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of the European Audiovisual Observatory

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MOSKAUER ZENTRUM FÜR MEDIENRECHT
UND MEDIENPOLITIK, MZMM



ΑΙΘΑΙΟ ΜΕΘΟΝ
ΕΝΗΜΕΡΩΣΗΣ
& ΕΠΙΚΟΙΝΩΝΙΑΣ

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: *Matúz v. Hungary*

In its judgment in the case of *Matúz v. Hungary*, the European Court of Human Rights confirmed the importance of whistleblower protection, in this case for a journalist who alarmed public opinion regarding censorship within the public broadcasting organisation in Hungary. The case concerned the dismissal of a television journalist, Gábor Matúz, working for the State television company Magyar Televízió Zrt., after having revealed several instances of alleged censorship by one of his superiors.

Matúz first contacted the television company's president and sent a letter to its board, informing them that the cultural director's conduct in modifying and cutting certain programme content amounted to censorship. A short time later, an article appeared in the online version of a Hungarian daily newspaper, containing similar allegations and inviting the board to end censorship in the television company. A few months later, Matúz published a book containing detailed documentary evidence of censorship exercised in the State television company. Subsequently, Matúz was dismissed with immediate effect. Matúz challenged his dismissal in court, but he remained unsuccessful in his legal action in Hungary. After exhausting all national remedies, he lodged a complaint in Strasbourg, arguing a violation of his rights under Article 10 of the Convention. He submitted that he had the right and obligation to inform the public about alleged censorship at the national television company. The Hungarian government argued that by publishing the impugned book without prior authorisation and by revealing confidential information in that book, Matúz had breached his duties, leading to his summary - and justified - dismissal.

The European Court accepted that the legitimate aim pursued by the impugned measure was the prevention of the disclosure of confidential information, as well as "the protection of the reputation or rights of others" within the meaning of Article 10 § 2 of the Convention. Once more, the central question was whether the interference was "necessary in a democratic society". The Court referred to its standard case law on freedom of expression and journalistic reporting on matters of public interest and also observed that the present case bears a certain resemblance to the cases of *Fuentes Bobo v. Spain* (see IRIS 2000-4/1) and *Wojtas-Kaletka v. Poland* (see IRIS 2009-9/1), in which it found violations of Article 10 in respect of

journalists who had publicly criticised the public television broadcaster's management.

The relevant criteria regarding the balancing of the right to freedom of expression of a person bound by professional confidentiality against the right of employers to manage their staff have been laid down in the Court's case-law since its Grand Chamber judgment in the case of *Guja v. Moldova* (§§74-78) (see IRIS 2008-6/1). These criteria are: (a) public interest involved in the disclosed information; (b) authenticity of the information disclosed; (c) the damage, if any, suffered by the authority as a result of the disclosure in question; (d) the motive behind the actions of the reporting employee; (e) whether, in the light of the duty of discretion owed by an employee toward his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) the severity of the sanction imposed. The Court emphasised that the content of the book essentially concerned a matter of public interest and it confirmed that it was not in dispute that the documents published by Matúz were authentic and that his comments had a factual basis. The Court also noted that the journalist had included the confidential documents in the book with no other intention than to corroborate his arguments on censorship and that there was no appearance of any gratuitous personal attack either (par. 46). Furthermore, the decision to make the impugned information and documents public was based on the lack of any response following his complaint to the president of the television company and letters to the board. Hence the Court was "satisfied that the publication of the book took place only after the applicant had felt prevented from remedying the perceived interference with his journalistic work within the television company itself - that is, for want of any effective alternative channel" (par. 47). The Court also noted that "a rather severe sanction was imposed on the applicant", namely the termination of his employment with immediate effect (par. 48).

The Court was of the opinion that the approach by the Hungarian judicial authorities neglected to sufficiently apply the right of freedom of expression. The Court concluded that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society". Accordingly, the Court unanimously found that there has been a violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights (Second Section), case of *Matúz v. Hungary*, Appl. No. 73571/10 of 21 October 2014
<http://merlin.obs.coe.int/redirect.php?id=17320>

EN

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Committee of Ministers: Reply to Parliamentary Assembly's Call to Revise the European Convention on Transfrontier Television

In January 2014, the Council of Europe's Parliamentary Assembly adopted a resolution on the revision of the European Convention on Transfrontier Television (Resolution 1978 (2014)). The resolution noted that the Convention had been "the first international legal instrument ensuring unimpeded transmission of programmes regardless of frontiers", but also noted that while the EU's Audiovisual Media Services Directive had been amended in 2007, the Convention had not been revised since 2002 (see IRIS 1998-9/4).

The Parliamentary Assembly's 2014 resolution stated that it "deplores the fact" that the revision of the Convention and the work of its standing committee on transfrontier television were discontinued. It also noted that the "current blockage of the revision may lead to normative conflicts in Member States bound by the updated European Union Directive and the unamended ECTT and prevents non-European Union Member States from having an updated legal instrument in a constantly changing media environment". The Assembly recommended that the Council of Europe's Committee of Ministers resume work on the revision of the Convention (Recommendation 2036 (2014)). The Assembly has made previous calls for the revision of the Convention in its 2009 recommendation (1855) (see IRIS 2009-3/2).

The Committee of Ministers has now responded to the Parliamentary Assembly's recommendation. In its reply (Doc. 13605, 23 September 2014), the Committee stated that the discontinuation of the revision of the Convention was "a serious step back", but that it "sees no possibility to continue work at the present stage". The Committee explained that this is because "it has been informed by the European Union delegation that most issues covered by the convention fall under the exclusive external competence of the European Union and that the European Union does not have any intention to become party to the convention".

Moreover, the Committee states that, due "to this regrettable deadlock", it has not allocated any resources to working on the Convention in the past three years and "sees no reason to review its position for the time being". Finally, because of "the present budgetary context", the Committee will not consider drafting a new convention focusing on the freedom of expression aspects of media regulation.

• Committee of Ministers, Reply to Recommendation 2036 (2014), 23 September 2014

<http://merlin.obs.coe.int/redirect.php?id=17321>

EN FR

• Parliamentary Assembly, Recommendation 2036 (2014) on Revision of the European Convention on Transfrontier Television, 31 January 2014

<http://merlin.obs.coe.int/redirect.php?id=17322>

EN FR

• Parliamentary Assembly, Resolution 1978 (2014) on Revision of the European Convention on Transfrontier Television, 31 January 2014

<http://merlin.obs.coe.int/redirect.php?id=17323>

EN FR

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EUROPEAN UNION

Court of Justice of the European Union: Embedding Hyperlinks to Legal Content Does Not Constitute Copyright Infringement

On 21 October 2014, the Court of Justice of the European Union (CJEU) issued a decision in Case C-348/13 (*BestWater v. Mebes*), following a request for a preliminary ruling from the German Federal Court of Justice (*Bundesgerichtshof*). The case arose when a water filtering company's marketing video was made available on YouTube and a competitor decided to embed this video on their own website. The filtering company brought an action for damages in the German courts over the embedding of their video.

The question referred to the CJEU was whether "embedding, within one's own website, of another person's work made available to the public on a third-party website", constitutes communication to the public within the meaning of Article 3(1) of the Copyright Directive 2001/29/EC, "even where that other person's work is not thereby communicated to a new public and the communication of the work does not use a specific technical means, which differs from that used of the original communication".

Under Article 3(1) of the Copyright Directive, Member States have to provide authors of works the exclusive right to authorise or prohibit any communication to the public of their works. In other words, the question from the *Bundesgerichtshof* addressed the issue of whether a person embedding a video from another website without authorisation of the author constituted a communication to the public and thus infringed copyright.

Notably, the Court chose to issue its decision in the form of an order under Article 99 of the Court's rules of procedure. According to Article 99, the Court can issue an order "[w]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt".

The issue of an order thus makes clear that the CJEU is of the opinion that the pre-existing case law, particularly the Svensson case (see IRIS 2014-4/3), already answered the question for a preliminary ruling by the Bundesgerichtshof. This implies that embedding, as long as the same technical means are used for the communication, does not constitute a communication to the public where the communication does not reach a new public. Thus, embedding lawful content which was previously made available online, does not constitute a communication to the public and is therefore exempted from the consent requirement by the copyright holder.

The plaintiff company maintained before the German courts that the video was uploaded to YouTube “without its consent,” but the German courts did not rule on this point and therefore the question referred to the CJEU did not address the situation where a video is uploaded without permission. Moreover, due to the fact that the CJEU issued its decision in the form of an order, it did not address the issue of whether embedding unlawful content constitutes copyright infringement. The pending case C-279/13 (C More Entertainment) before the CJEU may clarify this issue.

• *Beschluss des Gerichtshofs (Neunte Kammer) in der Rechtssache C348/13 BestWater gegen Mebes*, 21. Oktober 2014 (Order of the Court (Ninth Chamber) in Case C-348/13, Bestwater v. Mebes, CJEU 21 October 2014)

<http://merlin.obs.coe.int/redirect.php?id=17363>

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Council of the EU: Conclusions on European Audiovisual Policy in the Digital Era

On 25 November 2014, the Council of the European Union, meeting in its configuration for Education, Youth, Culture and Sport, adopted its Conclusions on European Audiovisual Policy in the Digital Era. This document outlines the Council’s perspective on the future of EU audiovisual policy and makes invitations to the European Commission and Member States to take certain actions in this field.

The document starts by recognising the importance of audiovisual policy in fostering cultural and linguistic diversity and competitiveness, thereby representing a key area for the EU’s Europe 2020 Strategy. It subsequently notes the “blurring of lines” between linear and non-linear services, which gives cause to re-examine existing legislation while presenting opportunities for innovation. It is also notes that audiences increasingly expect online content-on-demand services and that market fragmentation hinders cross-border service provision in this regard.

In light of these findings, the Council urgently invited the Commission to complete its review of the Audiovisual Media Services Directive and to submit a proposal for revision thereof. It also outlined certain areas to which particular attention must be paid, including: whether the distinction between linear and non-linear services is still appropriate in the digital area; the functioning of the “country of origin principle” for digital services; and the effectiveness of measures for the promotion of European works and possible alternatives. Besides the Directive’s revision, the Council also invited the Commission to implement the process of a structured dialogue about film policy in Europe through the European Film Forum and to promote the use of the Erasmus+, Horizon 2020 and COSME programmes to finance activities in the audiovisual sector.

The Conclusions also include comments on other policy areas: the audiovisual business environment, public funding and access to finance and media literacy and film heritage. These are generally addressed to both the Commission and the Member States within their respective spheres of competence. As regards the business environment, the Council called for, among other things, the facilitation of licensing for multi-territory audiovisual media services and closer international cooperation in the audiovisual chain. This includes enhanced cooperation with the European Audiovisual Observatory. Furthermore, it suggested the encouragement of release window experimentation, such as simultaneous release on different platforms. Its recommendations regarding public funding include a rebalancing towards development, distribution and promotion. As to media literacy, the Council suggested an assessment of European citizens’ media literacy levels and of the Creative Europe Programme’s film literacy activities. It also called for the promotion of media literacy in both formal and non-formal education. Member States are also invited to foster the innovative reuse of audiovisual heritage and to make better use of EU structural funds in the protection, digitisation and circulation of the same.

Finally, the Commission is also invited to bring forward the necessary proposals to continue modernising the EU copyright framework in light of the digital shift in audiovisual services.

• Council of the European Union, Council conclusions on European Audiovisual Policy in the Digital Era, 25 November 2014

<http://merlin.obs.coe.int/redirect.php?id=17326>

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European Commission: Progress Report on Film Heritage Digitisation

On 7 October 2014, the European Commission pub-

lished its report entitled “Film Heritage in the EU”. This is the fourth progress report on the implementation of the 2005 Recommendation on Film Heritage of the European Parliament and Council (see IRIS 2005-6/9 and IRIS 2006-1/4). The first report on the same topic was published in August 2008, the second in July 2010 (see IRIS 2010-9/4) and the third in December 2012 (see IRIS 2013-2/6).

The report is based on the answers of the Member States to a Commission’s questionnaire circulated in September 2013. This provides an overview of the Member States’ progress in 2012-2013 in implementing the Recommendation, as well as the main challenges and risks faced by the Member States along the way to digitising film heritage.

The Commission’s findings largely repeat those of the previous report. This supports the Commission’s overall conclusion that not much progress has been made during the reporting period. Similar to the 2012 Report, the European digital film heritage is still “at risk of being lost” and the opportunities offered by the digital revolution “are largely being missed”. Rare examples of the opposite are the projects funded with EU structural funds, through EFG1914 or through a national policy of digitisation of film heritage, such as the Dutch “Images of the Future” or the British “Film Forever”.

The Commission acknowledged that the main obstacles to the digitisation of European film collections and the provision of online access to digitised collections, even for educational purposes, are still in place. During the reference period, the legal framework within which film heritage institutions (FHI) operate has not changed and clearing copyright and related rights to audiovisual material remains complex and costly. In this respect the publishing by “Licences for Europe” (a stakeholder dialogue on copyright and digital content facilitated by the European Commission) of its “Statement of Principle and Procedures for facilitating the digitisation of, access to and increased interest of European citizens in European cinematographic heritage works” is an important step forward. However, its effectiveness is yet “to be assessed over time”.

As compared to the findings of the previous report, budget and human resources allocations have remained stable or even reduced. Resources devoted to film heritage continue to represent a very small fraction of the resources allocated to the funding of new film productions by all Member States. New exploitation opportunities for heritage films, such as “long-tail” revenues or mash-ups of film heritage, remain largely unexploited. Although in several countries film heritage material is made available online for mash-up, overall online footage available for mash-up is still very limited.

On a more positive note, the Commission pointed out the increase in the number of film databases accessible and searchable online or which give the possibility to stream the works. FHI became more aware

of the need for long-term digital preservation systems that take care of both analogue and digital collections. However, this awareness is not backed by necessary funding and specialised professional training in both digital and analogue competences. The Commission also noted some progress in the field of education, namely an increase in film literacy activities and the development of cooperation between FHI and universities. However, obstacles posed by rights-clearance procedures still hugely restrain the availability of on-line material for film literacy.

In conclusion, the Commission does not give Member States any clear recommendations and limits itself to sporadic advice on further desirable action throughout the report. This advice amounts to an encouragement to extend certain good practices (such as making film databases accessible and searchable online or updating archival policies, in order to include digital preservation), recommendations to further explore existing possibilities (such as re-use of catalogue sources for new creation) and develop new mechanisms (for example, facilitating the educational use of films from a rights-clearance perspective), as well as to continue cooperation between different stakeholders (such as FHI and European Film Agency Directors).

The Commission plans to continue to monitor the application of the Recommendation. Member States are asked to submit their fifth implementation reports by November 2015 in response to the Commission’s questionnaire to be circulated mid-2015.

- European Commission, Report on the Implementation of the European Parliament and Council Recommendation on Film Heritage 2012-2013, Working document, 1 October 2014
<http://merlin.obs.coe.int/redirect.php?id=17324>

EN

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NATIONAL

AL-Albania

Parliament Elects Chair and Two Members of the Regulator

The Albanian Parliament recently elected the chairman and two new members of the Audiovisual Media Authority (“AMA”). The voting process for the two new members took place on 9 October 2014, while the chairman of the regulator was elected almost a month later on 6 November 2014. AMA’s new chairman is a lawyer with experience managing different companies, including in the media sector. The two

new members are a well-known publicist and head of the Institute for Dialogue and Communication and the head of the European Movement Albania.

Both the chairman and the two new members of the regulator were only voted for by the ruling majority of the Members of the Parliament, because the opposition has boycotted all parliament activities since July 2014. However, the opposition MPs quickly condemned the election of the two new members, considering it illegal. Article 9 of the Act 97/2013 ("Act") on the Audiovisual Media in the Republic of Albania stipulates that proposed AMA candidates must be individually shortlisted by the Parliamentary Committee on Media ("Committee"). The Committee is also instructed favour a balance between three candidates selected by the majority and three selected by the opposition. Following this, all candidates are submitted for approval to the plenary session of the Assembly.

According to the opposition, the Act clearly demands that the shortlisting of the candidates be done jointly by both the ruling majority and the opposition MPs. In addition, the opposition also contested the election of the chairman, claiming his past experience as director in one of the main commercial multiplexes in the country was a sign that both the government and the commercial media were seeking to take control of the regulator.

The voting in the parliament took place after repeated calls from the ruling majority MPs to their opposition colleagues to participate in the shortlisting process of the candidates. After these appeals were rejected in the context of general parliamentary boycott by the opposition, the ruling majority decided to proceed on its own, claiming that filling the vacancies in AMA required urgent action, because the deadline for the digital switchover is approaching, while the institution is hardly functional.

This decision was preceded by several months of discussions and disagreements between the MPs on the number of vacancies in the AMA. The disagreement focused on the validity of the mandate of the then-chairwoman of the AMA. The ruling majority claimed that the mandate of the then-chairwoman of the AMA was invalid. This argument was based on a memo of the Service of Monitoring of Independent Institutions, which concluded that her mandate had expired in September 2012, so that her continued service in the position over the previous 18 months was illegal. On this basis, the memo demanded that she be re-elected as a member of the AMA. On the other hand, the opposition MPs and the then-chairwoman of the AMA argued that the same body, the Service of Monitoring of Independent Institutions, had changed their opinion on this matter in July 2013, when they stated that there were three vacancies in AMA, not four.

• *Kuvendi mblidhet në seancë plenare. Kuvendi zgjedh kryetarin e ri të AMA-s, z. Gentian Sala.* (Report on the plenary session of 6 November 2014)

<http://merlin.obs.coe.int/redirect.php?id=17310>

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BG-Bulgaria

CEM Report on the 2014 National Parliament Elections

On 21 October 2014, the Council for Electronic Media ("CEM") presented its report on the 2014 National Parliament elections. In its report, the CEM concluded that, in more significant television programmes on a variety of audiovisual media service providers (like bTV, Nova, TV 7 and News 7) paid political advertising dominated in comparison to the non-paid agitation forms.

According to the CEM report, the dominating broadcast presence of the little parties, coalitions and initiative committees during the election period was stimulated by media packages, which were paid by the government. With regard to the TV programmes themselves, the monitoring of the CEM demonstrated that there is a trend of distinguishing paid political advertising in a clearer manner by using audiovisual signals, which illustrate the difference between these two forms of election campaigns.

Furthermore, the CEM report stipulates that a large number of audiovisual media service providers (bTV, Nova, TV 7, Channel 3, Bulgaria on Air, TVV, TV Eye and others) have published information on their Internet sites concerning the contracts which they concluded with regard to the election campaigns with political parties, coalitions and initiative committees that have registered candidates, as well as with other contractors. But in this respect, the CEM report criticises the lack of details about paid political advertising on these webpages.

Finally, the CEM report determines that the audiovisual media service providers, with the exception of the public television service broadcaster BNT, did not introduce sign language in their programmes to allow hearing-impaired persons to understand the messages of the broadcast election campaigns.

• Доклад от наблюдението върху медийното отразяване на изборите за 43-то Народно събрание (CEM report on the 2014 National Parliament elections)

<http://merlin.obs.coe.int/redirect.php?id=17311>

BG

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Regulator publishes activity report for first half of 2014

On 31 October 2014, the Bulgarian regulator, the Council for Electronic Media, published the report on its activities for the first half of 2014. During the period in question, the Council for Electronic Media reported 69 infringements, ten more than in the second half of 2013. In 68 of these cases, the Bulgarian Broadcasting Act had been infringed. Fines were imposed against 24 audiovisual media service providers, 42 companies that only distribute audiovisual content and three radio stations. The cases essentially involved four types of infringement.

Some of the cases concerned breaches of provisions on the protection of minors. Three of these involved violations of Article 32(5) of the Broadcasting Act, which punishes non-compliance with time restrictions on content that may harm young people.

In seven cases, the Council for Electronic Media complained that audiovisual media service providers had infringed Article 76(2), in conjunction with Article 126(d), by failing to comply with decisions issued against them by the Ethics Commission of the National Council for Self-Regulation (Етична комисия към Националния съвет за саморегулация). According to Article 76, audiovisual media service providers are obliged to adhere to the Bulgarian media code of ethics and national ethical rules on advertising and commercial communication. If related decisions of the self-regulatory bodies are flouted, the Council for Electronic Media is authorised to impose fines of between BGN 2,000 and BGN 5,000 (approximately EUR 1,000 and EUR 2,500).

In seven other cases, audiovisual media service providers failed to meet their obligation to provide information to the Council for Electronic Media (Article 13(3), in conjunction with Article 14(4) of the Broadcasting Act), while various advertising regulations enshrined in the Broadcasting Act were breached in four further cases.

Most of the fines were imposed under Article 125(c)(2), in conjunction with Article 126(a)(5)(2) of the Broadcasting Act. In these 41 cases, penalties were imposed for breaches of copyright rules linked to the distribution of audiovisual content.

In its activity report, the Council for Electronic Media wrote that it often found it difficult to get hold of media service providers because it was too easy to obstruct the necessary serving of legal documents. For this reason, it had been unable to complete formal proceedings in 24 cases, even though the facts had been fully established. The Council for Electronic Media therefore recommended that the legislator make corresponding improvements. For example, provisions on the serving of these legal documents could

be designed in such a way that the documents could be considered to have been served if the addressee refused to accept their delivery.

• Отчет на ЦЕМ за периода 01.01.2014 г. - 30.06.2014 г. (Activity report of the Council for Electronic Media for the period between 1 January and 30 June 2014)

<http://merlin.obs.coe.int/redirect.php?id=17342>

BG

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CH-Switzerland

More flexibility for regional radio and TV stations

The Federal Council has approved a partial revision of the legislation on radio and television broadcasting (Ordonnance sur la Radio et la Télévision - ORTV), relaxing the conditions applicable to regional broadcasters. This will take effect on 1 January 2015. The Swiss Government's purpose, in approving the revision, is to support the transition of local radio stations to DAB+ digital technology. Thus, those broadcasters transmitting using DAB+ can be released from the obligation to broadcast using OUC technology. This will avoid imposing on the broadcasters concerned the cost of substantial financial investment in the renewal of OUC installations which are now dilapidated.

The revised order also abolishes the obligation for some local radio and television stations to broadcast each day a window of programmes directed at each region in the area they cover. This obligation only applied to those stations broadcasting to an area covering several cantons not served by other local radio and television stations; its aim was to ensure that local news was included in the supra-cantonal service. This obligation has now been abolished, so that the broadcasters concerned can be allowed greater flexibility: although they will still need to supply regional news services, they will now be able to choose whether to continue to offer separate programme windows or to incorporate regional news in the main programme. This move should allow the broadcasters to make substantial savings, while supplying the public with fuller news coverage.

The new order also relaxes the obligations incumbent on broadcasters of television programmes regarding the promotion of the Swiss cinema industry and the adaptation of broadcasts for the hard of hearing and the visually impaired. Whereas until now the broadcasters were subject to these obligations as soon as their annual operating costs exceeded 200 000 Swiss francs, this threshold has now been raised to 1 million Swiss francs, so that the smallest broadcasters can be

exempted. The cost of determining and collecting the “encouragement tax” in favour of the Swiss cinema industry in fact took up a disproportionate amount of its yield. The losses in the promotion of Swiss cinema films should be minimal. Moreover, the associations defending the interests of the hard of hearing and the visually impaired would like, above all, the broadcasts of the Swiss national broadcasting company, Société Suisse de Radiodiffusion et Télévision, and those of the other major Swiss television channels to be adapted, so that the exemption of small broadcasters will only have a marginal effect.

Lastly, the Federal Council has decided not to introduce hybrid television (HbbTV) as an associated service (i.e. a telecommunication service forming a functional unit with a television programme or necessary to be able to use the programme). This possibility had given rise to lively controversy because of the substantial investment that implementation would have involved. The obligation to broadcast associated services based on HbbTV technology has therefore been withdrawn from the revised order and will be examined more thoroughly.

• *Ordonnance sur la radio et la télévision (ORTV), modifications du 5 novembre 2014* (Amendments made to broadcasting legislation on 5 November 2014)

<http://merlin.obs.coe.int/redirect.php?id=17352>

DE FR

• Press Release, “More flexibility for regional radio and TV stations”, 5 November 2014

<http://merlin.obs.coe.int/redirect.php?id=17353>

DE EN FR

Patrice Aubry

RTS Radio Télévision Suisse, Geneva

DE-Germany

Federal Constitutional Court rejects excessive demands on applicants requesting temporary legal protection in relation to information requests made under freedom of the press rules

Excessive demands may not be made of a journalist who requests temporary legal protection in order to obtain information under German press law, according to a decision issued by the Bundesverfassungsgericht (Federal Constitutional Court - BVerfG) on 8 September 2014 (case no. 1 BvR 23/14).

The BVerfG based its decision on the fundamental right to effective legal protection, enshrined in Article 19(4) of the Grundgesetz (Basic Law - GG). It ruled that the press can be granted temporary legal protection if the level of public interest and topical relevance of the reporting are high. Limiting temporary legal protection to urgent cases represents a disproportionate intrusion on the freedom of the press.

Nevertheless, the BVerfG dismissed the complaint of the editor in question in the specific case at hand, because he had failed to provide sufficient proof of the urgency of his application. His application for a temporary injunction was therefore also rejected.

The complainant was an editor for the German daily newspaper “Tagesspiegel”. In September 2013, he asked the Bundesnachrichtendienst (Federal News Service - BND) for information about the export to Syria between 2002 and 2011 of so-called “dual-use goods”, which can be used to make weapons. The BND employees responsible refused to provide the requested information on the grounds that they only reported to the Federal Government and the relevant bodies of the Bundestag (lower house of parliament). In any case, the Federal Government’s export committee did not meet in public. In October 2013, the complainant therefore applied to the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) for temporary legal protection. However, in a decision of 26 November 2013 (case no. 6 VR 3.13), the BVerwG refused the application for a temporary injunction in the first instance.

The BVerfG did not identify any infringement of fundamental rights in the disputed BVerwG decision. It found that the BVerwG had rightly held that the granting of temporary legal protection depended, at least partly, on how the administrative courts were likely to rule on the main issue. Although questionable in view of the guarantee of effective legal protection enshrined in Article 19(4) GG, the demands that had been laid down for temporary legal protection to be granted in this case were found to be compatible with the Constitution.

However, the BVerfG questioned the compatibility with the Constitution of the BVerwG’s view that the press should regularly accept a certain loss of topicality and that an exception can, at best, apply if the events under discussion irrefutably require an immediate journalistic explanation that cannot be delayed, for example if there are clear indications that state authorities are breaking the law or if direct state intervention might urgently be required to stave off threats to the public interest. According to the BVerfG, the BVerwG’s interpretation of the notion of a serious disadvantage was too narrow and therefore imposed a standard that did not take sufficient account of the role of the press in a free democratic state.

Indeed, the role of the press is, first and foremost, to provide the public with information in order to support the formation of public opinion. Acting within the law, journalists themselves can decide whether and how they will report on a particular issue. This autonomy includes the freedom of the press to decide whether an issue should be reported on immediately. However, if the press can only obtain such information from public authorities by applying to the courts for temporary legal protection under the conditions laid down by the BVerwG in the disputed decision, this will constitute a

disproportionate limitation of temporary legal protection from a press freedom point of view.

• *Beschluss des BVerfG vom 8. September 2014* (Decision of the Federal Constitutional Court of 8 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17355>

DE

Ingo Beckendorf

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Federal Administrative Court grants press the right to names of people involved in court proceedings

If a member of the press requests information about the names of people who participated in a court procedure, such a request should, in principle, be granted, according to a decision issued by the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) on 1 October 2014 (case no. 6 C 35.13).

An editor for the magazine "Anwaltsnachrichten Ausländer- und Asylrecht" instigating the proceedings after asking the director of the Amtsgericht Nürtingen (Nürtingen District Court - AG Nürtingen) to send him a copy of a criminal court decision. The AG Nürtingen then sent him a copy of the ruling in which the names of all the people involved in the case had been blanked out. These included the names of the judge and jurors, the public prosecutor's representatives, the defence counsel and the court registrar.

The director of the AG Nürtingen subsequently gave the editor the name of the judge, but refused to disclose the names of the other participants. The journalist filed an appeal against this decision with the Verwaltungsgericht Stuttgart (Stuttgart Administrative Court - VG Stuttgart), which fully rejected the appeal in a ruling of 28 April 2012 (case no. 1 K 57/12). The editor's appeal against this decision was partially upheld by the Verwaltungsgerichtshof Mannheim (Mannheim Administrative Court of Appeal - VGH Mannheim) on 11 September 2014 (case no. 1 S 509/13). The VGH Mannheim ruled that the defendant, the Land of Baden-Württemberg, should also give the plaintiff information on the names of the jurors, but not of the other participants. It ruled that the fundamental right to privacy of the other participants took precedence over the right of the press to information, which was also a fundamental right.

The editor appealed to the BVerwG against the part of the VGH Mannheim's decision which confirmed the VG Stuttgart's dismissal of his appeal in the first instance. The BVerwG granted the plaintiff's claim to information regarding the names of the public prosecutor and defence counsel. When weighing up the relevant fundamental rights, the right of the press to information prevailed over these individuals' right

to privacy, since the public prosecutor and defence counsel, as organs for the administration of justice, were in the public eye when they took part in court proceedings. In view of the importance of the principle that court proceedings conducted under the rule of law should take place in public, the journalist's request for the names of the public prosecutor and defence counsel should be granted. The only exception to this rule applies if the lawyers involved in a court procedure are likely to suffer serious harassment or a threat to their safety if they are named. However, this was not the case here.

The BVerwG justified its decision by stating that the press can itself determine what information it needs to prepare a report on a court procedure. The state may not influence journalists' examination of the relevance of this information. However, the journalist must be able to explain clearly the factual background to a request for information. If a request is made purely at random, the state authority is not obliged to reveal the names of the people involved in the proceedings. For this reason, the BVerwG rejected the plaintiff's appeal concerning the name of the court registrar.

• *BVerwG 6 C 35.13 - Urteil vom 01. Oktober 2014* (Decision of the Federal Administrative Court of 1 October 2014 (BVerwG 6 C 35.13))

<http://merlin.obs.coe.int/redirect.php?id=17367>

DE

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Stuttgart district court allows broadcast of illegally-made film recordings under public right to information

In a judgment of 9 October 2014 (case no. 11 O 15/14) that has not yet been published, the Landgericht Stuttgart (Stuttgart District Court - LG Stuttgart) ruled that illegally obtained information may be broadcast on television in accordance with the principle of broadcasting freedom.

The case concerned the broadcast on 13 May 2013 of a report on the TV channel "Das Erste" on the theme of "Starvation wages on the production line - how wages are being undermined", which contained footage filmed secretly at a Daimler car factory.

The video footage was recorded on four hidden cameras by a journalist working for Südwestrundfunk ("SWR"). He had got a job through a temping agency and worked for two weeks at a Daimler factory in Stuttgart-Untertürkheim in order to conduct undercover research.

The footage suggested that the workers employed under a so-called "Werkvertrag" (service contract) were

paid less than the company's permanent staff despite doing the same job, and that they sometimes had to boost their salary by claiming state benefits ("Hartz IV").

Daimler asked the LG Stuttgart for an injunction prohibiting the further use of the video recordings on the grounds that the footage had been obtained illegally and that broadcasting it would constitute a serious infringement of its rights.

The LG Stuttgart held that the recording of the video footage had infringed the rights of the plaintiff, Daimler, since the journalist had infringed the company's rights as the factory owner. However, the plaintiff could not stop the report on such a deplorable situation being broadcast because the public right to information clearly took precedence over those rights.

When weighing up the parties' respective interests, the LG Stuttgart ruled that SWR's freedom of expression and broadcasting under Article 5 of the Grundgesetz (Basic Law - GG) outweighed the disadvantages suffered by the plaintiff as a result of the illegal acquisition of information. Consequently, the LG Stuttgart dismissed Daimler's complaint against SWR.

• *Pressemitteilung des LG Stuttgart vom 9. Oktober 2014* (LG Stuttgart press release, 9 October 2014)
<http://merlin.obs.coe.int/redirect.php?id=17345>

DE

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LMK appeals to Constitutional Court against BVerwG decision on "Hasseröder Männercamp"

On 16 October 2014, the Landeszentrale für Medien und Kommunikation Rheinland-Pfalz (Rhineland-Palatinate Media and Communication Office - LMK) announced that it had lodged an appeal with the Bundesverfassungsgericht (Federal Constitutional Court - aBVerfG) against the judgment of the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) of 23 July 2014 (case no. 6 C 31.13).

The BVerwG had ruled (see IRIS 2014-9/14) that the depiction of a brand of beer at the "Hasseröder Männercamp" before and after the live broadcast of a football match on the Sat.1 television channel did not constitute unlawful product placement for the purposes of Article 7(7)(3) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV) because it had not been excessive. The LMK disagreed, considering that the way in which the product had been depicted by Sat.1 breached the relevant provisions on product placement.

The LMK said that, by appealing to the Federal Constitutional Court, it hoped to obtain a preliminary ruling from the Court of Justice of the European Union (CJEU) in order to clarify the interpretation of the notion of "excessive depiction". The LMK complained to the BVerfG about the BVerwG's failure to submit a question to the CJEU, referring to the principle of the prohibition of the removal of a case from the jurisdiction of the lawful judge, as enshrined in Article 101 of the Grundgesetz (Basic Law - GG). In the LMK's opinion, the BVerwG's interpretation of the notion of "excessive depiction" differs significantly from that contained in the case law of other EU member states. According to the LMK, such a different interpretation should not be used by a supreme federal court such as the BVerwG without referring the matter to the CJEU for a preliminary ruling first. The LMK also stressed that the case at hand was of fundamental importance because there is currently no relevant case law on product placement in Germany.

The LMK concluded by stating that the referral of the matter to the Constitutional Court has received widespread support from the other Land media authorities in Germany.

• *Pressemitteilung der LMK vom 16. Oktober 2014* (LMK press release of 16 October 2014)
<http://merlin.obs.coe.int/redirect.php?id=17346>

DE

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ES-Spain

Partial Reform of the Spanish Intellectual Property Act

On 4 November 2014, the Spanish Parliament adopted a new law amending the Intellectual Property Act (Ley 21/2014, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual (Act No. 21/2014)). The intellectual property legal framework, now partially amended, had been compiled in the Royal Decree 1/1996 (see IRIS 1996-6/17) and modified by the Act 1/2000 (see IRIS 2010-1/Extra). The provisions contained in the new 2014 Act will come into force on 1 January 2015.

The amendments of this law are focused on the protection and strengthening of intellectual property rights, due to the social, economic and technological changes that have occurred in recent years. The Act also transposes into the Spanish legal framework Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011, amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (see IRIS 2011-9/6)

and Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (see IRIS 2012-10/1).

The reform of the Spanish Intellectual Property Act introduces several new provisions, such as an obligation for news aggregators to pay a “fair compensation” to publishers for the reproduction of “non-significant fragments of content, published in periodical publications or in websites that are regularly updated and have an informative purpose, create public opinion or have an entertainment goal”. The 2014 Act also applies to copyright breaches on the Internet and introduces a new provision in relation to linking to webpages. The fines related to copyright breaches will range from EUR 150,000 to EUR 600,000. In addition, the Spanish Commission on Intellectual Property will be entitled to compel advertisers or online payment services to stop working with infringing webpages.

Furthermore, the 2014 Act reduces the scope of the concept of “private copying”, by excluding from it, for example, the activity of streaming. It is relevant to note that the government had already substantially modified the private copying regime through Royal Decree 1657/2012, which provides that the relevant compensation shall be financed and paid onwards to the collective management societies out of the State budget, instead of by the manufacturers of the devices used to record and reproduce content (CD, DVD, pen drives, MP3 players etc.). Notably, the Spanish Supreme Court has recently considered this specific issue of the payment of the private copying compensation out of the State budget, as it implies that all Spanish citizens have to pay for the compensation independently of whether they have reproduced or not works for their private use. On 18 September 2014, the Spanish Supreme Court made a request to the Court of Justice of the European Union for a preliminary ruling on the consistency of this measure with the 2001 Copyright Directive. The Supreme Court has also asked whether the total amount of the compensation, “still being calculated based on the real injury caused, should be set within the budgetary limits set for each year”.

Other new provisions relate to the extension of the term of protection of the rights of artists and performers and of the producers of phonograms by an additional 20 years (from 50 to 70 years) and the establishment of a legislative framework to ensure the legal certainty in the use of orphan works by cultural institutions. On the other hand, the 2014 Act limits to 10 years the maximum period during which a work can be reproduced in the scientific and academic fields.

• *Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (Act 21/2014, 4 November 2014, approving the revised text of the Copyright Act, adopted by Royal Decree 1/1996, 12 April 1996, and Act 1/2000, 7 January 2000, on Civil Procedure)

<http://merlin.obs.coe.int/redirect.php?id=17327>

ES

• *Auto del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección cuarta, recurso num.: 34/2013, 10 de septiembre de 2014* (Request of the Spanish Supreme Court to the Court of Justice of the European Union for a preliminary ruling, 10 September 2014)

<http://merlin.obs.coe.int/redirect.php?id=17328>

ES

Mònica Duran Ruiz
Catalan Audiovisual Council

New Electronic Communications Services Tax to Boost the Catalan Audiovisual Sector and Digital Cultural Promotion

On 4 December 2014, the Parliament of Catalonia adopted a new law creating a tax on content provision by the providers of electronic communications services to boost the audiovisual sector and cultural digital promotion (Llei 2014, de creació de l'impost sobre la provisió de continguts per part de prestadors de serveis de comunicacions electròniques per al foment del sector audiovisual i per a la difusió cultural digital (Act 2014)).

The new tax will be charged from January 2015 onwards to electronic communications service providers and will consist in a fixed fee of EUR 0.25 a month per contract for access either through a landline or via a mobile device, which is signed in the territory of Catalonia. The purpose of this tax is to promote the production and improve the competitiveness of the Catalan audiovisual sector, as well as set up a fund for digital cultural promotion, focused on funding public policies that promote citizens' access to digital cultural content.

The income generated from the new tax will be added to the public funds that the Department of Culture of the Catalan Government will allocate to the audiovisual sector. In particular, the tax will be a new source of income that will be used for the several funds mentioned in Article 29 of the Catalan Cinema Act (Act 20/2010, July 7) (see IRIS 2011-10/14 and IRIS 2009-5/21). Notably, these funds include the fund for the promotion of the production of cinematographic and audiovisual works; the fund for the promotion of independent distribution; the fund for the promotion of exhibitions; the fund for the promotion of the distribution and promotion of cinematographic works and culture; and the fund for the promotion of commercial competitiveness.

Moreover, the income from the tax will also be used for digital cultural promotion. By means of Article 14 of the new Act, a new fund for digital cultural promotion will be created that will fund projects or activities that create digital cultural content and make it accessible to the public by means of digitisation policies.

As stated in Article 6.3 of the new legal text, the tax does not entail any tax burden on people who have

contracted an access service for content provision over electronic communication networks, as explicitly states that the providers subject to the tax may not impose the amount of the tax on their customers. According to the Act, the Catalan Tax Agency, the Department of Culture of the Catalan Government and consumer bodies will be responsible for the implementation of this tax.

- (Act 15/2014, of 4 December, creating the tax of content provision by the providers of electronic communications services to boost the audiovisual sector and for the cultural digital promotion) **CA**

Mònica Duran Ruiz
Catalan Audiovisual Council

FR-France

Conseil d'État confirms two decisions by Private Copy Committee

Two judgments, delivered by the Conseil d'État on 19 November, have confirmed recent decisions on private copying remuneration adopted by the responsible committee and which had been contested by representatives of industrialists and distributors of electronic equipment and a number of manufacturers. These were Decision 15, which laid down the remuneration for most media, and Decision 14, which reinstated the remuneration for tablets following the annulment by the Conseil d'État of the committee's previous decision on the topic. The applicants had challenged a number of points, including not only the committee's competence, its composition and the procedure for adopting the disputed decisions, but also the basis used for calculating the remuneration, its amount, and its refund.

The Conseil d'État began by recalling the principle according to which private copying remuneration should be fixed at a level that makes it possible to produce revenue to be shared among the rightsholders that is broadly similar to the sum that would be raised by the payment of a fee by each person who makes a copy for private use, if it were possible to establish and collect such a fee. It was also recalled that the remuneration referred to in the disputed decisions could not be considered a tax: the applicants were not justified in claiming that the committee had exceeded its remit by introducing a compulsory levy of a fiscal nature. Moreover, the fact that five of the six organisations representing the manufacturers and importers of recording media had announced in November 2012 that they no longer wished to take part in the work of the committee and had therefore not been present one month later when the contested Decision 15 was adopted could not be regarded as invalidating the committee's composition. The court also

validated the surveys which provided information on the use made of equipment on the basis of which the contested remuneration had been determined. It was also found that, contrary to the claims made by Canal Plus, the committee had not made an error of appreciation when it considered, in the light of the results of a multi-media survey and another survey on "video recorders with integrated memory", that decoder recorders fell within this latter category, in view of their potential use for the purpose of making a copy for private use. Moreover, it was not important whether the decoder recorders were the subject of technical protective measures restricting the possibilities of making copies for private use, since such measures did not prevent the making of copies from a lawful source on the decoder recorders, but only their further copying or transfer onto other media. It was also found that the fact that 25% of the yield of the remuneration for making a copy for private use resulting from application of the disputed decision was, in application of Article L. 321-9 of the Intellectual Property Code, to be allocated to "support for the creation and broadcasting of live shows and training for performers" was not counter to the provisions of Article 5-2 b) of Directive 2001/29/EC, as interpreted by the judgment of the CJEU delivered on 11 July 2013 in the Amazon case.

The Minister for Culture has reacted to the announcement of these decisions. "This consolidates the remuneration for making copies for private use, with clarified methods of calculation validated by the Conseil d'État and new scales that are valid for an indefinite period of time". The rightsholders also expressed their satisfaction with these decisions, as they felt they "consolidated an important section of the financing of cultural action in our country". The remuneration for making copies for private use yielded EUR 50 million in 2013.

- *Conseil d'Etat (10e et 9e sous-sect.), 19 novembre 2014 - Canal Plus distribution et a.* (Conseil d'Etat (10e et 9e sous-sect.), 19 November 2014 - Canal Plus distribution and other)

<http://merlin.obs.coe.int/redirect.php?id=17347>

FR

- *Conseil d'Etat (10e et 9e sous-sect.), 19 novembre 2014 - société Research in Motion et a.* (Conseil d'Etat (10e et 9e sous-sect.), 19 November 2014 - société Research in Motion and other)

<http://merlin.obs.coe.int/redirect.php?id=17348>

FR

Amélie Blocman
Légipresse

French IAPs ordered to block access to Pirate Bay sites

After Allotstreaming in November 2013 (see IRIS 2014-1/23), it is the turn of the Pirate Bay constellation to be blocked by order of the regional court in Paris.

SCPP, the company which collects and redistributes royalties for a catalogue covering more than 80% of

the recognised rights held by the producers of phonograms, had produced proof that the Pirate Bay site was offering links to download phonograms in its repertoire. The phonograms at issue were both old and new and by artists of both French and other nationalities. Having had no success in asking the said site to delete the links at issue, SCPP had most of the French Internet access providers (IAPs) (Orange, Free and Bouygues, which together represent 90% of Internet users) summoned to appear in court under the urgent procedure on the basis of Article L. 336-2 of the Code de la Propriété Intellectuelle (Intellectual Property Code - CPI), calling on them to implement every possible means of preventing access from anywhere in France to the disputed site and to redirected websites, mirror sites (copies of the original site) and proxies (intermediary servers collecting content downloaded from the original site) which make it possible to access the site.

The court began by noting that the dispute involved sites of the Pirate Bay network, whose activity is unlawful since they offer content devoted almost exclusively to the reproduction/communication to the public of phonograms, in the form of downloads or streaming, without the authorisation of the rightholders. The network at issue even goes as far as to claim the absence of rights to use the works, which has earned the founders of the site criminal convictions elsewhere in Europe. It was also pointed out that, while it was true that any blocking measure, as requested, could be circumvented by some Internet users, the measures requested were aimed at the majority of users, who did not necessarily have the time or the specialist skills to look for ways of circumventing the measures. Thus, the impossibility of ensuring complete blanket effectiveness of the decisions, which was the defence put forward by the IAPs, was deemed to not constitute an obstacle to the decision to authorise the measures preventing access to the sites contributing to the circulation of illegal copies on the Internet. In the case at issue, SCPP's request to block access to the sites was deemed to be the only effective means available to the rightholders to combat the infringement of copyright on the Internet. Regarding the choice of the measures the IAPs should take, the court found in favour of the SCPP's application, in that it left each party the possibility of deciding on the nature of the measures to be implemented, depending on their corporate structure, the effects of measures adopted and the further stages in the dispute and that it used a measure accepted by all the IAPs summoned in the case. The court therefore ordered the IAPs, without delay and within no more than fifteen days, to set up all appropriate measures to prevent access from anywhere in France to the disputed sites, whether the original sites, or redirected, mirror or proxy sites, for a period of twelve months. This is to be achieved by any effective means and, more particularly, by blocking domain names. Should the dispute develop further, for instance if the disputed content is deleted, the sites at issue cease to exist or domain names or access routes are altered, SCPP will be able

to refer back to the same court for an updated judgment on the measures. Recalling the decision of the Constitutional Council on 28 December 2000 and the CJEU's judgments in the SABAM and Telekabel cases, the court stated that the IAPs should not be burdened with the cost of implementing the measures being ordered and could therefore claim repayment from SCPP of the expense incurred with regard to the measures they already introduced and those undertaken specifically in order to comply with the court's order.

• *TGI de Paris (3e ch. 1Re sect. En la forme des référés), 4 décembre 2014 - Société civile des producteurs phonographiques (SCPP) c. Orange, Free et a.* (Regional Court of Paris (3rd chamber, 1st section, under the urgent procedure), 4 December 2014 - Société Civile des Producteurs Phonographiques (SCPP) v. Orange, Free, and others)

FR

Amélie Blocman
Légipresse

Court finds against virtually unaltered take-up of a legal case in a reality law TV programme

After a court decision under the urgent procedure early last year (see IRIS 2014-4/15), it was the turn of the regional court in Paris to deliberate on the merits of the Intime Conviction case. The dispute arose as a result of the broadcasting by channel "Arte", in February 2014, of a cross-media programme entitled Intime Conviction. This consisted of three parts: a television film following the course of the investigation into the death of the wife of a forensic doctor, "Dr Villers"; a web series reconstituting the court proceedings against the doctor, including the deliberations, in video format; and an 'interactive' part enabling Internet users to consult the fictional contents of the investigation file and, after each hearing, to report online their "firm conviction" (hence the title of the programme) regarding the accused party.

Dr Müller, acquitted in October 2013 of murdering his wife after twelve years of legal proceedings, claimed that the television film was a remake of his life and of the case brought against him. Under the urgent procedure, he had obtained a ban on the broadcasting of the programme, which was found to infringe his privacy (see IRIS 2014-4/15). The production company, which contested the ban ordered under the urgent procedure, brought court proceedings on the merits of the case. In his defence, the doctor claimed damages amounting to EUR 100,000 as compensation for the moral prejudice suffered from the invasion of his privacy and for the civil wrongdoing he felt resulted from the absence of any indication in the programme that the final outcome had been his acquittal.

The court began by recalling the principle according to which facts referred to publicly during public court

proceedings, although they are within the protected area of personal privacy, become legitimately public as a result of such proceedings and may, with regard to the requirements of Article 9 of the Civil Code and in the absence of any malevolence or infringement of dignity, be referred to again in public without infringing the rights covered by the Civil Code or by Article 8 of the European Convention on Human Rights. However, when the facts lawfully rendered public are mixed with elements taken from the imagination of the creator of the work, without the reader or viewer being in a position to distinguish between fact and fiction or speculation, these elements infringe the victim's privacy, since they are presented as being real. In the case at issue, in view of the extensive similarities, it was found that the disputed programme, and in particular the television film, was not a work in which the creator has used elements taken from a number of different cases, but indeed a virtually unaltered take-up of the court case involving Dr Müller, which had served as its sole foundation. The fictional elements which were added to the story (on Dr Müller's ambiguous relations with the female investigator, his desire to kill, his violent nature, elements insinuating his guilt, etc) were perceived by the viewer as belonging to the reality of the court case, such that they infringed the doctor's right to privacy. The same applied, for the same reasons, to the second and third parts of the programme, which belong to the genre of reality TV.

The court also found that the doctor shown in the programme at issue was right in claiming that a civil wrong was committed, resulting from the absence of any indication in the programme or in his mock trial that the final outcome had been his acquittal, since the way it was portrayed made it possible to question his innocence. Such questioning of the final decision of acquittal was deemed to infringe the respect due to the authority of both the judge and the courts, constituting undeniable wrongdoing within the meaning of Article 1382 of the Civil Code. This wrongdoing caused the victim serious prejudice in view of, above all, the fourteen years of criminal proceedings he went through and the short period of time between the outcome of the proceedings and the broadcasting of the programme. The court therefore ordered the production company to pay damages amounting to EUR 50,000 as compensation for the moral prejudice caused by the broadcast. It also ordered the company to include a notice in the credits of the first part of the programme, should it be shown again, and banned the broadcasting on any media whatsoever of the second and third parts of the programme at issue.

• *TGI de Paris (17e ch.), 5 novembre 2014 - Maha Production c/ J.-L. Muller, Arte France et a.* (Regional court of Paris (17th chamber), 5 November 2014 - Maha Production v. J.-L. Muller, Arte France, and others)

FR

Amélie Blocman
Légipresse

Conditions for copyright protection of a television programme

On 10 October the regional court in Paris delivered an interesting judgment which recalled how problematic it can be to have tv formats protected by copyright. In the case at issue, a man said he had sent an audiovisual production company two plans for broadcasts, the name and summary of which had been deposited with a copyright society online. When he discovered that a television channel had broadcast a programme entitled "On ne demande qu'à en rire" produced by the same production company, which he considered infringed his copyright in respect of the programme projects, he instigated court proceedings against the company for infringement of his copyright and, in the alternative, for unfair competition. The defendant company contested the copyright protection of the applicant's plans, on the grounds that the characteristics being claimed were common. The court began by recalling the principle that a programme project can constitute an intellectual work, subject to two conditions. Firstly, the person claiming protection under copyright must describe the creation in sufficient detail to allow its identification (in respect not only of its procedure and mechanisms, but also of everything concerning its form, such as sets, framing, soundtrack, colour codes, etc). Secondly, the person must demonstrate that the programme is the result of creative activity expressing the creator's personality, conferring originality.

The court then pronounced itself firstly on the existence of earlier programmes, which the defendant claimed were based on the same concept as the first programme project developed by the applicant, entitled "Comédiens Interprètes", which was presented as a talent show for would-be actors and comedians. The court noted that these earlier programmes cited by the production company were significantly different from the programme project at issue and could not be claimed to be an earlier version rendering the project non-creative. The court then went on to note that, for television programmes, particularly games, originality could be the result of an original combination of known elements and that in the present case the elements constituting the programme project for "Comédiens Interprètes" formed a particular combination that was the result of a creative effort with no demonstrated precedent, such that it was covered by copyright protection. This was not the case for the second programme project, entitled "Jeu de Scènes", for which the applicant failed to demonstrate any originality. The court then considered whether the programme produced by the defendant company constituted an infringement of the copyright covering the "Comédiens Interprètes" project. It recalled that infringement of copyright was determined on the basis of similarities, not differences, but that with the exception of cases where the originality of the

work rested, as in the present case, on the combination of elements that were not in themselves original, there was no infringement of copyright unless the programme at issue faithfully reproduced the combination in all its essential elements. In the present case it appeared however that, while a number of aspects (the method of selecting and assessing contestants, filming at the Moulin Rouge cabaret in Paris, the length of the programme) were common to both the disputed programme and the programme project, their aim, form and purpose with regard to the contestants' performances were very different, which meant that the existing programme was significantly different from the project. The purpose of the contestants' performances was clearly different, as was the arrangement and decoration of the studio used for filming. The applicant's claims were therefore rejected, as were the alternative claims based on unfair competition and free-riding.

• *TGI de Paris (3e ch. 2e sect.)*, 10 octobre 2014 - *Eric A. c/ Sté Tout sur l'écran Productions* (Regional court of Paris (3rd chamber, 2nd section), 10 October 2014 - *Eric A. v. the company 'Tout sur l'écran Productions'*)

FR

Amélie Blocman
Légipresse

New CSA deliberation on right to short excerpts of sport competitions

On 1 October the Conseil Supérieur de l'Audiovisuel (audiovisual regulatory authority - CSA) adopted a new deliberation reorganising the broadcasting of excerpts of sport events. According to Article L. 333-7 of the Sport Code, it is for the CSA to "lay down the conditions for broadcasting short excerpts [of sport competitions] after consulting the French National Olympic Committee and organisers of sport events referred to in Article L. 331-5". In January 2013, the CSA adopted a deliberation laying down the conditions for broadcasting short excerpts of sport competitions and other events of major public interest (see IRIS 2013-3/16). However, a good number of sport organisations, contesting the deliberation, appealed to the Conseil d'État for its cancellation. The CSA was therefore keen to carry out broad consultations with all the stakeholders in the sector and this led to the adoption of a new deliberation. The deliberation is marked by the CSA's concern for ensuring that a balance is reached between the public interest, respect for the editorial freedom of the television companies and the protection of the value of the rights to make use of sport competitions, while at the same time guaranteeing the mechanisms for the financing of sport activities. The deliberation remains applicable to all television services established in France and to their catch-up TV services. The excerpts broadcast must identify the service which holds the rights:

its name must be shown on-screen for at least five seconds. The main change concerns the duration of the broadcasting. While the maximum duration of excerpts broadcast remains one minute and thirty seconds per hour of air time, the deliberation lays down four restrictions, three of which are new. As a result, the maximum duration of broadcasting will be three minutes per each day of a competition and thirty seconds per event for sport competitions categorised as regular. In addition, the short excerpts may not cover an entire sport competition. Lastly, as in the previous deliberation, the duration of excerpts must not exceed 25% of the duration of the competition if this lasts less than six minutes, but may not be less than 15 seconds. The new recommendation also alters the definition of the type of broadcast in which short excerpts may be shown (these now include television newscasts and regular information spots, multidisciplinary sport magazine programmes and general news magazine programmes, in both cases where these are at least weekly). This means that, unlike what was previously the case, sport magazine programmes devoted to a single discipline are no longer entitled to show excerpts. In order to increase the promotion of the less broadcast sports, the CSA has laid down an annual obligation to show 24 types of sport (for men, women, and handicapped people). The new provisions will take effect on 1 January 2015.

• *Délibération n°2014-43 du 1er octobre 2014 relative aux conditions de diffusion de brefs extraits de compétitions sportives et d'événements autres que sportifs d'un grand intérêt pour le public*, *Journal officiel du 30 octobre 2014* (Deliberation no. 2014-43 of 1 October 2014 on the conditions for broadcasting short excerpts of sport competitions and non-sport events of major public interest, published in the official gazette (*Journal Officiel*) of 30 October 2014)

<http://merlin.obs.coe.int/redirect.php?id=17351>

FR

Amélie Blocman
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Changes in support for production of documentaries

The Centre National du Cinéma (national cinema centre - CNC) has announced changes in support of the production of documentaries (audiovisual support fund, COSIP), which has remained unchanged since 2004. In recent years, the CNC has substantially increased its support for such productions, which remain the leading audiovisual genre receiving support. The changes are the result of the consultation carried out in collaboration with professionals in the sector, which began in mid-2012 after the report entitled *Le Documentaire dans Tous ses États* had been submitted to the Minister for Culture. The report pointed to those areas that posed a threat to diversity in the creation of documentaries. It proposed that the industry should agree on a table of objective criteria for a closer appreciation of the different types of writing and that the debate on defining what constituted

a “creative documentary” should not be re-opened. At present, the support generated by a work, in proportion to its duration, is linked to a weighting which changes for each level of capital investment in the programme on the part of the broadcasters. This system has however become rather blurred and unpredictable. The scale of weightings produces a number of threshold effects, thereby creating an imbalance between the amount invested by the broadcasters and the amount of the support generated. In addition, the rules for the current support no longer tally with the developing economy for ordering series and collections of documentaries. The reform replaces the present scale of steps with a curve, with the support being in direct proportion to the capital contribution made by the broadcasters, thereby making it possible to avoid threshold effects. It will be possible to increase the basic weighting by applying a set of objective top-ups (on the basis of the quality of the writing, potential for developing the project, editing time, etc) aimed at quantifying the artistic and technical ambition of the people making the documentaries. The reform therefore aims at providing better financing for the most ambitious and creative works, regardless of their cost. It particularly encourages the development of science and history documentaries, which will receive a 20% top-up in addition to the support generated normally. It also provides for greater transparency in the sector, by extending to all documentary works receiving CNC funding of at least EUR 50 000 the obligation to have their production accounts certified by an external auditor. The reform also aims to encourage the export potential of such works on international markets. The CNC has also announced that it will be increasingly vigilant regarding which programmes may be qualified as documentaries, specifically by setting up a specialist formation of the COSIP committee. The reform will come into effect on 1 January 2015.

The CNC has also announced the setting-up of automatic financial support for the editors of video-on-demand services (VOD) for online broadcasting of cinematographic works; this is in addition to the support already available to the sector. Since 2008, the CNC has in fact been encouraging the development of the VOD market through selection aid for showing cinematographic and audiovisual works in VOD format. This new automatic support covers all types of marketing for VOD (pay-per-view rental, permanent download or subscription), but does not include catch-up TV services.

• *Communiqué de presse du CNC du 13 novembre 2014* (Press release of the CNC of 13 November 2014)

<http://merlin.obs.coe.int/redirect.php?id=17349>

FR

• *Communiqué de presse du CNC du 1 décembre 2014* (Press release of the CNC of 1 December 2014)

<http://merlin.obs.coe.int/redirect.php?id=17350>

FR

Amélie Blocman
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GB-United Kingdom

Competition Appeal Tribunal allows BT to Transmit Sky Sports 1 and 2 on its Platform as an Interim Measure

The Competition Appeal Tribunal has determined that British Sky Broadcasting Limited (Sky) should allow British Telecommunications Plc (BT) sports channel BT Sports to screen Sky's sports channels. The background to the case was that in 2010, the UK communications regulator Ofcom decided to vary Sky's broadcast licence pursuant to section 316 of the Communications Act 2003, whereby Sky had to offer its Sky Sports 1 and 2 channels at wholesale prices to other TV platforms - this is known as wholesale must-offer obligation (WMO) (see IRIS 2010-5/26).

Later in 2010, Sky appealed Ofcom's decision to the Competition Appeal Tribunal, pursuant to Competition Appeal Tribunal Rules (SI No. 1372 of 2003), seeking urgent interim relief. The parties to the appeal, including Sky, BT and Ofcom, agreed on an Interim Relief Order (IRO). Various appeals were lodged and the IRO has remained in operation far longer than expected for various reasons, as the appeals by different broadcasters have taken longer to resolve, including appeals to the Court of Appeal (see IRIS 2014-4/17 and IRIS 2013-1/23).

However, at the time of the IRO, BT was using a platform called Cardinal STB (set-top box), but owing to advancements in technology, they began to use YouView STB (set-top box). While the YouView platform had conditional access capabilities, it did not have the ability to decrypt a DTT (Digital Terrestrial Channel) signal, which had enabled BT viewers using the Cardinal platform to watch Sky Sports 1 and Sky Sports 2.

Sky could screen BT Sports, but BT did not have wholesale supply of Sky Sports 1 and 2 channels. BT considered this a violation of the Interim Relief Order (IRO), whereby Sky was required to provide its two sports channels to Qualifying Platforms. The schedule to the IRO defined a Qualifying Platform as “via DTT (in the case of BT, Virgin and Top Up TV and via its existing cable platform in the case of Virgin), with all parties having liberty to apply.”

BT had a commercial agreement with Sky to supply Sky Sports 1 and 2 via IPTV (Internet protocol television) to customers using BT's Cardinal System, as this was not covered by the IRO. In July 2013, BT stopped supplying Sky Sports to customers via DTT. However, neither the IRO nor the commercial agreement covered the provision of Sky Sports via BT's YouView STB. Although there were negotiations about supplying the YouView Channel, the talks broke down,

as Sky wanted, as a condition, for BT Sport to supply its channels by wholesale arrangement to Sky.

On 24 May 2013, BT complained to Ofcom pursuant to the Competition Act 1998, contending that Sky's condition of wanting a reciprocal arrangement was an abuse of a dominant position, even though BT had acquired significant TV football rights, especially for the 2014/15 season. Ofcom considered that there was no urgency to adopt the remedy sought by BT; also Ofcom announced that they would review the 2010 WMO.

As a consequence, BT applied to the Competition Tribunal claiming relief pursuant to rule 61(a) of the Tribunal Rules for an interim order and, in addition, BT invoked the "liberty to apply" forming part of the existing IRO. In both instances, BT sought for the definition of Qualifying Platform to include its YouView platform. Sky would have to demonstrate damage as a consequence of such a change.

Sky argued that to vary a term BT had to show a significant change of circumstances, which could not be shown, as Sky considered that BT was having a "second bite of the cherry", as the YouView platform was envisaged at the time the original IRO was agreed.

However, BT argued that it was not applying a general liberty to apply, but a specific liberty pursuant to para 2 of the IRO schedule. Whilst there was an agreed definition of Qualifying Platforms, the terms envisaged reconsideration of the platform definition. It was not a case of considering a significant circumstance change, but of applying the obvious meaning of the express liberty to apply term. The BT YouView channel had been envisaged, it had yet to be developed. At the same time, improvements in copper wire technology allowed broadcasting to an IPTV platform.

The Tribunal stated that the technological developments had rendered the original IRO redundant and BT should not be expected to use defunct Cardinal STB technology to access Sky Sports channels. BT's competitiveness had improved by acquiring additional football rights, but its customers should benefit from new technology. Moreover, Sky offered its sports channels to BT's Cardinal platform, suggesting Sky did not consider BT as a commercial threat. Commercial and technological developments would change the relative competitiveness between Sky and its rivals, and the regulator, Ofcom, should review matters rather than the Competition Appeal Tribunal when determining each case.

The Tribunal granted BT's application to amend the IRO, meaning Sky must now supply Sky Sports 1 and 2 to BT's YouView platform. However, the Tribunal noted that its order was conditional on BT maintaining BT Sport on Sky's platform.

• British Sky Broadcasting Limited v. Office of Communications and British Telecommunications PLC and others [2014] CAT 17
<http://merlin.obs.coe.int/redirect.php?id=17331>

EN

Julian Wilkins
Blue Pencil Set

New Rules on the Marketing of E-Cigarettes

The UK co-regulatory bodies, the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice have introduced changes to their codes to regulate the marketing of e-cigarettes. The former covers general advertising, including non-broadcast electronic media, such as company websites and posts on social media directly connected with the supply of goods and services; the latter covers television services licensed by Ofcom. There were previously no specific restrictions on non-broadcast advertising of e-cigarettes. However, e-cigarettes could in practice not be advertised in television because of a general prohibition of indirect promotion of tobacco products. The effect of this change is to permit such advertising, but only subject to major restrictions.

The two codes (the UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing and the UK Code of Broadcast Advertising) now contain a number of new rules. These rules provide that advertisements for e-cigarettes must be socially responsible, must not contain anything that might reasonably be associated in the audience's mind with a tobacco brand and must not promote or show the use of a tobacco product in a positive way (this will not prevent cigarette-like products from being shown). They must make it clear that the product is an e-cigarette and not a tobacco product. Advertisements must not contain health or medicinal claims, unless the product is authorised by the Medicines and Healthcare Products Regulatory Agency; e-cigarettes may be presented as an alternative to tobacco, but the advertisements must not undermine the message that giving up tobacco use is the best option for health. Health professionals must not be used to endorse e-cigarettes, advertisements must state clearly whether the product contains nicotine and must not encourage non-smokers to use e-cigarettes. They must not be likely to appeal particularly to people under 18 and people shown using e-cigarettes must neither be, nor seem to be, under 25. The non-broadcast code also specifies that no medium should be used to advertise e-cigarettes if more than 25% of its audience is below 18 years old. The broadcast code requires that advertisements for e-cigarettes must not be in or adjacent to programmes likely to appeal particularly to audiences below 18.

The new rules came into effect on 10 November 2014.

• CAP and BCAP's Joint Regulatory Statement, New Rules for the Marketing of E-Cigarettes, 10 November 2014
<http://merlin.obs.coe.int/redirect.php?id=17330>

EN

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IE-Ireland

Radio Presenter Violated Broadcasting Code by Expressing View on Same-Sex Marriage Referendum

The Broadcasting Authority of Ireland's compliance committee has held that the Newstalk 106-108 radio station breached the Authority's broadcasting code, when one of its presenters stated he would vote in favour of same-sex-marriage in any future referendum in Ireland. The decision arose when a complaint was made to the Authority over a 10-minute item on the Newstalk Breakfast Show programme concerning a forthcoming gay-pride parade in Dublin (for a similar complaint against the Irish public broadcaster recently upheld by the Authority, see IRIS 2014-8/27).

The programme item included a presenter and two guests discussing the Dublin Gay Pride celebrations, how celebrations of the gay community had changed in Ireland, the personal experiences of the guests and "potential changes to Irish law to permit same-sex marriage". At one point during the discussion, the presenter stated that he would vote in favour of any forthcoming referendum on marriage equality and expressed his impatience with not being able to vote immediately on this issue.

Under section 48 of the Broadcasting Act 2009, individuals may make a complaint to the Authority that a broadcaster failed to comply with the broadcasting code. The complainant argued that there had been a breach of rule 4.21 and 4.22 of the Authority's Code of Fairness, Impartiality and Objectivity in News and Current Affairs (see IRIS 2013-5/32). These rules provide that (a) news presenters in a news programme may not express their own view on matters of public controversy or current public debate and (b) presenters on a current affair programme shall not express their views on matters of public controversy or current public debate, "such that a partisan position is advocated".

The complainant argued that the presenter "stated that he would vote in a referendum in favour of changes to Irish law to permit same-sex marriage" and that "the presenter didn't even ask a question, merely stating his impatience with not being able to vote immediately". The broadcaster admitted that its

presenter "did proffer his voting preference", but argued that "in the overall context of the piece and the fact that there were no expressions of opinion other than that", this did not constitute a breach of the code.

The Authority's compliance committee first noted that some of the programme did not constitute "news and current affairs", but that the discussion on changes to the law on same-sex marriage was "news and current affairs", as it was a "matter of current public debate". In this regard, the committee noted that under rule 4.22 of the Authority's code, a presenter on a current affairs programme "shall not express his or her own views on matters that are either of public controversy or the subject of current public debate such that a partisan position is advocated".

The committee held that the presenter stating he would vote in favour of any forthcoming referendum on marriage equality and his stated impatience with not being able to vote immediately, constituted a "statement of a partisan position by a news and current affairs presenter on a matter of current public debate" and thus violated rule 4.22 of the Authority's code.

• Broadcasting Authority of Ireland, Broadcast Complaint Decisions, November 2014, p. 4

<http://merlin.obs.coe.int/redirect.php?id=17335>

EN

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New Freedom of Information Law

Following its 12-month passage through parliament, the new Freedom of Information Act 2014 came into force in Ireland on 14 October 2014. The 91-page law repeals both the original Freedom of Information Act 1997 (see IRIS 1997-10/13) and the Freedom of Information (Amendment) Act 2003 (see IRIS 2003-9/28). Moreover, the Irish public expenditure minister has made a ministerial order under the 2014 Act, setting out the new fees that will be charged for freedom of information requests from October 2014 onwards.

The most significant reform brought about by the 2014 Act is that, instead of listing specific bodies which are subject to freedom of information law, the Act now extends to all "public bodies", subject to exemptions. The Act provides a generic definition of "public bodies", which includes all government departments, bodies established by statute or government, public universities and all bodies covered by previous legislation. Moreover, any public body created by government or statute in the future is automatically subject to the freedom of information law.

Of particular note, the freedom of information law now extends to many new bodies not previously subject to the law. These new bodies include companies in which the government holds a majority of shares, subsidiaries of such companies, the police force, the central bank and the national asset management agency (a government-created agency holding large banking assets). Bodies now covered by freedom of information law, but which were not previously covered, are granted a six-month period before being subject to the new law. The Act also provides that the minister may extend the law to non-public bodies, particularly companies that receive government funding. However, the Act exempts a number of public bodies from freedom of information law, including most commercial state bodies (e.g. bus, rail, utilities) and certain police and defence agencies.

Importantly, in relation to government records, the 2014 Act reduces the period during which certain government records are exempt from freedom of information requests, from 10 years to five (reversing an amendment brought in under the 2003 Act). The Act also contains a number of exemptions in relation to public-body records, including records which are commercially sensitive and records which could “reasonably be expected to affect adversely” security, defence or international relations.

Finally, following a ministerial order under the 2003 Act, a more expensive fee regime was introduced in 2003, including a new EUR 15 application fee for freedom of information requests, a EUR 70 fee for an internal review of the request, and a EUR 150 fee for appeals to the information commissioner. Thus, under the 2003 fee regime, the total fee for pursuing a refused freedom of information request was EUR 240. The new ministerial order under the 2014 Act has significantly reduced these fees, including the abolition of the application fee, and reductions in both the internal review and appeal to the information commission fees to EUR 30 and EUR 50 respectively. This means that pursuing a freedom of information request to the information commissioner will now cost EUR 80. Moreover, the ministerial order provides for caps on how much public bodies can charge for search, retrieval and copying fees.

• Freedom of Information Act 2014, No. 30 of 2014, 14 October 2014
<http://merlin.obs.coe.int/redirect.php?id=17332> EN

• Freedom of Information Act 2014 (Fees) Regulations, S.I. No. 484/2014, 28 October 2014
<http://merlin.obs.coe.int/redirect.php?id=17333> EN

• Freedom of Information Bill 2013 Explanatory Memorandum
<http://merlin.obs.coe.int/redirect.php?id=17334> EN

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LT-Lithuania

Lithuania Bans Advertising in LRT Programmes

On 1 January 2015, the Act amending the Act on the Lithuanian National Radio and Television (public service broadcaster LRT) came into force. This amendment was adopted by the LR Seimas (the Lithuanian Parliament) on 23 December 2013.

The amended act stipulates that advertising is prohibited on all the LRT programmes, except in cases when LRT is obliged to broadcast commercial communication as a part of a contractual obligation concerning the acquisition or marketing of rights for broadcasting international events. In addition, under the amendments to be soon enforced, LRT radio and television programmes shall also not be sponsored. However, it should be noted that the prohibition is not absolute, as the amended law foresees exceptions where sponsorship is allowed. The exceptions are permitted for cultural and sports events and/or broadcasts intended to promote cultural, sporting, social or educational activities and initiatives.

It is determined that LRT shall be funded from an allocation of the State Budget, income obtained for the marketing of radio and television broadcasts, sponsorship announcements, publishing, as well as support and income derived from commercial and economic activities.

The amendment determines that the yearly amount of the LRT funding from the State Budget shall be comprised of 1.5 percent of the preceding year’s actual revenues from the income tax and 1.3 percent from the excise revenues, as later specified in the Act of 8 May 2014 amending the Act on the Lithuanian National Radio and Television.

The amount of the LRT funding to be allocated from the State Budget for 2015, which is estimated to reach EUR 29,964,666, shall be based on the State Budget revenues from the income tax and the excise revenues received in 2012.

Each subsequent year, the LRT funding allocations shall be no less than the amount calculated in accordance with all of the 2012 State Budget revenues from the personal income tax and the excise revenues.

It is expected that the amended act will ensure a long-term, stable and adequate funding of the public service broadcaster, which for a long time was one of the lowest funded broadcasters among the European public service broadcasters.

- Lietuvos Respublikos Lietuvos nacionalinio radijo ir televizijos įstatymo 6, 7, 15 straipsnių pakeitimo ir papildymo įstatymas (Act from 23 December 2013 amending the Law on the Lithuanian National Radio and Television)

<http://merlin.obs.coe.int/redirect.php?id=17312>

LT

- Lietuvos Respublikos Lietuvos nacionalinio radijo ir televizijos įstatymo 6, 7, 15 straipsnių pakeitimo ir papildymo įstatymo Nr. XII-736 3 straipsnio pakeitimo įstatymas (Act from 8 May 2014 amending the Law on the Lithuanian National Radio and Television)

<http://merlin.obs.coe.int/redirect.php?id=17313>

LT

Jurgita Iešmantaitė

Radio and Television Commission of Lithuania

LU-Luxembourg

Regulator Imposes Warning on RTL for Breach of Rules on Protection of Minors over Syrian War Coverage

On 5 November 2014, the Independent Audiovisual Authority of Luxembourg (Autorité luxembourgeoise indépendante de l'audiovisuel - ALIA) issued its second decision which falls in the category of "decisions to be published" since it has been established by the law of August 2013 (see IRIS 2013-10/32). In its first published decision of February 2014, ALIA rejected an application for a new radio station (see IRIS 2014-7/27). This new decision concerns a programme transmitted on television in Belgium. The complaint, which was originally brought before the Belgian regulatory authority of the French Community, the Audiovisual Regulatory Authority (Conseil Supérieur de l'Audiovisuel), was transferred to the Luxembourgish regulator which is competent to hear the case. According to the Audiovisual Media Services Directive (Art. 2 AVMSD), the country where the broadcaster is established has jurisdiction. The programme in question was disseminated on RTL TVi, the license holder of which is RTL Belux, established in Luxembourg.

The complaint specifically concerned the programme "Indices" ("Evidence") broadcast on 30 April 2014 at 20:30. The programme showed young Belgian Islamists leaving their home country to fight in the war in Syria. To this end, it contained images of an exceedingly violent character, including scenes of mass executions, decapitations, crucified persons, torture and other degrading acts. The images were in part blurred by technical means. The programme was categorised as "12", meaning that it was considered suitable for minors aged 12 and above. The complainant, however, argued that these depictions were harmful to minors (including those older than 12 years) and that the broadcaster had violated the rules on protection of minors.

ALIA examined whether the transmission of the broadcast in the evening hours violated Art. 27ter (2) of

the Luxembourgish Law on Electronic Media (hereinafter LEM), which sets out that programmes which are "likely to impair the physical, mental or moral development of minors are prohibited except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such services" and closely resembles Art. 27 AVMSD. After hearing the defendant on September 2014, ALIA determined that the content of the programme exceeded the limits of what is authorised by virtue of Art. 27ter LEM. It made clear that the age category "12" was inappropriate for a programme which repeatedly presented exceedingly violent images. ALIA opined that the programme was unsuitable even for minors aged above 12. Additionally, ALIA pointed out that these depictions were not justified from an editorial perspective, thereby disagreeing with the broadcaster that had considered them indispensable for reporting on this issue.

In its decision, ALIA found that RTL Belux had breached the provision on protection of minors by scheduling the programme at that particular time and applying an age category of "12". It thus imposed a sanction in the form of a warning to the broadcaster, the first of a catalogue of possible sanctions (which includes a warning, the publication of a notice, fines, temporary suspensions and withdrawal of licences) prescribed by Art. 35sexies LEM.

This dispute can be seen in the context of previous discussions about the regulatory approach to broadcasters established in Luxembourg primarily targeting audiences in other Member States, mainly of the Benelux. In that respect the Luxembourgish government is also preparing a new Grand-Ducal Regulation on the labelling of programmes which will affect both linear and non-linear audiovisual media services.

- *Décision n° 12/2014 du 5 novembre 2014 du Conseil d'administration de l'Autorité luxembourgeoise indépendante de l'audiovisuel concernant une plainte déposée par XXX à l'encontre du service de télévision RTL TVi* (Décision N°12/2014 du 5 novembre 2014 du Conseil d'administration de l'Autorité luxembourgeoise indépendante de l'audiovisuel concernant une plainte déposée par XXX à l'encontre du service de télévision RTL TVi)

<http://merlin.obs.coe.int/redirect.php?id=17336>

FR

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MK-"the Former Yugoslav Republic Of Macedonia"

Amendments to the Act on Public Procurement

The latest amendments to the Act on Public Procurement (Законот за јавни набавки), which are, at the end

of the year 2014, in second reading before Parliament, allow the state and public institutions to advertise in the media without the possibility of a public bidding for the benefit of competitors in the media and advertising markets. The amendments to Article 2 of the Act on Public Procurement widens the existing exceptions of public procurement for the so-called “political advertising areas”, allowing the government, as well as other state and public institutions and agencies, to use public and state funds in order to promote themselves and their activities in the media.

Political advertising has become one of the predominant components of the advertising market in the past several years. According to the annual reports of the Agency for Audio and Audiovisual Media, the central government was the top advertiser in the year 2013 with regard to the purchased advertising time. With respect to the advertising funds spent, the central government was in second position, with almost 4.99 percent of the total advertising market, which includes six free-to-air TV broadcasters. The biggest advertiser for 2013 (an international commercial company) accounted for 5.40 percent on the TV advertising market. The other political entity which was present on the advertising market and in the five top advertisers was the ruling political party VMRO-DPMNE, with a 2.84 percent participation in the overall advertising market of the TV-broadcasting sector.

From this it becomes apparent that, political advertising as an advertising category is notably present on the advertising market with 7.83 percent, meaning that only the central government and the ruling political party VMRO-DPMNE have concluded contracts with the free-to-air broadcasters with a budget volume of EUR 25 million. On the other hand, there is no public information regarding how much the other ministries, state agencies and local institutions have spent on self-promotional activities in the media. The high rate of the government’s advertising was also noted by the European Commission in the latest Country Progress Report for 2014 as one of the main factors that affects the freedom of the media. The report concluded that the condition of media freedom in Macedonia has continued to deteriorate. According to the report, the influence of the government on the media is exercised by state-financed advertising, which is an indirect form of state control of the media.

The Association of Journalists is worried that there will be a lack of transparency and fair competition if the state institutions are allowed to decide by themselves with which media outlet they will conclude a contract. In the opinion of the Association of Journalists, such a situation could further worsen the position of the freedom of the media. According to the Press Freedom Index of the Reporters without Borders, the country of Macedonia is on the 123rd position, one of the lowest rankings in Europe.

• Законот за јавни набавки (Amendments to the Act on Public Procurement)
<http://merlin.obs.coe.int/redirect.php?id=17314> MK

• EU Country’s Progress Report for 2014
<http://merlin.obs.coe.int/redirect.php?id=17315> EN

• Press release of the Macedonian Association of Journalists, 7 November 2014
<http://merlin.obs.coe.int/redirect.php?id=17316> EN

Borce Manevski

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MT-Malta

Consultation Document on the Broadcasting Code for the Protection of Minors

The Broadcasting Authority has published a Consultation Document to amend the Broadcasting Code for the Protection of Minors. The Code, in its current format, has the defect of concentrating mainly on the protection of minors from the viewpoint of advertising, while barely dealing with other aspects of protection of minors in the broadcasting sector (see IRIS 2010-7/29). The current Code also doesn’t address the participation of minors in various programmes. As the remit of the Code is being extended, the Broadcasting Authority in its Consultation Document is proposing to alter the title of the Code to read “Code for the Protection, Welfare and Development of Minors on the Broadcasting Media”.

The new provisions proposed for inclusion in the new Code include those relating to social development by means of building a healthy society through positive values, addressing violence and fostering diversity and eliminating stereotypes. The new Code will require broadcasting stations to have officers in charge of programme rating. Programme promotions should not include gratuitous violence and any other material suitable only for a mature audience. Programme promotions may be broadcast during the day, so long as each specific episode is rated. Minors continue to be defined as persons who are under sixteen years of age.

Where minors feature in any programme, the broadcasting station has to obtain permission from the parents or guardians in the event of shooting any footage for news, vox pops and interviews. Minors who are not eligible to make use of social media, owing to any criteria, including their age, cannot be shown doing so or be encouraged to do so. Presenters are bound to inform listeners or tele-viewers about any conditions to use social media.

No material which primarily exists for sexual arousal or stimulation may be broadcast in programmes aimed at minors or before nine p.m. When legal restrictions apply to prevent the identification of any person, broadcasters must pay particular attention to

withholding any information which could identify minors who are or may be victims, witnesses, defendants or authors in cases of a sexual offence in the civil or criminal courts. This may be achieved by avoiding reporting limited information which can be linked to other pieces of information from elsewhere or inadvertently or in any other indirect manner describing the offence as being incest.

In so far as participation of minors in political programmes is concerned, minors cannot be featured in close-ups or be interviewed so as to be recognised whenever a film is being shot for an activity involving party politics. Nor should minors appear or participate in programmes involving party politics. Finally, minors cannot appear in advertisements involving party politics.

Broadcasts related to the paranormal are not allowed between six a.m. and nine p.m. These include exorcism and occult practices, but do not include programmes involving drama, films or comedies. On the other hand, minors cannot participate, both directly and indirectly, in programmes based on luck and gambling or other programmes linking winnings with luck. Anti-social behaviour, apart from drama programmes, should not be broadcast. Violence should not be portrayed in children's programmes, whilst criminal behaviour should be depicted as unacceptable. Scenes showing cruelty to animals or animals which are treated badly should not be displayed unless such scenes form an essential part of the story or are intended to create greater awareness among the audience about caring more for animals.

Finally, presenters cannot use stereotyped language and material. They may also not speak in such manner or show their prejudice. Guests should be corrected if they are prejudiced in their views. Producers should invite a varied audience and guests from both sexes, both Maltese and foreign and from different ethnic groups.

• Malta Broadcasting Authority, Consultation Document on the Code for the Protection of Minors in Broadcasting, 2014
<http://merlin.obs.coe.int/redirect.php?id=17365>

EN MT

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NL-Netherlands

Dutch Musician Ordered to Remove Music Video from YouTube Containing Threats to Politician

On 7 November 2014, the District Court of The Hague declared Dutch musician Honzy guilty of mak-

ing death threats to politician Geert Wilders through a music video. The court sentenced the musician to a suspended prison sentence and, inter alia, ordered the musician to remove the video from his YouTube account.

The video was first published on the musician's YouTube account in March 2014. In the video, an actor wearing a blonde wig is dragged out of his office by two men wearing balaclavas. The men in balaclavas cover the actor's head with a bag, put him on his knees and press a gun against his head. The parties both agreed that the actor represented an imitation of Geert Wilders. In the final seconds of the video, the screen turns black and the sound of a gunshot is heard. In the lyrics of the song, the musician warns Wilders about the consequences of his political speeches about Muslims and Islam.

The musician's attorney pleaded for acquittal on the grounds of freedom of expression and in view of the fact that the music video was, given the foolish imitation of Wilders, clearly a parody. The court ruled that there was no doubt that the combination of the video and the rap song constituted a threat towards Wilders and that Wilders had reasonable grounds to fear for his life.

Furthermore, the court declared that the video made no contribution to the public debate. On the contrary, the video was created to keep Wilders from expressing his opinion and contributing to the public debate. As a result, the musician violated one of the ground rules of a democratic society; the right of freedom of expression. The court continued by stating that the lyrics made clear that the musician was aware of Wilders' need for security, following other threats that have been made against him in the past. By making the death threats, the musician violated Wilders' right to respect for private life.

The court granted the special conditions sought by the public prosecutor with regard to the order against the musician to remove the video from his YouTube account and to keep the video removed. If the musician continues with making the video available to the public, he will continue being guilty of threatening Wilders and can be prosecuted again. Furthermore, the defendant was sentenced to a suspended prison sentence and community work.

• *Rechtbank Den Haag, 7 November 2014, ECLI:NL:RBDHA:2014:13583* (District Court of The Hague, 7 November 2014, ECLI:NL:RBDHA:2014:13583)
<http://merlin.obs.coe.int/redirect.php?id=17337>

NL

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Broadcasting Regulator Imposes a EUR 160,000 Penalty on Disney for Exceeding the Maximum Advertising Time

On 18 November 2014, the Commissariaat voor de Media (Dutch Media Authority - CvdM) imposed a EUR 160,000 penalty on TV10 B.V (Disney) for exceeding the maximum advertising time on the commercial broadcasting channel Disney XD.

The maximum time for broadcasting commercials or teleshopping programmes on television is 12 minutes per hour, according to Article 3.8 of the Dutch Media Law (Mediawet 2008). Disney repeatedly exceeded this time by up to 15 minutes and 59 seconds of advertising during the months of November and December 2013. Disney admitted exceeding the time, but claimed that the violations were not deliberate or motivated by commercial intentions. Disney claimed that the proposed penalty was disproportionately high, on the grounds that the violations were not structural and a by-product of unintentional mistakes.

The CvdM qualified the violations as very serious, due to the fact that the broadcasting of the advertisements took place during the broadcasting of television programmes for children. Exceeding the maximum advertising time can affect children. The protection of minors is one of the main priorities of the CvdM. The CvdM emphasised that minors are a vulnerable group of the population, which an independent supervisory authority like the CvdM should aim to protect. The CvdM imposed a penalty on Disney from the highest category.

The maximum size of an administrative penalty in the relevant category is set at EUR 225,000. The CvdM took Disney's precautionary measures and appropriate steps after the violation into account when deciding on the size of the penalty. The fact that Disney did not receive a prior warning was not seen as a reason to lower the penalty.

• *Sanctiebeschikking van het Commissariaat voor de Media betreffende een overtreding van artikel 3.8 eerste lid, van de Mediawet 2008 door TV 10 op het programmakanaal Disney XD, 18 november 2014, 626148/635635* (Decision concerning a penalty by the Dutch Media Authority relating to a violation of the first paragraph of Article 3.8 of the Media Act 2008 by TV 10 programme channel Disney XD, 18 November 2014, 626148/635635)
<http://merlin.obs.coe.int/redirect.php?id=17338>

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Dutch Minister Prolongs Private Copy Levy System and Lowers Levy in Response to CJEU Ruling

On 10 April 2014, the Court of Justice of the European Union ruled in the *Stichting ThuisKopie* case that Article 5(2)(b) of the Copyright Directive does not apply to private copying from an illegal source (see IRIS 2014-6/4). Article 5(2) (b) allows Member States to create a private copying exception, provided that the rightholders receive a fair compensation. In the Netherlands, a levy for private copying was previously intended to cover both copying from a legal, as well as from an illegal source. As it has become clear that that system was not in accordance with European law, the Dutch Minister of Justice has issued a new decision lowering the levy by 30% and in this way keeping the system in force.

Based on the Copyright Directive, a Member State can create an exception for private copying, provided that the rightholders will receive a fair compensation for this. The Netherlands has such an exception. With every purchase of certain copying devices, the consumer pays a levy, which is then distributed to the rightholders. The *Stichting ThuisKopie* organisation is assigned by the Minister of Justice to administer the private copying system. In reaction to the CJEU's ruling the Minister of Justice ordered a report from *Stichting ThuisKopie* calculating a new levy based only on private copying from a legal source. This organisation offered its advice on 7 October 2014, suggesting lowering the fees by 30%. The advice further suggests adding e-readers to the list of copying devices.

Based on this advice, the Minister issued a decision on 28 October 2014. This decision extends the private copy levy system for another three years. The Minister further follows the advice of the *Stichting ThuisKopie* and lowered the levy by 30%. This is not only based on the new method of calculation, but also on the ascertainment that there is less evasion of the system and fewer requests for restitution.

In the explanatory note the Minister stated that the new amounts are in conformity with European law, since the CJEU has stated that it is for the Member States to determine what a fair compensation is. It is estimated that EUR 30,000,000 in levies will be collected in the forthcoming year. According to the Minister, this amount is similar to that in other countries.

• *Besluit van 28 oktober 2014, houdende wijziging van het Besluit van 23 oktober 2012 tot aanwijzing van de voorwerpen, bedoeld in artikel 16c van de Auteurswet, en tot vaststelling van nadere regels over de hoogte en de verschuldigdheid van de vergoeding, bedoeld in artikel 16c van de Auteurswet* (Decision of 28 October 2014, amending the Decree of 23 October 2012 designating the objects referred to in Article 16c of the Copyright Act and laying down detailed rules on the amount and chargeability of the allowance referred to in Article 16c of the Copyright Act)

<http://merlin.obs.coe.int/redirect.php?id=17366>

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State Secretary for Education, Culture and Science Publishes Plans for the Future of the Dutch Public Broadcasting System

On 13 October 2014, the State Secretary for Education, Culture and Science wrote a 25-page letter to the House of Representatives reporting the cabinet's plans to strengthen the Dutch public television broadcasting system. The public broadcasting system has been the object of large budget cuts since 2013 and will have to merge from 21 to eight public broadcasting organisations before 2016. According to the state secretary, the public broadcaster has to produce more innovative and distinctive television programmes to be able to stay relevant in a changing media landscape.

In his letter, the state secretary questioned the necessity of a public broadcasting system. The market for broadcasting organisations in the Netherlands has become more diverse due to digitalisation, globalisation and convergence. However, the state secretary concluded that there is a growing need for a public broadcaster with the duties of being an independent and reliable source of information. A new public broadcasting system should produce high-quality drama or educational shows, content which reflects the diversity of Dutch culture, reliable news, as well as being a platform for innovative ideas.

The cabinet wants to break up the monopoly of the public broadcasting organisations over the production of television programmes. The plan is to oblige public broadcasting organisations to hand over 50% of their total programme budget to external parties. This way, producers and social and cultural institutions will have direct access to public broadcasting, which stimulates creative competition. To achieve this goal, the cabinet will have to remove a number of guarantees from the Dutch media law. Furthermore, different tasks, now divided between the public broadcasting organisations, will be covered by a single Dutch public broadcasting organisation. The central organisation will receive all income and rights from television productions.

The state secretary will present necessary amendments in 2015. The plans will be discussed by the House of Representatives. The state secretary announced that all measures must be taken before 1 January 2016.

• (Letter from state secretary Dekker (Education, Culture and Science) to the House of Representatives concerning the future of public broadcasting (Brief van staatssecretaris Dekker (OCW) aan de Tweede Kamer over de toekomst van het publieke mediabestel))

<http://merlin.obs.coe.int/redirect.php?id=17339>

NL

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Report of the Dutch Media Authority on the Effect of the New Dutch Must-Carry Rules

On 12 November 2014 the Dutch Media Authority (Commissariaat van de Media) published its yearly research report on the Dutch media, the Mediamonitor (for previous reports, see IRIS 2011-5/35 and IRIS 2006-1/33). The report discusses the Dutch media landscape. This year's report pays special attention to diversity in the field of television, in order to evaluate the new Dutch must-carry rules.

As of 1 January 2014, a new law has been implemented changing the Dutch must-carry rules (see IRIS 2013-7/22). Under the old rules, cable operators were advised by boards of consumers (programmraden) on what channels should be included by them. With the new legislation, there is no longer any such direct consumer influence on the set of channels offered.

From 1 January 2014 onwards, cable operators that serve over 100,000 households must offer a minimum number of channels. Cable operators that provide digital television are obliged to offer a minimum of 30 channels, while analogue providers must offer a minimum of 15 channels. These packages must include seven channels that are provided by the Dutch and Belgian public broadcasters, as well as the regional public broadcaster.

In order to evaluate the effects of the implementation of the new must-carry rules, the report looks at the packages of channels to which consumers can subscribe. The basic package consists of 12 different genres on average. The diversity of channels increases with the addition of an extra set of channels, which 45% of the households choose by subscribing to additional sets. Cable operators offer almost the same packages as they did in 2011, when the former rules still applied. However, diversity is slightly less; fewer channels and fewer genres are included in most packages. Still, all providers offer more channels than is

legally required, most of them significantly more. According to the report, further research is necessary over the next few years.

In addition to this, the Mediamonitor focuses on consumer satisfaction. On average, people indicate that they are very happy with their television subscription. 78% say that they are not missing any channels. Applying a regression analysis, the report shows that the addition of an extra genre to the set of channels a consumer receives does lead to higher consumer satisfaction. In contrast to this, consumers themselves indicate they do not care for additional channels or genres.

In conclusion, it can be said that, according to this report, the change of the legal regime has not led to a big change to the sets of channels offered to the consumers and that consumers are very satisfied with the channels they receive.

• *Commissariaat voor de Media, Mediamonitor: mediabedrijven en mediemarkten 2013-2014, oktober 2014* (Dutch Media Authority, Mediamonitor: media companies and markets 2013-2014, October 2014)

<http://merlin.obs.coe.int/redirect.php?id=17340>

NL

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RO-Romania

Government Decision on Financing TVR Studios Abroad

On 29 October 2014, the Romanian Government adopted Decision No. 955/2014 ("Decision") with regard to establishing the categories of expenditures, procedures and limits that may make possible advance payments of public funds by the Romanian Television for the production and broadcasting of television programmes abroad in the Romanian language, as well as for arranging the production and broadcasting facilities of foreign television stations controlled by the public broadcaster, Romanian Television ("TVR"). The Decision was published in the Official Journal of Romania No. 806 (Part I) of 5 November 2014. The Decision was adopted shortly after the Decision of TVR's Board of Administration of 27 October 2014 with regard to establishing a TVR branch in the majority Romanian-speaking Republic of Moldova (see IRIS 2013-10/36, IRIS 2014-1/38, IRIS 2014-4/25).

The adopted Decision of the Government establishes categories of expenses for which payments may be made in advance of up to 100% of public funds. These

categories of expenses are: staff costs, costs of production and communication, travel and accommodation expenses, copyrights and related rights, services, arrangement and operation of production and broadcast spaces of television stations abroad, the provision of immovable inventory, expenses for services and supplies, the rental of premises and equipment, studies and research, expert advice, prints and actions to promote television stations abroad.

The amounts are to be given in monthly instalments based on cost estimates, excepting expenses for the rental of premises and equipment, which are to be given in quarterly instalments. The first instalment shall be granted upon the signing of the contract, while the next ones will be based on supporting documents for the payment of the previous instalment.

The Decision of the Government applies both to the "Subsidiary of the Romanian Television" (Kishinev Studio - LLC) in the Republic of Moldova, a company controlled by TVR, and to the programmes and editorial projects intended for broadcasting abroad, as well as for arranging the production and broadcasting facilities of the foreign television stations controlled by TVR.

The TVR branch in the Republic of Moldova will conduct radio and television broadcasting activities, the production and broadcasting of programmes, advertising activities and motion picture and video productions. The activity of the TVR branch will run independently and its legal status will be that of a legal person of private law with distinct patrimony and the purpose to make profit.

TVR resumed its broadcasting activities in the Republic of Moldova on 1 December 2013 (the National Day of Romania). TVR has launched a special programme schedule for Moldova, after the existing legal issues between the two sides were amicably solved on 12 September 2013. Both sides signed the agreement for an amicable settlement of Application No. 36398/08, which was filed by TVR against Moldova before the European Court of Human Rights on 1 August 2008. The complaint was lodged because the former Communist majority in the Republic of Moldova had assigned the frequency used by TVR to a Moldovan TV channel.

• *Hotărârea nr. 955/2014 privind stabilirea categoriilor de cheltuieli, a procedurilor și limitelor în care se pot efectua plăți în avans din fonduri publice de către Societatea Română de Televiziune pentru producerea și difuzarea emisiunilor de televiziune în străinătate în limba română, cât și pentru amenajarea spațiilor de producție și emisie ale posturilor de televiziune din străinătate controlate de Societatea Română de Televiziune* (Decision No. 955/2014 of 29 October 2014, Official Journal of Romania No. 806 (Part I) of 5 November 2014)

<http://merlin.obs.coe.int/redirect.php?id=17359>

RO

• *Comunicat de presă - TVR 31.10.2014* (TVR press release from 31 October 2014)

<http://merlin.obs.coe.int/redirect.php?id=17317>

RO

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RU-Russian Federation

New Act to Counteract Piracy Online

On 24 November 2014, the President of the Russian Federation signed into law a Statute amending the civil procedural law and the information law. The new act introduces a number of measures aimed at boosting the ability of rightsholders to cease distribution via the Internet of illegal content.

In particular it specifies that Article 10 (Distribution of Information or Provision of Information) of the Federal Statute "On information, information technologies and on protection of information" (see also IRIS 2014-6/31) shall include an obligation of all owners of websites to publish on their sites their names, whereabouts and address, as well as email address and an electronic form for complaints.

These data and the e-form shall be instrumental in submitting complaints by rightsholders to website owners. A new Article 15-7 of the same federal statute provides for a list of information that the rightsholder shall submit in order to have the illegal information taken down from the website. Unless the website owner has proof that the publication of information (works) on the website complies with the copyright law, he/she shall remove it within 24 hours from the receipt of the complaint.

Another important innovation in the Statute is the expansion of the content-blocking procedures introduced in 2013 for audiovisual works (see IRIS 2013-8/33) for all protected works online with the exception of photographs and similar works. A rightsholder, after obtaining the Moscow City Court's resolution, shall submit a request to the supervisory authority, Roskomnadzor (see IRIS 2012-8/36), to order the blocking of illegal content on the Internet. Within three working days said body shall notify the hosting provider of a website containing illegal content. The latter shall inform, within a working day, the owner of the website about the supervisory authority's notification and demand that access to the illegal information be blocked. If neither the hosting provider nor the owner of the website reacts properly to the notification within the expected period, Roskomnadzor shall require Internet providers to block the domain names of the website with the illegal content.

A new article, 15-6, is introduced to the Federal Statute "On information, information technologies and on protection of information"; it addresses the issue of websites where copyright violations happen on a regular basis. Upon obtaining the Moscow City Court's resolution in this regard, Roskomnadzor shall order Internet service providers to block, within one working day, access to the illegal website indefinitely.

Roskomnadzor shall also officially publish online a register of such blocked websites.

Relevant changes, embracing all copyrighted works (with the exception of photographs), were added to the Civil Procedure Code of the Russian Federation. They include the expanded competence of the Moscow City Court on such matters, as well as procedures for using injunctive remedies in cases of protection of a wider spectrum of intellectual property rights online.

The Statute enters into force on 1 May 2015.

• О внесении изменений в Федеральный закон "Об информации, информационных технологиях и о защите информации" и Гражданский процессуальный кодекс Российской Федерации (Federal Statute of the Russian Federation of 24 November 2014 # 364-FZ "On amending the Federal Statute of the Russian Federation 'On information, information technologies and on protection of information' and the Civil Procedure Code of the Russian Federation")

<http://merlin.obs.coe.int/redirect.php?id=17341>

RU

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TR-Turkey

Constitutional Court Overturns Recent Amendments to the Internet Act

On 2 October 2014, the Turkish Constitutional Court (CC) held that the amendments to the Internet Act, Law No. 5651 (see IRIS 2007-7/32), which were adopted on 10 September 2014, are unconstitutional and therefore, must be annulled (for other recent decisions of the CC on freedom of expression and the Internet see IRIS 2014-7/33 and IRIS 2014-6/35).

The controversial amendments, which were adopted as a part of an omnibus bill, introduced fundamental changes concerning internet data rendition. According to the amendments, the Telekomünikasyon İletişim Başkanlığı (Presidency of Telecommunication and Communication - TIB), the regulatory authority of telecommunications in Turkey, was given more authority to block websites swiftly and without a court order, as well as to collect and retain Internet users' data.

The older version of the Act required TIB to address an application to a court within 24 hours and to obtain a court decision in 48 hours after blocking a website with an executive order. Although this procedure has been retained, the amendments extended TIB's authority to block websites by establishing further grounds for restrictions and, hence, entitling the head of TIB to order the blocking of a website within

four hours for the purpose of “protecting national security and public order, as well as preventing crime”. Furthermore, before the amendments, TIB had limited powers in the collection of Internet traffic data with regard to pinpointing certain users and could request identifying information from the Internet service providers (ISPs) only by referring to a court order or a criminal investigation. However, following the amendments, TIB was allowed to store Internet traffic data. In addition, a court order was only deemed necessary when TIB sends particular data to a public institution that requests it. Lastly, the amendments decreased the maximum time allowed to ISPs to comply with TIB’s blocking orders to a mere four hours.

Against this background, the Republican People’s Party (CHP), the main opposition political party in Turkey, lodged a case before the CC for the annulment of the amendments after they came into force on 11 September 2014. In its decision of 2 October 2014, the CC held that the amendments, which expanded the grounds that enable TIB to block websites to protect the national security and the public order, as well as to prevent crimes and allowed TIB the use of Internet traffic data, were unconstitutional and hence, should be annulled. On the other hand, the decrease of maximum time allotted to ISPs to abide by the TIB’s blocking order to a mere four hours was declared constitutional.

- *2 Ekim 2014 Perçembe Günü Saat 09.30’da Yapılan Mahkeme Toplantısında Görülen Dosyalar ve Sonuçları* (Summary of the decision of the Turkish Constitutional Court (the reasoned decision is still not available))

<http://merlin.obs.coe.int/redirect.php?id=17318>

TR

- *İnternet Ortamında Yapılan Yayınların Düzenlenmesi ve Bu Yayınlar Yoluyla İşlenen Suçlarla Mücadele Edilmesi Hakkında Kanun* (Amendments to the Internet Law (Law No. 5651))

<http://merlin.obs.coe.int/redirect.php?id=17319>

TR

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AL-Albania

Legal disputes over a tender for digital networks of the public broadcaster

On 13 October 2014 an order was published in the Bulletin of Public Procurement which proclaimed the company Rohde & Schwarz as the sole winner of a tender to build the digital networks of the public broadcaster RTSH.

The Ministry of Innovation and Information and Communication Technology published a request for proposals with the subject “For the Finance, Design, Supply, Installation, Training and Transfer of a DVB-T2 Network for the Republic of Albania” on 12 April 2013.

The aim of the tender proclaimed by the Ministry was to select a company that would build the digital networks that would then enable the public broadcaster Radio Televizioni Shqiptar (RTSH) to transition its broadcasting from analogue to digital networks. The tender was carried out amid disputes of the opposition that it was not appropriate to undertake projects of such a scale immediately before the election period.

Four companies applied for the tender and the Ministry proclaimed two winners on 17 June 2013: Rohde & Schwarz and Ericsson AB. According to the Ministry both companies initially expressed their willingness to carry out the contract, but the company Rohde & Schwarz sent e-mails to the Ministry in July 2013 complaining about the procedure. The Ministry decided to exclude the company from the tender after the company’s failure to clarify its position upon the Ministry’s request. On 15 August 2013, following the exclusion, the company filed a lawsuit at the Court of Tirana which rejected the request four days later. The Minister, faced with this situation and with an imminent rotation of power after the general elections in June 2013, annulled the tendering procedure altogether. The Ministry then proclaimed two other bidders as the winners of the tender.

The company Rohde & Schwarz filed another lawsuit, challenging both the cancellation and the proclamation of the two winners of the tender, which the Court of Tirana accepted on 9 December 2013. The court ruled that the order the Ministry issued, proclaiming the two other bidders as winners of the tender was illegal and consequently also repealed the order that annulled the tender procedures in August 2013.

The Ministry, which by the end of 2013 had been transformed to the Ministry of Innovation and Public Administration appealed the court decision. On 18 June 2014 the Court of Appeals ruled that the matter had to be transferred to the Administrative Court of Appeals as it fell under its jurisdiction. At this point the Ministry decided to withdraw its appeal. On 15 September 2014 the Administrative Court of Appeals issued its decision which ruled that the case was closed, and one month later the order which proclaimed the company Rhode & Schwarz as the sole winner of the tender was published in the Bulletin of Public Procurement.

After these procedures, the final decision of the Ministry was challenged by the other bidder of the tender, the company Ericsson AB, as incompatible with the Constitution of the Republic of Albania. On 5 December 2014 the Constitutional Court decided to reject the lawsuit. The decision stated that the company Ericsson AB was seeking to repeal the court decision that resulted from a process the company had not been part of and therefore cannot appeal the decision. The court stated that the company also had not exhausted all other court instances and hence it should not file its request with the Constitutional Court.

- - (The Court Ruling of First Instance, Decision no.12316)
<http://merlin.obs.coe.int/redirect.php?id=17772> **SQ**
- - (The Ruling of Court of Appeals, Decision no.2712)
<http://merlin.obs.coe.int/redirect.php?id=17773> **SQ**
- - (The Ruling of Administrative Court of Appeals, Decision no.3407)
<http://merlin.obs.coe.int/redirect.php?id=17774> **SQ**
- - (The Decision no.195 of Constitutional Court)
<http://merlin.obs.coe.int/redirect.php?id=17775> **SQ**

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Parliament elects five members of the Steering Council of the Public Broadcaster

On 4 December 2014 the Parliament elected in a plenary session five members of the Steering Council of the Public Broadcaster Radio Televizioni SHqiptar (RTSH.) The new members were elected by Members of Parliament from the ruling majority, as the Members of Parliament representing the opposition continued to boycott all parliamentary activities. The short listing process in the Parliamentary Commission on Media was also only done by Members of Parliament from the ruling majority after failed appeals to the opposition to come to the parliament and resolve the deadlock. The mandate of all members of the Steering Council of RTSH had expired at least one year earlier, while some mandates were not valid since already two years. Similar to the regulator Audiovisual Media Authority (AMA) the Members of Parliament representing the ruling majority have stated that the five remaining members of the Steering Council of RTSH can be shortlisted by the Members of Parliament from the opposition when they return to the Commission. However, the Members of Parliament from the opposition have opposed the election of the members of the Steering Council of the Public Broadcaster RTSH without their presence and agreement, claiming that the process goes against legal procedures.

According to Article 93-94 of the Law no. 97/2013 on Audiovisual Media in the Republic of Albania the Steering Council is composed of the chair and ten members. The candidates which are proposed from different associations and organizations, are then eliminated one by one by members of the Parliamentary Commission on Media where Member of Parliament from the opposition and from the ruling majority take turn in eliminating the candidates, so that a political balance can be preserved, in case they cannot agree.

The election of new members of the Steering Council was also opposed by the Deputy Speaker of the Parliament and chair of the Party of the Union of Human Rights. He stated that it was unacceptable that a body like the Steering Council which has to represent interests of all Albanian citizens in the Public Broadcaster does not have a representative of ethnic minorities.

The Prime Minister replied by stating that such a requirement existed in the old Law on Radio and Television, but during the drafting of the existing Law on Audiovisual Media such a requirement had been removed.

After the election of the five members of the Steering Council, the ruling majority declared that the process of electing the chair of the Steering Council of RTSH will start soon. According to Article 95 of the Law 97/2013 on Audiovisual Media in the Republic of Albania the chair is elected no later than ten days after the procedure for the election of the Steering Council members is completed. The Parliamentary Commission on Media shortlists four candidates for the chair and the Members of Parliament representing the opposition in the commission are expected to eliminate two of the four shortlisted candidates, while the final two remaining candidates are elected by simple majority in the parliament.

- Act no. 97/2013 "On Audiovisual Media in the Republic of Albania"
<http://merlin.obs.coe.int/redirect.php?id=17031> **EN**
- *Kuvendi mblidhet në seancë plenare [04 Dhjetor, 2014]* (The report on plenary session of 4 December 2014 "Parliament convenes in plenary session")
<http://merlin.obs.coe.int/redirect.php?id=17776> **SQ**

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CZ-Czech Republic

Amendment of the Copyright Act

On 23 October 2014 the Parliament of the Czech Republic approved an amendment to the Copyright Act. The amendment fulfills obligations for the Czech Republic's membership in the European Union. Namely, the extension of the term of protection of property rights of performers in their artistic performances recorded on sound recordings, and property rights of phonogram producers for their records. Furthermore, the introduction of appropriate accompanying measures in favor of performers (annual supplementary remuneration, the right to withdraw from the contract and the right to remuneration), and the introduction of the method of calculating the duration of the ownership of music rights. The amendment to the Copyright Act also introduces the definition of orphan works, and the mutual recognition of the orphan work status, as well as rules for the search for rightholders of the works, rules for the termination of the orphan work status, and a statutory license for the use of orphan works (and records).

Property rights of the performers last 50 years from the creation of the performance. However, if during

this period a recording of the performance - other than a sound recording - has been lawfully published or lawfully communicated to the public, the rights of the performing artist lapse 50 years from the day of the first lawful publication or communication to the public of such a record. If during the 50 years after the creation of the performance a sound recording of the performance has been lawfully published or lawfully communicated to the public, the performance rights of the performing artist lapse 70 years from the day of the first lawful publication or communication to the public of such a record.

The new law regulates the license for certain uses of orphan works. Works in the form of books, magazines, newspapers or other documents, and cinematographic or audiovisual works can be orphan works. To achieve objectives related to missions in the public interest, orphan works can be reproduced for the purpose of digitization, making available on the internet, indexing, cataloging, preserving or restoring, if the orphan work is part of the users collections or archives.

The public service broadcaster can reproduce for the purposes of digitization, making available on the internet, cataloging, preserving or restoring orphan works which were already included in its archives before 31 December 2002 to achieve objectives related to its mission in the public interest.

• *Zákon č.228 /2014 Sb., kterým se mění zákon č.121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon), ve znění pozdějších předpisů* (Act no. 228/2014 Coll. Amending the Copyright Law)
<http://merlin.obs.coe.int/redirect.php?id=17777>

CS

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LV-Latvia

Amendments to the Latvian Electronic Media Law

On 23 October 2014 Saeima (the Latvian Parliament) adopted amendments to the Electronic Media Law which changed the language requirements for radio programmes, as well as it increased the power of the national regulatory authority: the Electronic Mass Media Council.

With respect to languages of radio programmes the amendments provide that now the radio stations may choose if their programmes will be in Latvian or in a foreign language. If the programme will be in a foreign language, then there is no translation required, thus in this sense the regulation is even more liberal than before. Before these amendments most of the

radio programmes had to include a certain proportion of broadcasts in the Latvian language in order to get access to the necessary frequencies. However, many programmes with a Russian speaking population as their target auditory, included the Latvian language parts only formally (e.g., at night during the music broadcasts). The amendments aim to eliminate such situations and to provide more legal certainty. If the programme is in Latvian, then for broadcasts in foreign languages within this programme a translation into Latvian is needed.

The amendments might have a negative impact on those radio stations which currently broadcast most of the time in a foreign language, although their programme concept provides that more than 50% of the broadcasts must be in Latvian. The transition rules of the amendments provide that for such stations 100% of their broadcasts have to be in Latvian. Those stations with the Latvian language below 50% according to their programme concept, must choose whether they will continue in Latvian or in a foreign language. The choice must be made until 31 December 2015 as the new rules will come into force on 1 January 2016.

Another novelty is that at least 90% of the radio programme will have to be home-made (i.e., not taken from another radio programme), except music, advertising, and radio shop. This amendment is aimed to improve the existing situation that many broadcasts in foreign languages (notably, Russian) within the Latvian stations are actually not prepared in Latvia, but purchased from Russian radio stations with minimum changes (e.g., insertion of Latvian advertising, etc.). The amendments also provide that such insertion of broadcasts from other programmes is now prohibited, except retransmission cases or when the broadcast contains important events for the Latvian public. These amendments become binding to the existing radio stations as of 1 January 2016.

The amendments also substantially increase the investigatory powers of the Electronic Mass Media Council, making them more similar to those of the competition authority. The Council now has the right to enter the premises of broadcasting companies, also without a previous notice. The Council may also apply to the court for a search warrant; and if the court issues the warrant the Council can search the premises together with the police even without the broadcaster's consent. The Council may also inspect computers and other carriers of information. The court's warrant may be appealed to the chairperson of the court, and if the warrant is repealed the evidence gathered during the search may not be used against the person of interest.

In the annotation to the draft amendments it is explained that the above amendments are necessary because the Council was faced with the failure to cooperate of several broadcasters, and thus could not fulfil its legitimate functions. The amendments came into force on 26 November 2014 (according to the

transition rules certain parts of the amendments will be applicable only as of 1 January 2016).

• *Grozījumi Elektronisko plašsaziņas līdzekļu likumā, "Latvijas Vēstnesis", 225 (5285), 12.11.2014 (Amendments to the Electronic Mass Media Law, published at "Latvijas Vēstnesis", 225 (5285), 12. November 2014)*

<http://merlin.obs.coe.int/redirect.php?id=17778>

LV

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MK: "the Former Yugoslav Republic Of Macedonia"

New regulation on broadcasting of European audiovisual Works and Works of independent producers

On 4 December 2014 the Media Regulation Authority - the Agency for Audio and Audiovisual Media Services - adopted a by-law regulation which is based on the provisions in Article 18 of the Broadcasting Law which regulates the broadcasts of European works and the works of independent producers. The by-law act "Rulebook on Broadcasting European Audiovisual Works and Works of Independent Producers" („437400460462470473475470472 за емитување европски аудиовизуелни дела и дела од независни продуценти“) defines more precisely the types of broadcast programming that could be considered as "European audiovisual work" or as "a work of an independent producer". The obligations from the Rulebook refer only to broadcasters with national coverage, while the regional and the local broadcasters, niche TV channels which broadcast news, sports events, advertising, and teleshopping as well as the Parliamentary Channel are exempt from this obligation.

The Rulebook provides the broadcasters with guidelines on how to calculate the airing time of European audiovisual works. The share of European audiovisual works in the broadcasts programming must include two broadcasts of each work (the premiere and the first rerun) in the course of one year, regardless of the year of the production. The European audiovisual works also include the audiovisual works produced by the broadcasters themselves and the Macedonian audiovisual works. For the newly licensed TV broadcasters the by-law act envisages in Article 6 a so called "progressive fulfilment of these requirements": "The television programme services that will be granted state-level broadcast licenses for the first time after this Rulebook enters into force, shall meet the requirement for the promotion of European audiovisual works progressively over a period of five years. In the first year, the share of European audiovisual works should be at least 10%, while in the second, third, and fourth

year, the share of European audiovisual works shall increase by at least 10% annually, amounting to at least 51 % in the fifth year."

The Rulebook obliges the TV broadcasters to allocate at least 10% of their annual programming-related budgets (both for production and for purchasing television programming), for European audiovisual works produced by independent producers, where at least half of these should be produced in the last five years. The broadcasters are required to keep daily records of the broadcast European audiovisual works and works by independent producers throughout the year and report to the Media Regulation Authority on the fulfilment of these requirement in the previous year, at the latest by 31 March of the following year.

• The Rulebook on Broadcasting Audiovisual Works and Works by Independent Producers

<http://merlin.obs.coe.int/redirect.php?id=17423>

EN

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BG-Bulgaria

Supreme Administrative Court sets aside Competition Commission's decision

The Supreme Administrative Court of the Republic of Bulgaria has set aside the decision of the Competition Commission (P465410465475470465 № 898 от 10.07.2014 г.) and the decision of the Director-General of Bulgarian National Television (BNT) in favour of issuing a public invitation to tender for the establishment of BNT's audience share (Решение № 30II -01-10/20.05.2014 г.).

After its Director-General had taken his decision, BNT issued the public invitation to tender for the following: "Establishment of audience shares and monitoring of television advertising, as well as the initialisation and maintenance of data processing software". It was only in the full text, in paragraph 3, that the scope of the invitation to tender was expanded and additional requirements to be met by the participants were laid down. For example, not only the audience shares but also the radio and print market usage data were to be ascertained.

Mediaresearch Bulgaria EAD ("Mediaresearch"), a part of the Nielsen group, lodged a complaint with the Competition Commission concerning this public invitation to tender as it regarded its conditions as discriminatory. The Commission dismissed the complaint as unfounded (see IRIS 2014-9:1/11).

Mediaresearch successfully appealed against this decision of the Commission to the Supreme Administrative Court, which considered the Commission's conclusions unlawful and ill-founded. Although it confirmed that it is basically within BNT's discretion to decide what actual services are to be put out to tender and what conditions and requirements are to be met by tenderers, this discretion is, according to the reasons given for the decision, not unlimited but linked to compliance with certain legal principles. According to the Supreme Administrative Court, BNT gave no reasons for expanding the scope of the invitation to tender. It was not until the proceedings before the Competition Commission that it explained why the additional data were needed. BNT had, the court said, breached section 25(5) of the Public Tenders Act as "requirements were imposed that were not adjusted to take account of the subject of the invitation to tender, thus unjustifiably limiting the possible number of participants in the tendering procedure".

Furthermore, BNT had also failed to comply with section 1 of the Public Tenders Act, which, as the main purpose of the Act, laid down the requirement to ensure the efficient use of public funds. Giving these reasons for its judgment, the court set aside the two decisions and ordered BNT to initiate a new procedure, taking these reasons into consideration.

• РЕШЕНИЕ № 14186 на Върховния административен съд на Република България София, 27.11.2014 (Judgment no. 14186 of the Supreme Administrative Court of the Republic of Bulgaria of 27 November 2014)

<http://merlin.obs.coe.int/redirect.php?id=17786>

BG

Evgeniya Scherer

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BY-Belarus

Amendments to the media law allow for control of online content

The Statute of the Republic of Belarus "On the Mass Media" of 2008 (see IRIS 2008-8/9) was amended by Parliament on 17 and 18 December 2014 and then signed into law by the President on 20 December 2014. The amendments came into force on 1 January 2015.

These amendments place responsibility on owners of online resources for the posting of illegal information, such as material considered to constitute extremist information or "other information that is capable of causing harm to the national interests of the Republic of Belarus" (amendments to Art. 38). The Ministry of Information reserves the right to block access to online resources without a court decision. This shall hap-

pen after it has issued two warnings within a twelve-month period (under the new Article 51-1).

The new amendments also introduce a ban on foreign ownership of more than 20 percent of the stock or other participation of such kind for any news outlet in Belarus, including online media. The amendments also give the Government the right to compile lists of all "disseminators of information", including re-broadcasters. It obligates disseminators to ensure that they do not make available "informational reports and/or materials" that are banned by law, thus imposing on them quasi-censorship functions. Breaches of this norm shall result in the expulsion of violators from the registry by the Ministry of Information, which amounts to a prohibition on disseminating information by any means, including online. The dissemination (i.e. re-broadcasting) of foreign television programmes without prior registration is also banned (under amendments to Article 17) for any news outlet in Belarus, including (under amendments to Article 15) broadcasters and online media.

OSCE Representative on Freedom of the Media Dunja Mijatović issued a statement on 22 December 2014 stating that the amendments "contain disproportionate restrictions that are based on vaguely formulated legal provisions." She also noted that the legislation had been speedily adopted without any public consultation.

• О внесении дополнений и изменений в Закон Республики Беларусь « О средствах массовой информации » (Statute of the Republic of Belarus of 20 December 2014, N 213-Z, on Amendments to the Statute of the Republic of Belarus "on the Mass Media")

<http://merlin.obs.coe.int/redirect.php?id=18612>

RU

• "New regulation and recent blockings threaten free speech on Internet in Belarus, says OSCE Representative", Statement by Representative on Freedom of the Media of 22 December 2014,

<http://merlin.obs.coe.int/redirect.php?id=18613>

EN

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Agenda

Book List

Tricard, S., *Le droit communautaire des communications commerciales audiovisuelles* Éditions universitaires européennes, 2014 ISBN 978-3841731135
http://www.amazon.fr/droit-communautaire-communications-commerciales-audiovisuelles/dp/3841731139/ref=sr_1_1?s=books&ie=UTF8&qid=140549942&sr=1-1&keywords=droit+audiovisuel
Perrin, L., *Le President d'une Autorite Administrative Independante de Régulation* ISBN 979-1092320008
http://www.amazon.fr/President-Autorite-Administrative-Independante-R%C3%A9gulation/dp/1092320008/ref=sr_1_5?s=books&ie=UTF8&qid=1405500579&sr=1-5&keywords=droit+audiovisuel
Roßnagel A., Geppert, M., *Telemediarecht: Telekommunikations- und Multimediarecht* Deutscher

Taschenbuch Verlag, 2014 ISBN 978-3423055987
http://www.amazon.de/Telemediarecht-Martin-Geppert-Alexander-Ro%C3%9Fnagel/dp/3423055987/ref=sr_1_15?s=books&ie=UTF8&qid=1405500720&sr=1-15&keywords=medienrecht
Castendyk, O., Fock, S., *Medienrecht / Europäisches Medienrecht und Durchsetzung des geistigen Eigentums* De Gruyter, 2014 ISBN 978-3110313888
http://www.amazon.de/Wandtke-Artur-Axel-Ohst-Claudia-Europ%C3%A4isches/dp/311031388X/ref=sr_1_10?s=books&ie=UTF8&qid=1405500906&sr=1-10&keywords=medienrecht
Doukas, D., *Media Law and Market Regulation in the European Union (Modern Studies in European Law)* Hart Publishing, 2014 ISBN 978-1849460316
http://www.amazon.co.uk/Market-Regulation-European-Modern-Studies/dp/1849460310/ref=sr_1_9?s=books&ie=UTF8&qid=1405501098&sr=1-9&keywords=media+law

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