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of the European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Arlewin v. Sweden

On 1 March 2016 the European Court of Human Rights (ECtHR) found Sweden in breach of the European Convention on Human Rights (ECHR) because it had denied access to court to a person who wanted to bring defamation proceedings in Sweden arising out of the content of a trans-border television programme service (TV3), suggesting that they resort to the jurisdiction of the United Kingdom. The European Court is of the opinion that requiring a Swedish national to bring defamation proceedings in the UK courts following an alleged defamatory TV programme broadcasted by the London-based company Viasat Broadcasting UK, but targeting mostly, if not exclusively, a Swedish audience, was not reasonable and violated Article 6 paragraph 1 of the Convention, which guarantees access to a court.

The programme in question had been broadcast live in Sweden and had accused Mr Arlewin, the applicant, of organised crime in the media and advertising sectors. Mr Arlewin brought a private prosecution for gross defamation against X. X was the anchorman of the television show and the CEO of Strix Television AB, the company that produced the TV3 programme. The Swedish courts subsequently found it did not have jurisdiction to examine Mr Arlewin's complaint, finding that the UK-based company under jurisdiction of the UK authorities, which broadcasted the TV3 programme, was responsible for its content. Mr Arlewin appealed to the Supreme Court, alleging that the Swedish courts' position ran contrary to EU law. He also requested that a question concerning the interpretation of the Brussels I Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters be referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling. According to him, the regulation entitled a person claiming non-contractual damages to bring actions in the territory where the harm had actually occurred, namely in Sweden, in his case. The Supreme Court rejected Mr Arlewin's referral request, and refused leave to appeal in the case. Finally in Strasbourg, Mr Arlewin complained that the Swedish courts refused to examine the defamation case brought by him against X on the merits, and thereby failed to provide him with an effective remedy to protect his reputation. The Swedish Government argued that in application of the Audiovisual Media Services Directive 2010/13/EU, Viasat Broadcasting UK was a company established in the UK and that the editorial decisions about their audiovisual media service were taken in the UK. Therefore the UK, through its Office of Communication ("Ofcom"), had supervisory jurisdiction over TV3's broadcasts.

According to the Strasbourg Court, the jurisdiction over broadcasters vested in one State under the AVMS Directive did not have general application, extending to matters not regulated therein. It also referred to Article 28 of the Directive, addressing the situation where a person's reputation and good name have been damaged by incorrect facts presented in a programme. This provision however only discusses a right of reply or equivalent remedies, and does not deal with defamation proceedings and an appurtenant claim for damages. The European Court was thus not convinced that the AVMS Directive determines, even for the purposes of EU law, the country of jurisdiction in which an individual brings a defamation claim and wishes to sue a journalist or a broadcasting company for damages. Rather, jurisdiction under EU law is regulated by the Brussels I Regulation No. 44/2001. According to Articles 2 and 5 of the Regulation, both the UK and Sweden appear to have jurisdiction over the present matter: X is domiciled in Sweden whereas Viasat Broadcasting UK is registered and established in the UK, and the harmful event could be argued to have occurred in either country, as the television programme was broadcast from the UK and the alleged injury to the applicant's reputation and privacy manifested itself in Sweden. The CJEU has earlier had the occasion to interpret and apply Article 5(3) of the Brussels I Regulation No. 44/2001, allowing courts assuming jurisdiction in a member State, not only in the place where the defendant has his residence, but also in the "place where the harmful event occurred" or where the centre of the alleged victim's interests is based. Hence three options were available to hear an action for damages caused by the publication of a defamatory newspaper article or an Internet publication, according to EU law (CJEU in eDate Advertising and Martinez (Joined Cases C-509/09 and C-161/10)) (see IRIS 2012/1: Extra). According to the European Court it may be assumed that the same would apply to a broadcast via satellite.

While leaving open the question of whether a binding provision of EU law could justify the Swedish position, the ECtHR found that the Swedish Government had not shown that Swedish jurisdiction was barred in the case due to the existence of such a provision. Rather, jurisdiction was excluded by virtue of the relevant provisions of domestic law. The European Court found in particular that the programme and its broadcast were, for all intents and purposes, entirely Swedish and that the alleged harm to Mr Arlewin had occurred in Sweden. In those circumstances, the Swedish State had an obligation under Article 6 paragraph 1 ECHR to provide Mr Arlewin with an effective access to court. However, Mr Arlewin had been put in a situation in which he could not hold anyone responsible under Swedish law for his allegation of defamation. Requiring him to take proceedings in the UK courts could not

be said to have been a reasonable, effective and practical alternative for him. In the European Court's view, the limitations on Mr Arlewin's right of access to court had therefore been too far-reaching and could not, in his particular case, be considered proportionate.

The Court is unanimous in finding a violation of Article 6 paragraph 1 of the Convention and ordered Sweden to pay Mr Arlewin EUR 12,000 in respect of non-pecuniary damage and EUR 20,000 in respect of costs and expenses.

• Judgment of the European Court of Human Rights, Third Section, case of Arlewin v. Sweden, Application no. 22302/10 of 1 March 2016
http://merlin.obs.coe.int/redirect.php?id=17909 EN

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European Court of Human Rights: Kalda v. Estonia

For the first time the European Court of Human Rights (ECtHR) has stated that denying a prisoner access to the Internet may amount to a violation of Article 10 of the European Convention of Human Rights (ECHR). In Estonia, Mr Kalda, who is serving a life sentence in prison, requested from the governor of the prison access to the online version of the State Gazette, to the decisions of the Supreme Court and administrative courts, and to the HUDOC database of the ECtHR. The governor refused this request, and so did the Administrative Court and the Tallinn Court of Appeal. The Supreme Court, however, decided that the refusal of the prison administration to grant detainees access to the rulings of the administrative courts and of the ECtHR interfered with their right to freely obtain information disseminated for public use, and considered the refusal unlawful. Some time later, Mr Kalda made a new application, requesting to be granted access to the Internet sites www.coe.ee of the Council of Europe Information Office in Tallinn, www.oiguskantsler.ee, the website of the Chancellor of Justice and www.riigikogu.ee, the website of the Estonian Parliament. He argued that he was involved in a number of legal disputes with the prison administration and that he needed access to those Internet sites in order to be able to defend his rights in court. Again Mr Kalda's request was refused. The Supreme Court this time concluded that the prohibition of detainees' access to the three Internet sites at issue was justified by the need to achieve the aims of imprisonment and in particular the need to secure public safety. Mr Kalda lodged an application with the ECtHR, complaining that the Estonian authorities' refusal to grant him access to certain websites violated his right to receive information "without interference by public authority", in breach of Article 10 of the ECHR.

In its judgment of 19 January 2016, the European Court reiterated that the right to receive information basically prohibits a government from preventing a person from receiving information that others wished or were willing to impart. It also emphasises that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. However, as imprisonment inevitably involves a number of restrictions on prisoners' communications with the outside world, including on their ability to receive information, the Court considered that Article 10 of the Convention cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners. Nevertheless, since access to certain sites containing legal information is granted under Estonian law, the restriction of access to other sites that also contain legal information constitutes an interference with the right to receive information. Therefore the Court needed to examine whether this interference met the conditions of Article 10 paragraph 2 of the Convention. As there was no discussion that the interference with Mr Kalda's right to receive information was prescribed by the Imprisonment Act and pursued the legitimate aims of the protection of the rights of others and the prevention of disorder and crime, the ultimate question was whether the refusal to grant access to the websites at issue was necessary in a democratic society.

The Court noted that the websites to which Mr Kalda wished to have access predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. It considers that the accessibility of such information promotes public awareness and respect for human rights and gives weight to Mr Kalda's argument that the Estonian courts used such information and that he needed access to it for the protection of his rights in the court proceedings. The Court drew attention to the fact that in a number of Council of Europe and other international instruments, the public-service value of the Internet and its importance for the enjoyment of a range of human rights has been recognised. By referring to the 2003 Declaration on freedom of communication on the Internet of the Committee of Ministers of the Council of Europe (see IRIS 2003-7/3) and to the 2011 report to the Human Rights Council (A/HRC/17/27) of the UN Human Rights Council's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (see also IRIS 2011-8/2), the Court held that Internet access has increasingly been understood as a right, and that calls have been made to develop effective policies to attain universal access to the Internet and to overcome the "digital divide". The Court considered that these developments reflect the important role the Internet plays in people's ev-

eryday lives, as an increasing amount of services and information is only available on the Internet.

Finally the Court notes that under the Imprisonment Act, prisoners in Estonia have been granted limited access to the Internet via computers specially adapted for that purpose and under the supervision of the prison authorities. Thus, arrangements necessary for the use of the Internet by prisoners have in any event been made and the related costs have been borne by the authorities. While the security and economic considerations cited by the domestic authorities may be considered relevant, the Court noted that the domestic courts undertook no detailed analysis as to the security risks allegedly emerging from the access to the three additional websites in question, also having regard to the fact that these were websites of State authorities and of an international organisation. The Court also considered that the Estonian authorities have failed to convincingly demonstrate that giving Mr Kalda access to three additional websites would have caused any noteworthy additional costs. In these circumstances, the Court is not persuaded that sufficient reasons have been put forward in the present case to justify the interference with Mr Kalda's right to receive information. The Court concluded, by six votes to one, that the interference with Mr Kalda's right to receive information, in the specific circumstances of the present case, could not be regarded as having been necessary in a democratic society. Accordingly it found a violation of Article 10 of the ECHR.

In his dissenting opinion, the Danish judge Kjølbro found that there is no violation of Article 10 and that Mr Kalda's application should have been dismissed. He also argues that the question of prisoners' right to access to the Internet is a novel issue in the Court's case law and that given the general importance of prisoners' access to the Internet, as well as the practical and financial implications of granting prisoners access to the Internet, the question should not have been decided by a Chamber, but by the Grand Chamber. In the meantime, the Estonian Government has announced a request for a referral to the Grand Chamber in this case.

• Judgment of the European Court of Human Rights, Second Section, case Kalda v. Estonia, Application no. 17429/10 of 19 January 2016
http://merlin.obs.coe.int/redirect.php?id=17910 EN

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European Court of Human Rights: Görmüş a.o. v. Turkey

The European Court of Human Rights (ECtHR) has once more confirmed the strong protection that is to be given to journalists' sources, in a case also related to the disclosure of confidential information and the protection of whistle-blowers. The Court is of the opinion that the Turkish authorities have violated the right to freedom of expression of journalists, reporting on important matters related to the armed forces.

The magazine Nokta published an article based on documents classified "confidential" by the Chief of Staff of the armed forces in Turkey. It revealed a system for classifying publishing companies and journalists according to whether they were "favourable" or "hostile" to the armed forces, so that specific journalists could be excluded from covering activities organised by the army. Following a complaint by the Chief of Staff of the armed forces, the Military Court ordered a search of all the magazine's premises, demanding electronic and paper copies of the files stored on all private and professional computers. The Military Court considered the search and seizure lawful, as these measures had only been intended to elucidate the circumstances surrounding the disclosure of a document classified as "secret", and not to identify those responsible for the leak of the confidential information. The Military Court also pointed out that the Criminal Code made it an offence to procure, use, possess or publish information whose disclosure was prohibited for the purposes of protecting State security, and that journalists were not exempted from criminal liability in that connection. The director of the magazine, the editors and some journalists lodged an application with the Strasbourg Court complaining of a violation of their right to freedom of expression and information (Article 10 ECHR).

The European Court held that the article published by Nokta, on the basis of "confidential" military documents, was capable of contributing to public debate. It emphasised the need to protect journalistic sources, including when those sources are State officials highlighting unsatisfactory practices in their workplace. It considered the seizure, retrieval and storage by the authorities of all of the magazine's computer data, with a view to identifying the public-sector whistleblowers, as a disproportionate interference with the right to freedom of expression and information. The action taken by the authorities had undermined the protection of sources to a greater extent than an order requiring them to reveal the identity of the sources, since the indiscriminate retrieval of all the data had revealed information that was unconnected to the acts in issue. The Court also held that the impugned interference by the Turkish authorities could risk deterring potential sources from assisting the press in informing the public of matters involving the armed forces, including when they concerned a public interest. In the Court's view, this intervention was likely not only to have very negative repercussions on the relationships of the journalists in question with their sources, but could also have a serious and chilling effect on other journalists or other whistle-blowers who were State officials, and could discourage them

from reporting any misconduct or controversial acts by public authorities.

Furthermore, the Court noted that the reasons for which the contested documents had been classified as confidential were not justified, as the government had not shown that there had been a detrimental impact as a result of their disclosure. Thus, the Court considered that the contested article had been highly pertinent in the debate on discrimination against the media by State bodies, especially as the style used in the article and the time of its publication had not raised any difficulty that was such as to damage the interests of the State. The Court is also of the opinion that the journalists of Nokta had acted in accordance with professional ethics, and that they had had no intention other than to inform the public of a topic of general interest. The Court unanimously concluded that the Turkish authorities have violated Article 10 of the ECHR, holding that the interference with the journalists' right to freedom of expression, did not meet a pressing social need, had not been proportionate to the legitimate aim pursued and that, in consequence, it had not been necessary in a democratic society.

• *Arrêt de la Cour européenne des droits de l'homme, Deuxième section, affaire Görmüş et a. c. Turquie, requête n° 49085/07 du 19 janvier 2016* (Judgment of the European Court of Human Rights, Second Section, case Görmüş a.o. v. Turkey, Application no. 49085/07 of 19 January 2016)
http://merlin.obs.coe.int/redirect.php?id=17911 FR

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European Court of Human Rights: de Carolis and France Télévisions v. France

The European Court of Human Rights (ECtHR) has confirmed the robust Article 10 protection for investigative journalism expressed in a television documentary, holding that a conviction for defamation of a Saudi Arabian prince violated the right to freedom of expression as guaranteed by Article 10 of the European Convention of Human Rights (ECHR).

In 2006, Prince Turki Al Faisal brought defamation proceedings against France Télévisions, Patrick de Carolis as its director, and a journalist, after the broadcasting on the TV channel France 3 of a documentary entitled "11 September 2001: the prosecution case". The documentary investigated why there had still been no trial five years after the events of 11 September. It focused on the complaints lodged by families of the victims of the 9/11 attacks in the US and the proceedings against persons suspected of having helped or funded al-Qaeda. The documentary highlighted the claimants' concerns that the trial might be jeopardised by the economic links between the US and Saudi Arabia. Mr de Carolis and the journalist who made the documentary were found guilty of public defamation against the Prince and the Court declared France 3 civilly liable for the damage caused. In essence the French courts found that the journalist should have demonstrated prudence and objectivity, because she had referred to extremely serious accusations against Prince Turki Al Faisal, accusations that had not yet been examined by a court of law.

Before the ECtHR, France 3 and its director complained of a violation of their right to freedom of expression. The European Court undertook a detailed examination of the content of the documentary and of the way in which the subject was dealt with, in particular the excerpts accusing Prince Turki Al Faisal of having assisted and financed the Taliban as head of the intelligence service in Saudi Arabia. The Court reached the conclusion that the allegations in the documentary had a sufficient factual basis, and that the documentary was balanced and did not contravene the standards of responsible journalism. As regards the sanctions, the fine to which Mr de Carolis had been sentenced and the civil liability finding against France 3 were considered a disproportionate interference with their right to freedom of expression. The Court is of the opinion that a moderate criminal sanction, combined with civil damages, does not take away the risk of a chilling effect that a criminal conviction may have on the right to freedom of expression. As the interference by the French authorities was not necessary in a democratic society, the Court unanimously came to the conclusion that Article 10 has been violated. The French government is ordered to pay the applicants EUR 11,500 in respect of pecuniary damages, and EUR 30,000 in respect of costs and expenses.

• *Arrêt de la Cour européenne des droits de l'homme, Cinquième section, affaire de Carolis et France Télévisions c. France, requête n° 29313/10 du 21 janvier 2016* (Judgment of the European Court of Human Rights, Fifth Section, case de Carolis and France Télévisions v. France, Application no. 29313/10 of 21 January 2016)
http://merlin.obs.coe.int/redirect.php?id=17912 FR

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EUROPEAN UNION

Court of Justice of the European Union: Court rules on TV advertising in the context of Finnish approaches to "split screens" and "black seconds"

On 17 February 2016, the Court of Justice of the European Union (CJEU) rendered its judgment (C-314/14) on television advertising. The ruling sheds light on the proper interpretation of the Audiovisual Media Services Directive (2010/13/EU; AVMSD). The preceding television directive from 1989 as amended in 1997 and 2007 was implemented by the Finnish Act on Television and Radio Operations (744/1998; TV and Radio Act) and amendments thereto. Subsequently, the provisions at issue of the TV and Radio Act have been codified in the Information Society Code (917/2014; ISC) (with minor amendments) which entered, to a large extent, into force on 1 January 2015 (see Chs 26 and 42 ISC).

The dispute between Viestintävirasto (Finnish Communications Regulatory Authority; FICORA) and Sanoma Media Finland Oy / Nelonen Media (Sanoma) derives from early in 2012 when FICORA declared infringing some of Sanoma's practices regarding TV advertising, including those concerning screen-splitting, presentation of sponsor signs and duration of advertising breaks. Sanoma was found in breach of the TV and Radio Act: advertising was not kept distinct from programmes pursuant to Section 22(1) while advertising time exceeded the maximum time as prescribed by law, that is 12 minutes per clock hour, excluding, among others, sponsorship announcements (§ 29(1)-(2)). Commercial communication must be clearly recognisable (§ 21(1)). Separation of programmes and advertising may be established "by acoustic or optical means, or by spatial division" (§ 22(1)). These provisions transposed into Finnish law Articles 19(1) and 23(1)-(2) of the codified AVMSD respectively (Arts. 10(1) and 18(1)-(2) of directive 2007/65/EC). The directive thereby requires that advertising and teleshopping must be "readily recognisable and distinguishable from editorial content" and "kept distinct from other parts of the programme by optical and/or acoustic and/or spatial means" (Art. 19(1)). For its part, Article 23(1) includes a maximum proportion of 20% for TV advertising spots and teleshopping spots within a clock hour with exceptions, such as sponsorship announcements, in paragraph 2. Section 26(2) of the TV and Radio Act notes that sponsor signs must be presented clearly in the beginning or end of sponsored programmes while sponsored programmes must be clearly identified by inclusion of sponsor signs pursuant to Article 10(1)(c) AVMSD. Member States may impose more detailed or stricter rules complying with union law for AVMS providers under their jurisdiction (recital 41, 83; Arts 4, 26).

Relying on its interpretation of the TV and Radio Act, FICORA deemed some programmes inadequately separated from advertising since split screens were used so as to show closing credits and a list of upcoming programmes simultaneously. The menu for upcoming programmes was not used in the place of or akin to break-bumpers. The screen was split between two programme types without express elements indicating the beginning of commercial breaks. Moreover, sponsor signs presented outside the sponsored programmes (i.e. otherwise than required by law) were to be regarded as advertising spots while "black seconds" used to separate advertising spots from each other and from the upcoming programmes were to be included in the maximum advertising time. Thereby, TV channel Nelonen, operating under Sanoma's umbrella, had the average advertising time of 12 minutes and 7 seconds per clock hour during a time frame in 2011. Sanoma was notified and ordered to amend its practices.

Sanoma appealed the FICORA decision to Helsinki Administrative Court which found in favour of FICORA. The dispute was then brought before the Supreme Administrative Court which stayed the proceedings and decided to request a preliminary ruling on the following issues: Since national law seems to present various means as alternatives it asked: Does Art. 19(1) AVMSD preclude national law being interpreted so as to exclude split screens realised as described above from the concept a break-bumper separating programmes from advertising? Taking into account the concept of "advertising spots" and since the AVMSD did not expressly link presentation of sponsor signs to sponsored programmes, the Court asked: Does Art. 23(2) AVMSD preclude interpretation whereby sponsor signs presented outside the sponsored programs are included in the maximum permissible time allotted to advertising thus classified as advertising spots pursuant to Art. 23(1)? Moreover, in view of Art. 23(1) AVMSD and taking into account the minimum nature of the directive, may national law be interpreted in a manner which includes "black seconds" to the maximum permissible advertising time? With regard to Article 19(1) AVMSD, the CJEU noted that an individual means of separation despite its nature must in itself meet the minimum requirements of the said article where not accompanied by other means. National law does not have to require the means to be executed together. For their part, sponsor signs presented outside the sponsored programmes must be included in the maximum advertising time pursuant to Article 23(1); sponsor signs not fulfilling the requirements of Article 10(1) AVMSD cannot fall within the scope of Article 23(2). Taking into account the objective of the provision, Article 23(1) indeed requires the inclusion of "black seconds" in the maximum time where the national legislator has not opted for a more stringent limit; the time reserved for programmes cannot drop below 80% within a given clock hour.

As a background, FICORA had issued guidance (2004; updated 2011) of a non-binding nature on the duration and placement of advertisements so as to clarify its interpretation of the law. FICORA had also published its non-binding stance on screen-splitting in 2010.

• Judgment of the Court (Fourth Chamber) in Case C-314/14 Sanoma Media Finland Oy-Nelonen Media v. Viestintävirasto, 17 February 2016
http://merlin.obs.coe.int/redirect.php?id=17934 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV HR

• *KHO 2014:116, 27.6.2014* (Supreme Administrative Court, KHO 2014:116, 27 June 2014)
http://merlin.obs.coe.int/redirect.php?id=17935 FI

• *Viestintäviraston mainonnan kestoa ja sijoittelua koskeva ohjeistus, 31.1.2004, päivitetty 22.3.2011* (FICORA's guidance on duration and placement of advertisements)
http://merlin.obs.coe.int/redirect.php?id=17949 FI

• *Viestintäviraston kannanotto jaetun kuvaruudun käytöstä mainonnassa, 1162/9220/2010, 21.12.2010* (FICORA's stance on the use of split screens in advertising)
http://merlin.obs.coe.int/redirect.php?id=17950 FI

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NATIONAL

AT-Austria

Vienna Commercial Court Wien refers question to the ECJ for a preliminary ruling on the concept of "communication to the public"

On 2 December 2015, the Vienna Commercial Court referred a question to the ECJ on the concept of "communication to the public" in copyright law, in proceedings for a preliminary ruling under Article 267 TFEU.

The reason for the referral was an action brought by the Austrian collecting society Verwertungsgesellschaft Rundfunk (VGR) against a hotel operator for a breach of broadcasting rights. The hotel management provides TV sets in the hotel rooms by means of which the signals of several television and radio programmes can be seen and heard (so-called "hotel room TV"). The room price per night covers the use of the TV sets and the provision of the TV and radio programmes. VGR claims that this constitutes communication of the programmes to the public and is thus a breach of broadcasting rights. The Commercial Court stayed the proceedings and referred a question to the ECJ for a preliminary ruling. The Court asks whether the condition of the "payment of an entrance fee" within the meaning of Article 8(3) of Directive 2006/115/EC (Rental and Lending Directive) is satisfied if: TV sets are provided in separate rooms of a hotel and the signals of TV and radio programmes are capable of being seen or heard as a result of that provision by the hotel management; the management makes a charge per night for using the room with "hotel room TV" ("room price"); and the charge covers the use of the TV sets and the possibility of seeing or hearing the TV and radio programmes provided.

This case is somewhat different from earlier referrals asking the ECJ to rule on the right of communication to the public in hotel rooms. The most recent referrals were from Ireland in 2012 and the Czech Republic in 2014, where the subject of the proceedings was either Article 3(1) of the Copyright Directive, which grants the exclusive right of communication to the public, or Article 8(2) of the Rental and Lending Directive, which concerns the use of phonograms communicated to the public. In the present case, however, the provision at issue is Article 8(3) of the Rental and Lending Directive, which concerns the broadcasting right itself and according to which the broadcasters have the exclusive right to communicate programmes to the public in places accessible to the public against payment of an entrance fee. The question now is whether the hotel rooms equipped with "hotel room TV" are places only accessible to the public against payment of an entrance fee. If so, the "entrance fee" would be the price the guest pays for a room.

• *Vorabentscheidungsersuchen des Handelsgerichts Wien (Österreich) eingereicht am 2. Dezember 2015 - Verwertungsgesellschaft Rundfunk GmbH gegen Hettegger Hotel Edelweiss GmbH (Rechtssache C-641/15)* (Request for a preliminary ruling from the Handelsgericht Wien (Austria) lodged on 2 December 2015 — Verwertungsgesellschaft Rundfunk GmbH v Hettegger Hotel Edelweiss GmbH (Case C-641/15))
http://merlin.obs.coe.int/redirect.php?id=17953 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV HR

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BG-Bulgaria

Advertising campaign with the slogan "The best from Bulgaria. The best from Europe" is misleading

On 8 February 2016, the Supreme Administrative Court of the Republic of Bulgaria dismissed the action brought by the retailer Lidl Bulgaria EOOD and Co. against the decision of the Commission on Protection of Competition (the Commission) and confirmed the decision of the lower court. The Commission had imposed on Lidl a fine of 0.1% of its revenues for 2012,

or 370,859 leva (approx. EUR 189,620), for a misleading advertising campaign employing the slogan "The best from Bulgaria. The best from Europe".

The campaign involved outdoor, print, and TV advertising. In the TV commercial, a young woman in Spain, France and Bulgaria, bought food items typical of the country, such as oranges, a baguette, camembert and yoghurt. At the end of the commercial came the aforementioned slogan followed by "Lidl is worth it". The other advertising formats, in which other European countries were included with products characteristic of the country, were designed in a similar way. The focus was only on those products whose designation or brand could be connected to Lidl, as they are sold exclusively by that company. As the products were not shown in an abstract way and were presented without any distinguishing features, the Commission held that the claim that they were "the best" could only be seen as relating to the brands or designations concerned. The Commission accordingly examined in its decision the extent to which the Bulgarian products shown (yoghurt, honey, lutenitsa - a traditional Bulgarian vegetable paste - and chicken) were objectively the best in their category in terms of their quantity and quality. After a thorough analysis, it was not possible to prove that that was the case.

The Supreme Administrative Court emphasised in its decision that it had been right for the Commission to examine whether the advertisers' claim (that the products were "the best") was objectively correct and sufficiently precise. Inasmuch as that examination had established that the products were in fact not the best, the Commission had been right to rule that the advertising slogan had been objectively untrue and that its dissemination had been an unfair business act. The Court continued to state that it was not possible to discern any fact that could support the company's claim: that the aim of the advertising campaign had been completely different and the intention had not been to emphasise that the products were the best in their category but, rather, to describe them as the most distinctive for the European country concerned.

The Court also dismissed as unfounded the plaintiff Lidl's further arguments that the advertising was not a statement of fact but only a subjective opinion on the part of the advertisers and that the fine imposed did not correspond to the purpose of the law. It stressed that when conducting an assessment of the misleading character of the advertising it was irrelevant whether the deception resulted from false claims or a subjective opinion.

Before the state institutions had considered them, the facts had been determined in 2013 by the National Council for Self-Regulation. The Council's Ethics Commission ruled that the advertising breached neither Article 5.1 (deception) nor Article 5.5 (veracity) of the Advertising Code of Ethics. In the Council's opinion, the advertising slogan was not to be understood in relation to actual products. Rather, the intention of the advertising was to emphasise the wide range and international nature of the plaintiff's products. However, neither the Commission on Protection of Competition nor the Court were bound by that decision.

• РЕШЕНИЕ *№ 1714* на Комисията за защита на конкуренцията от *18.12.2013* г (Decision No. 1714 of the Commission on Protection of Competition of 18 December 2013)
http://merlin.obs.coe.int/redirect.php?id=17938 BG

• РЕШЕНИЕ *№ 1283* Върховен административен съд на Република България от *08.02.2016* г (Decision No. 1283 of the Supreme Administrative Court of the Republic of Bulgaria of 8 February 2016)
http://merlin.obs.coe.int/redirect.php?id=17939 BG

• РЕШЕНИЕ *№ 147* на Етичната комисия на Националния съвет за саморегулация от *19.09.2013* г (Decision No. 147 of the Ethics Commission of the National Council for Self-Regulation of 19 September 2013)
http://merlin.obs.coe.int/redirect.php?id=17940 BG

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DE-Germany

Google liable if aware of breaches of the law

The operator of the search engine Google can be held liable for breaches of the law on third-party websites displayed in search results. The precondition for this is that Google has been informed about the breach and has nevertheless not taken any suitable measures to block the content accessed via the search engine. This was the ruling of the Landgericht Köln (Cologne Regional Court) in a judgment of 16 September 2015 (Case 28 O 14/14).

In the case at issue, a married couple were confronted with insults in an Internet forum. Among other things, it was claimed that they operated websites with morally reprehensible content. After the facts had been clarified, the allegations could still be found by searching for the relevant terms in Google. The couple were afraid of suffering professional and private disadvantage as a result of damage to their reputation and filed a cease-and-desist action. In the plaintiffs' view, in order to meet its obligation to check search results, Google should have installed a search filter to prevent the websites concerned from being displayed when the relevant search terms were entered.

The Regional Court judges affirmed that the operator of the search engine was liable. They considered that Google's contribution to the breach of the law lay in the fact that it had taken no steps to remedy the situation after having been previously made aware by the plaintiffs of the unlawful content. In the Court's opinion, automatically linking the specific search terms

to the display of links to certain third-party websites with unlawful content means that Google is responsible as a co-liable party (Störerhaftung) if it has been informed about the unlawful content and takes no steps to put an end to the breach of the law. The Court noted that the search engine operator's contribution, for which no legal fault was found, lay in enabling users of the search engine to encounter the relevant statements. The company should therefore have taken action against the breaches of personality rights complained of instead of permitting them on its own platform.

However, the Court did not endorse the plaintiff's view that Google should have installed a search filter in order to meet its obligations, because the development of a search filter involved the investment of excessive time and effort for the company and accordingly was not proportional. Moreover, in view of the steadily growing capacity/size/scope of the Internet, Google was unable to run a continuous check of unlawful content on links found by the search engine.

Overall, the Cologne judges affirmed that the company was obliged to remove the link but denied that a search index was necessary. They also dismissed the claim against Google for pecuniary damages.

• *Urteil des Landgericht Köln vom 16. September 2015 (Az.: 28 O 14/14)* (Cologne Regional Court of 16 September 2015 (Case 28 O 14/14))
http://merlin.obs.coe.int/redirect.php?id=17954 DE

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YouTube is not a music service subject to licensing

The Oberlandesgericht München (Munich Regional Court) held, in a judgment of 28 January 2016 (Case 29 U 2798/15), that the online video portal YouTube cannot be held liable for breaches of copyright committed via the platform.

The case comprised an action for damages brought against YouTube by the music performing rights society GEMA. For many years, GEMA has been demanding licence fees from YouTube for the use of music in the videos on its platform. YouTube refuses to pay, which GEMA considers unreasonable, especially in view of the advertising revenues generated by YouTube. It claims that YouTube is exploiting the music works that can be retrieved from its platform, and considers that the fact that YouTube keeps works available on its platform is relevant because it makes YouTube itself a perpetrator of copyright violations. The platform is, GEMA asserts, therefore a music service and is accordingly obliged to pay fees. YouTube, on the other hand, mainly considers itself a technical service provider with no control over the publication of individual videos. Rather, it claims, it only provides the platform via which users disseminate content, and the relevant act as far as copyright is concerned is the actual uploading of videos by its users.

The Munich Regional Court ruled in the defendant's favour and dismissed GEMA's action, stating that YouTube was not a music service subject to licensing. In the Court's view responsibility for the content of the videos uploaded to the online video platform lies not with YouTube itself but with those who upload content. As such the Court considers that GEMA must seek payment from the platform's users and not YouTube itself.

The judgment is not yet final, as leave has been given to lodge an appeal on points of law (Revision) to the Bundesgerichtshof (Federal Court of Justice - BGH). GEMA has announced its intention to do so.

• *Urteil des Oberlandesgericht München vom 28.01.2016 (Az.: 29 U 2798/15)* (Judgment of the Munich Regional Court of 28 January 2016 (Case 29 U 2798/15))
http://merlin.obs.coe.int/redirect.php?id=17941 DE

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North Rhine-Westphalia Landtag passes new law strengthening public service broadcasting

At its sitting on 27 January 2016, the Landtag (parliament) of North Rhine-Westphalia passed a new law providing for changes for the public service broadcaster Westdeutscher Rundfunk (WDR). The law provides a new overall plan to strengthen the public service broadcasting system and safeguard the diversity of media reporting.

The law defines the remit of WDR and lays down its institutional structure. For example, the broadcaster is given a clear mandate for the organisation of information and communication services (Telemedien) and Internet content, with the aim of ensuring its future in the digital age. The Rundfunkrat (Broadcasting Council) will in future hold its meetings in public, while the Verwaltungsrat (Board of Directors) is to be developed into a specialised professional body, thus strengthening internal supervision on a pluralistic basis.

The proportion of state representatives on the Broadcasting Council will be reduced from just under 31% to around 22%, exceeds the demands of the Bundesverfassungsgericht (Federal Constitutional Court) in its "ZDF judgment" (judgment of 25 March 2014, Cases 1 BvF 1/11 and 1 BvF 4/11 - see IRIS 2014-5:1/11). The WDR can now cooperate on research with other public

service broadcasters and commercial third parties. It is hoped that this cooperation in research will create synergies between the organisations. A further innovation in the law is that above a certain threshold the procurement of programmes from WDR subsidiaries will be subject to scrutiny by the aforementioned specialised body, with the aim of promoting transparency.

A particularly important new provision provides that WDR radio advertising will be reduced to 75 minutes a day from 2017 and to 60 minutes from 2019. With this measure, the Landtag aims to increase public acceptance of public service broadcasting and safeguard media diversity in North Rhine-Westphalia. The statutory reduction of advertising in the case of public service broadcasters is so far unique in this form and could mean further losses to a budget already in deficit. For example, the number of posts to be discarded - the current plan is to cut about 500 by 2020 - could rise further. This new rule was severely criticised by the WDR; the WDR's director general stated, "This is a short-sighted decision that is only in the interests of publishers and our commercial radio competitors". However, the Verband Privater Rundfunk und Telemedien (Association of Commercial Broadcasters and Audiovisual Services - VPRT) welcomed the decision: the Chairman of the VPRT's Department of Radio and Audio Services stated that "In passing the WDR Act today, the NRW government coalition has taken an important step towards a better balance in the dual broadcasting system and pointed the way forward for other Länder".

• *Gesetz zur Änderung des WDR-Gesetzes und des Landesmediengesetzes Nordrhein-Westfalen (15. Rundfunkänderungsgesetz) vom 2. Februar 2016* (Act amending the WDR Act and the North Rhine-Westphalia Regional Media Act (15th Amendment to the Broadcasting Act) of 2 February 2016)
http://merlin.obs.coe.int/redirect.php?id=17955 DE

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FR-France

Court suspends classification licence banning the showing of 'Salafistes' to under-18s

On 27 January - the day on which the film 'Salafistes' was released in cinemas - Minister for Culture Fleur Pellerin, adopting the Film Classification Board's opinion, banned the showing of the documentary film to anyone less than 18 years of age. The film provides a sounding board for a number of theoreticians of Islamic terrorism, and shows the everyday application of sharia law in Mauritania, Mali and Iraq. It also includes video footage of propaganda by the jihadist group Islamic State (IS) and by al-Qaeda, as well as amateur footage filmed during the attacks of 11 September 2001 and the attack against the magazine 'Charlie Hebdo'. Considered by some to be a "dangerous platform offered to extremists" and by others a "vital, enlightening document", and released just months after the attacks in Paris, the film has caused widespread controversy.

The production company applied to the administrative courts, under the urgent claims/matters procedure, to obtain suspension of performance of the classification licence, to which a warning was attached. It felt the condition of urgency required by Article L. 521-1 of the Code of Administrative Justice was met, since it had only been possible to release the film in four cinemas rather than the anticipated twenty-five. Its broadcasting on public-service television channels, either in full or as extracts, had been rendered impossible, and the financial survival of the company that had made the film was at risk. On the merits of the case, the company contested the legality of the Minister's decision, holding that the ban on showing the film to anyone under the age of 18 constituted a disproportionate infringement of freedom of expression and the public's right to be informed. The company claimed that the decision was based on an error of appreciation, since the film could not be regarded as glorifying violence but rather contributing to the duty to provide information.

Recalling the terms of Articles R. 211-10 to R. 212-13 of the Cinema and Animated Image Code, the judge stated that the Court had to decide whether the scenes at issue bore the characteristics of scenes of extreme violence as defined in the fourth and fifth paragraphs of Article L. 211-12 prohibiting the showing of such scenes to minors. Were the judge to find the scenes to contain such content, it would then be for the Court to assess how the scenes had been filmed and how they fitted into the work in question, in order to determine which of the two restrictions was appropriate. In the case at issue, the judge noted that the film, according to the very terms of the warning it carried, contained "utterances and images of extreme violence and intolerance likely to be disturbing for audiences". The Court nevertheless found that, by their impact and by the way in which they were included in the documentary, the scenes at issue actually contributed to denouncing the actions being committed. Similarly, the utterances and the scenes as a whole were deemed to have been "put into perspective". The judge sitting in urgent matters found, consequently, that the film, which also included scenes of resistance and dissidence, enabled its audience to think about the impact of the documentary and to achieve the necessary distance from the images and utterances presented, owing to its overall concept and even because of the violence of certain images. Under these conditions, it did not appear to be necessary to regard them as constituting "scenes of extreme violence" within the meaning of the aforementioned provisions such that showing it to anyone under 18 should be banned. The disputed classification licence

was therefore suspended, pending the court proceedings on the merits of the case for its cancellation.

• *Tribunal administratif de Paris (ord. réf.), 18 février 2016 - Société Margo Cinéma* (Administrative Court of Paris (under the urgent procedure), 18 February 2016 - the company Margo Cinéma)
http://merlin.obs.coe.int/redirect.php?id=17942 FR

Amélie Blocman
Légipresse

Court finds alleged victim of screenplay piracy guilty of abuse of process against authors and producers of 'The Artist'

A French scriptwriter claimed that he realised, when viewing the trailer for the film 'The Artist', released in October 2011, that the key sequences of a screenplay he had written had been used. The director had written a project for a silent cinema film in black and white, entitled 'Timidity, la symphonie du Petit homme' in the form of a usable version, first in 2000 and then in 2006. He had a summons for infringement of the copyright protection for the screenplay of his film issued against the author and the director of the film 'The Artist', which won several awards the following year at the Academy Awards and César ceremonies, and at the Cannes Film Festival, together with the film's producers.

The main point at issue before the regional court concerned proof of the anteriority of the applicant's rights. The defendants claimed there was no certain date on the screenplays presented to the Court (one in 2006 and the other in 2008, according to the applicant, who claimed the anteriority of his screenplay, on which he claimed to have worked for more than ten years). By definition, piracy supposes the existence of an original creation prior to the offending work, and the applicant's interest in taking legal action is conditional on demonstrating such anteriority. Thus the burden of proof is on the applicant to identify the work and determine the exact date of its creation. In the present case, the applicant based his claim on the production of two screenplay handouts, testimony, and attestations from various cinema technicians, and correspondence in relation to financing for the applicant's 'Timidity' project. After analysing these elements, the Court concluded that none of the documents made it possible to determine the content of the projects communicated by the applicant, or the exact date of the creation of the screenplays submitted by the applicant. Indeed the earliest date the Court could ascertain was seven months after 'The Artist' was released. The applicant, unable to establish the anteriority of any putative moral or pecuniary rights, was found to have no interest in taking legal action for infringement of copyright, and his claims were judged totally inadmissible.

The defendants had brought a counterclaim on the grounds of abuse of process, as they felt the applicant had made exorbitant claims (over five million Euros in compensation for the alleged prejudice suffered) since there could be no mistake over the extent of his rights in view of the absence of significant similarities between his work and the film 'The Artist'. The Court therefore examined the matter more closely. It noted that the concept of producing a silent film in black and white, even at the end of the 20th century, could not be protected by copyright, and that the works at issue differed in terms of plot, construction, style, ambience, the nature of their intended tribute to cinema, characters, and treatment of situations. Their only similarity lay in ideas that could not be appropriated. The Court also stressed the applicant's biased presentation of the facts, having failed to demonstrate the principle of the alleged prejudice suffered and manifesting culpable levity in exercising his right to take legal action. The applicant was further found at fault for having widely advertised the existence of the Court case, both in France and elsewhere, by presenting the alleged infringement of copyright as a certain fact. Furthermore, the applicant was held to be at fault for denigrating the film's director and producers, in such a way that there could be no doubt that the intention was to cause them offence. The Court found that this had caused the defendants prejudice by damaging their reputations, and therefore ordered the applicant to pay EUR 18 000 to the producers and the executive producer of 'The Artist'.

• *TGI de Paris (3e ch. 1re sect.), 25 février 2016 - C. Valdenaire c/ M. Hazanavicius, La classe américaine et a.* (Regional court in Paris (3rd chamber, 1st section), 25 February 2016 - C. Valdenaire v. M. Hazanavicius ('La Classe Américaine') and others) FR

Amélie Blocman
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Report submitted to Minister for Culture advocates reforming film classification

On 29 February, Jean-François Mary, Chairman of the Film Classification Board, submitted a report to the new Minister for Culture, Audrey Azoulay, on the classification of cinematographic works with reference to minors between the ages of 16 and 18 years. The report had been commissioned in September 2015, following the controversy over the courts' suspension of the classification licence for films including scenes of non-simulated sex, such as 'Love' and 'La Vie d'Adèle' (see IRIS 2015-8/15, IRIS 2015-10/13 and IRIS 2016-1/10). More recently, the suspension by the administrative court in Paris of the classification licence that the Minister had issued for the film 'Salafistes' because of the "extreme violence" of certain passages, which banned the showing of the film to under-18s, confirmed the need to deal with the subject (see IRIS 2016-4/xxx).

Consideration was given to the automatic nature of the ban on showing to under-18s that results from application of current law, as appreciated in jurisprudence. Since the provisions in force and their application by the administrative courts refer to criteria resulting in a ban on allowing minors to watch films that include "scenes of non-simulated sex or of extreme violence", this limits the Classification Board and hence restricts its appreciation. The classification a film receives impacts the film not only when it is released but also when it is shown on television or released on DVD. The report therefore recommended revising the wording of Article R. 211-12 of the Cinema and Animated Image Code, since the text has "become totally inconsistent" with the protection of minors guaranteed by Article L. 227-24 of the Criminal Code (banning messages of a violent or pornographic nature if they might be seen by minors), which does not help to ensure legal certainty on this point. The report therefore advocates that a classification licence should be issued "in keeping with the disturbance the work is likely to cause regarding the sensitivity of minors". The new legislation would continue to list just one criterion for the most restrictive level of classification (which provides that the content is not to be shown to anyone under the age of 18), replacing the criterion of "scenes of non-simulated sex" with a criterion of "scenes of sex" and including a ban on "incitement to violence". The report also recommends creating an intermediate category that would restrict films anyone less than 14 years of age might watch.

The report goes on to suggest amending the wording of Article 227-24 of the Criminal Code, which bans messages of a violent or pornographic nature if they might be seen by minors. This is so that, in cases brought before a criminal court, the judge is in a position to take account of the intention and the artistic process of the work's originator in defining the messages at issue. It also advocates simplifying routes for appeal, to shorten the time taken before cases are heard in the administrative courts when a classification licence is contested. This would involve amending the regulatory part of the Code of Administrative Justice to determine the court of first and last resort (the Conseil d'État). The aim is to limit the number of appeals, in order to ensure consistency over the duration of a work's exploitation. The Minister announced her intention to "embark immediately on the proposed regulatory reform, so that classification can take more account of the singularity of the works and their impact on audiences".

• *Rapport de Jean-François Mary, relatif à la classification des œuvres cinématographiques relative aux mineurs de seize à dix-huit ans* (Report by Jean-François Mary on the classification of cinema films in relation to minors between 16 and 18 years old)
http://merlin.obs.coe.int/redirect.php?id=17943 FR

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GB-United Kingdom

Court of Appeal rules on principle of "open justice" and national security

Erol Incedal, a 28-year-old law student from south London, was arrested in October 2013 and found to be in possession of a bomb-making manual on a memory card hidden inside his mobile phone case. He had been stopped for speeding in an E-class Mercedes, and a piece of paper inside his glasses case had a note of the address of a property owned by ex-prime minister Tony Blair and his wife. Following an almost totally secret trial, he was cleared of plotting a terrorist attack on the streets of London but was imprisoned for having the manual in his possession. Only 10 of the almost 70 hours of evidence were heard in open court. 10 specially accredited journalists were allowed to hear some of the secret evidence in locked sessions, but they were banned from telling others what they had seen or heard, and the Court retained their notebooks (mobile phones had to be surrendered on entering the Court and were locked away). More than a third of the prosecution case was held in complete secrecy with the journalists told they could face jail if they ever revealed what they had heard.

On 9 February 2016, the Court of Appeal (for England and Wales) gave its judgment on an application by several media organisations, pursuant to section 159 of the Criminal Justice Act 1988, for permission to appeal an order made by Nicol J on 1 April 2015. The order dismissed the application made on behalf of various media organisations that the reporting restrictions which applied during Incedal's trial be varied so as to permit the publication of reports of most, if not all, of what took place during hearings held in private but in the presence of accredited journalists. The media parties included Guardian News and Media Ltd, Times Newspapers Limited, News Group Newspapers Limited, Associated Newspapers Limited, Independent Print Limited, Telegraph Media Group, the BBC and ITN. The application was also supported by BSkyB Limited and the Press Association.

The media parties submitted that, following the conclusion of the trial against Incedal, there is no longer a significant risk or serious possibility that the administration of justice would be frustrated if the media could publish reports of the core of Incedal's trial. In consequence, there is no longer a continuing justification for the restrictions on reporting the trial that were imposed by the Court of Appeal's Order of 12 June 2014. Alternatively, the publication of reports of parts of the core of the trial would not give rise to such a risk.

The judges dismissed the media parties' appeal. They said that they were "quite satisfied from the nature

of the evidence for reasons which we can only provide in a closed annex to this judgment that a departure from the principles of open justice was strictly necessary if justice was to be done. It was in consequence necessary that the evidence and other information heard when the journalists were present was heard in camera." Further, because of the nature of that evidence, "those reasons continue to necessitate a departure from the principle of open justice after the conclusion of the trial and at the present time." The judges accepted that the decision compromised the press' function of being the watchdog of the public interest in holding the prosecution to public accountability; however, the Court noted that, since the context was terrorism, accountability would be possible through the work of the Intelligence and Security Committee of the House of Commons (Parliament). Finally, the Court noted that "it must always be a possibility, that at a future date, disclosure will be sought at a time when it is said that there could no longer be any reason to keep the information from the public, including this court's reasons for upholding the decision of the trial judge."

• Guardian News Media Ltd and Others v. R and Erol Incedal [2016] EWCA Crim 11
http://merlin.obs.coe.int/redirect.php?id=17918 EN

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Court of Appeal rules on "stop power" under Terrorism Act and journalistic material

The case concerned the legality of the stopping and searching of David Miranda at Heathrow Airport in 2013, who was believed to be carrying information relating to the Snowden disclosures which had been published in The Guardian newspaper (see IRIS 2016-2/28). Miranda is the spouse of Glenn Greenwald, a journalist who at the material time was working for The Guardian. The police relied on the Terrorism Act 2000 (TACT), and the High Court held that the actions of the police were legal, but gave leave to appeal. The Court of Appeal suggested that there were three questions before it: (a) the definition of TACT powers, so as to determine whether the power was used for its intended purpose; (b) the question of proportionality of the power's use; and (c) whether the use of the power is compatible with the rights guaranteed by Article 10 ECHR, specifically in relation to journalistic material.

As regards the first point, the Court of Appeal held that terrorism required some intention to cause a serious threat to public safety. Nonetheless, the use of the TACT powers in this context was in accordance with the act because TACT did not require actual knowledge or suspicion that the person to be stopped is a terrorist but instead the power may be used "for the purpose of determining whether he appears to be a [terrorist]". The Court of Appeal approved the approach taken at first instance, that this means "the power has been given to provide an opportunity for the ascertainment of the possibility that a traveller at a port may be concerned in the commission, preparation or instigation of an act of terrorism", and that the use in this case was therefore appropriate.

The Court of Appeal also considered the proportionality of the measure. The Court accepted that in assessing a matter affecting national security, a significant degree of deference should be shown to the view of the security services, and should also take into account the degree of harm that could materialise. The Court of Appeal determined that although the use of the Schedule 7 power was an interference with press freedom, the interests of national security outweighed the Article 10 right.

Despite this, the Court of Appeal then considered Article 10 again and the specific question of whether the stop and search procedure, when used in respect of journalistic information or material, is incompatible with Article 10 in that it is not "prescribed by law" as required by Article 10(2) ECHR. Here, the concern is the lack of safeguards, which is a qualitative element of lawfulness arising from the Strasbourg jurisprudence (see Sanoma Uitgevers v. the Netherlands, IRIS 2010-10/2), but also noted by the Supreme Court (see Beghal v. DPP [2015] UKSC 49). The Court of Appeal accepted that there were some safeguards in the system but found that these were insufficient. Lord Dyson MR argued: "The central concern is that disclosure of journalistic material (whether or not it involves the identification of a journalist's source) undermines the confidentiality that is inherent in such material and which is necessary to avoid the chilling effect of disclosure and to protect Article 10 rights. If journalists and their sources can have no expectation of confidentiality, they may decide against providing information on sensitive matters of public interest. That is why the confidentiality of such information is so important. It is, therefore, of little or no relevance that the Schedule 7 powers may only be exercised in a confined geographical area or that a person may not be detained for longer than nine hours. I accept that the fact that the powers must be exercised rationally, proportionately and in good faith provides a degree of protection. But the only safeguard against the powers not being so exercised is the possibility of judicial review proceedings."

So while the Court of Appeal upheld the Divisional Court judgment on the first two points, it allowed the appeal on this last point, holding that "the stop power conferred by para. 2(1) of Schedule 7 is incompatible with Article 10 of the Convention in relation to journalistic material in that it is not subject to adequate safeguards against its arbitrary exercise."

• R. (Miranda) v. Secretary of State for the Home Department [2016] EWCA (Civ) 6
http://merlin.obs.coe.int/redirect.php?id=17916 EN

• Beghal v. Director of Public Prosecutions [2015] UKSC 49
http://merlin.obs.coe.int/redirect.php?id=17917 EN

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Ofcom's strategic review of digital communications

On 25 February 2016, Ofcom announced the conclusions of its Strategic Review of Digital Communications in the United Kingdom. The report focused particularly upon Openreach, which is a wholly owned subsidiary of telecommunications company BT Group. Ofcom raised concerns as to whether the particular structure of Overreach was favouring BT against its rivals, leading to a lack of transparency, competition and quality of service for customers, especially in the provision of universal broadband connectivity.

Openreach is responsible for the provision of the fibre optic cable system necessary for the delivery of broadband services. BT controls most of the network including over-ground and below-ground networks, primarily as a consequence of when the United Kingdom had a nationalised telephone system and before BT went into private ownership. Ofcom restructured BT in 2005, leading to the creation of the Openreach subsidiary. Although part of BT Openreach had to treat all customers equally, including broadband providers such as TalkTalk and Vodafone, who have to use the BT network.

Ofcom's Review considered that Openreach was working more for the benefit of BT, rather than fulfilling an equal treatment of all wholesale customers. The Review has proposed various changes. A review of Openreach will follow including whether it should be a ring-fenced wholly-owned subsidiary of BT Group with its own purpose and board members. If necessary, Ofcom reserves the right to require BT to spin off Openreach as an entirely separate legal entity with its own shareholders. Ofcom will prepare detailed proposals later this year. The main concern is to have a structure that does not favour BT at the expense of competitors, nor detract from winning investment to improve the infrastructure. Moreover, the increased independence of Openreach will be reviewed later this year, including discussions with the European Commission on competition issues.

Ofcom recommended greater consultation and involvement with wholesale customers on strategic investment and technical decisions such as the location of new cables and masts, as well as the type of technology used so as to encourage efficiency, competition and innovation, especially given the global move towards 5G mobile networks which is predicted to be in the UK by 2025. The technological improvement is also to improve coverage problems in buildings, and transport. This consultation would extend to allowing other wholesale customers to lay their cables alongside BT's.

Minimum quality standards need to be imposed to ensure that all customers' expectations are fulfilled and to reflect changing demand and technology. A system of fines against Openreach has been recommended if it fails to meet or maintain required standards with the standard threshold to increase over time. Openreach needs to provide greater information on broadband speeds, quality standards, whilst working towards a standard cost comparison so it is easier to compare the costs provided for different products and by competitors. Ofcom regarded this as essential given the increase in switching from triple play services (i.e. phone line, TV and broadband) to quad play, which includes mobile phone services too.

Demand for broadband services is expected to soar; for instance, UK on-demand TV services were used by 74% of adults in 2015, whilst the increasing use of downloading content to mobile applications is predicted to increase. Ofcom preferred to encourage co-operation and competition, and to only intervene and regulate where absolutely necessary.

As a consequence of their Review, Ofcom will now consult with relevant parties including the wholesale providers and produce detailed implementation in due course. Ofcom will work with the government to implement the new universal right to broadband with a minimum standard of 10Mb for everyone. Both fixed superfast broadband and mobile coverage is lower in Scotland, Wales and Northern Ireland than in the UK as whole, as are average speeds; as such the service needs to improve.

• Ofcom, Making communications work for everyone: Initial conclusions from the Strategic Review of Digital Communications, 25 February 2016
http://merlin.obs.coe.int/redirect.php?id=17914 EN

• Ofcom, Strategic Review of Digital Communications: Discussion document, 16 July 2015
http://merlin.obs.coe.int/redirect.php?id=17915 EN

Julian Wilkins
Blue Pencil Set

BBC issues editorial guidelines for EU referendum

The BBC has issued editorial guidelines for the campaign period before the referendum on UK membership of the EU to be held on 23 June 2016. They apply in addition to the general editorial guidelines that cover issues such as impartiality and broadcasting during elections.

The referendum guidelines set out the application of the BBC's obligation of impartiality in detail. This cannot be achieved by a mathematical formula or use of a stopwatch, but the objective should be to provide a "broad balance" between the two sides. Normally, in daily programmes this will mean a broad balance across each week of the campaign, although for one-off output due impartiality and a broad balance must be achieved within a single programme. Particular care should be taken to ensure that audiences know whom or which campaign a contributor is representing. Special care must be taken in broadcasting unrelated stories about individuals or organisations involved in the campaign, but here a broad balance may not be required, for example where a politician is involved in a newsworthy incident unrelated to the referendum. In debates and discussions on the referendum, neither side should be able to exercise a right of veto by declining to take part; in that case producers must take all reasonable steps to ensure that the audience is presented with material from both sides of the referendum debate. There is no requirement for balance between the political parties in discussing the referendum issue, although the general obligation for fair treatment, breadth of opinion and due impartiality remains.

The same guidelines will apply to BBC editorial content on all BBC websites as well as material identified with the BBC that appears on sites operated by third parties. BBC staff must avoid compromising the BBC's impartiality by expressing their own views on personal websites or social media. All online debate on the referendum, whether on the BBC website or BBC branded social media, will be actively hosted and will be moderated and filtered. There will be no online votes, and the BBC will not publish numbers of contributions to assess support for either side.

BBC reporting of opinion polls will not lead a news bulletin or programme simply with the results of a poll, as polls have to be placed in context. The BBC will not rely solely on the interpretation of a poll by the organisation that commissioned it, nor use language which gives polls greater credibility than they deserve (use "suggests" but never "proves" or "shows"). Onscreen graphics must always show the margin for error in a poll.

On the polling day there will be no coverage of any of the issues relating to the referendum from 00.30 a.m. until the polls close at 22.00 p.m.

• BBC, EU Referendum Guidelines (2016)
http://merlin.obs.coe.int/redirect.php?id=17913 EN

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IE-Ireland

High Court rejects application to remove court report from media website

On 8 February 2016, the High Court delivered its judgment in Philpott v. Irish Examiner Limited, concerning (a) the circumstances where a court will order the media to cease further publication of a defamatory statement, and (b) the defence of absolute privilege for "fair and accurate" court reporting.

The case arose following publication of two articles by the Irish Examiner newspaper in 2015, headlined "Former CEO loses case against hospice," and "Ex-Marymount Hospice executive's legal case resolved." Both articles reported on a court action taken by a hospital official against his employer, following the official's dismissal. The articles included the statement that the official "was dismissed from his post in February after seven months for 'significant interpersonal difficulties' between him and other staff members."

The hospital official initiated defamation proceedings against the newspaper, arguing that the articles were defamatory, and sought "removal of the articles from the internet." The official argued that "it is proving difficult for him to get employment." The official sought an order under section 33 of the Defamation Act 2009, which provides that a court may grant an order prohibiting the publication, or further publication, of a statement where, in the court's opinion, (a) the statement is defamatory, and (b) the defendant has no defence to the action that is reasonably likely to succeed.

In the High Court, Justice Max Barret first examined section 33, noting that because of the "premium placed by our society on freedom of speech," section 33 "merely" provides that the court "may" grant an order, "even when the court is of the opinion that an insensible defamatory statement" is published. The judge then laid down a test for the granting of a section-33 order: in the opinion of the court: (1) is the statement complained of defamatory?; (2) does the defendant have a defence to the claim of defamation?; and (3) is that defence reasonably likely to succeed?

Importantly, Justice Barrett held that there is now an "even stronger" threshold for plaintiffs to satisfy under section 33 than existed under the pre-2009 law. Under section 33, the court must be of the opinion "that an impugned statement 'is defamatory', not that it is arguably or even unarguably so, but that, in the court's opinion, it 'is' so." Justice Barrett added that given the "very height of the that threshold," and the legal costs involved, section 33 orders would only be available to "the very rich" and "those who have

been so demonstrably and disgracefully defamed that the justice of their case cries out for injunctive relief." Notably, Justice Barrett also held that "there is nothing in the technology-neutral wording of s.33 to suggest that Internet publications fall to be treated differently from other publications when it comes to the granting of a s.33 order."

The Court then examined section 17 of the 2009 Act, which provides a defence of "absolute privilege" for "a fair and accurate report" of court proceedings. Justice Barrett approved 13 principles from the textbook Gatley on Libel and Slander (12th edition) on "fair and accurate" reporting, as "good law in this jurisdiction." Notably, Justice Barrett rejected the argument that "a court reporter needs to be present for any, let alone every, aspect of court proceedings on which s/he reports," and stated that "this proposition is entirely rejected by this Court."

Justice Barret stated that he saw "nothing in this text but an abridged, condensed or summarised account of the trial and appellate proceedings." The judge concluded that both articles were within the "liberality and latitude that is afforded court reporters and court reports pursuant to, and consistent with" the defence of absolute privilege of fair and accurate reports of court proceedings. The Court then applied its three-step test, and concluded that neither of the articles was defamatory, and the defence of absolute privilege was open to the Irish Examiner in respect of both articles. The Court therefore rejected the hospital official's application.

• Philpott v. Irish Examiner Limited [2016] IEHC 62
http://merlin.obs.coe.int/redirect.php?id=17923 EN

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Political party loses legal challenge over televised leaders' debate prior to election

In judicial review proceedings in the High Court, a political party (Green Party) challenged the exclusion of its leader from a televised party leaders' debate by public service broadcaster RTÉ.

The applicant (a trustee of the Green Party), sought a declaration that the criteria operated by RTÉ, and in particular the requirement that a party have "at least three sitting members" in the outgoing Dáil Éireann (lower house of Irish parliament) before the leader of that party be invited to participate in the leaders' debate was unfair, undemocratic and unconstitutional and in breach of RTÉ's statutory obligations as a public broadcaster under the Broadcasting Act 2009.

The applicant argued that the inequality of treatment of the Green Party (who were unable to meet the requirement), would be to its detriment and suggested to the public that the Green Party was "not a significant player by its exclusion".

RTÉ said its criteria were objective, fair, transparent and applicable to all political parties and were put in place following an extensive review by an expert Steering Group and in "light of editorial factors". The broadcaster argued that it "must be afforded a margin of appreciation in the making of editorial decisions". RTÉ accepted that the purpose of the leaders' debate is "to bring to the public a debate on national issues between parties holding policy positions on those issues". However as a matter of editorial choice, "it must adopt a formula which results in an informative, engaging and meaningful television programme" which simultaneously "achieves the overall objective of fairness, balance and impartiality." The broadcaster contended that the Green Party were effectively seeking to have RTÉ apply "subjective" criteria for televised party leaders' debates that would favour the Green Party over other parties.

Ms Justice Marie Baker agreed with RTÉ's arguments and found its criteria were "sufficiently reasonable and impartial", not unfair or irrational, and were "proportionate to the needs of the political debate and the public's right to be informed and educated".

The judge stated that RTÉ had accepted that the editorial criteria that it had adopted for the 2016 election were "not perfect". Her primary difficulty with the applicant's argument was that many of the considerations contended for were "considerations which would favour the Green Party over other possible participants in the TV debate". It was claimed by the applicant that the refusal of RTÉ to invite the Green Party leader to the debate "indicated a failure to consider the strength and historical and international importance of Green Party policies". Ms Justice Baker found those factors were "overly subjective" and could lead to arguments of "partiality and subjectivity".

According to Ms Justice Baker, the choice of the criteria for determining inclusion in the live TV leaders' debate arose from an "editorial decision that the debate would not be attractive and informative to viewers if the leader of every political party were to participate". The judge accepted the general proposition that some threshold requirements and some editorial choice had to be made. In reaching her decision, she took into account the "extent to which the role of RTÉ as an expert must be respected by the Court" and which is given a "singular and unique recognition in the Constitution." Ms Justice Baker stated that she did not "consider that the High Court can have any role in that editorial choice" and that "the Court cannot be asked to fix programming criteria in which it has no expertise." Accordingly, Ms Justice Baker refused the relief sought by the applicant.

• Kivlehan v. Radió Teilfís Éireann [2016] IEHC 88
http://merlin.obs.coe.int/redirect.php?id=17921 EN

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IT-Italy

AGCOM publishes the results of the inquiry on the audiovisual production sector

On 25 February 2016, by Resolution no. 582/15/CONS, the Italian Communications Authority - (Autorità per le garanzie nelle comunicazioni - AGCOM) published the results of the inquiry relating to audiovisual production sector.

The inquiry started on 13 January 2015 (Resolution no. 20/15/CONS) in order to carry out a review of the audiovisual production sector, as well as to make an in-depth analysis on the production process of audiovisual works and on the mechanisms of market functioning. The inquiry ended on 16 October 2015. The AGCOM report, running to more than 170 pages, provides a comprehensive analysis of legal and economic aspects of the sector.

According to AGCOM, producers and audiovisual media services providers operate in a market made uneven due to the peculiar structure of the national market, the technology changes (in particular, convergence), the differences of the value chain depending on nature, duration and genre of the audiovisual work, and the complexity of the legal and regulatory framework. These elements lead to the inadequacy, undercapitalisation and risk-averse nature of several companies operating in the sector at hand.

Audiovisual media services providers believe that these characteristics are due essentially to the legal framework, in particular regarding the investment obligations, which are capable of altering the competitive ability of the market players. Moreover, under Italian law the investments obligations are calculated on the revenues of the broadcasters, while the EU legal framework refers to the programming budget (see IRIS 2008-9/2). In addition they believe that the subquotas devoted to certain specific genres (like programmes aimed at children) are a legacy of the analogue age, no longer necessary and adequate in the digital environment, where there are many thematic channels (e.g. children's channels).

The producers instead deem that the complexity and the inadequacy of the market is due to the imbalance in the rights management system of the produced works. They underline the necessity to change the regulation concerning the primary and secondary rights on the audiovisual works.

Both audiovisual media service providers and producers agree on the inadequacy of the legal framework concerning the "over-the-top" operators: they deem that OTT operators (excluding those who exercise editorial control over the content and therefore fall within the scope of the Audiovisual Media Service Directive) (i) do not have to comply with the obligations established by the Audiovisual Media Services Directive, including investment and programming quotas to support the production and consumption of European works; and (ii) benefit from the tax system. According to audiovisual media service providers and producers, this unbalanced legal framework leads to an unlevelled playing field, with a consequent alteration in the competitive dynamics and allocation of resources.

• *Delibera n. 582/15/CONS - Conclusione dell'Indagine conoscitiva avviata con delibera n. 20/15/CONS sul settore della produzione audiovisiva, 16 ottobre 2015* (Resolution no. 582/15/CONS, Conclusion of the inquiry launched with the Resolution no. 20/15/CONS on the audiovisual production sector, 16 October 2015)
http://merlin.obs.coe.int/redirect.php?id=17468 IT

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NL-Netherlands

Politician convicted for insulting and discriminatory remarks made in TV interview

On 1 February 2016, the Court of Appeal of Amsterdam sentenced local Dutch politician Delano Felter to pay a fine for making insulting and discriminatory remarks against homosexuals during a TV interview in 2010. The same Court acquitted Felter in 2013, but was ordered to revise the ruling by the Dutch Supreme Court in 2014. The ruling could prove important for future prosecutions for insulting and discriminatory remarks against a specific group (for previous prosecutions, see IRIS 2009-3/103).

In February 2010, Felter was running for the local elections in Amsterdam as leader of a small local party. After a public debate about freedom of speech between party leaders who were running for the local elections, Felter was interviewed by the local TV station 'AT5'. When asked about his opinion regarding homosexuals, Felter spoke about homosexuals as "dirty men", who are "dominant aggressive persons with a sexual deviation" and that "it is normal to hate them". He went on to say that they should be "actively opposed by heterosexuals" and "thrown out of the city". The footage was shown on the local TV-network the day after the interview on 25 February 2010.

Felter was charged with making insulting and discriminatory remarks against a specific group, based on Aarticles 137c and 137d of the Dutch Criminal Code. The defence attorney pleaded for acquittal on the grounds of freedom of speech. He emphasised the importance of freedom of speech for politicians regarding a topic of public debate. The Court of Appeal followed the reasoning of the defence attorney in 2013, ruling that the remarks made by the suspect were "reasonable value judgements". Although these value judgments could "offend, shock or disturb", the Court ruled that they were not "excessive" and were part of the public debate that took place earlier that evening.

The Dutch public prosecutor appealed the decision, and in 2014 the Dutch Supreme Court ruled that the Court of Appeal of Amsterdam had to revise the verdict. The Court of Appeal had not given enough weight to the responsibility of politicians "to prevent that they disseminate statements that conflict with the law and with the principles of constitutional democracy". The Supreme Court stated that "this not only involves statements that incite hatred or violence or discrimination, but also inciting to intolerance".

In the judgment of 1 February 2016, the Court of Appeal of Amsterdam ruled that the remarks made by Felter were "so contrary to the Constitution and the fundamental principles of the Dutch democratic constitutional state that they are not worthy of protection". The Court also doubted whether the remarks could be seen as a contribution to a public debate, and if so to which public debate. The Court ruled that the remarks were "gratuitously offensive" and thus not protected by the freedom of speech.

- *Gerechtshof Amsterdam, 1 februari 2016, ECLI:NL:GHAMS:2016:296* (Court of Appeal of Amsterdam, 1 February 2016, ECLI:NL:GHAMS:2016:296)
http://merlin.obs.coe.int/redirect.php?id=17925 NL
- *Hoge Raad, 16 december 2014, ECLI:NL:HR:2014:3583* (Supreme Court, 16 December 2014, ECLI:NL:HR:2014:3583)
http://merlin.obs.coe.int/redirect.php?id=17926 NL

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Court rules on investigative TV programme's methods and the right to privacy

The Dutch TV show *Onopgeloste zaken* investigates unsolved cases, which usually leads to a confrontation with a person on camera. In this particular case, a person confronted about possible wrongdoing considered the confrontation to be a violation of his privacy and brought proceedings against the TV show.

The claimant was approached by a family, asking him to store their furniture while they were renovating their house. Upon completion of the renovation they wanted their furniture back, but it seemed that the claimant's company could not be reached by phone or mail. Thereupon the family approached the TV show, which decided to investigate the case. After extensive research the production team found several witnesses who confirmed some suspicions. Onopgeloste Zaken tracked down the home address of the claimant and confronted him abruptly with their research results and stated that he had unjustly enriched himself by selling the furniture that was entrusted to him by the family. The claimant instantly acknowledged that he had not returned the family's belongings to them and that it could well be possible that he had sold it. He promised on camera to make financial amends upon presentation of a list of the missing furniture.

The District Court considered the case a clash between two fundamental rights: on the one hand the right to privacy, which entails the prevention of being lightly accused of a crime in public, and on the other hand the freedom to receive and impart information. Several aspects were taken in to consideration in deciding which fundamental right prevailed in this case. These were the nature and possible consequences of the broadcasted incriminations, the severity of the suspected crime which was brought to the attention of the public, whether the accusations were grounded in the available facts, the presentation of the accusations, and finally whether it would have been possible to reach the same result using less damaging methods than broadcasting the issue on national television.

Weighing these factors the severity of the abuse was taken very seriously and by revealing the claimant's role in the embezzlement of the furniture, the show fulfilled its role as a public watchdog. The judge stresses that investigative journalists enjoy a rather wide margin of appreciation in assessing the proper methods for achieving their journalistic goals. In this case the goal was to help the family find their furniture. The research and set-up of the show was intended to achieve that particular goal and precautions were taken, such as blurring the claimant's face, in order to prevent the claimant from being unnecessarily harmed. These precautions were not necessary, but were well in place considering the intrusive nature of television broadcasting. The exchange of strong wording, as happened in the broadcasting, is protected by the freedom of speech and should therefore not be prohibited. In conclusion, the balancing of interests of both parties was decided in favour of the interests of the TV show since these align with the interests of the public.

- *Rechtbank Overijssel, 29 december 2015, ECLI:NL:RBOVE:2015:5786* (District Court Overijssel, 29t December 2015, ECLI:NL:RBOVE:2015:5786)
http://merlin.obs.coe.int/redirect.php?id=17927 NL

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RO-Romania

Act on the Scientific Information and Education

On 17 February 2016, the Chamber of Deputies, the lower Chamber of the Romanian Parliament, tacitly adopted the Draft Law on the completion of Audiovisual Law no. 504 of 2002, republished on 11 July 2014 (Propunere legislativă pentru completarea Legii audiovizualului nr. 504 din 2002, republicată în 11 iulie 2014). The objective of the Law is to ensure the information and education of the public under a scientific and technological aspect. The final decision belongs to the Senate, the upper Chamber of the Romanian Parliament. The Draft law had been tabled by 75 Members of Parliament from almost all the parliamentary forces (see IRIS 2009-2/29, IRIS 2010-1/36, IRIS 2011-4/31, IRIS 2011-7/37, IRIS 2013-3/26, IRIS 2013-6/27, IRIS 2014-1/37, IRIS 2014-2/31, IRIS 2014-7/29, IRIS 2014-7/30, IRIS 2014-7/31, IRIS 2014-9/26, IRIS 2015-8/26, IRIS 2015-10/27, IRIS 2016-2/26).

The proponents argue that there is a need to support, through proactive measures, a prominent status of science in society and to correctly promote the scientific and technological information of citizens. They consider the promotion in the media and in society of genuine scientific information to be insufficient; therefore, they propose the completion of Article 3 paragraph 1) of the Draft Law as follows: The broadcasting and retransmission of programme services shall ensure the political and social pluralism, the cultural, linguistic and religious diversity, the information and education of the public in terms of science and technology, and the entertainment, with respect for the fundamental freedoms and human rights. A new obligation of the National Audiovisual Council (Consiliul Naţional al Audiovizualului, CNA) was proposed in Article 10 paragraph 3) m) to ensure the accurate transmission of information on science and technology. The audiovisual media service providers with national coverage shall include in their main news programme information on science and technology for at least one minute daily, except on such days when events of wide public interest or live broadcasts prevent the release of newsreels. Audiovisual media service providers that do not offer newsreels in their programmes are exempted from this provision. Article 17 paragraph 1) d) (point 12) with regard to the authorization of the CNA to issue decisions with regulatory force regarding the cultural responsibilities of audiovisual media service provider was completed to include the scientific responsibilities of audiovisual media service providers as well. Article 29 paragraph 1) with regard to the conditions to be observed by the commercial audiovisual communications aired by the audiovisual media service providers was completed with the introduction of paragraph j): not to conflict with the generally accepted scientific standards of the international scientific community.

• *Propunere legislativă pentru completarea Legii audiovizualului nr. 504 din 2002 (republicată în 11 iulie 2014) în sensul de a asigura informarea şi educarea publicului inclusiv sub aspect ştiinţific şi tehnologic - forma adoptată de Camera Deputaţilor* (Draft Law on the completion of the Audiovisual Law no. 504 of 2002, republished on 11 July 2014, in the sense of ensuring the information and education of the public under a scientific and technological aspect - form addopted by the Chamber of Deputies)
http://merlin.obs.coe.int/redirect.php?id=17928 RO

• *Propunere legislativă pentru completarea Legii audiovizualului nr. 504 din 2002 (republicată în 11 iulie 2014) în sensul de a asigura informarea şi educarea publicului inclusiv sub aspect ştiinţific şi tehnologic - expunerea de motive* (Draft Law on the completion of the Audiovisual Law no. 504 of 2002, republished on 11 July 2014, in the sense of ensuring the information and education of the public under a scientific and technological aspect - explanatory memorandum)
http://merlin.obs.coe.int/redirect.php?id=17929 RO

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Recommendation on the correct use of the Romanian language in commercial communications

On 25 February 2016, the National Audiovisual Council (Consiliul Naţional al Audiovizualului, CNA) issued Recommendation no. 2/2016 with regard to the correct use of the Romanian language in commercial communications aired by audiovisual media service providers (see IRIS 2011-1/37, IRIS 2012-3:1/31, and IRIS 2014-1/40).

The Recommendation was triggered by more ads aired between November and December 2015 and is based on Article 6 paragraphs 1) to 5) and Article 17 paragraph 1) d) 2) of Audiovisual Law no. 504/2002, republished. These articles of the Audiovisual Law entail the powers of the CNA to issue recommendations, instructions and conduct codes. These powers are accompanied by the interdiction of censorship and of any kind of interference in the editorial independence of the broadcasters and, respectively, the obligation of the Council to ensure the correct use of Romanian and minority languages. The Recommendation is also based on Articles 83 and 102 paragraph 1) of the Audiovisual Code, with regard to the correct use of the Romanian language and, respectively, to the interdiction of adverts which do not observe the legal provisions. The Council recommends the compliance with spelling, punctuation and orthoepy, as well as the morphology and syntax of the Romanian language in commercial communications released in audiovisual programmes. The Council reminds the audiovisual media service providers that audiovisual commercial communications are part of their audiovisual programmes and that they are not exempted from the obligation to comply with the proper use of

the Romanian language established by the Romanian Academy.

The CNA considers that the broadcast of audiovisual commercial communications with Romanian language misspellings, orthoepic and morphology errors could have a significant adverse impact on the public, especially on minors, through the repetitive nature of broadcasting (12 minutes during any given hour for commercial broadcasters and 8 minutes per hour for public broadcasters).

• *The Reomandarea C.N.A. nr. 2 din 25 februarie 2016* (CNA Recommendation no. 2 of 25 February 2016)
http://merlin.obs.coe.int/redirect.php?id=17930 RO

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SI-Slovenia

Amendment to the Media law

On 28 January 2016, the National Assembly adopted an amendment to the Media law with 47 votes for and two votes against. The amendment provides, in addition to quotas for Slovenian music on radio and television stations, for the regulation of comments on online media websites.

In the debate, the government amendment was met with a stormy reaction, especially in relation to the quotas of Slovenian music on the radio. According to Article 86 of the existing law, at least 20 per cent of the daily transmission of music of private radio and television channel must be Slovenian music or musical production of Slovenian artists and performers. The proportion of daily transmission of music for public radio and television is at least 40 per cent, and in case of radio and television programmes of special importance at least 25 per cent. After the coalition addendum, which was accepted by the National Assembly during the second reading, Article 86 was amended, with Article 86a providing time obligations for the quotas of Slovenian music. Thus, radio and television channels have to include at least 60 per cent of Slovenian music in the all-day share of music transmission, between 6 am and 7 pm. For public radio and television, Slovenian music must represent at least 40 per cent of all music transmission, for radio channels of special interest at least 25 per cent, and for commercial radio at least 20 per cent. Both Radio Slovenia and the commercial stations have warned that the amendment to the Media law, in setting quotas and intervals of Slovenian music, might interfere with their editorial policy and significantly alter the character of the radio. But the Minister of Culture shares the opinion that such an approach is justified by the need to promote domestic music creativity, national language, and culture. Article 86a will come into force on 1 July 2016.

The amendment relating to the regulation of hate speech on online media websites imposes on media providers the responsibility to establish rules regarding comments. It also sets out the deadline for fulfilling the demand for correction. In accordance with the decision of the Constitutional Court, the request should be submitted within 30 days from the date when the person concerned becomes aware of the publication of the notice, but no later than three months after the publication itself.

• *Zakon o stremenbah in dopolnitvah zakona o meijih (ZMed-C) dne 28.1.2016* (Amendment to the media law of 28 January 2016)
http://merlin.obs.coe.int/redirect.php?id=17931 SL

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US-United States

No copyright protection for a "monkey selfie"

On 28 January 2016, the U.S. District Court for the Northern District of California issued an opinion that an Indonesian macaque cannot claim copyright over a "selfie" it made in 2011.

The case arose when the organization People for the Ethical Treatment of Animals ("PETA") filed a lawsuit on behalf of the macaque Naruto, accusing the owner of the camera that was used to take the picture of copyright infringement for posting and profiting from the selfie. PETA petitioned the Court to allow PETA to manage the picture on the macaque's behalf and use the proceeds to benefit macaques. PETA argued that the definition of authorship under the Copyright Act is sufficiently broad so as to permit the protections of the law to extend to any original work, including those created by monkeys. The judge rejected this argument, finding PETA's argument a "stretch." The judge found that Congress did not intend to extend the Copyright Act in such a manner and noted that the U.S. Copyright Office says it will not honour copyright claims for works by animals. The judge told the parties during oral arguments that he would formally dismiss PETA's suit in an upcoming order. PETA lamented the decision but proclaimed the case "a vital step toward fundamental rights for nonhuman animals for their own sake, not in relation to how they can be exploited by humans." They promised to "continue to fight for Naruto and his fellow macaques, who are in grave danger of being killed for bush meat or for

foraging for food in a nearby village while their habitat disappears because of human encroachment".

• District Court for the Northern District of California, Order Granting Motion to Dismiss, Case No. 15-cv-04324-WHO
http://merlin.obs.coe.int/redirect.php?id=17948 EN

Jonathan Perl
Locus Telecommunications, Inc.

Life story of an Iraq war veteran may be filmed without his consent

On 17 February 2016, the 9th Circuit US Court of Appeals ruled that the First Amendment to the US Constitution, which, inter alia, governs freedom of speech, protects the filming of the life story of even an unknown person.

The appellant was an Iraq war veteran. The case concerned the film "The Hurt Locker", which is a war movie that shows the work of a bomb disposal squad in the Iraq war. The appellant claimed that the film's main protagonist was based on him and sued its director and screenwriter, stating that the film was defamatory and breached his personality rights ("right of publicity"), i.e. his right to determine the use of identifying aspects of his person. The lower court dismissed his action and the appeal court has now confirmed that decision.

The Court had to strike a balance between the appellant's right to privacy and the defendant's right to freedom of speech. The law of the state of California, which was applicable in this case, contains both a statute on the protection of privacy and another aimed at the prevention of lawsuits that impede the exercise of freedom of speech (and other rights protected by the First Amendment) if the exercise of these rights is in the public interest. The appeal court first of all established that a film on the work of a bomb disposal squad in the Iraq war dealt with a subject of public interest and that the law on preventing lawsuits that impede the exercise of freedom of speech was applicable. The Court also established that the First Amendment protects artists who make a film based, for example, on real stories from the lives of ordinary or extraordinary people. In the Court's opinion, a limit to this protection based on the appellant's right of publicity was a content-based and therefore unconstitutional restriction of freedom of speech. Furthermore, the Court pointed out that the film did not defame the appellant but rather portrayed him as a hero, and dismissed the appeal.

• Judgment of the US Court of Appeals of 17 February 2016
http://merlin.obs.coe.int/redirect.php?id=17936 EN

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AL-Albania

Regulator approves PBS fee for digital network hosting

On 29 March 2016, the Audiovisual Media Authority (AMA) approved the fee that the public broadcaster Radio Televizioni Shqiptar (RTSH) will charge to operators that will be hosted in the second digital network that the public broadcaster RTSH is building. The decision followed previous meetings organized with the participation of local broadcasters that are supposed to use the network.

The final fee that was approved by AMA was in the amount of 1,073 Euro per month, without VAT. The fee will be applicable for no more than a year, and then AMA will revisit it again. In addition, the fee will vary based on the location of the broadcasters and the area they will cover. So, for the central allotment of Tirana and Durres the double amount of the proposed fee will be applied, namely 2,146 Euro per month. The fees will change according to the location. To the most populous cities in the Western Plain, along the coast, and Korca and Shkodra higher fees will apply, and to the more remote and isolated areas lower monthly fees will apply. Overall, the fees will range from 365 Euro to 2146 Euro per month.

The fee was approved after several negotiations between the regulator AMA and the public broadcaster RTSH, as well as discussions with local operators. RTSH will manage two of the seven national terrestrial digital networks that Albania has.

• *AMA, 29/03/2016* (Decision of the Audiovisual Media Authority, 29 March 2016)
http://merlin.obs.coe.int/redirect.php?id=18729 SQ

Ilda Londo
Albanian Media Institute

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Agenda

International Copyright Law Summer Course
4-8 July 2016 Organiser: Institute for Information Law (IViR), University of Amsterdam Venue: Amsterdam
http://ivir.nl/courses/icl

IViR Summer Course on Privacy Law and Policy
4-8 July 2016 Organiser: Institute for Information Law (IViR), University of Amsterdam Venue: Amsterdam
http://ivir.nl/courses/plp

Book List