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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Niskasaari and Otavamedia Oy v. Finland

An interesting judgment of the European Court of Human Rights (ECtHR) recently became final, in which the Court confirmed the right of journalists to express severe criticism in strong wording on matters of public interest. The judgment clarifies that this right is also protected under Article 10 of the European Convention on Human Rights (ECHR) when the criticism relates to journalistic reporting by other media, and focuses in casu on a journalist who produced two TV documentaries broadcast by the Finnish public service broadcaster.

In this case, the journalist, Mikko Veli Niskasaari, and the media company Otavamedia Oy, were found liable for defamation of a journalist who had been criticised for having manipulated a documentary. The criticism had been uttered in Seura magazine, and on two internet discussion forums, calling the journalists of the Finnish public service broadcaster who produced two documentaries on forest protection “liars”. According to Niskasaari, some figures and data in the documentary were fabricated, and one of the journalists who made the documentary was “lying cold-bloodedly and intentionally”. Niskasaari was convicted in Finland because there was no evidence that the journalist had disseminated wrong or misleading information in the documentaries in question. As a consequence, Niskasaari had not had strong reason or probable cause to hold his own accusations to be true, and to call the journalist a liar. Niskasaari was convicted under criminal law and was ordered to pay a fine (EUR 240) and damages (EUR 2000) to the complainant journalist. The media company was ordered, together with Niskasaari, to pay EUR 4000 in damages to the complainant, as well as the latter’s costs and expenses of EUR 25500. The criminal conviction and civil damages were based on Chapter 24, section 9, of the Penal Code (defamation) and Chapter 5, section 6, of the Tort Liability Act (dissemination of information that violates private life or reputation).

According to the ECtHR, there is no doubt that the measures against Niskasaari and Otavamedia Oy were prescribed by law, fulfilling the requirements of precision and clarity, and were pursuing the legitimate aim of protecting the reputation or rights of others. The Court, however, finds unanimously that the Finnish authorities have violated the right to freedom of expression of the applicant journalist and media company, as the interference with their rights under

Article 10 of the European Convention is not considered necessary in a democratic society. According to the Court’s case law a number of criteria are relevant when examining the necessity of an interference with the right to freedom of expression in the interests of the “protection of the reputation or rights of others”, namely (i) contribution to a debate of general interest; (ii) how well-known the person concerned is and what the subject of the report is; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity; (v) content, form and consequences of the publication; and (vi) severity of the sanction imposed.

In the case at issue, the ECtHR is of the opinion that it was not clear from the reasoning in the judgments of the domestic courts what “pressing social need” was taken to justify protecting the TV-journalist’s right to reputation over the freedom of expression of Niskasaari and Otavamedia Oy, particularly as it concerned a debate between two professional journalists discussing the limits of critical and investigative journalism. The European Court considers that journalists who use strong expressions and pursue so-called investigative journalism in a TV-documentary could be expected to tolerate even severe criticism of their activities. It emphasises that it is relevant for the judicial balancing exercise, that the complainant TV-journalist, while entitled to benefit from the protection afforded to every individual’s reputation by Article 8, was himself an investigative journalist involved in making TV documentaries on controversial issues for a public broadcasting company. Hence the journalist was engaged in an activity very much in the public domain in a manner and in circumstances “where he could himself expect to be the subject of robust scrutiny, comment and criticism regarding his professional conduct”. The Court is of the opinion that the Court of Appeal did not pay sufficient attention to this “journalistic” hue of the case. The ECtHR also points out that Seura magazine provided the reporters who had made the TV-documentaries in question, including the complainant, with an opportunity to reply to the first applicant’s criticism. In response to this reply, the magazine subsequently published a page-long counter-reply by Niskasaari. The Court notes that different statistical information existed as far as the conserved forest area in Finland was concerned and that it could not therefore be said that the figures given by the complainant TV-journalist were fabricated. However, the domestic courts did not, as required by Article 10 of the ECHR, proceed to a sufficient evaluation of the actual impact of Niskasaari’s right to freedom of expression on the outcome of the case. In particular, the Appeal Court did not balance his right to freedom of expression under Article 10 of the European Convention, on the basis of the relevant criteria, in any considered way against the complainant’s conflicting right to reputation, under Article 8 of the Convention. Nor is it clear whether, according to the Appeal Court, the resultant interference with Niskasaari’s freedom of expression was proportionate to the legitimate aim pursued. The European Court

regards the amount of compensation (EUR 4000) as substantial, given that the maximum compensation afforded to victims of serious violence varies between EUR 3000 and EUR 5000. Having regard to all the foregoing factors, and notwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts failed to undertake an assessment capable of striking a fair balance between the competing interests at stake under Articles 8 and 10 of the European Convention. Therefore the ECtHR concludes that the reasons relied upon by the domestic courts, although relevant, were not sufficient to show that the interference complained of was “necessary in a democratic society”. Accordingly, the Finnish authorities were found to have violated Article 10 of the ECHR.

• Judgment by the European Court of Human Rights (Fourth Section), *Niskasaari and Otavamedia Oy v. Finland*, Application no. 32297/10 of 23 June 2015

<http://merlin.obs.coe.int/redirect.php?id=17734>

EN

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EUROPEAN UNION

Court of Justice of the European Union: *Schrems v. Data Protection Commissioner*

On 6 October 2015, the Court of Justice of the European Union (CJEU) delivered its judgment in Case C-362/14, *Schrems v. Data Protection Commissioner*, which was a preliminary reference from an Irish court asking whether: (a) national data protection authorities are absolutely bound by a European Commission decision, where an individual claims their personal data is being transferred to a country where there are inadequate laws on data protection, and (b) should a national data protection authority conduct its own review in light of factual developments since a Commission decision was first taken.

The case arose when an Austrian user of Facebook made a complaint to the Irish Data Protection Commissioner, asking the authority to prohibit Facebook Ireland from transferring his personal data to the United States, as he claimed US law did not adequately protect his personal data. The Commissioner rejected the complaint, holding that under the Commission’s Decision 2000/520 (the “safe harbour scheme”), US law ensured an adequate level of protection. The Irish High Court reviewed the Commissioner’s decision, and asked the CJEU to rule on whether the Commissioner was absolutely bound by the Commission’s decision on US law, and whether

the Commissioner should instead carry out its own review of US law.

On the questions referred by the Irish court, the CJEU ruled that the Data Protection Directive must be interpreted as meaning that a Commission decision “does not prevent” a national authority from examining a claim from an individual that “the law and practices in force” in another country “do not ensure an adequate level of protection”. The Court then noted that the Irish court “seems essentially to share” the complainant’s “doubts” about the “validity of Commission 2000/520”, and “in order to give the referring court a full answer”, the Court also examined whether the Commission’s decision complied with the Data Protection Directive and the EU Charter of Fundamental Rights.

The CJEU reviewed the Commission’s decision, and concluded the decision was “invalid” because “the Commission did not state, in Decision 2000/520, that the United States in fact ‘ensures’ an adequate level of protection by reason of its domestic law or its international commitments”. Thus, the decision was invalid, “without there being any need to examine the content of the safe harbour principles” by the Court. Finally, the Court held that the Commission “exceeded [its] power” when it restricted national authorities’ powers of review.

• Judgment of the Court (Grand Chamber) in C-362/14 *Schrems v. Data Protection Commissioner*, of 6 October 2015

<http://merlin.obs.coe.int/redirect.php?id=17735>

DE EN FR

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Court of Justice of the European Union: *New Media Online v. Bundeskommunikationssenat*

On 21 October 2015, the Court of Justice of the European Union (CJEU) delivered its judgment in *New Media Online v. Bundeskommunikationssenat*, which was a preliminary reference from an Austrian court, asking whether a newspaper’s website containing video is covered by the EU’s Audiovisual Media Service Directive. The Court disagreed with Advocate General Szpunar’s recent opinion in July 2015, which had held that neither a newspaper’s website with audiovisual material, nor any section of such a website, is an “audiovisual media service” under the Directive (see IRIS 2015-8/3).

The case concerned the *Tiroler Tageszeitung Online* (*Tiroler Tageszeitung* newspaper’s website), 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, the Kommunikationsbehörde Austria (the Austria's communications regulator) held that the video section of the website was an "on-demand audiovisual media service" under the Bundesgesetz über audiovisuelle Mediendienste (Austrian law transposing the EU directive). The ruling was appealed to Verwaltungsgerichtshof (Austria's Supreme Administrative Court), and in 2014, that court referred two questions to the EU Court of Justice for a preliminary ruling.

The first question was whether the concept of a "programme" under Article 1(1)(b) of the AVMS Directive includes short video clips made available on a newspaper's website. The Court recalled that a programme was defined "as a set of moving images 04046 constituting an individual item within a schedule or a catalogue established by a media service provider and the form and content of which are comparable to the form and content of television broadcasting." It then noted that the definition did "not contain any requirement relating to the length of the set of images concerned", and television broadcasting also offered "programmes of short length." Moreover, "the purpose of the directive" was to apply "the same rules to actors competing for the same audience", and prevent on-demand services "such as the video collection at issue" from "engaging in unfair competition with traditional television." In this regard, the Court held some of the newspaper's videos containing local news "compete with" regional radio broadcasters; while the videos relating to cultural, sporting and recreational reports "compete with music channels, sports channels and entertainment programmes." The Court thus concluded that a "programme" under the AVMS Directive's Article 1(1)(b) includes "under the subdomain of a website of a newspaper, the provision of videos of short duration consisting of local news bulletins, sports and entertainment clips."

The second question was what criteria are to be used to assess the "principal purpose" of a newspaper website which makes videos available, under Article 1(1)(a)(i) of the Directive. The Court held that "assessment of the principal purpose of a service making videos available offered in the electronic version of a newspaper" must examine "whether the service offered in the videos subdomain has form and content which is independent of that of the written press articles of the publisher of an online newspaper. If so, that service falls within the scope of Directive 2010/13. If, on the other hand, that service appears to be indissociably complementary to the journalistic activity of that publisher, in particular as a result of the links between the audiovisual offer and the offer in text form, it does not fall within the scope of that directive."

Importantly, the Court stated that the assessment "is a matter for the referring court," although the Court did say that "it appears" from the evidence that "very few press articles are linked to the video clips at is-

sue," and a "majority of those videos can be accessed and watched regardless of whether the articles of the electronic version of a newspaper are consulted."

• Judgment of the Court (Second Chamber) in Case C-347/14 New Media Online GmbH v. Bundeskommunikationssenat, 21 October 2015

<http://merlin.obs.coe.int/redirect.php?id=17759>

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

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European Commission: Consultation on platforms and online intermediaries

On 24 September 2015, the European Commission launched its public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing, and the collaborative economy. This consultation is part of the Commission's recently published Digital Single Market Strategy for Europe (see IRIS 2015-6/13), and the consultation's purpose is "to better understand the social and economic role of platforms, market trends, the dynamics of platform-development and the various business models underpinning platforms".

The consultation document defines platforms as "undertakings operating in two (or multi)-sided markets, which use the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups". Examples of platforms are provided, including audiovisual and music platforms (e.g., Spotify, Netflix), video-sharing platforms (e.g., YouTube), Internet search engines, news aggregators, online market places, social networks and "collaborative economy platforms" (e.g., AirBnB and Uber).

The 46-page document asks a large number of questions in four distinct areas: (a) online platforms; (b) tackling illegal content online and the liability of online intermediaries; (c) data and cloud in digital ecosystems; and (d) the collaborative economy. Notably, and in relation to audiovisual media, the consultation seeks views on the relation between platforms and holders of rights in digital content, including on video sharing websites using protected works online without having asked for authorisation; video sharing websites refusing to enter into or negotiate licensing agreements; video sharing websites or content aggregators willing to enter into a licensing agreement on terms considered unfair; and online platforms using protected works but claiming to be hosting providers under Article 14 of the E-Commerce Directive in order to refuse to negotiate a licence or to do so under their own terms.

The consultation opened on 24 September 2015, and will run until 30 December 2015. It is available in 23 languages, and the Commission will publish a summary of responses in a report for the Directorates General for Communications Networks, Content and Technology and for Internal Market, Industry, Entrepreneurship and SMEs.

• European Commission, Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, 24 September 2015
<http://merlin.obs.coe.int/redirect.php?id=17768>

EN

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NATIONAL

AL-Albania

Parliament approves guarantee agreement on loan for financing public broadcaster building of digital networks

On 2 July 2015, the Parliament approved in its plenary session Law no. 65/2015 “On tax exemptions and immunity for a guarantee agreement on a loan for financing digital networks DVB-T2 of the public radio-television broadcaster RTSH.” (Ligji nr. 65/2015 “Për miratimin e përgjashtimeve nga taksat dhe të parashikimeve për heqjen dorë nga imuniteti i kushtëzuar, sipas marrëveshjes së garancisë, në lidhje me marrëveshjen e huas, për financimin e zbatimit të projektit për ndërtimin e rrjeteve numerike (digjitale) DVB-T2 të transmetuesit public (RTSH). The law was approved by the governing majority of the Parliament with 77 votes in favour of the law, while the opposition abstained, both in the parliamentary commission discussions and in the plenary session.

The Albanian public broadcaster *Radio Televizioni Shqiptar* (RTSH) signed a contract with the German company Rohde & Schwarz to build two national digital networks on 19 March 2015. The signing of the contract followed a long legal dispute concerning the tender on the construction of the two digital networks for the public broadcaster. The Ministry of Innovation and Public Administration has been in charge of overseeing the process of negotiation and the digital switchover in the country in general. The contract assigns the company Rhode & Schwarz the task of building two national digital networks that will belong to and be managed by the public broadcaster. The public broadcaster also has the obligation to host local program operators in one of the two networks, according to the Strategy for Digital Switchover.

The public broadcaster must take a loan from Deutsche Bank to pay the company Rhode & Schwarz for building the two digital multiplexes. The loan needs to be guaranteed by the state to Deutsche Bank. The now approved law contains only two articles and aims to guarantee the exemption from taxes of the state loan that is needed for the financing of the public broadcaster’s two digital multiplexes. The explanatory report on the Law states that RTSH is responsible for paying back the loan, while the state is the loan guarantor. According to the Albanian law on state loans and state debt, this agreement on loan guarantee benefits from tax exemption and immunity.

The opposition refused to vote for this draft law. The head of the Parliamentary Commission on Media said that while they see the draft law as part of the important digital switchover process that Albania has to carry out, the draft law and the whole process did not include crucial information about the contract between the public broadcaster RTSH, the company Rhode & Schwarz, and the government. More specifically, he mentioned that they were not aware of important details on the contract for building the two multiplexes, which were not necessarily technical details. There was no information on the way the signal coverage would take place in specific areas, or how the signal would cover the most densely populated areas, as well as the most sparsely populated and remote areas, where the signal also has to reach. He argued that this information is not only technical, but it is directly related to freedom of the media and freedom of information.

• *Kuvendi mblidhet në seancë plenare* (The news on the Parliament’s approval of the law)

<http://merlin.obs.coe.int/redirect.php?id=17744>

SQ

• *Ligji nr. 65/2015 “Për miratimin e përgjashtimeve nga taksat dhe të parashikimeve për heqjen dorë nga imuniteti i kushtëzuar, sipas marrëveshjes së garancisë, në lidhje me marrëveshjen e huas, për financimin e zbatimit të projektit për ndërtimin e rrjeteve numerike (digjitale) DVB-T2 të transmetuesit public (RTSH)”* (The Law no. 65/2015 “On tax and immunity exemptions for a guarantee agreement on a loan for financing digital networks DVB-T2 of the public radio-television broadcaster RTSH)

<http://merlin.obs.coe.int/redirect.php?id=17745>

SQ

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Parliament discusses proposed amendment on removal of ownership regulation for audiovisual media

The Parliamentary Media Commission is reviewing an amendment to Law no. 97/2013 “On Audiovisual Media” (Projektligj “Për disa shtesa dhe ndryshime në ligjin nr.97/2013 “Për mediat audiovizive në republikën e shqipërisë”), which was submitted to the parliament by a Member of Parliament for the ruling majority in April 2015. The proposed amendment repeals

Article 62 of Law no. 97/2013 “On the audiovisual media in the Republic of Albania”. The article in question regulates the ownership provisions for audiovisual media.

The Member of Parliament who submitted this amendment based it on the claims that the current ownership regulation has created barriers that should be eliminated, as they pose “a real obstacle to the development of broadcasting.” According to the report accompanying the proposed amendment, the barriers of ownership are unnecessary. The report also claims that under the current situation, fair and effective competition is seriously violated, the quality of audio and audiovisual services might decrease, and one of the fundamental principles on which the Audiovisual Media Authority (AMA) should exert its activity, namely that of guaranteeing equal access to and a non-discriminatory audio and audiovisual media market, may be violated. The amendment also claims that Article 62 of Law no. 97/2013 is unnecessary, as it overlaps with competencies that the Authority on Competition should have, instead of the AMA. The report also claims that the amendment provides favourable conditions for the fulfilment of the obligations and objectives laid down in the National Strategy for the transition from analogue to digital broadcasts (2012) alleging that such an action will help with a more efficient use of the spectrum.

Given the sensitive nature of the amendment, the Parliamentary Media Commission asked international bodies for feedback on the amendment before making a decision, namely the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe, and the European Commission. In the meeting on 21 September 2015, the Commission gathered to discuss the opinions received on the proposed amendment. The chair of the Commission briefed the participants on the materials received, emphasizing that all three responses strongly opposed such an amendment, assessing it as a development that might have negative consequences to media pluralism in the country. He also mentioned that opinions on the amendment were also submitted by the regulator AMA and the telecommunications service provider Tring TV. AMA's opinion was the only one that supported approving the amendment.

The ruling majority Members of Parliament suggested that since AMA has the technical expertise and is the regulator, its representatives should also be heard on this matter at the Commission. The hearing session with the members of the AMA was planned to take place on 30 September 2015. However, due to the absence of all Members of the ruling majority of Parliament, the hearing session did not take place and was postponed to a later date. Consequently the opposition issued a statement for the media, stating that it was not acceptable that the ruling majority Members of Parliament had proposed such a hearing and then fail to attend it. In addition, the statement pointed out that currently the process of digital licensing is

delayed and deadlocked, and the amendment regarding Article 62 of Law no. 97/2013 on the ownership for audiovisual media is a major obstacle in this process.

• *Projektligj “Për disa shtesa dhe ndryshime në ligjin nr.97/2013 “Për mediat audiovizive në republikën e shqipërisë”* (The draft Law and the explanatory memo submitted by a Member of Parliament)
<http://merlin.obs.int/redirect.php?id=17746> SQ

• *Komisioni për Edukimin dhe Mjetet e Informimit Publik u diskutoi mbi përgjigjet e dhëna nga organizmat ndërkombëtarë në lidhje me kërkesën për projektligjin “Për disa ndryshime dhe shtesa në ligjin nr. 97/2013 “Për mediat audiovizive në RSH”* (The report on the Commission's meeting of 21 September 2015)
<http://merlin.obs.coe.int/redirect.php?id=17747> SQ

• *Të majtët braktisin “Median.” AMA do raportonte për nenin 62* (The report on the failed hearing and the opposition's statement)
<http://merlin.obs.coe.int/redirect.php?id=17748> SQ

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AT-Austria

Vienna Commercial Court in Wien rules on blank cassette levy

On 26 August 2015, the Vienna Commercial Court ruled that the Austrian legislation imposing a levy on blank cassettes is incompatible with the Copyright Directive and the case law of the Court of Justice of the European Union (CJEU).

The collecting society Austro-Mechana claimed payment of the so-called Leerkassettenvergütung (blank cassette levy) under section 42 of the Urheberrechtsgesetz (Copyright Act) for all storage media sold by Amazon. The collecting society won its case at trial and on appeal, but the Oberster Gerichtshof (Supreme Court) stayed the proceedings to refer several questions to the CJEU for a preliminary ruling concerning the interpretation of the Copyright Directive 2001/29/EC. According to the Copyright Directive, copyright holders have the exclusive right to prohibit or permit the copying of their works. However, it provides for an exception to this right, namely the right to make private copies, but these are only legal when copyright holders receive “fair compensation”. In Austria, this fair compensation is given to copyright holders via the aforementioned blank cassette levy, that is to say a levy on the first sale of recording media suitable for copying.

In its judgment of 11 July 2013 (Case C-521/11), the CJEU established that charging the blank cassette levy is not compatible with the Directive if the recording medium concerned is obviously not to be used to make private copies. However, the rules may be compatible with the Directive if they provide for the reimbursement of the levy paid if no private copies are made. Whether the Austrian provisions on the blank

cassette levy meet these requirements and whether the reimbursement of the levy is not excessively difficult, and is accordingly compatible with the Directive must, however, be examined by the Supreme Court. The Supreme Court then set aside the judgments of the lower courts and referred the dispute back to the Vienna Commercial Court. The latter has now ruled that the Austrian provisions on the blank cassette levy do not meet the requirements laid down by the CJEU since the possibility of reimbursing the levy afforded by these provisions is unlikely to correct any imbalances they create. Most market players in Austria are, it said, unaware of the possibility of reimbursement so it is for that reason alone incapable of ensuring sufficient compensation. Furthermore, private final consumers are completely excluded from the possible reimbursement of the levy.

• *Urteil des Handelsgerichts Wien vom 26. August 2015* (Judgment of the Vienna Commercial Court of 26 August 2015)
<http://merlin.obs.coe.int/redirect.php?id=17769>

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BG-Bulgaria

The New Bulgarian Media Group Holding may purchase additional media outlets

Seven days after receiving the application, the Bulgarian Комисията за защита на конкуренцията (Commission on the Protection of Competition - the Commission) ruled on the acquisition of the TV channel Kanal 3 by the powerful Нова Българска Медийна Група Холдинг ЕАД (New Bulgarian Media Group Holding EAD). According to the decision, the acquisition does not fall within the scope of the Protection of Competition Act and therefore does not raise any concerns.

Bulgarian law contains no specific provisions on media concentration. All mergers in the media field are therefore judged under the Protection of Competition Act by the Commission in its capacity as the general competition authority. Accordingly, on 21 August 2015, the New Bulgarian Media Group Holding EAD lodged an application with the Commission for the approval of the acquisition of the company Елит Медиа България ЕООД (Elit Media Bulgaria EOOD), the broadcaster of the TV channel Kanal 3.

The New Bulgarian Media Group Holding EAD is already the corporate group with the widest reach on the Bulgarian print market. It is, for example, the publisher of three national daily newspapers Monitor, Telegraf and Meridian Mach, the weekly newspapers Politik and Europost and the regional newspaper

Borba. Furthermore, together with her son, the media group's sole proprietor has a minimum 50%, and mostly even a 100%, stake in a range of other media companies, including in the field of the electronic media. They also have interests in companies that distribute press products.

According to section 24(1) of the Protection of Competition Act, only those mergers where the total domestic revenues of the companies to be merged exceeded 25 million lev (approximately EUR 12.5 million) in the previous financial year require the prior notification of, and examination, by the Commission. The second, cumulative prerequisite for the relevance of a merger under competition law as far as being subject to the Commission's jurisdiction is concerned is that the total domestic revenues of at least two of the companies involved in the merger, or the revenues of the company to be acquired, exceed three million lev (approx. EUR 1.5 million).

In its examination of the application, the Commission established that neither prerequisite existed because the combined total domestic revenues of the companies in question did not exceed 25 million lev and the company to be acquired did not generate revenues in excess of three million lev. Accordingly, the Commission ruled, the takeover did not fall within the scope of section 24(1) of the Protection of Competition Act, so that, according to the Commission's normal practice, it was unnecessary to carry out a market analysis or an examination of the expected consequences for the competition environment. On this basis, the Commission decided on 1 September 2015 that the acquisition did not raise any concerns.

• РЕШЕНИЕ № 686 на Комисията за защита на конкуренцията от 01.09.2015 г. (Decision No. 898 of the Commission on the Protection of Competition of 1 September 2015)
<http://merlin.obs.coe.int/redirect.php?id=17760>

BG

Evgeniya Scherer

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CZ-Czech Republic

UPC fined for the neglect of its duty to inform its customers

The City Court of Prague dismissed the action of the company UPC against a decision of the Chairman of the Council of the Czech Telecommunication Office (CTU). The Chairman of the CTU decided to impose a fine on UPC for the neglect of its duty to inform its customers about new prices pursuant to section 63, paragraph 6 of the Electronic Communications Act.

In May 2012, UPC increased the price for the use of its modems, started charging for the use of set-top-

boxes, and increased the monthly fee for providing internet services, without informing their customers of the changes. Consequently denying the customers their right to terminate the contract without the obligation to pay a penalty fee. UPC changed its product Fiber Power 10 to the product Fiber Power 30 which came — along with an increase in the connection speed — with an increase in the monthly fee. The price went from 445 CZK to 499 CZK. The monthly price for the product Fiber Power 120 rose from 749 CZK to 799 CZK.

CTU imposed a fine of one million CZK (EUR 37 000) on UPC. The company appealed to the City Court against the fine and the amount of the fine, defending its having neglected to inform the customers by arguing that customers would suffer no disadvantage if they would get higher bandwidth for that price.

According to the judgment, this argument does not hold. The Court dismissed the action and stated that UPC could not assume that all subscribers of its internet services would prefer a faster speed connection over a lower price. It concluded that these changed contractual conditions were essential requirements of the contract (in particular, the price increase). In such a case of changed contractual conditions, UPC was obliged to inform its customers of the changes and their right to terminate the contract without incurring a penalty fee, at least one month before introducing the changes.

According to the court, the amount of the fine was also reasonable. For the perpetration of the administrative offense a fine in the amount of up to ten million CZK can be imposed. When determining the amount of the fine, CTU had to take into account the seriousness of the offense, the duration of the infringement, and the number of subscribers affected by the unilateral contractual changes. CTU imposed a fine on UPC amounting to one million CZK, and therefore acted within the range of the law.

• *Milionová pokuta UPC za nesplnění informační povinnosti platí*
(Press release of the Czech Telecommunication Office of July 2015)
<http://merlin.obs.coe.int/redirect.php?id=17749>

CS

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DE-Germany

The “right to be forgotten” can be asserted vis-à-vis the operator on an online archive

In a judgment of 7 July 2015, the *Oberlandesgericht Hamburg* (Hamburg Court of Appeal) decided that the

“right to be forgotten” can also be asserted vis-à-vis the operator on an online archive (Case 7 U 29/12).

The plaintiff sought injunctive relief against the publisher of a national daily newspaper and operator of its internet site, where, in addition to news items, older reports were made available in an online archive. The reports included the institution, progress and discontinuance of investigation proceedings brought against the plaintiff by the public prosecutor’s office and on third parties’ reactions dating from 2010 and 2011. The subject matter of the proceedings was a criminal complaint brought against the plaintiff alleging he had anonymously faxed insulting and defamatory letters to a politician. After the proceedings had been discontinued against payment of EUR 40,000, the circumstances of the case were criticised and commented on in the daily press. The plaintiff complained that the defendant was continuing to keep the reporting on the circumstances of the case publicly accessible. The undated articles on the defendant’s website could still be found among the top three search results on google.de after 2012 by entering the plaintiff’s name. The plaintiff called for the reporting on the investigation proceedings mentioning either his name or other details revealing his identity to be discontinued. The *Landgericht Hamburg* (Hamburg District Court) dismissed the complaint in its judgment of 30 March 2012 (Case 324 O 9/12), stating that the plaintiff was not entitled to injunctive relief because ordering the defendant to delete or amend the articles that had initially been lawfully disseminated constituted a serious violation of press freedom that was not justified by the infringement of the plaintiff’s general personality rights. The reporting was on a subject of considerable public interest at the time of the publication, concerned a mere suspicion and did not portray the plaintiff as a convicted offender.

In response to the plaintiff’s appeal, the Hamburg Court of Appeal set aside the lower court’s decision and partially allowed the complaint, stating that, although the plaintiff had no right to call for the defendant to cease the future dissemination of the articles in its online archive, the appeal was well-founded insofar as he called for the defendant to modify the articles in question in such a way that they did not appear in lists of search results when his name was entered into internet search engines. This, the court said, followed *mutatis mutandis* from section 1004(1), first sentence of the *Bürgerliches Gesetzbuch* (Civil Code - BGB) in conjunction with general personality law. The fact that the reports on the investigation proceedings against the plaintiff could easily be located on the Internet and retrieved by any user by simply entering his name was a significant breach of his personality rights, because the dissemination of information likely to have a lasting adverse effect on his public reputation, would thus be perpetuated. That adverse effect was all the more serious as the originally sufficient public interest in the case no longer existed.

The court went on to state that if according to the

judgment of the CJEU of 13 May 2014 (Case C 131/12, see IRIS 2014-6/3) such a right could be claimed against the operators of Internet search engines, then it could be asserted all the more against the authors of the relevant articles.

• *Urteil des Oberlandesgerichts Hamburg vom 7 Juli 2015 (Az. 7 U 29/12)* (Judgment of the Hamburg Court of Appeal of 7 July 2015 (Az. 7 U 29/12))

<http://merlin.obs.coe.int/redirect.php?id=17770>

DE

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ES-Spain

Supreme Court defamation judgment concerning popular Spanish TV show

On 15 September 2015, the Spanish Supreme Court upheld the decision from the Court of Appeal, which found three members of the panel of speakers from the popular TV programme "Sálvame" responsible for defamation, after insulting Spanish socialite Carmen Lomana on air. The defendants will have to compensate Lomana with EUR 120 000 in total (EUR 60 000, EUR 30 000 and EUR 30 000 respectively).

The decision from the Court of Appeal had already recognised the existence of "an illegal interference with the reputation of the applicant for the serious and repeated insults made during the Sálvame and Sálvame Deluxe programs".

During their interventions in three programmes broadcast in April 2011, the defendants referred to Lomana, as "shameless", "illiterate", "clown", "idiot", "cheat", "real dog", "suck ass to get invited to parties", "parent pigs, hogs children" "hustler", "silly ass", "seeks high beds" and "sow" («sinvergüenza», «analfabeta», «payasa», «tonta», «cerda», «chupas el culo para que te inviten a fiestas», «de padres cerdos, hijos marranos, «estafadora», «imbécil», «busca camas altas»).

The Supreme Court considered that most of those words and expressions are to be taken in the public perception as pure and simple expressions of insults only aimed at offending. It also adds that, by their objective and repetition in a short space of time and the mise-en-scène, with vulgar words, the intention was to ridicule the plaintiff's character with insidious insinuations.

In addition, the Supreme Court indicated that these programmes, although they are usually in an aggressive tone, must abide by rules, including those imposed by the protection of fundamental rights under the Spanish Constitution.

In their defence, the defendants alleged that there was no illegal interference with Lomana's honour because their words were covered under the umbrella of freedom of expression and information, were not offensive, and referred to a person who was well known for her voluntary appearances on television, and had previously criticised those who had been her TV companions.

• *Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, 15 de septiembre 2015* (Judgment of the Supreme Court, 15 September 2015)

<http://merlin.obs.coe.int/redirect.php?id=17738>

ES

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FR-France

Ban on showing the film "Love" to under-18s - decision by the Conseil d'Etat

After the administrative court this summer (see IRIS 2015-8/15), it has been the turn of the *Conseil d'Etat* to consider the classification licence issued to Gaspar Noé's film "Love"; and delivered its decision on 30 September 2015. In the case at issue, the Ministry of Culture - which in July had issued a classification licence preventing the film being shown to minors over 16 years of age - and the production companies had called on the *Conseil d'Etat* to cancel the order delivered under the urgent procedure suspending performance of the licence because it did not allow the film to be shown to minors between 16 and 18 years of age. In doing so, the *Conseil d'Etat* has given details of the legal framework for the classification of films presenting "scenes of non-simulated sex". Thus, "when a film includes such scenes, the only classifications that are legally applicable are those provided for in paragraphs 4 and 5 of Article R. 211-12 of the Cinema and Animated Image Code", i.e. they may not be shown to anyone under 18 years of age, and if appropriate, the film should also be listed as pornographic ("X-rated"). The *Conseil d'Etat* pointed out that scenes of non-simulated sex were "scenes which, without any dissimulation, presented practices of a sexual nature", and that in deciding whether or not scenes qualified for this description it was necessary to take into consideration the more or less realistic manner in which they were filmed, and the effect they were intended to have on anyone watching the film. Lastly, if such a classification were adopted, it was necessary to appreciate the way in which the scenes were filmed and how they fitted into the work in question in order to determine which of the two possible restrictions was appropriate.

In the present case, the *Conseil d'Etat* found that, in allowing the application for suspension which the

court had received, the judge sitting in urgent matters at the administrative court in Paris had found, by applying his undistorted sovereign appreciation, that the film included numerous scenes of non-simulated sex, and in law, was therefore right to deduce that it was covered by the provisions of paragraph 4 of Article R. 211-12 of the Cinema and Animated Image Code. The merits of the dispute are still to be heard at the administrative court in Paris, which will have to reach a final decision on the legality of the film's classification licence. Until this judgment is delivered, then, "Love" may only be shown to audiences over 18 years of age (without being X-rated).

Promptly, on 9 September, Minister Fleur Pellerin announced the start of a rethink of the conditions for banning the showing of feature films to minors. The Minister "wished to question the automatic nature of imposing a ban on showing films to minors which resulted from the current legislation as appreciated in jurisprudence, so that classification could take better account of the individual nature of the works and their impact on the public". The chairman of the film classification board is required to submit proposals by January 2016.

• *Conseil d'Etat, 30 septembre 2015, ministère de la culture et de la communication et autres c/ association Promouvoir* (Conseil d'Etat, 30 September 2015, Ministry of Culture and Communication, and others vs. the association 'Promouvoir')

<http://merlin.obs.coe.int/redirect.php?id=17762>

FR

Amélie Blocman
Légipresse

Audiovisual creation based on actual events

In a decision delivered on 30 September, the Court of Cassation rejected the appeals brought by the channel Arte and the production companies which produce the programme "Intime Conviction" against the appeal judgment delivered under the urgent procedure ordering them to stop broadcasting the programme on pain of penalty payments (see IRIS 2014-4/15). They had also been ordered to pay a provisional amount towards compensation for the prejudice suffered as a result of the invasion of the privacy of the applicant party, a coroner (medical examiner) who had been taken in for questioning after his wife had been shot dead, before being acquitted in autumn 2013 by a court of assizes, and who had recognised himself in the main character featured in the programme. The "Intime Conviction" programme comprised firstly a TV film shown on 14 February 2014 describing a police investigation carried out following the violent death of a woman and resulting in the arrest of her coroner husband, referred to as "Paul X". The programme also included a number of videos shown over a period of fifteen days - on an Internet site operated by the company which edited the TV

channel - following the case each day in the court of assizes. Internet users could view the file created by the production company and, after each hearing, give their opinion on the innocence or guilt of the accused party; the verdicts of the fictional court of assizes and of Internet users was to be broadcast at the end of the two-week period.

In support of their appeal, the television channel and the production companies claimed the benefit of freedom of audiovisual creation, which they held to include the possibility for authors of works of fiction to draw inspiration from actual facts, and to incorporate fictional elements in their works. They also argued that relating facts that were public knowledge as they had already been divulged could not in itself constitute an invasion of privacy.

The Court of Cassation recalled the principle according to which it was for the judge to seek a balance between the right to privacy and the right to freedom of expression where they were of equal normative value and, as appropriate, to come down in favour of a solution which best protected the most legitimate interest. In the case at issue, the court of appeal had noted that, although the TV film was a work of fiction, it did display many similarities with the case on which the applicant was judged; these similarities were listed in the decision. In its decision, the Court noted that a scene of pure fiction, added to actual events, which were also described in the decision, did indeed constitute an invasion of the person's privacy, even if the work was fictional. The minimal differences between the work of fiction and the applicant's life were not enough to prevent confusion, particularly as the press had commented at length on the programme's story line being based on the applicant's party's case and the reactions of Internet users showed that they had identified him. The decision went on to state that even though some of the facts connected with the person's private life had already been divulged, they could not lawfully be reproduced since the programme "Intime Conviction" was a work of fiction, and neither a documentary nor an informative broadcast. Although audiovisual creation could draw inspiration from actual events and represent living persons, it could not, without their agreement, invade their privacy if it did not clearly present such elements as being totally fictional. The Court of Cassation found that the court of appeal had considered the balance of the applicant's entitlement to privacy and the entitlement to freedom of expression on the part of the channel and the production company, and had decided that this work of fiction based on actual events constituted an infringement of the applicant's right to privacy. The Court had been able to deduce that the applicant's privacy had indeed been invaded, justifying a restriction on the right to freedom of expression. Although this overturns the decision of the appeal court delivered under the urgent procedure, the merits of the case are still awaiting judgment.

• *Cour de cassation (1re ch. civ.), 30 septembre 2015 - Arte et Maha film c/ J.-P. Muller* (Court of Cassation (1st civil chamber), 30 September 2015 - Arte and Maha film vs. J.-P. Muller)
<http://merlin.obs.coe.int/redirect.php?id=17763>

FR

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Details of conditions for INA using artists' performances

With its decision delivered on 14 October 2015, the Court of Cassation has provided details on respect for the neighbouring rights of performing artists when their performances are used by the *Institut National de l'Audiovisuel* (National Audiovisual Institute - INA). The INA has a public-service mission to conserve, use, and make available France's audiovisual heritage. More specifically, under its most recent terms of reference, the INA has undertaken to "improve the editorialisation of its archives by constituting a themed multimedia offer that is as relevant and as accessible as possible, while respecting beneficiaries' rights". The INA therefore concluded, notably between 2005 and 2008, various general and collective agreements with the representatives of the beneficiaries concerned (writers, producers, performers, etc). This agreement has been consolidated by Article 44 of the Code de la Propriété Intellectuelle (Intellectual Property Act - CPI) of 1 August 2006, which reinforces the presumption of the transfer of performers' rights to the INA as resulted, in the audiovisual field, from Article L. 212-4 of the CPI. This Article amended Article 49 II of Act No. 86-1067 of 30 September 1986 on freedom of communication, according to which "the INA exercises the rights to use the audiovisual archives of the national programme companies while respecting the moral and pecuniary rights of the holders of copyright and neighbouring rights and of their beneficiaries; nevertheless, Articles L. 212-3 and L. 212-4 of the CPI notwithstanding, the conditions for using the performances of artists contained in the archives and the remuneration generated by such use are governed by a number of agreements concluded between the performers themselves or the employee organisations representing the performers, and the INA. These agreements ought to lay down the scale of remunerations and the ways in which such remuneration is to be paid".

In the present case, the beneficiaries of the rights in respect of the late jazz drummer Kenny Clarke claimed that the INA was offering a number of videograms and one phonogram reproducing the musician's performances for sale on its Internet site without their authorisation. They therefore had the INA summoned to obtain compensation for the alleged infringement of the performer's rights which they held. They invoked Article L. 212-3 of the CPI, according to

which a performer's written authorisation is required for making a recording, reproducing and communicating to the public his/her performance, and any separate use of the sound and image of the performance where this had been made in respect of both sound and image. The court of appeal found in their favour and ordered the INA to pay them EUR 5,000 to make good the prejudice suffered as a result of the unauthorised use of the videograms and the phonogram at issue. The judge recalled that the mission to conserve and use audiovisual archives conferred on the INA by the legislator did not exonerate it from respecting performers' rights, and stated that the waiver provided for in Article 44 of the Act of 1 August 2006 should only apply where the performer had authorised the recording and initial use to be made of his/her performance. In such a case, the INA was released from the requirement to request authorisation from the performer or his/her beneficiaries for further use of the performance. In the present case, however, the INA was not able to establish a written contract or any other element establishing the existence of agreement on the part of the musician. The INA appealed to the Court of Cassation against this decision, which substantially reduces its possibility of using the programmes in its archives. In its decision delivered on 14 October 2015, the Court of Cassation found that by subordinating in this way the applicability of the exemption scheme set up in favour of the INA as evidence of the performer's authorisation of the initial use of the performance, the court of appeal had added to the law a condition that it did not contain and had violated the applicable provisions of the law. The dispute was therefore referred to another court of appeal.

• *Cour de cassation (1re ch. civ.), 14 octobre 2015 - Institut national de l'audiovisuel c/ M. Laurent X. et autres* (Court of Cassation (1st civil chamber), 14 October 2015 - Institut National de l'Audiovisuel (INA) vs. Mr Laurent X. and others)
<http://merlin.obs.coe.int/redirect.php?id=17771>

FR

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GB-United Kingdom

BBC breaches Ofcom's Code about reducing the risk to viewers susceptible to photosensitive epilepsy from flashing lights

The BBC programme *The Voice UK: the Live Final* (a singing talent competition) breached Ofcom's Rule 2.12 of its Code of Conduct for failing to take sufficient measures to avoid flashing lights during one performance, and as a consequence the broadcaster did not comply with Ofcom's technical guidance to avoid

photosensitive epilepsy (PSE). Such flashing lights can trigger seizures in persons susceptible to PSE.

Rule 2.12 states that “Television broadcasters must take precautions to maintain low level of risk to viewers who have photosensitive epilepsy. Where it is not reasonably practicable to follow the Ofcom guidance (see the Ofcom website), and where broadcasters can demonstrate that the broadcasting of flashing lights and/or patterns is editorially justified, viewers should be given adequate verbal and also, if appropriate, text warning at the start of the programme or programme item”.

In the case of *The Voice*, there was a sole complaint to Ofcom and it concerned the lighting during the performance of one of the finalists, Emmanuel Nwamadi, wherein there was one sequence of flashing lights of over 1.5 seconds in duration, and then another period of flashing lasting over 3.5 seconds during which the flashing dominated the screen with about 20 flashes. Ofcom’s technical guidance on PSE states that a sequence containing flashing at a rate of more than 3 flashes per second, which exceed specific intensity thresholds, may be potentially harmful.

The Voice is made for the BBC by an independent production company, Wall to Wall, and during the dress rehearsal the production team ran PSE Guidance tests which showed the lighting was non-compliant. The lighting director was informed and remedial action was taken but did not correct the problem. The production team assumed the problem had been corrected. According to the BBC’s own procedures, if the PSE test is failed then the matter has to be referred to the broadcaster’s Commissioning Editor, but this did not occur on this occasion.

As a consequence of this incident, the BBC has reminded Wall to Wall of its responsibility in this area and further the broadcaster has implemented new procedures to avoid recurrence. Wall to Wall did not make separate representations to Ofcom, but did express its regret for non-compliance on this one occasion.

Fulfilling its statutory duty under the Communications Act 2003 to set standards for broadcast content including that “generally accepted standards are applied to the content of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of harmful and /or offensive material”, Ofcom had to consider whether there was a breach of Rule 2.12 of the Code.

The purpose of Rule 2.12 is to minimise the risk to viewers with a susceptibility to epilepsy, and the PSE Guidelines were developed with medical expert contributions providing the technical standard expected of broadcasters. Ofcom found that *The Voice* had shown flashing lights for over five seconds in total thus exceeding the maximum limits set by the PSE Guidelines. As a consequence this posed a significant

risk to viewers or those in the audience of the show who have a susceptibility to PSE.

Ofcom considered that as the issue had been identified at the dress rehearsal, the BBC had sufficient time and opportunity to correct or minimise the problem before the live broadcast. As such, Ofcom did not go on to consider whether the inclusion of the flashing light was editorially justified or whether adequate warning of flashing had been provided. Ofcom determined there had been a breach of Rule 2.12 of the Code.

• Ofcom Broadcast Bulletin, Issue number 287, 14 September 2015, p. 7
<http://merlin.obs.coe.int/redirect.php?id=17736>

EN

Julian Wilkins
Blue Pencil Set

Regulator finds Fox News to be in breach of Code because of ‘no-go’ areas for non-Muslims claim

Ofcom, the UK Communications Regulator, has decided that Fox News, the US news channel broadcast on the digital satellite platform and licensed by Ofcom, had breached its Broadcasting Code. The Code provides that “[f]actual programmes or items or portrayals of factual matters must not materially mislead the audience” so as to cause harm or offence.

The broadcast in question was in an episode of “Justice with Jeanine Pirro” on 11 January 2015, dealing with Islamic extremism after the Charlie Hebdo attack. One contributor, described as “an expert on the radicalism of the French Muslims”, stated that in Paris and other French cities there are Muslim “ghettos which the French authorities have abandoned. They don’t provide an ambulance service, they don’t provide public service”. A second contributor, the founder of the US-based “Investigative Project on Terrorism”, claimed that “in Britain there are not just ‘no-go’ areas, there are actually cities like Birmingham that are totally Muslim, where non-Muslims simply don’t go in”. The presenter did nothing to correct these comments. A week later, Fox News broadcast an apology pointing out that the statements were incorrect; the most recent census for Birmingham (the UK’s second largest city) indicated that 22% of the population identify themselves as Muslim and no credible source indicated that it is a ‘no-go’ area. A second correction was also broadcast, stating “there is no formal designation of these zones in either country and no credible information to support the assertion there are specific areas in these countries that exclude individuals based solely on their religion.”

Fox news maintained that Article 10 of the European Convention on Human Rights (ECHR) created a presumption of freedom of expression, and in the mind

of any UK viewer the statements would be so clearly inaccurate as to be incapable of being misleading or offensive. Ofcom considered that, although the audience would be familiar with the controversial content and approach of the programme, viewers would expect to be able to rely on factual statements made in it, especially as the contributors were presented as experts and as the presenter was referred to as 'Judge' Jeanine (she was in fact a qualified attorney and former criminal prosecutor). Furthermore, it was the presenter who had introduced the topic of 'no-go' areas. The statements were inaccurate and therefore misleading and had the potential to cause offence to viewers, especially members of the Muslim communities in the cities referred to. The statements also had the potential to cause harm by eroding viewers' trust in current affairs programmes. The apologies helped to mitigate these effects to some extent, but Ofcom remained concerned that Fox News had not acted sooner, especially in the context of a current affairs programme on a controversial subject at a sensitive time. The programme was thus in breach of the Code.

• Ofcom Broadcast Bulletin, Issue number 288, 21 September 2015, p. 61
<http://merlin.obs.coe.int/redirect.php?id=17737>

EN

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IE-Ireland

Programme featuring instructions on contraceptive use did not violate broadcasting code

On 1 September 2015, the *Broadcasting Authority of Ireland* (BAI) held, by a majority, that showing a model of an erect penis having a condom put on it did not violate broadcasting rules on offence, harm, or the protection of children. The decision arose following a complaint made about an "Ireland AM" programme broadcast by TV3. Ireland AM is a morning programme with a range of content, broadcast between 7 a.m. and 10 a.m., and during a discussion on contraception, a model of an erect penis was shown having a condom put onto it.

The complainant claimed that "this type of material is completely inappropriate on a programme that many households have on in the morning, before children go to school. The complainant stated that "there may have been warnings before the item, but she changed channel to TV3 and none was evident to her". Accordingly, the complainant claimed there had been a violation of the Broadcasting Act's rules on offence and harm (section 48), and the BAI's Code on Programme Standards, in particular the code's rules on due care

(section 2.2), protection of children (section 2.3), and sexual conduct (section 3.2).

The BAI rejected the complaint, and held: (a) there were three clear warnings before the segment started, one at the beginning of the programme, one shortly before the segment started, and another during the introduction to the piece. For this reason, the Forum was satisfied that the broadcaster took reasonable measures to ensure that the viewers were informed; (b) although "the time of broadcast meant that some children could view the programme and that some viewers may have found it inappropriate", there was "nothing in the programme likely to cause undue offence or to cause harm"; and (c) the content was "factual and informative", and did not constitute "sexual content".

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, September 2015, p. 93
<http://merlin.obs.coe.int/redirect.php?id=17719>

EN

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Complaint from government health authority over RTÉ investigative programme rejected

On 1 September 2015, the *Broadcasting Authority of Ireland* (BAI) held, by a majority, that the public broadcaster RTÉ did not violate the Broadcasting Act's and Broadcasting Code's rules on fairness and objectivity when it broadcast a programme based on a leaked internal document from a government health authority. A complaint had been made by the *Health Service Executive* (HSE) to the BAI following a broadcast of RTÉ's current affairs programme "Prime Time", which concerned a pregnant asylum seeker and her interactions with a number of government agencies. The programme broadcast information from a draft report which had been commissioned by the HSE, and which had not yet been made public.

The HSE claimed that RTÉ had violated section 48(1)(b) of the Broadcasting Act 2009, as not "fair to all interests concerned" because it "misled the public in relation to the nature of the draft report", as the broadcaster did not make reference to the fact that it was a very early draft of the report, the key interviews and facts had not yet been considered and that the information contained in it had not yet been verified". Moreover, the HSE claimed that it was not "contacted by RTÉ prior to the broadcast and were not given the opportunity to object to the broadcast or to contribute to it", being told by an editor that this "was to eliminate the possibility that the HSE would obtain an injunction prohibiting the broadcast of the programme".

The BAI first reiterated that broadcasters "may choose to bring into the public domain documents

that it has received and that this may on occasion be done against the expressed views of the creators of said documents”, and holding that the draft report had a “significant public interest”. Second, it was held that “the broadcaster had taken adequate steps to ensure that viewers to the programme would be very clear about the status of the H.S.E. report as a draft document.” Finally, the BAI held that because the draft report was commissioned and produced by the HSE, no “unfairness arose from the decision of the broadcaster not to include a contribution from the HSE”.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, September 2015, p. 11

<http://merlin.obs.coe.int/redirect.php?id=17719>

EN

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IT-Italy

New regulation on protection of customers in the supply of electronic communications services

On 5 October 2015, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - AGCOM) issued Resolution no. 519/15/CONS on protection of customers in connection with contracts relating to the supply of electronic communication services.

According to Articles 70 and 71 of Legislative Decree no. 253 of 1 August 2003, electronic communications providers must adopt all measures necessary to provide customers, in a clear and detailed manner, with the information required by law, particularly in case of distance contracts and off-premises contracts.

The Regulation is aimed at (i) implementing the abovementioned statute provisions; (ii) protecting a customer's right to choose freely the provider of the service; and (iii) preventing activations not requested by customers or based on incomplete or misleading information.

The provider shall communicate changes to contractual terms to customers in a transparent and efficient manner; a format arranged by the Authority shall be used for the purpose of such communication. If the customer does not like the changes, he may terminate the agreement at no costs.

The minimum initial commitment for customers shall not exceed 24 months. Furthermore, the provider shall also make available at least one offer with a duration no longer than 12 months. In addition, AGCOM

will promote adoption of self-regulatory codes of conduct, with the involvement of consumer associations.

Finally, the Authority approved guidelines relating to contracts for the supply of electronic communications services concluded by phone. AGCOM shall monitor compliance with the related provisions of the Consumers Code (Legislative Decree no. 206 of 6 September, 2005).

• *Delibera n. 519/15/CONS, Approvazione del regolamento recante disposizioni a tutela degli utenti in materia di contratti relativi alla fornitura di servizi di comunicazioni elettroniche* (Resolution no. 519/15/CONS, Approval of Regulation on protection of customers in connection with contracts relating to the supply of electronic communication services)

<http://merlin.obs.coe.int/redirect.php?id=17468>

IT

• *Delibera n. 520/15/CONS, Approvazione degli orientamenti per la conclusione per telefono di contratti relativi alla fornitura di servizi di comunicazioni elettroniche* (Resolution no. 520/15/CONS, Approval of Guidelines on conclusion by phone of contracts relating to the supply of electronic communication services)

<http://merlin.obs.coe.int/redirect.php?id=17468>

IT

Ernesto Apa, Fabiana Bisceglia

Portolano Cavallo Studio Legale

AGCOM orders the blocking of the DNS of several football streaming sites

On 10 September 2015, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority - AGCOM) by means of Resolutions no. 157/15/CSP, 158/15/CSP and 159/15/CSP ordered the blocking of the DNS of several web pages hosted on servers managed by foreign companies through which it was possible to view football matches between Italian and foreign teams.

The legal basis of the abovementioned AGCOM decisions is the Regulation for the protection of copyright on electronic communications networks adopted by means of Resolution no. 680/13/CONS on 12 December 2013.

In particular Section 8, paragraph 4 of the above AGCOM Regulation sets forth that if AGCOM ascertains a copyright infringement and the infringing website is hosted on servers located outside Italy, AGCOM may order the relevant service providers to disable the access to the web page.

Furthermore according to paragraph 5 of the same section, AGCOM may order that users requesting access to the disabled websites are automatically redirected to a landing page stating that the websites were shut down according to Regulation no. 680/13/CONS.

In light of the above-described legal framework, and following Mediaset Premium S.p.A.'s complaints, AGCOM ascertained that streaming websites hosted on

foreign servers made accessible several Series A and the International Champions Cup football matches, whose audiovisual rights were held by Mediaset.

With reference to the copyright infringements at hand, AGCOM deemed the exceptions and limitations to the protection of copyright set forth under Italian Copyright Law not applicable, and therefore ordered the mere conduit service providers to block the DNS of the websites through which the football matches were accessible within two days.

• *Delibera n. 157/15/CSP, Provvedimento ai sensi degli articoli 8, commi 2 e 4, e 9, comma 1, lett. d) del Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazioni elettronica e procedure attuative ai sensi del Decreto Legislativo 9 aprile 2003, n. 70, di cui alla delibera n. 680/13/CONS* (Resolution no. 157/15/CSP, Decision issued according to Sections 8, paragraphs 2 and 4, and 9, paragraph 1, letter d) of the Regulation for the protection of copyright on communications services networks and relevant implementing measures provided under Legislative Decree of April 9, 2003, no. 70 as set forth under Resolution no. 680/13/CONS)

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IT

• *Delibera n. 158/15/CSP, Provvedimento ai sensi degli articoli 8, commi 2 e 4, e 9, comma 1, lett. d) del Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazioni elettronica e procedure attuative ai sensi del Decreto Legislativo 9 aprile 2003, n. 70, di cui alla delibera n. 680/13/CONS* (Resolution no. 158/15/CSP, Decision issued according to Sections 8, paragraphs 2 and 4, and 9, paragraph 1, letter d) of the Regulation for the protection of copyright on communications services networks and relevant implementing measures provided under Legislative Decree of April 9, 2003, no. 70 as set forth under Resolution no. 680/13/CONS)

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IT

• *Delibera n. 159/15/CSP, Provvedimento ai sensi degli articoli 8, commi 2 e 4, e 9, comma 1, lett. d) del Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazioni elettronica e procedure attuative ai sensi del Decreto Legislativo 9 aprile 2003, n. 70, di cui alla delibera n. 680/13/CONS* (Resolution no. 159/15/CSP, Decision issued according to Sections 8, paragraphs 2 and 4, and 9, paragraph 1, letter d) of the Regulation for the protection of copyright on communications services networks and relevant implementing measures provided under Legislative Decree of April 9, 2003, no. 70 as set forth under Resolution no. 680/13/CONS)

<http://merlin.obs.coe.int/redirect.php?id=17468>

IT

Ernesto Apa, Daniel Giuliano
Portolano Cavallo Studio Legale

MK-"the Former Yugoslav Republic Of Macedonia"

The Law on prohibition of public revelation of illegally recorded audiovisual materials may restrict media freedom

In October 2015, the Law on the Prohibition of Owning, Editing, Publishing and the Usage of Materials, which come from Illegal Communications' Surveillance (Zakon za zabrana za poseduvanje, obrabotka, objavuvanje i raspolaganje so materijali koji proizleguvaat od nezakonsko sledenje na komunikaciite) was proposed by two Members of Parliament from the ruling majority. The law aims to prevent the media from publishing wiretapped conversations of the most senior

politicians, which may reveal their heavy criminal activities.

The country is in the middle of the deepest political crisis since its independence in 1991. For months, the political opposition has been revealing wiretapped phone conversations by the National Intelligence Service (UBK), in which the highest political authorities are caught conducting criminal activities. The EU Senior Experts' Group on systemic Rule of Law issues stated in its report regarding the communications interception: "Apparent direct involvement of senior government and party officials in illegal activities including electoral fraud, corruption, abuse of power and authority, conflict of interest, blackmail, extortion (pressure on public employees to vote for a certain party with the threat to be fired), criminal damage, severe procurement procedure infringements aimed at gaining an illicit profit, nepotism and cronyism; indications of unacceptable political interference in the nomination/appointment of judges, as well as interference with other supposedly independent institutions for either personal or political party advantages."

As given in Articles 3 and 4 of the law, those who own materials of illegally recorded communications will be sentenced to at least four years of prison. In the case that a person is affected by these materials in the form of any legal consequences, the minimal sentence of the owner of the material would be five years of imprisonment. This practically means that, if a journalist possesses audiovisual materials, which are of public interest (high level corruption, election fraud etc.), he/she would not be able to publish or inform the public, since the perpetrator may face legal consequences.

Any media outlet where such information would be revealed will be fined, and the responsible person would be sentenced to a minimum of four years of imprisonment. As a contrast to the other national legislation, the jurisdiction of this law goes beyond the territory of the country (according to Article 4, paragraph 1) and is retroactive, which means that all media (including the online media outlets and their archives), libraries or other entities, which collect and possess information about the revealed information of conducted criminal activities are obliged to delete all materials from the wiretapped conversations, which may cause high level politicians to be prosecuted by the courts.

The press release of the Association of Journalists of Macedonia (AJM) and the Journalists' Union called this law "an attempt for censorship" by the ruling political parties.

• *Zakon za zabrana za poseduvanje, obrabotka, objavuvanje i raspolaganje so materijali koji proizleguvaat od nezakonsko sledenje na komunikaciite* (Law on Prohibition of Owning, Editing, Publishing and Usage of Materials, which come from Illegal Communications' Surveillance)

<http://merlin.obs.coe.int/redirect.php?id=17750>

CS

• *Press release of the Association of Journalists* (Press release of the Association of Journalists)

<http://merlin.obs.coe.int/redirect.php?id=17751>

CS

• The former Yugoslav Republic of Macedonia: Recommendations of the Senior Experts' Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015
<http://merlin.obs.coe.int/redirect.php?id=17752>

EN

Borce Manevski
Independent Media Consultant

NL-Netherlands

Court of Appeal rejects Ryanair's appeal over broadcaster's programme

On 14 July 2015, the Amsterdam Court of Appeal upheld an earlier District Court decision that critical statements made in a Dutch television programme regarding the airline Ryanair were not unlawful.

Around the end of 2012, the Dutch public broadcaster KRO aired two episodes of a programme in which the business practices of Ryanair were said to endanger flight safety. More specifically, it was said that pilots were encouraged to fly with the absolute minimum of fuel and that they felt obliged to fly whilst feeling unwell. KRO also published press releases preceding the broadcasts.

Ryanair appealed the Amsterdam District Court's judgment, stating that the statements were lawful. Their main complaint is a lack of causality and a lack of factual basis regarding the statements. They also complained about the anonymity of the pilots in the interview.

The Court of Appeal agreed with the lower court that enough research has been done by KRO by conducting interviews with Ryanair pilots and consulting documents, and that these sources give enough factual basis to support the statements made by KRO. The Court refused to accept Ryanair's argument that facts may only be reported after they have been irrefutably proven by solid research, or that all the research needs to point in a certain direction. The Court stated that accepting these kinds of arguments would make news reporting impossible.

The Court found that the reason for the anonymity of the pilots (i.e. fear of sanctions) is justified (for an earlier ruling on the anonymous sources, see IRIS 2013-7/20). The identity of the pilots was checked by KRO. Ryanair argued that their employees have a duty not to disclose information following ECtHR case law on whistleblowers (ECHR 12 February 2008, *Guja v. Moldova*) (see IRIS 2008-6/1). The Court decided that this case law was irrelevant as it concerned the special duty of civil servants towards the government. Such a special duty cannot be said to exist for pilots.

Ryanair also complained that the opinions of four pilots could not warrant factual statements. The Court dismissed this. Considering the importance of flight safety and the role of the press as public watchdog, KRO had the freedom to make the statements, despite the fact that they were based on the subjective perception of four pilots.

Procedurally, Ryanair complained that their adversarial right had been breached by KRO. The Court stated that the right to be heard is not absolute, and that Ryanair had been given enough opportunity to respond. How and whether KRO dealt with the response given is in principle a matter of journalistic freedom.

• *Gerechtshof Amsterdam*, 14 juli 2015, ECLI:NL:GHAMS:2015:2887 (Amsterdam Court of Appeal, 14 July 2015, ECLI:NL:GHAMS:2015:2887)

<http://merlin.obs.coe.int/redirect.php?id=17739>

NL

• *Rechtbank Amsterdam*, 16 april 2014, ECLI:NL:RBAMS:2014:2003 (Amsterdam District Court, 16 April 2014, ECLI:NL:RBAMS:2014:2003)

<http://merlin.obs.coe.int/redirect.php?id=17740>

NL

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Amsterdam Court of Appeals rules media may assume factual correctness of news agency reports

In its judgment of 16 June 2015, the Amsterdam Court of Appeal decided that media may assume that press reports published by the news agency ANP are factually correct. The case concerned two articles written by journalists of the Dutch newspaper *De Telegraaf* on the involvement of former directors in the bankruptcy of investment fund Partrust. The investment fund had been under investigation by the Dutch public prosecutor and the *Autoriteit Financiële Markten* (Financial Markets Authority - AFM) for large-scale investment fraud and undertaking a pyramid scheme for over five years.

In one of the two articles, *De Telegraaf* stated that "the Autoriteit Financiële Markten deemed that Partrust was a pyramid scheme because up to three-quarters of the investments of new investors was shared out as dividend to earlier shareholders". The applicants contested an earlier judgment of the District Court, which had judged the statement lawful. According to the applicants, such a statement was unlawful because the AFM had never filed a report accusing the applicants of undertaking a pyramid scheme, and the AFM had only filed a report that stated that they believed that this might be the case. Furthermore, they argued that due to the prosecution being limited to other possible criminal acts by the public prosecutor, the newspaper's link between the losses of 300 investors and a pyramid scheme was unlawful.

The Court of Appeals first recognised that two competing interests were at stake; namely the freedom of expression of De Telegraaf, and the protection against infringement of the reputation of the three former directors. The Court then stated that the statement had been transcribed from the news agency ANP, after which it stated that barring exceptional circumstances, the media could assume that press reports published by the news agency ANP are correct, and that they do not need to conduct further research, before publishing its information. The Court furthermore recognised that suspects, like the applicants in this case, retain this status until conviction in court. Nevertheless, the fact that the AFM had only filed a report accusing the applicants of other criminal acts, does not mean the AFM only presumed the undertaking of a pyramid scheme. The Court therefore concluded that the complaint of the applicants must fail, confirming the ruling of the District Court.

• *Gerechtshof Amsterdam, 16 Juni 2015, ECLI:NL:GHAMS:2015:2318* (Amsterdam Court of Appeals, June 16 2015, ECLI:NL:GHAMS:2015:2318)

<http://merlin.obs.coe.int/redirect.php?id=17741>

NL

Robert van Schaik

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Court declares broadcasting hidden camera images of public figure unlawful

In a judgment on preliminary relief proceedings on 12 August 2015, the District Court of Amsterdam declared the broadcast of images of the former mayor of Maastricht unlawful. The images were recorded by the Dutch broadcaster Powned, by means of a hidden camera. The Court ordered Powned to ensure that the unlawful images can no longer be found through search engines on the Internet.

In December 2013, the mayor of Maastricht, who is married, was discredited when a Dutch broadcaster published a photo of him kissing a 24-year-old man in a hotel lobby. In the same period, a photo of the mayor was found on the gay dating application Grindr, showing his naked torso. The city council chairmen of Maastricht discussed the position of the mayor, but this did not lead to further consequences.

Less than a year later, Powned published secretly recorded footage, showing the mayor dating another young man. This second scandal led to his resignation as mayor of Maastricht.

The former mayor sued Powned, and the Court concluded that the broadcaster's right to freedom of expression conflicted with the former mayor's right to privacy. These rights are protected under Articles 10

and 8 respectively of the European Convention on Human Rights (ECHR). Restrictions on freedom of expression are possible when they are prescribed by law and are necessary in a democratic society.

The Court stated that the answer to the question of which right should outweigh the other can be found by looking at all the relevant circumstances of the case. First, the press has a special position, considering their task as a public watchdog and to report on issues of general interest, and considering the public's right to receive information and ideas. Second, public figures have to tolerate greater intrusion in their private lives. It is also relevant whether a breach of Article 8 ECHR is a foreseeable consequence of one's own actions. Finally, the use of a hidden camera should be taken into consideration.

The Court ruled that, to a certain extent, the former mayor had made his private life subject to public debate. Moreover, a mayor should be a role model. However, this does not mean the mayor was not entitled to any legal protection. In the opinion of the court, the behaviour of the former mayor did not justify the breach of his right to a private life. The mayor was free to meet other young men, and the use of a hidden camera did not meet the proportionality requirement.

Therefore, Powned was found to have acted unlawfully. The restriction on freedom of expression was proportional and necessary in a democratic society. The court ordered Powned to ensure that the unlawful images can no longer be found through search engines on the Internet. In addition, Powned was ordered to hand over all the images and recordings to the former mayor, since these might have been tampered with.

• *Rechtbank Amsterdam, 12 augustus 2015, ECLI:NL:RBAMS:2015:5070* (District Court of Amsterdam, 12 August 2015, ECLI:NL:RBAMS:2015:5070)

<http://merlin.obs.coe.int/redirect.php?id=17742>

NL

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Preliminary reference on the use of media players containing "add-ons" which hyperlink to copyrighted content

On 30 September 2015, the District Court of Midden-Nederland sent a preliminary reference to the Court of Justice of the European Union (CJEU), containing the following question: does "communication to the public", within the meaning of Article 3(1) of Directive 2001/29/EC, include providing access to copyright-protected material by media players using "add-ons"? Add-ons are software files made by third parties and

are freely available on the Internet. They can contain hyperlinks to streaming websites on which access to copyright-protected material has been made available, not necessarily with the consent of the copyright holders.

The defendant in the case provides specific media players which, when connected to the Internet and television, are able to stream audiovisual material from the internet instantly. In these media players fourteen “add-ons” - including the well-known 1Channel add-on - are installed which link to streaming websites providing unauthorised access to copyright-protected works like films and TV-series. Several other installed “add-ons” link to websites that do give authorised access, for example YouTube and Vimeo. As such, users can consider installing other “add-ons” by themselves. The media players are widely promoted under slogans such as “Never again pay for films, TV-series and sports!” and “Netflix is a thing of the past!”

The complainant in the case is Stichting Brein, a joint foundation of several Dutch associations who fight against the illegal exploitation of information and protect the interests of Dutch copyright holders. Brein has made eleven claims against the defendant. For the interpretation of Article 3(1) of Directive 2001/29/EC, it needs to be decided if providing and selling the media players that contain the “add-ons” can be qualified as “a communication to the public”. This raises the question of whether a “new public” is reached that was not taken into account by the copyright holders when they authorised the initial “communication to the public”.

Three important sub questions are also included. First, it is asked whether it matters if the copyrighted material has not been made available on the Internet before or only on the basis of a licence. Second, it is asked whether it matters if the “add-ons” that contain hyperlinks to material - for which no consent has been given by the copyright holders - are freely available and might be possible to install by the users of the media players themselves. Finally, it is asked whether it would differ if the websites containing the copyrighted material were also available to the public without using the media players.

Since these questions cannot be answered with regard to the current case law of the CJEU, including the well-known Svensson case (see IRIS 2014-4/3) and the BestWater case (see IRIS 2015-1/3), the Dutch court found it necessary to submit a preliminary reference. In its opinion, the outcome will make the interpretation of the Directive 2001/29/EC on these terms much clearer.

• *Rechtbank Midden Nederland*, 30 september 2015, ECLI:NL:RBMNE:2015:7192 (District Court of the Mid-Netherlands, 30 September 2015, ECLI:NL:RBMNE:2015:7192)
<http://merlin.obs.coe.int/redirect.php?id=17743>

NL

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RO-Romania

Rejected modifications of the Audiovisual Law

On 21 September 2015, the Romanian Senate (upper chamber of the Parliament) rejected modifications of Audiovisual Law no. 504/2002. The Senate’s decision was final.

According to Article 13 of the Audiovisual Law, the appointment of Members of the National Audiovisual Council (Consiliul Național al Audiovizualului, CNA) may be revoked on request by a specialized commission of the Parliament, in case a Member is not able to exert his function for a period longer than 6 months, and in case of a penal conviction applied by a final court decision. According to the rejected modification of Article 13 of the Audiovisual Law, a Member of the CNA would have been automatically suspended in case of a repeated non-compliance or breach of duties as they are laid down in Article 17 of the Audiovisual Law (with regard to the main duties of the CNA) and in case of a criminal prosecution or a criminal indictment. The Council Member would have been suspended either until the end of the criminal prosecution in case it ended without an indictment, or until a final judgment was issued.

Furthermore, a legal initiative for the modification of the Audiovisual Law to oblige all audiovisual media service providers in Romania to subtitle their programs in Romanian language was withdrawn by its proponents on 23 September 2015, after a debate without a final vote in the Chamber of Deputies (lower chamber of the Parliament) (see inter alia IRIS 2010-1/36, IRIS 2011-4/31, IRIS 2011-7/37, IRIS 2013-3/26, IRIS 2013-6/27, IRIS 2014-1/37, IRIS 2014-2/31, IRIS 2014-7/29, IRIS 2014-9/26).

The proponents also intended to extend the duties of the CNA. According to the proposed modifications, the Council would have had to monitor the compliance of all audiovisual media service providers with the obligation to subtitle their programs in the Romanian language, and to monitor the compliance of the providers with the obligation not to air programs which promote anti-European and anti-Romanian cultural values as well as programs which incite: hatred based on race, religion, nationality; chauvinism and separatism; or the breaching of the fundamental legal provisions of Romania. The Draft Law also provided that in localities with more than 20% of the population belonging to a national minority, the distributors are obliged to offer the programs free to air in the languages of the respective minorities (proposed modification of Article 82 paragraph 4 of the Audiovisual Law).

A new extended and more punitive form of Article 95 paragraph 1 of the Audiovisual Law had been proposed, according to which the Council was obliged to withdraw an audiovisual license, or the right to provide an audiovisual media service, for repeated infringements by the media service provider of one of the stipulated deeds. The new form of the text proposed to add to the already provisioned deeds (Article 95, paragraph 1 a) to d) of the Audiovisual Law) the following three paragraphs: the breach of fundamental legal provisions of Romania; breaches of Article 3 paragraph, 4 of the Audiovisual Law; and insulting or slandering people by the moderator of a show or station employees, constituting aggravating circumstances.

• *Propunere legislativă privind modificarea art.13 din Legea audiovizualului nr. 504/2002 - forma inițiatorului* (Draft Law on the modification of Article 13 of the Audiovisual Law no. 504/2002 - proponent's form)

<http://merlin.obs.coe.int/redirect.php?id=17753>

RO

• *The Propunere legislativă pentru modificarea și completarea Legii 504/2002 a audiovizualului - forma inițiatorului* (Draft Law on the modification and completion of the Audiovisual Law no. 504/2002 - proponent's form)

<http://merlin.obs.coe.int/redirect.php?id=17754>

RO

Eugen Cojocariu
Radio Romania International

UA-Ukraine

Transparency of broadcasting enforced

The Ukrainian Supreme Rada (Parliament) adopted, on 3 September 2015, the Statute “On amendments to certain statutes of Ukraine as to the provision of transparency of property of the mass media and implementation of the national policy in the field of television and radio broadcasting” (Про внесення змін до деяких законів України щодо забезпечення прозорості власності засобів масової інформації та реалізації принципів державної політики у сфері телебачення і радіомовлення).

The Statute introduces changes into the Ukrainian Statute “On TV and Radio Broadcasting” (see IRIS 2006-5/34) and “On the National Television and Radio Broadcasting Council” (see IRIS 1998-4/14).

In particular, the amendments make more detailed and thorough demands to broadcasters, as well as operators of digital terrestrial multiplexes and cable TV networks in relation to transparency of these businesses. They provide for the disclosure by entities that directly and/or indirectly control, influence and/or own such businesses, of an annual online publication of data on property structure and on end beneficiaries, including their full names, date of birth, nationality and address, as well as changes thereof. Control

over the implementation of the law is entrusted with the National Television and Radio Broadcasting Council (the audiovisual media regulator).

The amendments also impose on the National Television and Radio Broadcasting Council, as the sole licensing body, an obligation to publish detailed explanations of the motives of its decisions in each of its acts that affect individual licence-holders or applicants for a licence. It includes references to the particular legal provisions, a narration of proven circumstances, and considerations of the Regulator.

The amendments introduce a blanket ban on ownership of or participation in television and radio entities, and multiplex and cable operators for entities and entrepreneurs that are registered in the offshore zones, as defined in a list to be approved by the Government. There will also be a blanket ban for natural persons and legal entities that are residents in a country recognized by the Supreme Rada as an aggressor-state or an occupying state. Previously the Russian Federation was recognized as such a state by a Decree of the Supreme Rada (see IRIS 2015-5/37).

The amendments entered into force on 1 October 2015. Within six months from this date, the subjects of this Statute shall provide first reports on their property ownership and control.

Dunja Mijatović, the OSCE Representative on Freedom of the Media, welcomed the new legislation and expressed her trust that these legislative measures “will be effectively implemented to foster diversity and editorial independence of all Ukrainian media outlets.”

• Про внесення змін до деяких законів України щодо забезпечення прозорості власності засобів масової інформації та реалізації принципів державної політики у сфері телебачення і радіомовлення (Statute of Ukraine “On amendments to certain laws of Ukraine as to provision of transparency of property of the mass media and implementation of the national policy in the field of television and radio broadcasting”) of 3 September 2015, N 674-VIII. Published in the official daily Holos Ukrainy on 12.09.2015 — N 169.)

<http://merlin.obs.coe.int/redirect.php?id=17757>

UK

• Press release of the OSCE Representative on Freedom of the Media “OSCE Representative welcomes law on transparency of media ownership in Ukraine as it comes into force,” 1 October 2015

<http://merlin.obs.coe.int/redirect.php?id=17758>

EN

Andrei Richter

Faculty of Journalism, Lomonosov Moscow State University

US-United States

The obligation to consider fair use

On 14 September 2015, the United States Court of Appeals for the Ninth Circuit held that copyright hold-

ers must consider whether a disputed use of its copyrighted work is protected as fair use by the *Digital Millennium Copyright Act* ("DMCA") before sending a takedown notification. The ruling came in a case that resolved a dispute between a private individual and the company Warner Music Corporation ("Universal") over whether a video that the former litigant posted on YouTube infringed one of their copyrighted works.

On 7 February 2007, the private citizen, a mother of two children, uploaded a 29-second home video titled "Let's Go Crazy' #1" to YouTube, in which her two young children danced to the song Let's Go Crazy by Prince in the family kitchen (the "Video"). Universal sent a notice to YouTube requesting that they take the video down because it contained unauthorized use of the copyrighted song. The woman subsequently filed a lawsuit against Universal arguing that Universal's request should be denied because her use of the copyrighted music is permitted as fair use under the DMCA.

Under Section 512(c)(3)(A) of the DMCA, a takedown notification must include identification of the copyrighted work, identification of the allegedly infringing material, and a statement that the copyright holder believes in good faith that the infringing material "is not authorized by the copyright owner, its agent, or the law." The plaintiff argued that Universal's takedown notification was not made in good faith because they did not perform any analysis of whether her use of the copyrighted material was permitted as fair use under the DMCA. The Court agreed with the plaintiff's argument, finding that a copyright holder can only satisfy the good faith requirement by considering whether the potentially infringing material is fair use. It explained that, while the Court is ultimately in no position to dispute a copyright holder's belief even if it would have reached the opposite conclusion, the copyright holder must be able to form a subjective good faith belief that the allegedly infringing material does not constitute fair use.

The Court acknowledged that there is some level of uncertainty regarding how this might be achieved because the statute does not specify how belief of infringement may be formed or what knowledge may be chargeable to the notifying entity, and it is unaware of any decision that has addressed the need for human review. However, it provided guidance on how the requirement might be met. The copyright holder's consideration of fair use need not be searching or intensive, because it is mindful of the pressing crush of voluminous infringing content that copyright holders face in a digital age. The Court explained in dicta that the consideration of fair use may be sufficient if copyright holders utilize computer programs that automatically identify for takedown notifications content where: "(1) the video track matches the video track of a copyrighted work submitted by a content owner; (2) the audio track matches the audio track of that same copyrighted work; and (3) nearly the entirety . . . is comprised of a single copyrighted work."

The Court also agreed with the plaintiff's request that Universal be required to pay her damages for initiating a takedown notification that was not made in good faith. Under the DMCA, a plaintiff may seek recovery of any damages, including costs and attorney's fees, incurred by the alleged infringer. It found that a copyright holder will be found to have "knowingly materially misrepresented that it held a good faith belief" if the plaintiff can establish two factors: "(1) the defendant subjectively believed that there is a high probability that the video constituted fair use, and (2) the defendant took deliberate actions to avoid learning of that fact." The Court held that Universal did not form any subjective good faith belief about the video's fair use because it failed to consider fair use at all, and knew that it failed to do so.

- The ruling of the United States Court of Appeals for the Ninth Circuit <http://merlin.obs.coe.int/redirect.php?id=17755> EN

- The video is available at: <http://merlin.obs.coe.int/redirect.php?id=17756> EN

Jonathan Perl
Locus Telecommunications, Inc.

Agenda

New report and conference on the role and financing of public service media online announced.

European Audiovisual Observatory announces this year's Brussels autumn conference !

Public Service Media online – their remit and financing will come under the spotlight this autumn in Brussels. The European Audiovisual Observatory has just published a timely IRIS *Special* report which analyses the definition of public service media and current funding models in an online world. The Observatory invites you to an expert conference which will look at the role of public service media online and their financing in an increasingly competitive media landscape.

This free entry public conference will take place in Brussels on Tuesday 17th of November from **12.30 to 15.30**.

The event is hosted by the Representation of the Free State of Bavaria to the EU. Before the conference you are invited to join us for a networking buffet lunch from **12.30 – 13.30**.

The conference will last from **13.30 – 15.30** (NB. This is 30 minutes later than we initially announced)

The working language of this conference is English. Participation is free but upon registration only. To reserve a seat, contact alison.hindhaugh@coe.int
Link to complete programme.

Book List

Tricard, S., *Le droit communautaire des communications commerciales audiovisuelles* Éditions universitaires européennes, 2014 ISBN 978-3841731135

http://www.amazon.fr/droit-communautaire-communications-commerciales-audiovisuelles/dp/3841731139/ref=sr_1_1?s=books&ie=UTF8&qid=1405499942&sr=1-1&keywords=droit+audiovisuel

Perrin, L., *Le President d'une Autorite Administrative Independante de Régulation* ISBN 979-1092320008
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