

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: *Prezhdarovi v. Bulgaria* 3

EUROPEAN UNION

European Commission: Aid to finance digitisation and extension of terrestrial television in Spain incompatible with EU law 4
European Commission: Progress report on cultural heritage digitisation 4

NATIONAL

BE-Belgium

New act addresses sexism in the public space 5

BG-Bulgaria

Another private special-interest channel withdrawn from digital transmission 5

CH-Switzerland

Parliament adopts universal broadcasting charge 6

DE-Germany

BGH permits use of illegally obtained e-mails for reporting purposes 7
BGH confirms advertising ban for online game "Runes of Magic" 7
Discontinued porn films constitute official information in accordance with the Freedom of Information Act 8
Federal Government report on progress in combating child pornography on the Internet 8
GVK and VPRT agree guidelines for labelling of scripted reality formats 9

ES-Spain

National Commission for Market Competition opens an investigation into the Commercial Radio Broadcasters Association 9

FR-France

Play TV heavily penalised for infringing copyright held by France Télévisions 10
Judgment ordering Facebook France to reinstate a "non-official" page operated by fans of a television series overturned 11
Recognition of the good faith of a journalist who wrongly presented a man as a terrorist 12

Infiltration and concealed camera methods do not exclude good faith 12
Bonus channel - Conseil d'État rejects M6's application .. 13
CSA's refusal to authorise LCI's move from pay TV to freeview: the next stage in the courts 14

GB-United Kingdom

United Kingdom adapts existing copyright law to allow greater fair dealing and flexibility for the digital age 15
The BBC sets a requirement for current affairs programming in peak hours on its main channel 16
Split-screen advertising: reminder about the applicable rules 16

HU-Hungary

State intervention in the market for commercial television 17

IE-Ireland

Complaint against broadcast of dance routine with sexual overtones upheld 17

LU-Luxembourg

Ratification of the Council of Europe Convention on Cybercrime 18

NL-Netherlands

Court applies Google Spain: no right to be forgotten for convicted criminal 19
Dutch legislator proposes two bills on the protection of journalistic sources 19
Amendments to frequency allocation regulation 20
Proposed amendments to telecommunications law affecting public broadcaster's website cookies 21

PT-Portugal

Amendment to the Cinema Act allows operators to pay less 21

RO-Romania

Rules for the audiovisual electoral campaign for the presidential election 22

RU-Russian Federation

Act on the limitation of foreign ownership in the media .. 23

UZ-Uzbekistan

Statute regulates blogging 24

MK-"the Former Yugoslav Republic Of Macedonia"

Government's subsidies for private and public media 24

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: **Prezhdarovi v. Bulgaria**

In an unexpected judgment, the European Court of Human Rights found a violation of the right to respect for private life, as it considered that the confiscation of computers containing illegal software was not “in accordance with the law”, as required by Article 8 of the European Convention of Human Rights (ECHR). Rumen Trifonov Prezhdarov and Anna Aleksandrovna Prezhdarova had started a business in their garage renting computers to clients, without having the necessary software licence for reproduction and distribution of the software and games that were installed on the computers. After a complaint by a manager of a company that distributed computer games, the district prosecutor ordered a police inquiry. Three weeks later the police inspected the applicants’ computer club and found that five computers contained computer games. Prezhdarov was invited to present documents, such as purchase invoices or any other evidence of his title to the games. As he failed to do so, the police seized the computers. Several requests to return the computers, due to the fact that they contained personal data, were dismissed. During the further criminal proceedings and trial, the computers remained confiscated. Prezhdarov was convicted for illegally distributing computer games and for illegally reproducing computer programmes and films. He was sentenced to one year and six months’ imprisonment, suspended for three years, and ordered to pay a fine in the amount of BGN 4,000. The confiscated computers were not returned after sentencing.

Prezhdarov and Prezhdarova, relying on Article 8 ECHR, complained that the search in their garage and the seizure of five computers had not been conducted in accordance with the law. They argued, in particular, that private documents contained in the seized computers, which were unrelated to the criminal proceedings against the first applicant, had been caught up in the search-and-seizure operation.

The European Court of Human Rights emphasised that, in the context of search and seizure, the domestic law must provide for sufficient safeguards against arbitrary interference with Article 8 ECHR. The Court accepted that Bulgarian law allowed the police to conduct an immediate search-and-seizure operation outside the criminal proceedings if that was the only possibility of collecting and securing evidence. The Court, however, expressed its doubts of whether the circumstances in the present case were really press-

ing, given that the prosecutor ordered the said operation three weeks before it was conducted. Therefore, the authorities had enough time to collect more information regarding the alleged criminal conduct, to open criminal proceedings, and to submit a prior request to the Court.

Furthermore, the Court considered that the absence of a prior judicial warrant was not counterbalanced by the availability of a retrospective and effective judicial review. The Bulgarian court that approved the measure did not consider the scope of the operation, and did not make a distinction between information that was necessary for the investigation, and information that was not relevant. The European Court of Human Rights accepted that, as a matter of principle, the retention of the computers for the duration of the criminal proceedings pursued the legitimate aim of securing physical evidence in an ongoing criminal investigation. However, it was of the opinion that the lack of any consideration of the relevance of the seized information for the investigation, and of the applicants’ complaint regarding the personal character of some of the information stored on the computers, rendered the judicial review formalistic and deprived the applicants of sufficient safeguards against abuse. Therefore, the Court considered that even assuming that there existed a general legal basis in Bulgarian law for the impugned measure, the applicants in the present case were not offered sufficient guarantees for their right to respect for their private life before or after the search-and-seizure operation. In these circumstances, the Court found that the interference with the applicants’ right to respect for their private life was not “in accordance with the law” as required by Article 8 § 2 of the Convention and hence violated Article 8 of the Convention. Consequently, the Court did not need to examine whether the impugned measure had a legitimate aim and was proportionate.

One judge, Faris Vehabović, dissented, arguing that as Prezhdarov was sentenced for illegal use of software, it appeared that through his request for return of the confiscated computers (together with software installed on them), he was in fact seeking to regain possession of intellectual property acquired by committing a criminal act. In any democratic country, according to judge Vehabović, it would be unprecedented that property acquired as a result of a criminal act be returned to a convicted person, even if that property contained personal data, in order to satisfy the requirements of Article 8 under the concepts of “home” or “private life”. But this argument could not persuade the majority of the Court that found a violation of Article 8.

• Judgment by the European Court of Human Rights (Fourth Section), case of Prezhdarovi v. Bulgaria, Appl. No. 8429/05 of 30 September 2014
<http://merlin.obs.coe.int/redirect.php?id=17253>

EN

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EUROPEAN UNION

European Commission: Aid to finance digitisation and extension of terrestrial television in Spain incompatible with EU law

On 1 October 2014, the European Commission concluded that subsidies granted in the Spanish region of Castilla-La Mancha to fund the digitisation and extension of the terrestrial television network in remote areas were incompatible with EU state aid rules. The Commission also ordered the recovery of such aids worth EUR 46 million. This decision follows the conclusions already expressed in a decision of 19 June 2013, which referred to the national scheme to finance digital terrestrial television transition in Spain (see IRIS 2013-7/5).

According to the Commission, the measure violated the principle of technological neutrality to the extent that public funds are only made available to one specific transmission platform therefore discriminating alternative ones like cable, satellite or the Internet. In addition to this, the Commission concluded that the Government of Castilla-La Mancha also engaged in discriminatory treatment between different terrestrial operators, as the subsidies were directly granted to two specific companies without any previous open tender.

The Commission had previously established the criteria for member states to support digital switchover in line with EU State aid rules in its decision on digital transition in Berlin Brandenburg (see IRIS 2004-6/5, IRIS 2004-9/3 and IRIS 2006-1/8). The principle of technological neutrality was confirmed by the Court of Justice in the Mediaset case T-177/07 (see IRIS 2011-8/4).

• European Commission, 'State aid: Commission orders recovery of incompatible aid from certain terrestrial digital platform operators in Castilla-La Mancha', IP/14/1066, 1 October 2014
<http://merlin.obs.coe.int/redirect.php?id=17255>

DE EN FR

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European Commission: Progress report on cultural heritage digitisation

On 24 September 2014, the European Commission published its report 'Cultural Heritage: Digitisation, Online Accessibility and Digital Preservation'. This is the first progress report on the implementation of the European Commission's 2011 Recommendation on the digitisation and online accessibility of cultural material and digital preservation (see IRIS 2012-1/4) and the EU Council Conclusions of the same name (see IRIS 2012-7/4). The report reviews and assesses the overall progress achieved in the EU in this field from 2011 to 2013.

The report is mainly based on a set of national reports of 32 countries (28 EU Member States, 3 EEA countries: Norway, Iceland, Liechtenstein and Switzerland) submitted in late 2013, and early 2014. The areas covered by the reports are: organisation and funding of digitisation, digitisation and online accessibility of public domain material and material protected by copyright (orphan and out-of-commerce works), Europeana (the European digital library) and digital preservation.

The report notes that digitisation of cultural material still remains a challenge, with only approximately 12% on average of the libraries' collections and less than 3% of films digitised so far. This observation reflects the overall assessment of the Member States' progress, which is echoed throughout the report.

The European Commission observes that digitisation strategies have mostly local-, sector- or institution-specific characters. Moreover, the digitisation itself largely relies on public funds, both national and those of European Structural Funds.

As regards cultural material in the public domain, the European Commission concludes that its web visibility has improved. However, statutory and contractual limitations persist for digitisation of public domain works, for example, with legal uncertainty regarding the legal status of their digital reproductions.

The report shows that the part of the Recommendation on bringing online copyrighted material, as well as the Orphan Works Directive of 2012 (see IRIS 2012-10/1), have had a very limited effect. The transposition of the Directive and the implementation of legally backed collective licensing solutions for wide-scale digitisation of out-of-commerce works called upon by the Recommendation, remain an exception rather than the rule. The same holds for the implementation of rights information databases, such as ARROW or FORWARD.

With respect to Europeana, the report points out that it has exceeded its 2015 target of 30 million digitised objects ahead of schedule. However, the progress

has been much slower in relation to masterpieces and sound or audiovisual material.

In the area of digital preservation of cultural material, the report notes the adoption of a wide variety of long-term preservation strategies or schemes. However, much remains to be done when it comes to legislative provisions for multiple copying, format migration or web-harvesting, elimination of technical hindrances to long-term preservation of digital-born material or prevention of wide variations of legal deposit arrangements.

In conclusion, the European Commission acknowledges that progress has been made during the first two years of implementation of the Recommendation. However, 'the overall picture of cultural heritage digitisation remains fragmented and patchy', 'widely dependent' on cultural institution initiative or funding, 'with a limited overview of digitisation activities across sectors and borders'. The Commission refrains from giving any clear recommendations. It merely identifies the weaknesses, which require further attention and action.

• European Commission, Implementation of Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation: Progress report 2011-2013, Working document, September 2014

<http://merlin.obs.coe.int/redirect.php?id=17254>

EN

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NATIONAL

BE-Belgium

New act addresses sexism in the public space

A highly controversial act has been adopted in Belgium to address sexist gestures and acts in the public space. A prison sentence of up to one year and/or a fine of up to EUR 1000 can be imposed for 'any public gesture or act, which is obviously intended to express contempt vis-à-vis a person because of his or her sex or, for the same reason, considers a person as inferior or reduces the person to his or her sexual dimension and which results in a serious infringement on the dignity of that person'. The act also amends the Law of 10 May 2007 to combat discrimination between women and men by incorporating two articles in relation to discrimination on the basis of gender. The rationale for the adoption of the act, according to the Explanatory Memorandum, is that sexism is a

widespread phenomenon, which cannot be tolerated in a democratic society.

There are two views on the new act. On the one hand, some commentators consider that the restriction that the act imposes on freedom of expression may be too broad. They claim that the definition of the acts that are punishable may be too vague and question the fact that it may transfer the task of the legislator to the judiciary. On the other hand, the act does require special intent and clearly adds that the acts and gestures that are being considered as criminal acts should result 'in a serious infringement on the dignity of that person'. This additional criterion should ensure that only grave abuses will be punished. Another observation is that prison sentences may have a potential chilling effect on freedom of expression and this may be incompatible with the European Convention of Human Rights.

• *Wet ter bestrijding van seksisme in de openbare ruimte en tot aanpassing van de wet van 10 mei 2007 ter bestrijding van discriminatie teneinde de daad van discriminatie te bestraffen* (Act to combat sexism in the public space, amending the act of 10 May 2007 to combat discrimination in order to punish the act of discrimination, 22 May 2014, Official Gazette 24 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17294>

FR NL

• *Note explicative, DOC 53 3297/001* (Explanatory Memorandum, DOC 53 3297/001)

<http://merlin.obs.coe.int/redirect.php?id=17257>

FR NL

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BG-Bulgaria

Another private special-interest channel withdrawn from digital transmission

Following the early termination of the digital broadcasting licences of two television channels - bTV Lady+1 and RING.BG+1 - in May 2014 (see IRIS 2014-6/8), the Council for Electronic Media received a similar request to cancel the licence of another channel in September. The two media services withdrawn earlier in the year were both provided by the bTV Media Group and are now only available via cable and satellite. The third channel that now wants to stop broadcasting digitally, Diema Family+1, is owned by Bulgaria's second largest TV group, the Nova Broadcasting Group. Following the early termination of this licence, the Nova Broadcasting Group, like its competitor, the bTV Media Group, will only transmit one digital channel, i.e. its main channel, Nova TV.

The analogue switch-off in Bulgaria took place on 30 September 2013. Although the Council for Electronic Media has licensed more than 30 channels for digital terrestrial transmission, less than half of them have

started broadcasting via DVB-T. The number of digital channels that can currently be received terrestrially is even smaller - they are the three channels of public service broadcaster BNT (BNT1, BNT2 and BNTHD), bTV, Nova TV, News 7, TV 7, Diema Family+1 (now withdrawn) and Bulgaria on Air.

However, it is not just private TV broadcasters that are having problems financing digital channels. According to the digital multiplex operator First Digital EAD, BNT's failure to pay the fees for the digital transmission of its channels has put First Digital EAD in a very difficult position, preventing it from paying its own running costs and going ahead with planned network investments. Therefore First Digital EAD requested that BNT be ordered by the Council for Electronic Media to pay the long overdue sum of BGN 2,553,580. However, as the regulatory authority, the Council for Electronic Media does not believe it has the legal powers to impose such obligations on BNT. Even so, it has promised to try to act as mediator in this difficult situation once it has heard BNT's position on the matter.

• Протокол № 33 на Съвета за електронни медии от редовно заседание, състояло се на 09 септември 2014 г. (Report no. 33 on the regular meeting of the Council for Electronic Media, 9 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17284>

BG

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Parliament adopts universal broadcasting charge

On 26 September 2014, the Swiss Parliament approved the introduction of a new broadcasting charge, which all households and businesses will have to pay whether they own a reception device or not. The Government (Bundesrat) had proposed the idea in May 2013 in response to technological advances, including the possibility of watching TV programmes on mobile phones. Both Chambers of Parliament approved the new system (the Nationalrat by 109 votes to 85 with 4 abstentions and the Ständerat by 28 votes to 14 with 3 abstentions).

However, the introduction of the new charge is still not guaranteed and it seems likely that the amendment of the Radio and Television Act- (Radio und Fernsehgesetz - RTVG) approved by Parliament will be submitted to the Swiss population for a decision after the Swiss Trades Association called for a referendum against the draft amendment. A referendum must be held if 50,000 signatures are collected before the deadline of

15 January 2015. The Swiss Trades Association is contesting the proposal that all companies with an annual turnover of at least CHF 500,000 must pay the charge.

Like the broadcasting charge introduced in Germany in 2013, the system adopted by the Swiss Parliament also requires that all households pay the charge. However, an opt-out rule will apply for a five-year transitional period, enabling households without a device that can receive radio or television programmes to request exemption from the charge for an initial period after its introduction. The smaller Chamber of Parliament (Ständerat) had originally opposed the new Article 109c RTVG, preferring to introduce the new broadcasting charge in June without such a transitional arrangement (see IRIS 2014-8/14). After the Nationalrat insisted on the opt-out rule being included for a limited time, the smaller chamber relented in September.

The household charge will be collected by a private organisation chosen by the State after a public tendering procedure (Billag AG currently collects the charge). The company charge, however, will be collected by the Swiss federal tax authorities, which can refer to data on VAT.

The purpose of the charge has not changed: it will be used to fund SRG programmes and private channels with a public service remit across all parts of Switzerland. The private broadcasting sector will be allocated between 4% and 6% of the total income generated by the charge (Art. 40(1) of the amended RTVG). Under the system adopted by the Bundesrat, the new charge should not result in SRG and the other recipients being paid more than before. Since the total amount will be paid by a greater number of households and businesses, the charge to be paid by individual households should be lower in future. They are expected to pay less than the current annual broadcasting charge of CHF 462 (approximately EUR 380), which only applies to homes with a reception device.

The new system is unlikely to be introduced before 2018. Until then, the Billag company will remain responsible for collecting the existing broadcasting charge.

As well as the new system for the funding of broadcasting, the amendment of the RTVG, as approved by the Swiss Parliament, deals with a series of other, less controversial topics. These include responsibility for monitoring SRG's online service, the improved implementation of regional TV broadcasters' independence from the State, as well as licensing obligations and various other conditions applicable to private channels (for example, those concerning subtitling).

• *Texte des nouvelles dispositions de la loi sur la radio et la télévision adoptées par le Parlement, 26 septembre 2014* (Text of the amended Radio- und Fernsehgesetz (Radio and Television Act - RTVG) approved by the Swiss parliament, 26 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17281>

DE FR

• *Chronologie des travaux législatifs* (Chronology of legislative documents)

<http://merlin.obs.coe.int/redirect.php?id=17282>

DE FR

• *Announce du référendum contre la modification de la loi sur la radio et la télévision sur le site de l'usam* (Announcement of referendum against the RTVG amendment on the website of the Swiss Trades Association (sgv - usam))

<http://merlin.obs.coe.int/redirect.php?id=17283>

DE FR

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BGH permits use of illegally obtained e-mails for reporting purposes

In a ruling of 30 September 2014, which has not yet been published in full (case no. VI ZR 490/12), the Bundesgerichtshof (Federal Supreme Court - BGH) decided that the public's right to information should take precedence over a politician's general privacy rights. Although the judgment concerns print media, it is also relevant to reporting in the audiovisual media sector.

The plaintiff held various political posts between 1994 and 2010, including that of Finance Minister, Home Affairs Minister, and Head of the State Chancellery of a German Bundesland. In 1997, he had a daughter from an extra-marital relationship with a colleague. The girl's mother, who brought the child up alone, applied for maintenance payments and received money for her daughter in accordance with the Unterhaltsvorschussgesetz (Child Support Act) until October 2003.

When the plaintiff lost his laptop in 2009, four e-mails that he had received from the child's mother were sent to the defendants' editorial offices. In these e-mails, the politician was accused of failing to make regular maintenance payments for his daughter and committing social insurance fraud. The defendants published the content of the e-mails in the print media and the plaintiff resigned as Minister. He then applied for an injunction against the reporting of the private e-mails in either direct or indirect speech.

In accordance with the general right to privacy, the lower instance courts granted the plaintiff's application (Landgericht Berlin, case no. 27 O 719/10 - ruling of 28 June 2011 and Kammergericht Berlin, case no. 10 U 118/11 - ruling of 5 November 2012).

The BGH, however, overturned these rulings and rejected the application.

The BGH found, firstly, that the reports published by the defendants intruded on the plaintiff's privacy and right to informational self-determination. However, the intrusion was not unlawful. Even though the information (the truth of which was not questioned by

the plaintiff) had been obtained unlawfully by a third party, the public's right to information outweighed the plaintiff's right to privacy. The plaintiff was a well-known political figure whose conduct was in the public eye. The press had used the e-mails to prove that the politician was aware that the child's mother was receiving payments for their daughter under the Child Support Act, even though the requirements for such payments had not been met because he himself was obliged to pay them.

When weighing reporting freedom against the protection of privacy, the BGH considered that this information had a high level of "public value". The BGH therefore found the publication of the various e-mails in direct or indirect speech to be lawful.

• *BGH, Pressemitteilung Nr. 137/14 vom 30. September 2014* (Federal Supreme Court, press release no. 137/14 of 30 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17285>

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BGH confirms advertising ban for online game "Runes of Magic"

According to media reports, the Bundesgerichtshof (Federal Supreme Court - BGH), in a ruling of 18 September 2014, which has not yet been published in full (case no. I ZR 34/12), decided that an advertisement for video game accessories, written in language likely to appeal to children, represented an unlawful exhortation to children to purchase and therefore infringed Article 3(3) of the Act against unfair competition (Gesetz gegen den unlauteren Wettbewerb - UWG). This ruling is also relevant to the audiovisual media sector, firstly because video games and their advertisement represent audiovisual content and, secondly, because the advertising rules in the UWG are very similar to those in the Audiovisual Media Services Directive (AVMSD).

Through its ruling, the BGH confirmed a judgment by default that it had previously issued against the game operator on 17 July 2013 (see IRIS 2013-8/14).

The Bundesverband der Verbraucherzentrale (Federation of German Consumer Organisations - vzbv) had complained after advertisements for additional content for the "Runes of Magic" game had appeared in online forums, using the slogans "Pimp your character" and "Grab the opportunity and give your arms and weapons a certain something". After the defendant appealed against the judgment by default, a further oral hearing was held on 18 June 2014 and the BGH issued its decision on 18 September 2014.

The BGH decided that the use of the informal “Du” and of “children’s language including popular anglicisms” comprised a suggestive and unlawful exhortation to children to purchase. The BGH’s decision is based on Article 3(3) of the UWG in conjunction with no. 28 of the annex to the UWG (the so-called “black list” of unlawful commercial practices), which states that an advertisement that exhorts children to buy advertised products themselves or to ask their parents to do so infringes competition law. In the BGH’s opinion, the actual age structure of players of the game was “not crucial”. The BGH therefore did not rule on what exactly constitutes “children” for the purposes of no. 28 of the annex to the UWG.

• *Urteil des I. Zivilsenats vom 17. Juli 2013 (I ZR 34/12)* (Ruling of the 1st civil chamber of 17 July 2013 (I ZR 34/12))

<http://merlin.obs.coe.int/redirect.php?id=17286>

DE

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Discontinued porn films constitute official information in accordance with the Freedom of Information Act

In a ruling of 22 September 2014 (case no. 13 K 4674/13), the Verwaltungsgericht Köln (Cologne Administrative Court - VG) upheld a private collector’s right to a copy of a pornographic film.

The plaintiff had initially asked the Bundesprüfstelle für jugendgefährdende Medien (Federal Department for Media Harmful to Young People - BPjM) for a copy of the classified video film, which was no longer available to buy, “for his own use”. His request was rejected by the BPjM on the grounds that, firstly, the request had not been made within the scope, and for the purposes of the Freedom of Information Act (Informationsfreiheitsgesetz - IFG), and secondly, the BPjM did not hold distribution rights for the purposes of Article 17(1) of the Copyright Act (Urhebergesetz - UrhG) or reproduction rights under Article 16 UrhG.

The collector appealed to the VG Köln against this decision.

The VG explained that the film constituted official information. Furthermore, the plaintiff had a right of access to the information under Article 1(1)(1) IFG because the classified film was stored by the BPjM for official purposes. Any classification carried out by the BPjM was dependent on the latter having access to the film concerned, in order to assess its content. In addition, the BPjM was in possession of the film not for entertainment reasons, but for official purposes.

The VG also said that the requested film was clearly a copyright-protected work. However, the plaintiff

could make use of the exemption rule in Article 53 UrhG, under which reproduction was admissible if the work had been discontinued for at least two years and exclusively analogue use took place.

It ruled that rules on the protection of minors were irrelevant because the copy was being made for an adult.

The VG therefore rejected all of BPjM’s arguments and upheld the private collector’s complaint.

• *Urteil des Verwaltungsgericht Köln, 13 K 4674/13, 22. September 2014* (Ruling of the Cologne Administrative Court, 13 K 4674/13, 22 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17287>

DE

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Federal Government report on progress in combating child pornography on the Internet

In mid-September 2014, the Federal Government submitted a “report on the measures taken in 2013 to remove telemedia services containing child pornography” in accordance with Article 184b of the Strafgesetzbuch (Criminal Code - StGB) to the German lower House of Parliament (Bundestag).

In the digital world, images of sexual abuse of children are distributed to a high but unknown number of users worldwide. There is therefore an urgent need to effectively protect the victims of this abuse.

With this aim in mind, the Federal Criminal Police Authority (Bundeskriminalamt - BKA), the national body [jugendschutz.net](http://www.jugendschutz.net), the Federal Department for Media Harmful to Young People (Bundesprüfstelle für jugendgefährdende Medien - BPjM), and other “complaints offices” - all members of the International Association of Internet Hotlines (INHOPE) - work closely together.

As a result of this cooperation, the report included an evaluation of the measures taken to remove child pornography during the previous year, as well as the statistics produced by the BKA to assess the success of these measures. According to the report, the “remove instead of block” principle is applied, whereby sites with illegal content are notified to providers in Germany and abroad so they can be removed, rather than added to a provider-blocking list.

Any reports of telemedia services containing child pornography are immediately forwarded to the BKA by police authorities or complaints offices, regardless of whether the server on which the content is hosted is in Germany or abroad.

According to the statistics, the BKA received a total of 4,317 reports of abuse in 2013, 82% of which were hosted abroad, and 18% in Germany. Most of the servers were in the USA and Japan. In nine cases, the location of the illegal content could not be identified because the servers concerned could only be accessed via an anonymous network.

The report also deals with the time it takes for content hosted in Germany and abroad to be removed. 80% of child pornography hosted in Germany was removed within two days and 100% within two weeks. However, the procedure takes longer for content hosted abroad, since it is more complex. In this category, 55% of all content was deleted within a week and 77% within four weeks. Even so, the total number of foreign cases fell for the first time since statistics were first collected in 2010.

The report considers cooperation an effective means of combating child pornography on the Internet, both in relation to the criminal prosecution authorities and in terms of contacting service providers in order to ensure images of abuse are removed as quickly as possible.

• *Bericht der Bundesregierung vom 18. September 2014* (Federal Government report of 18 September 2014)
<http://merlin.obs.coe.int/redirect.php?id=17288>

DE

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GVK and VPRT agree guidelines for labelling of scripted reality formats

On 19 September 2014, the Conference of Chairpersons of the Decision-Taking Councils (the Gremienvorsitzendenkonferenz - GVK) of the Land media authorities (Landesmedienanstalten) and the Private Broadcasting and Telemedia Association (Verband Privater Rundfunk und Telemedien e.V - VPRT) announced that, following joint discussions, they had agreed on a set of guidelines on the clear labelling of own-produced scripted reality formats. The purpose of these guidelines is to give viewers a standard level of transparency and information across all broadcasters and formats.

Broadcasters are required to select the appropriate wording and location for the relevant format. To this end, the voluntary code of conduct contains examples of how to word specific labels, such as "This case/story/plot is (completely) fictitious" or "Based on a real/actual story/event".

The code of conduct also contains rules on the location and legibility of labels, designed to ensure that

they are suitably recognisable. These include provisions on the place and timing of the insert as well as recommendations concerning the size, type and colour of the lettering.

The standardised labelling described in the guidelines should be used with immediate effect by all newly produced programmes. The guidelines also state that they should be reviewed on 20 September 2015.

• *Leitlinien für die Kennzeichnung und deren Wahrnehmbarkeit bei Scripted Reality-Formaten - Freiwillige Verhaltensgrundsätze der privaten Fernsehveranstalter, 19. September 2014* (Guidelines on the clear labelling of scripted reality formats - voluntary code of conduct for private television broadcasters, 19 September 2014)

DE

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ES-Spain

National Commission for Market Competition opens an investigation into the Commercial Radio Broadcasters Association

In Spain, the Sociedad de Artistas Intérpretes o Ejecutantes de España (AIE), and the Asociación de Gestión de Derechos Intelectuales (AGEDI) are the collective management societies or performing rights societies respectively representing musical performing artists and phonogram producers. These collective management societies are entitled to administer the right to receive an equitable remuneration from any third party that publicly performs or communicates sound recordings to the public, such as bars, clubs and radios, cinemas and television broadcasters (when recordings are synchronised with films).

AGEDI and AIE normally formalise agreements with the industry associations for a certain term of duration. In 2009, the term of the agreement with the Association of Commercial Radio Stations (AERC), which includes important radio stations such as Prisa, Cope and Atresmedia Radio, expired and since then both parties have been negotiating a new agreement without success.

During the course of such negotiations, the radio broadcasters association considered that the fee AGEDI-AIE intended to collect was excessive, abusive, and inequitable and filed a claim before the Spanish competition authority, the Comisión Nacional del Mercado de la Competencia (CNMV - see IRIS 2014-2:1/16). The CNMV opened investigation proceedings on the basis of a possible abuse of their dominant position in the market of commercial and public communication of phonograms. Given that AGEDI and AIE

are the only collective management societies managing those public performance rights, the CNMV considered that AGEDI-AIE could be engaging in abusive practices prohibited by Article 2 of the Spanish Competition Act (Ley 15/2007, de 3 de julio, de Defensa de la Competencia).

During the proceedings, the CNMV opened a new investigation, this time against the AERC, following a complaint from AGEDI-AIE. It is based on the possible restrictive competition practices that can exist when making collective recommendations to the radio stations, which are members of the AERC. The practices include suggesting that radio stations avoid paying any fees to AGEDI-AIE on the grounds that these are disproportionate and abusive, as those performing rights societies have a dominant position in the market; with such a recommendation intended to have more force in the course of the negotiation of the collective agreement.

Taking into account the information gathered, the CNMV considers that there is prima facie evidence that the AERC has been committing practices, which are prohibited by article 1 of the Spanish Competition Act and also by article 101 of the Treaty of the Functioning of the EU. The opening of these proceedings does not prejudice the final outcome of the investigation. There is now a maximum period of 18 months for a resolution by the CNMC.

• CNMC, *Nota de Prensa, a 29 de septiembre 2014* (CNMC, Press Release, 29 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17267>

ES

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FR-France

Play TV heavily penalised for infringing copyright held by France Télévisions

In a judgment delivered on 9 October 2014, the Regional Court of Paris banned and heavily penalised the online broadcasting on the Playtv.fr site of television programmes belonging to the France Télévisions group (France TV). Since 2010, the company Playmédia has been offering a service free of charge and without subscription showing television channels, which are accessible on the Internet. In the face of the public-sector group's refusal to allow its programmes to be carried, PlayTV claimed that it ought to have the benefit of the must-carry scheme.

Article 34-2 of the Act of 30 September 1986 introduced an obligation, requiring distributors of terrestrially broadcast services to make their public-sector

audiovisual channels “available to their subscribers free of charge”. The dispute was referred to the audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA) (see IRIS 2013-8), which noted that while Playmédia did have the status of distributor of services, it did not have any subscribers, since at the time its service was offered with unrestricted access and free of charge. However, having subscribers was a determining condition for being subject to the must-carry obligation. When Play TV announced its intention to set up a subscription system, which it went on to do, France TV announced its intention to “continue with the legal proceedings already instigated to achieve a judgment against this violation of [its] intellectual property rights”, which it also went on to do; the judgment was delivered on 9 October 2014.

Playmédia had France TV summoned as it believed the public-sector group was at fault in refusing to contract with a view to allowing its programmes to be broadcast via the complainant's on-line service, while France TV, for its part, claimed compensation for the infringement of its copyright and neighbouring rights. It was therefore for the court to state how the must-carry provisions in the Act of 30 September 1986 should be combined with the provisions of the Intellectual Property Code, and more particularly whether the 1986 Act was able to diverge from the Code, as Playmédia was claiming. In its judgment, the court noted that the 1986 Act should be applied while scrupulously respecting the intellectual property rights of the creators and producers of audiovisual and cinematographic works and the rights of rightsholders for sports events. No divergence was possible, and it was important to ensure that each party's property rights were upheld. Thus the court clearly stated that “must-carry is not a scheme set up to allow access by final users without ensuring the preservation of intellectual property rights”. It then went on to recall that setting up must-carry was subject to a number of conditions. Firstly, it was necessary for “a significant number of final users of these networks to use them as their principal means of receiving radio and television broadcasts”. Playmédia did not provide evidence that this condition was met. Secondly, Playmédia was still not in a position to claim it was a subscription service, since the company's offer of access to Internet users from 1 January 2014 did not meet this condition.

The final condition is set out in Article 34-2 of the 1986 Act, which requires the “full, simultaneous” take-up of programmes. This condition was included in France TV's list of specifications. However, certain rightsholders (American cinema studios and holders of sports rights) have not authorised France TV to broadcast their programmes on services such as those operated by Playmédia or, in the case of the statutory must-carry obligation, have limited their authorisation to mobile telephone networks. Take-up limited just to those programmes authorised by third-party producers (with certain programmes being blacked out), as Playmédia proposed to France TV, was found in-

compatible with the latter's public-service missions. France TV had therefore been right in concluding that the Playmédia offer did not enable it to fulfil the obligation of full, simultaneous take-up. The court therefore found that France TV had not acted abusively by refusing to enter into a contract with Playmédia authorising the latter to broadcast its programmes on its Internet site at playtv.fr. Playmédia claims in this respect were rejected.

Regarding the counter-claims made by France TV, the court recalled that broadcasting the company's programmes without its authorisation constituted infringement of copyright. It noted that the company enjoyed neighbouring rights regarding the communication of its television programmes to the public in the same way that it held copyright and producer's rights in respect of the broadcasts it produced or co-produced and its purchases of various works (news programmes, documentaries, magazines, TV films, and cinema films). By broadcasting these programmes without France TV's authorisation, Playmédia had infringed copyright and neighbouring rights, as it had also done by reproducing the community and French brand names owned by the public-sector television group. Taking into account Playmédia's turnover and the audience share of the channels it operates (75%), the court decided that France TV should be awarded €1 million to compensate for the prejudice suffered and €25,000 as compensation for the infringement of its rights in respect of brand names. Playmédia was ordered to refrain from taking up and broadcasting programmes from the public group's channels, and would be fined for any delay in complying with the judgment.

• *TGI de Paris (3e ch. 1Re sect.), 9 octobre 2014 - Playmédia c. France Télévisions* (Regional court in Paris (3rd chamber, 1st section), 9 October 2014 - Playmédia v. France Télévisions)

FR

Amélie Blocman
Légipresse

Judgment ordering Facebook France to reinstate a "non-official" page operated by fans of a television series overturned

In a decision on 16 October, the Court of Appeal in Paris overturned the judgment of the Regional Court in Paris which had ordered Facebook France to reinstate a "non-official" page operated by fans of the popular TV series *Plus Belle la Vie* ("PBLV"), which had been blocked the previous year by its executive producer (see IRIS 2014-1/21).

In the present case, the creator and moderator of "pblvmarseille", a non-official Internet site devoted to the series launched the "PBLV Marseille" Facebook page in 2008. In 2012, she discovered that

the producer of the series and owner of the "Plus Belle la Vie" and "PBLV" brand names, with whom she maintained regular relations, had asked Facebook France to merge her non-official page (which had 605,200 fans at the time) with the production company's official page. She felt the latter had thereby surreptitiously appropriated the fans of her page, and had Facebook France ordered to reinstate the page and pay her compensation for the prejudice she had suffered. Although Facebook France did not appoint counsel in the original proceedings, it appealed against the judgment and asked for it to be cleared.

The company said that while it did indeed belong to a group of companies whose parent company was Facebook Inc., it was a separate legal entity and neither operated nor hosted the social network's service. It said that the conditions for using the service, which all users had to accept, specified that users resident outside North America contracted with the company Facebook Ireland Limited when they created an account. The creator of the disputed fan page contested this let-out, on the grounds that the company Facebook France was held by the company Facebook and managed by the same person, from France.

The Court of Appeal stated that the host, within the meaning of Article 6.1.2 of the LCEN, the Act on which the respondent party's claim was based, was the only party storing the content of the Facebook service and the only one that had the technical means of taking any action involving the service. There was nothing to prove, and indeed it was not even being claimed, that Facebook France operated and hosted the Facebook service. Thus, according to its entry in the companies register, the activity of the company Facebook France is to provide the Facebook group with services in connection with the sale of advertising space, commercial development, marketing, public relations, lobbying, communication, legal support and any other services of a commercial, administrative and/or IT-related nature aimed at developing the services provided by the Facebook brand in France. It did not own the Facebook domain names. This all showed that the companies Facebook Ireland and Facebook France SARL were separate legal entities. Their activities were not the same as those of their parent company, and were strictly limited; they had no authority or right of supervision regarding the operations and content of the Facebook.com service. The fact that the same person managed the two companies did not prevent the two entities having separate legal existences.

In the present case, it was not shown that Facebook France held any kind of authorisation to represent the Irish company in France, that it had had any contact with the respondent party, or that it had been involved in the withdrawal of the disputed Facebook page (the e-mails informing it of the removal of the page in favour of the series' production company were in English, sent by Facebook.com, and signed "The Facebook team"). The court deduced from this that the original court had been wrong in ordering Face-

book France to reinstate the respondent party's Facebook site, as it had no entitlement to do so. The judgment was overturned in this respect and the applicant party was found incompetent to take action against Facebook France.

• *Cour d'appel de Paris (pôle 5, ch. 2), 17 octobre 2014 - EURL Facebook France c. Laurence Collard* (Court of appeal in Paris (centre 5, chamber 2), 17 October 2014 - Facebook France SARL v. Laurence Collard) FR

Amélie Blocman
Légipresse

Recognition of the good faith of a journalist who wrongly presented a man as a terrorist

An interesting judgment delivered on 17 October 2014 by the press chamber of the Regional Court in Paris is the outcome of a case involving proof of the good faith of a television journalist being prosecuted for defamation. In the case at issue, an Algerian man had a summons issued against the directors of the publication of a television channel and its Internet site, and the journalist who wrote a paper, which was broadcast on the main evening news on television on the expulsion of five Islamists ordered by the Minister for the Interior. The photograph of the plaintiff had been shown on the screen, with a voice-over commentary stating that he had been found guilty in 1997 for the attacks committed in Marrakech in 1994 during which a number of Spanish tourists were killed, and that he maintained "regular contact" with people involved in terrorist activities ("former jihadists who had been through training at camps in Afghanistan and Pakistan"). The court found that this caused prejudice to the man's honour and to the consideration due to him, as it was specifically stated that he had been found guilty of committing terrorist attacks, which proved to be false, and of maintaining close links with terrorists. The defamatory nature of the utterances in the case was therefore proven.

The journalists thus brought to book and then attempted to prove that they had acted in good faith. According to longstanding jurisprudence, defamatory remarks are deemed at law to have been made with the intention of causing harm, but they may be justified if their perpetrator establishes having acted in good faith by proving that a legitimate goal, untinged by any personal animosity, had been pursued and that a certain number of safeguards have been observed, including the rigorous nature of the investigation and the prudent manner of making the utterances. The court found that by devoting a news report to the expulsion, carried out by the Minister for the Interior "as an extremely urgent measure", of persons presented as being "radical Islamists" suspected inter alia of "preaching against the West, in favour of

sharia", the aim pursued by the journalist was legitimate. It was indeed a matter of informing the public of measures adopted by the Government to counter possible terrorist threats, in the context of a paper of general interest, the subject having been raised a few days after the much mediated series of murders committed by Mohamed Merah in Toulouse. There was no mention of any personal animosity on the part of the journalist towards the man involved. Given that the man is not recorded as having been found guilty of carrying out any such terrorist acts, he was entitled to have felt shocked and hurt by the way he was presented in the newscast.

The court noted nevertheless that in view of the very nature of the information broadcast publicly, the fact that the source of the information, namely the Ministry of the Interior, theoretically ought to have checked its accuracy, and the circumstances of the broadcasting of the information (during the main evening newscast, devoted mainly to the presentation of news items circulated by press agencies with an international reputation based on the fact that they state they have checked all the information they circulate), the journalist was not obliged to carry out a full investigation and to check the content of the information being broadcast, despite the corroborating checks he said he had carried out in the police hierarchy and among people responsible for gathering such information, whose identity he could not reveal for reasons of source secrecy. Lastly, the court found that under the very particular circumstances of the case, it could not be held that the journalist had not interviewed the man involved or his counsel once the expulsion measure was actually under way. The court granted the accused the benefit of good faith and therefore discharged them from prosecution.

• *TGI de Paris (17e ch.), 17 octobre 2014 - A. Belhadad c. A. Girard, N. Paolini et a.* (Regional court of Paris (17th chamber), 17 October 2014 - A. Belhadad v. A. Girard, N. Paolini and others.) FR

Amélie Blocman
Légipresse

Infiltration and concealed camera methods do not exclude good faith

In a judgment delivered on 16 October 2014, the Regional Court of Paris has defined the conditions under which journalists prosecuted for defamation following a concealed-camera report may claim that they acted in good faith, thereby escaping prosecution. Associations responsible for the management of a parish and a school and their representatives, were suing the publication director of a television channel, a number of journalists, and the manager of the production company of the 'Les Infiltrés' programme for defamation following the broadcast of a report (followed by

a pre-recorded studio debate), entitled “A l’extrême droite du Père” (on the extreme right hand of the Father). The report had been produced using the infiltration method, which enabled a journalist to infiltrate a small extreme right-wing group presented as being extremely violent and racist in a parish, in a school, and to film various people using a concealed camera, as well as applying certain blurring and voice-distortion techniques prior to broadcasting. The report claimed that the Roman Catholic associations and the person in charge of them had links with this small group and with the school, which was qualified as a “nest of Fascists”, backed by various elements and examples given in the report. It was also claimed that the school’s teaching was “overtly anti-Semitic” and even revisionist. The court found that all the utterances at issue were defamatory with regard to the parish, the school, and its manager, who was shown un-blurred in the broadcast and was wrongly presented as the founder of the school, whereas he is in fact chairman of the association which manages the school.

Regarding the proof of the good faith claimed by the journalists being prosecuted, the civil parties’ main complaints were that the infiltration had been unfair and that the broadcast was based on set-ups, manipulations and lies. The court nevertheless stated that in defamation cases, freedom of proof might permit the production of documents obtained unfairly. Thus, although by their nature they involved a degree of dissimulation, the use of infiltration and concealed camera methods did not intrinsically exclude good faith; they might be permissible, subject to certain conditions. Firstly, they must be a necessary means of revealing legitimate information to the public on an item of general interest that could not have been discovered otherwise. Next, the principle of proportionality must be respected, as well as various precautions involved in ensuring the anonymity of certain people and the absence of any deformation of the sequences broadcast.

In the case at issue, the court found that it was legitimate to inform the public of the existence of violent and racist political groups, and of the links that may exist between such a group, the clergy in a parish, and a school. The elements of the investigation were mainly the result of sequences broadcast in the report itself (extremely violent, racist statements), and were corroborated by others included in the uncut footage. While it was true that some of the passages at issue contained a number of inaccuracies or approximations, they were deemed to have little effect on the impact of the utterances, and to be non-determining.

Furthermore, the principle of hearing both sides of an argument had been observed, with the un-blurred interview of the school’s manager and the priest who was its head teacher, whose utterances were broadcast in the report, and the presence of another priest among the participants in the debate in the studio that followed the broadcast. A degree of prudence

was evident in that the final version of the report did not include a number of particularly shocking statements that were present in the uncut footage.

Consequently, and in view of the general interest of the subject and with all these elements taken together, the court found that the accused had sufficient factual grounds for making and broadcasting the disputed utterances. The court allowed them the benefit of having acted in good faith and the prosecution was dropped.

• *TGI de Paris (17e ch.), 16 octobre 2014 - Association d’enseignement populaire Saint Projet, Association culturelle institut du bon pasteur et a. c. P. de Carolis, D. Pujadas et a.* (Regional court of Paris (17th chamber), 16 October 2014 - the popular education association ‘Saint Projet’, the cultural association ‘Institut du Bon Pasteur’, and others v. P. de Carolis, D. Pujadas, and others) **FR**

Amélie Blocman
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Bonus channel - Conseil d’État rejects M6’s application

In a decision delivered on 22 October 2014, the Conseil d’État dismissed all the applications brought by the company that edits the channel M6, whose claim for the allocation of a ‘bonus channel’ had been turned down. Under Article 103 of the Act of 30 September 1986, introduced by the Act of 5 March 2007, the French legislator had allowed those “historic” operators (TF1, M6, and Canal+) which requested the possibility of being allocated a bonus channel to compensate for the prejudice suffered as a result of the early stoppage of their broadcasting in analogue mode and the appearance of competitive channels on digital TV. However, on 29 September 2011, at the end of a procedure lasting more than two years, the European Commission sent France a reasoned opinion, holding that this arrangement was contrary to European Union law as it penalised the channels’ competitors and deprived television viewers of a more attractive offer (see IRIS 2011-9/7). The legislator therefore adopted legislation on 15 November 2013 on the independence of the public audiovisual sector, which repealed this arrangement, so that the bonus channels were never actually allocated.

The editor of M6 referred to the Conseil d’État, requesting the cancellation of the implicit decision to turn down the request to be allocated a bonus channel it had submitted on 23 April 2012 resulting from the silence maintained for more than two months by the audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA). The channel also asked for the State to pay compensation of almost €100 million for the various types of prejudice it had suffered as a result of the CSA’s contested decision. The Conseil d’État judge recalled that the allocation of a bonus

channel had been subject to the condition that the editors "subscribe to more stringent obligations in support of creation in terms of the broadcasting and production of European and French-language cinematographic and audiovisual works laid down by decree by the Conseil d'État" (Article 104 of the Act). However, no decree defining these obligations has been adopted. Thus, in the absence of any detail in the Act regarding these more stringent obligations, it was not possible for either Article 103 or Article 104, which could not be separated from the former, to enter into force. The Conseil d'État found that under these circumstances, the CSA was required to reject M6's application for the allocation of a bonus channel as provided for in the provisions.

The Conseil d'État then went on to examine the application for compensation submitted by the channel and found that since Article 103 of the Act had not entered into force, the CSA's rejection of M6's application under this Article did not constitute fault of a nature that would give rise to entitlement to compensation. Regarding the compensation for prejudice arising, according to the channel, from the failure to adopt an implementing decree covering this Article, the Conseil d'État found that any negligence should be appreciated by taking into account the date of the fact generating the prejudice, i.e. the date of the implicit decision of refusal resulting from the silence on the part of the CSA regarding the application submitted on 23 April 2012 with a view to benefiting from the provisions. The Conseil d'État recalled that a complaint had been submitted to the European Commission regarding the bonus channel arrangement in April 2008; this had resulted in the reasoned opinion ordering France to abolish the mechanism, delivered on 29 November 2011. The following day, plans for provisions repealing the mechanism were tabled in the French Parliament. In view of the circumstances, the Conseil d'État found that the fact that the decree had not been adopted on the date of the CSA's refusal for which cancellation was being called for, i.e. mid-2012, was not evidence of any fault that gave entitlement to any compensation. Thus M6, which could not be unaware of the risk of the provisions from which it was claiming benefit being called into question, was not justified in claiming compensation to cover cost it had nevertheless decided to incur from November 2010 in order to prepare its application. Lastly, having failed to establish the actual amount of the cost and lost earnings that the early extinction of the analogue signal would have caused the channel, M6's claims for compensation on this point were also rejected. TF1 referred to the administrative tribunal last spring for the same reasons; its complaint is currently being investigated.

• *Conseil d'État (4e et 5e s.sect.), 22 octobre 2014 - Société Métropole Télévision* (Conseil d'État (4th and 5th sections), 22 October 2014 - the company Métropole Télévision)

FR

Amélie Blocman
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CSA's refusal to authorise LCI's move from pay TV to freeview: the next stage in the courts

In a decision delivered on 23 October 2014, the Conseil d'État judge sitting in urgent matters rejected an application from the channel LCI to suspend the decision to refuse the approval of the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) to move from pay TV broadcasting to freeview. It should be remembered that a CSA decision delivered on 29 July 2014, elaborated on the basis of Article 42-3 (4) of the Act of 30 September 1986, refused granting LCI the approval it requested to change the way in which its digital TV service was financed, with a shift from pay TV to freeview (see IRIS 2014-8/22). LCI was therefore requesting, under the urgent procedure, the suspension of the decision and for CSA to be ordered to issue it provisionally with approval authorising the move from pay TV to freeview.

In support of its application, the channel claimed that the contested decision caused serious and immediate prejudice to its interests, and that since the main distribution contracts, which made it possible to finance the channel, expired on 31 December 2014, the only alternative to moving to freeview was therefore quite simply to close the channel down, resulting in serious change and the dismissal of 60% of its 247 employees. It also claimed that the contested decision would result in the disappearance of a news channel, which was damaging to the fundamental objective of diversity. LCI also claimed that the CSA had appreciated a certain number of elements wrongly, disregarded the principle of entitlement to defence, and failed to provide sufficient justification for its decision, which was vitiated by contradictions in its justifications and was perhaps even illegal.

The Conseil d'État recalled that urgency justified suspending performance of an administrative act if this was sufficiently seriously and immediately damaging to the public interest, to the situation of the applicant party, or to the interests that party wished to defend. It was therefore for the judge sitting in urgent matters to appreciate specifically, in the light of the justifications supplied by the applicant party, whether the effects of the contested act were such as to justify, given the urgency of the matter, not waiting for the judgment on the merits of the case, and therefore suspending performance of the decision. The urgency of the matter therefore needed to be appreciated objectively, and account taken of the full circumstances of the case.

In the case at issue, the Conseil d'État considered that the financial difficulties referred to by LCI, although they were aggravated by the refusal to move to freeview, they were not such as to prevent the company waiting for a final decision by the administrative

courts on the merits of the case. This would be delivered soon, in early 2015, according to the decision. The court went on to observe that there was no legal constraint obliging LCI to cease activities or transform them substantially within this timeframe. What was more, the channel's major financial difficulties were nothing new, and its deficit would in any event be increased further in the short term by moving to free-view. Lastly, the court found that only a final decision delivered by the Conseil d'État could give the channel the legal security necessary for implementing a new broadcasting strategy. LCI's application was therefore dismissed. A decision on the merits of the case is expected in early 2015.

• *Conseil d'État (ord. Réf), 23 octobre 2014 - LCI (Conseil d'État (decision under the urgent procedure), 23 October 2014 - LCI)* **FR**

Amélie Blocman
Légipresse

GB-United Kingdom

United Kingdom adapts existing copyright law to allow greater fair dealing and flexibility for the digital age

On 1 October 2014, changes to UK copyright law came into effect. A series of Statutory Instruments have been given effect that in turn amend the relevant sections of the Copyright, Designs and Patents Act 1988 (1988 Act).

The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 amends section 30 of the 1988 Act so that fair dealing with a copyright work for the purposes of caricature, parody, or pastiche does not infringe copyright in the work. This means that one can use a sample of another person's work, e.g. song, music, film or artwork, without seeking permission or a licence, provided that the use is regarded as fair dealing. If the extent of the material used is regarded as outside the scope of fair dealing, then a licence or permission of the copyright owner will be required.

There is no statutory definition of [U+02BD]fair dealing[U+02BD]. It will depend on all the facts and the circumstances and may include factors such as how the use of the work affects the original's market? Is the amount of copyrighted material reasonable and appropriate?

The amendments will not affect a copyright holder asserting moral rights, so if they consider that the pastiche, caricature or parody constitutes derogatory treatment then a remedy is available for such an abuse.

With regard to the use of quotation, before 1 October 2014 the use of quotation could only be allowed, without the copyright owner's permission, if it was for fair dealing, for criticism, review or news reporting. The change allows people the benefit of this copyright exception for other purposes, provided these are reasonable and fair. The application of this law is in line with fair dealing described above, so it would be unreasonable to quote all of another person's book, or very long sections, but only use what is fair and reasonable to illustrate the point you wish to make. Whilst the new amendment applies to all copyright work, including photographs, it will be difficult to see in practice how an entire photograph could be reproduced in its entirety under the fair dealing rules pertaining to quotations.

Another change is implemented by The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, which amends sections 28 and 296 of the 1988 Act. The amendments allow an individual, for their own use, to transfer material such as a book or film they have bought on one device, and transfer it to another device, for example, a CD to their MP3 Player. The consumer cannot make multiple copies for third parties and they must have purchased the material they are copying. A copyright owner can continue, however, to prevent copying by the application of copy-protection technology.

The remaining set of Regulations, namely The Copyright (Public Administration) Regulations 2014; The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014; The Copyright and Rights in Performances (Disability) Regulations in summary achieve the following changes to existing UK copyright law:

- Reasonable copying of sound recordings, films and broadcasts for non-commercial research and private study without seeking the permission of the copyright owner. Complete copying would not be considered reasonable, and the fair dealing principles as above would apply.
- Researchers will be allowed to text or data mine i.e. undertake computer-based analysis provided they have the right to access the material and the research is for non-commercial purposes.
- Schools and educational establishments will have greater flexibility to use copyrighted material for distance learning and displaying quotations and extracts without seeking permission from the copyright owner provided the use is fair and reasonable.
- Libraries, archives, museums and galleries will be allowed to copy all of their creative works in their collection for posterity, where it is not reasonably practicable to acquire a replacement item.
- Public bodies can make third party copyrighted material available online for wider viewing.

- Disabled persons may make a single copy of copyrighted material so they can access it on a device for their personal use. Further, charitable organisations may make multiple copies of a copyrighted material in order to make it accessible to disabled persons.

Where an existing licence between parties restricts use, then the new legislation will allow a licensee to use material in accordance with the new laws without being in breach of the agreement or having to seek amendment to the licence.

- The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014
<http://merlin.obs.coe.int/redirect.php?id=17270> EN
- The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014
<http://merlin.obs.coe.int/redirect.php?id=17271> EN
- The Copyright (Public Administration) Regulations 2014
<http://merlin.obs.coe.int/redirect.php?id=17272> EN
- The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014
<http://merlin.obs.coe.int/redirect.php?id=17273> EN
- The Copyright and Rights in Performances (Disability) Regulations
<http://merlin.obs.coe.int/redirect.php?id=17274> EN

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The BBC sets a requirement for current affairs programming in peak hours on its main channel

The BBC Trust, the apex of the BBC's system of self-regulation, issues a service licence for every BBC UK public service channel. The licence defines the scope, aims, objectives, headline budget, and other important features of each service and states how performance is assessed by the Trust. Each BBC service is reviewed against its licence at least once every five years.

Previously, the service licence for the main BBC channel, BBC One, did not contain any requirement as to the amount of current affairs programming to be shown in peak time on this channel. BBC One has the highest share of viewing of any UK channel. Earlier this year, the BBC Trust conducted a review of BBC News and Current Affairs. The review found that audiences rate BBC current affairs highly for quality and for keeping them informed; every week four out of five adults got news from the BBC. They rated its journalism as more trustworthy and better informed than that of any other provider. However, they expected more and the review considered that BBC current affairs programmes should be securing wider recognition and impact, particularly because the BBC makes the most significant investment in current affairs programming in the UK. One conclusion of the review was that the BBC should find ways to increase the impact of its current affairs output, and that programming

aimed at informing national and international debate should be promoted and signposted to audiences in a way that maximises its potential impact.

The amended licence thus includes a commitment that BBC One should broadcast at least 40 hours of current affairs in peak time each year. This will be measured on an annual basis, and the definition of peak time is defined as between the hours of 6pm and 10.30pm.

- BBC Trust, 'Current Affairs on BBC One', 23 September 2014
<http://merlin.obs.coe.int/redirect.php?id=17268> EN
- BBC Trust, 'BBC One Service Licence', Issued September 2014
<http://merlin.obs.coe.int/redirect.php?id=17269> EN

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Split-screen advertising: reminder about the applicable rules

The Audiovisual Media Services Directive contains a number of provisions concerning the scheduling and amount of advertising permitted on broadcast television (Arts. 19-26 AVMSD). In the UK, these requirements are enforced through the Code on the Scheduling of Television Advertising (COSTA) (see IRIS 2008-9/18).

In a recent Broadcast Bulletin, Ofcom published a 'Note to Broadcasters' providing guidance to broadcasters on the application of COSTA rules to split-screen advertising. This type of advertising is defined as: 'Split-screen advertising involves transmitting editorial content and advertising content simultaneously, with each occupying a distinct part of the screen'.

In principle, this mode of advertising is permissible. But, Ofcom notes that split-screen advertising is subject to the same rules as 'spot advertising', e.g., it is included when calculating the amount of advertising shown (Rule 4); it remains distinct from editorial content (Rule 11); and that it does not prejudice the integrity of programming (Rule 12).

In particular, licensees are reminded to be aware of the nature of programming, which includes split-screen advertising so that its 'integrity' is maintained. Ofcom accepts that it is not possible to draw up an exhaustive, prescriptive list of types of programming or considerations. However, the Note specifically mentions: (i) ensuring that the viewer continues to have confidence that the programme is impartial and free from commercial influence; (ii) the need to treat editorial content with appropriate sensitivity or to enable the programme to convey its messages without undue distraction (for example, where the programme focuses on a national tragedy or emergency), and (iii) the need to protect particular sectors of the audience

(e.g. children) from excessive exposure to commercial messages.

• 'Note to Broadcasters', Ofcom Broadcast Bulletin, Issue No 262, 22 September 2014, 3-4
<http://merlin.obs.coe.int/redirect.php?id=17275>

EN

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deejgee Research/ Consultancy

• 2014. évi XXXIX. törvény - Egyes törvényeknek a költségvetési tervezéssel, valamint a pénzügyi és a közüzemi szolgáltatások hatékonyabb nyújtásával összefüggő módosításáról (Act XXXIX of 12 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17258>

HU

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HU-Hungary

State intervention in the market for commercial television

On 12 September 2014, the Hungarian Parliament adopted an act that makes it impossible for the two national commercial television channels (RTL Klub and TV2) to request cable companies to pay a retransmission fee. As a result of this new piece of legislation, the two broadcasters have to proceed with an in-depth restructuring of their business models.

The two national commercial broadcasters have long been planning to collect retransmission fees from the cable companies as of 1 January 2015. Thus far, RTL Klub and TV2 (unlike the other channels) have been available for free, since before the digital switchover they were broadcast to all households as analogue terrestrial channels. According to the media act, national providers of analogue terrestrial audiovisual media services may not request a retransmission fee for the two channels until the deadline for the digital switchover (31 December 2014 according to Article 207 of the Act CLXXXV on Media Services and Mass Media of 2010).

The digital switchover was concluded before October 2013. Since free analogue terrestrial broadcasting no longer exists, RTL Klub and TV2 could in theory continue to operate under the same conditions as other TV channels and would thus be entitled to require from the cable operators to pay retransmission fees for their content. Nevertheless, the situation was legally not clear.

Among media professionals, it was taken for granted that the two commercial channels intended to demand retransmission fees for their broadcasts starting in 2015. However, the government decided to intervene in the national market for commercial television. Therefore, the Parliament adopted a legal amendment, which stipulates that RTL Klub and TV2 must continue to make their broadcasts available to the distribution companies for free, until the government works out a pricing formula, which could be the basis for the transition of the commercial channels to become fee-based providers.

IE-Ireland

Complaint against broadcast of dance routine with sexual overtones upheld

At its meeting of July 2014, the Compliance Committee of the Broadcasting Authority of Ireland (BAI) upheld, in part, a complaint made against the broadcast of a dance routine, which included clear sexual overtones. The complaint concerned the broadcast of the dance routine at 6:30pm on a Sunday evening on RTÉ television's *The Voice of Ireland*, without any prior audience warnings or notifications as to the nature of the content.

Under section 48 of the Broadcasting Act 2009, viewers can complain about broadcasting content, which they believe is not in keeping with broadcasting codes and rules. The complainant claimed the broadcast of the dance routine breached a number of sections of the BAI Code of Programme Standards (see IRIS 2008-5/23). In particular, the complaint focused upon the unsuitability of the dance routine broadcast without any audience warning and prior to the watershed, for children who were likely to be part of the viewing audience.

Section 3.6.2 of the BAI Code of Programme Standards requires that scenes of a sexual nature must have strong editorial justification before being broadcast and section 3.2.2 prohibits strong sexual content from featuring during children's programming. Where content of a sexual nature is editorially justified, section 2.2.1 of the Code requires that broadcasters should use due care to ensure that viewers are protected from undue offence and harm. Due care, under the Code, requires the use of prior warnings for programme material, which has the potential to offend.

In upholding the complaint, in part, the Compliance Committee noted that the audience profile did not make the programme a children's programme as defined by the Code. Viewers under 18 years of age made up 12.1% of the total audience, a figure that falls below the 50% threshold required in order for it to be considered a children's programme under the Code. Nevertheless, the nature and timing of the

programme was such that the Compliance Committee held that it constituted family viewing and regard should be had that children will be members of the audience.

While the Committee noted that the dance routine was editorially justified, the routine included clear sexual overtones and sexualised elements dealing with adult themes. These were considered inappropriate for children and adolescents who were watching the programme at the time of broadcast.

The Compliance Committee found that, in the absence of any prior audience warnings or notifications, the programme did not demonstrate due care appropriate for the time of the broadcast and the audience viewing. Accordingly, the programme infringed the requirements of section 2.2.1 of the BAI Code of Programme Standards.

• Broadcasting Authority of Ireland, Broadcasting Complaints Decisions (September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17259>

EN

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Ratification of the Council of Europe Convention on Cybercrime

On 18 July 2014, the Grand Duchy of Luxembourg formally ratified and implemented the Council of Europe Convention on Cybercrime, as well as its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. As the Grand Duchy was one of the last members of the Council of Europe that had signed (in 2003), but not ratified the Convention and its Protocol, the *Chambre des députés* (parliamentary assembly) had become subject to pressure from a number of international organisations.

Luxembourg had already introduced, before the increasing importance of the Internet, provisions in its criminal law concerning attacks on information systems. Therefore, the majority of the provisions included in the Convention covering substantive aspects had already been transposed by the Luxembourgish legislator and did not need to be amended. This concerns, for example, the offences foreseen by the Convention in relation to child pornography: Article 383ter of the Luxembourgish Criminal Code already established, amongst others, an extensive provision according to which it is a criminal offence to store or transmit an image of a pornographic nature of a minor with a view to disseminating the images by any means.

Similarly, the aim of the Additional Protocol to the Convention, to harmonise “substantive criminal law in the fight against racism and xenophobia on the Internet” and to improve “international co-operation in this area” had already been reached in Luxembourg: the national Criminal Code covers these crimes; for instance, Article 3 of the Protocol relating to the dissemination of racist and xenophobic material through computer systems corresponds to article 457-1 of the Criminal Code. This provision proscribes incitement to hatred and violence against a person or a group via any written, spoken or pictorial means based on one of the elements included in article 454 of the Criminal Code. Article 454 even goes beyond the list contained in Article 2 of the Protocol, as it includes not only race, colour, descent, national or ethnic origin and religion, but also attacks on individuals or groups on the grounds of their sexual orientation, their gender, their disabilities, as well as their age.

However, the ratifying law aims at filling some gaps in the national substantive law, taking into consideration national case law. This especially concerns criminal provisions in view of data protection breaches. The law of 18 July 2014 modifies a number of provisions in the Criminal Code and the Code of Criminal Procedure. For example, Article 496 of the Criminal Code now also explicitly includes electronic keys and passwords amongst the objects that the perpetrator of the offence may aim at obtaining, as it was not possible under the previous situation to criminalise the act of “phishing” a password or “stealing” other persons’ “online identities” if they were using their real names.

Most importantly, procedural rules were adapted in order to reflect the requirements of the Convention. In order to satisfy Title 2 of the Convention relating to expedited preservation of stored computer data, as one of the key amendments, Article 24-1, point 1 of the Code of Criminal Procedure introduces a “quick freeze procedure”. According to this procedure, it will be possible to track and localise the origin or the destination of traffic data without the obligation of immediately opening a preliminary investigation. This will be possible by requiring that the providers, on specific notice, store whatever data is available on a specific user or account and keep it available for possible later formal requests by the competent authority to hand over the data. In that way, useful information that is likely to be lost or modified can be kept available on request by the investigating judge or the general public prosecutor for a 90 day-period. Finally, necessary amendments resulting from the above mentioned changes are also introduced in the data protection law for the electronic communications sector.

• *Loi du 18 juillet 2014 portant 1) approbation de la Convention du Conseil de l'Europe sur la cybercriminalité ouverte à la signature à Budapest le 23 novembre 2001, 2) approbation du Protocole additionnel à la Convention sur la cybercriminalité, relatif à l'incrimination d'actes de nature raciste et xénophobe commis par le biais de systèmes informatiques, fait à Strasbourg le 28 janvier 2003, 3) modification du Code pénal, 4) modification du Code d'instruction criminelle, 5) modification de la loi modifiée du 30 mai 2005 concernant la protection de la vie privée dans le secteur des communications électroniques, Mémoires A - N°157, 12 août 2014, page 2406 (Act of 18 July 2014 on the Council of Europe Convention on Cybercrime, the Additional Protocol, and other amendments, Memorial A - N°157, 12 August 2014, p. 2406)*

<http://merlin.obs.coe.int/redirect.php?id=17260>

FR

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NL-Netherlands

Court applies Google Spain: no right to be forgotten for convicted criminal

On 18 September 2014, the Amsterdam Court handed down the first national application of the EU Court of Justice's Google Spain judgment (see IRIS 2014-6:1/3). The case was initiated by a convicted criminal after Google had not fully granted his online removal requests. The court rejected the claim, but it should be noted that the case strongly depends on its specific circumstances. Although the case concerns a judgment in summary proceedings, it is interesting to assess the court's considerations.

The facts are as follows: in 2012, the plaintiff had been convicted for attempted incitement to assassination. He had been released from custody pending the appeal of this conviction. Via Google, internet users can find links to information on the conviction and the plaintiff had filed an online request with the search engine to remove specified links, a request that Google had only partly complied with. Therefore, the plaintiff brought a suit against Google.

The Dutch court assessed the case on the basis of national data protection law (Wet bescherming persoonsgegevens, Wbp) and the CJEU's Google Spain decision. According to the court, the CJEU's decision does not aim to protect people against negative publicity on the internet, but only against being followed at length by information that is "irrelevant, excessive or unnecessarily defamatory". These criteria seem to differ slightly from those of the CJEU ("inadequate, irrelevant or no longer relevant, or excessive"). Also, contrary to the CJEU, the Dutch court explicitly acknowledged that removal requests, as in the present case, involve not only the plaintiff's fundamental right to privacy (Article 8 of the European Convention on Human Rights), but also the search engine's right to freedom of information (Article 10 ECHR). In addition, the

interests of internet users and information providers on the internet should be taken into account.

In applying the criteria, the court noted that committing a serious crime inevitably results in a lot of (negative) publicity, that, together with the criminal conviction itself will remain as relevant information about a person. And only in exceptional circumstances will such information be considered "excessive" or "unnecessarily defamatory". The plaintiff had neither sufficiently substantiated that the search results in question were irrelevant, excessive or unnecessarily defamatory, nor had he shown compelling, legitimate grounds relating to his situation that would have required Google to remove the links. Consequently, the court rejected the removal claim.

• *Rechtbank Amsterdam, 18 september 2014, ECLI:NL:RBAMS:2014:6118 (Amsterdam Court (summary proceedings), 18 September 2014, ECLI:NL:RBAMS:2014:6118)*

<http://merlin.obs.coe.int/redirect.php?id=17263>

NL

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Dutch legislator proposes two bills on the protection of journalistic sources

On 15 and 17 September 2014, the Dutch legislator issued two bills on the protection of journalistic sources. The bills follow several judgments against the Netherlands for violating Article 10 of the European Convention on Human Rights in cases concerning journalists and source protection.

With three violations on the matter in the last seven years (*Voskuil v. the Netherlands* (2007), see IRIS 2008-4/2); *Sanoma Uitgevers B.V. v. the Netherlands* (2010), (see IRIS 2010-10/2); and *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (2012), (see IRIS 2013-2/2), the Dutch government has been repeatedly criticised by the European Court of Human Rights for not having legislation in place that legally guarantees the protection of journalistic sources. Therefore, with these new bills, source protection issues in the Netherlands will be regulated under two laws.

First, the legislator has proposed a bill to amend The Intelligence and Security Services Act 2002 (*Wet op de inlichtingen- en veiligheidsdiensten 2002, Wiv*). The proposed amendment contains a requirement for a judicial and binding review before intelligence and security services (*Algemene Inlichtingen- en Veiligheidsdienst, AIVD*, and *Militaire Inlichtingen- en Veiligheidsdienst, MIVD*) may apply their special powers to journalists in order to uncover journalists' sources. Article 19 of the Act only requires permission from the relevant Minister, or the relevant head of a service

on behalf of this Minister, for the exercise of such a power. However, for the exercise of this power against a journalist in order to uncover his or her source, the newly proposed Article 19a now requires permission from the court of The Hague. This proposal addresses the main issue in the judgments against the Netherlands in *Telegraaf Media*, i.e. the lack of an independent and binding review by a judge or other independent body before the exercise of special powers by intelligence and security services against journalists and news media.

The second proposed bill amends the Dutch Code of criminal procedure (*Wetboek van Strafvordering*, Sv). With this proposed amendment, the right of source protection for free newsgathering in criminal cases and the journalistic right to non-disclosure (*verschoningsrecht*) are laid down in law. The new Article 218a ensures that journalists and commentators (*publicisten*) have a right to non-disclosure upon questions with regard to the origin of the information they receive from sources who wish to remain anonymous. Also, other provisions of the Code are amended, for example, on search and seizure. Thus, a search of a newspaper's office shall generally only be allowed with the intervention of the investigating judge. This brings Dutch law in line with the *Sanoma* judgment, which normally requires review by an independent body before seizure of journalistic material. The proposal further addresses the judgment against the Netherlands in *Voskuil*, which concerned a court order to detain a journalist for non-compliance with a judicial order to reveal the identity of his source (*gijzeling*). The measures of the authorities were considered so far-reaching that they would have a chilling effect on people who might want to share information with the press in the future. The interest of a democratic society in ensuring free and unhampered press reporting was considered to weigh heavily in that case.

What is explicitly excluded from both bills is a legal definition of the notion of 'a journalist'. However, the Explanatory Memorandum of the second proposed bill emphasises that source protection in the context of criminal procedures should not be limited to those that are involved in reporting professionally or on a paid basis. It is stated that the public debate is no longer confined to the traditional media but also takes place outside this structure, for example, on websites and blogs. Contrary to the *Wiv*, which only mentions 'journalists' in its new Article 19a, the new Article 218a Sv therefore also mentions 'commentators' that engage in public debate as eligible for a right of non-disclosure in criminal procedures.

• *Wetsvoorstel tot wijziging van de Wet op de inlichtingen- en veiligheidsdiensten 2002 in verband met de invoering van een onafhankelijke bindende toets voorafgaand aan de inzet van bijzondere bevoegdheden jegens journalisten, welke gericht is op het achterhalen van hun bronnen*, 15 september 2014 (Bill to amend The Intelligence and Security Services Act 2002 with regard to the introduction of an independent and binding review prior to exercising special powers against journalists, in order to discover their sources, 15 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17261>

NL

• *Wetsvoorstel tot wijziging van het Wetboek van Strafvordering tot vastlegging van het recht op bronbescherming bij vrije nieuwsgaring (bronbescherming in strafzaken)*, 17 september 2014 (Bill to amend the Dutch Code of criminal procedure in order to establish in law the right to source protection for free newsgathering (source protection in criminal procedures), 17 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17262>

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Amendments to frequency allocation regulation

On 1 September 2014, an amendment to the Dutch frequency allocation regulation, the 'Frequentiebesluit 2013' (Frequency Decree 2013), entered into force. This regulation sets out rules and guidelines for the distribution of spectrum usage rights by the Minister for Economic Affairs. The aim of the 2014 amendments is to increase legal certainty for current and prospective licensees by ensuring timely ministerial decisions on the granting of licenses (for previous amendments, see IRIS 2003-1:12).

The *Frequentiebesluit* of 2013 was an attempt at creating a more flexible framework for the allocation of spectrum usage licences, which was deemed necessary 'in order to adapt to rapid technological and international developments in the field of wireless communication'. It prescribed that ministerial decisions on requests for the renewal of spectrum usage licences were to be made between two and one years before the expiry of current licences.

The explanatory memorandum to the 2014 amendments shows that this period was considered to be too short by market participants, who required timely knowledge of redistribution plans in order to adapt business strategies and to make technical arrangements such as equipment replacements. Now, with the 2014 amendment, the term for renewal of decisions has been shifted to between two and four years before expiry, thereby creating a greater degree of foreseeability and certainty for current license holders and applicants. The regulation makes an exception for commercial licensees, however, to whom a term of between one and four years before expiry applies.

Besides these altered temporal requirements, the 2014 amendments also create a ministerial competence for licence extensions upon the minister's own initiative (i.e. even in absence of applications for renewal). Within two years before the expiry of a current licence, and in the absence of an application for renewal, the minister may now extend licences if he considers this to be in the interest of 'service continuity'. With the interests of end users in mind, this allows the government to prevent service disruption

due to the expiry of licences before the completion of redistribution procedures and the accompanying technical arrangements. In the words of the explanatory memorandum, this rule entails a formalisation of the intended 'director's role', which the minister must play in the allocation of scarce frequencies.

• *Frequentiebesluit 2014: Besluit van 10 juli 2014, houdende wijziging van het Frequentiebesluit 2013 in verband met de aanpassing van de voorschriften met betrekking tot de verlenging van vergunningen voor schaarse frequentieruimte* (Frequency Decree 2014: Decree of 10 July 2014, concerning amendment of the Frequency Decree 2013 relating to the adjustment of rules governing the extension of licences for scarce frequency space)

<http://merlin.obs.coe.int/redirect.php?id=17296>

NL

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Proposed amendments to telecommunications law affecting public broadcaster's website cookies

On 15 July 2014, the Dutch authority for consumers and markets (Autoriteit Consument en Markt) (ACM) imposed an order for periodic penalty payments on the Dutch public broadcaster NPO (Nederlandse Publieke Omroep) (see IRIS 2014-8/33). The NPO placed tracking cookies on end-user devices without correctly informing the end-user. Therefore, according to the ACM, the requisite consent for the placing of the tracking cookies was not in accordance with Article 11.7a of the Dutch telecommunications act (Telecommunicatiewet) and the Dutch data protection act (Wet bescherming persoonsgegevens). In order to comply with these laws, consent from the end-user is required in order to place a (non-functional) cookie on their device. Furthermore, the consent has to be given voluntarily and unambiguously, based on information that discloses the specific pre-determined purposes for the placing of the cookie.

Also, the NPO's modus operandi concerning cookies and obtaining the requisite consent had raised further controversy, when the Dutch Data Protection Authority (College bescherming persoonsgegevens) (CBP) held that the NPO's so-called 'cookiewall' did not meet the requirements under the telecommunications act and data protection act (see IRIS 2014-8/33). This was due to the fact that the requisite consent, in order to place a cookie on the terminal of an end-user, has to be given freely and unambiguously. In order to access the audio-visual content on the website of the NPO, end-users had no choice but to accept the cookies. By restricting access to the audio-visual content on the website, the CBP was of the opinion that consent, for the placing of the cookies, was not given freely and unambiguously and was therefore not in compliance with the law.

The Dutch parliament is now in the process of amending Article 11.7a of the telecommunications act, which governs the placing of cookies on the terminals of end-users (for previous amendments, see IRIS 2012-7/32). The current Article 11.7a exempts functional cookies, which are technically indispensable in order to provide a requested service to an end-user, from the consent requirement. However, consent is still required for analytical cookies that have little or no impact on the privacy of end-users. The amendment will amend Article 11.7a to exempt cookies from the consent requirement, which are solely used for analytical purposes. The amendment is designed to make the legal regime less strict for cookies that can be deemed non-privacy invasive, reducing the regulatory burden for the placing of cookies on end-users devices by websites.

Furthermore, the amendment provides that access to websites run by public bodies cannot be made dependent on a user consenting to privacy-invasive cookies. The explanatory memorandum states that a 'cookiewall' can be deemed to comply with the law, unless end-users are dependent on the information which is disseminated by the website. Thus, a 'cookiewall' as was used by the NPO for the placing of privacy-invasive cookies, is not compliant with the requirement of consent, due to the fact that there is no alternative for this public service. According to the explanatory memorandum, the rationale behind this is that public services are already paid for via public taxes. Individuals should not be forced to trade their privacy in order to access a public service.

• *Wijziging van de Telecommunicatiewet (wijziging artikel 11.7a)* (Amendment to the Telecommunications Act (Article 11.7a))

<http://merlin.obs.coe.int/redirect.php?id=17264>

NL

• *Autoriteit Consument en Markt, Nieuwsbericht, 31 juli 2014* (Dutch Authority for Consumers and Markets, Press Release, 31 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17297>

NL

• *CBP: Volgen bezoekers omroepwebsites met cookies in strijd met de wet, 31/07/2014* (Dutch Data Protection Authority, Press Release, 31 July 2014)

<http://merlin.obs.coe.int/redirect.php?id=17265>

NL

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PT-Portugal

Amendment to the Cinema Act allows operators to pay less

Early this year, the Portuguese parliament approved the first amendment to the Cinema and Audiovisual Act (no. 55/2012, dated 6 September 2012) (see IRIS 2012-7/33 and IRIS 2013-4/26), which establishes

reduced fees for operators. The act proposal was intended to provide more funding to this field of activity through the collection of a fee from pay-TV operators (namely, Zon/Optimus, MEO/PT, Cabovisão and Vodafone), an amount which is directed to the Institute of Cinema and Audiovisual (ICA - Instituto do Cinema e do Audiovisual) for later investment in the sector. However, at the beginning of this year, their debt was around EUR 11 million of the fee correspondent to the preceding year, 2013. So, this government proposal to amend the Cinema Act was mostly due to non-payment of fees from pay-TV providers. The decision was aimed at reverting the situation by altering the conditions of fee collection and proposing a different scheme for fee collection.

According to this amendment (Act no. 28/2014, of 19 May 2014), operators will pay less than before. It sets an annual fee of EUR 1.75 for each subscriber, which represents a significant reduction from what was established by previous rules (of a minimal amount of EUR 3.50 increased up to a maximum of EUR 5). In practice, the amount paid directly to ICA is lower when compared to what was defined by the initial version of the Cinema Act and the rest of it comes from fees which operators pay to the Telecommunications regulatory body, ANACOM (Autoridade Nacional de Comunicações). Operators will pay EUR 1.75 per year for each pay-TV subscriber until 2019 and ANACOM will pay the remaining EUR 1.75 (totalling the EUR 3.50). After this period, operators will pay EUR 2 while ANACOM will pay EUR 1.50 euro.

There is, however, an exception to this scheme, as ANACOM will pay more in 2014. In fact, a transitory provision establishes that “in 2014, the amount to be transferred to ICA, because of the net income of ANACOM (04046) is equivalent to the total amount due in that year by operators of subscription television services” (Article 4 of Law no. 28/2014). Summing up, cinema receives from the telecommunications sector EUR 3.50 for each pay-TV subscriber in 2014.

In short, the main goal of this amendment to the 2012 law was to solve the problem of delays in the payment of fees (which occurred in 2013, and also caused severe damage in the opening of public support programs for the sector) and to contribute to an effective funding of cinema production with public support through ICA.

• *Lei n.º 28/2014, de 19 de maio de 2014 - Altera a lei da arte do cinema e das atividades cinematográficas e audiovisuais, aprovada pela Lei n.º 55/2012, de 6 de setembro. Publicada no Diário da República n.º 95, 1.ª Série, de 19-05-2014 (Act no. 28/2014, of 19 May 2014 - First amendment to the Law of cinema and cinematographic and audiovisual activities no. 55/2012. Published in the official news bulletin “Diário da República” no. 95, 1st series, dated 19 May 2014)*
<http://merlin.obs.coe.int/redirect.php?id=17280>

PT

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RO-Romania

Rules for the audiovisual electoral campaign for the presidential election

On 11 September 2014, the National Audiovisual Council - CNA (Consiliul Național al Audiovizualului) adopted Decision No. 528 (Decizia nr. 528/2014 privind regulile de desfășurare în audiovizual a campaniei electorale pentru alegerea Președintelui României) with regard to the rules of the audiovisual electoral campaign for the election of the President of Romania (see IRIS 2009-10/24 and IRIS 2011-3/29). The presidential elections are convened on 2 November (first round) and 16 November 2014 (second round).

The electoral campaign lasts 30 days, from 3 October 00.00, until 1 November 07.00 (24 hours before the opening of the voting process) [Art. 1(1)]. The access of the presidential candidates to the public and private radio and television services is free of charge [Art. 2(1)]. The candidates, their representatives, and the representatives of political parties and alliances, as well as electoral alliances have access to the radio/TV services only in electoral promotion programmes, electoral debates, and information programmes [Art. 5(1)].

In connection with the coverage on the electoral campaign, the broadcasters have to observe the principles of equity, balance, and impartiality [Art. 3(1)]. The broadcasters are required to ensure that the electoral programmes observe the following rules:

- The electoral promotion shows, the electoral advertisements, and the other programmes made available by electoral competitors must not endanger the constitutional order, the public order, and the security of persons or property.
- The programmes shall not incite to hatred based on race, religion, nationality, sex or sexual orientation.
- They shall not contain statements that undermine human dignity, the right to one's image or which are contrary to morality.
- The programmes shall not contain criminal or moral accusations against other candidates or electoral competitors without being accompanied by relevant evidence, which must be explicitly presented [Art. 3(2)].

According to Art. 3(3), the producers, presenters and moderators of electoral debates have to ensure that the debate sticks to electoral themes. They must also intervene when their guests breach the rules stipulated in Art. 3(2). If the guests do not comply with

these requirements, the moderators may interrupt them. They must also require explicit evidence when the participants bring criminal or moral accusations against some of their competitors, so that the public can form a correct opinion [Art. 3(3)].

During the election campaign, the candidates and their representatives cannot be producers, presenters or moderators of public or private broadcasting programmes [Art. 4 (1)]. The candidates and the representative of the electoral competitors who hold public office, may appear in programmes other than electoral programmes, which are strictly related to issues on the exercise of their functions. In these situations, the broadcasters are required to ensure the equality and the diversity of the opinions [Art. 4 (2)].

Live broadcast or recorded rallies, campaign meetings, press conferences or other campaign activities of candidates are considered as electoral promotion programmes [Art. 5(2)]. Audiovisual election materials, other than electoral advertisements made available to the broadcasters by the candidates, can only run in election promotion programmes [Art. 5 (3)].

Broadcasters are required to identify the invited persons in their programmes as:

Candidates, representative of a political party, political/electoral alliances that support candidates, journalist, analyst, commentator, political consultant etc. [Art. 5 (4)].

According to Art. 6 (1), the public and private broadcasters may broadcast election advertisements only during electoral programmes [Art. 5 (1)] under the following conditions:

Electoral advertisements will only run, if they are appropriately marked. The ads may not be longer than 30 seconds and have to be clearly assumed by the electoral competitors. The access to broadcast electoral ads should be granted to all candidates equally. During electoral debates, only electoral ads of candidates who are participating in the relevant programme can be broadcast. The content of the electoral ads has to observe the provisions of Art. 3(2). The electoral advertisements are not considered as commercial ads and their release is free of charge [Art. 6(2)].

During the election campaign it is forbidden to broadcast (except for election ads) any form of audiovisual commercial or non-commercial communication containing references to the candidates or their representatives [Art. 6 (3)]. 48 hours before the election day it is prohibited to present electoral surveys or sociological inquiries on the street [Art. 7 (2)]. On the elections day, it is prohibited to present exit polls before voting closes [Art. 7 (3)]. 24 hours before the voting begins and before the close of voting, it is strictly forbidden to broadcast any messages or comments about the elections, election broadcasts, and election commercials, as well as to invite or present in the programmes

electoral competitors or their representatives, except as determined in Art. 9.

According to Art. 9, the persons whose rights or freedoms have been damaged by the release of incorrect facts during an electoral programme shall be entitled to reply. Also persons who are affected by inaccurate information shall be entitled to reply.

Since the entry into force of Decision No. 528, monitoring of compliance with the provisions regarding accurate information and pluralism of the Audiovisual Election Code is performed weekly, and broadcasters are required to address in the following week any breaches of the code.

According to Art. 13, the broadcasters must record the electoral programmes and keep the records during the entire electoral campaign, as well as 30 days after the official disclosure of the elections results.

According to Art. 14, the breaches of Decision No. 528 will be sanctioned under the provisions of the Audiovisual Law No. 504/2002 and of Law No. 370/2006. If the breaches occur after the end of the electoral campaign, the CNA will analyse the possible incidents as quickly as possible. The provisions of Decision No. 528 shall accordingly apply to the campaign to be held for the second round of the presidential elections (Art. 15).

• *Decizia nr. 528 din 11.09.2014* (Decision No. 528 of 11 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17266>

RO

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RU-Russian Federation

Act on the limitation of foreign ownership in the media

On 14 October 2014 President Vladimir Putin signed into law amendments to the Statute on the Mass Media that drastically limit foreign ownership in the media. The new Statute enters into force on 1 January 2016.

The amendments revise Article 19-1 of the Statute on the Mass Media, itself introduced in 2001 (see IRIS 2001-9/25), and further tightens the policy introduced by a 2008 statute to curb foreign investment in companies of strategic importance to the security of the nation (see IRIS 2008-8/32).

A foreign state, international organisation or an organisation under foreign control, a foreign citizen, foreign

legal entity, Russian entity with foreign stock, stateless person or a dual citizen may not establish a media outlet in Russia, act as its editorial office or engage in broadcasting. They may not own share or stock in media entities that exceed 20 percent of the charter capital. They may neither control nor direct media outlets and broadcasters nor determine their policies or decisions.

The amendments would extend to all media, including online outlets, registered in Russia.

The documents proving compliance with the new statute shall be submitted to Roskomnadzor, the governmental watchdog in the media field, by 15 February 2016. A failure to do so and/or non-compliance with the restrictions will lead to a suspension of activity of the media outlet or broadcasting organisation.

On 24 September 2014 the OSCE Representative on Freedom of the Media Dunja Mijatović called on the Russian authorities to carefully address the law, at the time only a draft, and noted that it should not concentrate ideas and information in the hands of national political elites, thus hampering the important watchdog function of journalists.

• О внесении изменений в Закон Российской Федерации "О средствах массовой информации" (Federal Statute of 14 October 2014, No. 305-FZ "On amending the Statute of the Russian Federation "On the Mass Media", adopted by the State Duma on 26 September 2014, approved by the Federation Council on 1 October 2014, published on the official portal on 14 October 2014)

<http://merlin.obs.coe.int/redirect.php?id=17278>

RU

• "Proposed media ownership requirements could further damage media pluralism in Russia, OSCE Representative says", Statement by the OSCE Representative on Freedom of the Media, 24 September 2014

<http://merlin.obs.coe.int/redirect.php?id=17279>

EN

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UZ-Uzbekistan

Statute regulates blogging

On 4 September 2014 President Islam Karimov of Uzbekistan signed into law a set of amendments and additions to several legislative acts, earlier adopted by the Oliy Majlis (the parliament). In particular, Article 23 of this new statute adds two new provisions related to the activity of bloggers to the national statute "On Informatisation" (No. 560-II, adopted 11 December 2003).

First, it gives a definition of a blogger as "a physical person, who posts on his/her website and/or pages of others' websites on the Internet generally accessible

information of a socio-political, economic and other nature, particularly for its discussion by users."

Second, the amendments impose a wide array of responsibilities, including an obligation to verify the truthfulness of information before its posting, as well to remove untrue posts upon the demand of the relevant governmental authorities. In case of violation of this provision, the statute foresees taking blocking measures against websites and other types of liability.

On 8 September 2014 OSCE Representative on Freedom of the Media Dunja Mijatović noted that the restrictions go far beyond the admissible limits to free speech expressed in the OSCE commitments and other international standards.

• Закон Республики Узбекистан "О внесении изменений и дополнений в некоторые законодательные акты Республики Узбекистан" (The Law of the Republic of Uzbekistan "On amendments and additions to certain legislative acts of the Republic of Uzbekistan", No. ЗРУ -373, adopted by the Oliy Majlis on 23 August 2014, published in Narodnoe slovo official daily on 5 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17276>

RU

• "New restrictions in Uzbekistan further limit free expression on Internet, OSCE Representative says", Statement by the OSCE Representative on Freedom of the Media, 8 September 2014

<http://merlin.obs.coe.int/redirect.php?id=17277>

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MK-"the Former Yugoslav Republic Of Macedonia"

Government's subsidies for private and public media

The main goal of the amendments to the Law on Audio and Audiovisual Media (Законот за аудио и аудиовизуелни медиуми) which were adopted by the national Parliament in October 2014, is to provide support to the public and private TV broadcasters with funds from the state budget. According to the new regulation the national Government has to establish a specialised seven member commission with representatives from the Ministry of Finance, the Ministry of Culture, the Film Agency, the Agency for Audio and Audiovisual Media Services, the Central Government, the Public Revenue Office and the Ministry for Information Society and Administration. TV broadcasters have to submit project proposals for TV productions to the Commission, which, based on criteria from a Government's by-law act, will decide which broadcasters and to what extent will receive state funding.

The state funding of private broadcasters has become problematic during the past few years due to the

Government's and state institutions' advertising. According to the media regulation authority, the Agency for Audio and Audiovisual Media Services, the second biggest advertiser on the broadcasting market in 2013 was the national Government, and the fifth biggest was the ruling political party. In 2013 these two political advertisers - the only political entities from the Top 50 advertisers - bought 447 hours airing time to broadcast in total 21,780 advertising spots. There is no public data on how much funds other states, and public institutions and agencies have spent for self-promotion. There is also no information on how much public and state money has been spent for the purpose of political advertising in the new media and in the print media outlets.

The Government's advertising was noted by the OSCE ODIHR Mission in its report on the 2014 Presidential and Early Parliamentary Elections: "Many OSCE/ODIHR EOM interlocutors expressed concern about media independence, alleging that prominent media outlets are under the indirect control of the governing parties because of the state's position as the largest single advertiser. Media stakeholders also noted that self-censorship is practiced to secure state advertising and to avoid defamation lawsuits." The European Commission in its latest Country's Progress Report for 2014 also reacted to the increased state funded advertising: "There is indirect state control of media output through government advertising and government-favoured (and favourable) media outlets (04046). In September 2014, the government made data on government advertising, including partial figures, publicly available. However, it is still unclear which media outlets are the primary beneficiaries of such campaigns and according to what criteria public funds are disbursed."

The adopted amendments offer no clear mechanisms which could ensure the general public that this state funding does not affect the editorial policy of broadcasters and that all broadcasters on the market have equal access to subsidies from the state budget.

• *Zakon za izmenuvanje i dopolnivanje* (Amendments to the Law on Audio and Audiovisual Media Services)

<http://merlin.obs.coe.int/redirect.php?id=17779>

MK

• Presidential and Early Parliamentary Elections, 2014 - OSCE/ODIHR Election Observation Mission Final Report

<http://merlin.obs.coe.int/redirect.php?id=17780>

EN

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