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of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Perinçek v. Switzerland

On 17 December 2013 the Second Section of European Court of Human Rights (ECtHR) ruled by five votes to two that Switzerland violated the right to freedom of expression by convicting Doğu Perinçek, chairman of the Turkish Workers' Party, for publicly denying the existence of the genocide against the Armenian people (IRIS 2014-2/1 and IRIS 2014-7/2). After referral, on 15 October 2015 the Grand Chamber confirmed by ten votes to seven the finding of a violation of Article 10 of the European Convention on Human Rights (ECHR). In several public speeches, Perinçek had described the Armenian genocide as "an international lie". The Swiss courts found that Perinçek's denial that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years, was in breach with Article 261bis § 4 of the Swiss Criminal Code. This article punishes inter alia the denial, gross minimisation or attempt of justification of a genocide or crimes against humanity. According to the Swiss courts, the Armenian genocide, like the Jewish genocide, is a proven historical fact. Relying on Article 10 ECHR, Perinçek complained before the European Court that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had breached his right to freedom of expression.

The Grand Chamber, in a 128-page judgment, is of the opinion that the Swiss authorities only had a limited margin of appreciation to interfere with the right to freedom of expression, and it takes a set of criteria into consideration when assessing whether Perinçek's conviction can be considered as "necessary in a democratic society". Therefore the Court looks at the nature of Perinçek's statements; the context in which they were interfered with; the extent to which they affected the Armenians' rights; whether there is a consensus among the High Contracting Parties on the need to resort to criminal law sanctions in respect of such statements; the existence of any international law rules bearing on this issue; the method employed by the Swiss courts to justify the applicant's conviction; and the severity of the interference.

The European Court considers Perinçek's statements as a part of a heated debate of public concern, touching upon a long standing controversy, not only in Armenia and Turkey, but also in the international arena. His statements were certainly virulent, but were not to be perceived as a form of incitement to hatred, violence or intolerance. The Grand Chamber emphasises that it is "aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years are to be regarded as genocide, and of that community's acute sensitivity to any statements bearing on that point. However, it cannot accept that the applicant's statements at issue in this case were so wounding to the dignity of the Armenians who suffered and perished in these events and to the dignity and identity of their descendants as to require criminal law measures in Switzerland".

After analysing the relevant criteria and case-specific elements, and after balancing the conflicting rights at issue (freedom of expression under Article 10 versus the right of reputation and (ethnic) dignity under Article 8), the majority of the Grand Chamber concludes that Perinçek's right to freedom of expression has been violated by the Swiss authorities. The Grand Chamber summarises its finding as follows: "Taking into account all the elements analysed above - that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction - the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case". On these grounds, ten of the 17 judges come to the conclusion that the Swiss authorities have breached Article 10 of the Convention. The Grand Chamber majority also confirms that Article 17 (abuse clause) can only be applied on an exceptional basis and in extreme cases, where it is "immediately clear" that freedom of expression is employed for ends manifestly contrary to the values of the Convention. As the decisive issue whether Perinçek had effectively sought to stir up hatred or violence and was aiming at the destruction of the rights under the Convention was not "immediately clear" and overlapped with the question whether the interference with his right to freedom of expression was necessary in a democratic society, the Grand Chamber decided that the question whether Article 17 was applicable had to be joined with the examination of the merits of the case under Article 10 of the Convention. As the Court found that there has been a breach of Article 10 of the Convention, there were no grounds to apply Article 17 of the Convention.

Seven judges however, including the president of

the Court, argued that the conviction of Perinçek in Switzerland did not amount to a breach of his right to freedom of expression. Four of them also argued that Article 17 (abuse clause) should have been applied in this case. The dissenting judges emphasise "that the massacres and deportations suffered by the Armenian people constituted genocide is self-evident. The Armenian genocide is a clearly established fact. To deny it is to deny the obvious", immediately admitting however that this is not the (relevant) question in the case at issue. According to the dissenting judges the real issue at stake is "whether it is possible for a State, without overstepping its margin of appreciation, to make it a criminal offence to insult the memory of a people that has suffered genocide". They confirm that, in their view, this is indeed possible.

• Judgment by the European Court of Human Rights (Grand Chamber), Perinçek v. Switzerland, Application no. 27510/08 of 15 October 2015
http://merlin.obs.coe.int/redirect.php?id=17795 EN FR

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European Court of Human Rights: Pentikäinen v. Finland

On 20 October 2015 the Grand Chamber of the European Court of Human Rights (ECtHR) confirmed that the interference with a press photographer's right to freedom of expression and newsgathering as a result of disobeying a police order to leave the scene of a demonstration that had turned into a riot, can be said to have been "necessary in a democratic society" within the meaning of Article 10 of the European Convention on Human Rights (ECHR). The Grand Chamber comes to the same conclusion as the earlier judgment of the Fourth Section finding that the arrest, detention, prosecution and conviction of the journalist did not violate Article 10 ECHR (see IRIS 2014-4/2 and IRIS 2014-7/2).

The applicant, Markus Pentikäinen, is a photographer and journalist for the weekly magazine Suomen Kuvalehti. He was sent by his employer to take photographs of a large demonstration against the Asia-Europe meeting in Helsinki, and to conduct an extensive report on the demonstration for the paper version of the magazine and also to publish it online immediately, once the demonstration had ended. At a certain moment, the police decided to interrupt the demonstration, which had turned violent, and to seal off the demonstration area. It was announced over loudspeakers that the demonstration was stopped and that the crowd should leave the scene. The police continued to order the crowd to disperse, stating that any person who did not leave would be apprehended.

Hundreds of people then left voluntarily via several exit routes established by the police. When leaving, they were asked to show their identity cards and their belongings were checked. At one point, a police officer told Pentikäinen personally that he had one last chance to leave the scene. Pentikäinen told the police officer that he was reporting for Suomen Kuvalehti and that he was going to follow the event to its end. After the situation inside the cordon had already been peaceful for an hour with around only 20 demonstrators left, the police apprehended the protesters that had not left the scene yet, including Pentikäinen. He told the apprehending officer that he was a journalist and he presented his press card, which the police officer later confirmed. In addition, at the police station, the police were aware that Pentikäinen was a member of the press. He was detained for about 18 hours and later the public prosecutor brought charges against him. The Finnish courts found the journalist guilty of disobeying the police, but they did not impose any penalty on him, holding that his offence was excusable. Apart from the acceptance that the impugned measures were prescribed by law, the Grand Chamber also considers them necessary in a democratic society, as pertinently and sufficiently motivated by the Finnish authorities. In general terms the Court is of the opinion that "a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions". According to the Grand Chamber "the present case does not concern the prohibition of a publication (public disclosure of certain information) or any sanctions imposed in respect of a publication. What is at stake in the present case are measures taken against a journalist who failed to comply with police orders while taking photos in order to report on a demonstration that had turned violent" (§ 93). The Grand Chamber also endorses the argument of the Finnish Government, stating that "the fact that the applicant was a journalist did not entitle him to preferential or different treatment in comparison to the other people left at the scene".

The judgment refers to the obligation of a journalist to behave in a "responsible" way, which includes obeying lawful orders by the police: "Against the background of this conflict of interests, it has to be emphasised that the concept of responsible journalism requires that whenever a journalist - as well as his or her employer - has to make a choice between the two duties and if he or she makes this choice to the detriment of the duty to abide by ordinary criminal law, such journalist has to be aware that he or she assumes the risk of being subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of, inter alia, the police".The Grand Chamber agrees with the Finnish authorities that the impugned measures taken against Pentikäinen were

necessary and proportionate for the protection of public safety and the prevention of disorder and crime. That includes not only his apprehension, but also the near 18-hour detention, the prosecution, and finally the criminal conviction for having disobeyed the police.

The majority of the Grand Chamber, by thirteen votes to four, comes to the conclusion that there has been no violation of Article 10 of the Convention. The Court recalls that it "clearly transpires from the case file that the authorities did not deliberately prevent or hinder the media from covering the demonstration in an attempt to conceal from the public gaze the actions of the police with respect to the demonstration in general or to individual protesters (..). Indeed, the applicant was not prevented from carrying out his work as a journalist either during or after the demonstration". It also stresses that "this conclusion must be seen on the basis of the particular circumstances of the instant case, due regard being had to the need to avoid any impairment of the media's "watch-dog" role". The dissenting judges consider the reasoning and finding by the majority of the Grand Chamber "a missed opportunity", neglecting the rights of journalists to observe public demonstrations effectively and unimpeded, so long as they do not take a direct and active part in hostilities. The four dissenters emphasise "the fundamental role of the press in obtaining and disseminating to the public information on all aspects of governmental activity". In a statement of 12 November 2015 published on the Council of Europe's Platform to promote the protection of journalism and the safety of journalists, the EFJ, the IFJ, Index on Censorship and Article 19 call on Finland and other Council of Europe member states to adopt a clear legal framework for the treatment of journalists during protests, in order to ensure the right balance between press freedom and public order during protests and demonstrations.

• Judgment by the European Court of Human Rights (Grand Chamber), Pentikäinen v. Finland, Application no. 11882/10 of 20 October 2015
http://merlin.obs.coe.int/redirect.php?id=17793 EN FR

• EFJ, IFJ, Article 19, Index, "Finland: Unclear Legal Framework for Guaranteeing Journalists' Rights Covering Protests" 12 November 2015
http://merlin.obs.coe.int/redirect.php?id=17794 EN

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European Court of Human Rights: Couderc and Hachette Filipacchi Associés v. France

The Grand Chamber's judgment in Couderc and Hachette Filipacchi Associés v. France elaborates on the appropriate standards for privacy and media coverage on issues related to the private life of public persons (see also IRIS 2014-3/1). In 2005, the French magazine Paris Match was ordered to pay EUR 50,000 in damages and to publish a statement detailing the judgment of the Versailles Court of Appeal finding a breach of privacy, because of an article which caused damage to Albert II of Monaco. The impugned article in Paris Match contained an interview with the former lover of Albert Grimaldi, Ms Coste, who claimed that Albert Grimaldi, who had become the reigning prince of Monaco, was the father of her son. In particular, the interview described the circumstances in which Ms Coste had met the Prince, their intimate relationship, their feelings, and the manner in which the Prince had reacted to the news of Ms Coste's pregnancy and had behaved towards the child at his birth and afterwards. Ms Conte also revealed that she was living in the Prince's Paris apartment and that she received an allowance from him, being the mother of his illegitimate child. The article was illustrated by several photographs showing the Prince with the child in his arms and with Ms Coste. Considering that the publication of the article in Paris Match interfered with his right to private life and to protection of his own image, the Prince had brought proceedings against Paris Match, seeking damages from the publishing company and an order to publish the court's ruling. The French Court of Cassation confirmed the finding of the invasion of Albert Grimaldi's privacy, inter alia on the grounds that "every person, whatever his rank, birth, fortune or present or future functions, is entitled to respect for his private life".

The publication director, Ms Couderc, and the publishing company, of the weekly magazine Paris Match lodged an application with the European Court of Human Rights (ECtHR) against France, complaining about an unjustified interference with their right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The Fifth Section of the ECtHR, in a judgment of 12 June 2014, held, by four votes to three, that there had been a violation of Article 10 of the Convention. The Chamber judgment, however, did not become final. On request of the French Government, the case was referred to the Grand Chamber. In its judgment of 10 November 2015, the Grand Chamber confirms the finding of a violation of Article 10 ECHR. The Court refers to the relevant criteria applied in other cases in which the rights under Article 8 and 10 needed to be balanced. These criteria are: 1. contribution to a debate of public interest and the subject of the news report; 2. the degree of notoriety of the person affected; 3. the prior conduct of the person concerned; 4. the content, form and consequences of the publication; 5. the circumstances in which the photographs were taken, the way in which the information was obtained and its veracity; and 6. the gravity of the penalty imposed on the journalists or publishers.

In relation to the first aspect, the Court finds that the birth of the Prince's illegitimate son could not come

solely within the private sphere of Albert Grimaldi, as the disclosure of the Prince's fatherhood could be understood as constituting information on a question of public interest, as at the material time the child's birth was not without possible dynastic and financial implications. According to the Court, the impugned information also had a political dimension. It further emphasises "that the press's contribution to a debate of public interest cannot be limited merely to current events or pre-existing debates. Admittedly, the press is a vector for disseminating debates on matters of public interest, but it also has the role of revealing and bringing to the public's attention information capable of eliciting such interest and of giving rise to such a debate within society".

The Grand Chamber is particularly critical of the domestic courts' failure to weigh up the Prince's right to privacy with that of his son and the child's mother. Ms Coste had willingly given the interview and revealed certain details of her private affair with the Prince. The resulting disputed article had made clear that her son's right to public recognition by his father was of utmost importance to her, and was a key reason for her decision to publicise the issue. Hence, Ms Coste "was certainly not bound to silence" and the Prince's private life was not the sole subject of the article. It also concerned the private life of Ms Coste and her son, her pregnancy, her own feelings, the birth of her son, a health problem suffered by the child and their life together. The Court emphasises "that the combination of elements relating to Ms Coste's private life and to that of the Prince had to be taken into account in assessing the protection due to him".

The Court also refers to the fairness of the means used to obtain the information and reproduce it for the public, and the respect shown for the person who is the subject of the news report: Ms Coste herself contacted Paris Match, the veracity of the information is not disputed and the pictures which illustrate the interview were handed over voluntarily by Ms Coste to Paris Match. In addition, the photographs taken with the Prince were not taken without his knowledge and were taken in public places, raising no particular issues. The magazine furthermore cannot be criticised for enhancing the article and striving to present it attractively, provided that this does not distort or deform the information published and is not such as to mislead the reader. With regard to the photographs illustrating the article which show the Prince holding the child, the Court reiterates that Article 10 ECHR leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. While there is no doubt that these photographs fell within the realm of the Prince's private life and that he had not consented to their publication, their link with the impugned article however was not tenuous, artificial or arbitrary, and their publication could be justified by the fact that they added credibility to the account of events. The pictures were neither defamatory, depreciatory or pejorative for the Prince's image.

The Court finally reiterates that in the context of assessing proportionality, "any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions", while the order to pay EUR 50,000 in damages and to publish a statement detailing the judgment cannot be considered as insignificant penalties.

The Court concluded that the arguments for the protection of the Prince's private life and his right to his own image, although relevant, cannot be regarded as sufficient to justify the interference at issue. The French courts did not give due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. They thus exceeded the margin of appreciation afforded to them and failed to strike a reasonable balance of proportionality between the measures restricting Paris Match's right to freedom of expression, and the legitimate aim pursued. The Court therefore, unanimously, concludes that there has been a violation of Article 10 of the Convention.

• *Arrêt de la Cour européenne des droits de l'homme (Grande chambre), Couderc et Hachette Filipacchi Associés c. France, requête n°40454/07 du 10 novembre 2015* (Judgment by the European Court of Human Rights (Grand Chamber), Couderc and Hachette Filipacchi Associés v. France, Application no. 40454/07 of 10 November 2015)
http://merlin.obs.coe.int/redirect.php?id=17792 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: Hewlett-Packard Belgium v. Reprobel

On 12 November 2015, the Court of Justice of the European Union (CJEU) delivered its judgment in Hewlett-Packard Belgium v. Reprobel, which was a preliminary ruling on the interpretation of "fair compensation" under Articles 5(2)(a) and 5(2)(b) of Directive 2001/29/EU (the "InfoSoc Directive"). The case arose in Belgium, when a collective rights management organisation, Reprobel, requested that Hewlett-Packard pay a EUR 49.20 levy for every "multifunction printer" it sold. The dispute reached the Brussels Court of Appeal (Cour d'appel de Bruxelles), which referred a number of question to the CJEU.

Article 5(2)(a) provides that member states may provide for exceptions to the reproduction right "in respect of reproductions on paper or any similar

medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation". Article 5(2)(b) provides for another exception "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation".

The first question was whether, when interpreting the term "fair compensation" in Article 5(2)(a) and Article 5(2)(b), it is necessary to draw a distinction between (a) the making of reproductions by natural persons for private use and for ends that are neither directly nor indirectly commercial and (b) the making of reproductions by natural persons but for a use other than private use or for ends that are directly or indirectly commercial or the making of reproductions by other categories of users. The Court ruled that "since the harm suffered by the rightholders in each of those situations is not, as a general rule, identical", it followed that such a distinction should be drawn.

The second question answered concerned whether the above articles precluded national legislation, such as the Belgian legislation, which authorises a member state to allocate a part of the fair compensation payable to rightholders to the publishers of works created by authors, with the publishers being under no obligation to ensure that the authors benefit, even indirectly, from some of the compensation of which they have been deprived. The Court first noted that publishers are not among the reproduction rightholders listed in Article 2 of the Directive. Moreover, "publishers do not suffer any harm" for the purposes of the reprography exception and the private copying exception. It followed, according to the Court, that publishers cannot receive compensation under those exceptions when such receipt would have the result of depriving reproduction rightholders of all or part of the fair compensation to which they are entitled under those exceptions.

Finally, the Court ruled on whether Article 5(2)(a) and Article 5(2)(b) preclude legislation which combines, in order to finance the fair compensation granted to rightholders, two forms of remuneration: first, lump-sum remuneration paid prior to the reproduction operation by the manufacturer, importer or intra-Community acquirer of devices enabling protected works to be copied, at the time when such devices are put into circulation on national territory, the amount of which is calculated solely by reference to the speed at which such devices are capable of producing copies; and second, proportional remuneration, recovered after the reproduction operation, determined solely by means of a unit price multiplied by the number of copies produced, which also varies depending on whether or not the person liable for payment has cooperated in the recovery of that payment, which, in principle, is to be made by natural or legal persons who make copies of works. The Court held that "a combined system of remuneration of that kind must include mechanisms, in particular for reimbursement, which allow the complementary application of the criterion of actual harm suffered and the criterion of harm established as a lump sum in respect of different categories of users".

• Judgment of the Court (Fourth Chamber) in Case C-572/13 Hewlett-Packard Belgium SPRL v Reprobel SCRL, 12 November 2015
http://merlin.obs.coe.int/redirect.php?id=17796 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV HR

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NATIONAL

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The National Assembly does not accept CEM's report

On 29 October 2015 the National Assembly did not pass the activity report of the Council for Electronic Media (CEM), after the Assembly held a plenary discussion on the matter on 28 October 2015.

Pursuant to Article 39, para 1 of the Radio and Television Act (RTA), CEM has the duty to present a report on its activities for discussion at the National Assembly no later than 31 October for the first half of each year, and no later than 31 March for the second half of the previous year. In addition, CEM has to post the report on its internet webpage.

On 21 May 2015, the Committee on Culture and Media of the National Assembly accepted the activity report of CEM for the period of 1 January 2014 to 30 June 2014, as well as the activity report of CEM for the period of 1 July 2014 to 31 December 2014 with 12 votes "for", 0 "against" and 1 "abstaining". However, a few months later, on 28 October 2015, the National Assembly held a plenary discussion concerning CEM's report from the previous year and did not accept it. The failure to accept CEM's report will produce no legal consequences for the Council.

• Стенограма от заседание 402476 на Комисията по култура и медии на *21.05.2015* г (Shorthand Report from the Session of the Committee on Culture and Media, 21 May 2015)
http://merlin.obs.coe.int/redirect.php?id=17812 BG

• Стенограми от заседанията на Народното събрание на *28.10.2015* г (Shorthand Report from the Plenary Sessions of the National Assembly, 28 October 2015)
http://merlin.obs.coe.int/redirect.php?id=17813 BG

• Стенограми от заседанията на Народното събрание на *29.10.2015* г (Shorthand Report from the Plenary Sessions of the National Assembly, 29 October 2015)
http://merlin.obs.coe.int/redirect.php?id=17814 BG

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Federal Administrative Court declares commercial bumper broadcast by Sat.1 unlawful

In a judgment of 14 October 2015 (Case no. 6 C 17.14), the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) decided that a bumper introducing a block of commercials and linked to a programme announcement was in breach of the rules on separating TV programmes from advertising.

During a break between two early evening programmes, the television broadcaster Sat.1 had broadcast commercial bumpers that included the word "Werbung" (advertisement). The bumpers also contained announcements for the programmes to follow. The *Landeszentrale für Medien und Kommunikation Rheinland-Pfalz* (Rhineland-Palatinate Media and Communication Authority - LMK) considered that this was in breach of Article 7(3) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV) and ordered the broadcaster not to use the bumpers again. The Administrative Court of First Instance dismissed the action brought by the broadcaster and its ruling was later confirmed by the Oberverwaltungsgericht Rheinland-Pfalz (Rhineland-Palatinate Administrative Court of Appeal - OVG).

The BVerwG has now dismissed the appeal lodged on points of law and confirmed the breach of the requirement to separate TV programmes from advertising. In the Court's opinion, advertising must, according to the relevant provision of the Inter-State Broadcasting Agreement, be kept separate by visual or acoustic means appropriate to the broadcast medium or be clearly separate in terms of space from other parts of the programme. "Other parts of the programme" within the meaning of this provision included announcements concerning the broadcaster's own programmes to be shown later.

In the Court's opinion, although the Inter-State Broadcasting Agreement did not call for the visual means separating the programme from advertising (in this case, the display of the word WERBUNG) to be inserted after the last frame of the programme and before the first frame of the advertisement, the design of the word displayed chosen in this case was insufficient to distinguish the advertising clearly from the programme announcement. In view of the visual dominance of that announcement, which was still on screen, the very short display was not sufficient to make it clear enough to the reasonably attentive viewer that advertisements would begin to be shown immediately afterwards.

• *Urteil vom BVerwG vom 14. Oktober 2015 (Az. 6 C 17.14)* (Judgment of the Federal Administrative Courtof 14 October 2015 (Case no. 6 C 17.14))
http://merlin.obs.coe.int/redirect.php?id=18542 DE

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ARD publishes first report on programme producers

The Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (German Association of Public Service Broadcasters - ARD) has published a report on programme producers for the first time. It covers the year 2014, in which the ARD says it commissioned films, documentaries and entertainment programmes worth more than EUR 707.1 million. The aim of the report is to ensure more transparency because the ARD, as a public service broadcaster, is also funded by licence fees collected from the public. Writing in the foreword, the ARD's Chairman Lutz Marmo and its Director of Film Production Dr Karola Wille state: "Most of the money for producing the programmes comes from contributions made by everyone, so we want to make the way we use the money entrusted to us as transparent as possible". The report contains details of commissioned productions, co-productions and mixed productions directly commissioned by the regional broadcasters that make up the ARD and "ARD Degeto". The latter is a wholly owned ARD subsidiary and its shareholders are the nine regional ARD broadcasters and their advertising subsidiaries.

The figures in the report show that around 70 per cent of the ARD and Degeto contracts, worth a total of EUR 493.5 million, were awarded to independent producers. Lutz Marmor added: "Two-thirds of the contracts go to independent producers, whose diverse creativity is indispensable for the quality of our programmes. Working with both small and large production companies enables exciting programme material to be made for the ARD, and especially our audience". The report therefore draws a distinction between whether a production was made by a dependent or independent film and/or TV producer. A company is classified as dependent if the regional broadcaster concerned has a direct or indirect stake in it (for example, the DREFA media group in the case of MDR or the Studio Hamburg Group in the case of NDR). For Degeto, companies in which the regional broadcasters own shares

are considered dependent. On the other hand, according to the report's definition contracts are to be considered awarded to independent producers if the regional broadcaster concerned has neither a direct nor an indirect financial involvement in them.

There are no legal provisions governing the award to production companies of regional broadcasters' commissioned productions and co-productions. According to the judgment of the Court of Justice of the European Union of 13 December 2007 (Case C-337/06, see IRIS 2007-9:3/2), public service broadcasters constitute contracting authorities within the meaning of public procurement law, but the rule in section 100a(2)(1) of the Gesetz gegen Wettbewerbsbeschränkungen (Restraints of Trade Act - GWB) expressly excludes audiovisual services, such as the purchase, development, production or co-production of programmes, from the application of public procurement laws. The core area of the public service broadcasters' business operations thus does not fall within the ambit of formal public procurement law, but the public service broadcasters have reached an internal agreement on the award of commissioned productions and co-productions. The aim of these arrangements is to ensure efficiency in the award of contracts and transparency in the procurement process.

• *Produzentenbericht der ARD* (ARD report on programme producers)
http://merlin.obs.coe.int/redirect.php?id=17818 DE

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ES-Spain

Regulation of the pre-funding of European audiovisual works

The Spanish government approved on 30 October 2015 a Royal Decree that specifies the details of the obligation to pre-fund European audiovisual works which is contained in the General Law of Audiovisual Communications approved by the Parliament in 2010 (see IRIS 2010-4/21).

This law establishes the obligation for audiovisual media services providers to earmark annually a percentage of their operating revenue, accrued in the previous financial year, for the pre-funding of the following European works: cinematographic films (feature-length and short films), films, series and documentaries made for television, and animated films and series. Such percentage refers, according to their operating account, to those national and regional television channels whose programming schedules include works which are less than seven years old by reference to their date of production.

According to this new piece of legislation, that replaces Royal Decree 1652/2004, private providers must earmark 5 percent of their operating revenue to comply with the pre-funding obligation, reserving at least 60 percent of that funding to cinematographic films. Within such 60 percent, 60 percent must in turn be reserved to works of which the original language is any of the official languages of Spain. Additionally, at least 50 percent of the latter 60 percent must be reserved to works of independent producers. In any case, to fulfil the obligation providers can pre-fund, up to 40 percent, other types of audiovisual works produced for television (films, series, documentaries, and animated films and series).

Public providers must earmark 6 percent of their operating revenue to fulfil the pre-funding obligation, reserving at least 75 percent of that funding to cinematographic films. Within such 75 percent, 60 percent must in turn be reserved to works of which the original language is any of the official languages of Spain. Additionally, at least 50 percent of that 60 percent must be reserved to works of independent producers. In any case, to fulfil the obligation, providers can pre-fund, up to 25 percent, other types of audiovisual works produced for television. Nevertheless, at least 50 percent of that 25 percent must be reserved to films or series made for television, whether they are animated of fiction based.

These obligations can be fulfilled taking part directly in the production of the audiovisual works or by acquiring rights for their commercialisation. As regards direct participation, the following alternatives are allowed: in-house production, commissioning, co-production and financial contributions.

• *Real Decreto 988/2015, de 30 de octubre, por el que se regula el régimen jurídico de la obligación de financiación anticipada de determinadas obras audiovisuales europeas* (Royal Decree 988/2015, of 30 October, establishing the legal regime of the obligation on the pre-funding of certain European audiovisual works)
http://merlin.obs.coe.int/redirect.php?id=17816 ES

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FR-France

Production of the opera 'Les Dialogues des Carmélites' banned on television

On 13 October 2015 the Paris Court of Appeal delivered a judgment which will prevent opera lovers seeing a screen version of 'Les Dialogues des Carmélites' produced by Russian artiste Dimitri Tcherniakov, as staged in 2010 and 2011 at the Munich

opera house and recorded on DVD and Blu-ray. The judgment raises the question of the limits to freedom of adaptation and creation. The beneficiaries of the rights of Francis Poulenc, who composed the music, and Georges Bernanos, who wrote the libretto, felt that this production completely transformed and distorted the end of the work, and therefore applied to the courts for a ban on it being performed and on the videogram of it being shown. When the Paris court refused their application, they lodged an appeal.

As France Musique recalls, "The action [of the work] takes place during the French Revolution, centring on the character of Blanche de la Force, a young women who decides to enter a convent. During the period of the Reign of Terror, the nuns refuse to renounce their faith and are condemned to death by a revolutionary tribunal. The work culminates in the finale [04046]: singing the Salve Regina, the nuns go to the scaffold one by one and are guillotined. Blanche, who questions her own faith, finally joins them and is in turn executed". In support of their applications, the rightsholders claimed that the raison d'être and significance of 'Les Dialogues des Carmélites' lies in this finale. In the disputed production, however, in which the action is transposed into the contemporary world and almost all the religious references have been deleted, the scenery comprises a wooden hut surrounded by the crowd, held back by security tape. Blanche arrives to the sound of recorded religious chants and frees the nuns from the hut, bringing them out one by one, choking as if on the point of suffocating; once they are all out, she shuts herself in the hut on her own, and a few moments later the hut explodes. The Court of Appeal recalled the principle according to which "while it may be agreed that directors have a certain degree of liberty in carrying out their work, that liberty is limited by the moral right of authors to respect for their works, in terms of both integrity and spirit, which should not be distorted". In the light of the various literary documents produced, the Court found that the end of the story as produced and as described by the director, Tcherniakov, adhered to the themes (hope, martyrdom, grace, etc) which were dear to the authors of the original work. Nevertheless, and contrary to the findings of the original court, the Court of Appeal found that despite its brevity and regardless of any appreciation of its merit, the staging of the final act modified the work of both Bernanos and Poulenc at a crucial point in the opera, changing the meaning and consequently distorting the spirit of the work.

The original judgment was therefore overturned, and the Court of Appeal upheld the application brought by the applicant parties regarding a ban on marketing the disputed DVD and broadcasting it on television, in all countries. On the other hand, their application for a ban on performing the opera was declared inadmissible because this came up against the principle of res judicata, as the Regional Court in Paris declared itself incompetent in 2012 to deliberate on applications regarding such performances of the opera outside France.

• *Cour d'appel de Paris (pôle 5 ; ch. 1), 13 octobre 2015 - G. Bernanos et a. c/ D. Tcherniakov, Bel Air Media, Mezzo et a.* (Paris Court of Appeal (Centre 5, Chamber 1), 13 October 2015 - G. Bernanos and others vs. D. Tcherniakov, Bel Air Media, Mezzo and others) FR

Amélie Blocman
Légipresse

Classification licence for 'La Vie d'Adèle' withdrawn

After the films "Love", "Saw 3D" and "Nymphomaniac", it is the turn of "La Vie d'Adèle" (English title: "Blue is the Warmest Colour"), which was awarded the Palme d'Or at the Cannes Film Festival in 2014, to have its classification licence issued by the Minister for Culture withdrawn. In the present case, an association and a number of parents of under-18-year-olds had applied to the Administrative Court for the decision by the Minister for Culture granting a classification licence to the film to be changed to include a ban on the film being shown to anyone under 12 years' old and for it to carry a warning pointing out the presence of "realistic sex scenes likely to be disturbing for young audiences". As the Administrative Court had rejected the application, the applicants appealed against the judgment.

The Administrative Court of Appeal noted that the film at issue related the various stages in a passionate love affair between Adèle, a secondary school pupil under 18 years of age, and Emma, a 25-year-old artist. To illustrate their passion, the film includes a number of sex scenes presented in a realistic fashion, in close-up, including one in particular which lasts for almost seven minutes and apparently shows the actresses' genitals. The Court began by stating that if a film included sex scenes that were presented in a realistic fashion and were likely to be disturbing for young audiences, the objectives of protecting children and young people referred to in Article L. 211-1 of the Cinema and Animated Image Code required the Minister with responsibility for culture to combine the classification licence with a blanket ban on showing the film to anyone under the age of 12.

The Court found that the film director's decision to present these scenes in long takes, with neither artifice nor musical accompaniment, his aim being to confer greater emotional intensity on the scenes, made it impossible for anyone watching, and particularly younger audiences, to maintain any distance from what they were being shown. This meant that the realistic sex scenes were indeed likely to be disturbing for young audiences, and the Minister for Culture could not, without committing an error of appreciation, grant a classification licence that did not include a ban on the film being shown to anyone under the age of 12. The Minister was enjoined to reconsider

the application for a classification licence for the film, within a period of two months from the date of notification of the appeal judgment. The other submissions, however, which called on the Court to decide on the age limit to be applied, were rejected, since there are a number of possible options for applying the classification: these are defined in Article R. 211-12 of the Cinema Code (licence with a ban on showing the film to either anyone under the age of 16 or to anyone under the age of 18).

• *Cour administrative d'appel, Paris, (4e ch.), 8 décembre 2015, Association Promouvoir et a.* (Administrative Court of Appeal, Paris (4th chamber), 8 December 2015, the association 'Promouvoir' and others) FR

Amélie Blocman
Légipresse

Audiovisual adaptation of a political book constitutes free-riding

A journalist who wrote a book about a famous political adviser to the Vth Republic felt that a documentary devoted to "the secrets of the Elysée's gurus" broadcast on a public-service television channel two years after the book's publication constituted an infringing adaptation of his work. He therefore had the producer and the channel summoned to face charges of infringement. When the Regional Court in Paris concurred, the producer and the television channel appealed against the judgment. In its decision delivered on 17 November 2015, the Paris Court of Appeal overturned the original judgment. It recalled that neither the investigative journalism, the historical events, the information regarding political life, including a number of anecdotes and revelations, nor the slogans of a political campaign, which belonged to history, could in themselves be protected under copyright. On the other hand, the originality of the work lay in the combination of the author's arbitrary selection of the facts reported and the way in which he analysed them, his drafting skills, and the light he personally shed on the psychology and the actions of the political adviser who is the subject of the book. The Court observed, however, that - unlike the book - the documentary only devoted a few moments to the personal life of the person concerned: the spotlight was not on the person, but on the new strategies of political communication. The Court found that the documentary's lack of emphasis on the personal life of the subject of the book meant that it was not possible to detect the same combination of characteristics that made the book an original work.

The Court then went on to analyse the appellants' subordinate appeal on the grounds of free-riding. It began, before considering the facts of the matter, by recalling the principle according to which free-riding consisted of economic players placing themselves in the wake of other players and deriving undue benefit from the latter's skill, notoriety or investments, even if there were no risk of confusion. Thus legal action claiming free-riding could be founded on the same facts as those alleged in support of legal action for infringement which was rejected under private law on condition that justification of the wrongful behaviour was furnished. In the case at issue, the author claimed that the appellant companies had made systematic wrongful use of the information and anecdotes he had selected for inclusion in his book, on the basis of his analysis, and in an identical or very similar formal presentation. The Court noted that the bibliography and the author's acknowledgements included in the book reflected the scale of the work of investigation, research and selection he had carried out. And indeed both the content and the format of the book had been awarded the Prix du Livre Politique in 2010. For its part, the publishing company which had commissioned and paid for the book and been responsible for its rewriting and layout as well as its printing and promotion, justified the substantial investment it had made. As the Court showed in its analysis of the alleged infringement, the documentary constantly borrowed heavily from the applicant's book, but made no reference at all to it, and did not include the author in the list of people included in the acknowledgements. The Court saw in this a reflection of the editor's warnings as to the unavailability of rights to adapt the book and the author's refusal to collaborate in the production of the documentary in the capacity of a political adviser.

It was therefore judged that by deliberately appropriating, in disregard of the investment made and without providing official acknowledgement, the fruits of the author's intellectual labours made possible thanks to the financial investments of his editors, the producer and broadcaster of the documentary had ensured the success of the documentary at issue at minimum effort and cost to themselves, and were therefore guilty of free-riding. The Court set the figure of EUR 20,000 on the resulting prejudice suffered by both the author and his editor.

• *Cour d'appel, Paris (pôle 5; ch. 1), 17 novembre 2015 -France Télévisions c/ F. Bazin, Edi 8 et a.* (Paris Court of Appeal (Centre 5, Chamber 1), 17 November 2015, France Télévisions vs. F. Bazin, Edi 8 and others) FR

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GB-United Kingdom

Children's right to privacy regarding published photographs upheld

On 21 October 2012, the Mail Online (owned by As-

sociated Newspapers Ltd) published an online article which bore the headline "A family day out". It showed photographs, taken by an unnamed photographer, of musician Paul Weller and some of his children, out shopping in the street, and relaxing at a café on the edge of the street in California, United States. On 16 April 2014, there was a finding at first instance of liability for misuse of private information.

In that judgment, Dingemans J awarded Paul Weller's three children a total of GBP 10,000 damages in respect of seven photographs published. The judge held that the claimants had a reasonable expectation of privacy "because the photographs showed their faces, one of the chief attributes of their respective personalities, as they were on a family trip out with their father". Applying the criteria for balancing Articles 8 and 10 of the European Convention on Human Rights (ECHR) laid down by the Grand Chamber of the European Court of Human Rights (ECtHR) in Von Hannover v. Germany (No.2) (see IRIS 2012-3/1), he held that the balance came down in favour of the claimants.

Associated Newspapers Ltd appealed. On 20 November 2015, the Master of the Rolls, Tomlinson and Bean LJJ upheld Dingemans J's judgment in Weller & Ors v Associated Newspapers Ltd [2015] EWCA Civ 1176, upholding the finding of liability for misuse of private information (and breach of the Data Protection Act).

The Master of the Rolls outlined the "correct general approach to the question whether a publication is in breach of a person's privacy rights". It is a two-stage test, both stages being questions of fact. The first stage asks whether the claimants had a reasonable expectation of privacy. If they did, the second stage is to conduct a balancing exercise as between the individual's right to privacy under Article 8 ECHR and the publisher's right to freedom of expression under Article 10 ECHR. Where the claimant is a child, the Court set out the approach to be followed regarding the reasonable expectation of privacy: (a) a child does not have a separate right to privacy merely by virtue of being a child; (b) there are several considerations which are relevant to children, but not to adults; thus, in a particular case, a child may have a reasonable expectation to privacy whereas an adult does not; and (c) common to both is that all the circumstances of the case should be taken into account in deciding whether there is a reasonable expectation of privacy (relying on paragraph 36 of the Murray case).

The Master of the Rolls then set out how the Murray factors should be applied to children claimants. First, although the photographs were taken in a public place, which was an ordinary incident of living in a free community, the activity was a private family outing and so was protected by the broader right of personal autonomy. Second, the parents had not consented to the taking or publishing of the photographs. Third, the claimants were children and had been identified by name, thus exposing them to a special vulnerability. Fourth, the twins, who were both less than one year old, did not knowingly or accidentally lay themselves open to the possibility of having their photographs taken in the context of an activity that was likely to be recorded in a public manner. Nor did their parents court publicity for them. The fact that a child's parents are celebrities may not, without more, be relied on to argue for a lower reasonable expectation of privacy. Fifth, the identification of the claimants by surname created a risk of embarrassment and potentially more serious threats to their safety, against which they ought to be protected.

Finally, in relation to the balancing exercise, the Court emphasised the following points: the fact that a child's Article 8 rights are engaged as a result of the application of the first stage of the test does not automatically mean that any Article 10 rights will be trumped by the need to consider the best interests of a child. However, the primacy of the best interests of a child means that, where a child's interests would be adversely affected, they must be given considerable weight. While the photographs had only impacted one of the three claimants, the absence of harm could not be determinative as the best interests of the child had to be taken into account.

Associated Newspapers was denied leave to appeal to the Supreme Court.

- Weller & Ors v Associated Newspapers Ltd [2015] EWCA Civ 1176
http://merlin.obs.coe.int/redirect.php?id=17798 EN
- Weller & Ors v Associated Newspapers Ltd [2014] EWHC 1163 (QB)
http://merlin.obs.coe.int/redirect.php?id=17799 EN
- Murray v Big Pictures (UK) Ltd [2008] EWCA Civ 446
http://merlin.obs.coe.int/redirect.php?id=17800 EN

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Regulator ends co-regulatory arrangements for video-on-demand

Ofcom, the UK communications regulator, has decided to take the regulation of video-on-demand services in-house. These services were previously regulated by the Authority for Video on Demand (ATVOD), designated in 2010 as the co-regulator to take the lead in regulating editorial content for these services (see IRIS 2010-5/27). ATVOD originated as a self-regulatory body but was restructured with the creation of a board, with a majority of members independent of the industry. Ofcom retained concurrent responsibility to act in addition to, or in place of, ATVOD.

The services include catch-up TV, on-demand services on TV, and the Internet. They have become increasingly popular with viewers, with the proportion of adult viewers who watch video-on-demand services having increased from 27% in 2010 to 57% in 2014; for younger viewers the figure is 70%.

Following a review, Ofcom has decided to act as sole regulator of these services. It considers that this will create operational efficiencies and will allow editorial content of video-on-demand to sit alongside Ofcom's existing regulation of broadcast content. Thus, the review concluded that, in the light of the increasing convergence of linear services and on-demand programme services, the Single Digital Market Review in the EU (see IRIS 2015-6/13) and the need for a comprehensive solution to the future of content regulation, Ofcom should take sole responsibility for regulation of editorial content from 1 January 2016. Advertising content on video-on-demand services will continue to be subject to a process of co-regulation involving the Advertising Standards Authority.

• Ofcom, "Ofcom brings regulation of "video-on-demand" in house", Press Release, 14 October 2015
http://merlin.obs.coe.int/redirect.php?id=17797 EN

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Ofcom determines RT programme was unjust and unfair in its depiction of BBC reporting on Syria

Ofcom determined that global news and current affairs channel RT, produced in Russia and funded by the Federal Agency for Press and Mass Communications of the Russian Federation, had unfairly and unjustly treated the BBC in its depiction of the British public service broadcaster's reporting on the Syrian crisis.

The BBC complained about an episode of RT's current affairs programme Truthseeker entitled "Media staged Syrian Chem Attack" and broadcast several times in March 2014. The programme made allegations concerning three BBC news reports shown on BBC News at Ten on 29 August 2013, 30 September 2013, and an edition of their current affairs series Panorama, broadcast on 30 September 2013.

The programme used a complaint letter submitted to the BBC by Robert Stuart. Mr Stuart's complaints asserted that the BBC had fabricated an atrocity in a report on Syria, thus attempting to mislead the public and encourage military intervention; the BBC digitally changed the wording used by an interviewee suggesting there had been a chemical weapons attack; the BBC used actors in the reports pretending to be victims of the attack and also relied on claims of a doctor purportedly biased due to family political connections and was lying to win support for British military action; and the BBC used the reports to provoke war and military action in Syria.

The BBC's Editorial Complaints Unit had responded three times in writing to Mr Stuart's complaints, and in extensive detail, concluding that they would not uphold his complaints.However, the programme described Mr Stuart's complaint as "a massive public investigation" with "some extremely disturbing findings". The programme stated that Mr Stuart's complaints to the BBC "remain unanswered" and made no mention of the BBC's detailed response. Further the programme refers to a "statement" in which the BBC said it "stands by its report" thus giving the impression that RT had asked the BBC for its comment ahead of broadcast, whereas it knew nothing of the programme until after broadcast.

The BBC's complaints to Ofcom denied the allegations made in the programme, and Ofcom in its determination made clear it was not a fact-finding tribunal. Ofcom had to instead consider its Code of Conduct drawn up pursuant to section 107 of the Broadcasting Act 1996 to avoid unjust and unfair treatment in programmes.

Rule 7.1 of its Code of Conduct provides that "Broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes". Also, Rule 7.9 of the Code provides, "Before broadcasting a factual programme, broadcasters should take reasonable care to satisfy themselves that material facts have not been presented, disregarded or omitted in a way that is unfair to the individual or organisation". In addition, Rule 7.11 of the Code states, "If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond". Finally, Ofcom had to consider Rule 7.13 of its Code, which reads, "Where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner".

When considering the application of the Code concerning the BBC complaint, Ofcom also applied section 3.4(g) of the Broadcasting Act 1996, whereby it has to uphold an appropriate level of freedom of expression.

The BBC complained that the programme had treated it unjustly or unfairly, because material facts about or related to it were presented, disregarded or omitted in a manner which gave viewers an unfair impression of the broadcaster. Further, the BBC had not been given an appropriate and timely opportunity to respond to the claims made in the programme. Thirdly, the BBC's views were unfairly represented in the programme.

Ofcom upheld the BBC's complaints, considering that the programme suggested the BBC was subject to a significant official enquiry, rather than responding to Mr Stuart's complaints. Secondly, the programme depicted the BBC as not responding to or answering Mr Stuart's complaints, whereas it had and in detail. Thirdly, the allegations against the BBC "fundamentally attacked" the impartiality and integrity of the organisation. Ofcom considered that the BBC ought to have been given sufficient time before the broadcast

of the programme to comment, whereas they were not contacted by RT. The programme gave the impression that the BBC had been approached prior to broadcast and responded solely by saying it stood by its findings. No aspect of the BBC's responses to Mr Stuart were included in the programme.

• Ofcom, Broadcast Bulletin, Issue number 288, 21 September 2015, p. 5
http://merlin.obs.coe.int/redirect.php?id=17737 EN

Julian Wilkins
Blue Pencil Set

GR-Greece

New law regulating licensing of content providers of digital terrestrial television

A new law (the fourth since the launching of private television 25 years ago), regulating the licensing of content providers of digital terrestrial television, has been passed by the Greek Parliament on 24 October 2015.

According to this law, ten-year licences shall be granted through an auction procedure to be held by the independent regulatory authority Ethniko Symvoulio Radiotileorasis (ESR). Candidates should meet requirements such as a minimum share capital (which is EUR 8,000,000 for licensees having a licence of national range to broadcast informative/general content), a minimum number of employees (400 for those that broadcast in national range), and technological equipment.

Before the auction's procedure, the competent Minister shall determine the different categories of licences to be awarded (national or regional range, informative or non-informative programmes, etc.), as well as the auction's starting price, after consultation of the ESR. However this authority actually operates with four members (out of seven), since the term of office of three members ended in April 2015 after several extensions (IRIS 2013-5/31) and, due to a special provision of this law, the term of office has been ended for three other members too. The decision on the designation of six new members of ESR is to be taken in the future.

It should be noted that existing television stations still operate with "temporary" licences under legislative provisions that have been declared unconstitutional by the Plenary Session of the Supreme Administrative Court of Greece (IRIS 2011-1/34).

• Νόμος *4339/2015* «321364365371377364΄377304367303367 παρόχων περιεχομένου επίγειας ψηφιακής τηλεοπτικής ευρυεκπομπής ελεύθερης λήψης (04046) και άλλες 364371361304΄361376365371302» (Act 4339/2015 "Licensing of content providers of free-to-air digital terrestrial television (04046) and other provisions")
http://merlin.obs.coe.int/redirect.php?id=17824 EL

Alexandros Economou
National Council for Radio and Television

HR-Croatia

"Let's choose what we watch"

"Let's choose what we watch" is a national campaign by the Agency for Electronic Media (AEM) and UNICEF, which aims to raise awareness of the importance of media literacy of parents, caregivers, and children, and on the importance of careful selection of media content for children. The campaign urges parents to use the TV ratings system that is designed to draw attention to the suitability of programmes for different age groups.

According to research conducted by AEM and UNICEF in October 2014, children watch television for approximately three hours each day and almost half of that time spent in front of the screen is unsupervised by an adult. This research highlights the important role media plays in a child's development. It is crucial to raise the awareness and media literacy of parents and caregivers, as well as children, on the importance of choosing appropriate content.

The video campaign consists of three videos that indicate the potential harmful effects of violent and unsuitable content, as well as distorted and unrealistic media images. In addition the campaign consists of testimonials by known television personalities, journalists and editors talking about their parenting experiences and the importance of choosing media, as well as watching and talking with children about the programmes that have been watched.

The campaign builds on the existing partnership between the Agency for the Electronic Media and UNICEF, which is focused on improving, realising and protecting children's rights through the media.

• Campaign video "Let's choose what we watch"
http://merlin.obs.coe.int/redirect.php?id=17825 EN

Nives Zvonarić
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IE-Ireland

Broadcaster ordered to pay EUR 140,000 in damages for defaming lawyer

The High Court has awarded EUR 140,000 damages against the broadcaster TV3, for broadcasting a news report which incorrectly identified a Dublin-based lawyer as a defendant on trial for a number of criminal offences. It was the first time the court has ruled on the "offer of amends" procedure under the Defamation Act 2009, where a broadcaster publishes a correction and apology, and the court is asked to determine the issue of damages only.

On 11 November 2013, during TV3's evening news programme, the newsreader was reporting on the ongoing trial of a former lawyer, Thomas Byrne, for a number of criminal offences. However, as the newsreader read the report, the large screen behind the news desk showed a close-up of Byrne's lawyer, David Christie, rather than the Byrne himself. Christie was shown for nine seconds, as the newsreader stated that "the jury in the trial of solicitor Thomas Byrne will resume its deliberations tomorrow morning," and that Byrne had "pleaded not guilty to 50 counts of theft, forgery, using forged documents and deception."

Two days later, Christie wrote to TV3, claiming the broadcast was defamatory, and seeking a retraction, apology and "substantial compensation." On 15 November 2013, TV3 broadcast a correction and apology, stating that there was "absolutely no suggestion that Mr. Christie has been on trial for any such offences. TV3 are happy to acknowledge that Mr. Christie is a well-respected solicitor and would like to apologise to Mr. Christie and his family for any distress and embarrassment that may have been caused".

Following the apology, Christie initiated defamation proceeding against TV3, and TV3 invoked section 22 of the Defamation Act 2013. This section provides that "a person who has published a statement that is alleged to be defamatory of another person may make an offer to make amends", which is defined as publishing a suitable "correction" and "apology", and pay compensation or damages. Where the parties do not agree as to the amount of damages, the High Court can determine the amount.

The High Court judge first considered the "hypothetical scenario of the case being dealt with as a fully contested defamation action heard without a jury, with no mitigating aspects," and considered that he would be "inclined" to award EUR 200,000 in damages. The judge then took into account the "offer to make amends and the apology," and considered it "appropriate to allow a discount in the region of one third." However, the judge did not think it "appropriate" to allow a further discount "in the absence of a more comprehensive apology," and a failure to "take responsibility for the fact" the defence lawyer "was damaged in his reputation." Therefore, the judge awarded EUR 140,000 in damages to the defence lawyer.

• Christie v. TV3 Television Network Ltd [2015] IEHC 694
http://merlin.obs.coe.int/redirect.php?id=17802 EN

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BAI issues guidelines on general election coverage

On 9 November 2015, the Broadcasting Authority of Ireland (BAI) published its new Guidelines on General Election Coverage (for previous guidelines, see IRIS 2014-5/23). The guidelines are designed to provide direction and advice to broadcasters as to how fairness, objectivity and impartiality can be achieved in their coverage of the upcoming general election in Ireland.

Rule 27 of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs provides that broadcasters must comply with guidelines and codes of practice on election and referenda coverage. The new guidelines set out various rules, including on (a) conflicts of interest, (b) opinion polls, (c) social media, (d) political advertising, (e) party political broadcasts, and (f) the moratorium on coverage before the election.

In particular, the moratorium rule provides that radio and television broadcasters shall observe a moratorium on coverage of the General Election, with the moratorium operating from 2 p.m. on the day before the poll takes place and throughout the day of the poll itself until polling stations close. The guidelines elaborate upon application of this rule, including that "broadcasters should avoid airing content (including breaking news stories) that the broadcaster believes is intended and/or likely to influence or manipulate voters' decisions during the moratorium period. This is an editorial matter to be considered on a case by-case basis".

The guidelines come into effect immediately upon the dissolution of the "31st Dáil" (current lower house of the Irish parliament) and will remain in effect until the closing of polling stations on the day of the general election.

• Broadcasting Authority of Ireland, Rule 27 Guidelines - General Election Coverage, November 2015
http://merlin.obs.coe.int/redirect.php?id=17803 EN

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IT-Italy

Constitutional Court rules that shorter hourly advertising limits for pay-TV broadcasters are not in breach of Italian Constitution

On 29 October 2015, by decision no. 210/2015, the Constitutional Court ruled on the constitutional legitimacy of Article 38(5) of Legislative Decree no. 177/2005 (Consolidated Text of the audiovisual and radio media services) as amended in 2010, which states that pay-TV channels are subject to hourly advertising limits shorter than those which apply to free-to-air broadcasters. The Constitutional Court ruled that this provision is in full accordance with the Italian Constitution.

Article 38 provides stricter limits than those provided by Directive 2010/13/EU. The difference between the limit provided for pay-TV, which could broadcast advertising up to a maximum of 12% of each hour, and the one provided for free-to-air channels, 18%, was not stipulated by the European Directive, but established by national rules.

In 2012, TAR Lazio, the Regional Administrative Court of Lazio, made a request to the Court of Justice of the European Union (CJEU) for a preliminary ruling in order to establish whether different hourly advertising limits for broadcasters are compliant with the principle of equal treatment and the freedom of the media. By its judgment dated 18 July 2013 in Case C-234/12, the Court of Justice stated that Italian legislation on television advertising is compliant with European Union law, provided that national courts ensure that the principle of proportionality is respected (see IRIS 2013-8/7).

The Court of Justice underlined that there are two different kinds of interests which should be balanced in the audiovisual sector: the interests of broadcasters, typically financial, and the protection of consumers, as viewers, from excessive advertising, which is an essential aspect of the objective of the Audiovisual Media Services Directive. In addition, the Court finds that the financial interests of pay-TV broadcasters are different from those of free-to-air broadcasters. Whilst the former generate revenue from subscriptions taken out by viewers, the latter do not benefit from such a direct source of financing, and must finance themselves either by generating income from television advertising, or by other sources of financing. Such a difference is, in principle, capable of placing pay-TV broadcasters in a situation which is objectively different, having regard to the economic effect of the rules relating to the transmission time for television advertising on their methods of financing.

After the decision of the CJEU, on 17 February 2014, TAR Lazio made an application to the Constitutional Court raising the question of the constitutional legitimacy of Article 38(5). Consequently, the Constitutional Court ruled that Article 38 is lawful because it serves to achieve a balance of the interests between those of the broadcasters and those of the television viewers. Starting with this consideration, the Constitutional Court examined three questions of TAR Lazio, and ruled that they have not been deemed acceptable.

The question regarding Article 3 of the Constitution (reasonability and equality) was declared inadmissible. Indeed the acceptance of the question might have resulted in the loss of any advertising limits for pay-TV: paradoxically, this result would aggravate the disparity of treatment.

With reference to Article 41 of the Constitution (freedom of enterprise), the question was declared groundless: the limit imposed by Article 38(5) to freedom of enterprise of pay-TV is justified by consumer, competition and pluralism protections.

The last question concerns the misuse of powers: according to TAR Lazio, the Government exceeded the power granted by the Parliament, which delegated to the Government implementation of the Audiovisual Media Service Directive, but did not extend this to the ability to introduce any differentiated advertising limit between pay-TV and free-to-air broadcasters. This violation of the limits of the power delegated to the Government would be in breach of Article 76 of the Constitution. The Constitutional Court also rejected this argument, based on the ruling of the Court of Justice about the ratio of the matter. Indeed the Government had a broad mandate to implement the Directive: it could enact not only the "necessary" amendments, but even those which are "opportune". In addition, in accordance with the case law of the Constitutional Court, when the Government is empowered by the Parliament to implement a European Directive, the boundaries of the legislative power delegated to the Government are marked by the principles laid down by the Directive. Since the Directive allows Member States to establish more detailed rules, including shorter hourly advertising limits, the Italian Government had the power to introduce stricter limits for pay-TV broadcasters, consistent with the decision of the EU Court of Justice.

• *Corte Costituzionale, sentenza n.210 del 29 Ottobre 2015* (Constitutional Court, decision no. 210 of 29 October 2015)
http://merlin.obs.coe.int/redirect.php?id=17801 IT

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AGCOM launches public consultation on changing the regulation on digital terrestrial radio broadcasting

On 16 October 2015, with Resolution no. 577/15/CONS, the Autorità per le garanzie nelle comunicazioni (Italian communication regulatory Authority - Agcom) launched a public consultation on changing the regulation concerning digital terrestrial radio broadcasting (DAB).

This is a further amendment of the regulation regarding the establishment of digital terrestrial broadcasting, adopted by Resolution no. 664/09/ CONS, the goal of which was to help stimulate operators, especially in the local industry, to move to DAB in light of subsequent developments, especially in terms of spectrum resources (see IRIS 2001-2/21 and 2001-4/21).

The new regulation provides that, in order to be beneficiaries of the rights of use for broadcasting frequencies, it is necessary to form consortia composed of analog concession assignees. Considering, however, the current stalemate of the sector, especially at local level, due to the high number of analogue local radio stations in operation, the Authority finds it appropriate to amend the current conditions and introduce more accessible minimum thresholds for local operators. As a result, from the previous criterion of 30% of the assignees, the criterion was introduced which provides for a minimum number of subjects (at least 12).

In parallel, the Authority proposes the introduction of the mechanism of competitive selection procedures for the assignment of rights of use to local operators (as it is currently required for national ones) where an imbalance arises between the available transmission capacity and the number of applicants.

The aforementioned comparative selection procedure will be managed by the Ministry of Economic Affairs and will be activated only in the event that the number of consortia applying for the rights of use is higher than the number of frequency blocks planned.

Finally, the last proposal under consultation is to introduce for both national and local radio network operators using digital technology, more stringent coverage obligations in order to ensure that the assigned frequencies are used effectively and efficiently. Hence, in order to secure the actual implementation of the networks by the national and local operators, it seems appropriate to provide for an obligation to cover 70% of the population of each point of reference, to be reached within four years of the grant of the rights to use frequencies. This provision adds to the coverage obligation of 40% of the population, to be reached by the second year of the granting of the rights to use that provided by the original regulation.

The duration of the public consultation was set at 30 days starting from 27 October 2015.

• *Delibera n. 577/15/CONS "Consultazione pubblica relativa a modifiche e integrazioni al regolamento recante la nuova disciplina della fase di avvio delle trasmissioni radiofoniche terrestri in tecnica digitale, di cui alla delibera n. 664/09/CONS, come modificata dalla delibera n. 567/13/CONS* (Agcom Regulation no. 357/15/CONS)
http://merlin.obs.coe.int/redirect.php?id=17468 IT

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Dutch Supreme Court requests ruling on whether The Pirate Bay "makes a communication to the public"

In its judgment of 13 November 2015, the Dutch Supreme Court asked two preliminary questions to the Court of Justice of the European Union (CJEU), one of which concerning the "communication to the public"-criterion stated in Article 3 paragraph 1 of the EU's Copyright Directive. The questions were formed in relation to pending proceedings between Stichting BREIN, a Dutch collective rights management organisation, and Ziggo and XS4ALL, two Dutch internet service providers (ISPs).

At first instance, Stichting BREIN had asked for an order directed at the ISPs, to block not only all IP addresses currently related to torrent website The Pirate Bay (TPB), but also all IP addresses related to TPB in the future (see IRIS 2012-2/31). After earlier proceedings in lower courts, the Hague Court of Appeals had ruled that copyright had been infringed by subscribers to the ISPs, as well as by TPB, by communicating "art work" (covers of movie-DVDs, game-DVDs, CDs, books etc.). However, TPB was considered to have offered only indirect access to other, "torrentable" works on other computers. In this sense, TPB's conduct did not amount to copyright infringement, according to the Hague Court (see IRIS 2014-3/37).

BREIN appealed to the Supreme Court, disputing the indirectness assumed by the Hague Court. It argued that such access did actually amount to a communication to the public and thus an infringement of copyright. The Supreme Court restated the CJEU's earlier Svensson ruling (see IRIS 2014-4/3), in the sense that

offering hyperlinks constituted a communication to the public. Yet the Supreme Court proceeded by noting that this could not answer the question whether or not TPB made communications to the public. This was because, contrary to the facts of Svensson, TPB did not decide itself which content was placed on its website.

Finally, the following questions were asked: first, is there a communication to the public in the sense of Article 3 paragraph 1 of the Copyright Directive by the administrator of a website, if there are no protected works available on the website, but a system exists whereby meta-information about protected works situated on computers of users is indexed and categorised for users, in such a way that the users can trace, upload and download the protected works based on the meta-information? Second, in the case that the answer to question 1 is negative: do Articles 8 paragraph 3 of the Copyright Directive and 11 of the Enforcement Directive provide space for an order directed at an intermediary as intended in those provisions, in case these intermediaries facilitate infringing conduct of third parties as intended in question 1?

• *Hoge Raad der Nederlanden, 13 november 2015, ECLI:NL:HR:2015:3307* (Supreme Court, 13 November 2015, ECLI:NL:HR:2015:3307)
http://merlin.obs.coe.int/redirect.php?id=17805 NL
• *Gerechtshof Den Haag, 28 januari 2014, ECLI:NL:GHDHA:2014:88* (The Hague Court of Appeals, 28 January 2014, ECLI:NL:GHDHA:2014:88)
http://merlin.obs.coe.int/redirect.php?id=16928 NL

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Court orders Google to provide contact details of e-book pirate

On 5 October 2015, the Hague District Court ruled in Stichting BREIN v Google that Google has to provide the contact details of a user that illegally traded in e-books on Google Play. According to the Dutch court, the protection of intellectual property rights of the publishers outweighs the user's right to freedom of speech and Google's right to conduct a business.

The user offered e-books far below the regular price under the name of Flamenca Hollanda on Google Play Books. On behalf of the Dutch publishers, Stichting BREIN - an anti-piracy foundation - requested Google to take down the illegal account and hand over contact details of the user. Google removed the unlawful account, but refused to provide the contact details. BREIN argued that the refusal was a violation of the Dutch Copyright Act and the dispute was brought to court. Google argued that it did not infringe any copyrights and therefore could not be ordered to hand over personal data of its users. Furthermore, Google argued that it was merely a neutral provider of an online platform and could not be regarded as an infringer.

The Hague District Court ruled that even if the actual infringer is not a party to the proceedings, a request to hand over information can be ordered. The Court also rejected Google's 'neutral provider' defence and held that the fact that Google can be qualified as a neutral provider of an online platform does not preclude that it can be ordered to provide information on its unlawful users.

The Court also explained the conflicting fundamental rights at stake, which are, on the one hand, the right to protection of intellectual property of BREIN (and the publishers), and on the other hand, Google's right to conduct a business and Flamenca Hollanda's right to freedom of speech, which includes the right to remain anonymous and the right to privacy. According to the Court, BREIN had a genuine interest in requesting the information, namely the protection of intellectual property rights, and it sufficiently demonstrated why this interest outweighs the other fundamental rights in question. The Court held that BREIN adequately argued that there are no other remedies available to obtain the contact details of the infringer. Furthermore, the breach of Google's right to free entrepreneurship was limited, because it only has to provide information which it currently has (which Google admitted itself).

In light of this, the Court held that Google should hand over the contact details of the user. However, the court did set one condition, namely that the user is able to (anonymously) submit objections to the transfer of his personal data to BREIN. In a later judgment of the Hague District Court, the user submitted a defence. Nevertheless, the Court stated that this defence is very confusing and not seriously substantiated. According to the Court, it is not clear whether the user opposes the processing of his personal data. Thus, the Court held that Google has to handover the contact details of Flamenca Hollanda. Google confirmed that it will provide this information to BREIN.

• *Rechtbank Den Haag, 5 oktober 2015, ECLI:NL:RBDHA:2015:11408* (District Court of The Hague, 5 October 2015, ECLI:NL:RBDHA:2015:11408)
http://merlin.obs.coe.int/redirect.php?id=17809 NL
• *Rechtbank Den Haag, 6 november 2015, ECLI:NL:RBDHA:2015:12706* (District Court of The Hague, 6 November 2015, ECLI:NL:RBDHA:2015:12706)
http://merlin.obs.coe.int/redirect.php?id=17810 NL

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OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS

Legal Observations
of the European Audiovisual Observatory

Court allows broadcast of secretly recorded footage of prisoner on conditional release

On 20 September 20 2015, the District Court of Amsterdam denied attempts by two plaintiffs to prevent the broadcasting of secretly recorded audiovisual materials. The first plaintiff, Volkert van der Graaf, had been conditionally released from prison, having been sentenced to 18 years after he murdered the Dutch politician Pim Fortuyn in 2002. Graaf had been released six years early from prison on, amongst others, the condition that he would refrain from contact with the media. In the secretly recorded footage at issue in this case, Graaf was recorded stating that he himself contacted a photographer of a Dutch national newspaper to take pictures of him. These pictures were published in a national newspaper in July 2014. He also stated that he violated other conditions of his release, which obliged him to reintegrate in society. Notably, in cases of violation of the conditions of release, individuals may be sent back to prison.

The second plaintiff, another convicted prisoner, secretly recorded the material on two occasions and offered it for sale to a journalist from a Dutch journalistic platform. He renegotiated to meet a third time with the first plaintiff, but he would only do so if the journalist would refrain from broadcasting the prior materials. After a couple of weeks, the platform offered the materials to a Dutch journalistic television show, which is broadcast on national television. This show, called Brandpunt, announced they would use the materials in their upcoming broadcast.

The plaintiffs sought judgment against the broadcaster, to prevent the release of the materials on the grounds that it violated their right to privacy and their portretrecht (Dutch law states an explicit ownership on the publication of your picture). The Court stated that a prevention on the release of the materials is a limitation of the broadcaster's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), which is only allowed when it is prescribed by law and necessary in a democratic society. In order to judge whether respect for the right to privacy outweighs the right to freedom of expression, the Court balances the interests of both parties in the circumstances of the case.

The Court stated that Brandpunt has the right to report on issues that affect society in a way it sees fit. The violation of the conditions of release by the murderer of a high-profile politician is an issue of public interest. Due to the severity of the crime committed by the first plaintiff, the public will continually have an interest in his actions. The audiovisual materials are the core of the broadcasting of this issue, and the nature of the statements in the broadcast justifies the use of the materials. In addition the Court noted that the images and voice-recordings of the first plaintiff circulate widely on the Internet and therefore his portretrecht was not violated. Based on these conclusions, the claims of the plaintiffs were denied.

- *Rechtbank Amsterdam, 20 september 2015, ECLI:NL:RBAMS:2015:6674* (District Court of Amsterdam, 20 September 2015, ECLI:RBAMS:2015:6674)

http://merlin.obs.coe.int/redirect.php?id=17804 NL

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Court rules on lawfulness of allegations made against psychiatrist in investigative programme

On 25 November 2015, the District Court of North-Netherlands ruled on a case about the lawfulness of a television programme in which negative statements about a psychiatrist were made. It decided that the broadcaster did not act unlawfully, but that one of the interviewees - an ex-colleague of the psychiatrist - did make an unlawful allegation.

The broadcaster EO aired an episode of a programme in which the malpractice of a psychiatric facility was investigated, and more specifically the conduct of the claimant in his capacity as leading psychiatrist. Several interviewees gave negative accounts of the claimant's practice, amongst them a former colleague of the claimant. Because of unrest at the facility, the claimant was forced to resign, and he was dismissed from his subsequent employment after the broadcast.

The Court decided that EO did not act unlawfully by making and broadcasting the programme, or by publishing corresponding announcements on its website and Twitter. The programme covered a topic of public interest. EO had collected sufficient evidence for the content, and presented the views of the interviewees as subjective accounts rather than facts, and did not adopt these views itself. The Court did find that the programme gave a one-sided account of the story. Based on the materials, EO could have also given an account which was less onerous on the claimant. However, EO enjoys journalistic autonomy and was free to do as it did.

With regard to the second defendant, the claimant's ex-colleague, the main complaint was that the statements did not have sufficient factual basis. The Court held that the majority of the statements made by defendant were mere opinions that do not need a basis in fact, even if they were of an insulting nature. Some were not pure opinions, but were sufficiently supported by declarations of other sources.

However, the defendant made one very serious allegation of a factual nature which was found to be

unlawful. It was suggested that the claimant, in his role as psychiatrist at the facility, restricted patients' freedom through separation treatment without proper medical or judicial grounds. The Court found that there was no factual basis for this allegation. It was also important that the defendant chose to make this allegation public to a wide audience through a national television programme whereby she had EO incorrectly present her as an experienced psychologist whilst she had only just finished her education.

The Court awarded immaterial damages of EUR 8,000, having particular regard to the harmfulness of the allegation for the claimant's career. Material damages following from the unlawful statement are likely, such as loss of income, and must be assessed in a separate procedure.

• *Rechtbank Noord-Nederland, 25 november 2015, ECLI:NL:RBNNE:2015:5428* (District Court of North-Netherlands, 25 November 2015, ECLI:NL:RBNNE:2015:5428)
http://merlin.obs.coe.int/redirect.php?id=17807 NL

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Dutch telecom company granted exemption from must-carry rules for new app

KPN, a Dutch landline and mobile telecommunications company, has been granted an exemption from the must-carry rules with regard to its new television service. The telecom provider developed a new service in the form of a mobile application that serves a package with 18 linear television channels, catch-up television, on-demand-content, and recording options. A subscriber pays an all-inclusive fee per month to use the service (called "Play"). KPN offers Play as an over-the-top (OTT) service, meaning that the service is available over the open Internet using Internet access from any Internet service provider.

On the basis of Article 6.13 of the Dutch Media Act 2008, KPN is subject to the so-called must-carry rules (see IRIS 2013-7/22 and IRIS 2015-1/34). Section 1 of the article states that every subscriber of a digital programme package should receive at least a standard programme package from its service provider. This means every broadcasting network provider is obliged to retransmit a set of predetermined television and radio channels. Section 2 of the article determines that a standard package should encompass, among others, the three television channels of the Dutch public service broadcasters, and two channels from regional and local public service broadcasters. Article 6.14d of the Dutch Media Act 2008 provides that the Commissariaat voor de Media (the Dutch Media Authority - CvdM) may exempt a company from the must-carry rules under certain conditions.

The CvdM did exempt KPN from the must-carry rules for Play. Initially, the Media Authority decided that the telecom provider had to be subjected to the rules. On appeal, it considered the rationale of the must-carry rules is a pluralistic and diverse programme offering. It reasoned that the market for apps like Play is different from traditional cable networks. In the case of apps, there is no lack of competition or scarcity that may cause an incomplete range of channels for the end user to choose from. Neither are apps like Play, for a significant amount of users, the primary means by which to receive television and radio signals. Furthermore, the CvdM found that KPN had successfully demonstrated that compliance with the must-carry rules in this case would result in sizable extra costs for KPN. Due to the higher costs, Play would no longer be commercially viable. The telecom company would be unable to respond to consumer demands to pay only for content they wish to receive. This would hinder innovation, partly to the detriment to the end user. The CvdM concluded that KPN would be exempted from the must-carry rules until 1 January 2017. At this time the Media Authority will review the situation.

• *Commissariaat voor de Media, Beslissing op bezwaar, 14 juli 2015* (Dutch Media Authority, Appeal Decision, 14 July 2015)
http://merlin.obs.coe.int/redirect.php?id=17811 NL

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Dutch Media Authority imposes EUR 275,500 fine on regional public service broadcaster

In a decision on 22 September 2015, the Commissariaat voor de Media (the Dutch Media Authority - CvdM) imposed a EUR 275,500 fine on Stichting Omroep Limburg (SOL; more commonly known as L1), a regional Dutch public service broadcaster. According to the Dutch Media Authority, the broadcaster L1 was fined because of commercial interference, which violates the Dutch Media Act. Extensive investigation showed several serious violations in the areas of sponsorship and advertisement.

In 2014, website operator and competitor of L1, WijLimburg B.V. filed a request for enforcement with the Dutch Media Authority. WijLimburg B.V. argued that L1 had violated the Dutch Media Act. On account of its supervisory function, the Media Authority opened an investigation into L1's commercial activities.

According to the Media Authority, independence and non-commercialism are important principles in the Dutch public service broadcasting system. They are guaranteed by several articles in the Media Act, including articles on advertising, prohibited communications, sponsorship and the prohibition on subservience to profits of third parties (Article 2.88b(1),

Article 2.89(1b), Article 2.94(1a) and 2.95(1a), Article 2.106, Article 2.108 and Article 2.141(1) of the Dutch Media Act respectively). In the opinion of the Media Authority, L1 violated all these articles. Most of the violations concerned sponsorships. In exchange for a financial contribution to a TV show or TV series, frequent references were made to goods or services of the relevant sponsor.

Due to the violations of these articles, the Media Authority decided to impose a EUR 275,500 fine on L1. The Authority considered the fine proportionate to the discovered violations. Because of the severity of the violations, its extent and the unfair competition which has affected commercial media institutions like WijLimburg B.V., the Media Authority saw no reason to waive enforcement or to lower the intended fines. It emphasised the importance of public service broadcasters consistently checking whether their activities and media content are in accordance with the Media Act.

• *Commissariaat voor de Media, Boetebeschikking van het Commissariaat voor de Media betreffende overtreding door Stichting Omroep Limburg van de artikelen 2.88b, eerste lid (herkenbaarheid reclameboodschappen), artikel 2.89, eerste lid onder b van de Mediawet (vermijdbare uitingen), artikel 2.94 eerste lid onder a en artikel 2.95 eerste lid onder a van de Mediawet (reclameboodschappen), artikel 2.106 en 2.108 (sponsoring) en artikel 2.141, eerste lid van de Mediawet 2008 (dienstbaarheidsverbod), 22 september 2015* (Dutch Media Authority, Decision with regard to the imposition of a fine by the Dutch Media Authority concerning violation of the Media Act 2008 by Stichting Omroep Limburg, 22 September 2015)
http://merlin.obs.coe.int/redirect.php?id=17808 NL

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Report of the Dutch Media Authority on the transparency and independence of Dutch media

For 25 years the Commissariaat voor de Media (the Dutch Media Authority) has been the monitor of the Dutch media sector, seeking to safeguard its pluralistic and independent character. An annual report, called Mediamonitor, gives insights into the sector's latest trends, media corporations and markets (for previous reports see IRIS 2015-1/34, IRIS 2011-5/35 and IRIS 2006-1/33). The latest report, published on 23 November 2015, mainly focuses on two themes: the independence of the media and the transparency of media institutions. Subsequently, it highlights some specific trends shown by contemporary media developments.

Though media independence is one of the core values within the Dutch democracy, the Authority's research has shown increasing pressure on the independence of media editors and reporters. As financial ressources decline - especially for newspapers - the pressure imposed by commercial organisations is expected to rise. Thereby, media concentration will keep intensifying, which could also affect independence.

Transparency in the media sector can as well be seen as a central topic within the supervising tasks of the Dutch Media Authority. The report highlights how Dutch media corporations increasingly tend to develop into multimedia corporations, focusing simultaneously on, for instance, television, online services and web shops. Internationally operating media corporations enjoy an increase in revenue, whereas nationally operating corporations experience the opposite. The latter do not yet seem to keep pace with new market players like Netflix, who successfully utilise new digital possibilities through the local applications of their global services.

An important trend acknowledged in the report is the rapidly growing influence and use of YouTube. In particular, younger age groups are highly attracted by the platform and the amount of YouTube channels and subscriptions is constantly increasing. The Mediamonitor reports on how this development is of specific interest to advertisement industries, since commercial messages that cannot be broadcasted via regular television may easily reach the target audience through specific YouTube channels.

The YouTube trend relates to the more general conclusion that increasing numbers of users are consuming audiovisual content online. The report shows 91% of the Dutch population makes use of the Internet, mostly by using a laptop. It is expected that the smartphone will overtake this role in the coming year. Surprisingly, the amount of time people spend on watching television has increased with 5 minutes a day. Nevertheless, the average time spent on listening to the radio has decreased from 184 to 175 minutes a day.

In anticipation of future trends, the Dutch Media Authority is translating the notion of pluralism into one of their core values. This motivation derives from the ongoing diminution of newspaper editions, especially at the local and regional level. As local and regional press tends to lose its significance, this results in a less well-informed society - a crucial element for a healthy democracy.

With regard to pluralism in relation to television, the report concludes with research on the diversity of TV packages and the general level of consumer satisfaction. Acquisitions in the television media sector show how growing corporations tend to dominate the market, which could negatively influence its pluralistic character. Nevertheless, the average consumer score for diversity is deemed acceptable; probably due to the fact digital TV packages offer a high number of channels.

• *Commissariaat voor de Media, Mediamonitor: mediabedrijven en mediamarkten 2014-2015, november 2015* (Dutch Media Authority, Mediamonitor: media companies and markets 2014-2015, November 2015)
http://merlin.obs.coe.int/redirect.php?id=17806 NL

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Modifications to the Copyright Act

On 3 November 2015, the Romanian President promulgated Act no. 261/2015 on the modification and completion of Act no. 8/1996 updating the copyright and related rights (Legea 8/1996 actualizată privind dreptul de autor şi drepturile conexe - see IRIS 2002-3/20, IRIS 2005-3/34, IRIS 2006-8/27, IRIS 2012-4/38, IRIS 2015-5/30, IRIS 2015-7/27 and IRIS 2015-8/28).

The draft Law modified Article 131(2) b) and Article 154(3) of Act no. 8/1996 and introduced a new letter i) to Article 1311 (1). The modifications were adopted on 23 March 2015, by the Romanian Senate (upper Chamber of the Parliament) and on 7 October 2015, by the Chamber of Deputies (lower Chamber of the Parliament).

The Act modifies Article 131 on the methodologies for negotiations between collective copyright administration organizations and broadcasters. According to the modified version of Article 131(2) b), the negotiation committee includes "one representative of the main associative structures mandated by national users, provided that they have declared the Romanian Office for Copyright on oath, a representative of the top three major users and a representative of two associative structures representative of local users or, failing that, two representatives of local users on the basis of turnover and market share in this area, and - on the other hand - a representative of the public radio as well as a representative of the public television".

Concerning Article 1311 (1), on the main criteria for the negotiations methodologies, a new section i) states that "in the case of broadcasters, remunerations are established through predictable and proportionate negotiations with potential recipients of the programmes, so that users can visualize their payment obligations at the beginning of each fiscal year".

In addition, Article 154(3) is modified by the Article "(3) Within 6 months of the entry into force of this law, the part of the methodologies provided by Article 131 and Article 1311 on the minimum amount for local broadcasters will be renegotiated on the basis of the modifications to the present law, to comply with the proportionality regarding potential recipients of the programmes".

• *Lege nr. 261 din 3 noiembrie 2015 pentru modificarea şi completarea Legii nr. 8/1996 privind dreptul de autor şi drepturile conexe - forma pentru promulgare* (Act no. 261 of 3 November 2015 on the modification and completion of Act no. 8/1996 on copyright and related rights - form sent for promulgation)
http://merlin.obs.coe.int/redirect.php?id=17815 RO

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European Parliament: Resolution "Towards a Digital Single Market Act"

In response to the Digital Single Market Strategy, published by the European Commission last year (see IRIS 2015-6/3), the European Parliament adopted its resolution entitled "Towards a Digital Single Market Act" on 19 January 2016. In brief, the Commission's Strategy was composed of three pillars: (1) creating better access to digital goods and services; (2) stimulating digital networks and innovative services; and (3) maximising the growth potential of the digital economy. It set forth 16 key actions to be initiated by the end of 2016.

With its resolution, the Parliament welcomes the Digital Single Market Strategy. The Parliament agrees with the Commission on many points, and supports many of the Commission's plans announced in the Strategy. At the same time, the Parliament makes various calls on the Commission for further action, and highlights several aspects of the Strategy that it finds particularly important.

The Parliament makes the following comments regarding audiovisual media: to modernise the current copyright framework, the Commission should better identify and take into account the specificities of the creative sector. For example, it should consider the important role of territorial licensing for European films. The Parliament further appreciates the Commission's initiative to analyse the role of online platforms. In that regard the Parliament emphasises that platforms dealing with cultural goods, especially audiovisual media, should be treated in a specific manner that respects the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (see IRIS 2005-10/1).

With respect to the Commission's plan to review the Audiovisual Media Services Directive (AVMSD) and develop a media framework for the 21st century, the Parliament expresses its belief that everyone, including providers of online audiovisual media platforms and user interfaces, should be subject to the AVMSD as far as it concerns an audiovisual media service. The Parliament suggests that Member States could introduce specific rules that aim to preserve diversity of

culture, information, and opinions. According to the Parliament such rules could be part of the effort to ensure the findability of audiovisual content of public interest.

In addition, the Parliament urges the Commission to take into account changing viewing patterns and new ways of accessing audiovisual content. The Parliament suggests the Commission align linear and non-linear services, and set out European-level minimum requirements for all audiovisual media services. The Parliament further calls on the Commission and the Member States to develop the concept of "media services" defined in Article 1 of the AVMSD to take more account of the potential socio-political impact of services. That particularly concerns the impact on diversity of opinion, and the question of editorial responsibility.

The Parliament's resolution will feed into the 16 initiatives that the Commission set out to initiate by the end of 2016. The Parliament will co-legislate with the EU Council of Ministers on the legislative proposals to boost the Digital Single Market.

• Resolution of the European Parliament "Towards a Digital Single Market Act" (2015/2147(INI)), 19 January 2016
http://merlin.obs.coe.int/redirect.php?id=18101 DE EN FR
CS DA EL ES ET FI HR HU IT LT LV
MT NL PL PT SK SL SV

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Channel 4 News breaches accuracy rules during Shoreham air crash report

Ofcom has determined that the Channel 4 News report on 25 August 2015 concerning the aftermath of the Shoreham air show crash two days earlier was in breach of Rule 5.1 of the Ofcom code, as it did not report facts concerning the circumstances of two of the crash victims with due accuracy.

Channel 4 News is produced by Independent Television News (ITN) for Channel 4, a terrestrial public service TV station in the UK. On 23 August 2015 a vintage aircraft crashed onto a main road at Shoreham, West Sussex, England, during a display at an air show, killing 11 people. On 25 August 2015 Channel 4 News held a live piece whereby the reporter, Cordelia Lynch, spoke to the studio news presenter Cathy Newman at the crash scene.

The report, which lasted about three minutes 45 seconds, included pre-recorded footage of the crash scene and also a report about one of the victims, Matt Jones, who was a member of a local football team. This was followed by a still image of Daniele Polito for about four seconds and then an image of Mark Trussler for a further four seconds. These images were accompanied by commentary by Ms Lynch: "By the afternoon Daniele Polito, who was in the car with him [Matt Jones], was also named among the dead. So too was motorcyclist Mark Trussler".

At the time of this broadcast report both Daniele Polito and Mark Trussler had not been formally declared dead. Sussex Police had left it to families whether or not to publicly confirm the death of a victim. By 24 August 2015 some family members had given confirmation that a relative had died, but others had not issued such a confirmation as some hoped their relative might still be alive.

Channel 4 noted that at the time of the broadcast various news media had said Mr Polito and Mr Trussler were "missing feared dead". ITN's editorial team had spoken to a colleague of victim Matt Jones, saying Mr Polito had died. A family member of Mark Trussler asked that they were not to be contacted by the media, and via a note circulated by the Press Standards Organisation stated that "Mr Trussler had been presumed killed". Online news sites made references to Mr Trussler being dead alongside an image of him but the body of the articles stated he remained missing.

Channel 4 said that it was difficult to acquire information from Sussex Police to confirm whether a victim was dead. Channel 4 conceded that there was no direct confirmation as to the deaths of Daniele Polito and Mark Trussler and that there had not been compliance with their editorial procedures. Channel 4 said they had immediately removed references to the deaths from their online site and gave unreserved apologies.

Under the Communications Act 2003 Ofcom has a statutory duty to set standards for broadcast content, including for radio and television news to report with due accuracy and impartiality. These objectives are embodied in section five of the Broadcasting Code. Rule 5.1 contains the requirement for broadcasters to report with "due accuracy". The notes accompanying the rules indicate the term "due" means adequate or appropriate to the subject and nature of the programme. Ofcom stated that it was important for broadcasters to maintain the trust of their viewers.

Ofcom accepted that it was appropriate for Channel 4 to refer to the two victims during the report, but the broadcast description was not accurate, and there was potential for the viewing audience to have been misled to believe both Mr Polito and Mr Trussler had been officially declared dead, whereas there status was still that of missing. Also, the reporting had the effect of causing distress to the victims' family and friends. Ofcom also noted that the inaccurate piece was pre-recorded and so the error should have been identified before broadcast.

Ofcom considered the broadcast of a statement in a news item that two people had died without appropriate confirmation to be a significant lapse in editorial judgment that breached Rule 5.1. Further, Ofcom noted that this was Channel 4 News' third recent breach of Rule 5.1 (see IRIS 2015-7/17 and IRIS 2015-5/16) and requested that they attend a meeting to discuss compliance in this area.

• Ofcom Broadcast Bulletin, Issue number 295, 21 December 2015
http://merlin.obs.coe.int/redirect.php?id=18103 EN

Julian Wilkins
Blue Pencil Set

Agenda

Book List

Tricard, S., Le droit communautaire des communications commerciales audiovisuelles Éditions universitaires européennes, 2014 ISBN 978-3841731135
http://www.amazon.fr/droit-communautaire-communications-commerciales-audiovisuelles/dp/3841731139/ref=sr_1_-1?s=books&ie=UTF8&qid=1405499942&sr=1-1&keywords=droit+audiovisuel
Perrin, L., Le President d'une Autorite Administrative Independante de Régulation ISBN 979-1092320008
http://www.amazon.fr/President-Autorite-Administrative-Independante-R%C3%A9gulation/dp/1092320008/ref=sr_-1_5?s=books&ie=UTF8&qid=1405500579&sr=1-5&keywords=droit+audiovisuel
Roßnagel A., Geppert, M., Telemediarecht: Telekommunikations- und Multimediarecht Deutscher Taschenbuch Verlag, 2014 ISBN 978-3423055987
http://www.amazon.de/Telemediarecht-Martin-Geppert-Alexander-Ro%C3%9Fnagel/dp/3423055987/ref=sr_1_-15?s=books&ie=UTF8&qid=1405500720&sr=1-15&keywords=medienrecht
Castendyk, O., Fock, S., Medienrecht / Europäisches Medienrecht und Durchsetzung des geistigen Eigentums De Gruyter, 2014 ISBN 978-3110313888
http://www.amazon.de/Wandtke-Artur-Axel-Ohst-Claudia-Europ%C3%A4isches/dp/311031388X/ref=sr_1_-10?s=books&ie=UTF8&qid=1405500906&sr=1-10&keywords=medienrecht
Doukas, D., Media Law and Market Regulation in the European Union (Modern Studies in European Law) Hart Publishing, 2014 ISBN 978-1849460316
http://www.amazon.co.uk/Market-Regulation-European-Modern-Studies/dp/1849460310/ref=sr_1_-9?s=books&ie=UTF8&qid=1405501098&sr=1-9&keywords=media+law