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## INTERNATIONAL

### COUNCIL OF EUROPE

#### **European Court of Human Rights: Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary**

On 2 February 2016 the European Court of Human Rights (ECtHR) held that a self-regulatory body (Magyar Tartalomszolgáltatók Egyesülete, MTE) and an Internet news portal (Index.hu Zrt) were not liable for the offensive comments posted by their readers on their respective websites. Anonymous users of MTE and Index.hu had posted vulgar and offensive online comments criticising the misleading business practices of a real estate website. The European Court found that by holding MTE and Index.hu liable for the comments, the Hungarian courts have violated the right to freedom of expression. The present judgment is the first in which the principles set forth in the Grand Chamber's judgment in *Delfi AS v. Estonia* were tested (see IRIS 2015-7/1).

The case started in Hungary in 2010, when a real estate company brought a civil action claiming an infringement of its personality rights, on the basis that its right to a good reputation had been violated by readers' comments posted on MTE and Index.hu. The operators of the websites immediately removed the allegedly offending comments from their websites. In the subsequent proceedings the domestic courts found that the comments at issue were insulting and went beyond the acceptable limits of freedom of expression. They rejected the applicants' argument that they were only intermediaries and that their sole obligation was to remove certain content in the event of a complaint. As the comments attracted the applicability of the Hungarian Civil Code rules on personality rights, and since the comments were injurious for the plaintiff, the operators of the websites bore objective liability for their publication. As the applicants were not intermediaries, they could not invoke the limited liability of hosting service providers, as provided in the Directive 2000/31/EC on Electronic Commerce. Therefore the applicants were held liable for the offensive comments on their websites and they were ordered to pay the court fees, including the costs of the plaintiff's legal representation. No award for non-pecuniary damages was imposed.

MTE and Index.hu complained that the rulings of the Hungarian courts establishing objective liability on Internet websites for the contents of users' comments amounts to a violation of freedom of expression as provided in Article 10 of the European Convention on Human Rights (ECHR). As a consequence, liability

for comments could only be avoided either by pre-moderation or by disabling commenting altogether: both solutions would work against the very essence of free expression on the Internet by having an undue chilling effect. They argued that the application of the "notice and take down" rule, as a characteristic of the limited liability for internet hosting providers, was the adequate way of enforcing the protection of reputation of others.

Referring to *Delfi AS v. Estonia*, the European Court takes as its starting point that the provisions of the Hungarian Civil Code made it foreseeable for a media publisher running a large Internet news portal for economic purposes (Index.hu) and for a self-regulatory body of Internet content providers (MTE), that they could, in principle, be held liable under domestic law for unlawful comments of third-parties. Thus, the Court considers that the applicants were able to assess the risks related to their activities and that they must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10. The decisive question remained whether there was a need for an interference with freedom of expression in the interests of the "protection of the reputation or rights of others". By referring to its Grand Chamber's judgment in *Delfi AS* again, the Court confirms that Internet news portals, in principle, must assume duties and responsibilities. However, because of the particular nature of the Internet, these duties and responsibilities may differ to some degree from those of a traditional publisher, notably as regards third-party content. The Court is of the opinion that the present case was different from *Delfi AS*: though offensive and vulgar, the incriminated comments did not constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence, as they did in *Delfi AS*. Next the Court applied the relevant criteria developed in its established case-law for the assessment of whether the interference in situations not involving hate speech or calls to violence is proportionate. These criteria are: (1) the context and content of the impugned comments; (2) the liability of the authors of the comments; (3) the measures taken by the website operators and the conduct of the injured party; (4) the consequences of the comments for the injured party; and (5) the consequences for the applicants.

The Court considers that the Hungarian courts, when deciding on the notion of liability in the applicants' case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants' right to freedom of expression and the real estate website's right to respect for its commercial reputation. Notably, the Hungarian authorities accepted at face value that the comments had been unlawful as being injurious to the reputation of the real estate websites. The European Court however is of the opinion that the comments were related

to a matter of public interest, being posted in the context of a dispute over the business policy of the real estate company perceived as being harmful to a number of clients. It also observes that the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals - a consideration that reduces the impact that can be attributed to those expressions.

Apart from that, the conduct of the applicants in providing a platform for third-parties to exercise their freedom of expression by posting comments is to be considered as a journalistic activity of a particular nature. Interferences with such activities, including the dissemination of statements made by other persons, may seriously hamper the contribution of the press to discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so. The Court continues to state that the applicants took certain measures to prevent defamatory comments on their portals or to remove them. Both applicants had a disclaimer in their general terms and conditions and had a notice-and-take-down system in place, whereby anybody could indicate unlawful comments to the service provider so that they could be removed. Holding the applicants liable merely for allowing unfiltered comments breaching the law would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.

The Court also emphasises that there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Furthermore there were already ongoing inquiries into the plaintiff company's business conduct. Consequently the Court is not convinced that the comments in question were capable of making any additional and significant impact on the attitude of the consumers concerned.

The Court is of the view that the decisive question when assessing the consequence for the applicants is not the absence of damages payable, but the manner in which Internet portals can be held liable for third-party comments. Such liability may have foreseeable negative consequences for the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet, this being particularly detrimental for a non-commercial website such as MTE. The Court is of the opinion that the Hungarian courts paid no heed to what was at stake for the applicants as protagonists of the free electronic media, as they did not embark on any assessment of how the application of civil-law liability to a news portal operator would affect freedom of expression on the Internet. Indeed, when allocating liability in the case, those courts did not perform any balancing analysis between this interest and that of the plaintiff at all.

Finally, the Court refers once more to *Delfi AS*, in which it found that if accompanied by effective procedures allowing for rapid response, the notice-and-take-down-system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved. The Court sees no reason to hold that such a system could not have provided a viable avenue to protect the commercial reputation of the plaintiff. It is true that, in cases where third-party user comments take the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of the society as a whole might entitle Contracting States to impose liability on Internet news portals if they failed to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties. As the present case did not involve such utterances, the European Court comes to the conclusion that the rigid stance of the Hungarian courts reflects a notion of liability which effectively precludes the balancing between the competing rights according to the criteria laid down in the Court's case law. All these considerations are sufficient for the Court to conclude that there has been a violation of Article 10 of the Convention.

• Judgment of the European Court of Human Rights, case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, Application no. 22947/13 of 2 February 2016  
<http://merlin.obs.coe.int/redirect.php?id=17904>

EN

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## WIPO

### WIPO: New international survey on private copying

The World Intellectual Property Organisation (WIPO) and the Dutch collecting society for private copying remunerations, Stichting de Thuiskopie, have published their latest joint report on the law and practice of private copying systems around the world. The 172-page report has comprehensive information about levy systems and legal developments in 34 countries. The information is provided by collective management societies in the respective countries, with the countries surveyed including 22 countries from the European Union, in addition to Norway, Switzerland, Russia and Turkey.

The report is based on the results of a number of survey questions, concerning a range of levy system issues. These include the type of remuneration system

in operation, who is liable for payment, the role of collective management societies, information on rate setting, and how levies are determined. Further, the survey information also includes the collection process in individual countries, the distribution process, which rightholders are represented, and how the distribution schemes are determined.

In addition, there are extensive sections on national legal developments, and court cases are included for each country. Notably, the survey information includes the applicable national levy rates on various media devices, and revenues from levies, including audio revenues, video revenues, and device revenues. The survey contains revenue data up to 2014 and information about levy systems and tariffs up to October 2015.

Finally, the survey provides a number of conclusions. It states that “total revenues from private copying levy systems have increased from €598 million in 2007 to an all-time high of €804 million in 2014.” The report notes that “underlying this trend is a gradual modernization of levy systems in many countries by extending them to new devices such as smartphones and tablets.” Moreover, “revenues per capita range from less than €0.01 in the United States and Ukraine to €3.48 in Germany in 2014. In 2014, Germany collected the highest private copying levies per capita, closely followed by France and at some distance by Belgium and Hungary.”

• WIPO and Stichting de ThuisKopie, *International Survey on Private Copying: Law & Practice 2015*  
<http://merlin.obs.coe.int/redirect.php?id=17871>

EN

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## NATIONAL

### AL-Albania

#### **Audiovisual Media Authority fails to grant national digital licenses**

On 1 February 2016, the Board of the Autoriteti i Mediave Audiovizive (The Audiovisual Media Authority - AMA) held a meeting with the aim of taking a decision on the licensing process of national commercial multiplexes.

In April 2015 the regulator approved the decision to issue the call for granting national licenses for commercial digital operators, based on the “beauty contest”

procedure, inviting five existing so-called “historical” operators to participate in the call for licenses. The operators invited were the national commercial channel TV Klan, and Top Channel TV and the three existing commercial digital platforms, Digitalb, Supersport, and Tring. The latter decided not to participate in the contest, leaving only four applicants.

In the meantime, the decision-making process in AMA Board has been deadlocked for many months, since two Board members have refused to participate or vote during the meetings. They finally participated in the meeting of 1 February 2016, but the Board failed to reach the quorum of five to grant licenses, as the two above-mentioned members voted against the issuing of licenses. According to AMA’s statement their decision was based on the argument that the beauty contest procedure was supposed to grant licenses for a transition period, meaning within the deadline for digital switchover of 17 June 2015. Since the deadline has passed, they argued that the applicants should not receive the licenses. They based their argument on paragraph 8 of Article 139 of the Law 97/2013 on Audiovisual Media, which states that: “Licensing, according to this article, shall be done by AMA for a transitory period until the termination of the deadline for full switchover to the digital broadcasting, defined by article 136, paragraph 1.” Article 136 sets the deadline for full switchover as 17 June 2015.

Two days before the official deadline, AMA issued a press release explaining that the deadline could not be met due to the various delays in the process. AMA declared that: “in spite of measures taken from our institution, it is impossible to fully implement the Strategy of Switching to Digital Broadcasting and the final deadline of switching off analogue broadcasting, 17 June 2015, cannot be respected. The postponement of the deadline, the delays in digital switchover process, apart from bearing financial costs, also influence the Albanian state’s ability to respect international commitments.”

• *Deklarata e Autoritetit të Mediave Audiovizive, “AMA vendos mosdhënien e licencave kombëtare të transmetimit audioviziv numerik sipas procedurës së Beauty Contest”, 1 Shkurt 2016* (Audiovisual Media Authority’s statement “AMA decides not to grant national licenses for digital audiovisual broadcasting according to the Beauty Contest procedure”, 1 February 2016)

<http://merlin.obs.coe.int/redirect.php?id=17884>

SQ

• *Deklarata e Autoritetit të Mediave Audiovizive, “Mbi mosrespektimin e afatave të digjitalizimit”, 15 Qershor 2015* (Audiovisual Media Authority’s statement “On Failure to Respect the Deadline of the Digitalization Process”, 15 June 2015)

<http://merlin.obs.coe.int/redirect.php?id=17706>

SQ

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## AT-Austria

### Administrative Court classifies video offering of Tyrol daily newspaper as audiovisual media service

In the legal dispute between New Media Online and the Bundeskommunikationssenat (Federal Communications Board) (Case 2015/03/0004), the Verwaltungsgerichtshof (Administrative Court) decided on 16 December 2015 that the video offering on the plaintiff's website was to be classified as an audiovisual media service within the meaning of the Audiovisual Media Services Directive (AVMSD). The video offering, it said, was independent and not (no longer) linked to the journalistic activity.

The Tyrol daily newspaper's online service, which is operated by the plaintiff, provides not only articles but also videos with local news, sports and entertainment footage. In a subdomain, more than 300 videos can be accessed. They are all very short and last several minutes at most. The communications authority KommAustria established in a written decision that the video offering was an audiovisual media service within the meaning of the Österreichisches Audiovisuelles Mediendienstegesetz (Austrian Audiovisual Media Service Act - AMD-G), which transposes the AVMSD into Austrian law. The plaintiff challenged KommAustria's decision (see IRIS 2013-3/9) and took the case to the Administrative Court, which stayed the proceedings and referred two questions concerning an interpretation of the AVMSD to the European Court of Justice (ECJ). The ECJ ruled in a judgment of 21 October 2015 (Case C-347/14) that the provision of short videos on demand - as in the case of the website of the plaintiff in issue - was covered by the term "programme" within the meaning of Article 1(1)(b) of the AVMSD. However, it went on, whether the video offering constituted the principal purpose of the plaintiff's service depended on whether it was independent of the press articles also made available or whether the videos were inseparably linked to the written articles. That assessment, according to the ECJ, was a matter for the referring court. The ECJ pointed out in its decision, however, that based on the evidence available only few videos were linked to press articles (see IRIS 2015-10/3 and IRIS 2015-8/3).

The Administrative Court agreed with the ECJ's assessment and established that the service in question met all criteria required to classify it as an audiovisual media service within the meaning of the Directive, stating that the service offered was comparable in form and content to television programmes because footage like that contained in the short videos on the website was also shown in television programmes. Furthermore, the videos were directed at a mass au-

dience and could therefore have a clear impact. The video service offered in the subdomain was also independent of the press articles in both content and function since there were no indications that the videos were linked to the press articles.

• *Entscheidung des Verwaltungsgerichtshofs (Geschäftszahl 2015/03/0004) vom 16. Dezember 2015* (Decision of Administrative Court (Case 2015/03/0004) of 16 December 2015)  
<http://merlin.obs.coe.int/redirect.php?id=17908>

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## BA-Bosnia And Herzegovina

### New watershed rules for reality TV

On 17 December 2015, the Council of the Communications Regulatory Agency (CRA) adopted a new set of by-laws on audiovisual and radio media services amending and replacing the previous set from 2011, when the provisions of the Audiovisual Media Services Directive were first introduced into the regulatory framework of Bosnia and Herzegovina (see IRIS 2012-1/9). This set includes rules on Audiovisual Media Services (Pravilo o audiovizuelnim medijskim uslugama), rules on Radio Media Services (Pravilo o medijskim uslugama radija), a Code on Audiovisual and Radio Media Services (Kodeks o audiovizuelnim medijskim uslugama i medijskim uslugama radija), and a Code on Commercial Communications (Kodeks o komercijalnim komunikacijama). Both the scope and the titles of the above mentioned regulations remain the same. For the most part, the amendments concern certain technical and stylistic improvements based on the need to update, further elaborate or clarify some definitions and provisions that have turned out to be unclear in practice, such as a clearer procedure for claiming the right of reply and more detailed criteria for license award in a public tender procedure. The procedure for granting local broadcasters an exemption from the obligation to report on European works and European works created by independent producers has also been simplified. In addition, the new regulatory framework introduces certain new requirements for the providers of audiovisual and radio media services, such as the obligation to keep a daily log of all programmes, as well as the obligation to keep programme recordings for 6 weeks instead of 14 days, as previously required.

The most substantial amendment to the Code on Audiovisual and Radio Media Services concerns the introduction of a watershed period for the broadcasting of reality and pseudoreality television programmes. As of 27 January 2016, these programmes may be

broadcast only between 12 p.m. and 6 a.m., unless they are broadcast in encoded form. This measure came in reaction to the parallel emergence of several highly controversial regional reality shows that had been broadcast by big commercial broadcasters for several months, and that contained extremely inappropriate and harmful content broadcast every day, throughout the day. This had prompted a significant public outcry, demands for firmer regulatory action, and even calls for these programmes to be banned altogether.

For the purpose of this provision, the definition of reality programmes has been limited to ostensibly unscripted versions of this television genre that show the life of a group of participants in an isolated space who are permanently in the zone of video cameras and microphones, and who are trying to win a competition or are competing for a prize. This excludes other forms of reality television - such as talent shows - from the obligation to follow the watershed rule. Pseudoreality programmes are defined as scripted programmes that display either reconstructions of authentic events or entirely fictional but real life-like situations the focus of which is on drama and conflicts, for example adultery, criminal acts, difficult life situations etc.

In the course of public consultations, only few commercial broadcasters opposed the proposed measure, claiming it lacked clarity and was restrictive to their editorial freedom. On the other hand, the Council's proposal received wide support from the general public as well as some institutions such as the Human Rights Ombudsman. During public consultations, the Agency received a citizens' petition filed by one NGO, demanding that one of the most controversial reality shows broadcast at that moment, titled *Farma* (the Farm) should either be completely banned or restricted to being broadcast after midnight only.

• *Regulativa iz oblasti emitovanja* (The regulation of broadcasting)  
<http://merlin.obs.coe.int/redirect.php?id=17885>

BS

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## BG-Bulgaria

### On-budget subsidies for public media

On 12 January 2016, Decree No. 380 of 29 December 2015, implementing the state budget of the Republic of Bulgaria for 2016, was promulgated in State Gazette, issue 3/2016. The State Budget Act was promulgated in the State Gazette, issue 96/2015 on 9 December 2015. The State Budget Act provides for

an on-budget subsidy for the Bulgarian National Radio of BGN 42,112,000 (~ EUR 21.530.000) and an on-budget subsidy for the Bulgarian National Television of BGN 65,147,000 (EUR 33.310.000) according to Article 1, paragraph 2. The sum of the state funding received has not changed in comparison to the previous year.

Public suppliers of media services are funded by: a subsidy of the state budget; own proceeds from advertising and sponsorship; and proceeds from additional radio- and TV related activities, etc. (Article 70, paragraph 3 of the Radio and Television Act.) The subsidy from the state budget is for the preparation, creation and broadcast of national and regional programmes. The subsidy is determined on the basis of a rate per one hour of programme which is approved by the Council of Ministers. Furthermore, the subsidy from the state budget is a targeted subsidy to obtain and for major repair of long-term assets as per a list annually approved by the Minister of Finance (Article 70, paragraph 4). By virtue of the Decree No. 380 of 29 December 2015, the Council of Ministers approved a rate of BGN 1,628 (~ EUR 820) per one hour of programme for the Bulgarian National Television to prepare, create and broadcast national and regional programmes (Article 6), and a rate of BGN 410 (~ EUR 210) per one hour of programme for the Bulgarian National Radio to prepare, create and broadcast national and regional programmes (Article 7).

Pursuant to Article 90 of the Act, the total duration of advertising for any individual programme may not exceed 15 minutes per 24 hours and four minutes per hour for Bulgarian National Television (BNT), and six minutes per hour for Bulgarian National Radio (BNR). The Bulgarian National Television has the right to use up to one third of the total volume of advertising time for 24 hours within the time zone 7 p.m. to 10 p.m. With the introduction of digitization at the end of 2013, BNT closed its four regional programmes due to the lack of any private investor's interest to develop a regional multiplex broadcasting these programmes. They were replaced by the national programme BNT2, uniting the production of these regional centres.

• Закон за държавния бюджет на Република България за 2016 г (State Budget Act of the Republic of Bulgaria)  
<http://merlin.obs.coe.int/redirect.php?id=17886>

BG

• Постановление № 380 от 29 декември 2015 г. за изпълнението на държавния бюджет на Република България за 2016 г (Decree № 380 of 29 December 2015 on the implementation of the state budget of the Republic of Bulgaria)  
<http://merlin.obs.coe.int/redirect.php?id=17887>

BG

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## DE-Germany

### Obligation for commercial TV stations to broadcast a regional programme

The commercial television broadcaster Sat.1 must continue to broadcast the Hessian regional programme operated by the external provider TV Illa GmbH. This was decided by the first chamber of the Verwaltungsgericht Kassel (Kassel Administrative Court) in a judgment of 1 December 2015 (Case 1 K 618/13.KS). In reaching this decision, the Court dismissed the commercial broadcaster's complaint against the extension of the broadcasting licence granted by the Hessische Landesanstalt für privaten Rundfunk und neue Medien (Hessian regional commercial broadcasting and new media authority - LPR).

In Germany, section 25(4) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV) obliges the two commercial TV stations with the widest national reach to broadcast regional window programmes. The purpose of this provision is to prevent the development of a dominant influence on public opinion and to ensure diversity. Sat.1 is subject to this rule. The regional window broadcast by Sat.1 is the programme "17:30 Sat.1", the five editions of which are produced by different companies. TV Illa has produced the Hessian regional programme since 2004. The LPR extended its licence in October 2012. After the LPR had dismissed the commercial broadcaster's objection, the latter took legal action against the extension in May 2013. Sat.1 accused the LPR of making formal and substantive legal errors, pointing out that there had been no official invitation to tender for the operation of the regional window. In addition, senior Sat.1 executives voiced fundamental doubts about the constitutionality of the relevant rule of the RStV, stating that it was questionable whether the rule was compatible with freedom of broadcasting enshrined in Article 5(1) of the Grundgesetz (Basic Law).

However, the Administrative Court judges did not share these concerns. In a brief oral statement of their reasons, the President of the 1st Chamber said the challenged decision could not be faulted either formally or in terms of substantive law. However, the Court allowed an appeal to the Hessisches Verwaltungsgerichtshof (Hessian Administrative Court) owing to its fundamental importance.

Sat.1 will exercise this right. In response to an enquiry, a spokeswoman for Sat.1 stated: "This confirms us in our view that that these matters, especially the constitutional issue, must be referred to the highest court for a decision. We will now initially await the written reasons for the judgment, but we already expect to be appealing against the decision". On the

other hand, LPR Director Joachim Becker said in a press release: "I welcome the Court's decision, which proves that the Hessische Landesmedienanstalt (Hessian Regional Media Authority) took the correct decision. It is, of course, important for viewers that the journalistically high-quality regional window produced jointly for Hessen and Rhineland Palatinate be allowed to continue operating".

• *Pressemitteilung des VG Kassel, 2. Dezember 2015* (Press release of the Kassel Administrative Court, 2 December 2015)  
<http://merlin.obs.coe.int/redirect.php?id=17907>

DE

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### Right to quote protects the use of exclusive interviews by competing TV stations

The use of parts of an exclusive TV interview by another TV station can be covered by the right to quote enshrined in section 51 of the Urhebergesetz (Copyright Act). In this case, it is sufficient for the interview to appear as a discussion basis for independent comments made in the television programme using it. This is according to the I. Zivilsenat des Bundesgerichtshofs (1st Civil Chamber of the Federal Court of Justice) judgment of 17 December 2015 (Case I ZR 69/14).

In the case concerned, the two commercial television stations SAT.1 and VOX were in dispute over exclusive interviews conducted by the editors of the SAT.1 programme STARS & Stories with Liliana Matthäus, the ex-wife of footballer Lothar Matthäus. The station ran the interviews on 26 July and 2 August 2010. VOX also wanted to show the interviews in its programme "Prominent" and asked SAT.1 for permission, which was refused. When VOX nevertheless broadcast extracts from the interviews, indicating the source, SAT.1 filed an action with the Landgericht Hamburg (Hamburg Regional Court). The plaintiff claimed that its trade-mark rights as a broadcaster had been breached. It applied for an injunction, a disclosure order and the reimbursement of legal and other costs, and asked the court to establish that the defendant was obliged to pay compensation. In its judgment of 13 September 2011 (Case 310 O 480/10), the Court essentially upheld the complaint. The defendant's appeal to the Oberlandesgericht Hamburg (Hamburg Court of Appeal) was dismissed (judgment of 27 February 2014, Case 5 U 225/11) and a final appeal on points of law was lodged with the Federal Court of Justice.

In contrast to the lower courts, the Federal Court dismissed the complaint. The judges agreed that the



use of the interview images had breached the broadcaster's ancillary copyright, but said the Court of Appeal's observations did not go far enough for the assumption to be made that the breach was unlawful. The Federal Court first of all established that the defendant could not invoke the copyright limitation rule for reporting on daily news events enshrined in section 50 of the Copyright Act. This rule allows journalists to use copyright protected works for reporting on daily news events if it is not possible to obtain the necessary permission or unreasonable to require this be done. In the instant case, it was, however, possible for VOX to obtain the necessary permission from SAT.1 and reasonable to require it do so. Moreover, the Court went on, section 50 of the Copyright Act does not permit reporting on the copyright protected item itself - i.e. in this case the interviews themselves.

However, in the opinion of the Federal Court judges, the defendant could invoke the right to quote governed by section 51 of the Copyright Act. It noted that, contrary to the opinion expressed by the Court of Appeal, in order for this protective barrier to come into play it was not necessary for the quoting party to discuss the work in any great depth. Rather, it was enough for the other party's work to appear as a discussion basis for independent comments made by the quoting party, which was the case here. The VOX programme, the Court continued, had made Liliana Matthäus's self-presentation in the media a subject for discussion and used the interview extracts selected as proof of the fact.

The Federal Court observed that on the basis of the findings made thus far there was no cause to agree with the Court of Appeal's assumption that the extracts selected were key parts of the interview, and that it had been made extremely difficult for the plaintiff to exploit the interview commercially. The Court referred the case back to the Court of Appeal, which must now make the necessary determinations.

• Urteil vom 17. Dezember 2015 - I ZR 69/14 - Exklusivinterview (Pressemitteilung) (Judgment of 17 December 2015 - I ZR 69/14 - Exclusive interview (press release))

<http://merlin.obs.coe.int/redirect.php?id=17897>

DE

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## **ARD and Producers' Alliance negotiate "Framework Agreement 2.0"**

The new Eckpunktevereinbarung 2.0 ("Framework Agreement 2.0") between the regional broadcasters forming the ARD network and the Allianz Deutscher Produzenten - Film & Fernsehen (Alliance of German Producers - Film & Television, or Producers' Alliance) concerns balanced contract terms and conditions and

the fair distribution of exploitation rights between the public service broadcaster and TV programme producers. In this agreement, which came into force on 1 January 2016, the ARD has undertaken to adhere to certain terms and conditions with regard to television productions it has commissioned in the Fiction, Documentary and Entertainment genres. In particular, the agreement contains detailed new rules on "calculating prices" and "rights". For example, for the first time producers can now also assert rights in their works in the case of partially financed TV projects, and exploits those rights themselves from the outset.

As far as the calculation of costs is concerned, the ARD did not recognise important job designations like Producer or Head Author for a TV production in the past, nor did the broadcaster pay general costs, for example for a project-related legal consultation or archive work. The ARD will now notify these and comparable additional costs to the Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten (Commission for Determining the Financial Requirements of Broadcasters - KEF) for the next TV licence period, which begins in 2017. These costs are still subject to approval by the KEF.

Furthermore, for the first time in the history of commissioned productions in Germany producers can now acquire and also exploit their own rights by co-financing TV programme items. To this end, the parties to the agreement have developed a "layered model", which will enable the fair distribution of exploitation rights by means of a uniform catalogue. Producers were also able to negotiate a "success bonus" for their works: and the agreement contains a systematic success-based model, according to which the broadcaster will pay a bonus to honour awards and nominations for the best works, also taking account of the number of repeats of the TV item on the various ARD platforms. The ARD accordingly intends to award an annual amount of EUR 3.2 million in success-based bonuses to individual producers.

Other provisions of the "Framework Agreement 2.0" relate to revenue sharing and the exploitation of unused rights by producers, the creation of an arbitration body, and binding rules on invitations to pitch for contracts and on selection procedures. For example, the ARD will in future also meet a request for the reimbursement of expenses incurred when a producer pitches for but is not awarded a contract. Seven rules for a good pitch are also provided: limitation of number of participants, transparent procedure, concrete specifications, secure funding and a guaranteed broadcast slot, reimbursement of pitching costs, intellectual property protection and uniform continuous assistance.

• *Eckpunkte für ausgewogene Vertragsbedingungen und eine faire Aufteilung der Verwertungsrechte bei Produktionen für die Genres Fiktion, Unterhaltung und Dokumentation* (Guidelines for balanced contractual terms and conditions and the fair distribution of exploitation rights in the case of productions for the genres Fiction, Documentary and Entertainment)

<http://merlin.obs.coe.int/redirect.php?id=17905>

DE

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### **Public service TV broadcasters' framework agreement with Producers' Alliance**

After three years of negotiations, the public service broadcasters ARD and ZDF have renegotiated the "Framework Agreement on contractual co-operation on joint film/television productions and comparable cinema co-productions" with the Allianz Deutscher Produzenten - Film & Fernsehen (Alliance of German Producers - Film & Television, or Producers' Alliance). The Producers' Alliance is an independent association representing the interests of German producers of audiovisual works. It represents around 230 members, which makes it the largest association of its kind in Germany. The agreement lays down the basic conditions for drafting contracts for commissioned productions.

The changes to the renegotiated framework agreement concern, inter alia, commercial video-on-demand rights (VoD rights) to feature length films in which the public service broadcasters have a financial interest as co-producers. Among other things, the participants have decided that only producers will be entitled to claim pay-VoD rights in the future, provided that the broadcasters' share of the production costs is below 50 percent. The agreement also contains an obligation for the broadcasters to make use of geolocation measures when streaming their programmes. These measures include the use of technologies that impose territorial limits on calling up VoD items. New rules have also been established on the exploitation of subscription video-on-demand (SVoD) rights. This is a subscription model for the customer, who pays a fixed price for unlimited access to the range of programmes offered. ARD and ZDF are concerned that an SVoD service will have an adverse effect on the exclusivity of their broadcasting rights, so it was agreed that producers may exploit their SVoD rights no earlier than 36 months after the broadcasters have begun to use an item. Other important aspects of the renegotiated agreement are the exploitation of pay-TV rights and the increased restriction of decision-making and contract execution times. The contract terms and conditions for producers when public service broadcasters have only a minor financial involvement have also been improved.

• *Eckpunktevereinbarung zwischen ARD und ZDF und der Produzentenallianz* (Framework Agreement between ARD and ZDF and the Producers' Alliance)

<http://merlin.obs.coe.int/redirect.php?id=17901>

DE

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### **Youth channel planned by ARD and ZDF confirmed by signing of 19th Amendment to the Inter-State Broadcasting Agreement**

The 19. Rundfunkänderungsstaatsvertrag (19th Amendment to the Inter-State Broadcasting Agreement - RÄStV) was signed on 3 December 2015. The Länder heads of government decided to adopt the amendment, which focuses on youth programmes and youth media, at their annual conference on 8/9 October 2015. Despite the fears of a licence fee-funded distortion of competition expressed by the Verband Privater Rundfunk und Telemedien (Association of Commercial Broadcasters and Telemedia - VPRT), the signing of the agreement paves the way for the online-based range of youth programmes planned by ARD and ZDF. The agreement is scheduled to come into force on 1 October 2016.

Owing to the steadily rising average age of viewers and the resulting "separation of the generations", the public service broadcasters ARD and ZDF want to introduce an "only online" range of youth programmes, which they plan to launch for 14 to 29 year olds on third-party online platforms. In view of the change in younger viewers' consumption behaviour, it is hoped that this will ensure that the public service broadcasters can also fulfil their programming remit in the future. The youth channel will provide a mixture of information, pop culture and lifestyle subjects, education, fiction, comedy, game shows and events. In order to be able to produce this offering on a cost-neutral basis, the channels EinsPlus and ZDFkultur are to be discontinued.

The agreement also focuses on better protection for young people in the media world. The planned changes to the Jugendmedienschutzstaatsvertrag (Inter-State Agreement on the Protection of Minors in the Media) will also result in its provisions being brought into line with the rules of federal and EU law. For example jugendschutz.net, the joint youth-protection body of the Länder set up by the Oberste Landesjugendbehörden (Supreme State Youth Authorities) and for which the plan has so far been only to provide funding on a temporary basis, is to be given permanent funding by the Länder. Furthermore, the policy-making and procedural powers of the voluntary self-regulation bodies are to be strengthened.

- *Entwurf des 19. Rundfunkänderungsstaatsvertrages* (Draft of the 19th Amendment to the Inter-State Broadcasting Agreement)  
<http://merlin.obs.coe.int/redirect.php?id=17906>

DE

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## ES-Spain

### **CNMC decides on short news reports for football matches**

On 28 January 2016, Spain's National Authority for Markets and Competition (CNMC) adopted a decision ordering the Professional Football League (LFP) to give a 90-seconds short news summary of every game to every television station and allow free access to stadiums to broadcasters. However, the channels could only show the summary twice in a 24 hour period.

In its decision, the CNMC stressed "the unquestionable social relevance of professional sports" in Spain. However the regulator also considered that 90 seconds is enough to guarantee the citizens' rights to be informed, and therefore no economic exchange is foreseen for their broadcasting.

The decision followed a complaint issued in September 2015 by Mediaset Spain, a subsidiary of the Italian businessman Silvio Berlusconi, against the LPF over restrictions of access to the top football matches. The CNMC issued interim measures ensuring Mediaset access to stadiums.

The LPF, which sold free-to-air rights to the public RTVE broadcaster, considered this should mean one-and-a-half minutes on all games in a single day. Mediaset argued that there should be coverage of each game and refused to sign the LPF accreditation terms to get access to stadiums.

The Spanish legal framework requires the television rights holder to provide a 90-seconds short news summary to others broadcasters. This service shall only be used for general news programmes.

- *Resolución por la que se resuelve el conflicto iniciado por Mediaset España Comunicación, S.A. contra la Liga Nacional de Fútbol Profesional en relación con el Artículo 19.3 de la Ley 7/2010, de 31 de abril, General de la Comunicación Audiovisual, CNMC* (Resolution on the conflict initiated by Mediaset Spain against the Professional Football League, in connection with Article 19.3 of General Law 7/2010, of 31 April, on Audiovisual Communication, CNMC)  
<http://merlin.obs.coe.int/redirect.php?id=17894>

ES

**Sonia Monjas-González**  
CNMC

## FR-France

### **Conseil d'État approves appointment of new France Télévisions President**

On 23 April 2015 the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) appointed Delphine Ernotte Cunci, former Director-General of Orange, as President of France Télévisions. To achieve greater transparency, the Act of 15 November 2013 amended Article 47-4 of the Act of 30 September 1986, giving the CSA the power to appoint the presidents of the public-sector audiovisual companies (France Télévisions, Radio France, and the company responsible for audiovisual broadcasting outside France); this power had previously been exercised by the French President. The CSA was keen to have a totally secret process, but the appointment of the new President of France Télévisions attracted considerable criticism. Contesting the appointment, two of the unions active within the company had even called for the CSA's decision to be annulled on the grounds that it had exceeded its powers.

In its decision, the Conseil d'État (the Council of State), as the highest administrative tribunal in France, recalled that under the terms of the first two paragraphs of Article 47-4 of the Act of 30 September 1986, "The Presidents of the company France Télévisions, the company Radio France, and the company responsible for audiovisual broadcasting outside France shall be appointed for a period of five years by the CSA, by the majority of its component members. The appointments shall be the subject of a reasoned decision based on criteria of competence and experience. Applications shall be submitted to the CSA, which shall assess them on the basis of a strategic project."

Regarding the selection procedure, the Conseil d'État noted that the appellants were not justified in claiming that the decision at issue had been the result of a flawed procedure because the CSA had not published the names of the candidates. There was in fact no statutory provision or regulation - including Article 47-4 of the Act of 30 September 1986 or any general principle of law - that required the CSA to publish the names of applicants or the names of those candidates selected for interview. Regarding the choice of the candidate, the Conseil d'État recalled that, in deciding to appoint Ms Cunci, the CSA had taken account of the competencies that she had been able to develop in the telecoms and digital sector, particularly in terms of managerial skills, before going on to consider the relevance of her application in the light of its strategic project, one of the main areas of which covered the digital development of the services offered by the France Télévisions group. Thus, by consider-

ing that the candidate met the two-fold criterion of competence and experience required of a President of France Télévisions, and by appointing her to the post by means of a decision that was sufficiently reasoned, the CSA had not committed a manifest error of appreciation, and the appeal for the disputed decision to be annulled was deemed inadmissible.

• *Conseil d'Etat, (5e et 4e sous-sect.), 3 février 2016, Syndicat national des professionnels de la communication et de l'audiovisuel CFE-CGC et autres* (Conseil d'État, (5th and 4th sub-sections), 3 February 2016, CFE-CGC national trade union of professionals in the communication and audiovisual sectors, and others) FR

**Amélie Blocman**  
Légipresse

**Audiovisual communication companies have exclusive right to authorise making their programmes available on demand, including via deep links**

On 2 February 2016 the Court of Appeal in Paris delivered an interesting decision in the case between Play Media, editor of the Play TV site, and France Télévisions. The site had been offering a free and subscription-free service broadcasting television channels live since 2010, for which the regional court in Paris (Tribunal de Grande Instance - TGI) had ordered it to pay France Télévisions more than a million euros (IRIS 2014-10/13). In refusing Play Media the right to claim it was acting on the must-carry principle instituted by the Audiovisual Act of 30 September 1986, in which the TGI found that broadcasting France Télévisions' programmes without its authorisation constituted an infringement of copyright and neighbouring rights, and found wrongful use of the community and French brand names owned by the public-sector television group.

Play Media appealed against the judgment, and although the initial judgment was upheld, a new point of law came to light. In reaction to the initial court's decision, Play Media had in fact introduced on 20 November 2014 a new model for broadcasting and using France Télévisions' channels, based this time not on capturing, modifying and rebroadcasting their terrestrial or satellite signal on the Internet, but on the use of deep links directing Internet users to France Télévisions' Pluzz site and allowing direct, automatic access to its programmes. The deep nature of the links is a feature of the technique of 'transclusion' - the links do not take Internet users to the Pluzz site on which the broadcasts may be viewed, but enables Internet users already on the playtv.fr site to gain direct access to specific works and to view them online after the display of advertising "play-rolled" in by Play Media. France Télévisions considered that this new system was as much an infringement as the previous system, despite recent jurisprudence at the Court of Jus-

tice of the European Union (CJEU) on the subject of hyperlinks. Play Media's response was that it was using technology that was in frequent use, and recognised on the Internet. It referred to the CJEU's Svensson judgment delivered on 13 February 2014 in considering that broadcasting on its Internet site did not constitute broadcasting to a new audience but rather to the same audience, which was moreover counted in favour of the same editor, and that, because it was not a new audience, communication to that audience did not require the authorisation of the copyright holders.

The Court noted that from 20 November 2014 onwards the audiovisual communication company had only infringed France Télévisions' neighbouring rights, as covered by the second paragraph of Article 3 of Directive 2001/29/EC, and not its copyright protection, such that the Svensson judgment and the BestWater International order were not applicable in the case at hand. The Court added that it transpired from the CJEU's C-More Entertainment AB judgment of 26 March 2015 firstly that the notion of 'communication to a new audience' via the use of hyperlinks, as defined in the Svensson judgment and the BestWater International order, did not apply to the protection of the neighbouring rights of audiovisual communication companies; and secondly that the French legislator was entitled to afford holders of such neighbouring rights protection that was not specifically included in Directive 2001/29/EC. Thus, by virtue of the provisions of Article L 216-1 of the Intellectual Property Code, interpreted in the light of Article 3 (2) of Directive 2001/29/EC, France Télévisions, in its capacity as an audiovisual communication company, had the benefit of the exclusive right to authorise making its programmes available to the public online and on demand, including via the use of deep links using 'transclusion' technology.

By allowing access on its playtv.fr site since 20 November 2014 to the programmes broadcast by France Télévisions on its own Pluzz site using deep links and 'transclusion' technology without the company's authorisation, the appellant company had infringed the neighbouring rights of the audiovisual communication company owned by France Télévisions. The Court prohibited its insertion of these deep links, on pain of financial penalty. Thus the initial court's decision was upheld and the company was ordered by the Court of Appeal to pay France Télévisions 200 000 euros in respect of these practices (plus 150 000 euros on the grounds of unfair competition).

• *Cour d'appel de Paris (pôle 5, ch. 1), 2 février 2016 - Playmedia c/ France Télévisions* (Court of appeal in Paris (section 5, chamber 1), 2 February 2016 - Play Media vs. France Télévisions) FR

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## Report on application of legislation on the independence of the public audiovisual media

On 21 January 2016, French MP Marcel Rogemont submitted his report on application of the Act of 15 November 2013 on the independence of the public audiovisual media. In it he made 21 proposals. It should be borne in mind that the most recent legislation reforming the audiovisual sector substantially reinforced the powers of the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA). Firstly, regarding the public audiovisual sector by giving it the power to appoint the Presidents of the companies France Télévisions, Radio France and France Média Monde, previously in the hands of France's President; and secondly regarding its powers to regulate the sector's economy. At the same time the Act has also increased Parliament's control over the CSA's exercise of its missions, as the appropriate committees in each chamber may express their opinion on the CSA's application of the Act. This report is the first time this provision has been applied.

The author begins his report by examining the conditions under which the CSA appointed the Presidents of the companies Radio France in 2014 and France Télévisions in 2015. Given the difficulties encountered and the criticisms put forward (see article on the Conseil d'État's decision elsewhere in this issue), the author of the report favours the CSA's choice focusing more clearly on criteria of 'managerial competence and experience', and removing the reference to a 'strategic project' from the appointment procedure. He recommends maintaining the confidentiality of the procedure, which faced serious criticism when the President of France Télévisions was appointed, partly to enable a wide range of candidates to come forward, and partly to systematise prior scoping by the State in the form of a road map published in advance of the appointments. Thus Mr Rogemont deplored 'the clear violation of the secrecy of the deliberations in the procedure for the appointment of Ms Ernotte'. He felt that this 'compromised the credibility and legitimacy of the institution'. He also stressed the need to clarify the distribution of responsibilities between the shareholder State, the Parliament, and the regulator, by reverting to giving the CSA the task of defining the strategic objectives of the public-sector audiovisual media, thereby refocusing it on the supervision of implementation of those objectives. He would also like to see the CSA stop issuing opinions on the public audiovisual sector companies' contracts of aims and means. Regarding the reinforcement of the economic dimension of regulation of the audiovisual sector, the author of the report calls on the CSA to exercise greater transversality in dealing with applications, and invites the authorities to construct a clear doctrine on the use of impact studies. It was felt that these studies constitute undeniable progress in terms of the transparency of the CSA's action, but they

should not result in the institution becoming paralysed. As for the CSA's supervision of the operators' compliance with their undertakings, the author of the report wondered why the CSA made so little use of its power of sanction. He recommends reinforcing the legislative framework applicable if the company capital of the authorisation holders changes, in order to avoid the risk of speculation regarding terrestrial frequencies in the public sector.

• *Assemblée Nationale, Rapport d'information sur l'application par le Conseil supérieur de l'audiovisuel, de la loi n° 2013-1028 du 15 novembre 2013 relative à l'indépendance de l'audiovisuel public, présenté par M. Marcel Rogemont, 21 janvier 2016* (National Assembly, Report on application of the Act of 15 November 2013 on the independence of the public audiovisual media, by Mr. Marcel Rogemont, 21 January 2016)

<http://merlin.obs.coe.int/redirect.php?id=17902>

FR

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## Audiovisual production: conclusions of CSA concertation

In November 2015 the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) embarked on a series of hearings and concertation with the professionals in the audiovisual production sector (including editors of television services, representatives of writers, directors and producers). The process pointed to the economic difficulties facing broadcasters, who are the main financiers of audiovisual production, and the concerns of independent producers regarding the future of creation. On completing these hearings, the CSA drew up a list of possible areas for change in the regulations, and a list of undertakings that could result in professional agreements, either overall or for each editor. The CSA hailed the 'constructive work' carried out jointly by service editors and producers over the past two years. It hoped for the conclusion of cross-industry agreements that it, and the Government if appropriate, would be able to take into account in conventions and decrees. In this respect, the agreement concluded last December between France Télévisions and the professional organisations of independent producers constituted a reference; discussions could continue with the private groups.

It should be recalled that the present regulatory framework contains a first 'corridor' devoted to 'independent production' that is very closely supervised (by the Decrees of 2 July 2010 and 27 April 2010 as partially amended by the Decree of 27 April 2015) and a second on 'non-independent production' that is not binding on broadcasters. Between these two paths, the CSA recommends in its conclusions that producers and broadcasters, in association with their writer partners, should discuss a third path likely to lead to an agreement. Thus three paths could be defined

within the contribution to the development of audiovisual production: one presently reserved for strictly defined 'independent production'; a 'non-independent' path left free of constraint; and a third where it would be compulsory to use producers who were financially independent of the services editor, even in the case of investment producer's shares. This would be done in a controlled fashion, but the constraints would be less restrictive than in the 'independent' part, along the lines of the model discussed for the France Télévisions agreement in December 2015. This 'third path' would combine a number of advantages for the parties concerned: guaranteed overall annual turnover for independent producers; different duration and extent of rights for the various broadcasting media; investment conditions allowing producer's shares; and incentive to create original formats.

The CSA has already invited the producers, broadcasters and writers to embark on discussions, as much on the principle as on the methods for implementing the proposals.

• *Conclusions de la concertation sur la production audiovisuelle, janvier 2016* (Conclusions of the concertation on audiovisual production, January 2016)

<http://merlin.obs.coe.int/redirect.php?id=17903>

FR

**Amélie Blocman**  
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## GB-United Kingdom

### Court of Appeal upholds damages awards in phone-hacking cases

The Court of Appeal determined Mr Justice Mann's damages awards in the High Court judgment of *Gulati and Others v MGN Limited* for invasion of privacy, including phone hacking, were justifiable and reasonable (see IRIS 2015-7/18). The defendant newspaper proprietor, MGN Limited (MGN) appealed to the Court of Appeal on four grounds arguing the awarded damages were excessive. MGN's grounds for appeal were as follows: (a) the award should have been limited to damages for distress; (b) the awards were disproportionate when compared with personal injury awards (general damages); (c) the awards were disproportionate when compared with the less generous approach adopted by the European Court of Human Rights (ECtHR); and (d) the awards involved double counting.

The claim for damages arose from MGN's journalists accessing records and voicemails of well-known people, thus acquiring personal and confidential information known only to trusted people, with the consequential effect upon their relationships with friends

and family being some of the victims believing that those close to them had made the disclosure.

MGN contended damages should be for distress caused and not for any intrusion. Whilst previous decisions restricted damages to distress, as for example in *Vidal-Hall v Google Inc*, the Court of Appeal considered the courts should be unfettered in determining the basis of the damages so that damages could be for compensatory reasons and distress.

Secondly MGN contended scales used for personal injury damages should be used for misuse of private information or breach of privacy. This was rejected by the Court of Appeal who stated that each case should be considered on its own facts and merits - including taking each victim as you found them - because disclosing private and sensitive information had had more impact on some of the Claimants than others.

The High Court considered that £10,000 should be a starting point for general hacking, but not to be applied in a slavish way, as in some instances there had been persistent hacking and invasion of privacy which justified a higher award; in other situations newspaper articles were repeated with or without new details. The Court of Appeal considered there was no obligation for an exact correlation between general damages for personal injury and hacking claims. The personal injury tariff acted as a guide, with individual judges having discretion to deviate from the guidelines; including in deciding whether to award damages for each breach or apply moderation. Damages had to be flexible to reflect the particular circumstances of each case.

On the third point of appeal, the Court held that the English courts have only recently recognised a civil wrong for intrusion of privacy and misuse of information and it would not be appropriate to impose limits. There was no evidence to support or justify creating a fixed tariff linked to the awards of the European Court. The Court of Appeal considered the misuse of private information was for English domestic law to address. The English courts were in a better position to assess the appropriate measure of damages. There are enough checks and balances in the court system to moderate damages, or even appeal to a superior court if a party considered the damages award inappropriate. The Court considered that the domestic court was better placed than an international body to evaluate the impact of a particular hacking case on an individual.

With regard to the fourth ground of appeal, double counting, the High Court judge clearly denoted in his judgment that he had allowed for repetition of a published article and the impact of some revelations on some claimants was not as adverse as the original publication.

The High Court judge was conscious not to double count and not every hacking incident led to an award of damages. The test was not whether the Court of

Appeal would have awarded exactly the same award as the trial judge, as the assessment for general damages is not an exact science, but whether the trial judge determining the facts was entitled to make the award he did. The Court of Appeal saw no evidence suggesting that the Judge's awards of damages were excessive or unreasonable. When appealing MGN did not cite any particular damages award made by the trial judge as being excessive nor did they propose an alternative sum.

- Representative Claimants v MGN Ltd [2015] EWCA Civ 1291  
<http://merlin.obs.coe.int/redirect.php?id=17873>
- Gulati & Ors v MGN Limited [2015] EWHC 1482 (Ch)  
<http://merlin.obs.coe.int/redirect.php?id=17601>
- Google Inc v Vidal-Hall & Ors [2015] EWCA Civ 311  
<http://merlin.obs.coe.int/redirect.php?id=17874>

EN

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**Julian Wilkins**  
*Blue Pencil Set*

## Dwarf joke in breach of Broadcasting Code

A well-known UK comedian (Jimmy Carr) was interviewed on an early-evening (7 p.m.) magazine show on BBC1 on 4 November 2015 to promote his new touring show. In the course of the interview, he retold a joke which he described as his "shortest"-ever joke - "in two words Dwarf shortage". And he then said, "if you're a dwarf and are offended by that - Grow up!" Towards the end of the programme, the anchor said that "we" are sorry if anything had been said on the show which might have been "close to the mark". The comedian had also before that repeated a joke about a Welsh man which implied he had sexual relations with sheep.

Eleven people complained about the dwarf joke to Ofcom. Three of the complainants either had "dwarfism" themselves, or had family members who do. Dwarfism is an umbrella term for a wide range of conditions (most commonly achondroplasia) that result in an individual being short in stature (typically defined as those under 4'10").

Ofcom decided to investigate the matter as raising potential issues under Rule 2.3 of the Ofcom Broadcasting Code. This states: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context. Such material may include, but is not limited to, offensive language, violence, sex, sexual violence, humiliation, distress, violation of human dignity, discriminatory treatment or language (for example on the grounds of age, disability, gender, race, religion, beliefs and sexual orientation). Appropriate information should also be broadcast where it would assist in avoiding or minimising offence".

The meaning of "context" is non-exhaustively defined as: the editorial content of the programme, programmes or series; the service on which the material is broadcast; the time of broadcast; what other programmes are scheduled before and after the programme or programmes concerned; the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description; the likely size and composition of the potential audience and likely expectation of the audience; the extent to which the nature of the content can be brought to the attention of the potential audience, for example by giving information; and the effect of the material on viewers or listeners who may come across it unawares.

The BBC in response said that it was aware that humour alluding to disability had the potential to offend and in this instance "sincerely regrets any offence caused by it". It referred to a letter which all guests had to sign before appearing which states "we are obliged to point out that you are about to go before a live family audience and to please refrain from swearing or using language that might cause offence". It also referred to the fact that "clearly there is a limit to which the presenters can control what is said in the live elements of the show". The BBC also claimed that it was not the particular condition per se that was the butt of the humour and the fact that the presenter had sort of apologised at the end of the show. The BBC stated that the joke was not appropriate for the show but it did not believe it amounted to an infringement of Rule 2.3.

Ofcom acknowledged the importance of the right to freedom of expression of both the broadcaster and the audience and that therefore the Regulator had to seek an appropriate balance. However, it emphasised that the right was not unlimited - and had to be warranted by the elements of "context". It took the view that, in themselves, the joke and the follow up represented efforts to derive humour from dwarfism and that these statements had the potential to cause offence. As regards the issue of context, Ofcom disagreed with the BBC and the view that the joke was mainly about the shortest joke in the comedian's repertoire: "In our view, it would have been clear to the audience - and a substantial level of offence would have been likely to have been caused - by Jimmy Carr combining his initial joke ("Dwarf shortage") with his follow up statement ("If you're a dwarf and you're offended by that: Grow up!") in order to derive humour from people with the medical condition of dwarfism."

However, Ofcom also stated that it agreed with the BBC to the extent that "it was not the case that similar material could never appear in our output without raising an issue" under the Code and that "this Decision does not in any way suggest that dwarfism is prohibited under the Code as a subject of humour in broadcast output." Comedy often might cause offence but that has to be justified by "context". It is also

worth emphasising that the “pre-watershed” time of the output and the likely nature of the audience was a factor in the decision-making process. There was insufficient pre-warning of this content and the “apology” at the end of the show, thirty minutes after the telling of the joke and the follow-up, was insufficient to mitigate the offence caused.

Ofcom concluded that there had been an infringement of Rule 2.3 and that it has noted the BBC’s intention to amend the letter signed before appearing by guests to “make clear they should refrain from making jokes ‘at the expense of minorities’”.

• Ofcom Broadcast and On Demand Bulletin, Issue number 297, 25 January 2016, p. 24  
<http://merlin.obs.coe.int/redirect.php?id=17872>

EN

**David Goldberg**  
*deejee Research/ Consultancy*

### **Ofcom finds BBC breach of privacy was warranted in the particular circumstances**

Ofcom has decided that although the BBC had entered private premises without permission, the invasion of privacy on this occasion was warranted because of public interest considerations. The complaint was made against BBC1’s “The Dog Factory”, a documentary concerning the dog trade in Scotland and Northern Ireland, broadcast on 19 May 2015. The owner, Mr David Hamilton, of “The Furnish Kennels” in Northern Ireland, complained that the BBC had interfered with his privacy by filming in the middle of the night on his property without his permission, thus leading to adverse effects on him and his business.

The background was that the BBC had been investigating the Northern Ireland dog trade and laws relating to dog breeding. The programme included an interview with a former Department of Agriculture and Rural Development vet who had undertaken inspections of the Furnish Kennel and expressed concern about the dogs’ welfare, and that effectively it was a puppy farm placing the animals’ health at risk. The BBC said that they would not have been given consent to film the Furnish Kennels and, therefore, they would have to use covert means.

The BBC reporter, plus two other parties, went onto the property very late at night without permission, and filmed using night-vision technology. The BBC said that the Ulster Society for the Prevention of Cruelty to Animals (USPCA) believed that Furnish Kennels were operating an intensive agricultural system to the detriment of the physical wellbeing and mental health of the breeding bitches and their puppies. Subsequent to the night filming, the footage was shown to experts who commented upon the poor conditions and the effect upon the animals.

Ofcom’s statutory duties include the application in relation to television and radio services of standards for adequate protection to members of the public and all other persons from unjust and unfair treatment and unwarranted infringement of privacy in or in connection with the obtaining of material included in programmes broadcast. However, this statutory duty had to be balanced against the competing right of the broadcaster to freedom of expression. In doing so, Ofcom applied Rule 8.1 of their Code of Conduct, which states that any infringement of privacy in programmes in connection with obtaining material included in the programmes must be warranted. Ofcom had regard to practice rules 8.5 and 8.9 of the Code. Rule 8.5 states that any infringement of privacy should be with the person’s or organisation’s consent or otherwise be warranted. Rule 8.9 states that the means of obtaining material must be proportionate in all the circumstances and in particular to the subject matter of the programme.

Ofcom determined that the BBC had infringed Mr Hamilton’s privacy by filming without consent. Nevertheless, such a breach of privacy had been warranted. Ofcom stated that “warranted” meant that broadcasters wishing to justify an infringement of privacy as warranted should be able to demonstrate why in particular circumstances of the case it is warranted. If the reason is in the public interest, then the broadcaster should be able to demonstrate that the public interest outweighs the right to privacy. The BBC wished to reveal the poor conditions at the kennels and the inadequacies in the prevailing laws and/or their enforcement. Consent to film would not have been allowed by Mr Hamilton, and as such covert filming was required.

Ofcom determined that the BBC had only filmed where necessary, namely the accommodation. There was no filming of private documents, individuals or the residential area onsite. Therefore, in the circumstances, the filming was warranted and proportionate to the circumstances of the case. Reference was made to Ofcom’s Code rule 8.6, that consent to film should be acquired in advance but there are circumstances where the infringement of privacy is warranted. Ofcom considered that it was in the public interest for the conditions at the kennels to be shown. The Court found that whilst there had been a breach of privacy, that breach had been warranted in these circumstances.

• Ofcom Broadcast and On Demand Bulletin, Issue number 296, 11 January 2016, p. 11  
<http://merlin.obs.coe.int/redirect.php?id=17875>

EN

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*Blue Pencil Set*



## IE-Ireland

### Interview with elected official on abortion did not violate broadcasting rules

In a majority decision, the Broadcasting Authority of Ireland (BAI) has held that there is no automatic requirement for a broadcaster to challenge the views of a contributor on a current affairs topic. The decision arose following a complaint to the BAI concerning a 30-minute interview with an elected public official on the issue of abortion (for previous decisions, see IRIS 2016-2/14 and IRIS 2014-2/23).

The complaint concerned an August 2015 edition of *The Ray D'Arcy Show*, which is a lifestyle and entertainment programme, broadcast weekday afternoons on the public broadcaster channel RTÉ Radio 1. The programme featured a 30-minute interview an elected local government councillor, to discuss a recent newspaper article the councillor had written describing "her experience of a pregnancy involving a foetus with a medical problem."

Under Section 39(1)(b) of the Broadcasting Act 2009, broadcasters must ensure that the broadcast treatment of current affairs "is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views". However, if it is "impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other".

The complainant argued that the interview violated Section 39(1)(b) and the BAI's code on fairness in current affairs, because "the programme gave 30-minutes to the promotion of abortion in the case of pregnancies involving foetuses with genetic defects and pregnancies arising from rape and framed the issue only in terms of choice," "that the presenter endorsed this view," and "there was no one on the programme to offer a counter argument."

However, in a majority decision, the BAI rejected the complaint. The BAI found that the interview was "predominantly a human interest item which explored the issue of abortion through the experiences" of the councillor. The BAI did note that the interview included discussion about how the councillor's "experiences had impacted on her political perspective on the issue of abortion and in this regard the presenter questioned her on how her experience led her to hold the position that abortion on demand should be permitted in Ireland, subject to certain restrictions." However, the BAI held that "there is no automatic requirement to challenge the views of a contributor on a current affairs

topic." Moreover, "while the audience may have benefited from the expression of other perspectives during the programme, the Committee found that, overall, the approach to the interview by the presenter was fair, objective and impartial."

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, January 2016, p. 18

<http://merlin.obs.coe.int/redirect.php?id=17879>

EN

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### Review of the law on accessing phone records of journalists

On 19 January 2016, the Minister for Justice and Equality announced the establishment of an independent review of the law on access to the phone records of journalists. The review will be carried out by a former Chief Justice, the retired Mr. Justice John Murray, who is also a former judge of the Court of Justice of the European Union (CJEU).

The purpose of the Murray Review will be to "examine the legislative framework in respect of access by statutory bodies to communications data of journalists held by communications service providers." This will include taking account of "the principle of protection of journalistic sources, the need for statutory bodies with investigative and/or prosecution powers to have access to data in order to prevent and detect serious crime, and current best international practice in this area."

The Review was prompted by a story in newspaper *The Irish Times* on 14 January 2016, reporting that a policing authority (the Garda Síochána Ombudsman Commission - Gsoc) had accessed the mobile phone records of two journalists. The newspaper reported that Gsoc had been investigating leaks to the media by police officers, and informed three officers that a study of journalists' phone records "had established they had been in contact with the reporters." Under the Garda Síochána Act 2005, it is an offence for police officers to disclose certain information to third parties, including to the media. Gsoc has refused to confirm or deny that journalists' phone records have been accessed, but published an op-ed in *The Irish Times* on 23 January 2016, describing the scope of some of its legislative powers.

The law on government access to communication data is contained in the Communications (Retention of Data) Act 2011 (see IRIS 2009-8/102), while the laws on government surveillance and wiretapping are contained in the Criminal Justice (Surveillance) Act 2009

and the Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993. Notably, none of these laws contain provisions relating to the right to protection of journalistic sources, which the Irish Supreme Court recognised in 2009 (*Mahon Tribunal v. Keen*).

The Minister has stated that the Murray Review is expected to be completed by April 2016.

- Department of Justice and Equality, Statement by the Minister for Justice and Equality in relation to access to telephone records, 19 January 2016

<http://merlin.obs.coe.int/redirect.php?id=17876>

EN

- Supreme Court of Ireland Decision *Mahon Tribunal v. Keena* [2009] IESC 78

<http://merlin.obs.coe.int/redirect.php?id=17877>

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IFCO's four main classification issues, language continues to be of least concern to parents. The report notes that "these results closely correspond to those received from parents/guardians of primary school children." Of particular note is that a majority of respondents (77%) have allowed their children to watch a film that was classified for an older age group. Finally, on the need for film censorship in general, 76% of respondents disagreed with the statement: "there is no longer a need for film censorship (the banning or cutting of films)".

- Irish Film Classification Office, Film Classification Survey - Parental Attitudes (Post Primary) 2015

<http://merlin.obs.coe.int/redirect.php?id=17878>

EN

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## Film Classification Office publishes report on parents and film classification

The Irish Film Classification Office (IFCO) has published its new report *Parental Attitudes (Post Primary) 2015*. The report examines film classification and the views of parents of adolescent children, and forms part of earlier studies which examined similar issues relating to parents of primary school children, and adolescents themselves (see IRIS 2005-4/22 and IRIS 2004-9/27).

The 16-page report is divided into two main sections, detailing, first, parental awareness of IFCO's functions, and second, parental attitudes to the current classification system. The key findings include that the "vast majority" (over 98%) of parents feel it is important to have IFCO's classifications for guidance, while 80% feel that IFCO is effective in providing film classifications they could rely on. Notably, 78% of parents "always" check the age classification before allowing their adolescent children to watch a film. The report notes that this is a 12% drop from the previous survey on parents of primary school children, which the report explains is either due to parents becoming more relaxed, or "perhaps not in a position to be as vigilant as they were previously."

IFCO also noted that "one area of habitual concern for IFCO has been whether parents were sufficiently aware of what individual ratings mean, in particular as to whether accompaniment was compulsory or discretionary with regard to the 12A and 15A categories." However, the report notes that 60% of parents were accurate in defining the precise meaning of the 15A classification.

In relation to classification issues, the primary concern of parents with regard to classification issues is violence. This is followed by sex and then drug use. Of

## IT-Italy

### Italian Supreme Court reverses the Consiglio di Stato's judgment on the logical channel numbering plan (LCN).

By means of Resolution no. 366/10/CONS, the Italian Communications Authority (Autorità per le garanzie nelle comunicazioni - AGCOM) approved, in 2010, the first logical channel numbering plan for digital terrestrial television in Italy. This plan was voided by the Consiglio di Stato (the Italian High Administrative Court) by judgment no. 4660 of 2012.

Following this judgment, by means of Resolution no. 442/12/CONS, AGCOM launched a public consultation and appointed a specialised company to conduct a survey on viewers/users' preferences in order to adopt a new LCN plan. The plan was approved in 2013 by means of Resolution no. 237/13/CONS.

A local television broadcaster challenged the new LCN plan before the Consiglio di Stato requesting its partial annulment, and the appointment of an extraordinary commissioner to amend the numbering plan and assign channels 8 of 9 to local broadcasters instead of national ones.

The Consiglio di Stato upheld the broadcaster's petition by means of judgment no. 6021 of 2013. This judgment was then challenged by AGCOM and by the Italian Ministry of Economic Development before the Italian Supreme Court, which reversed it through judgment no. 1836/16, published on 1 February 2016.

According to the Supreme Court, the Consiglio di Stato's judgment did not meet the relevant requirements. Namely, the Consiglio di Stato stated that AGCOM, following the annulment of the first numbering

plan and in order to adopt the new numbering plan, should have carried out a survey on viewers/users' preferences referring to year 2010.

In the Supreme Court's perspective this would have been impossible for AGCOM from a practical/realistic point of view.

In particular the Supreme Court pointed out that the transition from analogue television to digital terrestrial television (which was completed in Italy on 4 July 2012) had an enormous impact on users' habits and this meant (i) it was practically impossible for AGCOM to carry out such a survey before the transition; and (ii) it was necessary for AGCOM to consider the impact of the transition on users' preferences in order to approve the new logical channel numbering plan.

• *Corte di Cassazione, Sezioni Unite Civili, Sentenza n. 1836/16* (Italian Supreme Court, Unified Sections, Judgment no. 1836/16)  
<http://merlin.obs.coe.int/redirect.php?id=17880>

IT

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## LV-Latvia

### Amendments adopted to the Electronic Mass Media Law

On 19 January 2016, new amendments to the Latvian Electronic Mass Media Law (EMML) came into force. The amendments have been adopted by Saeima (the Latvian Parliament) on 17 December 2015. The amendments are substantial, as they introduce new concepts in the EMML, supplement the list of must-carry provisions, and supplement the conditions on which the Latvian regulatory authorities may suspend broadcasts and on-demand services from other countries, including European Union countries.

Among the newly introduced concepts the most important is the "service of the distribution of television programmes", which is defined very broadly as a service that ensures an option to receive a television programme in the end equipment of the user. Accordingly, the concept of entities under Latvian jurisdiction is broadened, including within it the "providers of the service of the distribution of television programmes", which carry out their economic activity within the territory of Latvia or offer the services of the distribution of television programmes within the territory of Latvia.

The definition of retransmission was also changed. It is defined as the receiving of the programme and immediate full or partial distribution in Latvia in a public electronic communication network, without making any changes to the programme or the contents

of the broadcast. Before the amendments, the definition included that the programme must be distributed in Latvia in another public electronic communication network, but the word "another" is now eliminated. According to the annotation of the amendments to the EMML, the new concepts are introduced in order to provide fair competition between the cable operators and other operators who substantially offer retransmission services, but so far did not fit into the retransmission concept, such as satellite operators.

The list of must-carry provisions included in Section 19 of the law is substantially supplemented. Firstly, the scope of subjects of must-carry obligations is broadened: now the must-carry obligation applies not only to the retransmission operators who retransmit programmes by cable, but also to any "provider of the service of the distribution of television programmes". Secondly, the scope of obligations is extended. The previous must-carry obligations applicable to cable operators remain in force, but now in addition all retransmission operators and all "providers of the service of the distribution of television programmes" must include in their programmes:

- At least one programme that mainly includes news, analytic and information broadcasts made within the EU and in one of the official languages of the EU;

- At least one programme of which within at least 50% of the total broadcasting time is the state language, provided that the total broadcasting time of this programme is at least 18 hours daily, and the broadcaster has received the broadcasting permit for this programme in Latvia;

- At least one programme that mainly includes popular science broadcasts made within the EU and in one of the official languages of the EU;

- At least one programme that mainly includes broadcasts for children and youth audience made within the EU and in one of the official languages of the EU;

The listed programmes must be included in the programme catalogue before other programmes and in the order as provided above. According to the annotation of the amendments to the EMML, the new must-carry provisions are introduced in order to facilitate access to diverse information and to promote democracy and plurality of opinions.

Finally, the amendments supplement the EMML with the new III.1 chapter "Prohibition of distributing programmes of electronic mass media and on-demand services of other countries". The chapter includes new articles 21.1 to 21.6, listing lengthy conditions on which the National Electronic Mass Media council may temporarily suspend broadcasts and on-demand services from another EU Member State, EEA Member State, Member State of the European Convention on Transfrontier Television, or third country. The conditions and the procedure differ depending on which

category of countries the relevant broadcast stems from.

The strictest conditions apply to broadcasts coming from another EU or EEA Member State, which may be suspended only if the broadcaster clearly, seriously and substantially violates Article 24 parts 9 and 10 of the EMML (prohibition of violence and broadcasts harmful to minors) and Article 26 of the EMML (pornography, incitement to violence, racial or other hatred or discrimination, incitement to war, incitement to violently change territorial unity or structure, or to discredit Latvian state symbols). The violation must be repeated twice within a 12 month period. Before the suspension the Council must inform the relevant broadcaster, the relevant jurisdiction country, as well as the European Commission. If no settlement is reached within 15 days, the Council may suspend the broadcasting for a definite period (the maximum length is not indicated in the EMML). The decision may be appealed to the Administrative Court.

The suspension criteria are less strict if the relevant programme broadcast from another EU or EEA Member State is fully or mainly directed to the Latvian territory (Article 21.2 of the EMML). The Council must only inform the relevant Member State and the broadcaster on the observations that the broadcaster does not comply with the stricter provisions of the EMML, and if no settlement is reached, the suspension may be applied. The Council may also apply a penalty to the broadcaster if it can prove that the relevant broadcaster has obtained jurisdiction in another Member State in order to circumvent stricter rules applicable in Latvia. However, in such a case the Council must inform the European Commission in advance, and the European Commission must decide on the conformity of the planned activities with the European law.

The remaining articles of the new chapter deal with the suspension conditions for on-demand services coming from other EU or EEA countries, as well as to broadcasts and on-demand services coming from other Member States of the European Convention on Transfrontier Television and third countries.

• *Grozījumi Elektronisko plašsaziņas līdzekļu likumā* (Amendments to the Electronic Mass Media Law published in Latvijas Vēstnesis, No. 2 (5574), 05 January 2016)

<http://merlin.obs.coe.int/redirect.php?id=17890>

LV

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Sorainen

## NL-Netherlands

### Copyright ruling on Anne Frank's diary

On 23 December 2015, the District Court of Amster-

dam handed down a ruling in a case involving Anne Frank's diary. The case was brought by the Swiss Anne Frank Fonds against the Anne Frank Stichting and the Royal Netherlands Academy of Arts and Sciences (KNAW). It dealt with the alleged expiration of copyright in Anne Frank's diary and reproductions made by Huygens ING, a research institute affiliated with the KNAW. The Anne Frank Fonds holds the copyright to Anne Frank's diaries.

In 2008, all parties assumed that the copyright to Anne Frank's diaries would expire on 1 January 2016, 70 years after Anne Frank's death. After further studying of the copyright terms and the applicable transitional provisions of the amendment of the Dutch Copyright Act in 1995, it appeared that the copyright terms were extended by 20 years. Moreover, parts of the work were only first published in 1986, causing the copyright of those fragments to expire 50 years after 1 January 1987. Eventually, the litigating parties therefore agreed that the works of Anne Frank would still be protected under copyright law after 1 January 2016.

Subject of dispute were the XML files that Huygens ING created from a facsimile of Anne Frank's manuscripts and diaries, including metadata on several features of the texts, such as annotations and variations in handwriting. These files were meant to be used for textual analysis. The facsimiles were made with the permission of the Anne Frank Fonds, but the XML files were not. Principally, the Anne Frank Stichting and KNAW relied on three exceptions in the Dutch Copyright Act, but the Court did find them applicable to the creation of these files.

Nevertheless, the Court went along with the parties' secondary argument, asserting that the fundamental right to freedom of scientific research prevailed over the enforcement of copyrights in the underlying case. Although it acknowledged that such a balance is already made by the legislator, it found that courts must examine this balance if the arguments put forward in a case give rise to such an examination. The Court attached great importance to the principle of proportionality in this assessment.

In this light, it considered that the research involving the XML files served a public interest. This finding was not affected by the fact that the Anne Frank Fonds had initiated its own research; the fact that the parties had a disagreement on what approach to take in such research emphasised the need for independent scientific research. The Court found it evident that the reproductions made by Huygens ING were indispensable for its research and were solely made for the purpose of that research. Moreover, it found that the infringing copies had only a minimal impact, since there were only few of them accessible, and to which only a limited amount of individuals involved in the research had access.

The Amsterdam court therefore concluded that freedom of scientific research outweighed the enforcement of copyrights.

• *Rechtbank Amsterdam, 23 December 2015, ECLI:NL:RBAMS:2015:9312* (District Court of Amsterdam, 23 December 2015, ECLI:NL:RBAMS:2015:9312)  
<http://merlin.obs.coe.int/redirect.php?id=17881>

NL

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### Court rules retweeting is not an endorsement

On 10 December 2015, the District Court of the Hague delivered a comprehensive criminal judgment in a case against nine suspects of an international organisation with terrorist intent. The suspects were amongst many other things accused of crimes against the public order under Articles 131 and 132 of the Dutch Criminal Law (Sr). Article 131 Sr criminalises incitement to violence against public authorities and incitement to criminal offences through speech, writings or images. Article 132 Sr criminalises stocking such images or writings with the intent of making them publically available, if the suspect knows, or has serious reasons to believe, that they would cause incitement.

The suspects used multiple media channels (website, digital radio, YouTube, Twitter and Facebook) to spread messages that encouraged participation in violent jihad combat in Syria. The Court ruled that the rapid exchange of messages that takes place on social media like Twitter and Facebook does not result in a carte blanche for the user to post inflammatory content. Messages are often consumed quickly, and a superficial reading, which leaves no room for nuance or analyses of these messages. It has a reinforcing effect on the message conveyed when messages with similar intentions are placed frequently, in a short period of time.

The Court ruled that on Twitter the basic rule is that retweeting is not an endorsement. This means that retweeting inflammatory messages does not fall within the scope of Article 131 Sr. However, retweeting inflammatory messages does fall within the scope of Article 132 Sr. A different reasoning applies when it is clear from the comment by the suspect underneath the retweet that the suspect supports the message of the retweet, or when it is clear from the context of series of tweets posted by the suspect, that the retweet and his own tweets convey a similar message. This reasoning also applies to the placement of hyperlinks.

• *Rechtbank Den Haag, 10 december 2015, IEF 15542; ECLI:NL:RBDHA:2015:14365* (District Court of the Hague, 10 December 2015, IEF 15542; ECLI:NL:RBDHA:2015:14365)  
<http://merlin.obs.coe.int/redirect.php?id=17882>

NL

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### RO-Romania

#### Request for review of the law prohibiting advertising of medicinal products and pharmacies in audiovisual media

On 9 January 2016, the President of Romania sent a request to the Romanian Parliament for a review of the Law prohibiting the advertising of medicinal products and pharmacies in audiovisual media. The leader of the main parliamentary party, PSD (Partidul Social Democrat), had previously asked the President to request the review of the Law because of a technical error which occurred during the voting in the Senate of the mentioned draft Act. The Law had been adopted by the Chamber of Deputies (lower Chamber of the Parliament) on 13 October 2015 and by the Senate (upper Chamber) on 14 December 2015 (see IRIS 2006-6/33 and IRIS 2014-1/36).

The Draft Law on the modification and completion of Article 17 of Law No. 148/2000 on the advertisement and for the modification of Law No. 504/2002 of the audiovisual (Propunere legislativă pentru modificarea și completarea art. 17 din Legea nr. 148/2000 privind publicitatea și pentru modificarea Legii nr. 504/2002 a audiovizualului) proposed to prohibit advertising for medicinal products and pharmacies in audiovisual media. With regard to Law No. 148/2000 on advertisement, the draft was intended to completely ban advertisements for medicine on radio and TV and to permit this kind of advertisement only for medicine which does not require a medical prescription or the intervention of a physician for diagnosis, prescription, or treatment tracking. The draft was also intended to ban advertisements inducing the idea that a pharmacy is a model or benchmark for other pharmacies, respectively of advertising for pharmacies that are masked drugs advertising. With regard to Law No. 504/2002 of the audiovisual, the draft was intended to ban audiovisual commercial communications for medicinal products and medical treatment. The draft also proposed to ban the product placement of medical products and treatments.

The President of Romania considers the Act as contrary to the European Union's Directive 2001/83/CE and to Law No. 95/2006 on health reform, which transposes the Directive into national legislation and

already bans audiovisual commercial communications for medical treatments and products which require a medical prescription or for medicines which contain substances considered to be narcotic or psychotropic by the international conventions. On the other hand, the President considers the Act as discriminatory, because it only bans advertisement through radio and TV and allows advertisements through other means. The same objection is raised with regard to pharmacies, for which advertisement is banned only through audiovisual media.

According to the Zenith Romania Advertising Expenditure Forecast report, in 2014 the medicines and pharmaceutical products industry had the biggest advertisement investments in Romania, with 13% of the total advertisements expenditure, followed by food products with 12%, retail with 11.5% and telecom with 11.5%.

• *Cerere de reexaminare asupra Legii pentru modificarea art. 17 din Legea nr. 148/2000 privind publicitatea, precum și a Legii audiovizualului nr. 504/2002* (Request for review the law on the modification of the Article 17 of the Law no. 148/2000 on the advertisement, as well as of the Law no. 504/2002 of the audiovisual)  
<http://merlin.obs.coe.int/redirect.php?id=17893>

RO

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## SE-Sweden

### New guidelines on marketing and social media

The relationship between the Swedish Marketing Practices Act (MPA) and posts in blogs and social media has been a subject of discussion in Sweden during the last year. In order to provide further guidance to bloggers and companies promoting their products on blogs and social media the Swedish Consumer Agency has recently published guidelines for marketing through blogs and social media (the Guidelines).

The Guidelines confirm that there is no general prohibition against recommendations or posts about companies, products or services on blogs or in social media. If there is no link between a company and a blogger who writes about that company's product or services, then the MPA will not apply since the post will fall under the protected scope of freedom of expression.

However, if there is a link - whether formalised in an oral or written agreement, or even implied (e.g. a blogger receives compensation for writing about a company or a company's products or services), then the MPA will apply in full.

The principles of the Guidelines can be summarised as follows: First, all marketing, including marketing through blogs and social media, is covered by the rules of the MPA. According to the Guidelines, it does not matter if the compensation is pecuniary, free goods or services or any other type of compensation. The mere fact that the blogger is compensated means that a message constitutes marketing.

Second, the recipients of marketing must be able to immediately, and with ease, identify the communication as marketing. It should also be made clear who is behind the marketing, i.e. advertiser. Third, if a blogger is paid, or otherwise compensated for giving exposure to a company's business or products, posts must clearly be identified as marketing in order to avoid confusion of the marketing with other content. For instance, the Guidelines provide that the marketing can be disclosed by marking posts with "#advertising", "#ad", "advertising", or "ad" using different colours, fonts etc. at the beginning and end of posts as well as stating the advertiser's name.

Fourth, precaution should be taken when marketing to children. It is forbidden to exhort or invite children to buy products or services. Finally, marketing that does not comply with legal requirements can be prohibited. By violating that prohibition both the blogger and the advertiser can be subject to injunctions or fines.

• *Konsumentverket, Vägledning om marknadsföring i bloggar och andra sociala medier* (Swedish Consumer Agency, Guidelines on marketing in blogging and other social media)  
<http://merlin.obs.coe.int/redirect.php?id=17883>

SV

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## UA-Ukraine

### Act on international broadcasting service adopted

On 8 December 2015, the Ukrainian Supreme Rada (Parliament) adopted the Act «On the international broadcasting system in Ukraine» ( Про систему іномовлення в Україні ). The document creates a legal basis for the activities of the state-run company of broadcasting abroad.

The new law is considered one of the stages of the international service broadcasting reform undertaken by the newly-established Ministry of Information Policy of Ukraine.

According to this act, the international broadcasting system of Ukraine comprises the Ukrainian National Information Agency "Ukrinform", established in 1918,

and the “Multimedia International Broadcasting Platform of Ukraine” (MPIU), a state enterprise just established on the basis of the World Service of the state-run Ukrainian Radio and Television Broadcasting Company.

The act stipulates that the state-run channel “Ukraine Tomorrow” (UATV) will predominantly be broadcast in English (broadcasting in other languages shall not exceed the threshold of 50 percent). Selecting other languages for broadcasting will be based on meeting the needs of Ukrainian diasporas and foreign viewers interested in “obtaining objective and comprehensive information originating in Ukraine”. The act provides for a distribution of programmes and other materials via satellite, electronic broadcast channels and online.

UATV was actually launched on 1 October 2015. Today the channel broadcasts from three satellites in 4 languages: English, Ukrainian, Russian, and Crimean Tatar. It was established to inform foreign audiences about current events in Ukraine, activities of state agencies, to protect national interests beyond Ukraine, to support positive image of Ukraine in the world, as well as to provide a platform for discussion about the Ukrainian authorities’ official position on important issues in politics, economics and culture and to promote mutual understanding and exchange of ideas between different cultures and nations. The footprint of the new TV channel broadcasting is supposed to include the temporarily occupied territories of Ukraine.

Monitoring the foreign broadcaster’s compliance with the principles of freedom of expression and international standards of information exchange is imposed by the Law on the newly created Supervisory Board of the MPIU.

According to the act, UATV and MPIU will be financed from the state budget as well as from the other sources including content sale, sponsorship, and advertising (except for political advertising and advertising of alcohol).

• Закон України «Про систему іномовлення України» (Act of Ukraine «On the foreign broadcasting system in Ukraine») of 8 December 2015, №856-VIII. Published in the official daily Holos Ukrainy on 30 December 2015 - N 249)

<http://merlin.obs.coe.int/redirect.php?id=17895>

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### **Kosovo:\* Decision of the Parliament on the PSB funding**

By the end of 2015, the Minister of Finance of Kosovo\* confirmed that there is no legal basis for continuing the funding of the Public Service Broadcaster Radio Television of Kosovo (RTK) during 2016 through Kosovo’s Budget. The Parliament had to react accordingly with an immediate decision in order to secure the continuance of the funding for the RTK. On 16 December 2015, during the process of finalizing the Law on the Budget of the Republic of Kosovo for the year 2016 (Law No. 05/L -071), the Parliament decided to allocate funds to RTK for the period January to June 2016.

As the founder of the RTK, the Parliament must guarantee RTK’s institutional autonomy as well as adequate financing for the execution of RTK’s public service mission. The Law on Radio Television of Kosovo passed by the Parliament in 2012 (Law No. 04/L-046) institutes RTK as a legal nonprofit entity with the status of an independent public institution of particular importance. As determined by Article 21 RTK Law, RTK can be financed from fee, founder, or self-funding through its economic activity, as well as through other sources of revenue, including contracts with third parties, other programme services, sponsorships and donations, and in house productions and the sale of programmes. Article 21.4 RTK Law specifies that the Parliament must allocate 0.7% of the Kosovo Budget annually for a transitional three-year period to finance the RTK, until a permanent solution of funding through subscription is found. It notes that the Parliament, upon the proposal of the RTK Board, has 12 months (from entrance into force of the present law on 27 April 2012) to find a solution for the long-term funding. However, all the deadlines have passed and a solution has not been found. Some attempts were made by the Parliament and the RTK management to introduce a proposal for the long term solution for funding, yet no decision was made.

Therefore, the Minister of Finance stated that there was no legal basis to continue the funding of RTK. The reaction of the RTK management was immediate, considering the statement as a political pressure towards the RTK. The decision of the Parliament to secure the funding for six months offers only a short term provisional solution of funding. An appropriation of more than EUR 4.800.000 was designated, in accordance with Article 9.6 of the Law on Budget of Kosovo for 2016. A permanent solution for funding the Radio Television of Kosovo has to be found very soon, in order to allow the RTK to complete its public service oriented mission.

\*All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nation's Security Council Resolution 1244 and without prejudice to the status of Kosovo.

- The Law on Budget of Republic of Kosovo for year 2016, noting the funding for the RTK

<http://merlin.obs.coe.int/redirect.php?id=17888>

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- Law on Radio Television of Kosovo

<http://merlin.obs.coe.int/redirect.php?id=17889>

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## Agenda

### Book List

Tricard, S., *Le droit communautaire des communications commerciales audiovisuelles* Éditions universitaires européennes, 2014 ISBN 978-3841731135  
[http://www.amazon.fr/droit-communautaire-communications-commerciales-audiovisuelles/dp/3841731139/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=140549942&sr=1-1&keywords=droit+audiovisuel](http://www.amazon.fr/droit-communautaire-communications-commerciales-audiovisuelles/dp/3841731139/ref=sr_1_1?s=books&ie=UTF8&qid=140549942&sr=1-1&keywords=droit+audiovisuel)  
Perrin, L., *Le President d'une Autorite Administrative Independante de Régulation* ISBN 979-1092320008  
[http://www.amazon.fr/President-Autorite-Administrative-Independante-R%C3%A9gulation/dp/1092320008/ref=sr\\_1\\_5?s=books&ie=UTF8&qid=1405500579&sr=1-5&keywords=droit+audiovisuel](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](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](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](http://www.amazon.co.uk/Market-Regulation-European-Modern-Studies/dp/1849460310/ref=sr_1_9?s=books&ie=UTF8&qid=1405501098&sr=1-9&keywords=media+law)

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