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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: **Sousa Goucha v. Portugal**

In finding that there had been no violation of the right to privacy and the right to reputation, the European Court of Human Rights (ECtHR) upheld a high level of freedom of expression in a case concerning a joke in a TV-programme about the sexual orientation of a television celebrity in Portugal. For the ECtHR it was important that the domestic courts, in dismissing the defamation complaint by Mr Sousa Goucha, took into account the context in which the joke had been made, and referred to the playful and irreverent style of the television comedy show and its usual humour. It also noted that Mr Sousa Goucha, as a well-known television host, is a public figure, who had earlier publicly declared his homosexuality.

Mr Sousa Goucha lodged a criminal complaint for defamation and insult against the television company (RTP), the production company, the television presenter, and the directors of programming and content, following the joke made during the broadcast of a late-night comedy show on television. Mr Sousa Goucha alleged that the joke, which had included him in a list of best female television hosts, damaged his reputation as it had conflated his gender with his sexual orientation. The Portuguese courts, however, dismissed his claim for damages as ill founded. They considered that for a reasonable person, the joke would not be perceived as defamatory because it referred to aspects of Mr Sousa Goucha's characteristics, behaviour, and way of expressing himself, which could be seen as feminine.

Relying on Article 14 of the European Convention of Human Rights (ECHR), Mr Sousa Goucha submitted an application to the ECtHR, alleging that the domestic courts had discriminated against him because of his sexuality, which he had made public. According to the ECtHR, the case also deserved an analysis from the perspective of Article 8 of the Convention, as the right of reputation is protected under that provision, while the concept of "private life" also covers the moral integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identity and sexual orientation. The Court stated that sexual orientation is a profound element of a person's identity, and that gender and sexual orientation are two distinctive and intimate characteristics. However, the Court reiterated that in order for Article 8 to be triggered, the attack on personal honour and reputation must have a certain level of seriousness and such

a manner as to cause prejudice to personal enjoyment of the right to respect for private life. The main issue in the present case was whether a fair balance had been achieved between Mr Sousa Goucha's right to protection of his reputation, which is an element of his "private life" under Article 8, and the other parties' right to freedom of expression, as guaranteed by Article 10 of the ECHR.

It is in this balancing exercise that the Court first noted that Mr Sousa Goucha is a well-known television host in Portugal and thus a "public figure". The Court then recalled that it had been required on numerous occasions to consider disputes involving humour and satire, and reiterated that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care. Additionally, the Court also referred to the judgment of the Court of Justice of the European Union (CJEU) in the case of *Deckmyn v. Vandersteen* (IRIS 2014-9/5), acknowledging that a particularly wide margin of appreciation should be given to parody in the context of freedom of expression. It must also be noted, however, that the joke was not made in the context of a debate of public interest and, as such, no matters of public interest were at stake. On the other hand, the Court considered that the joke would not be perceived as defamation by a reasonable person, and it referred to Mr Sousa Goucha's characteristics, his behaviour, and way of expressing himself. Also of particular importance is the playful and irreverent style of the television comedy show and its usual humour. The Court considered that the domestic courts had convincingly established the need for placing the protection of freedom of expression above Mr Sousa Goucha's right to protection of reputation. The Court noted that they also took into account the lack of intent to attack the applicant's reputation and assessed the way in which a reasonable spectator of the comedy show in question would have perceived the impugned joke, as opposed to merely considering what the applicant felt or thought towards the joke. A limitation on freedom of expression for the sake of the applicant's reputation would therefore have been disproportionate under Article 10 of the Convention. The Court concluded that the domestic courts had struck a fair balance between the television show's freedom of expression under Article 10 and Mr Sousa Goucha's right to have his reputation respected under Article 8. In sum, the Court found no reason to substitute its view for that of the domestic courts.

With regard to the complaint under Article 14 ECHR (discrimination), the Court was of the opinion that the refusal to prosecute the TV-broadcaster and persons responsible for the impugned TV-programme for defamation was not due to because he was homosexual. Rather, the Court stated that it was due to the weight given to freedom of expression in the circumstances of the case, and the lack of intention to at-

tack the Mr Sousa Gaucho's honour. The Court stated that although the relevant passages were "debatable" and "could have been avoided", they did not have discriminatory intent. Consequently, in the absence of any firm evidence, it was not possible to speculate whether his sexual orientation had any bearing on the domestic courts' decisions. Therefore, the Court stated that it cannot be said that the Mr Sousa Goucha was discriminated against on the grounds of his sexual orientation, and accordingly, there had been no violation of Article 14 read together with Article 8.

• Judgment by the European Court of Human Rights, Fourth Section, case *Sousa Goucha v. Portugal*, Application no. 70434/12 of 22 March 2016

<http://merlin.obs.coe.int/redirect.php?id=18007>

EN

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European Court of Human Rights: *Pinto Coelho v. Portugal (No. 2)*

In a judgment of 22 March 2016 the European Court of Human Rights (ECtHR) found that Portugal has violated a journalist's right to report about the hearing in a criminal case. The ECtHR emphasised that the domestic court hearing was public and that the criminal conviction of the journalist for having broadcast unauthorised recordings of the statements of witnesses during the hearing was not necessary in a democratic society. Therefore the journalist's conviction amounted to a breach of Article 10 of the European Convention of Human Rights (ECHR).

The applicant in this case was Sofia Pinto Coelho, a TV-journalist and legal affairs correspondent. She was convicted for having broadcast in news report excerpts that included sound recordings from a court hearing, obtained without permission from the judge. The case on which Pinto Coelho had reported concerned the criminal conviction of an 18-year-old man for aggravated theft of a mobile phone. In her TV-report Ms Pinto Coelho argued that the defendant should have been acquitted, alleging a judicial error. She included in her report shots of the courtroom, extracts of sub-titled sound recordings, and the questioning of prosecution and defence witnesses, in which their voices and those of the three judges were digitally altered. The excerpts were followed by Ms Pinto Coelho's commentary, in which she tried to demonstrate that the victims had not recognised the defendant during the trial, supporting the defendant's claim that he had been at work at the time of the incident.

A short time later the president of the domestic court, who had presided over the case, lodged a complaint

against Ms Pinto Coelho. No permission had been given to broadcast extracts of the recordings of the court hearing, and the failure to obtain such authorisation breached Article 348 of the Criminal Code. After being convicted of non-compliance with a legal order and ordered to pay a fine of EUR 1,500, and after exhausting all national remedies, Ms Pinto Coelho submitted an application to the ECtHR in Strasbourg, alleging a breach of her right as a journalist to freedom of expression and information, under Article 10 of the ECHR.

In essence, in this case the ECtHR had to balance the right of the journalist to inform the public and the public's right to receive information against the right of those who testified to respect for their private lives and against the interest of maintaining the authority and impartiality of the judiciary. The Court reiterated that in principle journalists must obey the law, which includes when reporting on a criminal case of public interest. The Court stated that although Ms Pinto Coelho had not obtained the recordings of the hearing in an illicit way, as a journalist she must have been aware that the unauthorised broadcasting of the recordings violated Article 348 of the Criminal Code. The Court took into consideration, however, the fact that when the news report was broadcast the case had already been decided, and hence there was no indication that the broadcast of the audio extracts could have negatively influenced the proper administration of justice. Furthermore, the hearing was public and none of the witnesses whose evidence had been broadcast had filed any complaint. The Court also considered it relevant to emphasise that the witnesses' voices were distorted, which reduced the interest invoked by the Portuguese judicial authorities referring to the right to have the witnesses' and judges' voices protected under the right of privacy. The Court reiterated that Article 10 also protects the mode of expression of ideas and information, and that it is not for judges to substitute their own views for those of the press as to how a story should be presented. According to the ECtHR the domestic authorities had not sufficiently justified the criminal sanction imposed, despite the fact that it might have a chilling effect on journalistic reporting on matters of public interest. By six votes to one, the Court found a violation of Article 10 of the Convention. The Court held that the finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage sustained by Ms Pinto Coelho. It further awarded her EUR 1,500 in respect of pecuniary damage and EUR 4,623.84 in respect of costs and expenses.

• *Arrêt de la Cour européenne des droits de l'homme, quatrième section, affaire Pinto Coelho c. Portugal (n° 2), requête n° 48718/11 du 22 mars 2016* (Judgment by the European Court of Human Rights, Fourth Section, case Pinto Coelho v. Portugal (no. 2), Application no. 48718/11 of 22 March 2016)

<http://merlin.obs.coe.int/redirect.php?id=18006>

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EUROPEAN UNION

European Commission: Proposal to amend the Audiovisual Media Services Directive

On 25 May 2016 the European Commission published a proposal to amend the Audiovisual Media Services Directive (AVMSD). As the Commission noted in its press release, the aim of the proposal is: “to achieve a better balance of the rules which today apply to traditional broadcasters, video-on-demand providers and video-sharing platforms, especially when it comes to protecting children. The revised AVMSD also strengthens the promotion of European cultural diversity, ensures the independence of audiovisual regulators and gives more flexibility to broadcasters over advertising”.

The main changes pertain to the following aspects:

Scope: the principle of “TV-likeness” is removed, and video-sharing platforms will now be included in the scope of the Directive. Such platforms will have to protect minors from harmful content and protect all citizens from incitement to hatred. The proposal defines video-sharing platforms as commercial services addressed to the public which:

- store a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility;
- where the content is organised in a way determined by the provider of the service, in particular by hosting, displaying, tagging and sequencing;
- where the principal purpose of the service (or a dissociable section thereof) is devoted to providing programmes and user-generated videos to the general public, in order to inform, entertain or educate;
- is made available by electronic communications networks.

Incitement to hatred: there is a reinforcement of the grounds for prohibiting hate speech;

Country of origin: this principle is maintained, transparency obligations are reinforced, and the procedures for assessing jurisdiction are simplified;

Protection of minors: the two-tier approach is replaced by common rules concerning content that “may impair the physical, mental or moral development of minors”, and a provision that special measures must be put in place for the most harmful content;

European works: the obligations on broadcasters are maintained, while those on non-linear services are reinforced, also with regard to targeting countries. On-demand providers will have to make sure that their catalogues contain at least 20% share of European content. Member States will be able to ask on-demand services available in their country to contribute financially to European works.

Commercial communications: there is a relaxation of the rules, but also a reinforcement of self- and co-regulatory codes. The limit of 20% of broadcasting time is maintained between 7h and 23h, but broadcasters can choose freely when to show ads throughout the day. Broadcasters and on-demand service providers will also have greater flexibility to introduce product placement and sponsorship.

Audiovisual regulators: the principle of independence is recognised and ERGA will play a bigger role, including in assessing jurisdiction and adopting Union codes.

• Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities (COM(2016)287 final)

<http://merlin.obs.coe.int/redirect.php?id=18035>

DE EN FR

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

• European Commission, Press release, “Commission updates EU audiovisual rules and presents targeted approach to online platforms”, 25 May 2016

<http://merlin.obs.coe.int/redirect.php?id=18020>

DE EN FR

Department for Legal Information
European Audiovisual Observatory

European Commission: Consultation on the evaluation and review of the e-Privacy Directive

On 12 April 2016, the European Commission launched a Public Consultation on the evaluation and review of the e-Privacy Directive (Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications

sector, see IRIS 2002-7/10). The consultation is addressed to all relevant stakeholders from the civil society, business and public sectors.

The purpose of the consultation is twofold. Section I aims to retrospectively assess the functioning of the e-Privacy Directive, which is necessary for the review announced by the European Commission in the Digital Single Market Strategy for Europe (see IRIS 2015-6/3). Section II is aimed to produce a forward-looking assessment of possible improvements to the Directive.

Section I of the consultation corresponds to the so-called Regulatory Fitness and Performance Programme (REFIT) evaluation, and addresses the effectiveness, relevance, coherence, efficiency and “EU added-value” of the e-Privacy Directive. In particular, the stakeholders have to evaluate whether the Directive has been effective in achieving its objectives and whether these are still relevant given the new technological, social and legal developments. The focus is on the necessity and added value of the Directive’s sector-specific provisions in light of the new General Data Protection Regulation (GDPR). The questionnaire also aims to assess whether the existing rules fit with each other and whether they are coherent with other legal instruments, such as the Framework Directive, the GDPR, the Radio Equipment Directive, and the upcoming Network and Information Security Directive. A number of questions concern the efficiency of the Directive’s national implementation in regard to its contribution to the users’ trust in the protection of their privacy online and the additional costs to businesses.

The questions comprising Section II of the consultation correspond to five categories of potential improvements to the Directive. Among the most relevant is, first of all, the broadening of the Directive’s scope to include the so-called ‘over-the-top’ service providers. Although these providers render information society services functionally equivalent to the electronic communications services (such as voice over IP, instant messaging, webmail, and location services), unlike the electronic communications services providers they are currently not covered by the e-Privacy Directive. Second, the relative majority of questions are devoted to additional policy measures ensuring security and confidentiality of communications. Such measures, for example, include the securing users’ passwords, use of encryption apps, extension of security requirements to certain types of software, Internet of Things devices or network components (such as SIM cards), the so-called “cookie walls”, and consent to storage of or access to the information on users’ smart devices. Furthermore, attention is also drawn to the problems of unsolicited commercial communications and inconsistent enforcement and fragmentation.

The consultation also provides a possibility to identify any other issues that the stakeholders deem necessary and allows them to upload quantitative data reports or studies to support their views.

The consultation will run until 5 July 2016. The European Commission will then summarise the answers received in a report which it will publish on the website of the Directorate General for Communications Networks, Content and Technology one month after the consultation closes. The report will be used to draft a new legislative proposal on the e-Privacy Directive, expected by the end of 2016.

• European Commission, Questionnaire for the public consultation on the evaluation and review of the e-Privacy Directive

<http://merlin.obs.coe.int/redirect.php?id=18027>

DE EN FR

• European Commission, Background document to the public consultation on the evaluation and review of the ePrivacy Directive

<http://merlin.obs.coe.int/redirect.php?id=18030>

EN

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OSCE

OSCE: Propaganda and freedom of the media

The OSCE Representative on Freedom of the Media has published a non-paper (a discussion document) on the relationship between propaganda and freedom of the media, aimed to facilitate discussion among the participating states of the organization. The non-paper will result in formulating national and international law and policy toward the current spread of propaganda surrounding the conflict in and around Ukraine. The publication distinguishes two sorts of propaganda in the contemporary world. The first is ‘propaganda for war and hatred’; it demands legal action with appropriate measures in accordance with international human rights law. The second type of propaganda defined negatively, as the remaining kinds of propaganda. This kind of propaganda may be against professional standards of journalism, but does not necessarily violate international law. This non-paper reviews OSCE and other international commitments in regard to hateful international propaganda, in the context of the obligations of the participating States on freedom of expression and freedom of the media. The particular focus of the non-paper lies on the relation between Article 19 (on freedom of expression) and Article 20 (on banning war propaganda and incitement to hatred) of the International Covenant on Civil and Political Rights (ICCPR) and its interpretation by the UN Human Rights Committee (UNHRC). The non-paper reviews attempts to counteract propaganda through national laws that restrict foreign media messages and foreign media messengers. An evaluation of existing constitutions and national statutes in Europe demonstrates that there are traditional legal tools to stop the dissemination of hate

speech, although such tools might not be widely used by the judiciary.

• Organization for Security and Co-operation, Propaganda and Freedom of the Media: A non-paper of OSCE Office of the Representative on Freedom of the Media, 26 November 2015

<http://merlin.obs.coe.int/redirect.php?id=18008>

EN

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NATIONAL

AL-Albania

Parliament amends formula for election of public service broadcaster's General Director

On 14 April 2016, in a plenary session, the parliament voted to change the rules for the election of the General Director of the public broadcaster Radio Televizioni Shqiptar. The Act no. 22/2016 "On some additions and amendments to the Act no. 97/2013 'On Media in the Republic of Albania'" stipulates that the General Director of the public broadcaster needs 3/5 of the votes of the Steering Council members to be elected. If this does not happen in the first three rounds, he/she can be elected in the next two rounds through a simple majority. In case all five rounds fail, the Steering Council will be dissolved. Before these amendments to the Act, Article 102 of Act no. 97/2013 stated that the Steering Council can approve and dismiss the General Director with 2/3 of the votes, and did not set a limit on the number of voting rounds.

The ruling majority proposed this amendment in February 2016, as a result of the deadlock in the voting process for a new general director of the public broadcaster. The competition for electing the new general director was opened in June 2015, but after two candidates were shortlisted, neither of them received the required 2/3 of the votes of the Steering Council. The proposed amendment from the ruling majority Members of Parliament was opposed by the opposition Members of Parliament. The opposition Members of Parliament viewed the amendment as an attempt of the ruling majority to appoint a person that was close to the ruling majority as director, in breach of the agreement of consensus between opposition and ruling majority.

The proposed amendment was passed in the Parliamentary Commission on Media on 29 February 2016, with only the votes of the ruling majority, and voted in a plenary session on 10 March 2016. The Law

was returned again to the parliament for review by the President of the Republic, who considered the law might breach several constitutional provisions. However, after reviewing the President's arguments, the Parliamentary Commission again approved the Act on 6 April 2016, with only the ruling majority votes. In the plenary session on 14 April 2016 the amendment of the law was approved with 74 votes in favour and 37 against.

• Ligj nr. 22/2016, datë 10.3.2016, Për disa shtesa dhe ndryshime në ligjin nr. 97/2013, "Për mediat audiovizive në Republikën e Shqipërisë" (Act no.22/2016 "On some additions and amendments to Act no. 97/2013 'On Audiovisual Media in the Republic of Albania'")

<http://merlin.obs.coe.int/redirect.php?id=18016>

SQ

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BG-Bulgaria

New procedure for electing members of the Bulgarian media regulator

On 27 April 2016, the Bulgarian National Assembly elected two new members to the Council for Electronic Media (CEM) under a new procedure adopted on 8 April 2016. The new provisions relate in particular to the nomination of candidates, the public announcement of their nomination, and their being interviewed before the Culture and Media Committee, as well as their election by the National Assembly.

Although the 1998 Broadcasting Act, which was last amended in December 2015, provided in section 24(1) for three members of the CEM to be elected by the parliament and for two to be appointed by the state president, the election procedure has not been specified in detail until now. In the past, this often led to arguments and lengthy delays when an individual term of office expired, so the prompt transition to new terms of office was not possible and the terms of the members concerned were extended as a result. A very recent example was in spring 2015, when the terms of office of one member appointed by the state president and two members elected by the National Assembly had expired without the parliament electing two successors for the new term. The incumbent members continued their work in accordance with the continuity principle in force at the time. This was not altered by the fact that the state president had appointed a new member in time, because section 24(2) of the Bulgarian Broadcasting Act states that the president's decision shall enter into force together with that of the parliament. In a letter to the speaker of the parliament, the state president and the chairman of the CEM, the Supreme Administrative Public Prosecutor's Office drew attention to this delay, emphasising

ing that it results in the media regulator continuing to work with the same members as before.

The procedural rules now passed by the parliament provide four different steps. Firstly, individual MPs or political groups can submit proposals for the election of future members. These must contain a statement detailing “the nominees’ professional recognition and social authority”. They must also specify the documents to be attached. The second step is a public announcement, which involves all documents (subject to compliance with data protection provisions) being made available via a specially created link at the National Assembly’s website. Non-profit and professional organisations can comment on the candidacies of the individuals nominated and propose questions for the candidates to be asked at a public interview, which takes place before the National Assembly’s Culture and Media Committee. The latter then drafts a report, which must also be published on the website no later than 24 hours before the sitting of parliament. The National Assembly then elects members at a public sitting. A candidate with more than half the votes of the MPs present is elected.

In April 2016, the Bulgarian National Assembly chose the two members that it had to elect under this new procedure. This election was particularly important because the CEM will soon elect the director of the public service radio broadcaster, Bulgarian National Radio (BNR), and the director of the public service TV broadcaster, Bulgarian National television (BNT).

• РЕШЕНИЕ на 43- то Народно събрание на 8 април 2016 г. за приемане на процедурни правила за условията и реда за предлагане на кандидати за членове на Съвета за електронни медии от квотата на Народното събрание, представянето и публичното оповестяване на документите и изслушването на кандидатите в Комисията по културата и медиите, както и процедурата за избор от Народното събрание (Decision of the 43rd National Assembly of 8 April 2016 on the procedural rules for nominating candidates for membership of the Council for Electronic Media from the National Assembly quota, the submission and public announcement of documents, the interviewing of candidates in the Culture and Media Committee and their election by the National Assembly)

<http://merlin.obs.coe.int/redirect.php?id=18021>

BG

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DE-Germany

Federal Administrative Court denies unconstitutionality of broadcasting licence fee for private households

On 18 March 2016, the Bundesverwaltungsgericht (Federal Administrative Court) decided in a total of 18 cases, involving appeals on points of law, that the levying of the broadcast receiving licence

for private households is constitutional (cases nos. 6C6.15; 6C7.15; 6C8.15; 6C22.15; 6C23.15; 6C26.15; 6C31.15; 6C33.15; 6C21.15; 6C25.15; 6C27.15; 6C28.15; 6C29.15; 6C32.15).

Under the Rundfunkbeitragsstaatsvertrag (Inter-State Agreement on the Broadcasting Licence Fee - RBStV), since the beginning of 2013 a licence fee has been payable by every household, the obligation to pay a device-dependent licence fee having been abolished. Although the RBStV provides for exemption from the obligation to pay the fee on certain social grounds, or when it is objectively impossible for a person to receive a broadcast in their home, there is no exemption for cases where a person does not possess a reception device. The plaintiffs had refused to pay the fees, which were initially EUR 17.89 a month and have been reduced to EUR 17.50 since 2015. After the defendant broadcasting authorities had determined the total amount of unpaid fees, the plaintiffs opposed the payment, stating that they did not possess a reception device. They lost their cases in the lower courts and filed final appeals on points of law, which have now been dismissed by the Federal Administrative Court.

The judges did not agree with the plaintiffs’ view that the licence fee was a tax that Länder had no authority to levy. The licence fee, the judges ruled, was not a tax because it was not levied indiscriminately, without the imposition of conditions. Rather, it was levied in return for the possibility of receiving public service broadcasting programmes. In addition, the fees were not used to finance specific public expenditure but to ensure the financing of public service broadcasters in a manner commensurate with their functions. The constitutionally required justification followed, firstly, from the fact that the licence fee was a payment for being able to benefit from receiving broadcasts. Linking the obligation to pay the fees to a specific household, the Court continued, was the right way to establish that benefit because the legislature’s assessment prerogative was premised on the assumption that radio and television programmes were mostly received in homes. That followed from, amongst other things, the fact that according to the Statistisches Bundesamt (Federal Statistical Office), more than 90% of households possessed television sets. The Länder were further/also/thus entitled to adopt rules on the licence fee under their powers to enact broadcasting legislation.

The judges also did not agree with the plaintiffs’ view that the Länder should have retained the device-dependent licence fee. It was, for example, doubtful that the latter could have been made compatible with the requirement that taxation be fair for everyone because, in particular, the increase in multifunctional reception devices had made it harder to establish against the owner’s will that a reception device was being kept ready for use. In accordance with the binding view of the Bundesverfassungsgericht (Federal Constitutional Court), the Court also regarded the

levying of the licence fee as a means of funding appropriate to public service broadcasting: it enabled the broadcasters to carry out their remit under the dual (public and commercial) broadcasting system and at the same time avoid any dependence on advertising or state money that might jeopardise programme diversity. The Court also made it clear that opening up the possibility of granting exemption from the licence fee to people who did not possess a reception device ran counter to the legislative objective of levying the fee as fairly as possible. Furthermore, technical developments meant it could no longer be proved with absolute certainty that an individual did not possess a reception device.

Finally, the judges did not sustain the plaintiffs' objection that the licence fee breached the right of people who lived alone in their home to enjoy the equal treatment guaranteed by Article 3 of the Grundgesetz (Basic Law). The plaintiffs claimed unequal treatment as the licence fee had to be paid once per household, and so whilst those living together in a household could share the fee, a person living alone had to pay the fee in its entirety. In the Court's opinion, although that did indeed constitute unequal treatment, that treatment was sufficiently justified in view of the administrative work that would otherwise be involved, the large number of households and the frequency of payments, since the household was traditionally the place where programmes were received and the levying of the licence fee in its present form was possible without any significant investigative work.

• *Pressemitteilung des BVerwG zur Entscheidung vom 18. März 2016* (Press release of the Federal Administrative Court on its decision of 18 March 2016)
<http://merlin.obs.coe.int/redirect.php?id=18022>

DE

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The producer of the dubbed version of a film is to be considered a film producer

The OLG Rostock (Rostock Higher Regional Court) ruled in a decision of 6 January 2016 (case no. 2 W 31/15) that a film producer acquires rights in a dubbed version through a material act, even if the producer of the dubbed version has not obtained the necessary rights.

The plaintiff, who sought an interlocutory injunction, produced a dubbed German version of a Norwegian film. The title of the German version is "Z.D.K."; the original Norwegian title is "Mørke sjeler". It is not known whether other dubbed versions have been made. The defendant distributed the German version of the film without the consent of the plaintiff. The

latter objected and brought an action for injunctive relief. The defendant disputed that the plaintiff had any rights over either the German or the original version of the film.

In its decision, the Court established that the producer of the dubbed version was a film producer within the meaning of section 94 of the Urhebergesetz (Copyright Act - UrhG), because the dubbed version of a film with a new soundtrack constituted a new cinematographic work. When determining the existence of rights as a film producer, it was, the Court said, immaterial whether the producer of the dubbed version had acquired the necessary rights from the producer of the original Norwegian version or from the creators of the film. Rather, the film producer's rights within the meaning of section 94 of the Copyright Act came into being through a material act. Accordingly, in order for the rights to come into being there was no requirement that the recording be made legally, or that no copyrights or related rights be violated in the production of the dubbed version. The plaintiff was able to show convincingly that he/she/they had produced the dubbed German version, and the Court noted that he/she/they had not claimed any rights in the original version of the cinematographic work or any versions in other languages.

• *Entscheidung des OLG Rostock vom 06. Januar 2016* (Decision of the Rostock Higher Regional Court of 6 January 2016)
<http://merlin.obs.coe.int/redirect.php?id=18023>

DE

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New law for collecting societies

On 24 May 2016 the Verwertungsgesellschaftengesetz (Collecting Societies Act - VGG) was adopted. This act transposes Directive 2014/26/EU on collective management of copyright and related rights (see IRIS 2014-4/4) and replaces the previous Urheberrechtswahrnehmungsgesetz (Copyright Administration Act). The purpose of the new Act is to simplify the fixing of tariff rates, the EU-wide grant of usage rights and the participation in general meetings of members. The Bundestag commented in a resolution on the judgment of the Bundesgerichtshof (Federal Court of Justice - BGH) of 21 April 2016 concerning the distribution to publishers of royalties collected by the collecting society VG Wort. The Bundestag declared such distribution unlawful and stated that publishers and authors should continue to have their rights managed in joint collecting societies.

The previous obligation, to conduct negotiations on an inclusive contract for fixing tariff rates for copies of copyright protected works on computers and external

hard drives, has been abolished. Instead, independent arbitration procedures aimed at reaching agreements on the level of remuneration for the uses required are to be carried out between the industry and collecting societies. The government draft of the Act contains an obligation for the industry to set up a security fund for copyright levies. This was amended by the Bundestag and is now only to be applied when no adequate part-payments have been made and rightsholders have a considerable need for security.

The EU-wide granting of usage rights is to be simplified by means of joint licensing and processing hubs, which are to be given the possibility of licensing rights in music items for online offerings. The German collecting society GEMA, the UK's PRS for Music and Sweden's STM established such a licensing hub in the summer of 2015.

Additionally, participation in general meetings of members of collecting societies is to be simplified for rightsholders, by enabling those entitled to receive royalty payments to participate electronically.

• *Gesetz zur Umsetzung der Richtlinie 2014/26/EU über die kollektive Wahrnehmung von Urheber- und verwandten Schutzrechten und die Vergabe von Mehrgebietslizenzen für Rechte an Musikwerken für die Online-Nutzung im Binnenmarkt sowie zur Änderung des Verfahrens betreffend die Geräte- und Speichermedienvergütung (VG-Richtlinie-Umsetzungsgesetz), 24. Mai 2016* (Collecting Societies Act, 24 May 2016)

<http://merlin.obs.coe.int/redirect.php?id=18041>

DE

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Draft of a new Film Support Act adopted

On 23 March 2016, the German cabinet adopted the draft of a new *Filmförderungsgesetz* (Film Support Act - FFG) submitted by the Minister for Culture. Before that, comprehensive discussions had been held with the participation of the film-industry associations and institutions concerned.

The purpose of the draft Act is to adapt film support legislation to future needs. The Film Support Act is the legal basis for the provision of film support by the *Filmförderungsanstalt* (Film Support Agency - FFA). The aim is not only to provide more effective and successful support for quality German films, but also to continue efforts to preserve cinemas as places of culture. The intention is that the new Act should again improve the conditions for achieving these objectives. It is hoped that targeted measures, such as support for screenplay development, will promote artistic and creative success, because underlying the Film Support Act is the fundamental solidarity-based idea that all areas of the industry that exploit films must make an appropriate contribution to the preservation and

promotion of German works. The funds spent by the FFA to promote German films therefore originate from the cinema and video industry, including online providers and TV broadcasters, via a parafiscal levy (the so-called "film levy"). For every cinema with a net turnover above EUR 75 000 the levy is between 1.8% and 3% of annual net revenues. Video industry companies pay between 1.8% and 2.3% of their annual net revenues. The levy for TV broadcasters is in principle calculated on the basis of the proportion of cinema films in their total programme schedule. The FFA consequently obtains its income exclusively from funds provided by the film industry, and receives no money from the state budget. It currently has an annual budget of around EUR 76 million.

According to the new draft Act, the bodies concerned are to be more gender-balanced and will also be slimmed down. Moreover, subsidies are to be concentrated on fewer projects and selection is to be improved. Furthermore, in the future more money is to be made available for funding screenplays. Provision is made for an increase in film levy rates, but in contrast to earlier versions there will be no separate obligation for providers of HD-TV services to pay the levy. The new Film Support Act is scheduled to come into force on 1 January 2017. Under the current Act, the collection of the film levy expires on 31 December 2016.

• *Entwurf des Filmförderungsgesetzes* (Draft of the Film Support Act)

<http://merlin.obs.coe.int/redirect.php?id=18040>

DE

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FR-France

Court of Cassation refuses to penalise use of concealed camera and infiltration by journalists

On 30 March 2016 the Court of Cassation delivered an interesting decision on the infiltration and use of a concealed camera by journalists for a television magazine programme. In its 'Les Infiltrés' magazine programme, the public-sector channel France 2 had broadcast an item entitled 'À l'extrême droite du père' ('to the extreme right of the father'), produced by a journalist who had concealed his professional status and, using a hidden camera, had entered a number of "traditionalist" Roman Catholic establishments and associations, recording images and speech without the people concerned being aware that he was doing so. A number of complaints had been brought by these people on the grounds of invasion of privacy, production of a montage that violated the indi-

viduals' image, and fraudulent methods of obtaining the material. The case was brought against the journalist who had produced the coverage, the chairman of the television channel, and the production company and its manager. The investigating judge had referred the case to the criminal court on the grounds of invasion of privacy, the use of words and images obtained thereby, and collusion, and stated that the other charges should be dismissed. The civil parties joined to the proceedings had appealed against the decision of partial dismissal. Since the Court of Appeal upheld the decision of the investigating judge, the applicant parties appealed to the Court of Cassation.

Article 226-8 of the Penal Code prescribes a punishment of one year's imprisonment and a fine of EUR 15 000 for the publication by any means of any montage that uses the words or the image of a person without his or her consent, unless it is obvious that it is a montage, or this fact is expressly indicated. The Court of Cassation noted that, in upholding the dismissal the Court of Appeal had observed that the provision would penalise the montage in itself only if it deliberately distorted images and speech though the addition or removal of elements which did not serve its purpose. After analysing the various sequences at issue, the Court was able to note that the montage incorporated cuts and selected sequences with the aim of providing television viewers with certain information regarding areas of the extreme right, but that the process had not manipulated the information it contained. The Court also observed that it appeared to be obvious that the segment was in fact a montage, by its presentation, the repeated use of flashbacks to a grid of images during the reportage while the commentator was speaking, and because of the timescale made known to the viewer. Viewers were therefore in a position to note that the various situations shown were indeed a concentration of information formatted according to the requirements typical of the type of broadcast at issue. The investigating judge at the Court of Appeal had concluded that the reportage had not used either special effects or manipulation, had not distorted the reality of the images and words filmed and recorded, and had not altered their import or meaning. The Court of Cassation found, noting that the disputed reportage was obviously a montage and did not in any way manipulate the meaning of the recorded images and words, that the investigating judges had come to the right conclusion in their decision.

The Court of Cassation also confirmed the dismissal by the Court of Appeal of the claim of fraudulent obtaining, in which the Court of Appeal had noted that although the journalist had used a false name, this had not been decisive. The fact that he failed to indicate his professional status and told the people he met that he was a militant, an atheist or a volunteer did not constitute the assumption of a fictitious capacity within the meaning of the law: it was merely a lie. Thus, while the infiltration procedure was used

to reveal or bring to light the behaviour of these people without their consent, it did so without provoking them and did not constitute a fraudulent manoeuvre that could be qualified as fraudulent obtaining.

• *Cour de cassation (ch. crim.)*, 30 mars 2016 - *Association culturelle du Bon Pasteur et a.* (Court of Cassation (criminal chamber), 30 March 2016 - Bon Pasteur religious association and others)

FR

Amélie Blocman
Légipresse

Change in rules on politicians' speaking time in the media

The next presidential election in France will be held in the spring of 2017. As part of its tasks to ensure diversity at election time, conferred on it by Article 16 of the Act of 30 September 1986, the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) ensures the application of the specific rules applicable to the handling of election news. The organic law of 25 April 2016 modernising the rules applicable to presidential elections has been gazetted. The Act provides for the application of the principle of equity in audiovisual matters, during the period between publication of the list of candidates and the eve of the official campaign. According to this principle of equity, television services must allocate candidates (or political parties) and their supporters speaking or broadcasting time according to their representativeness and their actual involvement in the campaign. This principle therefore replaces the previous principle of equal speaking time for candidates during election campaigns, as advocated by the CSA; in September 2015 it published fifteen proposals it considered desirable to implement during future elections in order to achieve a better balance between freedom of communication and observance of political diversity in audiovisual media.

As a result, only the last two weeks preceding the presidential election will be subject to the principle of equal speaking time in the audiovisual media. The Constitutional Council has declared that the text does not contravene the Constitution; it considers that the legislator's intent was to promote clarity in the electoral debate, in the citizen's interest, and to allow the editors of audiovisual communication services greater freedom in their treatment of news in the period leading up to an election. The Constitutional Council felt that while these editors retained their decisive role in broadcasting information to citizens at election time, their diversity had been increased. It pointed out that there were also other methods for providing the population with information at election time that were not covered by identical regulations; it felt that in this way the legislator had reconciled the constitutional demands of diversity of ideas and opinions on

the one hand, and freedom of communication on the other. 25 April 2016 also saw the promulgation of an Act modernising various rules applicable to elections, and including provisions on the transparency of opinion polls.

• *Loi organique n°2016-506 du 25 avril 2016 de modernisation des règles applicables à l'élection présidentielle* (Organic law of 25 April 2016 modernising the rules applicable to presidential elections)
<http://merlin.obs.coe.int/redirect.php?id=18042> FR

Amélie Blocman
Légipresse

GB-United Kingdom

Supreme Court refuses permission to appeal against the basis for calculating damages awards for breach of privacy and misuse of information

The Supreme Court in *MGN Limited v Gulati and others* on 22 March 2016 upheld the High Court decision of Mr Justice Mann in respect of assessing damages payable to claimants who had been victim of invasion of privacy, including telephone hacking by some staff of the Daily Mirror newspaper, owned by Mirror Group Newspapers Limited (MGN) (see IRIS 2015-7/18).

MGN had appealed to the Court of Appeal, contending that the damages awarded by Mr Justice Mann were excessive. The Court of Appeal's judgment, dated 17 December 2015, dismissed MGN's appeal on all grounds (see IRIS 2016-3/17). The Court of Appeal refused MGN permission to appeal to the Supreme Court, so the newspaper company sought permission from the Supreme Court itself.

In an order given by Lords Neuberger, Sumption, and Hughes of the Supreme Court on the 22 March 2016 refused permission to appeal "because the application does not raise an arguable point of law".

Mr Justice Mann determined that the level of compensation that should be paid to the eight representative claimants should not be determined solely on the basis of distress alone, but also on the extent of the invasion of privacy.

When MGN appealed to the Court of Appeal they raised four points: (a) the level of damages should be limited to damages for distress; (b) the awards were disproportionate compared to general damages for a personal injury claim; (c) the awards were excessive compared to basis for calculating damages arising from the European Court of Human Rights (ECtHR); (d) the awards involved an element of double counting. These four points of appeal were rejected

by Court of Appeal judges Arden, Rafferty and Kitchen LJ (their rationale is outlined in IRIS 2016-3/17).

The consequence of the Supreme Court refusing an application for leave to appeal is that Mr Justice Mann's analysis of the legal principles for calculating breach of privacy damages remains binding, and will be applied in forthcoming cases concerning the Sun and News of the World newspapers.

- *MGN Limited v Gulati and others*, UKSC 2016/0016, 23 March 2016
<http://merlin.obs.coe.int/redirect.php?id=18032> EN
- *Gulati and others v MGN Limited* [2015] EWHC 1482(Ch)
<http://merlin.obs.coe.int/redirect.php?id=17601> EN
- *Representative Claimants v MGN Limited* [2015] EWCACiv 1291
<http://merlin.obs.coe.int/redirect.php?id=17873> EN

Julian Wilkins
Blue Pencil Set

New Ofcom rules on hate speech and abusive treatment

On 4 May 2016, Ofcom, the UK broadcasting regulator, published a statement announcing changes to rules in Section Three of the Broadcasting Code and the accompanying guidance, made to "ensure they are as clear as possible for broadcasters".

Thus, the version of the Code, in force as of 9 May 2016, becomes the latest version of the Code, and applies to all programmes broadcast on or after that date. Earlier programmes are covered by the Code in force on the date of broadcast.

Section Three pertains to material that is "likely to incite crime or disorder" and material containing "hate, hatred, abusive and derogatory treatment, and portrayals of crime and criminal proceedings."

First, Ofcom has updated the title of the Section, which now reads "Crime, Disorder, Hatred and Abuse", from its previous title "Crime". Second, two additional rules have been set out. These address content containing "hate speech and abusive or derogatory treatment." On hate speech, the new Rule 3.2 provides that "material which contains hate speech must not be included in television and radio programmes except where it is justified by the context." On abusive or derogatory treatment, the new Rule 3.3 states, "material which contains abusive or derogatory treatment of individuals, groups, religions or communities, must not be included in television and radio services except where it is justified by the context."

Importantly, Ofcom provides guidance notes on the meaning of "context" in both rules, stating, "key contextual factors may include, but are not limited to": (a) the genre and editorial content of the programme,

programmes or series, and the likely audience expectations. For example, there are certain genres such as drama, comedy or satire where there is likely to be editorial justification for including views that are challenging or extreme in relation to audience expectations, provided there is sufficient context. The greater the risk for the material to cause harm or offence, the greater the need for more contextual justification; (b) the extent to which sufficient challenge is provided; (c) the status or position of anyone featured in the material; (d) the service on which the material is broadcast; and (e) the likely size and composition of the potential audience, and their likely expectation.

• Ofcom, Statement: Broadcasting Code Review - Section Three: Crime, 4 May 2016

<http://merlin.obs.coe.int/redirect.php?id=18009>

EN

• Ofcom, The Broadcasting Code (Incorporating the Cross-promotion Code)

<http://merlin.obs.coe.int/redirect.php?id=18031>

EN

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IE-Ireland

Advertising Standards Authority upholds complaints over Toyota commercial

The Advertising Standards Authority for Ireland (ASAI) has upheld complaints in relation to television and radio advertising for Toyota Ireland (Toyota). The complaints centred on the question of “compatibility” of the “common claim” in the adverts to the effect that Toyota were “The Best Built Cars in the World” with the “widely publicised recalls” of Toyota cars.

The complaints were considered under various sections of the ASAI Code 2016 (see IRIS 2016-5/21), including sections dealing with “Honesty” and “Truthfulness”. Section 2.22 of the Code states that “Advertisers should not exploit the credulity, inexperience or lack of knowledge of consumers.” Section 2.24 provides that “A marketing communication should not mislead, or be likely to mislead, by inaccuracy, ambiguity, exaggeration, omission or otherwise.” In considering the complaints, the ASAI also took into account the fact that “Compliance with the Code is assessed in the light of a marketing communication’s probable effect when taken as a whole and in context” under Section 1.6 (c).

In response to the complaints, Javelin Advertising, the agency for Toyota, submitted inter alia a range of international “publications and reports”, which they stated provided “substantiation for the claims that were made in the advertising.”

The ASAI Secretariat sought independent expert advice on the “substantiation” provided by Javelin. It further “sought comprehensive information on recalls for Toyota, and a range of other large manufacturers, in order to address the relative position of Toyota and the effect of its claim to produce ‘The best built cars in the world.’” The independent expert stated that while he was “not satisfied that a claim that a particular Toyota car was better built” than “super” cars such as Ferrari, Rolls Royce etc., he was of the opinion that Toyota had substantiated a claim to be “the best built mass produced cars in the world.”

In reaching its decision, the ASAI Complaints Committee had regard to the detail of the complaints, the advertiser’s responses and the information submitted by them, and the opinion from the independent motor industry expert. The Committee “acknowledged” both the “information demonstrating the quality of the manufacturing process used by Toyota” and the independent expert’s view that the claim had been substantiated in relation to the “best built mass produced cars in the world.” The Committee were of the opinion however, that a “very high level of substantiation would be required to prove a “superlative” claim such as “best built” particularly in the context of it being ‘in the world.’” In this context, the Committee were of the view that it was “difficult to envisage the circumstances in which a claim of this magnitude could ever be fully proven.” The Committee noted that “no independent tests evaluating all the car brands available in the world” had been presented.

In finding that the claim ‘Best built cars in the world’ had not been substantiated and was not in compliance with the Code, the Committee upheld the complaints and requested that Toyota should not use the claim again.

• Advertising Standards Authority for Ireland, Broadcast Bulletin 16/2, Complaint Reference 22314, 20 April 2016

<http://merlin.obs.coe.int/redirect.php?id=18010>

EN

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Broadcasting Authority and the Canada Media Fund announce co-development incentive for audiovisual projects

On 20 April 2016 the Broadcasting Authority of Ireland (BAI) and the Canada Media Fund (CMF) announced a new funding incentive for the development of audiovisual projects. The CMF fosters, promotes, develops and finances the production of Canadian content and relevant applications for all audiovisual media platforms. Under this new incentive a total of EUR 150,000 is being made available to assist Irish and Canadian producers to “develop co-productions

on Irish and Canadian television services". The BAI and the CMF contributed an equal share in the total funding of the development incentive.

Awards made under the Canada-Ireland co-development incentive will be "allocated through an open application process to projects that fulfil the relevant criteria." It is expected that the guidelines, application documents and deadline for submissions will be announced in mid-May. "A selection committee of BAI and CMF representatives will assess and select the winning projects." The BAI's Chief Executive, Michael O'Keeffe, in expressing his delight to partner the CMF on the initiative, stated, "In an increasingly competitive media environment, Irish producers must focus on the potential offered by international partnerships".

The CMF President and CEO, Valerie Creighton, said that "Through the many successes of Canada-Ireland co-productions, whether it be feature film projects or very successful television productions... both countries have demonstrated their commitment to expanding our relationships while continuing to develop high-quality content." The new funding incentive aims to combine resources and talent within the context of a fast-evolving media landscape and to ensure the long-term viability of Canada and Ireland's content industries. One of its objectives is to permit producers in both countries to develop compelling projects that appeal not only to Canadian and Irish audiences, but that also captivate viewers beyond their borders.

The incentive is made under Section 5.6 of the "Sound & Vision III" broadcasting funding scheme, which was approved by the communications minister under Section 154 of the Broadcasting Act 2009 (see IRIS 2015-4/13).

- Broadcasting Authority of Ireland, "BAI and CMF Announce €150k Development Incentive for new Audio Visual Projects", 4 April 2016
<http://merlin.obs.coe.int/redirect.php?id=18033> EN
- Canada Media Fund, International Coproduction and Codevelopment Incentives - experimental
<http://merlin.obs.coe.int/redirect.php?id=18011> EN

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IT-Italy

Court of Rome: no need for a detailed notice to trigger ISP's liability

In its decision filed on 27 April 2016, the Court of First Instance of Rome (Tribunale di Roma) states that even a non-detailed cease-and-desist letter (i.e., a letter without any indication of the URLs), subject to specific conditions, may be deemed sufficient to oblige

the relevant hosting provider to remove the infringing content.

RTI S.p.A. ("RTI"), a company which belongs to the Mediaset group, owner of the exploitation rights of several TV shows, requested to TMFT Enterprises LLC - Break Media ("Break Media") which operates a well-known video-sharing platform, the removal of RTI's content available on the platform.

In the cease-and-desist letters sent to Break Media, RTI communicated the names of the relevant TV-shows but failed to locate the URLs where the content was available. Break Media did not comply with RTI's requests and the latter initiated litigation to recover, amongst others, damages suffered as a consequence of the Break Media behaviour.

As a preliminary issue, the Court affirms its jurisdiction following a consolidated trend in the Italian case law which considers relevant, for the application of the locus commissi delicti criterion, not only the place where the harmful event takes place, but also the one where the damages occur (i.e., in the Italian territory where RTI runs its business).

Concerning the merits of RTI's demands, the Court analyses in-depth the activities carried out by Break Media through its video-sharing platform. According to the Court, Break Media cannot be qualified as a passive and neutral hosting provider, but it is an "active" hosting provider. As an "active" hosting provider, Break Media, in the Court's opinion, is not bound to a general surveillance duty on the content hosted, but is not protected by the limitation of liability provided by the EU's E-Commerce Directive 2000/31/EC and the Italian implementing Legislative Decree (70/2003). In this respect, if the "active" hosting provider fails to remove the infringing content once it received a notice from the relevant rights holders, it is fully liable according to the general rules on torts.

The Court - in the case at hand has been supported by a court appointed expert - deems that Break Media is an "active" hosting provider because it: 1) hosts millions of videos which are not user-generated content; 2) organises and manages such videos; 3) collects and organises the advertising relating to the videos on the basis of specific and targeted commercial choices; 4) uploads some of the videos; and 5) has a dedicated editorial team which manages the videos.

With the above clarified, the Court addresses the issue related to the "actual knowledge" of the provider which triggers its liability. According to the Court the right holders are not required to specifically indicate the URLs where the infringing content is uploaded, as argued by Break Media, but it is sufficient to notify the names of the relevant content. On this point, which is the most innovative of the decision - also considering that it appears in contrast to what was affirmed in January 2015 by the Milan Court of Appeal in the RTI/Yahoo! Decision (see IRIS 2015-3/19) - the Court

stresses that the notoriety of the TV-shows at hand, and the presence of the Mediaset logo on the videos, make it not necessary for the right holder to identify and communicate to the provider the URLs where the content is hosted. In other words, Break Media, once it received the cease-and-desist letters from RTI was in a position to identify and remove the infringing content.

On the basis of the above, the Court: a) orders Break Media to stop its infringing behaviour and fixes a penalty of EUR 1,000 for any day of delay in the enforcing of said order and/or for any further infringement from Break Media; b) condemns Break Media to pay EUR 115,000 plus interests as compensation for the damages suffered by RTI; c) condemns Break Media to pay the fees of the court-appointed expert and the legal costs borne by RTI; and d) orders the publication of the decision twice on two main Italian national newspapers, at Break Media expenses, and on the Break Media platform homepage.

• *Tribunale civile di Roma, Sentenza n. 8437/2016 pubbl. il 27/04/2016. RG n. 24716/2012. Repert. n. 8012/2016 del 27/04/2016* (Court of First Instance of Rome, decision no. 8437/2016, issued on 15 March 2016, filed on 27 April 2016)

<http://merlin.obs.coe.int/redirect.php?id=18012>

IT

Ernesto Apa, Marco Bellezza
Portolano Cavallo Studio Legale

LV-Latvia

Regulator suspends the retransmission of a Russian TV channel

On 7 April 2016, the *Nacionālā elektronisko plašsaziņas līdzekļu padome* (National Electronic Mass Media Council), the national regulatory authority (the Council) adopted a decision to suspend the retransmission of the TV channel Rossija RTR for a period of 6 months. The suspension duty applies to all retransmission operators; to cable and satellite operators, as well as to Internet television providers.

The decision is based on Section 19, part 5, paragraph 1 of the Latvian Electronic Mass Media Law (EMML), which provides that the Council generally ensures the freedom of retransmission of broadcasts from other countries, unless these broadcasts manifestly, seriously, and gravely violate Section 24, part 9 or 10, or Section 26, of the EMML. In the current case the Council argues that the broadcasts of Rossija RTR have substantially violated paragraphs 3 and 4 of Section 26 of the EMML. The relevant paragraphs provide: “The programmes and broadcasts of the electronic mass media may not contain: [...] 3) incitement to hatred or discrimination against a person or group of persons on

the grounds of sex, race or ethnic origin, nationality, religious affiliation or faith, disability, age, or other circumstances; 4) incitement to war or the initiation of military conflict[...]”.

In the suspension decision the Council argues that the established violations are also contrary to the provisions of Article 6 of the EU Audiovisual Media Services Directive (incitement to hatred based on race or state affiliation).

The alleged violations have been found in the several broadcasts included in the programme of Rossija RTR, namely; the broadcasts “Sunday Night with Vladimir Solovyev” broadcast on 18 and 19 January 2015 and on 29 November 2015, as well as in the broadcast “Vesti” of 6 July 2015. The relevant broadcasts “Sunday Night with V. S.” of 18 and 19 January 2015 discussed the military conflict in Ukraine. In its decision the Council performs a detailed analysis of the contents of the programme and claims that both the host of the programme and almost all participants refer to Ukraine as an “aggressor” multiple times. A following quote is particularly emphasised, and was expressed by a programme participant: “Nazi, non-Nazi, fascist - that’s all just rhetoric. You have to realize - Ukraine is a territory occupied by Nazis (or fascists - whatever you call them). You cannot agree upon anything with them. You can only defeat them.” In the Council’s opinion, this statement includes incitement to hatred as it “is purposefully attempting to convince the audience that Ukraine is a fascist state, Ukraine is run by criminals/fascists who have illegitimately seized power”.

The broadcast of 29 November 2015 included an interview with the Russian politician Vladimir Zhirinovskiy discussing the downing of a Russian jet by Turkish forces. According to the Council, Zhirinovskiy welcomes retaliation in the form of the bombing of Turkey by Russian forces. A quote is provided: “It will not be a war, we will simply strike back without declaring a war. For one of our pilots [that is, a Russian] we will shoot down a hundred of your [Turkish] pilots.” In the Council’s opinion these statements include incitement to hatred and incitement to war, thus they are contrary to the Section 26 of the EMML and Article 6 of the Directive.

The relevant broadcast “Vesti” focussed on a domestic conflict in Jūrmala, Latvia. The broadcast included an interview with Aleksandrs Gaponenko who claims: “The [Latvian] government has been persistently kindling the ethnic conflict between Russians and Latvians. To a great extent, they have to do that because of the external political pressure. The Americans are pressing, and the government needs to explain why a military base is located here, why the troops, and why exercises are organized all the time. They are portraying Russia as an enemy.” In the Council’s opinion this statement, and the broadcast as a whole, includes incitement to hatred and incitement to ethnic conflict.

The programme Rossija RTR is retransmitted in Latvia from Sweden, and the holder of the broadcasting permit is registered in Sweden (NCP "RUSMEDIACOM"). The decision notes that the Council, according to the provisions of the Directive, has sent a notification of the established violations to the European Commission and to the Swedish Regulator, as well as meeting with the representatives of Rossija RTR. According to the Council Rossija RTR has ignored the warnings concerning the violating content, and has continued to make repeated violations. Therefore the Council argues in its decision that such activities of this broadcaster and the relevant content of the broadcasts cause harm to the Latvian public and endanger its security.

This is the second occasion in which the Latvian regulator had suspended the retransmission of Rossija RTR: the first suspension took place in April 2014, when the retransmission was restricted for a period of 3 months. The suspension decision came into force on 11 April 2016, after the publication in the official newspaper "Latvijas Vēstnesis". The decision may be appealed to the Administrative District Court within one month. At the time of writing it is as yet unknown whether the decision will be appealed.

- Press release of the National Electronic Mass Media Council, "NEPLP restricts rebroadcasting and distribution of Rossiya RTR in Latvia for six months", 19 April 2016

<http://merlin.obs.coe.int/redirect.php?id=18017>

EN

- LĒMUMS Nr.77 Par programmas „Rossija RTR” izplatīšanasierobežošanu Latvijas teritorijā. Rīgā, 2016.gada 7.aprīlī (Decision of the National Electronic Mass Media Council, 7 April 2016)

<http://merlin.obs.coe.int/redirect.php?id=18018>

LV

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MT-Malta

New tax reduction scheme for local film production

The Malta Film Commission has launched the 2016 'Guidelines for Applicants' whereby prospective applicants can benefit from grants totalling EUR 250,000. The Malta Film Fund has the following main objectives: to encourage the creation of quality productions; to support Maltese filmmaking talent that demonstrates long-term potential; to preserve and promote Maltese cultural and linguistic diversity through qualifying productions; to develop the artistic scope, quality and dissemination of Maltese qualifying productions; and to strengthen films as a cultural product and Malta as a production location.

Eligible qualifying productions aimed for local and international distribution consist of: feature films of a

total duration of minimum 80 minutes; short films (productions only) having a screening time of less than 25 minutes; creative documentaries of a total duration of minimum 60 minutes; and high quality international TV series aimed for an international market.

The Fund offered six schemes: Writers' Grant (maximum grant EUR 5,000); Development Grant (maximum grant EUR 30,000, not exceeding 60% of the budget); Short Film Production - New Talent (maximum grant EUR 2,500); Short Film Production (maximum grant EUR 20,000); Production (maximum grant EUR 120,000, not exceeding 50% of the budget); and International Film Festival Promotion Grant which is a 50-50 match funding for entry fees paid to put Maltese productions into international film festivals, not exceeding maximum grant of up to EUR 300 in total per short film and EUR 500 in total for feature films and documentaries. Further information on these grants may be obtained from the Malta Film Commission website (www.maltafilmcommission.com). The Malta Film Fund 2016 Guidelines for Applicants are also available from the Malta Film Commission website.

The Fund followed the announcement of a 150% tax deduction scheme for the film industry by the Minister for Tourism on 6 May 2016. Companies that choose to contribute towards the production of local films and training initiatives offered by the Malta Film Commission, will be able to benefit from the 150% tax deduction.

- Malta Film Commission, "Malta Film Commission announces new incentives to boost the local film industry. Call for applications for Film Fund 2016 now open", 6 May 2016

<http://merlin.obs.coe.int/redirect.php?id=18013>

EN MT

- *Stqarrija mill-ministeru għat-turiżmu: L-inċentivi u l-iskemi godda se jagħtu spinta lill-industrija tal-films lokali u se jgħinu sabiex issettur ikollu aktar stabbiltà u joffri aktar opportunitajiet ta' xogħol* (Press release from the Ministry of Tourism)

<http://merlin.obs.coe.int/redirect.php?id=18034>

MT

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NL-Netherlands

Court orders public broadcasting organisation to take two articles offline and publish a rectification

The District Court of Midden-Nederland ordered the Nederlandse Omroep Stichting (Dutch Public Broadcaster NOS), to rectify two articles it had published on its website. In these articles, Mr Baybaşın, the plaintiff, was associated with a person who is suspected of

an execution in Turkey in 2014. More than a decade ago, the plaintiff received life imprisonment in the Netherlands for a series of serious offences, such as involvement in murder and hostage taking, and participation as a director in a criminal organisation. The Supreme Court dismissed his appeal in cassation, but in 2011 the plaintiff requested a judicial review of his sentence. Last year, NOS published an article on its website in which it reported on the arrest of nine people. The article also stated that according to multiple sources, one of the arrested men was a former partner of Mr Baybaşın. Two days later, NOS published a second article online, in which the plaintiff denied the association. Nevertheless, the plaintiff wanted both publications to be taken offline.

To decide whether NOS's right to freedom of expression or the plaintiff's right to protection of his honour and good name prevailed, the District Court considered the criteria that the European Court of Human Rights (ECtHR) developed for such cases (see, for example, *Axel Springer AG v. Germany*, IRIS 2012-3/1). It decided against NOS on the following grounds. First, the articles were insufficiently factually supported. The association between the plaintiff and one of the arrested men was based on the journalists' own instance of insight, and was only confirmed by an anonymous source. Second, the articles did not make a contribution to a debate of general interest. The Court remarked that NOS is free to make associations as it sees fit, provided the associations are factually supported. Third, the plaintiff's reputation could be harmed by the publications. According to the Court, (at least part of) the audience would question the plaintiff's claim, in his still undecided appeal request, that he is not guilty of participation in murder, hostage taking, etc. The Court considered that creation of a certain image in the media might affect judicial procedures. Therefore, consequences for the plaintiff's appeal procedure could not be ruled out. Fourth, and finally, NOS did not hear both sides of the story for the composition of the first article. The second article (in which the plaintiff rejects his association with the arrested man) could not be seen as a rectification of the first unlawful article, since NOS did not distance itself from the original article.

On the basis of these circumstances, the District Court decided that the plaintiff's right to protection of his honour and good name outweighed NOS's right to freedom of expression. The Court ordered NOS to take both articles offline, and to issue a rectification on the homepage of its website.

• *Rechtbank Midden-Nederland*, 20/04/2016, ECLI:NL:RBMNE:2016:2202 (District Court Midden-Nederland, 20 April 2016, ECLI:NL:RBMNE:2016:2202) <http://merlin.obs.coe.int/redirect.php?id=18014>

NL

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Medical company's complaint over news programme upheld

In a judgment on 13 April 2016, the District Court of Amsterdam upheld the complaint of medical company Terumo against broadcasting organisation AVROTROS and two of its employees. The defendants were held liable for damages under Dutch tort law for two broadcasts about medical equipment of producer Terumo.

The broadcasts were part of the news programme *EenVandaag*. In summary, the journalists of *EenVandaag* reported on two anonymous whistle-blowers, who alleged that medical equipment produced by Terumo could be a threat to public health, and stated that Terumo knowingly maintained these wrongs. The Court notes that "even though not literally stated, viewers were given the impression that 20-30% of Terumo's 600 million [annually sold] needles were faulty" in a first broadcast. In a second broadcast, Terumo was accused of having sold unsterilized stents and heart catheters on the Dutch market. Importantly, the interviews were only broadcasted several months later. Shortly after the whistle-blowers had been interviewed, and ahead of the broadcast, three reports issued by government institutes were published, which concluded that both allegations were untrue. Despite the existence of these reports, AVROTROS transmitted its broadcast without referring to them.

Terumo sued for tortious interference, maintaining that both allegations were untrue. The defendants were unable to sustain their allegations with any expert evidence during the trial, apart from the two interviewed whistle-blowers, as well as one other whistle-blower who testified in court. The Court consequently held that the accusations were false. Next, in evaluating whether or not tortious interference had taken place, the Court applied a balancing test between the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) and the interests of Terumo.

Although recognising AVROTROS' public watchdog role and its aim of contributing to public debate, the Court concluded that its journalists had conducted insufficient research to support their statements. The Court set aside AVROTROS' defence that it could not have known of the published reports, as they had existed for several months prior to the broadcast. Furthermore, the Court mentioned a lack of communication between AVROTROS and the government agency issuing one of the reports as contributing to its conclusion. The Court acknowledged that the defendants had refused to communicate with the agency about which allegations would be made until only a few days in advance of transmitting the broadcasts. Consequently, Terumo's damages worsened, and additionally, the government agency was unable to take mea-

asures to protect public health in response to the allegations. Finally, the Court held that AVROTROS had offered insufficient opportunity for Terumo to counter the accusations.

The Court held that AVROTROS and the two employees committed unlawful acts and should be held liable for damages. The defendants were consequently ordered to delete all (mostly online) references to the broadcasts, to broadcast a rectification and to place a notification rectifying the unlawful allegations on the website of EenVandaag, all under threat of penalty payments, and to reimburse procedural costs.

• *Rechtbank Amsterdam*, 13/04/2016, ECLI:NL:RBAMS:2016:2121 (Amsterdam District Court, 13 April 2016, ECLI:NL:RBAMS:2016:2121)
<http://merlin.obs.coe.int/redirect.php?id=18015>

NL

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• Further information on the Istanbul court's judgment of 28 April 2016
<http://merlin.obs.coe.int/redirect.php?id=18026>

EN

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TR-Turkey

Prison sentences for the publication of a cartoon of Mohammed

On 28 April 2016, an Istanbul court sentenced two journalists of the Turkish newspaper *Cumhuriyet*, which is regarded as critical of the government, to two years' imprisonment for publishing a cartoon of Mohammed and thereby inciting public hatred and insulting religious values.

On the front page of its first issue after the attacks on its editors in Paris on 7 January 2015, the French satirical magazine *Charlie Hebdo* showed a cartoon of a crying Prophet Mohammed holding up a sign stating "Je suis Charlie" ("I am Charlie"). Following the attacks, the phrase "Je suis Charlie" became a sign of solidarity with the victims and support for freedom of expression.

An issue of *Cumhuriyet* carried a four-page extract from the first issue of *Charlie Hebdo*, translated into Turkish. However, it did not contain the aforementioned cartoon, which most Turkish media did not print after the Prime Minister had described its publication as an "open provocation". *Cumhuriyet* did, however, print a smaller version of the drawing in the same issue. The two convicted journalists are columnists for the newspaper and used the cartoon to illustrate their columns.

This publication led to the indictment and conviction of the journalists. Their defence counsel has announced their intention to appeal against the judgment.

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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