27 March 2014, the Broadcasting Authority of Ireland (BAI) released recent broadcasting complaints decisions. A total of ten complaints were considered in the period. At its meeting held in March 2014, the Compliance Committee considered and rejected nine complaints in respect of three programmes, with a further complaint being resolved by the Executive Complaint Forum at its February 2014 meeting.

Under section 48 of the Broadcasting Act 2009, viewers and listeners can complain about broadcasting content that they believe is not in keeping with broadcasting codes and rules. Seven of the complaints related to a single broadcast and in particular to comments made by the presenter of RTÉ 6.01 News, a daily news programme. The presenter referred to two members of a protest group, who moved about behind an interviewee and held up placards to the camera, as 'idiots', when he cut short a live interview.

The complaint relating to this incident was submitted either in whole, or in part, under section 48 of the Broadcasting Act 2009, the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs (see IRIS 2013-5/32), and the BAI Code of Programme Standards (see IRIS 2008-5/23).

In dealing with these complaints, the Compliance Committee was of the view that the presenter could have handled the situation in a better manner and avoided the use of the term 'idiots' to describe the protestors. However, they noted that the subject matter of the live interview was not the same issue as that the protesters were focused on. The Committee determined that as the actions of the protestors could not be considered a matter of news and current affairs that constituted the subject of the broadcast, the presenter's comments were not subject to the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs.

The Committee accepted that the presenter was dealing with what he perceived to be a technical issue linked to the disruption in the quality of an interview that was being broadcast live. They noted that the protestors had entered the camera shot after the interview commenced, moved about during the interview and could be heard talking. The Committee also noted that the presenter clearly linked the decision to end the interview early with the distraction being caused by the protestors. They determined that the use of the term 'idiots' to describe the protestors arose out of the presenter's frustration at the distraction being caused and could not be seen as a comment on the message the protestors sought to communicate.

Having regard to their determinations, in relation to the circumstances of the incident, the Committee did not agree that the presenter's 'idiots' comment infringed the rules of the BAI Code of Programme Standards in respect of commonly held standards, protection of groups and individuals in society or factual programming. Accordingly, all aspects of all the complaints, in respect to this incident, were rejected.

• Broadcasting Authority of Ireland, Broadcasting Complaints Decisions, (March 2014)
http://merlin.obs.coe.int/redirect.php?id=16991 EN

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LV-Latvia

The National Electronic Mass Media Council explores legal options to limit certain retransmissions

The *Nacionālā elektronisko plašsaziņas līdzekļu padome* (National Electronic Mass Media Council), the national regulatory authority, has been recently exploring legal options for limiting retransmission of certain television broadcasts, which might be contrary to Latvian and EU law. Within the context of the Ukraine

and Crimea crisis, the Council has received numerous complaints that several Russian language television channels contain broadcasts, which allegedly promote war and military conflict, as well as include incitement to hatred and destruction of the territorial unity of countries. Also, the Public Consultative Council, a consulting body to the Council, is of the opinion that several channels intentionally broadcast misleading information unfavourable to Latvian territorial integrity.

As a result, the Council has considered the possible steps of action in response to such complaints. The respective channels indicated in the complaints are mainly in the jurisdiction of other European Union member states or Latvia itself, so the freedom of reception generally applies. The only means to restrict such broadcasts should be based on Article 3(2) of the Audiovisual Media Services Directive, as implemented by the Latvian Electronic Mass Media Law. Thus, as the first step it must be established whether the broadcasts manifestly, seriously and gravely infringe Article 27(1) or (2) (protection of minors) and/or Article 6 (incitement to hatred) of the Directive.

Therefore, on 26 February 2014, the Council has requested information on the news broadcasts from the respective national regulators who have the jurisdiction over the possibly infringing channels. The respective channels are Rossiya RTR, which is under Swedish jurisdiction, and NTV-Mir, which is registered in the United Kingdom. These channels are retransmitted in Latvia by cable operators, and also available on satellite platforms. In addition, the Council itself has requested records of the news broadcasts broadcast within January and February 2014 from the satellite broadcaster SIA "Pirmais Baltijas kanāls" (First Baltic Channel), which is under the Latvian jurisdiction and targeting the Russian speaking audience in all three Baltic countries.

After receiving the programme broadcasts the Council is planning to analyse their contents to establish whether there has been any violation of the Latvian Electronic Mass Media Law and the principles established in the Directive.

In the following, the National Electronic Mass Media Council decided on 3 April 2014 to restrict the cable rebroadcasting of television channel Rossiya RTR on the territory of Latvia for a period of three months.

• Decision N°95 on restricting the rebroadcasting of Rossiya RTR in Latvia, 3 April 2014
http://merlin.obs.coe.int/redirect.php?id=16982 EN

• For more information see the EPRA news of 10 April 2014 "Latvian regulator issues temporary ban to Russian TV channel Rossiya RTR"
http://merlin.obs.coe.int/redirect.php?id=16983 EN

Ieva Andersone
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NL-Netherlands

Dutch Supreme Court rules on cable transmission

On 28 March 2014, the Dutch Supreme Court handed down its judgment in the case of NORMA and others v. NLKabel and others. NORMA, a collective management organisation for neighbouring rights of performers, claimed that the cable operators, represented by NLKabel, needed permission from the performers to transmit the television programmes over cable to their subscribers. Pursuant to the Dutch Neighbouring Rights Act, the retransmission rights of performers in their performances are enforced by a collective management organisation. In the present case, NORMA acted on behalf of the performers.

In its judgment, the lower court considered that two situations should be distinguished, i.e. the situation before the digital "switch-off"; and the situation after the 'switch-off'. This refers to the change in deliverance of TV signals from the broadcasters to the cable operators. Before the switch-off on 11 December 2011, broadcasters transmitted their TV signals over radio waves, which were receivable by both television viewers and cable operators. The cable operators then further transmitted these signals to their subscribed viewers. This was deemed to be a 'retransmission'. After the switch-off, the transmission of the TV signals over radio waves was discontinued. According to the lower court, the cable operators only received their TV signals directly from the broadcasters through a media gateway.

The Supreme Court had to decide whether the transmission of television programmes by the cable operators after the switch-off was to be considered a 'cable retransmission' within the meaning of the Dutch Neighbouring Rights Act and the SatCab Directive (93/83/EEC).

The Supreme Court decided that the technique used after the 'switch-off' could not be considered a 'retransmission' within the meaning of the SatCab Directive. The Court explained that the transmission by the cable operators has to be preceded by a primary 'communication to the public', a concept that is, according to the court, harmonised in the EU for both copyrights and neighbouring rights. It therefore interpreted the concept as developed by EU case law. As only the cable operators received the signals from the broadcasters, the cable operators could not be regarded as 'an indeterminate number of potential television viewers'. Therefore, they were not considered to be a 'public' and the transmission of the signals to the cable operators could thus not be regarded as a communication to the public. It was therefore held

that there was no 'retransmission' by the cable operators.

• *Hoge Raad, 28 maart 2014, ECLI:NL:HR:2014:735 (NORMA c.s./NL Kabel c.s.)* (Dutch Supreme Court, 28 March 2014, ECLI:NL:HR:2014:735 (NORMA and others v. NLKabel and others))
http://merlin.obs.coe.int/redirect.php?id=16996 NL

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RO-Romania

Audiovisual rules for the 2014 European Parliament elections in Romania

On 20 March 2014, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA) adopted the Decizia nr. 185/2014 privind regulile de desfăşurare în audiovizual a campaniei electorale pentru alegerea membrilor din România în Parlamentul European (the Decision no. 185/2014 with regard to the rules of the audiovisual electoral campaign for the election of the members from Romania in the European Parliament) (see IRIS 2009-6/28 and IRIS 2011-3/29).

The elections will be held on Sunday 25 May 2014. The audiovisual electoral campaign will start on 25 April at 00.00 and will end on 24 May at 07.00 local time [Art. 1(1)]. The legislation to be observed is composed of the Legea nr. 33/2007 privind alegerile pentru Parlamentul European, republicată (Law no. 33/2007 with regard to the elections for the European Parliament, republished), the Legea audiovizualului nr. 504/2002 cu modificările şi completările ulterioare (Audiovisual Law no. 504/2002 with further modifications and completions), the Audiovisual Code, and the present Decision [Art. 1 (2)].

The broadcasters have to observe the principles of fairness, balance, impartiality in relation to the electoral competitors (Art. 3). The electoral campaign programmes are free of charge on public radio and television services [Art. 7 (2)] and the commercial broadcasters which decide to offer airtime for the campaign will charge single rates per unit of time and/or programme [Art. 5 (2)]. These commercial radio and TV stations have to notify the CNA of their intention to air electoral programmes [Art. 5(1)], the electoral programmes schedule, as well as the tariffs they will charge (Art. 6).

The audiovisual electoral campaign airtime will be divided as follows: 4/5 will be equally shared among electoral competitors who now have MEPs (with the exception of independent candidates) and 1/5 of the airtime will be equally shared among electoral competitors which do not have MEPs, as well as among independent candidates [Art. 38 (4) of the Law no. 33/2007].

According to Art. 7, the access of electoral competitors will be allowed only in electoral promotion programmes, electoral debates and electoral advertisements. The electoral campaign activities of the competitors can be covered in informative programmes, under the condition of observing fairness, balance, impartiality and the correct information for the public (Art. 8).

The electoral promotion programmes will be clearly marked by broadcasters (Art. 11). During the election campaign, the candidates (representatives of electoral competitors) cannot be producers, presenters or moderators of public and private broadcasters' programmes [Art. 12 (1)]. The candidates who hold public office may appear in other programmes than electoral ones strictly on issues related to the exercise of their functions. In these situations broadcasters are required to ensure fairness and a diversity of opinions [Art. 12 (2)].

The broadcasters are also required to ensure for the electoral programmes the observance of the following rules: the programmes do not incite hatred on grounds of race, religion, nationality, sex or sexual orientation; they do not contain statements that undermine human dignity, the right to one's image, or that are contrary to morality; the programmes must not contain criminal or moral accusations against other candidates or electoral competitors without being accompanied by relevant evidence presented explicitly (Art. 13).

According to Art. 14, the producers, presenters and moderators of electoral debates have to be impartial; ensure the balance during the show, giving each guest the chance to express its opinions; ensure the debate sticks to electoral themes; intervene when guests breach, by conduct or expressions, the rules provisioned in Art. 13; if the guest does not comply with the requests, the moderator may take the decision to interrupt microphone or show off, as appropriate.

The breaches of the Decision will be sanctioned according to the Audiovisual Law and the Law 33/2007, republished.

• *Decizia nr. 185 din 20 martie 2014 privind regulile de desfăşurare în audiovizual a campaniei electorale pentru alegerea membrilor din România în Parlamentul European* (Decision no. 185 of 20 March 2014 with regard to the rules of the audiovisual electoral campaign for the election of the members from Romania in the European Parliament)
http://merlin.obs.coe.int/redirect.php?id=16984 RO

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Decision for the modification and completion of the Audiovisual Code

On 27 March 2014, the *Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA) adopted the*Decizia nr. 197/2014 privind modificarea și completarea Deciziei Consiliului Național al Audiovizualului nr. 220/2011 privind Codul de reglementare a conținutului audiovizual, cu modificările și completările ulterioare* (the Decision no. 197/2014 for the modification and completion of the CNA Decision no. 220/2011 with regard to the Audiovisual Content Regulatory Code, with further modifications and completions - Audiovisual Code) (see inter alia IRIS 2006-4/33, IRIS 2011-7/37, IRIS 2013-6/27).

A new Art. 291 was introduced after Art. 29 of the Code, according to which for live programmes, except news programmes and sports events, the broadcasters are obliged to use any means, including the delay, in order to prevent the airing of scenes, expressions and behaviors which breach the provisions of the Audiovisual Code with regard to the protection of minors and of human dignity. Art. 40 (3) was also modified and the new form provides that the moderators, the presenters and the programme makers are obliged not to use and not to allow the guests to use insulting language or to incite to violence.

The media associations, such as ActiveWatch and *Asociaţia Română de Comunicaţii Audiovizuale* (Romanian Association for Audiovisual Communications) harshly criticized the introduction of the delay in live broadcasts, citing possible censorship of the mass-media. They also considered that the measure is useless, because the National Audiovisual Council already has the necessary legal powers to sanction the broadcasters if needed. The critics of the measure consider that the delay affects the freedom of expression of the broadcaster and of the guests, as well as the right to information of the public. On the contrary, the President of the CNA, Laura Georgescu, considers that the measure has a preventative role.

Another modification of the Audiovisual Code concerns airing images or recordings with persons in detention or arrest. According to the new form of Art. 42 (1) it is forbidden to air images or recordings of persons in detention or arrested, without their consent. According to Art. 42 (2), it is forbidden to release images or recordings of convicted people, unless they prove violations of some rights or there is a justified public interest. Art. 42 (3) provides that these kind of images/recordings are not to be presented in an excessive and unreasonable way. The new form of Art. 42 stipulates in paragraph (4) that one cannot offer during audiovisual programmes, directly or in an indirect way, rewards or promises for rewards for people who could testify in court.

The decision enters into force 30 days after its publication in the Official Journal of Romania.

• *Decizia nr. 197 din 27 martie 2014 privind modificarea și completarea Deciziei Consiliului Național al Audiovizualului nr. 220/2011 privind Codul de reglementare a conținutului audiovizual, cu modificările și completările ulterioare* (Decision no. 197 of 27 March 2014 for the modification and completion of the CNA Decision no. 220/2011 with regard to the Audiovisual Content Regulatory Code, with further modifications and completions)
http://merlin.obs.coe.int/redirect.php?id=16985 RO

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ANCOM launches auction for digital television multiplexes

The *Autoritatea Naţională pentru Administrare şi Reglementare în Comunicaţii* (Romanian Authority for Management and Regulation in Communications - ANCOM) launched the auction for digital television multiplexes, by publishing on 27 March 2014 the official announcement on the availability for sale of the Terms of Reference (see IRIS 2009-9/26, IRIS 2010-3/34, IRIS 2010-7/32, IRIS 2010-9/35, IRIS 2011-4/33, and IRIS 2013-1/30).

In Romania, the digital switchover shall be completed by 17 June 2015, according to the strategy approved by the Government. On 17 June 2015, all analogue terrestrial broadcasting will be switched off and replaced by the digital terrestrial broadcasting of radio and TV programmes and related multimedia services.

Until 8 May 2014, at 5.00 pm local time, all interested bidders may apply for participation in the competitive selection procedure held by ANCOM for the five multiplexes available for Romania. ANCOM will auction four multiplexes in UHF and one in VHF, in the DVB-T2 standard.

The Terms of Reference can be purchased starting on 27 March 2014, at a price of lei 4,000 (EUR ˜895). In order to participate in the auction, applicants have to meet a series of qualification criteria, such as: the applicant must be a Romanian or foreign commercial company; its average turnover for the last 3 years or from the date of establishment must be of minimum EUR 2,000,000; the life duration of the applicant provided in its constitutive act must exceed 17 June 2025; all payment obligations to the state budget, social insurance budgets and special tax funds, contributions etc., as well as obligations towards ANCOM have to be paid in full. Companies belonging to the same group may not apply.

The Auction Commission will assess the application documents and will announce the applicants qualifying for the next stage by 15 May 2014. Also, by 22 May 2014 it will announce whether auction rounds are

required or not, depending on the supply/demand ratio. If the demand exceeds the available resources, the auction rounds will start on 5 June 2014.

The competitive selection procedure requires that each bidder submits an initial offer, indicating the number of multiplexes he wishes to purchase. Where the demand exceeds the number of available multiplexes, primary rounds will be organised until the demand no longer exceeds the supply. Where, upon the completion of the primary rounds, no bidder has won some of the multiplexes, ANCOM may decide to organise an additional primary round to which all the bidders qualified in the tender stage may participate.

The multiplexes in the UHF band, except for the multiplex under the free-to-air broadcasting obligation, will be allocated to the winners following the initial offer or the additional rounds, as applicable, by means of an allocation round.

The winner of the first multiplex in UHF will have the obligation to broadcast free-to-air, under transparent, competitive and nondiscriminatory conditions, the public and commercial televisions that are currently broadcast in analogue terrestrial system, in accordance with the provisions of the Audiovisual Law no. 504/2002. According to the digital switchover strategy, this multiplex will have to ensure a coverage, in fixed reception, of 90% of the population and of 80% of the Romanian territory by 31 December 2016, as the only multiplex, out of the five available, bearing such coverage obligations. For the other multiplexes, the operators will have the obligation to launch in operation by 1 May 2017 at least 36 broadcasting stations for each of the networks corresponding to these multiplexes, installed one in each allocation area.

The starting price for each multiplex is EUR 300,000, the minimum licence fee established by the Government. All the multiplexes will be granted for a 10-year period, while the licences will enter into force starting from 17 June 2015. The winners will have the obligation to pay the licence fee no later than 90 calendar days after the result is announced.

• *Announcement regarding the launch of the competitive selection procedure in view of awarding the licences for the use of the radio spectrum in digital terrestrial television system, 27 March 2014* (Announcement regarding the launch of the competitive selection procedure in view of awarding the licences for the use of the radio spectrum in digital terrestrial television system, 27 March 2014)
http://merlin.obs.coe.int/redirect.php?id=16986 RO

• Terms of reference for organising the competitive selection procedure for awarding licences for the use of the radio frequency spectrum in digital terrestrial television system
http://merlin.obs.coe.int/redirect.php?id=16988 EN

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Recommendation with regard to accidents and medical subjects coverage

On 6 March 2014, the*Consiliul Naţional al Audiovizualului* (National Audiovisual Council - CNA) issued the Recommendation no. 1/2014 with regard to the accidents and medical subjects coverage in the audiovisual programmes services (see IRIS 2011-1/44, IRIS 2011-10/37, IRIS 2012-3/31, and IRIS 2014-1/40).

The Recommendation was issued due to the accelerated tabloidisation of the audiovisual media in Romanian, to the important emotional impact of the news and current affairs TV programmes and is in line with the legal provisions. According to Art. 29 (1) of the Audiovisual Code (CNA Decision no. 220 of 24 February 2011), the news and current affairs programmes have to observe the principle of minor protection and of watching TV in family situations. According to Art. 29 (2), audiovisual programmes services providers are obliged before broadcasting shocking images, scenes of violence or with negative emotional impact on the viewers, to verbally warn the TV spectators: "Caution! The images can affect viewers emotionally!" The warning will be also displayed statically and readable on the screen. At the same time the broadcasters cannot repeatedly air scenes of violence in the same audiovisual works.

The Recommendation 1/2014 provides that news presenters have to avoid any emotional involvement and must present the subjects in a neutral, objective and balanced way, without any sensational stress, relying on information provided by studies, research and specialists, mainly in the fields of accidents and medical matters. The display of titles linked to accidents and medical issues have not to trigger emotional reactions. In the news bulletins, the broadcasters have not to air repeatedly and without justification violent images, as well as film credits and sounds with strong emotional impact.

The CNA asked all the broadcasters to observe the provisions of the Audiovisual Code with regard to news and debate programmes with a view to rigor and accuracy in editing and presenting the news; a real connection between the covered subject and the images used during the commentary; the titles and texts displayed on the screen have to reflect as closely as possible the core of the facts and data presented; in the case of reconstitutions, these have to be clearly marked; records coming from sources external to the news desk have to be clearly identified as such; by asserting of causal hypotheses with regard to the occurrence of any disaster, the broadcasters have to request the opinion of the competent authorities.

• *Recomandarea CNA nr. 1 din 6 martie 2014 cu privire la subiectele din domeniul medical sau din cel al accidentelor în cadrul serviciilor de programe audiovizuale* (CNA Recommendation no. 1 of 6 March 2014 with regard to the accidents and medical subjects coverage in the audiovisual programmes services)
http://merlin.obs.coe.int/redirect.php?id=16986 RO

Eugen Cojocariu
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RU-Russian Federation

Rosbalt case at Supreme Court

On 19 March 2014 the Judicial Collegium on administrative cases of the Supreme Court of the Russian Federation made a resolution on an appeal complaint from JSC "News Agency Rosbalt". The Supreme Court looked into warnings sent by Roskomnadzor (the federal media and telecommunications watchdog) on 12 and 25 July 2013 to the editorial office of the online news service Rosbalt. Roskomnadzor claimed that Rosbalt had abused media freedom by posting materials that contained obscene language. According to the media law, two warnings may lead to a demand by Roskomnadzor that the court annuls a media registration (see, e.g. IRIS 2009-8/28). It also reviewed the subsequent decision of the Moscow City Court to permanently annul Rosbalt's certificate of registration (dated 31 October 2013).

In its resolution the Supreme Court followed the legal finding of the Constitutional Court of the Russian Federation by saying that "limitations by law of freedom of speech and the right to disseminate information may not take place in relation to activities or information on the mere grounds of their inconformity with established traditional views, or contradiction with moral and/or religious preferences. Other will mean a retreat from the constitutional demand of necessity, proportionality and fairness of limitations of human rights04046"

The Supreme Court found that the lower courts had refused to look into the essence of Roskomnadzor claims while the warnings of the watchdog had been procedurally faulty.

The Supreme Court found that the sanctions imposed on Rosbalt were disproportionate and disregarded the context of the news stories. The stories, one of them on the Pussy Riot band, did not aim to shock imagination of the Internet users, but were rather of socio-political nature. Therefore the Moscow City Court decision cannot be recognized as lawful. The Supreme Court pronounced it null and void, and took a new decision that refuted Roskomnadzor claims.

On 27 March 2014, the OSCE Representative on Freedom of the Media Dunja Mijatović welcomed the Supreme Court decision to reinstate Rosbalt news agency's certificate of registration as a mass media outlet.

• Определение Судебной коллегии по административным делам Верховного суда РФ по делу № 5- АПГ *13-57* (Resolution of the Judicial Collegium on administrative cases of the Supreme Court of the Russian Federation on case #5-APG13-57)
http://merlin.obs.coe.int/redirect.php?id=16970 RU

• Press release of the OSCE Representative on Freedom of the Media, "Russian Supreme Court once again supports media freedom, says OSCE representative", 27 March 2014
http://merlin.obs.coe.int/redirect.php?id=16971 EN

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Sanction against current affairs programme with high representatives of executive dismissed

On 25 March 2014, the *Rada pre vysielanie a retransmisiu* (Council for Broadcasting and Retransmission of the Slovak Republic) delivered a decision that formally terminated the legal proceedings taken against the public service broadcaster (PSB). The strictly formal decision (with no reasoning since no sanction was imposed) was however adopted based on the judgment of the Supreme Court ("Court") of 26 September 2013 which overruled the original decision of the Council in the given case.

In its original decision, the Council imposed a warning to the PSB for breaching the obligation to present a current affairs programme that featured three highest representatives of the executive (President, Prime minister, Speaker of the Parliament) objectively and impartially. The Council stated that even though the guests of the programme participated as representatives of the executive and not as members of the political party, the overall message received by the audience was the praise of the executive's activities. The prime minister and Speaker of the Parliament were both members of the leading party.

The Council stressed that when evaluating the performance of the government it is virtually impossible to distinguish the executive function from the affiliation to a certain political party, especially in the case of the prime minister and speaker of the parliament.

The PSB presented the programme as a room for the highest representatives of the executive to express their opinions to the pressing social issues (economical crisis, new toll system and the truckers' strike but also a failed police exercise where Irish airplane security arrested a Slovak civilian). In its decision, the

Council highlighted that the programme lacked alternative points of view, especially in the parts of the programme where guests expressed mostly political statements. The PSB argued that the opinion diversity of the programme was preserved by the pre-recorded short messages from the political opposition (aired at the beginning of the programme) and by the active role of the programme's host.

The Council contended that the pre-recorded messages covered only a minimum part of the political messages expressed by the guests and even topics touched by these messages were in the end interpreted from the guests' point of view. According to the Council the host of the programme did not effectively use available means to preserve opinion diversity in the programme.

The Court acknowledged the PSB arguments about the character of the programme and agreed that the guests' appearance in the programme "was not strictly in political nature", moreover the President cannot be considered as a representative of any political party due to his unique position. The right to provide space for highest representatives of the executive to express their opinions on grave social issues is protected by Article 10 of the ECHR. The Court disagreed with the Council's opinion on the performance of the host of the programme. In the view of the Court, the host of the programme with his active approach balanced the overall message of the programme; thus preserved its objectiveness and impartiality. Therefore, the Court overruled and returned the decision to the Council for a new procedure. The Council, bound by the legal opinion of the Supreme Court therefore officially terminated the legal proceedings without imposing any sanction.

• *Najvyšší súd, 26/09/2013* (Decision of the Supreme Court of 26 September 2013)
http://merlin.obs.coe.int/redirect.php?id=16989 SK

• *Rada pre vysielanie a retransmisiu, 25/03/2014* (Council for Broadcasting and Retransmission of the Slovak Republic, decision of 25 March 2014)
http://merlin.obs.coe.int/redirect.php?id=17020 SK

Juraj Polak
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Sanction against current affairs programme state tender dismissed

On 25 March 2014, the *Rada pre vysielanie a retransmisiu* (Council for Broadcasting and Retransmission of the Slovak Republic) delivered a decision that formally terminated the legal proceedings taken against a major commercial broadcaster. The strictly formal decision (with no reasoning since no sanction was imposed) was however adopted based on the judgment of the Supreme Court ("Court") of 21 November 2013 which overruled the original decision of the Council in the given case.

In its original decision, the Council imposed a warning to the major commercial broadcaster for breaching the obligation to present current affairs programmes objectively and impartially. The programme reported upon the tender of an operator for the national medical emergency system. Among other things, the tender criteria and professional competency of the tender's committee members were questioned. The Council acknowledged these comments as legitimate with regard to the purpose of the article - media monitoring of the governmental tender procedure. However, when judging someone's professional capability, in order to maintain the objectiveness of the programme, it is necessary to provide his point of view to such delicate subject.

During the legal proceedings, the broadcaster claimed that he addressed each member of the committee. However, only one was willing to provide a statement on this subject (which was indeed used in the programme). The reporter informed the viewers about the refusal of other committee's members to comment on the subject.

The Council in its decision contended that the viewer was informed only by the reporter's statement without any means that would allow the viewer to verify it. As a result, the viewer was not properly informed about a crucial aspect of the topic. Therefore, the broadcaster did not preserve the objectiveness and impartiality of the current affairs programme.

The Court in its ruling stressed the educational aspect of the warning as a sanctioning tool. In order to adequately fulfil its purpose, the warning must contain "detailed instruction" for the broadcaster how to deal with similar situations in the future. The Court acknowledged the detailed arguments concerning the refusal to comment on the topic by the other members of the committee presented by the broadcaster during legal proceedings and pointed out that the Council in its decision did not contradict any of these arguments. According to the Court "it is impossible to force someone to comment on the topic in the programme". Furthermore, the Court stressed that it is unclear how the broadcaster should secure footage of the committee members' refusal to comment and how to "place" such footage into the storyline of the programme. In the Court's opinion, the broadcaster provided room for each member of the committee to comment on the topic as well as for the Health Ministry state body responsible for the tender. The Court came to the conclusion that the programme was objective and impartial. Therefore, the broadcaster fulfilled its legal obligation.

The Court overruled and returned the decision to the Council for a new procedure. The Council, being bound by the legal opinion of the Court, officially ter-

minated the legal proceedings without imposing any sanction.

• *Najvyšší súd, 21/11/2013* (Decision of the Supreme Court of 21 November 2013)
http://merlin.obs.coe.int/redirect.php?id=16990 SK

• *Rada pre vysielanie a retransmisiu, 25.03.2014* (Council for Broadcasting and Retransmission of the Slovak Republic, decision of 25 March 2014)
http://merlin.obs.coe.int/redirect.php?id=17021 SH

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Fine for Call TV Quiz Show Confirmed

On 6 May 2014, the Supreme 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 EUR 16,000 on the major commercial TV broadcaster for failing the obligation to broadcast only fair teleshopping.

The Council received a substantial amount of complaints against interactive quizzes offering money prizes broadcast on various TV channels. The complaints habitually referred to these as a "fraud" and questioned the core practises of such programmes, e.g. premium rate telephone numbers (PRTN), encouraging viewers to call in, but actually connecting only a minimum portion of callers etc.. The Council replied that it is not entitled to review, whether such business practices are in line with the relevant legislation and advised the applicants to address the Slovak Business Inspection. The Council however acknowledged that complaints that objected the unfair manners in which the quiz questions were presented can be a relevant violation of the law and declared that such actions may under certain circumstances qualify as the violation of the legal obligation to broadcast only fair teleshopping.

First however, it must have been assessed, whether these programmes may qualify as teleshopping. According to the judgement "No. C-195/06 KommAustria v ORF" of the European Court of Justice (ECJ) the main criteria when assessing Call TV Quiz Shows are whether the show represents a real offer of services having regard to the purpose of the broadcast of which the game forms a part, the significance of the game within the broadcast in terms of time and of anticipated economic effects in relation to those expected in respect of that broadcast as a whole and also to the type of questions, which the candidates are asked. The show in question invited viewers to participate through PRTN in game of chance with the possibility of winning prize money, i.e. the broadcaster in return for payment made a service available to the viewer by allowing him to participate in a game of chance. The Council therefore needed to assess, whether this possibility represents a real offer of service for the viewers.

In its decision, the Council declared that the purpose of the show was clearly to "acquire" as many callers as possible. The interactive element did not only represent a small supply of interactive entertainment in addition to the main purpose of the show, since the only purpose of the show was the offer to participate in an interactive game of chance. The shows in question represent circa 6% - 7 % of the daily transmission time of the broadcaster and one third of the daily time is devoted to the commercial media communication. Therefore, the shows constitute a relevant proportion of the broadcasting time as a whole. The Council also stated that even though the actual economic effects of the shows for the broadcasters cannot be established precisely (the Council lacks competences in this respect) due to the considerable broadcasting time devoted to these shows as well as the fact that these shows are not interrupted by advertising, it is reasonable to presume that the economic effect is significantly.

The question that needed to be correctly answered in order to win prize money was a form of mathematical exercise, which was displayed on the screen in pictures. The Council stated that the instructions given by the host of the show were misleading and confusing. During the show, instructions varied from counting the numbers to numeric characters and from counting numbers/numeric characters "on the picture" to counting these "on the screen" even though only counting all numeric characters (i.e. not only numbers but also letters and signs that could be considered as roman figures e.g. "C" = 100 etc.) on the whole screen (not only in the picture) could lead to the correct answer. Furthermore, the solution provided by the broadcaster interpreted same signs differently without any logical justification (bracket in one case was considered as "C", and thus 100 but the second bracket was considered as "nothing"). Based on all these facts, the Council declared that the show must be qualified as teleshopping. This teleshopping deceived the viewers by presenting false chance to win (in return for payment) and thus cannot be considered as "fair".

In his appeal, the broadcaster claimed that this show is merely an entertainment programme. According to the broadcaster, the transmission time devoted to this show is low and trivial compared to the transmission time of the TV Channel as a whole. The broadcaster also argued that the show in question is an acquired programme that does not bring any economic effect to him (i.e. he broadcasts the programme for free and does not share the incomes from phone calls).

The Court fully supported the Council's arguments with regard to the assessment of the programme as teleshopping as well as with regard to the misleading manner, in which the instructions for solving the

problems were presented. With regard to the broadcaster's claim of not having any profit from this show, the Court stated that the producer of this show on his website offers two types of business models for broadcasters. Broadcasters can either receive payment from the producer of the show for the provided transmission time (same principle as advertising) or they may provide the transmission time for free and participate on the incomes from phone calls. According to the Court, the broadcaster did not provide any evidence that could lead to a reasonable assumption that the broadcaster in this case did not profit from the show.

• *Najvyšší súd, 6.5.2014* (Decision of the Supreme Court of 6 May 2014)
http://merlin.obs.coe.int/redirect.php?id=17304 SK

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Agenda

Book List

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