

INTERNATIONAL

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland

After proceedings at national level over eight years, and after a preliminary ruling by the Court of Justice of the European Union (CJUE) on 16 December 2008 (Case C-73/07), the European Court of Human Rights (ECtHR) has delivered a judgment in a highly interesting case of conflicting rights between the right of privacy and the right to freedom of expression, in the domain of protection of personal data and data journalism. The Court has come to the conclusion that a prohibition issued by the Finnish Data Protection Board that prohibited two media companies (Satakunnan Markkinapörssi Oy and Satamedia Oy) from publishing personal data in the manner and to the extent Satamedia had published this data before, is to be considered a legitimate interference in the applicants' right to freedom of expression and information. More precisely, the Finnish authorities forbade Satamedia from collecting, saving and processing to a large extent taxation data, with the result that an essential part of the information published in the applicant's magazine Veropörssi could no longer be published and an SMS-service was discontinued. The ECtHR agrees with the Finnish authorities that the applicants could not rely on the exception of journalistic activities, as the publication of the large amount of taxation data by Satamedia was not justified by a public interest. The Court accepts the approach of the Finnish Supreme Administrative Court that it was necessary to interpret Satamedia's freedom of expression strictly, in order to protect the right of privacy of Finnish citizens.

The European Court recognises, however, the general subject-matter, which was at the heart of the publication in question; namely the taxation data about natural persons' taxable income and assets, while such data are a matter of public record in Finland, available to everyone. The Court agrees that as such this taxation information was a matter of public interest. The Court also emphasises that such data is public in Finland, in accordance with the Act on the Public Disclosure and Confidentiality of Tax Information, and that there was no suggestion that Satamedia had obtained the taxation data by subterfuge or other illicit means. The Court equally observes that the accuracy and reliability of the published information was not in dispute. According to the European Court the only problematic issue was the scale of the published information by Satamedia, as the Veropörssi magazine

had published in 2002 taxation data on 1.2 million persons. According to the domestic authorities, the publishing of taxation information to such an extent could not be considered journalism, but the processing of personal data which Satamedia had no right to do. The Court's judgment also contains a reference to the preliminary ruling of the CJUE of 16 December 2008, which found that the activities of Satamedia related to data from documents which were in the public domain under Finnish legislation, and could be classified as "journalistic activities" if their object was to disclose to the public information, opinions or ideas, irrespective of the medium which was used to transmit it.

Leaving a broad margin of appreciation, the European Court of Human Rights accepts the finding by the Finnish authorities that the publication of personal data by Satamedia could not be regarded as journalistic activity, in particular because the derogation for journalistic purpose in the Personal Data Act (see also Article 9 of Protection of Personal Data Directive 95/46/EC of 24 October 1995) was to be interpreted strictly. The European Court is of the opinion that the Finnish judicial authorities have attached sufficient importance to Satamedia's right to freedom of expression, while also taking into consideration the right to respect for private life of those taxpayers whose taxation information had been published. The Court finds that the restrictions on the exercise of Satamedia's freedom of expression were established convincingly by the Supreme Administrative Court, in line with the Court's case law. In such circumstances the Court would require strong reasons to substitute its own view for that of the domestic courts.

The Court finally notes that Satamedia was not prohibited generally from publishing the taxation information about private persons, but only to a certain extent. The fact that the prohibition issued led to the discontinuation of Veropörssi magazine and Satamedia's SMS-service was, according to the Court, not a direct consequence of the interference by the Finnish authorities, but of an economic decision made by Satamedia itself. The Court also takes into account that the prohibition laid down by the domestic authorities was not a criminal sanction, but an administrative one, and thereby a less severe sanction. Having regard to all the foregoing factors, and taking into account the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests at stake. Therefore there has been no violation of Article 10 of the European Convention on Human Rights (ECHR). Only one judge dissented, emphasising that the majority's approach does not follow the established case law of the Court, finding a violation of Article 10 in cases where national authorities have taken measures to protect publicly available and known information on matters of public interest from disclosure. The dissenting opinion also states that no negative effect or harm was identified as having been inflicted upon any individual, nor had soci-

ety been otherwise imperilled through the publication of the taxation data at issue. It states further that “regrettably, the majority agreed with the respondent state that the applicant companies’ activities did not fall within the exception for the purposes of journalism in the Personal Data Act”, and that this can lead to an interpretation “that journalists are so limited in processing data that the entire journalistic activity becomes futile (..), particularly in the light of the dynamic and evolving character of media”.

Apart from rejecting the applicants’ arguments with regard to their right to freedom of expression and information under Article 10 of the ECHR, the Court also rejected Satamedia’s claim that Article 14 of the ECHR had been violated. Satamedia had argued that they had been discriminated against vis-à-vis other newspapers, which had been able to continue publishing the taxation information in question. According to the European Court, Satamedia could not be compared with other newspapers publishing taxation data, as the quantity published by them was clearly greater than elsewhere. Therefore Satamedia’s situation was not sufficiently similar to the situation of other newspapers, and hence there was no discrimination within the terms of Article 14 of the ECHR. Indeed, in order for an issue to arise under Article 14 of the ECHR, there must be a difference in treatment in relevantly similar situations, which was not the case in this context. The European Court found this part of the application manifestly ill-founded and therefore inadmissible.

The Court did find however a violation of Article 6 § 1 of the ECHR (fair trial) in this case, as the length of the proceedings at domestic level (six years and six months) was excessive and failed to meet the “reasonable time” requirement, even taking into account the complexity of the case.

• Judgment by the European Court of Human Rights (Fourth Section), case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, Application no. 931/13 of 21 July 2015

<http://merlin.obs.coe.int/redirect.php?id=17636>

EN

• Judgment of the Court (Grand Chamber) in Case C-73-07 Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy, 16 December 2008

<http://merlin.obs.coe.int/redirect.php?id=17637>

DE EN FR

CS	DA	EL	ES	ET	FI	HU	IT	LT	LV	MT
NL	PL	PT	SK	SL	SV	HR				

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Council of Europe: Declaration on gender equality in the European film industry

As part of Bosnia and Herzegovina’s Chairmanship of the Council of Europe’s Committee of Ministers, a

high-level conference on “Women in today’s European film industry: gender matters. Can we do better?” was held in Sarajevo on 14 August 2015. Representatives from many European ministries of culture and film funds attended the conference, and a declaration was adopted, calling on the Council of Europe to encourage member states to implement policies to reduce gender imbalance in the European audiovisual industry.

The declaration first recalled the Committee of Ministers 2003(3) Recommendation on balanced participation of women and men in political and public decision-making (see IRIS 2013-8/3), and the Committee’s “Council of Europe Gender Equality Strategy 2014-2017”. In particular, it was recalled that “gender equality means an equal visibility, empowerment, responsibility and participation of both women and men in all spheres of public and private life”. To this end, the declaration acknowledged the “importance of audiovisual works in European culture and the significant role which the Council of Europe, through its cinema co-production support fund Eurimages, plays in the production and promotion of European cinema”.

Based on material presented at the Sarajevo conference, the declaration observed that women are “considerably underrepresented in key job roles in the film industry”, are “at a significant risk of receiving less favourable treatment than men, in terms of both pay and film funding opportunities”; and that “their work achieves less recognition than that of men”.

The declaration calls on the Council of Europe “to encourage its member states to implement policies to reduce the gender imbalance in the European audiovisual industry with a view to bringing about a lasting and widespread improvement in the situation; this involves enhancing women’s access to key posts in the audiovisual industry and film-making, so that they can express themselves, drawing on their talent, their perspective and their authenticity”.

In particular, the Council of Europe was called upon, through its Eurimages Fund, to engage in a number of activities, including (a) encouraging member states to produce gender-based statistics and analyse the causes of the marginalisation of women; (b) encouraging member states to adopt equality policies aimed at improving the access to public funding for women; (c) developing measures for improving gender balance in decision-making posts in the industry; (d) enhancing the visibility of female filmmakers; (e) raising awareness through holding/organising conferences, publishing studies, and collecting and disseminating examples of best practice; and (f) encouraging film-makers to be more sensitive to on-screen female representation.

• Bosnia and Herzegovina Chairmanship of the Committee Ministers of the Council of Europe, “Women in today’s European film industry: gender matters. Can we do better?”, Sarajevo, 14 August 2015

<http://merlin.obs.coe.int/redirect.php?id=17667>

EN

• Council Europe, Council of Europe Gender Equality Strategy 2014-2017, February 2014

<http://merlin.obs.coe.int/redirect.php?id=17668>

EN

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EUROPEAN UNION

Court of Justice of the European Union: Advocate General considers newspaper website containing video not covered by AVMS Directive

On 1 July 2015, Advocate General Szpunar delivered his opinion in Case C-347/14, *New Media Online GmbH*, which was a preliminary reference from an Austria court asking whether a newspaper's website containing video is covered by the EU's Audiovisual Media Service Directive. In the advocate general's opinion, neither a newspaper's website with audiovisual material, nor any section of such a website, is an "audiovisual media service" under the directive.

The case concerned the *Tiroler Tageszeitung* newspaper's website ("*Tiroler Tageszeitung Online*"), which was operated by the Austrian company *New Media Online*. The newspaper's website had a "video" section, which included a catalogue of around 300 videos, varying in length from several seconds, to several minutes, and included its own material, user-generated videos, and local television material. In 2012, Austria's communications regulator (*Kommunikationsbehörde Austria*) held that the video section of the website was an "on-demand audiovisual media service" under the Austrian law transposing the EU directive (*Bundesgesetz über audiovisuelle Mediendienste*). The ruling was appealed to Austria's Supreme Administrative Court (*Verwaltungsgerichtshof*), and in 2014, that court referred the question to the EU Court of Justice for a preliminary ruling.

The advocate general's opinion begins with the definition of an audiovisual media service under article 1 of the directive: a service under the editorial responsibility of a media service provider, and the principal purpose of which is the provision of programmes, in order to inform, entertain or educate, to the general public by electronic communications networks". The opinion then notes that the Austrian regulator had followed a "broad definition" of audiovisual media services, and admitted that "a literal reading" of the directive "may suggest" the regulator's interpretation was "correct". But according to the advocate general, there were a "number of flaws" in such a "broad interpretation", as it was incompatible with the "intention of the legislature" and the "objectives of the directive".

First, the "intention in including non-linear services within the scope" of the directive was "to ensure undistorted competition between similar kinds of economic activity by subjecting them, at least in essence, to similar rules. In my view, that objective should not be interpreted broadly so as to include within the scope of the rules services which are not in direct competition with television broadcasting". Second, the regulator's interpretation meant including within the scope of the directive "a large number of persons who operate websites with audiovisual content but the basic purpose of whose activity is not to offer audiovisual services within the meaning of the directive". This would mean "an enormous challenge to regulatory authorities" in the EU. Third, such an interpretation would make "application of the directive dependent on the architecture of the specific website", as only content "collected in a catalogue" would be an audiovisual media service. According to the advocate general "whether or not a service falls within the scope of the directive should be determined by the nature of the service and not the architecture of the internet portal on which it is offered".

Finally, the advocate general held that an internet portal, such as *Tiroler Tageszeitung Online*, was not an audiovisual media service under the directive because: (a) "it is not the result of the technological development of television, but an entirely new phenomenon linked primarily with the increase in the bandwidth of telecommunication networks"; (b) the principal purpose of an audiovisual media service was "to provide programmes, that is to say the element of a traditional television schedule"; and (c) the EU legislature in the directive's preamble expressly pointed out, "albeit in an anachronistic manner", that "it did not intend to include within its scope internet information portals". The advocate general concluded that the directive "should be interpreted as meaning that neither the website of a daily newspaper containing audiovisual material nor any section of that website constitutes an audiovisual media service within the meaning of that directive". The advocate general's opinion is not binding on the EU Court of Justice, and the court will now consider the opinion, in addition to the parties' submissions, and deliver its judgment at a later date.

• Opinion of Advocate General Szpunar, Case C-347/14 *New Media Online GmbH*, 1 July 2015

<http://merlin.obs.coe.int/redirect.php?id=17649>

DE EN FR

CS	DA	EL	ES	ET	FI	HU	IT	LT	LV	MT
NL	PL	PT	SK	SL	SV	HR				

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European Commission: Public consultation on the review of the Satellite and Cable Directive

In its Communication on a Digital Single Market Strategy for Europe (see IRIS 2015-6/3), the Commission stated its intention to review the Satellite and Cable Directive (93/83/EEC) in order to assess the need to enlarge its scope to broadcasters' online transmissions and the need to tackle further measures to ensure enhanced cross-border access to broadcasters' services in Europe. Following up on this, on 24 August 2015 the European Commission launched a public consultation with the aim of, on the one hand, gathering input for the evaluation process in order to assess the current rules, and on the other, seeking views on a possible extension of the Directive in light of market and technological developments. The Commission wants to assess, first, to what extent the Satellite and Cable Directive has improved consumers' cross-border access to broadcasting services in the Internal Market, and also what would be the impact of extending the Directive to TV and radio programmes provided over the Internet, notably broadcasters' online services.

The questionnaire enquires about the following topics:

- The principle of country of origin for the communication to the public by satellite
- The management of cable retransmission rights
- The extension of the principle of country of origin
- The extension of the system of management of cable retransmission rights
- The extension of the mediation system and the obligation to negotiate

This consultation complements the Commission's Green Paper on the online distribution of audiovisual works of July 2011 (see IRIS 2011-8/8) and the consultation on the review of the EU copyright rules of December 2013 (see IRIS 2014-1/8). In parallel, the Commission is conducting a study to assess the functioning and relevance of the Directive as well as the legal and economic aspects of the evolving broadcasting landscape. The results of the study will be made public in spring 2016 and will feed into the review.

The consultation is open until 16 November 2015.

• Consultation on the review of the EU Satellite and Cable Directive
<http://merlin.obs.coe.int/redirect.php?id=17669>

EN

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NATIONAL

BG-Bulgaria

Opinion of the Media Authority on direct and naturalistic suggestions in TV advertising

On 20 July 2015, the Council for Electronic Media (CEM) remembered its position of March 2014 against television advertising which relies on direct and naturalistic suggestions.

At its regular meeting on 25 March 2015, the Council for Electronic Media discussed the psychological effects on the audience of television advertising of products intended to solve physiological and hygienic problems (like sanitary napkins, cleaning products, and antifungal, anti-cystitis, anti-prostatitis, anti-dandruff, anti-diarrhoea medicinal products, etc.) relying on direct and naturalistic suggestions.

Discussions arose in Bulgaria due to the broadcasting of such television advertisements at improper times. Many letters, signals and complaints reached the Media Authority by viewers who harshly objected to the media planning of such advertisements at times when the Bulgarian family traditionally has dinner.

Before positioning itself, CEM took into account the significant role of advertising for the media, but it accepted that the advertising messages created discomfort and differed from the expectations of the audience. Therefore, CEM's position on the subject was unlikely to be in favour of the media. According to CEM, the consumers of television content need additional protection from advertising which relies on direct and naturalistic suggestions, but such protection cannot come through regulation, since it is not provided for in the Radio and Television Act. Therefore, stronger consumer protection can only be provided through self-regulation.

• Становище на Съвета за електронни медии относно телевизионната реклама, залагаща на директни и натуралистични внушения (Opinion of the Council for Electronic Media, 20 July 2015)

<http://merlin.obs.coe.int/redirect.php?id=17670>

BG

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Bulgarian media authority rules against distribution of private channels via public service platforms

On 30 July 2015, the Bulgarian media regulator, the Council for Electronic Media (CEM), decided that the agreement between the Director General of the public service radio broadcaster BNR and the private broadcaster 'Web Radio and TV OOD' concerning the distribution of five of the latter's radio stations via the BNR website infringed Bulgarian law. This decision will also have a significant future impact on public service television because the relevant provisions also apply to Bulgarian National Television (BNT).

On 17 July 2015, Bulgarian National Radio (BNR) launched a new live streaming platform on its website, via which the 17 BNR public service channels and five other private stations can be listened to worldwide. According to the BNR press release, it is the first time that such a wide variety of channels has been transmitted via an Internet platform in Bulgaria. Via the link '441473403410460471 БНР' ('Listen to BNR') on the public service broadcaster's website (www.bnr.bg), users can listen to the three national BNR channels 'Horizont', 'Hristo Botev' and 'Bulgaria', as well as a further eight regional BNR stations that are also broadcast terrestrially. Six specialist music stations from BNR's online portfolio ('Indi', 'Duende', 'Punk Jazz', 'Folklor', 'BG Pop' and 'Klassika') are also available via the site, along with the five radio stations of private broadcaster 'Web Radio and TV OOD': 'Digital Radio Smooth', 'Digital Radio Rock', 'Digital Radio Pop', 'Digital Radio DJ' and 'Digital Radio Hip-Hop'.

The CEM discussed the agreement between BNR and 'Web Radio and TV OOD' at two meetings before deciding that it infringed Articles 46 and 47 of the Bulgarian Broadcasting Act (RFG). Under Article 46(2) RFG, BNR and BNT may sign agreements with other media service providers for the 'supply, retransmission and exchange of programmes and channels'. In addition, BNR and BNT can, of course, under Article 47(1) RFG, continue to produce channels and programmes themselves, commission independent producers and participate in co-productions. Firstly, according to the CEM, the BNR Board of Directors had not consented to the agreement with 'Web Radio and TV OOD' under the terms of Article 62(2) and (3) RFG. Its consent would need to be obtained. As in similarly important cases, in order to obtain such consent, a detailed, clear and exhaustive explanation would need to be provided, clarifying, among other things, why the content and the way it was presented could not be offered by the public service broadcaster itself using its own technical, human and copyright-protected resources. Secondly, the criteria for selecting a private company to work with would need to be set out, as well as the conditions under which editorial independence and ex-post checks would be guaranteed.

The CEM also ordered BNR, on the basis of Article 47(4) RFG, to update and extend its internal rules on participation in co-productions and programmes with independent producers. In particular, rules should be drawn up guaranteeing standards of editorial independence and ex-post checks. Steps should also be taken to prevent the private broadcaster using the public service broadcaster to establish or commercially strengthen its own brand. Finally, BNR should draw up rules on the digitisation of its sound recordings and other items of cultural heritage in order to protect the national cultural memory.

• РЕШЕНИЕ РД -05-105 на Съвета за електронни медии от 30 юли 2015 (Council for Electronic Media decision no. RD-05-105 of 30 July 2015)

<http://merlin.obs.coe.int/redirect.php?id=17650>

BG

• С412476461411465475470465 за печата : БНР Player стартира с 22 програми от 17 юли 2015 (Press release: BNR Player launches with 22 channels on 17 July 2015)

<http://merlin.obs.coe.int/redirect.php?id=17651>

BG

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CH-Switzerland

No recount in referendum on Radio and Television Act amendment

The Swiss public's decision to adopt an amendment of the Radio- und Fernsehgesetz (Radio and Television Act - RTVG) has been confirmed. The Swiss voters had agreed, by a wafer-thin majority, to change the way public service broadcasting is funded on 14 June 2015 (see IRIS 2015-7/5).

According to the provisional official result, the difference between the yes and no votes was only 3,696. A number of voters asked the Bundesgericht (Federal Supreme Court) for a recount. However, in public deliberations, the highest Swiss court rejected their requests on 19 August 2015. In the court's opinion, there was no concrete evidence that the votes had been miscounted.

The legislative amendment is therefore legally valid. As a result, the current device-based broadcasting charge will be replaced with a universal charge for households and businesses. However, this will not happen immediately. The system will not change until 2018 or 2019, since the Bundesamt für Kommunikation (Federal Communications Office) believes that various preparatory steps need to be taken first, including the appointment of a fee collecting body and the creation of a new infrastructure.

In the meantime, the Bundesrat (government) will clarify the new legislative provisions adopted in the

referendum by incorporating implementing provisions in the Radio- und Fernsehverordnung (Radio and Television Decree - RTVV). For this reason, the federal authorities announced the planned amendments to the RTVV at a public hearing held shortly after the Bundesgericht had issued its decision.

• *Communiqué aux médias du Tribunal fédéral à la suite de la délibération du 19 août 2015 sur le refus d'un nouveau décompte du vote sur la LRTV.* (Bundesgericht (Federal Supreme Court) media release on the decision of 19 August 2015 to refuse requests for a recount of the RTVG referendum.)

<http://merlin.obs.coe.int/redirect.php?id=17654>

DE FR

Franz Zeller

*Federal Communications Office / Universities of Bern,
Basel & St. Gallen*

Swisscom threatened with sanction for breaching cartel law with exclusive sports broadcasts

Swiss telecommunications provider Swisscom is under threat of a sanction under cartel law because of its controversial handling of exclusive rights for the broadcast of certain sports events. In April 2013, the Swiss Competition Commission (Weko) had launched an investigation against Swisscom and its subsidiary Cinetrade (and pay-TV provider Teleclub). The Weko suspected Swisscom of infringing cartel law in relation to, among other things, the exclusive broadcast of certain Swiss football and ice hockey matches on pay TV. The Cinetrade group offers thousands of Teleclub live sports broadcasts each year via the Swisscom TV platform.

According to the Weko secretariat's findings, Swisscom and the content trading company Cinetrade, in which Swisscom holds a majority shareholding, occupy a dominant market position where live sports broadcasts on pay TV are concerned. In a draft decree issued in July 2015, the secretariat ruled that this dominant market position had been abused because certain live broadcasts had been offered exclusively via the Swisscom TV platform. For example, all matches in the top Swiss football and ice hockey leagues had only been available to Swisscom TV viewers.

The Weko secretariat considered the exclusion of other platform providers (such as the cable network operator Cablecom) unjustified and, in its 170-page draft decree, asked the Weko to fine Swisscom CHF 143 million for this and other infringements.

In a media release of 23 July 2015, Swisscom denied the accusation that it had abused a dominant market position. The Cinetrade group had acquired the broadcast rights from the Swiss sports federations. According to Swisscom, as in other countries, the sports federations granted the rights periodically as part of com-

petitions in which cable network operators, for example, also took part. Since entering the TV business in 2006, Swisscom had opened up fierce competition in the Swiss television market for the first time thanks to its high levels of investment.

If the Weko follows its secretariat's recommendation, Swisscom could challenge the decree before the Bundesverwaltungsgericht (Federal Administrative Court) and, in the last instance, the Bundesgericht (Federal Supreme Court).

• Swisscom media release of 23 July 2015 on the Weko secretariat's request to the Commission (fine of CHF 143 million against Swisscom)

<http://merlin.obs.coe.int/redirect.php?id=17698>

DE EN FR

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Higher international profile for Swiss cinema

At the press conference it gave at the International Film Festival in Locarno on 6 August 2015, the Federal Office for Culture (OFC) unveiled new measures to be implemented in support of Swiss cinema. These measures are the embodiment of the 'Culture Message 2016-2020' adopted by the Federal Parliament on 19 June 2015, and they will enter into force on 1 January 2016. The Culture Message ('Message on the financing of the Confederation's cultural activities') defines the strategic guidelines of the Confederation's policy on culture and determines the corresponding financial resources. The Culture Message emphasises cultural participation, social cohesion, creation, and innovation. For the next financing period, the aims as far as the cinema industry is concerned are to reinforce the activities of Swiss film-makers and to support international cooperation projects.

At the press conference in Locarno, Federal Council member Alain Berset stressed the importance of international exchanges for the Swiss cinema. He also confirmed the Federal Council's desire to see Switzerland's eventual return to the MEDIA Programme. Switzerland's participation in this European programme for encouraging the audiovisual sector was suspended on 1 January 2014: negotiations on extending participation were frozen when the Swiss population voted in favour of a popular initiative aimed at restricting immigration. To limit the negative consequences of the suspension, the Federal Council introduced compensatory measures amounting to five million Swiss francs per year (see IRIS 2014-8/12).

These compensatory measures are to be replaced in 2016 by a new Order on international cooperation. Apart from the present compensatory measures for project development, film distribution, European schemes for continuous training, and film festivals

and markets, the new Order will introduce new instruments aimed at reinforcing the presence of Swiss films on the international scene and exchanges with other countries. In particular, the introduction of 'slate funding' will enable production companies to develop packages of projects with European potential. The new Order also aims to support the presence of Swiss films at foreign festivals.

In terms of encouraging the cinema sector, the new programme for the 'promotion of investment in the film industry in Switzerland' aims to encourage the production and post-production of Swiss films in Switzerland and strengthen Switzerland's position as a film-producing country. The programme is backed by a budget of twenty-seven million Swiss francs for the years 2016 to 2020. The encouragement schemes will also be adapted to take into account the results of the evaluation of the present schemes covering the period from 2012 to 2015. In particular, the revision of the success-linked aid, which now takes account of a film's participation in festivals in addition to box-office sales, is considered to be conclusive. The cinema branch will be consulted on the new features of the encouragement schemes in autumn 2015.

• *Communiqué du Département fédéral de l'intérieur du 6 août 2015.*
(Communiqué from the Federal Department of the Interior (DFI) on 6 August 2015)

<http://merlin.obs.coe.int/redirect.php?id=17699>

FR

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DE-Germany

Federal Supreme Court quashes lower-instance rulings in dispute over feed-in fees

In the dispute over the cable feed-in fee between the public service broadcasters and a cable network operator, the BGH (Federal Supreme Court) referred two pending cases back to the appeal courts on 16 June 2015 (case nos. KZR 83/13 and KZR 3/14).

The public service channels are subject to the so-called must-carry rule of Article 52 of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), under which all cable network operators are obliged to carry the programme signals of the public service broadcasters. However, the RStV does not contain any rules on the fees that cable network operators can charge for carrying these signals.

Until now, the carrying of the programme signals was the subject of agreements between the public service broadcasters and the plaintiff, a cable network operator. A feed-in fee was payable to the cable network

operator under these agreements. However, the public service broadcasters cancelled these agreements. They argued that, since the cable network operator was legally obliged to carry their programme signals, there was no need for either an agreement or for a fee to be paid to the cable network operator for carrying the signals.

The cable network operator claims that the public service broadcasters broke the law by cancelling the feed-in agreements. It therefore asked the courts to confirm the validity of the agreements or, in the alternative, to order the defendants to sign new cable feed-in agreements.

The lower-instance courts rejected the cable operator's requests. In its decision, however, the BGH found that they had failed to sufficiently establish the facts of the case, and therefore referred the proceedings back to them. The lower-instance courts had not adequately explored whether the public service broadcasters had taken a joint decision to cancel the feed-in agreements. If the agreements had been cancelled on the basis of such an unlawful arrangement and not on the basis of independent business decisions, such cancellations would have been invalid under Article 1 of the Gesetz gegen Wettbewerbsbeschränkungen (Act on Restraints of Competition - GWB). In this case, the cable network operator's request would have to be upheld.

However, if each of the feed-in agreements had been cancelled on the grounds of an independent business decision, and had therefore been lawful, the appeal courts would have to decide what conditions for the feeding in and distribution of the must-carry programmes via the plaintiff's cable network would be reasonable. Depending on the answer to this question, either the cable network operator would be obliged to carry the programmes free of charge, or the public service broadcasters would be obliged to pay a fee, regardless of whether a feed-in agreement had been signed.

The BGH also ruled that the public service broadcasters were not obliged to sign a feed-in agreement with the cable network operator under broadcasting law, which merely required them to make their programme signals available in accordance with their universal service remit. In return, the cable network operator was obliged to feed in these signals under the must-carry rule of Article 52b RStV.

There were no provisions under EU or constitutional law to contradict this principle, since the BGH did not consider the must-carry obligation an unreasonable burden on the cable network operator. Rather, the programme signals made available free of charge by the public service broadcasters held considerable economic value in helping the plaintiff to market its cable TV services.

Furthermore, the decision to cancel the feed-in agreements did not constitute an abuse of a dominant mar-

ket position by the public service broadcasters in the sense of Article 19(2) GWB. It was true that the public service broadcasters held a dominant market position because they did not directly compete with providers of programmes not covered by the must-carry rule. However, just because the cable network operator received a feed-in fee from private broadcasters did not mean that they were abusing this dominant market position. Neither did the fact that the public service broadcasters paid fees for other forms of transmission (satellite or terrestrial) constitute unlawful discrimination, since these fees were limited to the actual cost of transmission.

• *Urteil des Kartellsenats vom 16. Juni 2015 - KZR 3/14* - (Decision of the BGH of 16 June 2015 - KZR 3/14 -)

<http://merlin.obs.coe.int/redirect.php?id=17694>

DE

• *Urteil des Kartellsenats vom 16. Juni 2015 - KZR 83/13* - (Decision of the BHG of 16 June 2015 - KZR 83/13 -)

<http://merlin.obs.coe.int/redirect.php?id=17695>

DE

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Repeated appearance of logo constitutes surreptitious advertising

In a recently published decision of 9 March 2015 (case no. 7 B 14/1605), the Bayerische Verwaltungsgerichtshof (Bavarian Administrative Court - BayVGH) ruled that the repeated appearance of a logo during a television programme constituted illegal surreptitious advertising.

The case concerned the broadcast of the programme 'Learn from the Pros' by TV channel Sport1, in which professional poker players give tips and tricks for the card game. As well as a standard sponsor reference at the start of the programme, the logo of the provider Fulltiltpoker.net was visible in virtually every shot, including on a large screen between two people talking to each other, on animated and real playing chips, in lower thirds, in explanatory animations, on the back of playing cards and on boards used to decorate the studio. At the end of the programme, viewers were encouraged to visit the Fulltiltpoker.net website.

The TV broadcaster's appeal against a decision of the Bayerische Landeszentrale für neue Medien (Bavarian New Media Office) had been rejected by the Bayerische Verwaltungsgericht München (Bavarian Administrative Court Munich) on 13 June 2013.

The BayVGH upheld the lower court ruling and found that the aforementioned use of the Fulltiltpoker.net logo constituted surreptitious advertising in the sense of the legal definition contained in Article 2(2)(8)(1) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), since the broadcaster had deliberately advertised the services of Fulltiltpoker. The

whole programme had more or less borne the stamp of Fulltiltpoker. The provider's logo had appeared in the frame whenever moves had been explained by two commentators, i.e. precisely when viewers were paying particularly close attention. Furthermore, the Fulltiltpoker brand had been presented on an exclusive basis during the programme. The broadcaster had therefore breached the ban enshrined in Article 7(7) RStV.

Finally, the court did not consider the numerous appearances of the logo as so-called forced advertising. Since the programme had not been transmitted as part of the broadcaster's obligation to provide information, other broadcasters would not have needed to show the logo in order to report on a real-life event.

Incidentally, misleading surreptitious advertising also occurred when goods or services were depicted in the editorial programme without being labelled as advertising and with such intensity and frequency that the intention to advertise was no longer hidden. In the BayVGH's opinion, the lack of an advertising label alone was sufficient to prove the intention to mislead viewers. It would be a strange outcome if the breach of the principle of separation of advertising and editorial content were to go unpunished simply because of its blatant nature.

• *Urteil des BayVGH vom 9 März 2015 (Az. 7 B 14/1605)* (BayVGH ruling of 9 March 2015 (case no. 7 B 14/1605))

<http://merlin.obs.coe.int/redirect.php?id=17693>

DE

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ES-Spain

New qualification criteria for audiovisual content

On 6 July 2015, the National Commission for Markets and Competition (Comisión Nacional de los Mercados y la Competencia - CNMC) adopted new guiding criteria for rating audiovisual content. These criteria apply both to providers of linear and non-linear audiovisual media and regardless of the transmission medium used (IPTV, online television, websites, mobile applications, etc.).

The guiding criteria apply to the following age categories: "Especially recommended for children", "Suitable for all ages", "Not recommended for children under 7 years", "Not recommended for children under 12 years", "Not recommended for children under 16 years", "Not recommended for under 18" and "X content".

For the preparation of these qualifying criteria the CNMC has identified seven categories of potentially harmful content: violence, sex, fear or anxiety, drugs and toxic substances, discrimination, imitable behaviour and language (written, verbal or gestural). The CNMC has identified, within each age group, a number of specific contents whose presence (verbal or visual) has to be specifically analysed. Likewise, the CNMC has identified a number of modulators in each category, which determine the age range corresponding to audiovisual content (realism, explicitness, detail, frequency, etc.).

On the same day, the CNMC announced an agreement with AUTOCONTROL (Association for Self-Regulation of Commercial Communications) for the “promotion of co-regulation for commercial communications on TV”. The CNMC recognises the usefulness of self-regulation in the field of television advertising and, in particular, welcomes the prior consultation system managed by AUTOCONTROL. While the CNMC supports the self-regulatory system of television advertising, it will still perform its duties, in particular those related to the inspection, control and sanction of audiovisual media services.

The agreement foresees the use by broadcasters and advertisers of AUTOCONTROL’s prior verification tool (Copy Advice) for the non-binding assessment of commercial communications. Moreover, the agreement provides that, when an audiovisual service provider receives an administrative requirement or a CNMC communication concerning an advertisement previously accepted by AUTOCONTROL, the latter may inform the CNMC about the content of the assessment report, in order to show its diligent behaviour. CNMC may take into consideration the fact that the advertisement had been previously verified by the Copy Advice tool. AUTOCONTROL commits itself to inform the CNMC regularly on the decisions taken by the Advertising Jury, as well as on its voluntary prior assessment of commercial communications. Moreover, AUTOCONTROL accepts the guiding criteria for the watershed, as established by the Code of Self-Regulation of Television Content and Children.

• *CNMC, Resolución por la que aprueban los criterios orientadores para la calificación de contenidos audiovisuales, CRITERIOS/DTSA/001/15* (CNMC, Resolution on the approval of guiding criteria for rating audiovisual content, CRITERIOS/DTSA/001/15)

<http://merlin.obs.coe.int/redirect.php?id=17672>

ES

• *CNMC press release, 6 July 2015, La CNMC y AUTOCONTROL firman un acuerdo para el fomento de la corregulación sobre publicidad en televisión* (CNMC press release, 6 July 2015, CNMC and AUTOCONTROL sign an agreement to promote co-regulation of television advertising)

<http://merlin.obs.coe.int/redirect.php?id=17671>

ES

CNMC extends conditions for Antena 3 and La Sexta merger

The National Commission for Markets and Competition (Comisión Nacional de los Mercados y la Competencia, CNMC) has extended for two years the conditions by which the merger agreement between Antena 3 and La Sexta was authorised by the Council of Ministers on 24 August 2012 (see IRIS 2012-8/21).

The merger of the two broadcasters was authorised for an initial term of three years, subject to compliance with certain conditions relating to television advertising, the acquisition of audiovisual content and periodic benefit obligations of information, and free TV. After this period, the CNMC would assess whether there had been a significant change in the markets affected by the merger, and whether to maintain, adjust, or withdraw the conditions for a further period of two years.

The competition authorities at the time of the merger determined that it reinforced the market power of ATRESMEDIA in the TV advertising market, and favoured creating a de facto duopoly between ATRESMEDIA and MEDIASET (the two groups control more than 85% of advertising investment).

The CNMC believes that the competitive position of the television advertising market in Spain has not improved since the merger was authorised. In particular, the extension of Antena 3’s advertising policies to La Sexta with packaging channels and the negotiation of advertising prices has increased the competitive pressure.

Furthermore, the reduction in the number of channels broadcast by Atresmedia has not influenced their ratios of audience and advertising investment. To a large extent, competition in these markets is determined by the competitive situation of the TV advertising market.

• *Comisión Nacional de los Mercados y la Competencia, La CNMC proroga las condiciones de la fusión entre Antena 3 y La Sexta, 31 de julio de 2015* (Spanish Competition Authority, CNMC extends conditions for the merger between Antena 3 and La Sexta, 31 July 2015)

<http://merlin.obs.coe.int/redirect.php?id=17638>

ES

• *Comisión Nacional de los Mercados y la Competencia, ANTENA 3/LA SEXTA, Expediente: C/0432/12* (Spanish Competition Authority, ANTENA 3/LA SEXTA, File: C/0432/12)

<http://merlin.obs.coe.int/redirect.php?id=17639>

ES

FI-Finland

Amended provisions on confidentiality of sources

Provisions on the protection of, and interferences with, the confidentiality of sources were amended in June 2015. For the most part, the provisions correspond to previous ones so far as substance is concerned. The amendments concern the numbering, division, and wording of provisions, as well as introduce some new provisions. The reform was conducted as part of a wider modernisation of procedural legislation, especially provisions on evidence and witnesses. The amendments enter into force 1 January 2016.

Section 16 of the Act on the Exercise of Freedom of Expression in Mass Media (460/2003 - FEA) (see IRIS 2004-1/22) provides originators of messages, publishers, and programme providers, and those in their service, the right to protect their information sources. Publishers and programme providers are also entitled to keep secret the identity of the source of the message. No amendments were introduced in this regard.

According to the Code of Judicial Procedure (4/1734; CJP), persons referred to in the FEA may refrain from testifying on the identity of information sources or creators of messages (17:20(1)). These persons may be obliged to testify in cases where the prosecuted crime has a maximum penalty of at least six years' imprisonment, or concerns a duty of non-disclosure breached in a punishable manner (17:20(2)). Previously, attempt of and accessory to the former were also mentioned, while the latter provision referred to "information given contrary to a duty of disclosure the breach of which is criminalised". Section 22(2) CJP provides those in service of the aforementioned persons with a similar right; previously, both were included in the same Section (17:24).

The duties or rights to refrain from testifying do not apply to information the unjustified obtaining, revelation, or utilisation of which is being prosecuted (17:9(3) CJP).

Section 7:3 of the Coercive Measures Act (806/2011; CMA) forbids confiscation and copying of material for evidence where confidentiality of sources is concerned (7:3). Exceptions apply where the person referred to in 17:20(1) CJP consents, or where the crime has a maximum penalty of at least six years' imprisonment and the court could oblige testimony pursuant to 17:20(2) CJP (7:3(3), points 2-3 CMA). Previously, the provision only contained the latter exception and the wording was slightly changed. Then again, an exception for situations where no right to

refuse testimony exists pursuant to 17:9(3) CJP excludes material in the possession of a person referred to in 17:20(1) CJP (7:3(3), point 4 CMA). Regarding a search, a special search of a domicile is required where there is an assumption that information would be revealed for which a right exists to refuse testifying pursuant to 17:20 CJP, and the confiscation or copying of which is forbidden pursuant to 7:3 CMA (cf. 8:1(3) CMA). The preparatory works note the aim for conformity with other proposed amendments as well as neutrality as regards objects of confiscation and copying. Section 7:8(1) of the Criminal Investigation Act (805/2011; CIA) notes that the right to refrain from testifying pursuant to 17:20 CJP also applies in pre-trial investigations. A witness is however obliged to testify where the investigated crime, or attempt or accessory thereto, is one with a maximum penalty of at least six years' imprisonment, and in which the court could oblige testimony pursuant to 17:20(2) CJP (7:8(2), point 2 CIA). Regarding investigated crimes where no right to refuse testimony exists pursuant to 17:9(3) CJP, persons referred to in 17:20(1) CJP are excluded (7:8, point 3 CIA). Thus, the possibilities of interfering with the confidentiality of sources remain somewhat different in scope during criminal investigations and trials.

Regarding administrative cases, a new Section (39 b) on the right of a witness to refuse making statements was added to the Administrative Judicial Procedure Act (586/1996), which covers information pursuant to Section 16 FEA (para. 3, point 2). Finally, provisions in the Information Society Code (917/2014) concerning restrictions on corporate subscribers' right to process data where disclosure of business secrets is concerned came to include an updated reference to 17:20(1) of the Code of Judicial Procedure (§ 151(1)). The same is true for the provision containing restrictions on the rights of access to data granted to the Finnish Communications Regulatory Authority and the Data ombudsman pursuant to Section 316(5).

- *Laki oikeudenkäymiskaaren muuttamisesta 732/2015* (Act amending the Code of Judicial Procedure 732/2015)
<http://merlin.obs.coe.int/redirect.php?id=17673> FI
- *Laki esitutkintalain muuttamisesta 736/2015* (Act amending the Criminal Investigations Act 736/2015)
<http://merlin.obs.coe.int/redirect.php?id=17674> FI
- *Laki pakkokeinolain muuttamisesta 737/2015* (Act amending the Coercive Measures Act 737/2015)
<http://merlin.obs.coe.int/redirect.php?id=17675> FI
- *Laki tietoyhteiskuntakaaren 151 ja 316 §:n muuttamisesta 758/2015* (Act amending Sections 151 and 316 of the Information Society Code 758/2015)
<http://merlin.obs.coe.int/redirect.php?id=17676> FI
- *Laki hallintolainkäyttölain muuttamisesta 799/2015* (Act amending the Administrative Judicial Procedure Act 799/2015)
<http://merlin.obs.coe.int/redirect.php?id=17677> FI

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FR-France

Under urgent procedure, administrative court suspends classification licence for the film 'Love'

In a decision delivered on 31 July 2015, the administrative court in Paris suspended the classification licence allowing the film 'Love' to be shown to anyone over 16 years of age which the Minister for Culture had issued in early July. Gaspar Noé's film, presented at the Cannes Film Festival and released on 15 July 2015, describes 'a burning passion full of promises, games, excesses and mistakes⁰⁴⁰⁴⁶'. At the time, it was screened (in 3D) at 33 cinemas throughout France, including seven in Paris. The Minister's decision was in line with the opinion of the CNC's classification board, which had tacked a warning onto the licence 'because of the numerous scenes of non-simulated sex. Nevertheless, the author's narrative intention in depicting an intense love affair and the strength of the connection created between the two main characters, as well as the humanity of their relationship, leaves the viewer in no doubt'. The association 'Promouvoir', whose aim is to promote Judeo-Christian values in every area of social life, applied to the administrative court under the urgent procedure, claiming that the film contained scenes of a pornographic nature and that it should therefore not be allowed to be shown to anyone under 18 years of age. Under the urgent procedure, the association therefore called for the suspension of the disputed licence which allowed the film to be shown to anyone over 16 years of age. In defence, the Minister for Culture held that the provisions at issue should be interpreted by combining objective and subjective criteria, in order to take account of both the intrinsic qualities of the scenes and the work as a whole. Thus the Minister felt that the main purpose of the film was to show an exclusive love affair in a realistic fashion: the narrative treatment and the artistic ambition of the film counterbalanced the sex scenes and, she believed, justified allowing the film to be shown to anyone over 16 years of age.

The judge sitting under the urgent procedure, whose competence was contested, found firstly that, in the light of the particularly raw nature of some of the sex scenes, allowing the film to be shown to anyone over 16 years of age constituted an urgent situation, given the need to ensure the protection of minors. On the merits of the case, he recalled that the provisions of Article L. 211-1 of the Cinema Code detailing the various categories of classification for a film's licence gave the Minister with responsibility for culture special authority based on the need to both protect children and young people and ensure respect for human dignity. By virtue of this authority, it was more par-

ticularly for the Minister to notify the licencing board of any infringement of Article 227-24 of the Criminal Code, which prohibited the circulation of messages of a violent nature or seriously infringing human dignity if they were likely to be watched or seen by minors. When judges sitting under the urgent procedure receive an appeal against a classification licence issued for a work with sexually explicit content, they must determine whether there are any scenes involving non-simulated sex, as this may not be shown to anyone under 18 years of age. In the present case, the judge found, after viewing the disputed film, that the main theme of the film was the various stages in an intense love affair between two young adults, and that the recounting of the couple's sex life involved numerous scenes of non-simulated sex, some of which were particularly explicit, throughout the film. Thus while the film's ambition was to offer the raw retelling of a passionate love affair, these scenes - by their repetition, by the way they were made, and by their importance in the scenario - included representations of sexual intercourse. Although the scenes were not specifically pornographic and indeed this was not the director's artistic intention - they could be considered as offensive to the sensitivities of minors, and consequently preventing the film being shown to anyone under 18 years of age was justified. The judge sitting under the urgent procedure therefore found that there was serious doubt as to the legality of the Minister's decision regarding classification. The licence was therefore suspended in that it did not forbid such representation. Minister Fleur Pellerin has announced that she will appeal against the decision.

• *Tribunal administratif de Paris (ord. réf.), 31 juillet 2015 - Association Promouvoir* (Administrative court in Paris (under the urgent procedure), 31 July 2015 - the association 'Promouvoir') FR

Amélie Blocman
Légipresse

SACD calls for films to be shown on catch-up TV on France Télévisions

Pascal Rogard, president of the French society of dramatic authors and composers (Société des Auteurs et Compositeurs Dramatiques - SACD), wrote to the Minister for Culture early in the summer 2015 on the matter of showing films on France Télévisions' catch-up service Pluzz. This was because when the public-sector audiovisual group had offered Claude Lanzmann's film 'Shoah' on Pluzz for a period of thirty days on the occasion of the anniversary of the Liberation, a number of professional organisations in the cinema sector had referred the matter to the national audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA), pointing out that such exceptional use of the film should only be authorised

because of the particular circumstances of the ceremonies connected with the Liberation anniversary celebrations. The organisations considered that cinema should remain outside the realm of catch-up TV, 'at the cost of a legal reading of the terms of reference that was to say the least rigorist, surprising, and indeed scandalous', according to the SACD's letter. The public-sector audiovisual group's terms of reference provide that 'all the programmes broadcast on the television services of France Télévisions shall be available free of charge for a period of at least seven days from the date of their first airing, except for cinematographic works and, as appropriate, sports programmes'. The SACD, for its part, considers that while there is no obligation to make films available on catch-up TV, there is certainly no ban on doing so. In support of this interpretation, the company recalls that the terms of the codicil to the contract of aims and means concluded between France Télévisions and the State, in which developing the digital offering was given priority status, and which indicates 'the need to ensure, both in terms of advantage to audiences and the legal display of works, the continuity of the experience of viewers off the air by offering the films the group broadcasts, free of charge, on catch-up TV, according to a method still to be defined'. Moreover, the substantial presence of sports events on Pluzz contradicts the interpretation put forward by the professional organisations in the cinema sector. However, even after five years of discussion with France Télévisions it has not been possible to reach agreement on the matter. The SACD feels the situation is damaging not only to the films and to their originators, who are not able to have the benefit of prolonged airing for their works, but also to broadcasters, for whom a linear and non-linear exploitation has proved to be vital in the digital environment. The latest figures from the CNC leave no doubt as to the generalisation of catch-up TV. Since the forthcoming renegotiation with the State of France Télévisions' contract of aims and means is favourable to the change, the SACD is calling on the Minister to 'emerge from this astounding impasse' and to intervene so that, in particular, those films co-produced and financed by France 2 and France 3 are no longer excluded from the catch-up TV offer.

• *Courrier du 23 juin 2015 de Pascal Rogard, directeur général de la SACD, à Madame Fleur Pellerin (Letter dated 23 June 2015 from Pascal Rogard, Director General of SACD, to Minister Fleur Pellerin)*

<http://merlin.obs.coe.int/redirect.php?id=17656>

FR

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GB-United Kingdom

Legislation to introduce copyright exception law with no accompanying levy scheme deemed unlawful

In a judgment dated the 19 June 2015, the High Court set aside section 28B of the Copyright, Designs and Patents Act 1988, introduced with effect from 1 October 2014 by Copyright and Rights in Performance (Personal Copies for Private Use) Regulations 2014, which allowed an exception to copyright laws based upon private use (see IRIS 2014-10/19).

Section 28B allowed for any person who had legitimately acquired copyrighted material to copy that work, including onto other formats, provided it was for legitimate non-commercial use. Section 28B arose from the government using a discretion under Directive 2001/29 of the European Parliament and the Council on the 22 May 2001 concerning the harmonisation of copyright and related rights allowing Member States to introduce exceptions to copyright in defined cases; such as Article 5(2)(b) of the Directive whereby a purchaser of content wished to copy it for private use. Section 28B introduced an exception for copying for private use but did not widen the ambit to allowing an exempted copy of a work to be given to a friend or family member.

Just prior to the implementation of Section 28B, a report commissioned by the European Commission and published by economic consultants CRA, and entitled "Assessing the economic impact of adopting certain limitations and exceptions to the copyright and related rights in the EU- analysis of specific policy options" highlighted that countries that had introduced a private use exception also introduced a levy scheme charged on, for instance, blank CD discs, MP3 players and printers as a means of compensating copyright owners for loss of revenue from the private use exception.

The UK government when considering the implementation of section 28B considered such a levy too bureaucratic and the private use exception would not be accompanied by a levy scheme. The government considered any loss to copyright owners by having no levy scheme would be minimal, and did not warrant establishing such a scheme; and also went against the ethos of having an exception to copyright law. As a consequence, a court action was brought against the UK Government by various bodies acting as the claimants in the proceedings representing the interests of the music industry.

The court had to consider, using a process called judicial review, the reasonableness of the UK government's decision not to accompany the copyright ex-

ception law with a levy scheme. The claimants contended that the evidence upon which the government had made its decision not to have a levy scheme was flawed and incorrect and thus rendering the proposed law unlawful.

The court had six factors to consider: first, whether there had been sufficient consultation prior to implementing Article 5(2)(b). Second, whether the government minister had given enough appreciation to the harm caused by implementing a copyright exception rule without a levy scheme and that this was against the spirit of Article 5(2)(b). Third, the government claimed there was no need for a levy as copyright owners already priced in private use into the selling price of copyrighted material. The claimants asserted there was no evidence to support this assertion. Fourth, the government concluded that the absence of a levy would cause no or very little (*de minimis*) harm, and the claimants stated that available evidence did not support that assertion. Fifth, whether the government had pre-determined the outcome. It was argued that whatever the evidence, they were determined to have a copyright exception law with no levy scheme. And sixth, was the introduction of a no-levy scheme some form of state aid under Article 107 the Treaty on the Functioning of the European Union (TFEU) and should it be reported to the European Commission?

Mr. Justice Green, considering the evidence and legal submissions of all the parties, found in favour of the government for items (2), (3), (5) and (6) above. However, the judge determined in favour of the claimants considering that the government evidence for making its decision was inadequate and some of the conclusions drawn by the government were not reasonable inferences, but speculation. As such, the judge found in favour on point (4) for the claimant questioning the legality of section 28B.

According to the judge, the government had three choices: (a) reinvestigate the matter and see if they can address the evidential gap before implementation of 28B, (b) if the evidential gap cannot be closed to justify the original decision then repeal section 28B or introduce a compensation scheme, or (c) not try and address the evidential gap and just introduce a compensation or levy scheme.

In a subsequent hearing before Mr. Justice Green on the 3 July 2015, and in response to government representations, the judge ordered that the Regulation would be quashed with prospective effect and not retrospectively. Also, at this stage the judge would not make any order for a reference to the EU Court of Justice. However, the parties were given liberty to apply to the High Court on the matter.

• R (on the application of British Academy of Songwriters, Composers and Authors Musicians' Union & Ors) v Secretary of State for Business, Innovation and Skills [2015] EWHC 1723 (Admin) (19 June 2015) <http://merlin.obs.coe.int/redirect.php?id=17645> EN

• R (on the application of British Academy of Songwriters, Composers and Authors Musicians' Union & Ors) v Secretary of State for Business, Innovation and Skills & Anor [2015] EWHC 2041 (Admin) (17 July 2015)

<http://merlin.obs.coe.int/redirect.php?id=17646>

EN

Julian Wilkins
Blue Pencil Set

HR-Croatia

Rules on ceding unutilised exclusive rights

After concluding consultations with stakeholders and the interested public, the Council for Electronic Media has adopted rules on ceding unutilised exclusive rights from stakeholders to third interested parties. The rules stipulate the procedure for ceding unutilised exclusive rights in the event of the procurement of audio and audiovisual content of a higher value on the basis of exclusive rights, and in the event of the procurement of premium sports events referred to in Article 9 paragraphs 2 and 3 of the Croatian Radio-Television Act.

The rules apply to the ceding of unutilised exclusive rights when the possibility of such ceding is stipulated by an agreement on the acquisition of exclusive rights for the exploitation of audio and audiovisual content of a higher value and/or premium sports events, or as stipulated by the law. Unutilised exclusive rights refer to those rights based upon which Croatian Radiotelevision has not broadcast content on programme channels in accordance with the provisions of the Croatian Radiotelevision Act and its contract with the Government of the Republic of Croatia. Audio and audiovisual content of high value refers to all activities that Croatian Radiotelevision procures under exclusive rights. The provisions of the rules do not apply to the archival material of Croatian Radiotelevision.

The ceding of unutilised exclusive rights is carried out based on a public tender and the starting fee shall not be less than 20% of the monetary value of the scope (quantity) of the unutilised exclusive rights that are to be ceded. The starting fee is calculated based on the fee in the contract on the acquisition of exclusive rights for the exploitation of audio and audiovisual content of a higher value, and/or premium sports events. The criterion for selecting the most favourable bid is the price of the bid.

• *Pravila o ustupanju neiskorištenih isključivih prava*, 28/04/2015 (Rules on ceding unutilised exclusive rights, Official gazette 47, 28 April 2015)

<http://merlin.obs.coe.int/redirect.php?id=17640>

HR

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IE-Ireland

Investigative reporters purchasing drugs online in public interest

The compliance committee of the Broadcasting Authority of Ireland (BAI) has held that the public broadcaster RTÉ did not violate broadcasting rules during a programme on the purchase of abortion pills online. A complaint had been made over an October 2014 broadcast of RTÉ's investigative programme 'Prime Time', claiming the programme breached the Broadcasting Code's rules on fairness and objectivity, and the Broadcasting Act's prohibition on promoting or inciting crime.

The Prime Time programme first featured a pre-recorded report, where a reporter explained how a group had been advertising the availability of "abortion pills" on posters in Dublin. The reporter pursued the advertised process; ordering the abortion pills online, making a EUR 90 donation, and, "demonstrating and explaining to the viewer how she was assisted in circumventing the law" by the group, collecting the pills by post. The programme then featured a studio discussion, with a representative from the "abortion-pill" group and a representative from an anti-abortion group, debating the potential risks of taking prescription drugs without medical supervision.

Under section 48 of the Broadcasting Act 2009, individuals may make a complaint to the BAI that a broadcaster failed to comply with the broadcasting rules. First, the complainant argued that there had been a breach of rule 4.1 of the Code of Fairness, Impartiality and Objectivity in News and Current Affairs: that broadcast treatment of "current affairs" must be "fair to all interests concerned", and the broadcast matter "presented in an objective and impartial manner". It was argued that the programme's "objective" was "the presentation of another option for women who want to obtain an abortion", and that its "underlying message" was that it was "a safer method than these 'back street' abortions".

Second, the complainant argued the programme breached section 39(1)(d) of the Broadcasting Act 2009, which prohibits broadcasting of "anything which may reasonably be regarded as (...) being likely to promote, or incite, to crime". It was argued that the programme "showed how the tablets can be illegally imported into Ireland for the purpose of engaging in criminal activity, namely the termination of the lives of unborn children", and the "message that nobody will be prosecuted in Ireland for breaking the law in this regard".

The BAI unanimously rejected both grounds of complaint. On the impartiality point, the Authority held

that the Prime Time programme's aim "was an examination of the facts of a situation where an organisation was facilitating the illegal importation of abortifacients into Ireland", and that the studio discussion was fair, with the representative being subjected to "robust questioning". On the promotion and incitement to crime point, the Authority "noted that the purchase of the drugs and their importation was undertaken in the public interest and that the broadcaster had liaised with the appropriate authorities. In the context of investigative reporting, the approach taken by the broadcasters was in line with standard investigative journalistic practice where the intent is the exploration of an issue in the public interest and not actions of a criminal nature".

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, June 2015, pp. 21-24
<http://merlin.obs.coe.int/redirect.php?id=17678>

EN

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New media merger guidelines

Following the publication of draft media merger guidelines in December 2014 (see IRIS 2015-2/24), the Minister for Communications, Energy and Natural Resources has now published the final version of the Guidelines on Media Mergers. The guidelines are made under the Competition and Consumer Protection Act 2014, which significantly reforms the law on media mergers in Ireland, and provides that the communications minister may publish guidelines on the operation of the Act (see IRIS 2015-2/23).

The final guidelines "broadly reflect" the draft guidelines, but with a number of significant amendments, including: first, a pre-notification process, where the minister's department facilitates "Pre-notification Meetings", which allows "parties to explore the nature of the transaction, identify what, if any, issues may arise in relation to media plurality as a result of the proposed merger and seek any flexibility around information requirements that may be appropriate given the circumstances".

Second, the guidelines now include a requirement in relation to the Irish language, in that the minister "will also have regard to any impact of the proposed merger on the Irish language; therefore evidence of Irish language content and measures to protect its continuation or plans to introduce more lingual diversity will be considered".

Third, in relation to the advisory panel of experts which may issue an opinion on proposed mergers, the guidelines now provide that these experts must have certain expertise, including that "individuals will be

appointed by the Minister on the basis of the applicability of their expertise to the media merger at hand. Any imbalance of expertise with regard to the examination of any particular media merger will be addressed through appointments to the Advisory Panel so that parties to a media merger can be assured of an expert examination of their proposed merger regardless of their individual circumstances”.

Finally, a new provision allowing parties to seek “flexibility” in terms of information requirements is introduced, “where there is no demonstrable impairment of the plurality of the media in the State”. This is to ensure that the media merger regime “is not an exercise in information gathering”, and that “where the public interest can be secured with fewer burdens on the parties involved, it should be”.

• “Guidelines on Media Mergers”, Department of Communications, Energy and Natural Resources, May 2015
<http://merlin.obs.coe.int/redirect.php?id=17679>

EN

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IT-Italy

AGCOM reviews the national frequency allocation plan for local television

On 25 June 2015, the Italian Communication Authority (Autorità per le garanzie nelle comunicazioni - AGCOM) adopted through Resolution n. 402/15/CONS the plan for allocating the frequencies allotted to Italy based on the 2006 Geneva Agreement and not assigned to national network operators for the digital terrestrial television service (for previous plans, see IRIS 2012-5/30).

Pursuant to Article 6, paragraph 8, of Act 21 February 2014, n. 9, as amended by Article 1, paragraph 147 of Act of 23 December 2014, n. 190 (Stability Law 2015), the decision of the Italian regulatory authority makes transmission capacity of the new networks available to local media service providers, which will be selected on the basis of regional lists by the Ministry for Economic Development. At a later stage, the Ministry will release the rights of use for the new frequencies exclusively for the establishment of networks operating via an iso-frequential system (single-frequency or multi-frequency) with regional or multi-regional coverage.

The solution adopted by the Authority has taken into account the timeliness and effectiveness of the entry into operation of the new networks, as well as the reduced need for investment, which is limited to the

technical constraints set by the planning, with a view to ensuring compatibility between the different networks.

It established that the same frequency shall not generally be used in neighbouring regions, with the exception of particularly favourable orographic settings and/or subject to an increase of the complexity and the manufacturing costs associated to the networks. The aim of this provision was to ensure that the network planning for each region be made in a way that each network ensures a proper reception quality within its region and a high level of compatibility with the existing networks operating in adjacent regions which carry different contents.

As a matter of fact, the use of the same frequency in two neighbouring regions implies the loss (due to the mutual interference) of a more or less extended service area over the border. In this way, it is possible to limit the co-channel interference between regions at levels that ensure that the planned new multiplexes have high percentages of served population and, at the same time, provides the possibility of using modulation schemes (so called “system variant”) with less protection (code rate) and higher transmission capacity (up to 25 Mbit/s), compared to multiplexes planned under the previous allocation plans (20 Mbit/s). Furthermore, such choice allows for the achievement of better results in terms of compliance with the reservation of transmission capacity for the broadcasting of local content, which is envisaged by law. The transport capacity of the new networks adds to that which the existing local network operators shall make available to content providers.

The adopted plan is still subject to review in the light of the negotiations made in the context of international coordination, of the potential changes of the National Frequency Allocation Plan and of any need to enhance compatibility between technical areas or neighbouring regions.

Thanks to the adoption of the aforementioned resolution, the Italian method becomes strengthened - that involves AGCOM and the Ministry - towards achieving the goals set out by law, i.e. resolving international disputes due to interferences with neighbouring countries and ensuring that providers of media services at a local level benefit from the right to be conveyed.

• *Delibera n. 402/15/CONS del 25 giugno 2015, Modifica del Piano Nazionale di assegnazione delle frequenze per la radiodiffusione televisiva in tecnica digitale DVB-T in attuazione dell'art. 6, comma 8, della legge 21 febbraio 2014, n. 9 e successive modificazioni, come modificato dall'art. 1, comma 147, della legge 23 dicembre 2014, n. 190.* (AGCOM Regulation no. 402/15/CONS concerning the Change of the National Plan of allocation of frequencies for broadcasting digital television DVB-T in the Art. 6, paragraph 8, of the 21 February 2014 law, n. 9 as amended by Art. 1, paragraph 147 of the Law of 23 December 2014, n. 190)

<http://merlin.obs.coe.int/redirect.php?id=17680>

IT

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AGCOM Public consultation on identification of emerging platforms for the purpose of marketing audiovisual sports rights

On 9 July 2015, the Italian Communications Authority (Autorità per le garanzie nelle comunicazioni - AGCOM) approved Resolution no. 414/15/CONS, launching a public consultation related to the identification of emerging platforms for the purpose of marketing audiovisual sports rights. According to Section 14, paragraph 1, of Legislative Decree no. 9 of 9 January 2008, AGCOM identifies periodically, and at least every two years, emerging platforms (for previous consultations, see IRIS 2012-2/27).

With reference to the marketing of audiovisual rights intended for emerging platforms, the aforementioned Legislative Decree no. 9/2008 sets forth a series of conditions which are more advantageous compared to the conditions related to other platforms, with the aim of stimulating effective competitiveness and to foster the growth of the relevant platforms thanks to the exploitation of rights on sport events.

In particular, the law states that (i) audiovisual rights intended for emerging platforms are offered on a non-exclusive basis; (ii) the organiser of the competition, in order to support the development and the growth of emerging platforms, must directly licence to said emerging platforms' audiovisual rights - including a significant quota of rights related to first broadcasting - suited to the technological features of each platform at prices which are proportionate to the users' actual use; and (iii) the audiovisual rights intended for emerging platforms must be licenced for each platform in order to avoid the creation of dominant positions.

Moving in the same direction as Section 14 of Legislative Decree no. 9/2008, Section 10 of Annex A to AGCOM Resolution no. 307/08/CONS sets forth that every two years in December AGCOM verifies the development of the technologies used as distribution systems of audiovisual products, in order to individuate emerging platforms.

By means of the public consultation launched through Resolution no. 414/15/CONS, AGCOM aims at acquiring comments, information and documents on the scheme of resolution related to identification of emerging platforms intended for the marketing of audiovisual sports rights attached to the Resolution at hand as annex A. In order to participate in the public consultation, interested parties must submit their proposals within 45 days from the publication of the Resolution on AGCOM's website (which occurred on 31 July 31 2015).

• *Delibera n. 414/15/CONS, Consultazione pubblica concernente l'individuazione delle piattaforme emergenti ai fini della commercializzazione dei diritti audiovisivi sportivi ai sensi dell'art. 14 del d.lgs. 9 gennaio 2008, n. 9 e dell'art. 10 del regolamento adottato con delibera n. 307/08/CONS* (Resolution no. 414/15/CONS, Public consultation relating to the identification of emerging platforms for the purpose of marketing audio-visual sports rights as provided under Section 14 of Legislative Decree no. 9 of January 9, 2008 and Section 10 of the Regulation adopted by means of Resolution no. 307/08/CONS)
<http://merlin.obs.coe.int/redirect.php?id=17681>

IT

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Court of Rome rules Wikimedia Foundation not liable for content posted by users

On 14 July 2015, the Court of Rome, First Civil Section, rejected in Decision no. 15422 the claims filed by the Italian Parents' Non-profit Organisation (MOIGE) concerning Wikimedia Foundation Inc., aimed at seeking compensation for damages deriving from a defamatory description of the same organisation on the Wikipedia online encyclopaedia.

MOIGE sued Wikimedia Foundation Inc., the foundation which owns and manages the famous online encyclopaedia Wikipedia, before the Court of Rome in order to seek compensation for damages deriving from MOIGE's description provided on the relevant Wikipedia page, which under the claimant's perspective was detrimental to its name, image and reputation.

Based on the Court of Rome's reasoning, although the provisions set forth under the Italian E-Commerce Decree are not directly applicable to Wikimedia Foundation Inc., since such provisions apply exclusively to services carried out by subjects established in EU countries, Wikimedia Foundation Inc. can be considered in any case as a hosting provider according to the general principles of Italian law.

Since - acting as hosting provider - Wikimedia Foundation Inc.'s activity consists solely of hosting information provided by users on its servers, under the Court's perspective it is clear that the defendant's position is neutral in respect of the content provided by users. In particular, such neutrality is related to the possibility for users to create and amend the content of the encyclopaedia regardless of the possibility for the hosting provider to delete unlawful content, if aware of it, following its posting.

Furthermore the Court of Rome states that the defendant's behaviour cannot be considered a "dangerous activity" under Section 2050 of the Italian Civil Code, given the presence on the Wikipedia web pages of a disclaimer, whereby Wikimedia Foundation Inc. provides a series of preventive information clarifying that it is not able to ensure the validity of the content posted by users. For this reason, the defendant

cannot be considered jointly liable with the user who posted the content since the strict liability regimen set forth under Section 2050 does not apply.

Based on the above arguments, the Court of Rome concluded that Wikimedia Foundation Inc. cannot be considered liable for the defamatory description of MOIGE on the relevant Wikipedia page because: (i) as hosting provider, the defendant's position is neutral in respect of the content posted by users on the Wikipedia pages; (ii) such neutrality is not undermined by the fact that the hosting provider may delete the content, if aware of its unlawfulness; (iii) given the presence of a general disclaimer, Wikimedia Foundation Inc.'s activity cannot be considered a "dangerous activity" under Section 2050 of the Italian Civil Code; and (iv) there is no obligation for the defendant to ensure that unlawful content shall not be posted on Wikipedia's pages since the hosting provider renders a service the main feature of which is the freedom of users to add and amend content.

• *Tribunale Ordinario di Roma, Prima Sezione Civile, Sentenza n. 15422 del 14 luglio 2015* (Court of Rome, First Civil Section, Decision no.15422 of 14 July 14 2015)

<http://merlin.obs.coe.int/redirect.php?id=17682>

IT

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LU-Luxembourg

Regulator imposes warning on RTL for breach of commercial communication rules

On 1 July 2015, the Independent Audiovisual Authority of Luxembourg (Autorité luxembourgeoise indépendante de l'audiovisuel, ALIA) issued a decision concerning a radio programme transmitted in Luxembourg. The complaint was initiated by ALIA's Director and brought to the Board of Directors as the result of a self-referral procedure, provided for by Article 35sexies (3) of the Luxembourgish Law on Electronic Media (Loi des medias électroniques - LEM) (see IRIS 2011-2/31), which sets out that ALIA can on its own initiative investigate an alleged breach by any provider of an audio and audiovisual media service established in Luxembourg.

On 1 September 2014, the radio programme in question was broadcast by RTL Radio Lëtzebuerg, the license holder of which is CLT-UFA. Its title was taken from an annual fair "Schueberfoeuer" taking place in August. The programme of about ten minutes was aimed at promoting the Schueberfoeuer and the products sold and undertakings present at the fair, as well as the sponsors of the radio programme. It consisted of a mix of infomercials, quizzes and commercial messages, which were connected by the same

background music. ALIA examined four issues which raised concerns under present Luxembourgish legislation, the main issue relating to one of the fundamental rules concerning commercial communications. The outcome of the decision may thus be applicable to audiovisual media services.

First, ALIA considered whether the programme had violated the rules concerning the separation of editorial content and commercial communications in programmes. In its decision, ALIA explicitly mentions Article 26 LEM, which defines the scope of application of that chapter of the law concerning rules which apply to audiovisual and sound services, and the Grand-Ducal regulation of 5 April 2001 setting the rules on advertising, sponsorship, teleshopping and self-promotion in television programmes (Règlement grand-ducal fixant les règles applicables en matière de publicité, de parrainage, de télé-achat et d'autoproduction dans les programmes de télévision), as last amended in 2010 (see IRIS 2008-7:Extra and IRIS 2011-4/28). The regulation is based on Article 28 LEM, which can be found in the same chapter of the legislation as Article 26 LEM. This provision is not expressly mentioned in ALIA's decision, but requires the passing of a regulation defining advertising placement and duration in television programmes. The provisions in the law and regulation stipulate that any inclusion of commercial communication must respect the integrity of the programme and require the separation of commercial and editorial content. After hearing the defendant, ALIA determined that a clear separation between commercial and editorial content was lacking, since the different elements of the programme "Schueberfoeuer" were connected by the same background music, giving it the appearance of a single programme constituting commercial communication. Additionally, the transition to other programmes was too fluid to allow the average listener to discern the commercial nature of the programme. This therefore constituted a breach of the law.

Second, ALIA examined whether the transmission of the programme violated the authorised time limits for commercial communication. For this commercial provider, which also offers some content under a public service mission, there are specific time limits laid down in an agreement concluded between the Luxembourg government and CLT-UFA - Convention on the Provision of a Public Service concerning radio and television in Luxembourgish (Convention portant sur la prestation du service public en matière de radio et de télévision en langue luxembourgeoise). According to the convention, commercial messages may not exceed 6 minutes per hour of broadcasting on a daily average, nor 8 minutes per fixed time slot calculated on a weekly average excluding Sundays. ALIA rejected the defendant's claim that only traditional commercial messages, nominally mentioning an enterprise or product, should be taken into account for calculating the total of aired commercial messages. In this respect, ALIA argued that the Audiovisual Media Services Directive, as well as the Grand-Ducal regula-

tion on commercial communications, governs different forms of commercial communications. ALIA considered that the programme in its entirety pertained to the category of commercial communication. Since the duration of the programme amounted to 9 minutes, adding to this 50 seconds of commercial messages aired within the same clock hour, the authorised maximum of 8 minutes was exceeded.

The third and fourth grounds discussed by ALIA concerned the lack of transparency in informing listeners about the costs of text messages, whereby listeners could participate in games played during the programme and compliance with legislation on games of chance. Even though ALIA found that the presenters did not inform listeners about the actual costs incurred, it noted that it was not competent to assess these two issues which concern rules established in laws outside the scope of the authority.

ALIA thus sanctioned the violations concerning the principle of separation between commercial communications and editorial content and the hourly advertising limit. Since this was the provider's first infringement of this sort, and in view of the constructive proposals CLT-UFA had made to remedy the infringements, ALIA resorted only to a warning pursuant to the catalogue of sanctions outlined in Article 35sexies (3) LEM, in addition to requesting compliance with the advertising rules.

• *Décision DEC022/2015-A001/2015 du 1er juillet 2015 du Conseil d'administration de l'Autorité luxembourgeoise indépendante de l'audiovisuel concernant une autosaisine à l'encontre du service de radio RTL Radio Lëtzebuerg* (Decision DEC022/2015-A001/2015 of 1 July 2015 of the Board of Directors of the Independent Audiovisual Authority of Luxembourg on its motion against the radio service RTL Radio Lëtzebuerg)

<http://merlin.obs.coe.int/redirect.php?id=17683>

FR

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NL-Netherlands

New copyright contract law comes into Effect

On 1 July 2015, the new Copyright Contract Act (wet auteurscontractenrecht) came into effect in the Netherlands. The law seeks to reduce the existing asymmetry in contractual negotiations between authors and performing artists and exploiters of their material. According to the Dutch legislator, authors' and performing artists' dependence on centralised exploiters calls for a stronger legal position for authors and performing artists.

The law states that the author or performing artist is entitled to fair remuneration for granting an exploitation right. Furthermore authors and performing artists

are entitled to claim additional fair remuneration in cases where there is a severe disproportionality between the payments received by the author and the entire commercial revenue that is made by the exploitation of their work.

The law also provides that the author or performing artist is entitled to partially, or completely, terminate an exploitation contract prematurely in cases where the work of the author is being insufficiently exploited. The law also provides that contractual clauses that are unreasonably onerous for the author or performing artist will be voidable. Furthermore, the law also establishes a dispute settlement committee.

The provisions of the new Copyright Contract Act have the status of mandatory law and thus cannot be waived by the author or performing artist. The new law has no retroactive policy, with the exception of certain termination clauses, the right to cancel an agreement prematurely, and the invalidation of unreasonably onerous contractual clauses.

• *Wet van 30 juni 2015 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de versterking van de positie van de auteur en de uitvoerende kunstenaar bij overeenkomsten betreffende het auteursrecht en het naburig recht (Wet auteurscontractenrecht)* (Act of 30 June 2015 amending the Copyright Act and the Act on rights related to the strengthening of the position of the author and the performer in agreements on copyright and neighbouring rights (Copyright Contract Law))

<http://merlin.obs.coe.int/redirect.php?id=17684>

NL

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RO-Romania

Modification of the Public Audiovisual Services Law

On 5 June 2015, the Romanian President promulgated the draft Law with regard to the approval of the Government Emergency Decree no. 110/2013 for the completion of Act no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation (Proiect de Lege privind aprobarea Ordonanței de urgență a Guvernului nr. 110/2013 pentru completarea Legii nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune). The new law no. 134/2015 was published in the Official Journal of Romania no. 403 of 9 June 2015 (see IRIS 2003-4/24, IRIS 2003-8/25, IRIS 2013-5/37, IRIS 2014-1/38, and 2014-6/30).

Through the modification of Article 46 of the Law no. 41/1994 the Government Emergency Decree was

meant to allow the Standing Bureaus of Romania's Parliament chambers (Chamber of Deputies and Senate) to appoint for 60 days an interim Director General of the public broadcasters with limited powers in case the plenum of the Parliament is not reached.

In May 2014, the Law had been sent back to the Parliament by the former President with a request to be reviewed because, in his opinion, the Government Emergency Decree no. 110/2013 did not stipulate how many interim mandates could be decided by the Parliament, and the lack of clear provisions could have affected the independence of the public broadcasters. It should be noted that the Chamber of Deputies (lower chamber) had rejected the draft law sent back by the former President on 11 February 2015, while the Senate had adopted the document on 18 May 2015. The decision of the Senate (upper chamber) was final.

- *Ordonanța de urgență a Guvernului nr. 110/2013 pentru completarea Legii nr.41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune* (Government Emergency Decree no. 110/2013 for the completion of the Law no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation)

<http://merlin.obs.coe.int/redirect.php?id=17687>

RO

- *Legea nr.134/2015 privind aprobarea Ordonanței de urgență a Guvernului nr. 110/2013 pentru completarea Legii nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune* (Act no. 134/2015 with regard to the approval of the Government Emergency Decree no. 110/2013 for the completion of the Law no. 41/1994 on the organization and operation of the Romanian Radio Broadcasting Corporation and of the Romanian Television Corporation)

<http://merlin.obs.coe.int/redirect.php?id=17688>

RO

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Modifications of the Audiovisual Law

On 21 July 2015, the Romanian President promulgated the Law no. 211/2015 on the modification of the Article 20 of the Audiovisual Law - no. 504/2002 republished - (Legea audiovizualului nr. 504/2002, republicată) with regard to the dismissal of the President of the National Audiovisual Council, CNA (Consiliul Național al Audiovizualului). According to paragraph 4 of the new form of the above mentioned Article 20, the rejection by the Parliament of the annual activity report of the National Audiovisual Council means ipso jure the dismissal from office of the President of the Council. In the situation provisioned under paragraph 4, the Parliament will appoint a new President for the remaining term of the former President. The new President will be appointed from the rest of the existing members of the Council, and the ousted former President cannot be re-elected until his mandate expires.

The draft Law had been rejected by the Chamber of Deputies; the lower chamber of the Romanian Parlia-

ment (see IRIS 2015-6/32), but was adopted by the Senate (upper chamber), whose decision was final.

On the other hand, the Act no. 181/2015 on the approval of Government's Emergency Decree no. 25/2013 on the modification and completion of the Audiovisual Act no. 504/2002 (Legea nr. 181/2015 privind aprobarea Ordonanței de urgență a Guvernului nr. 25/2013 pentru modificarea și completarea Legii audiovizualului nr. 504/2002) entered into force on 5 July 2015. The Act had been promulgated on 30 June 2015, more than two years after the start of its legal route and after a request in 2013 to the Parliament of the former Romanian President to review the draft law. Act 181/2015 changes Article 1 of the Audiovisual Law with regard to the ultimate beneficiaries of television advertising, Article 27 on the isolated advertising and teleshopping rules, and Article 29 on the rules of the TV advertising airtime purchase. Through a modified form of Article 51 (1), Act 181/2015 also regulates the procedure and conditions for issuing and amending audiovisual licenses which shall be established by decisions of the National Audiovisual Council.

- *Legea Nr.211 din 21.07.2015 pentru modificarea art. 20 din Legea audiovizualului nr. 504/2002* (Act no. 211/2015 on the modification of Art. 20 of the Audiovisual Law no. 504/2002)

<http://merlin.obs.coe.int/redirect.php?id=17689>

RO

- *Ordonanța de urgență a Guvernului nr. 25/2013 pentru modificarea și completarea Legii audiovizualului nr. 504/2002* (Government's Emergency Decree no. 25/2013 on the modification and completion of the Audiovisual Law no. 504/2002)

<http://merlin.obs.coe.int/redirect.php?id=16486>

RO

- *Legea nr. 181/2015 privind aprobarea Ordonanței de urgență a Guvernului nr. 25/2013 pentru modificarea și completarea Legii audiovizualului nr. 504/2002* (Act no. 181/2015 on the approval of Government's Emergency Decree no. 25/2013 on the modification and completion of the Audiovisual Law no. 504/2002)

<http://merlin.obs.coe.int/redirect.php?id=17690>

RO

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Legal provisions on the statute of orphan works

On 27 July 2015, the Romanian President promulgated the Law no. 8/1996 on copyright and related rights (Law for the completion of the Legea nr. 8/1996 privind dreptul de autor și drepturile conexe) with regard to orphan works (see IRIS 2006-8/27, IRIS 2012-4/38, IRIS 2015-5/30 and IRIS 2015-7/27).

The new Law no. 210/2015 was published in the Official Journal of Romania no. 550 of 24 July 2015. It transposes into the Romanian legislation the Directive 2012/28 EC on certain permitted uses of orphan works. The Law has been adopted under an emergency procedure by the Senate (upper chamber of the Romanian Parliament) on 23 June 2015 and by the Chamber of Deputies (lower chamber) on 30 June 2015.

The orphan work status applies to several categories of works and phonograms protected by copyright or related rights that have been published or broadcast for the first time in an EU Member State. The Law provisions 7 new articles (1122 - 1128) after the Article 1121, and a new subsection h) after following Article 1231 paragraph (1) g), on fair compensation for orphan works, as well as a new subsection i) after Article 1512 h), regarding the Directive 2012/28 EC of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

• *Legea nr. 210/2015 pentru completarea Legii nr. 8/1996 privind dreptul de autor și drepturile conexe* (Act no. 210/2015 on the copyright and the related rights)

<http://merlin.obs.coe.int/redirect.php?id=17685>

RO

Eugen Cojocariu
Radio Romania International

Modification of the conditions for issuing and amending the retransmission notification

On 2 July 2015, the National Audiovisual Council, CNA (Consiliul Național al Audiovizualului) adopted CNA decision no. 350/2015 on the modification and completion of CNA decision no. 72/2012 with regard to the conditions for issuing and amending the retransmission notification (see IRIS 2014-3/39).

The decision was published in the Official Journal of Romania no. 533 of 17 July 2015. It intends to clarify the procedure for implementing the must-carry system in the case of the retransmission of programme services at regional and local level according to Article 82 (2) of the Audiovisual Act. According to the Audiovisual Act, distributors retransmitting programme services at regional and local level are required to include in their offer at least two regional programmes and two local programmes where they exist. They will be selected on the basis of descending audience order.

After Article 13 of decision no. 72/2012, a new Article 13.1 was introduced: with a view to be included in the regional/local offer, the interested broadcasters have to send a written request for the retransmission under the must-carry principle of the TV service to the programme services distributors. The following data must be specified: the name of the TV service requiring retransmission under the must-carry regime; the area covered by the TV service; and the technical modalities to provide simultaneous capture and transmission of digital/analogue, un-coded/unencrypted, and free and unconditional signal. This request can be transmitted to services distributors until no later than 1 February each year for the current calendar year. Requests submitted after 1 February will not be taken into account. No later than 60 days after 1 February, the programme

services distributors are obliged to introduce in their regional/local the programme services satisfying the must-carry conditions. Within 30 days - as provisioned in Article 5 of decision no. 72/2012 - the services distributors must report to the CNA the change of the retransmission notification. If in the regional/local offer at least two regional/local programmes are not retransmitted, the retransmission notification file also has to include an affidavit stating that the distributor has included in its regional/local offer all the retransmission requests received by 1 February.

Decision 350/2015 also stipulates that for 2015 the deadline for the submission of applications under the provisions of Article 13.1 alinea (2) is 15 days from the date of publication of the decision in Part I of the Official Journal of Romania.

• *Decizie CNA nr. 350 din 2 iulie 2015 pentru modificarea și completarea Deciziei Consiliului Național al Audiovizualului nr. 72/2012 privind condițiile de eliberare și modificare a avizului de retransmisie* (CNA Decision no. 350 of 2 July 2015 on the modification and completion of the CNA Decision no. 72/2012 with regard to the conditions for issuing and amending the retransmission notification)

<http://merlin.obs.coe.int/redirect.php?id=17686>

RO

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RS-Serbia

Privatization of remained publicly owned media

Between August and October 2015, public auctions are being held for the privatisation of publicly owned media companies. The Agency for Privatization of the Republic of Serbia (Agency), which is responsible for the implementation of the process, announced public calls for the privatization of 50 media companies which have fulfilled all legal requirements for a public auction (submitting the fair assessment of their value and other documentation). The public auctions will be held within 30 to 90 days from the day of the public call.

The Law on Public Information and Media, which was adopted by the National Parliament of Serbia in August 2014 (see IRIS 2014-9/28) prescribed mandatory privatization of all publicly owned media companies (except Public Media Services). The process is regulated by the Law on Public Information and Media and the Law on Privatisation. In 2015, both laws were amended due to the many difficulties in fulfilling the legal requirements and respecting the deadlines prescribed by the law. There are two methods of privatisation of the media: public auctions, and free distribution of shares to the employees. The law prescribed that the public auction will be held only for

media companies for which a public call has been announced by the Agency. The potential investors are submitting their offers within the deadlines prescribed by the public call for every particular media company. The Agency organizes public bidding procedures. The starting price in the public auction is the amount set in the fair assessment of the value of the media company. The most valuable media companies are the newspaper "Dnevnik" from the city of Novi Sad (EUR 7,4 million), the national news agency "TANJUG" (EUR 761.000), the Radio and Television broadcaster "Studio B" (EUR 529.000) from the city of Belgrade, and the Radio and Television broadcaster "Šabac" from the city of Šabac.

The winner of a public auction is the entity which offers the best price (at least equal to the starting price). In the case that none of the bidders offers the starting price, the public auction can be repeated with half of the initial price. The winner of the public auction becomes the new owner of the media company. It has to conclude an agreement with the Agency: the new owner is obliged to preserve media activity for at least 5 years from the day of the signing of the agreement. If the public auction fails, the privatisation continues with the free distribution of shares to the employees, if they fulfil the eligibility criteria from the bylaw regulating the free share distribution and if they accept the shares. If employees are not able to take over the shares, the privatization process ends, and the media company ceases to exist. For 23 media companies, a public call hasn't been announced, and therefore, their only privatisation method is the free distribution of shares. If it fails, these media companies also cease to exist.

The deadline for the privatisation of the national daily newspaper "Politika" is 31 December 2015 and therefore later than for all other media companies, because it was determined as an "entity of strategic importance". The privatisation of the national daily newspaper "Večernje novosti" a couple of years ago was controversial and is on the European Commission list of suspicious privatisations. Therefore, it should be re-examined by the official authorities.

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RU-Russian Federation

Supreme Court on Public Figures and Right to Image

On 23 June 2015, the Supreme Court of the Russian Federation at its regular Plenary Meeting adopted Resolution "On the Case Law Related to Certain Provisions of Section 1 of Part 1 of the Civil Code of the

Russian Federation" (О применении судами некоторых положений раздела 1 части первой Гражданского кодекса Российской Федерации). Such resolutions routinely explain to the courts the statutory norms concerning particular topical issues of legal practice in Russia. According to Article 126 to the Constitution of the Russian Federation, as amended in 2014, "The Supreme Court of the Russian Federation shall be the supreme judicial body for civil cases, adjudication of economic conflicts, criminal, administrative and other cases under the jurisdiction of courts, established by federal constitutional law, shall carry out judicial supervision over their activities according to procedural forms envisaged by federal law and provide explanations on the issues of court practice." The Resolution dealt in particular with the provisions on privacy and reputation of the Civil Code (see IRIS 1995-4/13) as amended in 2013 by the State Duma (see IRIS 2013-8/34). Section 1 of Part 1 of the Civil Code of the Russian Federation is titled "General Provisions."

In its comment to Article 152-1 of the Civil Code of the Russian Federation, the Supreme Court notes that the divulging and further use of the image of a citizen is allowed only with the consent of the citizen, unless the use of the image is in state, social or other public interests, or if taken at an open public space with a particular person not being the main object of the image, or if the person posed for a fee. The Supreme Court explains that posting of one's image online by the person portrayed, even if an open access to the website/webpage is provided, does not imply that others may use this image without the permission of the person. Such permission however may be evident and recognized by the court if the person has agreed to the user agreement of the particular web resource (paragraph 43).

The Supreme Court instructs judges that, in line with the provision of Article 152-1 of the Civil Code on exceptions "in state, social or other public interests", the use of images of public figures without their permission is permitted. As the Russian statutory law lacks definition of a public figure, for the first time ever a court of such high level provides its own definition, now part of civil law in Russia. It broadly defines a public figure as the person "who has a state or municipal position, plays an essential role in the public life in the sphere of politics, economics, arts, sports, or any other sphere." Making public an image of the public figure and its use without permission are allowed if done "in connection with a political or public discussion and an interest to the particular person is of public importance." At the same time, if the only aim of such publication and use is "philistine satisfaction of interest in his/her private life or mere profit", such a permission is obligatory (paragraph 44). This explanation of the Supreme Court paves way to a generally wider interpretation of the right to disclose private information in the public interests than before.

Permission to use one's image can be provided in written or oral form, may contain conditions of use and

may be withdrawn at any time (paragraphs 46 and 49). In case of a legal conflict, the burden of proof on the circumstances of such a permission lies with the user of the image (paragraph 48).

• Постановление Пленума Верховного Суда Российской Федерации О применении судами некоторых положений раздела 1 части первой Гражданского кодекса Российской Федерации (Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation "On the case law related to some provisions of Section 1 of Part 1 of the Civil Code of the Russian Federation" No. 25 of 23 June 2015)

<http://merlin.obs.coe.int/redirect.php?id=17642>

RU

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SE-Sweden

Broadcaster ordered to stop broadcasting violence

On 7 August 2015, the Swedish Chancellor of Justice (Justitiekanslern - the "CJ") ordered the TV company C More Entertainment AB (C More) not to broadcast TV programs portraying certain kinds of violence, or any content containing detailed description of violence of a realistic nature, between 06.00 and 21.00. The order applies for one year from the decision and is subject to a conditional fine of SEK 200.000.

In 2014, C More had broadcasted two episodes of the TV series *The Leftovers* at 17.00 on Swedish television. One episode had included scenes in which several people kidnapped and killed a woman. The woman, who was tied to a tree, was shown in close-up when she was bleeding heavily from the head. In another episode, a woman was the victim of an assassination attempt by a man pulling a plastic bag over her head. Furthermore, the episode contained a scene in which a woman committed suicide by stabbing herself in the neck with a glass shard.

Section 5:2 Radio- och TV-lagen (The Swedish Radio- and Televisions Act - RTL) stipulates inter alia that programmes including detailed description of violence of a realistic nature which are broadcasted on television must not be transmitted during this time as there is a significant risk that children can be watching the programmes, if it is not justifiable for specific reasons.

In this case, C More admitted that the current episodes contained such violence referred to in section 5:2 RTV. C More submitted, however, that there were no grounds to impose a conditional fine, by making the following arguments: first, the broadcasts in question had ceased when the examination of the broadcasts was initiated; second, C More's broadcasts

are encrypted, which means that they are only available to paying adults, hence the TV programmes were not broadcast "in such way that there is a significant risk" that children could be watching the programmes; and third, most TV boxes have settings which enable parents to lock certain channels that are improper for children, meaning also that there was no "significant risk" that children could be watching the programmes.

The CJ considered that section 5:2 RTV applied to the broadcast since the challenged broadcast contained violence addressed by that provision. The CJ also held that the broadcasts had been shown during such time, and in such way, that there was a significant risk that children could be watching them. In this regard, the CJ agreed with C More that it may be relevant for the assessment of the requirement "in such way" whether a broadcast is encrypted or not. However, the CJ stated that this could not mean that a pay-TV channel with encrypted transmissions can broadcast programmes containing extreme violence at prime-time without facing a risk of breaching the RTL. The CJ pointed out that a large number of households have access to C More's selection of channels despite the broadcasts being encrypted. Because of this, the CJ considered that C More had broadcasted the series in such a way that there was a significant risk that children could be watching the programmes. The fact that most of the set-top boxes have settings which enable parents to lock certain channels that are inappropriate for children could not lead to a different assessment, according to the CJ.

Shortly before the current infringement, C More had been under a similar action regarding broadcasts containing violence. CJ considered that there were reasons to order a new action against C More, subject to a conditional fine.

• *Justitiekanslern meddelar ett vitesföreläggande mot ett programföretag som vid upprepade tillfällen, i strid med 5 kap. 2 § radio- och TV-lagen, sändt ingående våldsskildringar av verklighetstrogen karaktär på sådana tider och på sådant sätt att det har funnits en betydande risk för att barn kunnat se dem, 2015-08-7* (Decision Case No. 2562-15-34, 7 August 2015)

<http://merlin.obs.coe.int/redirect.php?id=17691>

SV

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UA-Ukraine

Ban on Communist and Nazi Propaganda

A Ukrainian law "On condemnation of the Communist and Nazi totalitarian regimes in Ukraine and banning of propaganda of their symbols" (Про засудження комуністичного та націонал - соціалістичного (нацистського) тоталітарних режимів в Україні та заборону пропаганди їхньої символіки) was adopted by the Supreme

Rada on 9 April 2015 and promulgated by President Petro Poroshenko.

The law criminalizes public denial of the activities of these regimes and bans all related symbols, except for restricted educational or scientific purposes. Violation of the law carries a penalty of potential termination of activities of media outlets and prison sentences for 5 to 10 years.

In particular, the law amends the law of Ukraine "On Television and Radio Broadcasting" (see IRIS 2006-5/34), by adding a norm that bans broadcasters from disseminating audiovisual works that "deny or justify the criminal nature of the Communist totalitarian regime of 1917-1991 in Ukraine, the criminal nature of the National-Socialist (Nazi) totalitarian regime, create positive images of persons who held administrative positions in the Communist Party (secretaries of the district committees and upwards) or top positions in the governing and executive bodies of the USSR, Ukrainian SSR, other Union and autonomous Soviet republics (with an exception of instances related to development of Ukrainian science and culture), those who worked at Soviet state security agencies." The ban also prohibits the justifying of the activity of such agencies, as well as justifying "the establishment of Soviet power on the territory of Ukraine or its parts and purges of Ukraine's independence fighters in the 20th century."

The OSCE Representative on Freedom of the Media, Dunja Mijatović, appealed to President Poroshenko on 15 April, asking for his careful consideration of the law before approving it. "While I fully respect the often sensitive and painful nature of historical debate and its effect on society, broadly and vaguely defined language that restricts individuals from expressing views on past events and people could easily lead to suppression of political, provocative and critical speech, especially in the media," she wrote.

- Про засудження комуністичного та націонал-соціалістичного (нацистського) тоталітарних режимів в Україні та заборону пропаганди їхньої символіки (Statute of Ukraine "On condemnation of the Communist and Nazi totalitarian regimes in Ukraine and banning of propaganda of their symbols", 9 April 2015, No. 317-VIII, officially published in Holos Ukrainy daily on 20 May 2015, N 87)

<http://merlin.obs.coe.int/redirect.php?id=17643>

UK

- Press release of the OSCE Representative on Freedom of the Media, "New laws in Ukraine potential threat to free expression and free media, OSCE Representative says", 18 May 2015

<http://merlin.obs.coe.int/redirect.php?id=17692>

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lawful professional activity of journalists" (Про внесення змін до деяких законодавчих актів України щодо посилення гарантій законної професійної діяльності журналістів) was adopted by the Supreme Rada on 14 May 2015 and promulgated by President Petro Poroshenko.

It introduces four new articles in the Criminal Code of Ukraine: "Threat or violence against a journalist"; "Deliberate destruction or damage to property of a journalist", "Attempt on the life of a journalist", and "Taking hostage of a journalist." These new crimes are severely punishable, including life imprisonment in the case of an attempt on the life of a journalist. The new norms also protect the family and close relatives of a journalist, and are to be enforced if the crime is related to the professional activity of a journalist.

The same new law amends the 1997 Ukrainian law "On State Support for the Mass Media and Social Protection of Journalists" (Про державну підтримку засобів масової інформації та соціальний захист журналістів) (see IRIS 1998-8:11/20) by adding provisions on one-time monetary contributions to be paid by the government in case of a violent death of a journalist or a wound inflicted to a journalist during his professional activity.

The OSCE Representative on Freedom of the Media, Dunja Mijatović, welcomed new legislation and expressed her trust "that these important legislative changes will contribute to ensuring journalists' safety in Ukraine."

- Про внесення змін до деяких законодавчих актів України щодо посилення гарантій законної професійної діяльності журналістів (Statute of Ukraine "On amendments to certain legal acts of Ukraine as to strengthening guarantees of lawful professional activity of journalists", 14 May 2015, No. 421-VIII, officially published in Holos Ukrainy daily on 10 June 2015, N 101)

<http://merlin.obs.coe.int/redirect.php?id=17644>

UK

- Press release of the OSCE Representative on Freedom of the Media, "OSCE Representative welcomes legislation aiming to enhance journalists' safety in Ukraine", 15 May 2015

<http://merlin.obs.coe.int/redirect.php?id=17662>

EN

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Protection of journalists enhanced

An Ukrainian law "On amendments to certain legal acts of Ukraine as to strengthening guarantees of

Agenda

Copyright in Europe: Adapting to the New Digital Reality

16th September 2015 Organiser: Public Policy Exchange
Venue: Brussels
<http://www.publicpolicyexchange.co.uk/events/FI16-PPE2>

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