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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: *Bédat v. Switzerland* (Grand Chamber)

In a judgment of 29 March 2016, the Grand Chamber of the European Court of Human Rights (ECtHR) in *Bédat v. Switzerland* found that a criminal conviction of a journalist, Arnaud Bédat, for having published documents covered by investigative secrecy in a criminal case is no violation of Article 10 of the European Convention of Human Rights (ECHR). The Grand Chamber is of the opinion that the Swiss authorities acted within their margin of appreciation and that recourse to criminal proceedings and the penalty imposed on the journalist did not amount to a disproportionate interference in the exercise of his right to freedom of expression.

The article published by Bédat in the weekly magazine *L'Illustré* concerned 'M.B.' and the criminal proceedings against him for having driven his car into pedestrians. The incident, in which three people died and eight others were injured, had caused great public outcry and controversy in Switzerland. The article contained a personal description of M.B., a summary of the questions put by the police officers and the investigating judge, and M.B.'s replies. It also contained the information that M.B. had been charged with premeditated murder and, in the alternative, with murder, and it was mentioned that M.B. appeared to show no remorse. The article was accompanied by several photographs of letters which M.B. had sent to the investigating judge. Criminal proceedings were brought against the journalist on the initiative of the public prosecutor for having published secret documents, in breach of Article 293 of the Swiss Criminal Code. It emerged from the investigation that one of the parties claiming damages in the proceedings against M.B. had photocopied the case file and lost one of the copies in a shopping centre. An unknown person had then brought the copy to the offices of the magazine which had published the impugned article. Bédat was found guilty of making public a series of documents which were at that stage to be considered protected as part of the secrecy of the criminal investigation, and he was ordered to pay a fine of 4,000 Swiss Francs (EUR 2,667). Bédat lodged a complaint before the ECtHR, arguing that this conviction had resulted in a violation of his right to freedom of expression.

On 1 July 2014 the Second Section of the ECtHR found that the article reported on an important case and that although the interference was prescribed by law

and pursued legitimate aims, it considered that the sanction did not respond to a pressing social need, not being sufficiently motivated and being disproportionate. Therefore, the majority of the Court, by four votes to three, found that the criminal fine imposed on the journalist breached Article 10 of the European Convention on Human Rights (ECHR).

While the Grand Chamber agrees with the Chamber that the interference was prescribed by law and pursued legitimate aims, namely of preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary and protecting the reputation and the rights of others, the majority of the Grand Chamber, with 15 votes to two, comes to another conclusion on whether the fine imposed on the journalist was necessary in a democratic society. The Grand Chamber reiterates that the protection afforded to journalists by Article 10 of the ECHR "is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the ECHR, is not confined to the contents of information which is collected and/or disseminated by journalistic means (...); the concept of responsible journalism also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly". The Grand Chamber clarifies that it must adjudicate on a conflict between two rights which enjoy equal protection under the Convention, and the Court must weigh up the competing interests. Reference is made to cases where the right to privacy (Article 8) and the right to freedom of expression (Article 10) are conflicting (see IRIS 2012-3/1) and the Court considers that an analogous reasoning must be applied in weighing up the rights secured under Article 10 and Article 6 paragraph 1 respectively. In such an approach to balancing rights, that the Court considers that where the national authorities have assessed the interests at stake in compliance with the criteria laid down in the Court's case-law, strong reasons are required if it is to substitute its view for that of the domestic courts.

The Grand Chamber takes into consideration six criteria as part of its balancing test:

(i) How the applicant came into possession of the information at issue: although Bédat had not obtained the information by unlawful means, as a professional journalist he must have been aware of the confidential nature of the information which he was planning to publish. It was not disputed that the publication of the information in question fell within the scope of Article 293 of the Swiss Criminal Code.

(ii) Content of the impugned article: the Court qualifies the impugned article about M.B. as portraying "a highly negative picture of him, adopting an almost mocking tone". The article had "a sensationalist

tone”, and it formulated a series of questions which the judicial authorities were called upon to answer, at both the investigation and the trial stages.

(iii) Contribution of the impugned article to a public-interest debate: according to the Court, the journalist failed to demonstrate how publishing records of interviews, statements by the accused’s wife and doctor, and letters sent by the accused to the investigating judge concerning banal aspects of his everyday life in detention, could have contributed to any public debate on the ongoing investigation.

(iv) Influence of the impugned article on the criminal proceedings: according to the Court it is “undeniable that the publication of an article slanted in that way at a time when the investigation was still ongoing entailed an inherent risk of influencing the course of proceedings in one way or another, whether in relation to the work of the investigating judge, the decisions of the accused’s representatives, the positions of the parties claiming damages, or the objectivity of the trial court, irrespective of its composition”. The Court agrees with the findings by the Swiss Courts that the records of interviews and the accused’s correspondence had been discussed in the public sphere before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court.

(v) Infringement of the accused’s private life: the Court agrees that the criminal proceedings brought against Bédât conformed with the positive obligation incumbent on Switzerland under Article 8 to protect the accused’s private life. It also notes that when the impugned article was published the accused was in prison, and therefore in a situation of vulnerability.

(vi) Proportionality of the penalty imposed: the Court considers that the recourse to criminal proceedings and the penalty imposed on Bédât did not amount to disproportionate interference in the exercise of his right to freedom of expression. The penalty was imposed for breaching the secrecy of a criminal investigation, and its purpose was to protect the proper functioning of the justice system and the rights of the accused to a fair trial and to respect for his private life. Therefore the Court states that such a penalty could not be considered liable to have a deterrent effect on the exercise of freedom of expression by Bédât or any other journalist wishing to inform the public about ongoing criminal proceedings. Accordingly, the Court sees no strong reason to substitute its own view for that of the domestic courts. Furthermore, having regard to the margin of appreciation available to States and to the fact that the balancing the various competing interests was properly conducted by the Swiss Federal Court, the Grand Chamber concludes that there has been no violation of Article 10 of the ECHR.

Two judges strongly dissented, Judges López Guerra and Yudkivska, the latter expressing the view that

“(t)his Court had always regarded the press as the servant of an effective judicial system, granting little scope for restrictions on freedom of expression in such matters as the public interest in the proper administration of justice. 04046 the present judgment constitutes a regrettable departure from this long-established position”.

• Judgment by the European Court of Human Rights, Grand Chamber, case of Bédât v. Switzerland, Application no. 56925/08 of 29 March 2016

<http://merlin.obs.coe.int/redirect.php?id=17957>

EN

• Judgment of the European Court of Human Rights, Second Section, case of A.B. v. Switzerland, Application no. 56925/08 of 1 July 2014

<http://merlin.obs.coe.int/redirect.php?id=17958>

EN

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Committee of Ministers: New Recommendation on Protection of Journalism and Safety of Journalists and Other Media Actors

On 13 April 2016, the Council of Europe’s Committee of Ministers adopted its Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors. This is a continuation of the Committee of Ministers’ engagement with the topic, following its adoption of an identically-titled Declaration in 2014 (see IRIS 2014-7/4).

The Recommendation’s opening paragraph describes the contemporary reality of attacks, threats and harassment targeting journalists and other media actors across Europe as both “alarming and unacceptable”. This strong language has been prompted by very troubling statistics. According to an online platform/early warning system developed by the Council of Europe with leading free expression and journalism NGOs, there have been more than 100 registered high-level alerts of threats to media freedom in Europe over the past year, including the killing of 13 journalists.

The Recommendation comprises three structural components: a preambular section, a set of Guidelines to States and a synthesis of relevant principles that have been identified and developed by the European Court of Human Rights. The Guidelines are divided into the following categories: Prevention, Protection, Prosecution (including a specific focus on impunity for crimes against journalists) and Promotion of information, education and awareness raising. These headings help to focus the Recommendation and to explore the various themes in considerable detail.

The Recommendation’s first aim is to provide detailed guidance to states on how to fulfil their (negative and

positive) legal obligations under the European Convention on Human Rights (ECHR) to guarantee the safety of journalists and other media actors, as well as their right to freedom of expression and ability to participate in public debate. As those state obligations are often quite abstract, the Recommendation seeks to spell out their practical implications for different branches of states' authorities.

The Recommendation's second aim is to urge states to regularly review relevant national laws - and their implementation - to ensure that they are in conformity with the legal obligations created by the Convention, in particular Article 10 (Freedom of expression). Such reviews should be independent and substantive and should be carried out at regular periodic intervals. As stated in the Recommendation itself, the reviews should "cover existing and draft legislation, including that which concerns terrorism, extremism and national security, and any other legislation that affects the right to freedom of expression of journalists and other media actors, and any other rights that are crucial for ensuring that their right to freedom of expression can be exercised in an effective manner".

The Recommendation takes a broad, forward-looking view of what journalism entails and underlines its importance in a democratic society (although the Russian Federation formally indicated that "it reserved the right of its government to comply or not with the recommendation, in so far as it referred to other media actors"). It acknowledges the valuable contributions that bloggers, whistle-blowers and a growing range of other actors can make to public debate and stresses the need to guarantee their safety and freedom of expression. In this spirit, it seeks to develop themes that have only received limited attention in relevant European and international standards. One such theme is the gender-specific dimension to violence, threats and abuse targeting female journalists and commentators, especially online. Another example is the "digital security" of journalists, including confidentiality of communications and freedom from surveillance.

The Recommendation aspires to have real impact and not be merely a paper tiger. The reviews of national legislative frameworks - and their implementation - will prove crucial for the realisation of that ambition in practice.

• Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, 13 April 2016

<http://merlin.obs.coe.int/redirect.php?id=18003>

EN FR

• Council of Europe, Platform to promote the protection of journalism and safety of journalists

<http://merlin.obs.coe.int/redirect.php?id=17981>

EN FR

Tarlach McGonagle

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European Commission against Racism and Intolerance: new General Policy Recommendation against Hate Speech

On 21 March 2016, the European Commission against Racism and Intolerance (ECRI) issued its General Policy Recommendation (GPR) No. 15 on Combating Hate Speech. The launch coincided with the International Day for the Elimination of Racial Discrimination; the GPR had already been adopted on 8 December 2015.

For the purpose of GPR No. 15, ECRI understands "hate speech" as "the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of 'race', colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status" (footnote omitted, Preamble). This understanding of the term is different to - and wider than - the most common reference point for the scope of the term "hate speech", within the Council of Europe's standards, i.e., the Committee of Ministers' Recommendation No. R (97)20 on "hate speech" (see IRIS 1997-10/4).

GPR No. 15 is essentially a ten-point plan for combating hate speech. Each of its ten main points or recommendations cascades into a number of more specific recommendations. Its main recommendations include calls on Council of Europe Member States to ratify various relevant treaties and withdraw reservations to particular treaty provisions; identify and address the root causes of hate speech; undertake public awareness-raising measures about the importance of diversity and the dangers of hate speech; provide support for persons and groups targeted by hate speech; withdraw (financial) support by public bodies for political parties and other organisations that use or condone hate speech, and take effective action - including criminal law measures, where appropriate - against hate speech that amounts to incitement to different types of illegal acts.

Two recommendations are particularly relevant for the media and Internet. Recommendation 7 calls on States to "use regulatory powers with respect to the media (including internet providers, online intermediaries and social media), to promote action to combat the use of hate speech and to challenge its acceptability, while ensuring that such action does not violate the right to freedom of expression and opinion [...]". An array of measures are contemplated in order to achieve these aims, including self-regulatory mechanisms, codes of conduct, monitoring and condemnation of hate speech, filtering techniques, training of

editors, journalists and other media professionals on hate speech and how to counter it, and promotion of complaints mechanisms to report hate speech.

Recommendation 8 urges States to “clarify the scope and applicability of responsibility under civil and administrative law for the use of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those who are targeted by it while respecting the right to freedom of expression and opinion [...]”. This recommendation is, in part, a response to the European Court of Human Rights’ differing findings in respect of Internet intermediaries’ duties, responsibilities and liability in respect of online content, including hate speech, in its recent *Delfi AS v. Estonia* [GC] (see IRIS 2015-7/1) and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (see IRIS 2016-3/2) judgments.

ECRI regularly drafts GPRs as part of its work on general themes, which is one of its three main lines of activity. Country-by-country monitoring and developing relations with civil society are its other two main lines of activity. The thematic focuses of earlier GPRs include: “Combating Racism and Racial Discrimination in the Field of Sport” (No. 12, 2009) (see IRIS 2009-5/3); “Combating racism while fighting terrorism” (No. 8, 2004) and “The fight against antisemitism” (No. 9, 2004) (see IRIS 2004-10/5) and “Combating the dissemination of racist, xenophobic and antisemitic material via the Internet” (No. 6, 2000) (see IRIS 2002-7/4).

In 2006, ECRI organised an expert seminar on combating racism while respecting freedom of expression, but that event does not appear to have been explicitly referenced either in GPR No. 15 or in its Explanatory Memorandum.

• ECRI, General Policy Recommendation No. 15 on Combating Hate Speech, 8 December 2015

<http://merlin.obs.coe.int/redirect.php?id=17959>

EN FR

• ECRI, Proceedings of Expert Seminar on Combating Racism while Respecting Freedom of Expression, 16-17 November 2006

<http://merlin.obs.coe.int/redirect.php?id=17960>

EN FR

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EUROPEAN UNION

European Commission: Public consultation on neighbouring rights for publishers and panorama exception

On 23 March 2016, the European Commission launched an open, online consultation concerning two

topics of EU copyright law. On the one hand, the purpose of the consultation is to seek views on the possible extension of the neighbouring rights to publishers. On the other hand, the Commission aims to gather views on the panorama exception, which concerns the use of images depicting buildings, sculptures and monuments. The consultation is part of the Commission’s Digital Single Market (DSM) strategy, aimed to create an EU single market which fits the digital age (see IRIS 2015-6/3). In particular, one of the DSM strategy’s objectives is to modernise the EU copyright rules (see IRIS 2016-2/3).

First, concerning the role of publishers in the copyright value chain: the Commission is interested as to whether publishers of print media (newspapers, magazines, books and scientific journals) are facing problems in the digital environment as a result of the current copyright legal framework, especially when it comes to their ability to licence and be paid for online use of their content. In particular, the consultation asks about the impact that the creation in EU law of a new neighbouring right granted to publishers would have on them and on other parties, such as authors, other rightholders, researchers and educational or research institutions, online service providers, and consumers/end-users/EU citizens. Moreover, the Commission is aiming to gather views as to whether the need (or not) for intervention is different in the press publishing sector to the book/scientific publishing sectors. Current EU copyright law grants neighbouring rights to performers, film producers, record producers and broadcasting organisations, but publishers are not among the neighbouring right holders at European level.

The final part of the consultation aims to gather views as to whether the current legislative framework on the panorama exception gives rise to specific problems in the context of the DSM. The panorama exception in EU copyright law allows Member States to lay down exceptions or limitations to copyright concerning the use of works of architecture or sculpture, intended to be located permanently in public places (for example by uploading images of monuments online).

With regard to both parts of the consultation, the Commission has invited all respondents to support their replies, whenever possible, with market data and other economic evidence. The consultation is open for everyone interested in the publishing sector and the digital economy, and it will run until 15 June 2016. The Commission will publish a short summary of the results of the consultation one month after the closing date.

• European Commission, Public consultation on the role of publishers in the copyright value chain and on the ‘panorama exception’, 23 March 2016

<http://merlin.obs.coe.int/redirect.php?id=17990>

EN

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NATIONAL

Committee of Ministers: Recommendation on Internet freedom

On 13 April 2016, the Committee of Ministers adopted a Recommendation to its 47 member states encouraging them to periodically prepare national reports evaluating their level of respect for human rights with regard to the Internet, and to share their findings with the Council of Europe.

The recommendation aims to help member states to create an enabling environment for Internet freedom and to promote increased compliance with their obligation to respect, protect, and promote human rights on the Internet.

The recommendation contains a list of indicators that can be used for measuring the level of compliance with existing human rights standards. These indicators cover various aspects of freedom of expression and access to information, media freedom, freedom of assembly and association, the right to privacy and personal data protection and the right to an effective remedy.

Concerning surveillance measures by states, for example, the recommendation lists a number of necessary legal safeguards for human rights and fundamental freedoms which relate to the scope of discretion conferred on state authorities carrying out surveillance measures, time limitations, processing of personal data and supervision by an independent oversight body.

Governments are invited to carry out these evaluations of Internet freedom with the participation of the private sector, civil society, academia and the technical community.

• Recommendation CM/Rec(2016)5 of the Committee of Ministers to member States on Internet freedom (Adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies)

<http://merlin.obs.coe.int/redirect.php?id=18001>

EN FR

Press release
Council of Europe

CZ-Czech Republic

Decision of the Supreme Court on copyright in spa facilities

On 14 October 2015, the Grand Chamber of the Civil and Commercial Division of the Supreme Court concluded that the copyright exception for health facilities, according to § 23 of the Copyright Act, does not apply to patients staying in spa facilities. According to the exception, no remuneration has to be paid for the broadcast of works protected by copyright in health-care facilities.

The collective management society OSA demanded payments totalling CZK 553,935 (approximately EUR 20,500) from the spa facility Léčebné lázně Mariánské lázně, for the unauthorised use of works protected by copyright in the period from 1 June 2007 to 18 May 2008. The collective management society argued that the exception in the Copyright Act does not apply to spa facilities. The spa facility refused to make any payment, invoking the exception of the Copyright Act. The Court of First Instance granted the application, but the Court of Appeal dismissed the action.

The Supreme Court upheld the appeal brought by OSA and decided that the exception in the Copyright Act does not apply to patients in spa facilities. For the purpose of assessing the question of whether the exception applies, it is necessary to distinguish carefully between the "patients" within the meaning of § 33 of the Act on public health insurance, § 19 of the Act on public health care, and other guests of the spa facilities accommodated only on a commercial basis. However, patients undergoing a comprehensive spa treatment prescribed by a doctor, in terms of a holistic healing process that is not regularly provided in the form of outpatient care, are considered patients within the meaning of § 33 of the Act on public health insurance and § 19 of the Act on public health care. The Court stated that accommodation of patients in a spa facility accelerates the healing process and results in reconstruction of the health status of treated patients.

It is thus necessary, for the purposes of interpretation of the last sentence of § 23 of the Copyright Act, to distinguish between patients in accordance with § 33 of the Act on public health insurance, § 19 of the Act on public health care and the other guests of spa facilities accommodated only on a commercial basis. The ratio of guests which exclusively use health care treatments to guests which use the spa facilities on a commercial basis is verifiable and can be used to determine the amount of remuneration.

• *Rozsudek velkého senátu občanskoprávníh a obchodního kolegia Nejvyššího soudu České republiky č.j. 30 Cdo 3093/2013* (Decision of the Grand Chamber of Civil and Commercial Division of the Supreme Court Nr. 30 Cdo 3093/2012 of 14 October 2015)
<http://merlin.obs.coe.int/redirect.php?id=17972>

CS

Jan Fučík

Česká televize, Prague

DE-Germany

Investigations against satirist approved

On 15 April 2016, the German Chancellor announced that the Federal Government would grant a request to allow investigations to be conducted against a German satirist for insulting a foreign head of state. The satirist had made controversial comments in a television programme about the President of Turkey in the form of a poem entitled *Schmähkritik* (abusive criticism). On 8 April 2016, the Turkish government had sent the German government a request for criminal proceedings to be brought.

The German satire programme *Extra 3* had produced a music video featuring the Turkish President that took a critical look at his policies, whereupon the Turkish government summoned the German Ambassador. The satirist against whom the proceedings now underway have been brought took this incident as an opportunity to speak to his viewers and the Turkish President in his satire programme and explain to them the difference between satire, which is permitted in Germany and is protected by freedom of speech and freedom of the press, and abusive criticism, which is not. *Schmähkritik* is a concept employed by the Bundesverfassungsgericht (Federal Constitutional Court) and establishes the borderline beyond which statements are no longer permissible. The term applies when a person is disparaged and no discussion on the matter takes place. In such cases the disparagement must be the aim and object of the expression of an opinion. In order to delimit between the indisputably permissible satirical video in the programme *Extra 3* and prohibited abusive criticism, the satirist read out in his programme a poem on the Turkish President that should, in the former's own estimation, be classified as abusive criticism and therefore not be broadcast on television. The statements concerning the President that he then read out constitute abusive criticism in themselves, but when interpreting the words as an "explanation of abusive criticism" in the context of the programme, the view that the poem falls within the scope of satirical freedom can justifiably be held. In the present case, the conflicting interests will have to be weighed by the Public Prosecutor's Office and the courts.

The satirist's statements might constitute the offences of slander and defamation, pursuant to sections 185 ff. of the Strafgesetzbuch (Criminal Code - StGB), so criminal investigations might be commenced in the event of an application for a prosecution. The relevant applications have in fact been made, and the Mainz Public Prosecutor's Office, which has jurisdiction in this case, has already begun its investigations.

However, as the person affected by the statements in the present case is not a private individual but the Turkish President, the offence of insulting a foreign head of state, pursuant to section 103 of the Criminal Code, may apply. According to this provision, anyone who insults a foreign head of state could face up to three years' imprisonment or a fine. This offence differs from slander and defamation in two respects, pursuant to sections 185 ff.: firstly, the threat of punishment is more severe because an insult under section 185 is punishable by up to only one year's imprisonment or a fine; and secondly the protection provided also differs. Sections 185 ff. protect the personal honour of the person about whom the statements are made, whereas section 103 not only protects personal honour but also serves to ensure the functional protection of foreign states and the protection of the diplomatic interests of the Federal Republic of Germany. Owing to this difference in protection afforded, section 104(a) StGB sets out specific conditions that must be satisfied for criminal proceedings to take place. For example, the Federal Republic of Germany must have diplomatic relations with the state concerned and reciprocity must be guaranteed, which means that Germany must enjoy the same legal protection in that state. Furthermore, the foreign government concerned has to call for a punishment to be imposed, and Germany must authorise criminal proceedings.

Now that the Turkish government has demanded a prosecution and the German government has announced its intention to grant the necessary authorisation, criminal investigations into insulting a foreign head of state can begin. However, this process has no legal effect on the decision of the Public Prosecutor's Office on whether to classify the statements as abusive criticism and bring an indictment, or to rule that the statements are covered by freedom of expression and to discontinue the proceedings.

Gianna Iacino

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Brussels

Potsdam District Court says spying on neighbours using a drone is not an innocent leisure pursuit

The Amtsgericht Potsdam (Potsdam District Court)

has ruled in a recently published judgment of 16 April 2015 (Case 37 C 454/13) that flying a drone equipped with a camera over a neighbour's property violates the neighbour's privacy rights. This therefore justifies a claim for injunctive relief under Article 1004(1), 2nd sentence of the Bürgerliches Gesetzbuch (Civil Code -BGB) in conjunction with Article 823(1) BGB, and Article 1(1), 1st sentence, in conjunction with Article 2(1) of the Grundgesetz (Basic Law - GG).

The plaintiff is the sole owner of a property protected by high hedges, the main purpose being to prevent anyone from looking in from neighbouring properties. His partner was sunbathing in the garden on the morning of 9 July 2013 when the defendant flew a drone equipped with a camera over the property with the camera switched on. The plaintiff had sent the pilot and subsequent defendant a written warning and demanded a cease-and-desist declaration. When the pilot refused, the plaintiff filed an action with the Potsdam District Court. In the proceedings, the pilot denied having flown over the neighbouring property, but the Court, having listened to several witnesses when taking evidence and established that disputes had taken place between the two neighbours for some time, reached the conclusion that the defendant had flown over the property at a height of about seven metres, with its camera switched on, while the plaintiff's partner was sunbathing, scantily clad.

The Court accordingly allowed the plaintiff's request and issued an injunction against the defendant, awarding costs to the plaintiff. In the Court's opinion, although it was necessary in the instant case to take account of the defendant's right to the free development of his personality in the form of pursuing his hobby (flying the drone), that right had to be weighed against the plaintiff's right to the protection of his privacy. It was clear that the plaintiff wished to protect the privacy of his property, because the property was well-protected from being viewed from the outside. Circumventing that protection using a drone, which filmed the plaintiff's partner engaging in a private activity, thereby constituted a breach of the plaintiff's privacy and was not an innocent leisure pursuit. Against the background of the disputes between the two neighbours, the flight of the drone over the property was not accidental but deliberate, and could justifiably be regarded as harassment. The Court stated that the risk of repetition indicated by the infringement of rights had not been dispelled by the fact that the plaintiff and his partner no longer lived on the premises, because the plaintiff still owned the property. The judgment is final.

• *Urteil des AG Potsdam vom 16. April 2015 (Az.: 37 C 454/13)* (Judgment of the Potsdam District Court of 16 April 2015 (Case 37 C 454/13))

<http://merlin.obs.coe.int/redirect.php?id=17982>

DE

Sofie Luise Burger

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Advertising in online games does not constitute prohibited children's advertising

According to media reports, in a judgment of 1 December 2015 (Case U 74/15) the Kammergericht Berlin (Berlin Higher Regional Court) ruled in appellate proceedings that advertising for virtual products in an online role-playing game should not necessarily be regarded as a direct invitation to children to buy the items. There was, the Court said, no breach of competition law as the advertising messages in the game were not aimed specifically at minors but at all players.

The Court had to rule on a complaint from the Verbraucherzentrale Bundesverband (Federation of German Consumer Organisations) concerning in particular two statements in an online role-playing game: "Buy in the pet shop" and "New and exclusive mount: Armoured Bloodwing - buy it now". The trial court, the Landgericht Berlin (Berlin Regional Court) had already ruled against the consumer organisations in its judgment of 21 April 2015 (Case 16 O 648/13), in which it held that the informal targeting in online games did not constitute a prohibited invitation to children to buy products.

The Berlin Higher Regional Court shared this view, stating that not all computer games could be categorised as children's games, and that the categorisation of the game as a "fantasy game" changed nothing in that respect. Even though the setting of the game was a colourful fantasy world and the figures were typical fantasy beings, it was not necessarily a children's game. Neither did a 12-plus age rating, prepaid cards, or the mentioning of underage users in the Standard Terms and Conditions constitute decisive indicators that minors were the target group. Rather, which group of players were targeted by a game had to be determined individually. Like the Court below it, the Higher Regional Court judges were of the opinion that addressing players in the second person singular familiar form ("Du") was no longer unusual in advertisements targeting adults, and could not be used as an indicator that the target audience was children. Rather, the wording in issue appealed to the role player's sense of pleasure in playing the game, irrespective of his or her age. The Court also stated that no objections could be raised to the use of "code" typical of young people to exclude "stuffy grown-ups". Finally, the Court stated that the advertising in the game did not exploit children's lack of experience, and that the prices for the items advertised had been communicated in a transparent way.

The Bundesgerichtshof (Federal Court of Justice) had already had to address issues relating to children's advertising in its "Runes of Magic" decision (judgment of 17 July 2013, Case I ZR 34/12; see IRIS 2013-8/14 and IRIS 2014-10/8), but the federal judges came to

different conclusions from those of the Berlin Higher Regional Court: the Federal Court established that advertising characterised by addressing individuals directly in the informal second person singular and by the use of terms typical of those used by children, including popular Anglicisms, was primarily aimed at children. The Higher Regional Court has now disagreed with this view. The judgment is final.

• *Bericht über das Urteil des Kammergericht Berlin vom 1. Dezember 2015 (Az. U 74/15)* (Report on the judgment of the Berlin Higher Regional Court of 1 December 2015 (Case U 74/15))
<http://merlin.obs.coe.int/redirect.php?id=17983>

DE

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Prohibited product placement of biscuits in TV show ("jungle camp")

The 7th Chamber of the Verwaltungsgericht Hannover (Hanover Administrative Court) in a judgment of 18 February 2016 (Case 7 A 13293/15) has held that if a chocolate biscuit is too highly praised in a TV show, this constitutes prohibited product placement.

In a controversial scene lasting about ninety seconds in the RTL show "Ich bin ein Star - Holt mich hier raus" (Dschungelcamp) (I'm A Celebrity - Get Me Out Of Here [Jungle Camp]), the show's participants were given a metal box with a big packet of "Pick Up" chocolate biscuits manufactured by food manufacturer, Bahlsen. The participants opened the box, held the biscuits up in the air, and cheered. The programme then showed a close-up of the participants enjoying them. This was followed by the candidates praising the product at length in individual interviews ("jungle telephone"). The Niedersächsische Landesmedienanstalt (Lower Saxony Media Authority) subsequently objected to the product placement as constituting prohibited surreptitious advertising. The media watchdogs cited the provisions of the Rundfunkstaatsvertrag (Interstate Broadcasting Agreement - RStV) as the reason for holding that view, according to which a product placement can under certain conditions be permissible in "light entertainment programmes" pursuant to section 44(1) RStV. However, a prerequisite for this is, according to section 7(7)(3) RStV, that the product is not given undue prominence. The TV station did not agree with the media authority's assessment and took the case to the Hanover Administrative Court.

In the Court's view too, however, the advertising purpose in the scenes concerned was too obvious. The chocolate biscuits were the central focus, as it were, and the description of the product had constituted "exaggerated verbal glorification". The RStV even suggested that a product could be permitted to be

highlighted in a TV show but stated that it could not be given undue prominence because there had to be a clear distinction between a programme and advertising. According to the Court, undue prominence was given when the advertising purpose was dominant and the natural flow of the programme faded into the background. With regard to the Jungle Camp episode in issue, the initial scenes had not departed from the context of the action: the use of the biscuits as a reward for the hungry candidates, the jubilation when they opened the box, and the close-ups of the campers eating the biscuits did not yet breach the prohibition on undue prominence, according to the judges. However, the candidates' excessive praise of the product both in the jungle phone box and off-screen had exceeded the restrictions on product placement, and had therefore become surreptitious advertising. Moreover, the main action as such had already finished by then. The candidates had referred exclusively to the product in their comments, so that, according to the Court, the advertising purpose was dominant. The description of the product therefore had to be categorised as prohibited surreptitious advertising. RTL has the right to seek leave to appeal to the Niedersächsisches Oberverwaltungsgericht (Lower Saxony Supreme Administrative Court) in Lüneburg.

• *Die Pressemitteilung zum Urteil des VG Hannover vom 18. Februar 2016 (Az.: 7 A 13293/15)* (Press release on the judgment of the Hanover Administrative Court of 18 February 2016 (Case 7 A 13293/15))
<http://merlin.obs.coe.int/redirect.php?id=17984>

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FR-France

Obligation to carry local public television services judged compliant with Constitution

Last December, the Conseil d'Etat made a referral to the Constitutional Council for a preliminary ruling on the constitutionality of the guarantee of the rights and freedoms contained in the second paragraph of Article 34-2 of the Act of 30 September 1986. This provision requires cable operators and Internet access providers (IAPs) using the landline network to carry local public television services (local programmes on general channels, cable channels showing local news, and local channels) for their subscribers. There is a second side to this obligation: the cable operators and IAPs are also required to bear the cost of transport and distribution from the place of editing inherent in this obligation.

In the present case, the municipality of Nice had entrusted the production, co-production, acquisition of rights and broadcasting of programmes directed at local residents to the company Azur TV. As a result, the company had called on the companies Iliad and Free to bear the cost of carrying and broadcasting its programmes, without success. Azur TV referred the matter to the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA), which enjoined Free to offer to take over and bear the cost of broadcasting and carrying the service from the place of editing. The companies Iliad and Free contested the legality of the CSA's decision before the courts. In support of their application, they requested a preliminary ruling on constitutionality. The companies maintained that by requiring them to carry the programmes without making arrangements or laying down a framework for the obligation, particularly with regard to determining the conditions for sharing the corresponding cost, the contested provisions of Article 34-2 disregarded the freedom to conduct business and the freedom to enter into a contract.

In its decision of 23 March 2016, the Constitutional Council recalled that, under Article L. 1426-1 of the General Code Governing Local Authorities (Code Général des Collectivités Locales), local authorities could edit a television service intended to provide local news, broadcast terrestrially or via a network that did not use frequencies assigned by the CSA. The Council further stated that, in adopting the contested second paragraph of Article 34-2, the legislator's aim had been to ensure that the development of these local public services would be maintained and promoted. These provisions should therefore be understood as imposing on the distributors of audiovisual services an obligation to make the services available, free of charge, which only applied in respect of subscribers located in the geographical area of the local authority editing the service. The obligation was, moreover, limited to the transport and broadcasting of the services' programmes, without any requirement to carry out connection or civil engineering work. The legislator also explicitly intended to exclude the responsibility to bear the cost of digitising programmes from the scope of the obligation. The Constitutional Council concluded that, to a limited degree, the disputed provisions infringed the distributors' freedom to conduct business and the freedom to enter into a contract. It also found that the obligation thus instituted pursued an objective of general interest and did not cause an unequal discharge of public burdens. The complaints claiming disregard of this principle, and those claiming infringement of the right of ownership, were set aside. The second paragraph of Article L. 34-2 of the Act of 30 September 1986 was found to be compliant with the Constitution.

• *Conseil constitutionnel, Décision QPC n°2015-529, 23 mars 2016, Sociétés Iliad et a.* (Constitutional Council, QPC decision no. 2015-529, 23 March 2016, the company Iliad and others.) FR

Amélie Blocman
Légipresse

State ordered to refund 900 000 euros to an IAP for cost of identifying subscribers for the graduated response procedure

Bouygues Telecom made a referral to the Conseil d'État on an issue concerning the non-payment of the allowances claimed by the IAP in return for the assistance provided to HADOPI in seeking out Internet users engaging in illegal downloading. Starting in September 2010, HADOPI's Commission for the Protection of Rights (Commission de Protection des Droits) had called on the electronic communication operators for assistance in seeking out, noting, and prosecuting failures to fulfil the obligation set forth in Article L. 336-3 of the intellectual property code (Code de la Propriété Intellectuelle).

In December 2015 Bouygues Telecom obtained the cancellation of the decision implicit in the Prime Minister's refusal to adopt the decree required for implementation of the HADOPI Act of 12 June 2009 on compensation for the additional identifiable and specific cost of the services carried out at HADOPI's instructions. This was on the grounds that the reasonable period of time within which the text should have been adopted had been exceeded. In the present proceedings, the IAP was claiming compensation for the resulting prejudice, for the period from September 2010 to November 2015.

The Conseil d'Etat confirmed that the reasonable period of time for adopting the decree necessary for application of the third paragraph of Article L. 34-1 of the Post and Electronic Communications Code (Code des Postes et des Communications Electroniques) had been exceeded, under wrongful conditions. In the case at issue, HADOPI had refused to pay the invoices sent to it by Bouygues Telecom, on the grounds that no decree had been adopted. The applicant company claimed that setting up specific processing procedures and using technical and human resources had resulted in specific additional cost. As part of the services provided, the company had processed more than 2 400 000 requests for the identification of IP addresses between September 2010 and November 2015. As justification of the reality and extent of the cost, which it estimated at 1.2 million euros, the company submitted documents including elements extracted from its internal management control system. The Conseil d'Etat ordered the State to pay Bouygues Telecom 900 000 euros in respect of the services provided for the period at issue, pending the future adoption of the expected decree.

• *Conseil d'Etat, (2e et 7e sous-sect. réunies), 4 avril 2016, Bouygues Telecom* (Conseil d'Etat, (2nd and 7th sub-sections combined), 4 April 2016, Bouygues Telecom) FR

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Right to be forgotten: CNIL fines Google 100 000^[U+202F] euros for failing to dereference from its entire search engine

In May 2015, further to the Costeja decision delivered on 13 May 2014, the Chair of the National IT and Freedom Commission (Commission Nationale Informatique et des Libertés - CNIL) ordered Google Inc. to carry out dereferencing on all the extensions of Google Search within a period of fifteen days. As this was not done within the given time, the Chair of the CNIL instituted sanction proceedings.

The authority's restricted formation found that the 1978 Information Technology and Freedoms Act was applicable to all processing connected with the Google Search service, as had the Court of Justice of the European Union (CJEU). Furthermore, it was within the CNIL's remit to determine how dereferencing was to be carried out, since the processing at issue was to be implemented "over all or part of the national territory, even if the entity in charge of the processing [was] established in the territory of another member State" (Article 48 of the 1978 Act). The CNIL also recalled that the right to be dereferenced, derived from the right to oppose data and the right to have data deleted, was attached to the person in question. Where the right was to be applied, it ought to be effective with no restriction and in respect of all processing, even if this would entail conflict with foreign rights. Lastly, the CNIL stated that the decision to dereference was made after an assessment of proportionality, intended to preserve a strict balance between the respect of entitlement to privacy and data protection on the one hand, and the public's interest in having access to information on the other. Thus the CNIL found that limiting dereferencing to Google's European extensions was firstly unfounded and secondly insufficient, as the dereferenced data could be accessed via the search engine's non-European extensions. The CNIL concluded that only dereferencing over the entire search engine could provide effective protection for personal rights. After the CNIL's deadline for compliance expired, Google had undertaken to improve its dereferencing arrangements. The CNIL found the proposed solution, which consisted of arranging filtering according to the geographical origin of the person using the search engine, incomplete and deemed that it was not sufficient to ensure full compliance with either its order or Articles 38 and 40 of the Information Technology and Freedoms Act. The CNIL therefore fined Google 100 000 euros.

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Originality of television broadcast format

Decisions on copyright protection for the format of a television programme are sufficiently rare so as to warrant reporting the recent decision handed down by the regional court (tribunal de grande instance - TGI) of Paris.

In the case at issue, the business manager of an audiovisual production company described himself as the creator of the 'Teum-Teum' audiovisual concept. This consists of filming, in a flat located in "sensitive" area, a magazine programme during which a presenter hosts a guest celebrity from the world of culture, show business, or politics for a discussion on their respective environments, current affairs, and everyday life in urban housing estates. Having produced the initial format for the broadcast in 2004, the applicant, the producer, had presented a pilot programme in 2005 to a number of media professionals who had been approached about the programme. The concept aroused interest at France 5 and in 2007 the applicant agreed to develop a new format for the 'Teum-Teum' programme with an executive co-producer (the defendant company), which became "a magazine for self-discovery through the eyes of other people". For this purpose, they signed an agreement to transfer to the defendant company all the rights for audiovisual adaptation and use involving the audiovisual concept of 'Teum-Teum', and an agreement with a view to co-producing a pilot broadcast. The executive producer also proposed that, should plans be made to produce a programme based on the format, the applicant company should co-produce the programme. The magazine programme developed within this contractual framework had been broadcast on a monthly basis and repeated on France 5 from 2009 to 2011. The broadcast had not been renewed thereafter and the executive producer had, for its part, developed and produced another programme, entitled 'Les uns, les autres'. The applicant company claimed that this new magazine used every aspect of the format of the 'Teum-Teum' programme, with the same presenter, narrative structure and teams, and that its partner, which had not consulted it, had violated the co-production contract. In view of this, the applicant company had the respondent company summoned to appear in court.

The Court analysed the evolutions in the format used for the programme and decided that it was the result of joint work carried out by its creator, the applicant, who had had the idea for a broadcast based on a celebrity's discovery of various aspects of an environment he or she was not familiar with, and the defendant executive producer, who had applied to these aims of encounter and cultural information a broader concept of the discovery of a neighbourhood and the people in it. The judge concluded that the final version of the format and the characteristics invoked, namely

the establishment of inter-generational gateways and the demonstration of a “collision of universes”, with a celebrity guest meeting stakeholders in the local urban culture, subsisted in the programme produced and should be appreciated in combination. In the light of the intellectual work undertaken to reach the format used and the aims pursued, this appeared to constitute the programme’s originality.

The Court continued to analyse the failure to perform the contract invoked by the applicant company, referring to the production of the programme ‘Les uns, les autres’. It set aside the alleged elements of similarity, finding that they were not elements that characterised the ‘Teum-Teum’ format specifically; the Court recalled that it was the formats of the programmes that needed to be compared, not their content in terms of information and intellectual action. Thus the legal arguments based on comparison of the subject matter treated by ‘Teum-Teum’ and ‘Les uns, les autres’ were irrelevant. Similarly, the Court found that the other areas of similarity noted in terms of “using the same approach”, such as the principle of a road movie, the definition of a single topic for each broadcast, the duration of the programme, the successive interviews, and the presenter’s empathy, were in fact common to all cultural and society magazines.

The programme ‘Les uns, les autres’ could therefore not be considered to be based on the format appended to the 2008 contract between the parties. The Court found that the applicant company was not justified in claiming, on the basis of this contract, that the defendant party had refrained from proposing a co-production of the new broadcast after the ‘Teum-Teum’ magazine had been stopped. The unsuccessful applicant has appealed against the judgement.

• *Tribunal de grande instance, Paris, (3e ch. sect.3), 12 février 2016, Cool Up’s productions et a. c/ Téléparis et a.* (Regional court (TGI) of Paris (3rd chamber, section 3), 12 February 2016, Cool Up’s Productions and others v. Téléparis and others.)

FR

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Court proceedings on remuneration for creators of ‘Arthur et les Minimoys’ characters

The regional court (tribunal de grande instance - TGI) of Paris has delivered an extremely significant judgement on the possibility of parties to an author contract waiving the principle of proportional remuneration.

In 2002 and 2008, the production company of the director of the animated film ‘Arthur et les Minimoys’ (English title: Arthur and the Invisibles) concluded an author contract for the “graphic conception of secondary characters, accessories and drawn decors” which provided for a lump-sum payment in return for

the agreed transfer of rights. Two further episodes in the trilogy had been produced subsequently, and new transfer contracts signed by the parties concerned in 2008, in return for a lump-sum remuneration of EUR 40,000. The new contracts also provided for the transfer of the merchandising rights of the four graphic artists, and additional remuneration on the condition that the representations and reproductions included only one or other of the secondary characters they had created. The production company had failed to produce elements making it possible to determine the amounts generated by merchandising, and the creators had discovered that the company was continuing to make use of their creations all over the world without their agreement, a contract, or remuneration. Because of this, the creators were calling on the courts to declare the transfer contracts null, and to award reparations for the prejudice suffered as a result of the wrongful use of their creative work.

The applicants claimed that their transfer contracts contravened the principle of proportional remuneration provided for in Article L. 131-4 of the Intellectual Property Code (Code de la Propriété Intellectuelle - CPI), in that their graphic creation could not be considered merely “accessory” to the film, contrary to the indications set out in their contracts. They also felt that that the co-contracting party had been fraudulent in only making provision for a percentage of the revenues from merchandising in the case of “individualised [reproduction] representing solely one of the secondary characters”. The Court recalled that, under Article L. 131-4 of the CPI, it was for whichever party so claiming to explain why rendering application of proportional remuneration was impossible, and to justify it applying lump-sum remuneration to the creator as an exceptional measure.

In the case at issue, it transpires from the contracts that the applicants had been entrusted with the intellectually creative work of creating both a number of characters and a quantity of accessories and decors for the film. The Court held that such a contribution could hardly be qualified as non-essential to the intellectual creation of the work, since it consisted of laying down the foundations for the film and creating its graphic environment. This important contribution to the creative process made by the applicants had indeed been specifically acknowledged by the defendant production company. The Court also noted that the fact that several people contributed together to the graphic work of an animated film, without it being possible to determine precisely the contribution of any one individual creator to each drawing, was not in itself enough to waive application of proportional remuneration, nor such as to establish the accessory nature of the person’s contribution to the complete work. On the contrary, the drawings, illustrations and graphic work constituted a foundational, principal element on the basis of which the work could be created in three dimensions and subsequently finalised. Thus the defendant party had not justified that it was not in a position to determine proportional remuner-

ation for the graphic artists, such that the disputed article in the contracts should be considered unlawful. The merchandising clause laying down a production condition which depended solely on the will of the defendant party was also erroneous. The illegality of these clauses, which constitute an essential and decisive element of the contract, resulted in the entire transfer contract being declared null.

The applicants were found justified in claiming damages in respect of the creation of all the characters, accessories and decors (and not solely the secondary characters, as claimed by the defendant party). Anyone who made use of their creations but disregarded their rights, which should be calculated in monetary terms as a proportional participation in income generated by sale or use, would have to pay damages to the applicants. An expert's report was ordered so as to determine the amount of income received as a result of making two sequels to the film and from spin-off merchandise.

• *Tribunal de grande instance, Paris, (3e chambre ; 2e section), 8 janvier 2016, P. Rouchier et a. c/ Société Europacorp et L. Besson* (Regional court (TGI) of Paris (3rd chamber, 2nd section), 8 January 2016, P. Rouchier and others v. the company EuropaCorp and L. Besson)

FR

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GB-United Kingdom

App for sharing sports clips violated copyright

In an action in the Chancery Division of the High Court of Justice presided over by Mr Justice Arnold, it was determined in a judgment given on 18 March 2016 that the reproduction and communication to the public of clips of TV broadcasts of England cricket matches and films via a sports clip sharing app was not protected by the defence of fair dealing for the purpose of reporting current events.

In this case, the claimants, the England and Wales Cricket Board (ECB) owned the copyright to the TV broadcasts of England cricket matches. The defendants, Tixdaq, owned a website (www.fanatix.com) and developed an app (the Fanatix app) for use in conjunction with the site. The app provided users of the site with the possibility of capturing and uploading clips of the claimants' broadcasts, each lasting up to 8 seconds. These clips were also available on their social media accounts (Facebook and Twitter). The ECB brought an action for copyright in respect of footage of cricket matches (signal copyright) that had been shared via the site. Tixdaq sought to rely

on the fair dealing defence in relation to news reporting (section 30(2) Copyright Designs and Patents Act (CDPA)) and on the safe harbour provisions deriving from the E-Commerce Directive (Regulations 17 and 19 of the Electronic Commerce (EC Directive) Regulations 2002). The new defence of quotation (section 30(1ZA) CDPA) was not advanced (see IRIS 2014-10/19).

The starting point of the Court was whether the work or a substantial part of the work had been copied. In assessing this question, the Court referred to the EU Court of Justice's Infopaq ruling (Case C-5/08, 16 July 2009). The substantial part should reflect the intellectual creation of the author. Mr Justice Arnold noted that it is not just any part of a broadcast that satisfies this test, but that "broadcasters and producers invest in the production of broadcasts and first fixations knowing, first, that some parts of the footage of an event (e.g. wickets in the case of cricket matches and goals in the case of football matches) will be more interesting to viewers than other parts and, secondly, that there is a market for highlights programmes and the like in addition to the market for continuous live coverage."

Section 30 CDPA essentially has three elements: a requirement as to purpose of use; fair dealing; and attribution of source. Mr Justice Arnold affirmed that section 30(2) must be construed in the light of the InfoSoc Directive, Article 5(3)(c), and both provisions should be interpreted in the light of freedom of expression. An important factor for assessing section 30(2) "is whether the extent of the use is justified by the informatory purpose". Mr Justice Arnold also noted that domestic authorities on the application of the test had been handed down before the InfoSoc Directive and should therefore be treated with caution. Given that there is little consideration of "news reporting" at EU level, Mr Justice Arnold however referred to *BBC v. BSB* [1991] Ch 441, in which news of a sporting character was held to fall within the definition of a "current event" for the purposes of section 30(2). The next question was whether the dealing was fair. While there are a range of factors that could come into play in this assessment, one of the most important is whether the defendant's use of the copyrighted work is in commercial competition with the owner's exploitation of the work; another is the amount and importance of the work which has been taken (citing *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142). It is also legitimate to consider the defendant's motive.

Applying the law to the facts, Mr Justice Arnold determined that "[q]uantitatively, 8 seconds is not a large proportion of a broadcast or film lasting two hours or more. Qualitatively, however, it is clear that most of the clips uploaded constituted highlights of the matches: wickets taken, appeals refused, centuries scored and the like. Thus most of clips showed something of interest, and hence value." This then was a substantial part.

Considering fair dealing, the Court accepted that citizen journalism could fall within the definition of journalism for the purpose of reporting current events. Although the commentary submitted with the clip facilitated discussion amongst users, the Court concluded that the primary purpose of the app was the sharing of clips: “[t]he clips were not used in order to inform the audience about a current event, but presented for consumption because of their intrinsic interest and value.” Thus, the use was not “for the purpose of reporting”, thereby falling outside section 30(2).

Nonetheless, Mr Justice Arnold considered whether the usage could be considered fair. He concluded that it was not. The defendants’ activities were commercially damaging to the ECB and conflicted with normal exploitation of the works. Mr Justice Arnold emphasised that the apps were intended to be used by large numbers of users. Further, clips which were uploaded to the app were often also uploaded to the website and/or the social media platforms. In later versions of the app, Tixdaq introduced an algorithm which limited the total number of clips and the amount of content uploaded to bring it closer to that permitted under the Sports News Access Code of Practice (“SNAC”), which sets out the circumstances under which one broadcaster is permitted to use footage from the sports broadcasts of another and which, under the terms of SNAC, is agreed to constitute fair dealing. Mr Justice Arnold held that approximating to the SNAC amounts did not mean that the use was fair. SNAC relates to linear broadcasting in the context of news reporting rather than near-live and on-demand services. Moreover, the use of the app was still likely to lead to greater consumption.

The defendants accepted that in circumstances where a user does not correctly attribute the clip, section 30(2) will not apply. In that instance, the defendants sought to rely on the intermediary liability provisions derived from Articles 12-14 E-Commerce Directive. While not dealt with in great detail, the Court suggested that an Article 14 defence would be available to the defendants in respect of user-posted clips which were not editorially reviewed, but not in respect of any which were editorially reviewed.

• England And Wales Cricket Board Ltd & Sky v Tixdaq Ltd & Anor [2016] EWHC 575 (Ch), of 18 March 2016

<http://merlin.obs.coe.int/redirect.php?id=17961>

EN

• Judgment of the Court (Fourth Chamber) in Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening, 16 July 2009

<http://merlin.obs.coe.int/redirect.php?id=17962>

DE EN FR

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

Decision on police accessing journalists’ communications data

The case arose from the “Plebgate” affair in September 2012, in which it was reported that the then Government Chief Whip had verbally abused a police officer when prevented from leaving Downing Street on his bicycle through the main gate. Official police logs were leaked, and the Sun newspaper received anonymous phone calls about the event on its tip hotline. This fact led to a concern that, in addition to the leaking of information, there was a conspiracy to bring down a member of the Government and the perversion of the course of justice by certain officers. The Chief Whip resigned from the Government in October 2012.

To ascertain whether there was a conspiracy, the police sought to obtain the communications data not only from police officers, but also from Sun journalists. Four authorisations were issued, all relying on section 22 of the Regulation of Investigatory Powers Act (RIPA) and the associated Code of Conduct - at that time Acquisition and Disclosure of Communications Data, 2007. That version of the code, which has since been updated, contained no specific protection for journalists or their sources.

Following the publication of the police report into the investigation, the journalists learned of the access of their data, and made a complaint to the Investigatory Power Tribunal (IPT), which is a statutory body that investigates complaints against the police’s use of surveillance. The question before the IPT was whether RIPA and the 2007 version of the code provided adequate protection or rather constituted a breach of Article 10 of the European Convention of Human Rights (ECHR).

On most issues, the IPT found for the police. Thus, it accepted that the relevant officers honestly and reasonably believed that there were grounds for suspecting the commission of an offence which was of sufficient seriousness to justify taking steps to identify the source of the leak. Further, the investigation could not be effective without the communications data. In respect of the authorisations, the IPT held that three of the four were necessary and proportionate. As regards the final authorisation (“the third authorisation”), it was not necessary as the identity of the informant had already been discovered.

There was, however, another issue to consider which concerned the protection (or rather lack of protection) of journalists’ sources. In considering this question, the IPT referred to the case law of the European Court of Human Rights (ECtHR). It held: “04046cases directly engaging the freedom of the press require to be treated differently. The case of Goodwin makes clear that the protection of journalistic sources is one of the

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basis (sic) conditions for press freedom, and that the necessity for any restriction on press freedom must be convincingly established” (see IRIS 1996-4/4).

So, while the safeguards in the system generally may have provided protection against the arbitrary use of power, it was deficient in that the system in operation at the time did not contain any safeguards for the press. This was the case even though the police would have no access to the material itself, nor require the journalist to disclose the source. The court noted that the safeguards in the system operate after the event: “Subsequent oversight by the Commissioner, or, in the event of a complaint, by this Tribunal, cannot after the event prevent the disclosure of a journalist’s source. 04046 Where an authorisation is made which discloses a journalist’s source that disclosure cannot subsequently be reversed, nor the effect of such disclosure mitigated.”

The IPT also noted that there was no requirement for the use of section 22 powers in respect of a journalist to be highlighted to the Commissioner, running the risk that any issues in such an instance might not be subject to effective review. Given the nature of the RIPA powers, it is only because the Metropolitan police disclosed the access that the journalists knew to bring a complaint. Furthermore, although the designated officer had experience in human rights issues generally, as required by the 2007 code, he had had no experience of investigations of journalists’ sources or the issues thereby raised. The matter was then judged as though it were a standard case, without these considerations being taken into account.

The 2015 version of the code now takes these matters into account.

• News Group Newspapers Ltd & Ors v Commissioner of Police of the Metropolis [2015] UKIPTrib 14_176-H (17 December 2015)

<http://merlin.obs.coe.int/redirect.php?id=17964>

EN

• Home Office, Code of practice for the acquisition and disclosure of communications data (March 2015)

<http://merlin.obs.coe.int/redirect.php?id=17994>

EN

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Report on BBC’s culture and practices in relation to serious sexual misconduct by celebrities

The report of the review by Dame Janet Smith into the BBC’s culture and practices during the Jimmy Saville and Stuart Hall years has now been published. Saville was a highly popular television presenter; it was revealed after his death that he had carried out a large number of acts of sexual abuse, especially against young girls, and many of these had been committed in relation to his work at the BBC. Hall was another

popular TV presenter; he was imprisoned after admitting 14 charges of abuse against young girls aged between 9 and 17 years over a period of three decades, once more in connection with his BBC work and on BBC premises.

The report found that complaints had been made and concerns raised about Saville in the 1960s and 1970s. Thus some staff were aware of his inappropriate sexual conduct and this should have been reported. However, there was no evidence that any senior member of staff or the BBC as a corporate body were aware of the conduct. Similar findings were made in relation to abuse by Hall, though his misconduct was known to more senior staff. There were cultural factors within the BBC which militated against the reporting of sexual complaints or concerns, particularly when these related to television stars. These factors involved a culture of not complaining because of the possible effect on the complainant’s career, deference and adulation accorded to celebrity stars and the lack of any suitable route for the making of complaints. There was also a failure to pass information between different BBC departments. In addition, there was a ‘macho culture’ in some BBC departments where few women worked and there was a reluctance to report sexual harassment. There was also a lack of concern for the welfare of under-age girls.

The report concluded that both Saville and Hall had over a long period of time engaged in inappropriate sexual conduct at the BBC and had taken advantage of their association with the BBC to further their contacts with young people for sexual purposes. The BBC’s failings reflected general cultural attitudes of the time such as a failure to recognise child abuse and the need to protect young people from exploitation by older men; the BBC had at the time been ‘a place of sexual discrimination and sexual harassment’ as was common throughout business, industry and the professions. However, there were failings more specific to the BBC as well; the lack of an effective complaints procedure, the need for stronger information sharing, the lack of an effective investigations process; the need for stronger audience protection and the need for an effective human resources department providing proper support to employees.

Since the events described social attitudes have changed greatly; the BBC has also changed and now has a satisfactory child protection policy and proper grievance and complaint procedures. Thus, the major recommendation of the report is that the BBC needs to demonstrate that it has taken the complaints seriously and has made or is making the necessary changes; it should explain its current rules, policies and procedures in the areas covered to demonstrate that they apply current best practice. There should also be an independent audit of those rules, policies and procedures. The BBC should also consider other issues relating to its internal lack of cohesion, the hierarchical structure of its management and its attitude to behaviour by its stars.

• BBC Trust, 'The Dame Janet Smith Review Report', 25 February 2016
<http://merlin.obs.coe.int/redirect.php?id=17965>

EN

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Regulation of e-cigarette advertising and sponsorship on television and radio

On 13 April 2016, Ofcom, the UK communications regulator, issued a Statement concerning e-cigarettes. It specifies amendments which Ofcom is making to the Broadcast Code and also the amendments which it has instructed the Broadcast Committee of Advertising Practice to make to the BCAP Code: the UK Code of Broadcast Advertising. BCAP had introduced rules on the marketing of e-cigarettes in 2014 (see IRIS 2015-1/23).

The changes were ordered by the UK Secretary for Health under section 321(6) of the Communications Act 2003. The amendments arise from the UK's implementation of the EU Tobacco Products Directive (2014). The Directive prohibits advertisements for electronic cigarettes and refill containers in broadcast television and radio services. It also prohibits programme sponsorship which has the aim or effect of promoting such products.

The amendments will come into effect on 20 May 2016.

• Ofcom, Regulation of e-cigarette advertising and sponsorship on television and radio, 13 April 2016

<http://merlin.obs.coe.int/redirect.php?id=17980>

EN

• Committees of Advertising Practice, Change to BCAP Code around nicotine-containing e-cigarettes, 13 April 2016

<http://merlin.obs.coe.int/redirect.php?id=18000>

EN

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GR-Greece

Application of law on licensing of digital television under controversy

An intense political controversy over licensing of digital television has arisen in Greece after the unsuccessful effort to nominate new members of the Regulatory Authority Ethniko Symvoulío Radiotileorasis (National Council of Radio and Television - ESR) in February 2016. According to Act 3439/2015, ESR must, first, give its opinion to the competent minister on the number and the kind of licences to be allocated and the

auction's starting price, and, secondly, carry out the auction procedure and issue licences (see IRIS 2016-1/16). However, a decision on the nomination of ESR members, which is taken by a majority of 4/5 of a 23-member special parliamentary body Diaskepsi ton Proedron (Conference of the Presidents), has not been reached. Opposition political parties refused to vote for the proposition presented by the President of the Parliament and claimed that Act 3439/2015 should be changed in order to give the regulatory body exclusive decisional powers on every aspect of licensing procedure.

Trying to break the impasse, the government decided that ESR has to be put aside for the first application of the law and passed new laws providing that the decision on the number of licences will be taken by Parliament, that the auction price will be determined by common decision of the Minister and the Minister of Finance and that the auction procedure will be organised by the ministerial services. These new texts are seriously questioned by professors of constitutional law, conflicting with the provisions of Article 15 paragraph 2 of the Greek Constitution which provides that ESR is the competent authority to grant licences to radio and television service providers.

According to another resolution passed by Parliament, following conclusions of a study conducted by the European University Institute in Florence, the public tender will be for four licences of general content and national coverage in high definition standards. This decision was fiercely denounced by opposition political parties and by the existing eight private television stations with national coverage, who presented technical arguments in favour of the status quo. As a consequence, ESR is still without a board (since October 2015 - see IRIS 2016-1/16) and thus unable to perform its duties. At the same time, the existing audiovisual media services providers are preparing to block the licensing procedure by taking the necessary legal measures before the competent courts for the annulment of the call for tender that will be issued by the government in the coming days.

• ΝΟΜΟ343 345340' 321341331330. 4364, 5 Φεβρουαρίου 2016 (Act 4364/2016, 5 February 2016)

<http://merlin.obs.coe.int/redirect.php?id=17966>

EL

• ΝΟΜΟ343 345340' 321341331330. 4367, 15 Φεβρουαρίου 2016 (Act 4367/2016, 15 February 2016)

<http://merlin.obs.coe.int/redirect.php?id=17967>

EL

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IE-Ireland

New code of standards for advertising and commercial communication

On 1 March 2016, the Advertising Standards Authority for Ireland's (ASAI) new Code of Standards for Advertising and Marketing Communications in Ireland (7th edition) came into effect (for previous codes, see IRIS 2006-2/24 and IRIS 2002-5/21). The ASAI is an independent self-regulatory body, and the code applies to advertising and marketing communication in all media in Ireland, including television and digital media.

The new 132-page code contains a number of new provisions, including the following: first, there is a new section on e-cigarettes, which provides that "marketing communications for e-cigarettes should be socially responsible and should contain nothing which promotes the use of a tobacco product or shows the use of a tobacco product in a positive light." Second, in relation to gambling, the new code states that "all advertisements for gambling services or products shall contain a message to encourage responsible gambling and shall direct people to a source of information about gambling and gambling responsibly." Third, the code has also been updated to bring it into line with Regulation (EC) No. 1924/2006 on nutrition and health claims on foods (see IRIS 2011-4/16 and IRIS 2011-8/20). Finally, in relation to children's advertising, the code now provides that "except those for fresh fruit or fresh vegetables, marketing communications should not seem to encourage children to eat or drink a product only to take advantage of a promotional offer: the product should be offered on its merits, with the offer as an added incentive."

The ASAI stated that the new code followed "significant public consultation process with a wide range of Government departments and agencies, consultations with consumer groups and other NGOs, and consultation with the advertising industry including advertisers, agencies and the media." Any individual may make a complaint to the ASAI concerning a commercial communication being in breach of the code, which the ASAI will adjudicate upon, and a decision will be published.

• Advertising Standards Authority for Ireland, Code of Standards for Advertising and Marketing Communications in Ireland, 7th edition, effective from 1 March 2016
<http://merlin.obs.coe.int/redirect.php?id=17968>

EN

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ME-Montenegro

Rulebook on electronic communications comes into force

On 8 February 2016, the Agency for Electronic Media adopted a Rulebook on electronic publications which introduces the first specific rules for the functioning of online media. All electronic publications are obliged to register with the Agency for Electronic Media and to align their operations with the Rulebook by mid-April 2016.

The Rulebook defines electronic publications as editorially-shaped internet pages and/or portals that contain programme content with audio or video materials that are transmitted to the public, as well as electronic versions of print media and/or media information which are made available to the general public. The term "electronic publications" was introduced in the general law on electronic media in 2011, and was aimed to cover the sphere of online media. However, but now only the Rulebook provides concrete rules on rights and duties for providers of electronic publication services.

The new legislation grants service providers with editorial freedoms in the creation of content, and introduces obligations, such as the obligation of registration and identification of the electronic publication service, and the right of reply and correction. Electronic publications are now obliged to respect the privacy and dignity of citizens and to protect the integrity of minors and vulnerable groups. Also, they are forbidden from providing services which might jeopardize the constitutional order and national security, and from instigating or spreading hatred or discrimination. In an attempt to fight the spread of hate speech through user generated content, the Rulebook requires providers of electronic publication services to adopt clear rules on user registration and comments posted on programme content. The service provider is obliged to remove any comment which is not in line with the adopted rules within 60 minutes of it being posted. If comments or replies are deleted or not posted, users have the option to file a complaint.

• *Pravilniko elektronskim publikacijama* (Rulebook on electronic publications)
<http://merlin.obs.coe.int/redirect.php?id=17999>

SR

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NL-Netherlands

Dutch Data Protection Authority finds processing of personal data for anti-piracy research lawful

On 14 March 2016, the Autoriteit Persoonsgegevens (Dutch data protection authority, AP) declared that a plan to process the personal data of internet users for anti-piracy investigations is lawful. Stichting BREIN, a Dutch anti-piracy organisation, intends to collect and further process the IP addresses and user names of Dutch citizens engaging in file sharing via 'BitTorrent' networks. The purpose of the data processing is to investigate the involvement of these people in the unauthorised, large-scale uploading and downloading of copyright-protected works, such as films and music. The organisation notified the Dutch data protection authority of its plans.

Stichting BREIN sought to process personal data without data subjects being aware of that, and to process personal data relating to criminal matters. As required under Article 31 of the Dutch Data Protection Act, the data protection authority conducted a prior check to assess the lawfulness of the planned processing operations. The authority in particular assessed whether Stichting BREIN would provide sufficient safeguards to protect the rights and interests of the data subjects.

In principle, Article 34 of the Dutch Data Protection Act requires that a data controller inform data subjects of its identity and the purposes of the data processing. According to its proposal, Stichting BREIN would inform only those people it would select for further investigation. To do so, the organisation would obtain the users' contact details via internet service providers. However, it would also process many user names and IP addresses without requesting the contact details of these people, and thus would be unable to inform these people individually. Instead, the organisation would inform internet users of its plans via general announcements on websites and in the media. The Dutch data protection authority concluded this solution satisfied Article 34.

Under Article 8 of the Dutch Data Protection Act, personal-data processing must be grounded on a legal basis, for example the legitimate interest pursued by the controller. Stichting BREIN stated that the purpose of the processing is to investigate whether BitTorrent users infringe the copyrights of rights holders represented by the organisation. The Dutch data protection authority found that this was a legitimate interest, but stipulated that the processing should also be necessary, and that Stichting BREIN's interest should outweigh the interests of the data subjects. According to the Dutch data protection authority, these require-

ments implied the anti-piracy organisation should implement sufficient safeguards.

Stichting BREIN explained it would indeed provide for a range of safeguards. For example, the organisation described in more detail the type of files and users it would select for further investigation. Essentially, they would focus on Dutch works and the "big fish" - not on Hollywood productions or the occasional downloader. Stichting BREIN would immediately remove most of the IP addresses and user names after a first selection, as well as the personal data, that were selected but not further acted upon within six months.

The Dutch data protection authority concluded that the remaining requirements specified in the Dutch Data Protection Act were also fulfilled (among others, limited storage time and data security). Stichting BREIN may therefore execute its plans.

• *Bekendmaking besluit Voorafgaand Onderzoek Stichting BREIN - Nieuwsbericht, 14 maart 2016* (Dutch Data Protection Authority, Announcement decision on prior check Stichting BREIN, 14 March 2016) <http://merlin.obs.coe.int/redirect.php?id=17996>

NL

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Man acquitted of insulting Muslims during television documentary

On 9 March 2016, a 37-year-old man was acquitted of insulting Muslims by the Amsterdam Court of Appeal. The man made his statements in a documentary about the Dutch politician Geert Wilders from the Partij voor de Vrijheid - (Party for Freedom, PVV) in 2010. The makers of the documentary wanted to investigate the motives of Geert Wilders and his followers. One of the interviewees was the defendant, who was presented as a follower of Geert Wilders. In the interview he spoke about Arabs as "fervent ass crashers" (fervent kontenbonkers), who also "fuck young boys". According to him this is "normal in their culture". The Court believed that the defendant meant Muslims when he talked about Arabs, so the man stood trial for publicly and intentionally insulting Muslims on the ground of their religion, under Article 137c of the Dutch Penal Code (Sr) (see IRIS 2009-3/109).

The central element of Article 137c Sr is the offensiveness of statements. A statement about a group is insulting if it impairs the self-respect or honour of the group, or discredits the group, because it belongs to a particular race, religion or belief. The context is particularly important for the determination of liability under Article 137c Sr. If the statements were made in the context of, for example, a public debate, this can reduce the punishable insulting-character of the

statement. However, this is only when the statements are not gratuitously offensive.

The Court considered that these statements were unmistakably insulting. The defendant had insulted Muslims with his statements by reasons of their religion, since he had implied that the behaviour described by him is rooted in Islam and so an expression of the creed of Muslims. With this he affected the dignity and self-respect of Muslims and discredited them as a group.

The Court also considered, on the other hand, that the statements of the defendant were made during a public debate, more specifically during an interview before an anti-Islam demonstration. According to the Court it cannot be said that these kinds of statements serve no useful purpose in public debate.

The question was ultimately whether the expressions used were gratuitously offensive. If so, the context of the public debate overrides the insulting character of the statements. The Court answered that question in the negative, stating that everyone who wants to raise topics of common interest should be free to do so, even if the statements are offensive, shocking or disturbing. According to the Court the statements used were unsavoury, but unsavoury statements are frequently used in public debate. The statements do not incite hatred, violence, discrimination or intolerance.

In other words, the defendant did not exceed the boundaries of the Article 10 ECHR right to freedom of expression. Therefore, the statements used could not be classified as 'insulting' for Muslims 'because of their religion', as intended in Article 137c of the Dutch Penal Code.

• *Gerechtshof Amsterdam, 9 maart 2016, ECLI:NL:GHAMS:2016:828* (Amsterdam Court of Appeal, 9 March 2016, ECLI:NL:GHAMS:2016:828)
<http://merlin.obs.coe.int/redirect.php?id=17969>

NL

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Amendments to Media Act concerning regional broadcasting

On 15 March 2016, the Senate passed the new amendments to the Mediawet (Media Act) in order to reform the regional broadcasting system. The State Secretary for Education, Culture and Science, Sander Dekker, wanted to transfer the administrative and financial responsibility of the regional broadcasters to the central government, realise a reduction of EUR 17 million in the budget of the regional broadcasters, and set up a single unified organisation responsible

for public broadcasting at a regional level. Additional reforms regarding the national broadcaster are contained in an additional bill, which the State Secretary aims to present to Parliament before the summer recess.

The new amendments to the Media Act, which have taken effect with its publication on 30 March 2016, create a legal basis for a new organisation, Regionale Publieke Omroep (Regional Public Broadcasters, RPO). The RPO will be granted an exclusive "concession" (concessie) by the Minister for Education, Culture and Science for ten years for the realisation of public broadcasting on a regional level, and will act as a single unified organisation responsible for public broadcasting at a regional level. In order to obtain this concession the RPO needs to submit a "concession policy plan" to the Minister beforehand and resubmit another one for review after five years. The plan must contain a detailed report on the ways in which the RPO wishes to shape public broadcasting on a regional level in the upcoming years. The plan should cover both quantitative and qualitative goals. It must specify the content of regional programmes in general terms, the intended audience of programmes, and the means the RPO needs to achieve these goals. It must also specify some organisational requirements, such as the nature and number of channels required and the frequencies needed to achieve this.

The concession policy plan will be made available to the public and the Minister is legally obliged to ask the Commissariaat voor de Media (the Dutch Media Authority, CvdM) and the Raad voor Cultuur (Council for Culture) for advice about the plan. Based on the plan, the Minister and the RPO come to a "performance agreement", which contains the quantitative and qualitative goals the RPO should achieve and the possible sanctions if it fails to do so. It is explicitly stated that the performance agreement does not relate to the content of specific regional programming, but is directed at the programming in general. As stated in the introduction, the RPO will be financially dependent on the central government and needs to submit a detailed budget to the Minister and the CvdM every year.

• *Wet van 16 maart 2016 tot wijziging van de Mediawet 2008 in verband met het toekomstbestendig maken van de publieke mediadienst* (Act of 16 March 2016 to amend the Media Act 2008 to make Public Broadcasting future proof)

<http://merlin.obs.coe.int/redirect.php?id=17995>

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PT-Portugal

New law on media coverage of elections

Procedures on the media coverage of elections in Portugal have been changed during the past year and had effect on recent elections, both legislative and presidential (on October 2015 and January 2016, respectively).

Currently, the law on the media coverage of elections (no. 72-A/2015) stipulates as a general principle (Article 4) that, during elections, the media enjoy editorial freedom and freedom of programming.

Amongst changes introduced is the exclusion of the relevance of political proposals for the choice of democratic alternatives as criteria for political representativeness in debates between candidates. This means that two criteria shall be applied (article 7): 1) having obtained representation in the previous elections for the body to which application is directed; and 2) media's editorial freedom to include other applications in debates to be organised.

In terms of sanctioning, financial penalties were excluded. Instead of a regime which provided fines (from EUR 3 to EUR 30,000), in cases of violations of equal opportunity and equal treatment of different political applications, media providers are now subject to warnings from the Entidade Reguladora para a Comunicação Social (State Media Regulatory body, ERC) during electoral campaigning.

These changes were introduced on 19 June 2015 following the final vote in the Portuguese Parliament. Law no. 72-A/2015 revoked Law-Decree no. 85-D/75, and came into force on 24 July 2015, although final provisions indicate that a review shall take place within one year.

• *Lei n.º 72-A/2015 de 23 de julho sobre a cobertura jornalística em período eleitoral e uso de meios de publicidade comercial - Estabelece o regime jurídico da cobertura jornalística em período eleitoral, regula a propaganda eleitoral através de meios de publicidade comercial e revoga o Decreto-Lei n.º 85-D/75, de 26 de fevereiro. Publicada no Diário da República, 1.ª série - N.º 142 - 23 de julho de 2015 (Act no. 72-A/2015 of 23 July, published in the official news bulletin "Diário da República" no. 142, 1st series)*

<http://merlin.obs.coe.int/redirect.php?id=17998>

PT

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Media regulatory body approves regulations on media transparency

The Entidade Reguladora para a Comunicação Social (Portuguese State Media Regulatory body, ERC) approved, on 22 March 2016, the final wording of the regulations on the transparency of the main funding sources of media companies, as well as on their annual corporate governance reporting. The Regulations (no. 348/2016) were published in the official news bulletin on 1 April 2016.

This document complies with Articles 5 and 16 of the Law on transparency of ownership, management and funding of media companies (no. 78/2015), since it establishes: 1) that the ERC is responsible for receiving information on the financial flux of media companies according to specifications defined by the regulator (Article 5, paragraph 1); 2) that annual corporate governance reporting shall be delivered by 30 April each year to the ERC (Article 16, paragraph 1). It further includes a "truthful, complete, objective and current report on corporate governance structures and practices adopted by media companies". Moreover, the regulations followed public consultation, with significant participation by media companies (a total of 57).

In short, these regulations establish that media companies are required to provide information on equity, liabilities, ownership and holding of corporate bodies, and related business activities. Disclosure of information is therefore mandatory and is delivered to the ERC. In addition, reporting includes a detailed description of internal mechanisms designed to minimise the risk of irregularities in obtaining financing means and conflicts of interest. A digital platform was released by the ERC on 11 April 2016 in order to facilitate this interaction.

Notwithstanding, an exception to disclosure is possible. Although information given to the regulator is of public access, there is legal protection for cases in which "the ERC understands that stakeholders' fundamental interest justifies exceptions to this principle" (Article 6, paragraph 1 of Law no. 78/2015).

Media companies may require the regulator to apply this exception. The argument for the exception relies on the sensitivity and confidential nature of some of the requested data, which raised concern during public consultation and was expressed by several media companies/associations.

• *Lei n.º 78/2015, de 29 de julho - Regula a promoção da transparência da titularidade, da gestão e dos meios de financiamento das entidades que prosseguem atividades de comunicação social e altera a Lei de Imprensa, a Lei da Televisão e a Lei da Rádio. Publicado no Diário da República, 1.ª série - N.º 146 - 29 de julho de 2015 (Act no. 78/2015 of 29 July, published in the official news bulletin "Diário da República" no. 146, 1st series)*

<http://merlin.obs.coe.int/redirect.php?id=17970>

PT

• *Relatório de consulta pública ao "Projeto de regulamento que estabelece as regras sobre a transparência dos principais meios de financiamento e sobre o relatório anual de governo societário das entidades que prosseguem atividades de comunicação social"* (Report of the public consultation on the regulations on the transparency of the main funding sources of media companies and on their annual corporate governance reporting)

<http://merlin.obs.coe.int/redirect.php?id=17971>

PT

• *Regulamento n.º 348/2016 - Estabelece as regras sobre a transparência dos principais meios de financiamento e sobre o relatório anual de governo societário das entidades que prosseguem atividades de comunicação social. Publicado no Diário da República, 2.ª série - N.º 64 - 1 de abril de 2016* (Regulation no. 348/2016 of 1 April, published in the official news bulletin "Diário da República" no. 64, 2st series)

<http://merlin.obs.coe.int/redirect.php?id=17997>

PT

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RO-Romania

Deputies reject draft law to cut the audiovisual licence fee

On 2 March 2016, the Chamber of Deputies (lower Chamber of the Romanian Parliament) rejected a draft Law, which was intended to abolish the audiovisual licence fee. The Senate (upper Chamber of the Romanian Parliament) will have the final decision (see inter alia IRIS 2003-4/24, IRIS 2013-5/37, IRIS 2014-1/38, IRIS 2014-6/30, IRIS 2015-6/33). According to the initiators of the draft law, the licence fee collected by the Romanian public broadcasting services would be completely cut, and would not be replaced by another source of revenue.

The Legislative Council, which issued a positive opinion on the draft law, warned that cutting the sources of revenue for the public Radio and Television could trigger their bankruptcy. On the other hand, the Legal Committee of the Chamber of Deputies issued an unanimously negative opinion on the draft law. The Romanian government issued a negative opinion on the draft law, which intended to abolish the licence fee for the public audiovisual broadcasters. The government considers it the public broadcaster's mission to ensure the right of the citizens to information, for which public spending is a necessity. The costs are covered by taxes and fees, and the licence fee represents a non-fiscal fee, existent in most of the European countries. Cutting the licence fee, the main source of revenue for the public broadcaster, would make it impossible for it to fulfil its public mission and could even lead to its abolition, stated the government. Without the licence fee, and in view of the limitation of advertisement to 8 minutes per hour (in comparison to 12 minutes for the commercial stations), the public radio and the public television would

be under political and commercial pressure, according to the government. The government recalled that the European Broadcasting Union (EBU) firmly recommended the licence fee as the best financing solution to guarantee the editorial independence of the public broadcasters. At the same time, the government underlined that the licence fee is not collected by the cable providers and that the public broadcaster does not receive money from the cable providers for the distribution of its channels, as is the case of the commercial stations. The Cabinet emphasised that the licence fee is a legal obligation, and the payment of a subscription to cable programme providers is optional. The distribution of the public TV channels is mandatory, without any additional cost, under Audiovisual Law no. 504/2002, with further modifications and completions.

The draft law was rejected by the Culture Committee of the Chamber of Deputies. The mission of the public broadcasters is to ensure the constitutional right of citizens to be informed and the licence fee makes that possible. The Culture Committee argued that cutting the licence fee, the main source of revenue, without replacing it with other revenues from other sources, would make it impossible for the public Radio and Television broadcaster(s) to fulfil their mission..

• *Propunere legislativă pentru modificarea art. 40 din Legea nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune - forma inițiatorului* (Draft Law on modification of the Art. 40 of the Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Company and of the Romanian Television Company - proponent's form)

<http://merlin.obs.coe.int/redirect.php?id=17975>

RO

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RU-Russian Federation

New rules of film exhibition

By a decree of 27 February 2016 the Government of Russia adopted "Rules on issuance, denial of issuance and reclaiming of an exhibition permit for a film". The new rules supersede the current ones, which were issued in 1993.

The permit is obligatory for film exhibition in a cinema, for rental of films in hard copy, or for both exhibition and rental. The Ministry of Culture is the governmental office in charge of the process. Within ten working days of submission it reviews applications together with copies of a set of documents related to the applicant and the film itself (including starting date of its exhibition) and a proof of payment of the relevant fee. The permit necessarily carries the age ratings

in accordance with the Federal Statute “On the Protection of Minors against Information Detrimental to their Health and Development” (see IRIS 2011-4/34 and IRIS 2012-8/36).

A permit will be denied if the application is for a film that already has an exclusive distributor with an application for a permit submitted earlier, if it contains materials that violate laws on terrorism and extremism. An application will also be denied if the film contains content that informs on the drug production, propagate pornography, cult of violence and cruelty, has subliminal messages, or swear words (see IRIS 2014-6/32), or which violate other provisions of the decree and federal statutes.

The Ministry continues to be in charge of conducting a “State Register of films with permits” which allows for an online search of a film in question (URL: <http://mkrf.ru/registr/>).

The decree enters into force three months after its official publication.

• ПОСТАНОВЛЕНИЕ от 27 февраля 2016 г. N 143 - Об утверждении Правил выдачи, отказа в выдаче и отзыва прокатного удостоверения на фильм и Правил ведения Государственного регистра фильмов (Decree of the Government of Russian Federation of 27 February 2016 N 143 “On adoption of the Rules on issuance, denial of issuance and reclaiming of an exhibition permit for a film and Rules of the conduct of the State Register of films.” Officially published on the “Official Internet portal of legal information on 2 March 2016)

<http://merlin.obs.coe.int/redirect.php?id=17988>

RU

Andrei Richter

Media expert (Russian Federation)

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

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