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

IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2016-7

INTERNATIONAL

NATIONAL

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

IRIS
Legal Observations
of the European Audiovisual Observatory

Editorial Informations

Publisher:
European Audiovisual Observatory 76, allée de la Robertsau F-67000 STRASBOURG
Tél. : +33 (0) 3 90 21 60 00 Fax : +33 (0) 3 90 21 60 19
E-mail: obs@obs.coe.int www.obs.coe.int
Comments and Contributions to:
iris@obs.coe.int
Executive Director:
Susanne Nikoltchev

Documentation/Press Contact:
Alison Hindhaugh
Tel.: +33 (0)3 90 21 60 10
E-mail: alison.hindhaugh@coe.int
Translations:
Snezana Jacevski, European Audiovisual Observatory (co-ordination) • Michael Finn • Katherine Parsons • Marco Polo Sarl • France Courreges • Nathalie Sturlèse • Brigitte Auel • Sonja Schmidt • Roland Schmid
Corrections:
Snezana Jacevski, European Audiovisual Observatory (co-ordination) • Sophie Valais et Francisco Javier Cabrera Blázquez • Barbara Grokenberger • Aurélie Courtinat • Lucy Turner
Distribution:
Markus Booms, European Audiovisual Observatory
Tel.:
+33 (0)3 90 21 60 06
E-mail: markus.booms@coe.int
Web Design:
Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com
ISSN 2078-6158

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Instytut Ekonomichnykh Reform, TOV v. Ukraine

In a judgment of 2 June 2016 the European Court of Human Rights (ECtHR) found that Ukraine had violated the right to freedom of expression by convicting a media company of the defamation of a political public figure. Although the impugned article had a highly sarcastic and offensive tone, the Court confirmed that journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation, especially in the context of a public debate and discussions in the media on important features of political life.

The case concerns defamation proceedings brought in 2007 against the editorial company (Instytut Ekonomichnykh Reform - IER) of one of the nationwide newspapers in Ukraine, the Evening News. At the time, the newspaper was closely associated with Yuliya Tymoshenko, a political leader in Ukraine and the then major rival of Prime Minister Mr Victor Yanukovych's. In May 2007, the newspaper published an article critical of Ms Ganna German, one of the main spokespeople for Mr Yanukovych. Ms German was also elected as a Member of Parliament on the list of the Party of Regions, led by Mr Yanukovych. At the material time she frequently presented the views of both her party and Mr Yanukovych on various television and radio programmes and debates. The article in the Evening News especially criticised the way Ms German, in an interview on the BBC, had commented on the institutional and political crisis in Ukraine, defending Mr Yanukovych's and the Party of Regions' policy. The article also suggested that Ms German had become a Member of Parliament for the sole purpose of obtaining a flat in Kyiv.

In July 2007, Ms German brought a defamation claim against IER and the author of the article. The Kyiv Pecherskyy District Court found that some of the statements in the article constituted statements of fact that had not been verified or proved by either of the defendants, and were negative about and insulting to Ms German. Therefore, IER was ordered to retract the information about the acquisition by Ms German of the flat in Kyiv, by publishing the operative part of its judgment. IER was also ordered to pay the plaintiff UAH 1,700, approximately EUR 300, in compensation for non-pecuniary damage. After exhaustion of all remedies at the domestic level, IER lodged an application with the ECtHR, complaining of a violation of its right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR).

The Ukraine Government agreed that the judgments of the domestic courts had constituted an interference with the applicant company's freedom of expression. However, it considered that the interference had been prescribed by law, being based on the relevant provisions of the Civil Code and the Information Act, and it had pursued the legitimate aim of protecting the reputation or rights of others. The Government also referred to the ECtHR's decision in Vitrenko and Others v. Ukraine (no. 23510/02, 16 December 2008), which, according to the government, supported the principle that even during an election campaign an individual could not be subjected to unfair accusations by his opponent. Therefore, the interference was to be considered necessary in a democratic society. The government also submitted that the interference had been proportionate and had not put an undue burden on the applicant company's right to freedom of political comment.

In a unanimous decision the ECtHR disagreed with both the findings by the Ukrainian courts and the government's arguments as to the necessity of the disputed interference with IER's right to freedom of expression.

The ECtHR reiterated that Article 10 (2) of the ECHR allows little scope for restrictions on political speech or debate on matters of public interest. The Court stated that whilst a politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, in such cases the requirements of that protection have to be balanced with the interests of the open discussion of political issues. The Court also recalled 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. The Court observed that at the relevant time the struggle between Yulia Tymoshenko and Victor Yanukovych and their allies was an important feature of Ukrainian political life. The impugned article constituted the sarcastic reaction of the Evening News' journalist to Ms German's participation in a BBC radio programme, during which she had commented on the popularity of her party. The Court considered that the subject matter of the impugned article, namely the author's speculation as to Ms German's motives for making her statements and supporting the Party of Regions, was of significant public interest.

In contrast with the findings by the domestic courts, the ECtHR was of the opinion that the statements concerning the acquisition of the flat were value judgments, having a sufficient factual basis. In this perspective the Court observed that the impugned statements were not particularly serious in tone. They were also not particularly damaging in substance, given that the author did not accuse Ms German of specific illegal or immoral conduct, even though he

ascribed to her less than admirable motives. Read in the context of a highly-charged political debate, and in the context of the article as a whole, the expressions found untrue by the domestic courts were supposed to illustrate the author's opinion that Ms German's expression of her political opinions was insincere and guided by considerations of material gain. The Court furthermore referred to the "highly sarcastic language" of the article, reaffirming that Article 10 also protects information and ideas that offend, shock, or disturb. In addition, the Court statetd that the extension of journalistic freedom to protect recourse to a degree of exaggeration, or even provocation, is an important principle, established in the Court's case law. According to the ECtHR, the domestic courts failed to explain why they considered that the impugned statements, satirical in tone as they were, went beyond the permissible level of exaggeration or provocation, given the impugned article's contribution to a debate of public interest and its subject's role as a prominent politician and the essential role played by the press in a democratic society. The domestic courts focussed on the a person's right to protection of their reputation, without sufficiently considering the right to freedom of expression of the applicant media company. Furthermore, while the sanction imposed on the applicant company was relatively modest, it nevertheless had symbolic value and could still have a chilling effect on the applicant company and other participants in the public debate. For all these reasons, the Court was not convinced that the balancing exercise had been undertaken by the national authorities in conformity with the criteria laid down in its case law. It thus concluded that the necessity of the interference with the media company's exercise of freedom of expression had not been demonstrated, and that, accordingly, there had been a violation of Article 10 of the ECHR.

• Judgment by the European Court of Human Rights, Fifth Section, case of Instytut Ekonomichnykh Reform, TOV v. Ukraine, Application no. 61561/08 of 2 June 2016
http://merlin.obs.coe.int/redirect.php?id=18043 EN

• Decision by the European Court of Human Rights, Fifth Section, case of Vitrenko and Others v. Ukraine, Application no. 23510/02 of 16 December 2008
http://merlin.obs.coe.int/redirect.php?id=18044 EN

Dirk Voorhoof
Ghent University (Belgium), Copenhagen University (Denmark), Legal Human Academy and member of the Executive Board of the European Centre for Press and Media Freedom (ECPMF, Germany)

Council of Europe: Expert Opinion on the three draft acts regarding Polish public service media

Within the framework of an expert dialogue with the Polish authorities, the Council of Europe (CoE) entrusted two experts, Ms Eve Salomon and Mr Jean-François Furnémont, with the task of preparing an expert opinion on three drafts bills regarding Polish public service media (the draft "Media Law package"). These draft bills were submitted to the Sejm (lower chamber of Polish Parliament) on the 20 of April 2016 for discussion (see also IRIS 2016-2/22).

The expert opinion focuses on how the proposed provisions (the draft Act on National Media, draft Act on Audiovisual Contribution and draft Act on Provisions introducing the Act on National Media and Act on Audiovisual Contribution) affect the democratic governance and control mechanisms of the public broadcaster in alignment with CoE standards; notably editorial independence and institutional autonomy to public service institutions.

The Council of Europe experts are of the opinion that improvements are required in the following areas:

- Governance: the procedure for the selection and appointment of members of the National Media Council should be transparent, set out in law and should ensure that those appointed are properly qualified for the job, are independent from political influence, and represent the diversity of Polish society;

- Content and public mission: a number of provisions in the new legislation affect media content and may result in reduced pluralism and editorial independence. Editorial control should be the responsibility of the directors and editors-in-chief. Content issued by public service media must reflect the diversity of Polish society, and should remain impartial and balanced.

- Protection of journalists: the current proposal for collective dismissal of middle management employees should be abandoned.

- The licence fee system: greater certainty should be provided over funding, but the reforms to the system should be more proportionate, with greater clarity given to the provisions relating to enforcement and the assessed adequacy of the funding and in order to realise the remit. A full impact assessment is recommended.

A meeting took place on 17 May between Council of Europe experts and the Polish Deputy Minister of Culture and National Heritage, who has responsibility for the Reform of Public Media. The meeting was in order to discuss the issues underlined by the experts, including possible amendments to the draft legislation. The Council of Europe welcomed the readiness of the Polish authorities to enter into a constructive dialogue, and outlined the need to make the new system of public media operate effectively, without undue political interference and in conformity with European standards.

• Council of Europe, DGI (2016) 13, Opinion of Council of Europe Experts, Mr Jean-François Furnémont and Dr Eve Salomon on the three draft acts regarding Polish public service media, 6 June 2016
http://merlin.obs.coe.int/redirect.php?id=18078 EN

• Press release of the Council of Europe, Conclusions of an expert dialogue between the Polish Government and the Council of Europe, 6 June 2016
http://merlin.obs.coe.int/redirect.php?id=18045 EN FR

Sophie Valais
European Audiovisual Observatory

EUROPEAN UNION

Court of Justice of the European Union: Private copying compensation cannot be funded through general state budget

On 9 June 2016, the Court of Justice of the European Union (CJEU) delivered its judgment in Case C-470/14, EGEDA v. Administracion del Estado. The case was a reference from the Spanish Supreme Court seeking a preliminary ruling on the interpretation of Article 5(2)(b) of Directive 2001/29/EU (the "InfoSoc Directive").

On 7 December 2012, the Spanish government had adopted Royal Decree 1657/2012, which regulates the procedure of compensating rightsholders for acts of private copying. This was a continuation of the derogation by Royal Decree Law 20/2011 of the private copying levy and the introduction of a new system whereby fair compensation for acts of private copying is paid to rightsholders from the state budget. This new system was a result of the government's intention to achieve full conformity with the regulatory framework and jurisprudence of the European Union following the decision of the CJEU in the Padawan case (see IRIS 2012-8/19, IRIS 2011-5/20, IRIS 2011-4/23 and IRIS 2010-10/7).

The applicants in the main proceedings are intellectual property rights collecting societies, which are entitled to collect the fair compensation owed to copyright holders in instances of private copying of their protected works or subject matter. On 7 February 2013 they brought an action for annulment of Royal Decree 1657/2012 before the Tribunal Supremo (Spanish Supreme Court). In support of their claims, the applicants in the main proceedings submitted that Royal Decree 1657/2012 is incompatible with Article 5(2)(b) of Directive 2001/29.

Article 5(2)(b) provides that Member States may provide for exceptions or limitations to the reproduction right "in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation".

The first question referred to the CJEU was whether a scheme for fair compensation for private copying is compatible with Article 5(2)(b) of the Directive, where the scheme, while taking as a basis an estimate of the harm actually caused, is financed from the General State Budget, as it is thus not possible to ensure that the cost of that compensation is borne by the users of private copies.

The second question was whether, if the first question is answered in the affirmative, the scheme is compatible with Article 5(2)(b) where the total amount allocated by the General State Budget to fair compensation for private copying, although calculated on the basis of the harm actually caused, has to be set within the budgetary limits established for each financial year.

In his Opinion of January 2016, Advocate General (AG) Szpunar expressed the view that the financing of the compensation from the general state budget is not contrary to the principles established by the Court in the Padawan case (see IRIS 2016-2/2). This was because it does not expand the scope of the levy to all taxpayers, but is a funding system based on a different logic. In its judgement of 9 June 2016, the CJEU departs substantially from the Opinion of the Advocate General by considering that the InfoSoc Directive precludes such a scheme, as it is not possible to ensure that the cost of the compensation is borne by the users of private copies.

The CJEU first recalled that, further to Recitals 35 and 38 InfoSoc Directive, Member States may provide for a private copying exception on the condition that it is accompanied by a fair compensation scheme. This is "triggered by the existence of harm caused to rightholders, which gives rise, in principle, to the obligation to 'compensate' them", according to the Court. Furthermore, Article 5(2)(b) of the InfoSoc Directive imposes "an obligation to achieve a certain result upon the Member States which have implemented the private copying exception, in the sense that they must guarantee, within the framework of their competences, the actual recovery of the fair compensation intended to compensate the rightholders".

On the other hand, the Court afforded to the Member States a broad discretion on how this result is to be achieved, including determining who has to pay the fair compensation, what form it would take, and according to what arrangements and level.

The Court notes that in principle, nothing in the InfoSoc Directive precludes the establishment of a fair compensation scheme financed by the general state budget of a Member State, in lieu of a levy system. However, it is for the person who reproduced the protected works or subject matter without the prior authorisation of the rightholder concerned, and who therefore caused harm to them, to make good that harm by financing the fair compensation provided for that purpose.

The Court considered that, in the Spanish scheme, the payment of the fair compensation is financed from all

the budget resources of the general state budget, and therefore also from all taxpayers. According to the CJEU, such a scheme is not a guarantee that the cost of that compensation is ultimately borne solely by the users of private copies.

The Court concluded that Article 5(2)(b) of the InfoSoc Directive precludes a fair compensation scheme financed from the general state budget in such a way that it is not possible to ensure that the cost of that compensation is borne by the users of private copies.

• Judgement of the Court (Fourth Chamber) in case C-470/14, EGEDA and Others, 9 June 2016
http://merlin.obs.coe.int/redirect.php?id=18069 DE EN FR
CS DA EL ES ET FI HR HU IT LT LV
MT NL PL PT SK SL SV

Sophie Valais
European Audiovisual Observatory

Court of Justice of the European Union: Austro-Mechana v. Amazon EU and Others

On 21 April 2016, the Court of Justice of the European Union (CJEU) delivered its judgment in Austro-Mechana v. Amazon EU and Others (Case C-572/14), concerning the jurisdiction of Austrian courts to hear legal proceedings where an Austrian copyright-collecting society seeks to obtain payment from Amazon EU for a recording device levy under Austrian copyright law (see IRIS 2013-9/3 for a related judgment).

Under paragraph 42b of the Austrian copyright law (Urheberrechtgesetz - UrhG), persons who are "first to place" certain recording equipment on the market, are required to pay "fair remuneration" to authors of certain works. Notably, the law also provides that copyright-collecting societies "alone" can exercise this right to remuneration. Austro-Mechana is an Austrian collective management society which collects the fair remuneration under UrhG paragraph 42b, while Amazon is a well-known group of companies which sells books, music and other products on the Internet. Of the five group companies listed in the proceedings (Amazon EU Sàrl, Amazon Services Europe Sàrl, Amazon.de GmbH, Amazon Logistik GmbH, Amazon Media Sàrl), three are governed by Luxembourg law and have their headquarters in Luxembourg, and two are governed by German law and have their headquarters in Germany.

Austro-Mechana sought payment from Amazon EU for "fair remuneration" under the UrhG, as Amazon sold recording media in Austria which was installed in mobile telephones enabling music to be reproduced. Austro-Mechana argued that Austrian courts had jurisdiction under Article 5(3) of EU Regulation No 44/2001 which provides that a person domiciled in a member state may be sued in another member state "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur" (see IRIS 2013-10/4).

The litigation reached the Austrian Supreme Court (Oberster Gerichtshof), which stayed the proceedings, and referred the following question to the CJEU: did a claim for payment of "fair compensation" under Article 5(2)(b) of Directive 2001/29 which, in accordance with Austrian law, is directed against undertakings that are first to place recording material on the domestic market on a commercial basis and for consideration, constitute a claim arising from "tort, delict or quasi-delict" within the meaning of Article 5(3) of Regulation No 44/2001? Therefore, the question for the CJEU was whether Austro-Mechana's claim was a "tort, delict or quasi delict" within the meaning Article 5(3) of Regulation No 44/2001, which is an exception to the general rule under Article 2(1) which attributes "jurisdiction to the courts of the defendant's domicile."

First, the Court noted that Article 5(3) lays down a "rule of special jurisdiction", where "a person domiciled in a Member State may, in another Member State, be sued ... in the courts for the place where the harmful event occurred or may occur." The rationale for the rule was that in matters relating to tort, delict and quasi-delict, "courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence."

Second, the Court held that matters relating to tort, delict or quasi-delict are "all actions which seek to establish the liability of a defendant and do not concern "matters relating to a contract." The Court then held that the claim did not concern a contract, and went on to consider whether it aims "to establish the liability of the defendant." This is the case where a "harmful event", within the meaning of Article 5(3), may be imputed to the defendant. In this regard, the Court stated that liability in tort, delict or quasi-delict can only arise provided that "a causal connection can be established between the damage and the event in which that damage originates."

The Court stated that in the present case, the action brought by Austro-Mechana sought to obtain compensation for the harm arising from non-payment by Amazon of the remuneration provided for in Paragraph 42b of the UrhG. The Court noted that "fair compensation" referred to in Article 5(2)(b) of Directive 2001/29, according to the case-law of the Court, "intends to compensate authors for the private copy made without their authorisation of their protected works, so that it must be regarded as compensation for the harm suffered by the authors resulting from such unauthorised copy by the latter." Therefore, according to the Court, the failure by Austro-Mechana to collect the remuneration provided for in Paragraph 42b of the UrhG

constitutes a harmful event within the meaning of Article 5(3) of Regulation No 44/2001. It was "irrelevant" that fair compensation must be paid not to the holders of an exclusive reproduction right that it aims to compensate, but to a copyright-collecting society. Thus, Austro-Mechana's claim seeks to establish the liability of the defendant, since that claim is based on an infringement by Amazon of the provisions of the UrhG imposing that obligation on it, and that that infringement is an unlawful act causing harm to Austro-Mechana.

The Court concluded that if the harmful event at issue in the main proceedings occurred or may occur in Austria, which is for the national court to ascertain, the courts of that Member state have jurisdiction to entertain Austro-Mechana's claim.

• Judgment of the Court (First Chamber) in Case C-572/14 Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v. Amazon EU Sàrl, 21 April 2016
http://merlin.obs.coe.int/redirect.php?id=18072 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

European Commission: Public consultation on media pluralism and democracy

The European Commission has opened a public consultation on media pluralism and democracy. The objective of the consultation is to prepare the second Annual Colloquium on Fundamental Rights. Annual colloquia are organised by the European Commission to achieve greater political engagement for the protection of fundamental rights in Europe. They bring together a variety of interest groups who discuss concrete actions to improve the fundamental rights situation in the European Union.

This year's colloquium will discuss the key role of a free and pluralist media, in particular digital media, in democratic societies.. As part of the general right to freedom of expression and information, Article 11(2) of the Charter of Fundamental Rights of the European Union provides that "[t]he freedom and pluralism of the media shall be respected." The two values are at the core of the basic democratic values upon which the European Union is founded.

During the second colloquium, EU institutions, Member States, media representatives, civil society, and academics will reflect in a roundtable discussion on topics such as: how to protect media independence from state intervention and undue political or commercial pressures; how to empower journalists and protect them from threats; the role of the media in promoting fundamental rights; and how a pluralistic media environment can encourage political debate on issues for democratic societies.

With the current public consultation, the Commission aims to gather feedback on current challenges and opportunities for media pluralism and democracy, and use this as input for the colloquium. The consultation consists of a questionnaire, which begins with questions about general issues of media freedom and pluralism, such as what the role of the state in the regulation of media should be. In addition, the consultation contains questions on journalists and new media players. It asks, for example, if contributors are aware of limitations to privacy and data protection imposed on journalistic activities, and whether they are aware of censorship in the European Union. Furthermore, the consultation covers hate speech online, e.g. by questioning how a better-informed use of modern media could contribute to the promotion of tolerance. Finally, the consultation addresses the role of free and pluralistic media in a democratic society. It asks whether contributors consider the role of platforms and social media to posespecific risks to the quality of the democratic debate.

The public consultation will run over eight weeks and closes on 14 July 2016. Anyone can submit a contribution. The Commission expressly invites public bodies of Member States, civil society, , members of the judicial branch, academics, and media representatives, including publishers, journalists and reporters to participate. Those interested can complete the questionnaire online.

• European Commission, Public consultation - 2016 Annual Colloquium on Fundamental Rights on 'Media Pluralism and Democracy', 19 May 2016
http://merlin.obs.coe.int/redirect.php?id=18046 EN

Sarah Johanna Eskens
Institute for Information Law (IViR), University of Amsterdam

NATIONAL

AL-Albania

Constitutional Court rules to remove ownership limitations for national audiovisual media

On 13 May 2016, the Constitutional Court of Albania ruled in favour of a request by the Association of Albanian Electronic Media seeking to abrogate paragraph 3 of Article 62 of the Law 97/2013 Për Mediat

Audiovizive në Republikën e Sqipërisë (On Audiovisual Media in the Republic of Albania). The paragraph states that: "No natural or legal, local or foreign person shall have more than 40 per cent of the general capital of a joint stock company that holds a national audio broadcasting license or a national license for audiovisual broadcasting."

The Association of Electronic Media argued in the hearing session of 19 April 2016 that the limitation imposed on media ownership for national media is anti-constitutional, breaching equal treatment before the law as well as the right to the property. The association's claim also found the support of the regulatory authority, the Audiovisual Media Authority (AMA), which claimed that this regulation does not fit with the current context and stage of development of the media landscape. The representatives of the parliament argued, in contrast, that the aim of imposing such limitation is to safeguard freedom of expression, which must prevail, in accordance with the European Court of Human Rights procedures.

In a press release published on its website, the Court explained that after reviewing the arguments made before it by the association, the regulator, and the parliament, it would accept the request of the association. Consequently, it abolished paragraph 3 of Article 62 of the Law on Audiovisual Media. As the legal basis for examining and agreeing to the request of the association, the Court's notification cites Articles 131/a and 134/f of the Constitution, which state respectively:

- The Constitutional Court decides on: a) the compatibility of a law with the Constitution or with international agreements, as provided in Article 122;

- The Constitutional Court initiates a proceeding only on the request of: political parties and other organizations.

The request was brought before the Constitutional Court after failed attempts last year to remove media ownership limitations through an amendment introduced in the parliament. The decision of the Constitutional Court paves the way for the existing terrestrial multiplexes and the two national TV stations to receive national licenses, which was not possible for all of them in view of their current ownership arrangement.

• *Ligji no. 97/2013, Për Mediat Audiovizive në Republikën e Sqipërisë* (Act no.97/2013, On Audiovisual Media in the Republic of Albania)
http://merlin.obs.coe.int/redirect.php?id=18064 SQ

• *NJOFTIM PËR MEDIAN* (Press release of the Constitutional Court)
http://merlin.obs.coe.int/redirect.php?id=18065 SQ

Ilda Londo
Albanian Media Institute

BE-Belgium

Court of Cassation extends the right to be forgotten to online newspaper archives

On 29 April 2016, the Court of Cassation rejected the appeal against a judgment of the Court of Appeal of Liège (25 September 2014) which found that a doctor could request the anonymisation of an article in the online archive of a newspaper. The article concerned a fatal car accident which the doctor had caused 20 years ago while inebriated (for a Dutch case on online news archives, see IRIS 2015-6/27).

The Court of Cassation confirmed the reasoning that the "digital" right to be forgotten (le droit à l'oubli numérique) is an intrinsic component of the right to privacy. In its assessment of the legality criterion of Article 10, paragraph 2 of the European Convention on Human Rights (ECHR), it finds that the interference with freedom of expression, that the right to be forgotten may justify, is based not on doctrine and jurisprudence, but on Article 8 of the ECHR, Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 22 of the Belgian Constitution. The reference by the Court of Appeal to the Google Spain judgment of the Court of Justice of the European Union (C-131/12) (see IRIS 2014-6/3) supports the scope that it bestows on this right to be forgotten.

Furthermore, according to the Court of Cassation, although Article 10 ECHR and Article 19 ICCPR ensure that the written press may put digital archives online and guarantees that the public may access these archives, these rights are not absolute. In certain circumstances, within the strict limits of these articles, these rights should yield to other equally respectable rights. The right to respect for private life contains the "droit à l'oubli" or right to be forgotten, allowing a person who has been found guilty of a crime or an offence to oppose in certain circumstances that his judicial past is recalled to the public on the occasion of a new divulging of facts, and may justify an interference with the right to freedom of expression. The digital archiving of an old press article that, at the moment when the facts occurred, legally rendered an account of the past that is now covered by the right to be forgotten, can be the subject of such interference. This may consist of altering the archived text in order to prevent or redress a violation of the right to be forgotten.

The Court of Cassation considered that the Court of Appeal judgment was right in stating that the online archiving of the article in question constituted a new divulging of the judicial past of the defendant, which may breach his right to be forgotten. By putting the article online, the applicant has enabled the article

to be "prominently available" through the search engine of its website, which can be consulted for free. Moreover, this availability is enhanced considerably by search engines such as Google.

In addition, it was confirmed that the defendant fulfils the conditions to benefit from the right to be forgotten. Maintaining the non-anonymised article online, many years after the incident about which the article was written, the Court agrees, may cause the defendant harm disproportionate to the advantages gained from the strict respect of the applicant newspaper's freedom of expression. The Court found that the conditions of Article 10 paragraph 2 ECHR, with respect to legality, legitimacy and proportionality, are fulfilled. Hence, the Court of Appeal judgment legally justified its conclusion that, by refusing to anonymise the article in question, the applicant has made a mistake. The order to replace the first and last name of the defendant with an "X" in the version of the article on the website, and to pay him EUR 1 as moral damage, is thus confirmed.

Interestingly, the Court of Cassation emphasised that the Court of Appeal does not base the digital right to be forgotten on the European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Nor, it stated, was it based on the Belgian Act of 8 December 1992 on the protection of privacy in relation to the processing of personal data.

• *Cour de cassation, C.15.0052.F, 29 avril 2016* (Court of Cassation, C.15.0052.F, 29 April 2016)
http://merlin.obs.coe.int/redirect.php?id=18047 FR

Eva Lievens
Ghent University

Self-regulatory bodies for journalism and advertising ethics report on their functioning

Two self-regulatory bodies, the Raad voor de Journalistiek (Flemish Council for Journalism) and the Jury voor Ethische Praktijken inzake reclame (Belgian Jury for Ethical Practices in Advertising) have reported on their 2015 activities and functioning.

The Flemish Council for Journalism opened 49 new files; 48 based on complaints (a 22% decrese from 2014), and one based on a request for advice. 23 complaints concerned daily newspapers, seven were aimed at weekly papers and magazines, seven involved television, two radio, and 19 complaints also related to websites. The latter is an increase from 22% in 2014 to 40% in 2015. The reasons for the complaints ranged from negligent reporting, invasions of privacy, libel, use of information from social media, to the protection of minors, the lack of a possibility to reply, discrimination, and stereotyping. The Council issued 27 decisions, 10 of which concluded that a violation of journalistic ethics had occurred. More than 30% of complaints were settled by agreement. In 2015, the Council also issued a new guideline on the portrayal of minors in the media (see IRIS 2016-2/4).

The Jury for Ethical Practices in Advertising (JEP) opened 127 files, based on 236 complaints: an increase compared to an exceptional low number, 136, of complaints in 2014. In 68% of the 2015 cases this resulted in a decision that "no comments" could be made about the advertising message in question, as it complied with the legislative and self-regulatory obligations (compared with 60% in 2014). In 35 files, the JEP issued an order to change or suspend the advertising campaign. Only in 3 of those cases did the advertiser not comply and a request to suspend the campaign was addressed to the media.

20.5% of files relate to television, 27% to radio, and 24% to digital marketing communication. 29% of files concern deception, 25% social responsibility, 4% health and safety, 24% decency and good taste, 3% lawfulness, and 15% other criteria. In 2015, the JEP also improved the procedures that allow advertisers to submit a "prior request for advice". 30 such requests were submitted in 2015. This option will be further promoted in the future. Steps were also taken to raise awareness about appropriate advertising of alcohol, and to investigate the development of practices in the advertising sector, in particular native advertising. Consultations with the Flemish Council for Journalism, the Conseil de Déontologie Journalistique (Council for Journalistic Ethics) of the French Community, and other self-regulatory bodies in France, the United Kingdom and the Netherlands, led to the adoption and publication of a "Recommendation on Native Advertising". This recommendation confirms essential principles of recognisability and transparency of the commercial character of advertising messages.

• *Raad voor de Journalistiek, Jaarverslag 2015* (Flemish Council for Journalism, Annual Report 2015)
http://merlin.obs.coe.int/redirect.php?id=18048 NL
• *Jury voor Ethische Praktijken inzake reclame, Activiteitsverslag 2015* (Belgian Jury for Ethical Practices in Advertising, Activity Report 2015)
http://merlin.obs.coe.int/redirect.php?id=18049 NL
• *Raad voor de Reclame, Native advertising: Aanbeveling* (Council for Advertising, Native Advertising: Recommendation)
http://merlin.obs.coe.int/redirect.php?id=18050 NL

Eva Lievens
Ghent University

IRIS
Legal Observations
of the European Audiovisual Observatory
OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

BY-Belarus

Amendments on the protection of minors from information detrimental to their health and development adopted

On 11 May 2016 the President of the Republic of Belarus signed into law the Statute earlier adopted by the national Parliament that aims to protect children from harmful information. Most of its provisions come into force on 1 July 2017.

The Statute significantly amends the 1993 Statute О правах ребёнка (On the Rights of the Child) (see IRIS Plus 2006-3) through the addition of Chapter (4-bis), "Protection of Minors against information harmful to the health and development".

The Statute prohibits the dissemination among minors (persons of below 18 years of age) of 12 categories of information. They range from erotica to information that "calls for a wish to consume alcohol, light alcoholic drinks, [or] beer", or which contains "bad language" and the "negation of family values and marital relations" (now a new Article 37-1 of the Statute On the Rights of the Child). Owners of Internet cafes and similar establishments are obliged to make efforts to prevent their clients among which children accessing harmful websites, while parents shall now be informed by Internet service providers about "organizational and software methods" to block harmful information.

The statute introduces ratings of the "informational products" related to the age of their consumers that shall be as follows: 0+ (below 6 years old), 6+, 12+, 16+ and 18+ (Article 37-2).

The 2008 Mass Media Statute (see IRIS 2008-8/9) is amended with a new provision (Article 17, part 5-2) that stipulates mandatory specific labelling of products, including TV programmes, in accordance with their age rating. The exceptions include live TV broadcasts, TV broadcasts of informational, informational/analytical, cultural/educational, spiritual/educational, reference and statistics character, sports TV programmes, and foreign TV broadcasts if distributed without change of their content or form.

Online information reports and materials are also exempt from the obligation to use ratings.

• О внесении изменений и дополнений в некоторые законы Республики Беларусь (The statute of the Republic of Belarus of 11 May 2016.N 362- З "On amendments and additions to certain statutes of the Republic of Belarus". Adopted by Chamber of Representatives 4 April 2016, approved by the Council of the Republic on 21 April 2016)
http://merlin.obs.coe.int/redirect.php?id=18062 RU

Andrei Richter
Media expert (Russian Federation)

CH-Switzerland

Government not in favour of introducing "droit de suite"

The right to an interest in follow-on sales ("droit de suite") granted to plastic artists entitles them to receive part of the sale price when art dealers sell their works on the secondary market. This right is embodied in the Berne Convention for the Protection of Literary and Artistic Works, as revised in Paris on 24 July 1971 (Article 14ter), and recognised in the legislation of 77 countries, mainly in Europe and southern and central America. It does not exist, however, in the USA or in China, two of the world's principal art markets. The States signatory to the Berne Convention are free to decide whether or not to apply "droit de suite", and to determine the method for doing so. In Switzerland, there have been a number of Parliamentary interventions calling for such a right to be introduced, but without success, and indeed the country decided not to introduce "droit de suite" when it revised its legislation on copyright (LDA) in 1992 and 2008.

On 5 December 2013, the Federal Council was called upon to propose measures to allow Swiss plastic artists to receive a percentage of the resale price when their works were sold by an art dealer. For its supporters, "droit de suite" pursues three main objectives: improving the individual economic situation of artists by allowing them to benefit from the proceeds of the resale of their works, supporting artists generally by allocating all or part of the revenue from "droit de suite" to a social or cultural fund in their favour, and providing artists with social recognition.

After an analysis of the methods and the conditions for "droit de suite" and a presentation of the international situation, the Federal Council looked into the expected economic consequences of introducing the entitlement. The Swiss art market is the sixth largest in the world: in 2014, sales realised a total sum of approximately EUR 816 million, i.e. 1.6% of the total turnover of the art market worldwide (EUR 51 billion). Works protected by copyright generated an estimated turnover of approximately EUR 680 million. The Federal Council calculated that the remuneration paid in

Switzerland as a result of introducing "droit de suite" would amount to at least EUR 1.8 million. According to the Federal Council, fewer than 10% of Swiss artists and their beneficiaries would receive anything and indeed, since 80% of sales on the secondary market take place after the artists concerned have died, a substantial proportion of the revenue from "droit de suite" would not be paid to the actual artists, but to their beneficiaries. Lastly, it is probable that a considerable proportion of the revenue would be redistributed to artists living in another country, without comparable amounts from those countries being paid to artists resident in Switzerland.

The Federal Council's report also refers to possible consequences of introducing a "droit de suite". First, the entitlement could result in a fall in sale prices for works of art on the primary market, particularly works by lesser-known artists, since investors would have to give up part of their profit to remunerate the artists whose works were already being sold on the secondary market. Furthermore, the expense connected with sales of works subject to "droit de suite" might encourage vendors to shift sales to countries where transaction costs were lower.

In conclusion, the Federal Council feels that introducing "droit de suite" would not achieve the desired results. In particular, the entitlement would only be to the advantage of a very small number of artists. What is more, compared with the CHF 2.7 billion (circa EUR 2,4 billion) that the Swiss public authorities devote to the encouragement of culture each year, the revenue to be expected from "droit de suite" would be marginal and would not achieve any noticeable improvement in the economic situation of artists. Furthermore, it is not possible to forecast the impact of introducing the entitlement on the competitiveness of the art market or to determine to what extent it would lead to delocalisation to countries where it did not exist. Consequently, the Federal Council is of the opinion that "droit de suite" should not be introduced, although it will continue to observe experience and developments in other countries. Thus the Federal Council does not exclude the possibility of reassessing the situation at a later date.

• *Rapport du Conseil fédéral sur le droit de suite du 11 mai 2016* (Federal Council report on 'droit de suite', 11 May 2016)
http://merlin.obs.coe.int/redirect.php?id=18087 DE FR IT

Patrice Aubry
RTS Radio Télévision Suisse, Geneva

CZ-Czech Republic

Amendment to the Audiovisual Law

On 5 May 2016, the Parliament of the Czech Republic adopted Act no. 139/2016 Coll., amending Act no. 496/2012 Coll., On audiovisual works and promotion of cinematography, and amending some other laws (the Audiovisual Act). The aim of this amendment is to secure sufficient funding to support cinematography. This should enable the long-term planning and predictable funding of the State Fund of Cinematography, so that it can create a long-term strategy of supporting the cinema.

The State Cinematography Fund was established on 1 January 2013, pursuant to the Audiovisual Act. The Act defines the purpose of the State Cinematography Fund, which is to provide support to cinematography. The decision-making body for the support scheme "Support for Cinema" is the Fund Board, which is appointed by the parliament after a proposal from film organizations. All requests for support are subject to a non-binding expert analysis.

To achieve the objective of securing sufficient funding for the support of cinematography, an additional amount of CZK 180 million (approximately EUR 7 million) must be secured annually.

The funds will be provided through regular annual mandatory contributions from the state budget. The amount of the contribution will be calculated from the volume of the collected broadcasting commercial fee by the Fund, and for this year will be approximately CZK 180 million. This broadcasting commercial fee has to be paid by operators other than local or regional television broadcasters, which operate under licence to broadcast via transmitters and which also distribute and spread cinematographic works. When the total fee revenue from broadcast advertising is less than a certain sum, the fee will increase. The proposed financing method is economically justified by the performance of Czech cinematography and the incentive character of the Fund.

• *Zákon, č. 139/2016 Sb., kterým se mění zákon č. 496/2012 Sb., o audiovizuálních dílech a podpoře kinematografie a o změně některých zákonů (zákon o audiovizi), a zákon č. 231/2001 Sb., o provozování rozhlasového a televizního vysílání a o změně dalších zákonů* (Act no. 139/2016 Coll. amending Act no. 496/2012 Coll., On audiovisual works and promotion of cinematography and amending some laws (Audiovisual Act) and Act No 231/2001 Coll. on Radio and Television Broadcasting and on Amendment to Other Acts)
http://merlin.obs.coe.int/redirect.php?id=18066 CS

Jan Fučík
Česká televize, Prague

DE-Germany

Hamburg District Court issues cease-and-desist order against broadcasting of a TV programme

In a decision of 12 April 2016 (Case 324 O 96/16), the

Landgericht Hamburg (Hamburg District Court) issued a temporary injunction prohibiting the broadcasting of a television programme produced by a team of reporters that had set itself the task of revealing serious shortcomings in companies.

In this particular case, the programme "Team Wallraff - Reporter undercover" of the broadcaster RTL wanted to show sloppy working practices in a hospital caused by pressure to keep costs down. In order to do this, a female reporter infiltrated the hospital disguised as a trainee and produced footage broadcast on 11 January 2016 in an episode entitled "Katastrophale Missstände in deutschen Krankenhäusern!" ("Appalling conditions in German hospitals!"). In addition to the images shot surreptitiously, a female member of the hospital staff was quoted as referring to "dangers of burnout" due to staff shortages.

After the programme in question had been broadcast, the hospital operator complained it had not shown any specific shortcomings but only an ordinary hospital day and claimed that the material produced was sensationalist and conveyed an overall picture that could only be described as misleading. Furthermore, the breach of the personality rights of patients and staff shown, in some cases in very private situations, could not be regarded as justified.

The broadcaster itself stressed that the research on the programme at issue had been conducted over a period of 14 months in full compliance with the law and the rules of good journalism and that an injunction, being an interim measure, did not constitute confirmation of incorrect or unlawful reporting. In this connection, it referred to the so-called "Wallraff judgment" of the Bundesverfassungsgericht (Federal Constitutional Court - BverfG) of 25 January 1984 (Case 1 BvR 272/81) and to the case law of the European Court of Human Rights, pointing out that both courts regarded the publication of secretly filmed footage as lawful provided that an unacceptable situation of social relevance is uncovered. The Federal Constitutional Court made it clear that in cases in which an individual has obtained information unlawfully through deception with the intention of using it against the person deceived that information may in principle not be published. An exception to this rule is when the importance of the information for enlightening the public and shaping public opinion outweighs the disadvantages brought about by the breach of the law for the person affected and for the legal system. The publication of unlawfully obtained information is, the judges said, also covered by the protection of freedom of speech enshrined in Article 5(1) of the Grundgesetz (Basic Law).

After due consideration, the Hamburg District Court ruled that the personality rights of the patients and members of staff shown in the film should be granted interim legal protection. Under the temporary injunction issued, RTL is now prohibited from publishing and disseminating the footage concerned.

• *Weitere Informationen zum Beschluss des LG Hamburg vom 12. April 2016 (324 O 96/16)* (Further information on the Hamburg District Court's decision of 12 April 2016 (Case 324 O 96/16))
http://merlin.obs.coe.int/redirect.php?id=18085 DE

Katrin Welker
Institute of European Media Law (EMR), Saarbrücken/ Brussels

Licence extension for window programmes declared lawful

In a judgment of 1 March 2016 (Case 5 K 977/14.NW), the Verwaltungsgericht (Administrative Court) in Neustadt an der Weinstrasse declared lawful the extension granted by the Rhineland-Palatinate Landeszentrale für Media und Kommunikation (Regional Media and Communication Authority - LMK) to the licence for the regional window programme "17:30 Sat.1 live", which is made by the TV production company TV IIIa GmbH & Co. KG (TV IIIa) and forms part of the schedule of the commercial broadcaster Sat.1.

Under section 25(4) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement), in order to foster regional diversity the two general-interest TV channels with the widest national coverage are obliged to include regional windows in their schedule to show political, economic, social and cultural events. In response to an application by TV IIIa, in May 2014 the LMK granted a ten-year extension to its licence dating from 2004 to organise and distribute the regional window programme in the Sat.1 schedule. This half-hour regional programme for the two Länder Rhineland-Palatinate and Hessen is broadcast every weekday under the title "17:30 Sat.1 live". The company Sat.1 SatellitenFernsehen GmbH is legally obliged to ensure it is properly funded, and the financial arrangements have been governed since 1997 by a service agreement subject to private law between TV IIIa and Sat.1 SatellitenFernsehen GmbH.

Both Sat.1 SatellitenFernsehen GmbH and ProSiebenSat.1 TV Deutschland GmbH had brought an action challenging the licensing of the regional window programme. ProSiebenSat.1 TV Deutschland GmbH is to organise the general-interest channel in future, but its licence depends on the outcome of court proceedings in Schleswig-Holstein. Both plaintiffs argued that the licence should only have been extended after a tendering procedure, which had not been held. In addition, they claimed, the decision to award the licence should not have based the financing arrangements on the excessively high rates specified in the service agreement and should therefore not have imposed them. The obligation to provide the financing, they pointed out, imposed an unlawful special levy on Sat.1 as one of the two general-interest commercial TV channels with the widest national coverage (the

other being RTL). They claimed that the legal basis relied on, section 25(4) of the Inter-State Broadcasting Agreement, was unconstitutional.

However, the Administrative Court judges rejected these arguments and dismissed the action against the decision to award the licence. It pointed out that although the LMK had initially made procedural errors, they had been corrected when the decision had been reviewed. In particular, the licence could have been extended without previously holding a tendering procedure. Separate procedural rules contained in the Inter-State Broadcasting Agreement for the award of nationwide transmission time to third parties, were, it said, not applicable to regional TV programmes. Moreover, the interests of the plaintiffs, which had to be considered, had not made it necessary to hold a tendering procedure before awarding the licence. Furthermore, the LMK had not specified any financing rules of its own in its award decision. In their examination of whether it could be assumed that the financing of the programme was assured, the media watchdogs had only taken as their basis for their decision the existing service agreement based on private law. The court was not required to consider the actual extent of the financial obligation that resulted from that agreement. Nor was the decision to award the licence based on unconstitutional rules. The provisions relevant here, contained in section 25(4), first and seventh sentences, of the Inter-State Broadcasting Agreement and the corresponding rules in section 22(3) of the Rhineland-Palatinate Landesmediengesetz (Regional Media Act) are, in the judges' view, compatible with the equal treatment requirement enshrined in Article 3(1) of the Grundgesetz (Basic Law) and the plaintiffs' broadcasting freedom.

An application for leave to appeal can made to the Rhineland-Palatinate Oberverwaltungsgericht (Higher Administrative Court) within one month of the judgment being served.

• *Urteil des Verwaltungsgerichts Neustadt an der Weinstraße vom 01. März 2016 (Az: 5 K 977/14.NW)* (Judgment of the Neustadt an der Weinstrasse Administrative Court of 1 March 2016 (Case 5 K 977/14.NW))
http://merlin.obs.coe.int/redirect.php?id=18073 DE

Ingo Beckendorf
Institute of European Media Law (EMR), Saarbrücken/ Brussels

ZAK reaches decision on breaches of advertising rules

At its meeting in Halle on 26 April 2016, the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision - ZAK) of the Landesmedienanstalten (Regional Media Authorities) reached a decision on breaches of advertising rules. It criticised three cases of unlawful product placement and two involving the inadequate separation of advertising and programming content.

The three cases of unlawful product placement it criticised were in the TV show "Germany's Next Topmodel" on the ProSieben channel operated by ProSiebenSat.1 TV Deutschland GmbH. In the media watchdogs' opinion, the focus in the scenes criticised was not on the action in the programme but on a detailed product presentation.

In two cases, the ZAK criticised the inadequate separation of advertising from other content, which, in its view, must be separated by an unambiguous transition element. This opinion, expressed in decisions of the media authorities, was confirmed by the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) in a judgment on the separation of advertising of 14 October 2015 (Case 6 C 17.14), according to which the separation is obvious when the average viewer who is not concentrating particularly hard must gain the impression from the design of the element used as a transition and from other circumstances that the following item is advertising.

The ZAK regarded the broadcasting of the "Newtopia" commercial bumper in the programme operated by Sat.1 SatellitenFernsehen GmbH as a breach of the rules, stating that the bumper did not meet the requirements that advertising be easily recognisable as such and clearly distinguishable from editorial content. By mentioning the item title "Newtopia", showing and mentioning the name of a protagonist and displaying a relatively small and inconspicuous word "Werbung" (Advertising) on the edge of the screen, the connection between the bumper and editorial content was so strong that there was insufficient separation of advertising and programming.

Finally, the Commission also ruled that the broadcasting of the bumper "Von A bis Z" on the sixx channel operated by ProSiebenSat.1 TV Deutschland GmbH was a breach of the requirement to separate advertising and programming. It criticised the fact that the overall impression made by the design of the bumper - relevant for determining that the separation was clear and unequivocal - was that the focus of the content was obviously on the sixx programme schedule and not on informing the viewer that advertising was about to follow.

• *ZAK-Pressemitteilung 04/2016, 27. April 2016* (ZAK press release 04/2016 of 27 April 2016)
http://merlin.obs.coe.int/redirect.php?id=18074 DE

Ingo Beckendorf
Institute of European Media Law (EMR), Saarbrücken/ Brussels

ES-Spain

Catalan Audiovisual Council launches project on protection of minors on the Internet

The Catalan audiovisual regulatory authority, the Consell de l'Audiovisual de Catalunya (Catalonian Audiovisual Council, CAC) has launched a project entitled "Protecció dels menors a Internet" (Protection of Minors on the Internet). The project aims to provide users, especially children and teenagers, with a set of tools and resources to ensure greater protection from harmful content online.

The aim of this Internet awareness campaign is to educate and provide families, teachers and children with tools and resources, which supplement the work that CAC already carries out to monitor and analyse risk content on the Internet. The CAC website has a new section that includes: recommendations aimed at families, clips with tips aimed at children; a set of filters for parental control, as well as a more streamlined system for making complaints.

The clips, which are available on the website, address topics such as bullying, 'sexting', anorexia, cyber addictions, and other harmful content. The videos feature teenage actors who use the same language and register as the target audience, and are shown on the social networks Twitter, Facebook, and YouTube.

The recommendations include tips for children on not sharing personal information on any sites or chats, and about telling their family if someone bullies them with comments, photos or videos. Parents are also advised to browse the Internet with their children and to encourage critical thinking about content.

The Catalan public service broadcaster (which delivers both radio and television) is also supporting the CAC project by broadcasting public service advertising featuring this project. In addition to posting these recommendations on the website, the CAC will publish them on paper and is working with the Department of Education of the Catalan Government to have them disseminated to primary and secondary school pupils in Catalonia.

• *Consell de l'Audiovisual de Catalunya, Protecció dels menors a Internet* (Catalan Audiovisual Council, Protection of minors on the internet)
http://merlin.obs.coe.int/redirect.php?id=18080 CA

Mònica Duran Ruiz
Catalan Audiovisual Council

FR-France

Infringement of protection of image suffered by a doctor, filmed without his authorisation by concealed camera without his anonymity being preserved

On 2 June 2016, the Court of Appeal in Versailles delivered a new decision on the use of concealed cameras. In the case at issue, a doctor - informed by friends and family that he had been filmed in his surgery without his knowledge for the purposes of a television magazine programme entitled "Régimes: la vérité sur les nouvelles méthodes pour maigrir" ("Diets - the truth about the new slimming methods") which was to be broadcast a few days later - immediately had the channel and the company editing its Internet site summoned to court to obtain a ban on broadcasting the sound recordings obtained without his knowledge, an order that his voice should be modified and the images blurred, and an award of damages. The judge in the urgent proceedings ordered the defendant companies to modify the voice and blur all the images which had been obtained without the doctor's knowledge and used in the disputed trailer, whether it was broadcast on television or posted on the Internet site, and to pay EUR 7,000 in compensation for the prejudice suffered as a result of their use of his image in this way. The companies appealed against the order delivered under the urgent procedure, claiming the nullity of the summons, which they considered constituted defamation: the image of the doctor was associated with a commentary preceding the disputed sequence which discredited him by using the extremely pejorative term of "charlatan". However, the Court of Appeal found that the broadcasting of images of the applicant which had been obtained irregularly did not constitute an element of defamation or a means used to effect defamation, but merely used the image, in the context of a television broadcast, to illustrate a spoken commentary which preceded the broadcasting of images: the commentary referred to the administration to patients of allegedly dangerous products. The court therefore found that the judge in the initial proceedings had been right in deciding that the aim of the applications had not been to penalise the defamatory statements but to obtain a ban on broadcasting images and sounds obtained in violation of the doctor's entitlement to prevent his image being used. The court found that the proceedings were covered not by the provisions of the Act of 29 July but by those of Article 9 of the Civil Code, and consequently rejected the application for the summons to be cancelled.

In respect of the applications brought by the doctor, the court adopted the reasoning followed by the judge in the urgent proceedings, who - the court felt - had

rightly concluded that the fact that the reason why the person concerned, whose images had been captured without his authorisation, could be identified on the trailer for the broadcast, and that he had indeed been identified by a number of patients and friends, was that he had not been rendered sufficiently anonymous. Moreover, the images had been broadcast in a somewhat unflattering fashion, such that with all the circumstances taken together there was no doubt that a manifestly unlawful interference had occurred. The claimed infringement of the journalists' right to inform and the general public's right to be informed on a subject of general interest resulting from the measures called for and agreed to by the court in the initial proceedings did not appear to be disproportionate to the infringement of the applicant's right to protect his image, which had involved his being filmed without his authorisation using a concealed camera, and without his anonymity being preserved. The order was therefore upheld.

• *Cour d'appel de Versailles (14e ch.), 2 juin 2016, SA Métropole Télévision c/ C. Bensoussan* (Court of appeal in Versailles (14th chamber), 2 June 2016, Métropole Télévision S.A. v. C. Bensoussan) FR

Amélie Blocman
Légipresse

Competition authority refuses to allow Canal Plus' plan for an exclusive distribution agreement with beIN Sports

In a decision on 9 June 2016, the national competition authority (Autorité de la Concurrence) refused to lift the ban on exclusive distribution of the premium sport channel Canal Plus has been under since 2012, which has been preventing the audiovisual group from finalising its plans to join forces with beIN Sports. Canal Plus wanted to sign a five-year exclusive distribution agreement with beIN Sports, and would have paid the Qatari chain between EUR 300 and 400 million for it. The agreement would have enabled Canal Plus to reconnect with the subscriptions of beIN's 2.5 million customers, with the aim of winning back subscribers the encrypted French channel lost to beIN when the latter obtained the rights for broadcasting a number of major sports competitions. beIN currently holds the rights not only for the French football championship and the Champions League, but also for American basketball and the Wimbledon tennis tournament.

When TPS and Canal Plus merged in 2012, the competition authority imposed 33 injunctions on the Canal Plus Group with the intention of re-establishing sufficient competition in the markets for pay television. One of these required Canal Plus to use CanalSat to distribute premium channels, including sport, on a non-exclusive basis. The injunctions were to be valid for a period of five years, at the end of which the state of competition would be analysed again to consider the relevance of maintaining them. The Canal Plus Group therefore submitted to the competition authority a request for the revision of the injunction concerning non-exclusive distribution which should enable it to conclude an exclusive distribution contract for the beIN Sports channels. The various operators in the markets in question (television channels, holders of sports rights, pay-television distributors, and more particularly the IAPs, etc) have now been consulted. On 13 April 2016, in response to an application from the competition authority, the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) delivered its opinion, and the Canal Plus Group proposed a series of undertakings which have been tested on the market with the various stakeholders concerned. On completion of a detailed examination of the various elements in the dossier, the competition authority felt that there was at present no justification for an early revision of the injunctions, even if Canal Plus were to adopt the undertakings it proposed. It felt that the change in the legal and actual circumstances taken into account in 2012 was not significant enough to make any difference to the competition analysis carried out at the time, which was the justification for the injunctions at issue; these were therefore still necessary. On the market upstream of the acquisition of sports rights, the competition authority noted that, as in 2012, the Canal Plus Group and beIN Sports held the broadcasting rights to virtually all the most attractive sports competitions, particularly for football. The structure of the market, close to a duopoly comprising the Canal Plus Group and beIN Sports, was still characterised by the dominance of the former of the two. The acquisition of the rights for the English Premier League by the Altice Group (SFR) was still an isolated case rather than a demonstration of the emergence of sufficient and durable competition in the market. Similarly, on the market downstream of the distribution of pay-television services, the Canal Plus Group still held a dominant position, with a market share of between 70% and 80%.

More generally, since implementation of the injunctions imposed in 2012, there have been clear rules of play for independent channels gaining access to distribution on CanalSat. It has also become possible for distributors in competition with the Canal Plus Group, including the IAPs, to compete effectively with the exclusive distribution of channels on CanalSat by having the possibility of gaining access to attractive content. The competition authority therefore feels that any isolated changes to this particular injunction might endanger the usefulness of the measures as a whole, and the authority is anxious to maintain consistency and effectiveness. The authority will nevertheless be carrying out a thorough re-examination of all the injunctions imposed in 2012, starting in July, in consultation with all the stakeholders concerned, so that a clear and foreseeable framework can be defined for 2017-2022.

• *Communiqué de presse de l'Autorité de la concurrence, 9 juin 2016*
(Press release of the national competition authority, 9 June 2016)
http://merlin.obs.coe.int/redirect.php?id=18089 FR

Amélie Blocman
Légipresse

TF1 follows France Télévisions in signing an agreement with audiovisual producers

The Decree amending the terms of reference of France Télévisions so as to allow implementation of the agreement concluded on 10 December 2015 between the public-sector audiovisual group and the representative organisations of audiovisual producers (USPA, SPFA, SPI and SATEV) was published in the Journal Officiel on 8 June 2016. In application of Article 48 of Act No. 86-1067 of 30 September 1986, the text amends Article 9 of the terms of reference and its annex on the extent of the rights transferred, in order to take into account this professional agreement, the aim of which is to allow France Télévisions to devote more of its expenditure on audiovisual production to works that are not produced independently. The Decree therefore includes in the terms of reference the main stipulations contained in the agreement: while maintaining unchanged France Télévisions' contribution of 20% of its turnover to the production of audiovisual works, Article 2 of the Decree, amending Article 9 (IV) of the terms of reference, reduces initially from 95% to 75% the proportion of independent productions in this contribution. In return, the non-independent proportion of the contribution, fixed henceforth at a maximum of 25%, is to be strictly regulated. Only half may be made with a production company that is dependent on France Télévisions in terms of company capital within the meaning of Article 15 of Decree No. 2010-747 of 2 July 2010. The tables attached to the terms of reference, on the extent of the rights transferred by genre of work, have been amended to take into account the new negotiated framework, setting out these rights in detail in relation to the independent/dependent parts of the contribution to be made.

At the same time, on 24 May 2016, under the auspices of the Ministry of Culture, an agreement was signed governing relations between audiovisual producers and the TF1 Group. The agreement increases to 36% the proportion of dependent production, with 26% earmarked for TF1's subsidiaries. Concurrently, the threshold for triggering coproduction shares, enabling TF1 to have property rights in respect of the works, has been lowered from 70% to 60% of the proportion financed for fiction works. Details have also been laid down on the rules on marketing mandates. As for France Télévisions, the agreement gives TF1 exclusive rights for subscription video on demand (SvOD). In exchange, TF1 will be required to invest 12.5% of its turnover in the creation of catalogue works for four years, and to allocate 75% of its investments to new production, compared with about two thirds up till now.

The Government will have to adapt the regulatory provisions which are impacted by the agreement signed between the broadcasters and the distributors, and this will have to be done by the end of 2016.

• *Décret n°2016-752 du 6 juin 2016 portant modification du cahier des charges de la société nationale de programme France Télévisions*
(Decree no. 2016-752 of 6 June 2016 amending the terms of reference of France Télévisions)
http://merlin.obs.coe.int/redirect.php?id=18090 FR

Amélie Blocman
Légipresse

GB-United Kingdom

Supreme Court judgment on privacy injunctions

The case of PJS v. News Group Newspapers Ltd concerns the attempts of a high profile couple to prevent the publication of a story relating to sexual encounters that one of the couple, identified only as "PJS", had had some time ago. On 22 January 2016, the Court of Appeal, pending the main trial, granted an interim injunction; it was generally accepted that this was properly granted. The dispute concerned whether the injunction should be dismissed since details of the story had been published in the media outside England and Wales, and also on various websites and social media. The English press (News Group Newspapers - NGN) therefore argued that they were being subject to grave injustice in not being permitted to publish the story. On 18 April 2016, the Court of Appeal set aside the injunction on the basis that the protected information was now in the public domain; the injunction served no useful purpose and potentially constituted an unjustified interference with NGN's right to freedom of expression, provided in Article 10 of the European Convention on Human Rights (ECHR). However, on 19 May 2016, the Supreme Court reversed the decision of the Court of Appeal, although not unanimously (Lord Toulson dissenting) and with Lord Mance, Lord Neuberger and Lady Hale all giving separate concurring judgments.

The Supreme Court reiterated that neither Article 10 nor Article 8 (the right to respect for private life) has automatic priority, but that this will be a fact-specific analysis taking into account the justifications for restricting the respective rights and the proportionality test. Even if the Court of Appeal had not, in suggesting that Article 10 should be more heavily weighted

in the light of section 12 of the Human Rights Act, misdirected itself on this point, it had accorded too much weight to the public interest of publication in its balancing of the various interests. The Court of Appeal had accepted that there was a limited public interest in publication insofar asthe media are entitled to criticise the conduct of individuals even when there is nothing illegal about the conduct. According to Lord Mance, that justification "cannot be a pretext for invasion of privacy". Referring to the European Court of Human Rights (ECtHR) judgments of Armoniene v. Lithuania (no. 36919/02, 25 November 2008), Mosley v. UK (see IRIS 2011-7/1) and Couderc and Hachette Filipacchi Associé v. France (see IRIS 2016-1/3), Lord Mance questioned whether "the mere reporting of sexual encounters of someone like the appellant, however well known to the public, with a view to criticising them does not even fall within the concept of freedom of expression under Article 10 at all".

Lord Mance's conclusion that the Article 8 interests outweighed the putative media interests was supported by Lord Neuberger, and by Lady Hale who elaborated on the impact on the children of PJS. Lady Hale stated that the IPSO Editor's Code, to which the Court must have regard, provides that there must be "an exceptional public interest to over-ride the normally paramount interests of [children under 16]".

In determining whether the fact that the identity of the couple was known at least somewhere in the world was fatal to a continuation of the injunction, the balance of secrecy and confidentiality on the one hand and invasion of privacy on the other was decisive to the question of whether the injunction should be maintained. It was in the assessment of this point that Lord Toulson differed from the four other judges. In Sunday Times v. UK (No. 2) (no. 13166/87, 26 November 1991), the publication of the restricted material outside the relevant jurisdiction, and consequent loss of confidentiality, meant that injunctions could no longer be justified. In the context of privacy, however, "the repetition of known facts about an individual may amount to unjustified interference with the private lives not only of that person but also of those who are involved with him". Nonetheless, the English courts have refused injunctions in relation to privacy applications on the basis that the facts were known, but in cases where there was very broad knowledge of the facts (for example, CTB v News Group Newspapers Ltd [2011] EWHC 1326 (QB)). Furthermore, the Supreme Court acknowledged that in terms of the degree of intrusion there is a difference between disclosure on the Internet and publication in the press. Lord Mance suggested that lifting the injunction would give rise to a "media storm" which would exacerbate the distress felt by PJS and his family. The Court recognised that privacy rights require an effective remedy; damages after the event are not always effective, and in this respect privacy differs from defamation.

• PJS v. News Group Newspapers Ltd [2016] UKSC 26, 19 May 2016
http://merlin.obs.coe.int/redirect.php?id=18051 EN

• PJS v. News Group Newspapers Ltd [2016] EWCA Civ 393, 18 April 2016
http://merlin.obs.coe.int/redirect.php?id=18052 EN

• PJS v. News Group Newspapers Ltd [2016] EWCA Civ 100, 22 January 2016
http://merlin.obs.coe.int/redirect.php?id=18053 EN

• CTB v News Group Newspapers Ltd [2011] EWHC 1326 (QB)
http://merlin.obs.coe.int/redirect.php?id=18054 EN

• Judgment by the European Court of Human Rights (Second Section), case of Armonienė v. Lithuania, Application no. 36919/02 of 4 November 2008
http://merlin.obs.coe.int/redirect.php?id=18055 EN

• Judgment by the European Court of Human Rights, case of The Sunday Times v. the United Kingdom (no. 2), Application no. 13166/87 of 26 November 1991
http://merlin.obs.coe.int/redirect.php?id=18056 EN

Lorna Woods
School of Law, University of Essex

Use of "offensive" word on morning radio programme chat show investigated

A guest (Jeremy Irons) on a morning programme on BBC Radio 2, in telling an anecdote, used the word "fuck". The presenter immediately said, "You can't say that", apologised to listeners, and asked Irons to apologise too - which he did. The presenter then reminded other guests not to use offensive language.

Ofcom received one complaint about the use of the word at that time of day. Ofcom decided to mount an investigation on the basis of issues raised under Section 2.3 of the Broadcasting Code: "In applying generally accepted standards broadcasters must ensure that material which may cause offence is justified by the context 04046 Such material may include, but is not limited to, offensive language."

The BBC was asked how the programme's content complied with the rule. It said that Irons had been assessed as "unlikely" to use inappropriate language, but nonetheless had been given a full "face-to-face" briefing which included being reminded that the programme had a large family audience with the potential for children to be listening, and that he should moderate any stories and use of language accordingly. The BBC argued that adequate steps were taken before the programme aired and the immediate response was also appropriate and adequate.

Ofcom had in 2010 conducted research into the pubic's consideration of the use of offensive language, Audience attitudes towards offensive language on television and radio. This had concluded that the use of the word "fuck" was deemed to be amongst the most offensive, and thus Irons' use was capable of causing offence. The question was then whether the context could redeem the use of the word. Ofcom chose to look at the programme as a progamme with a large family audience including children listening to it during the school run, within a channel made up of

popular music and comedy content. Thus, the use of the most offensive language was not justified by the context.

However, Ofcom chose to resolve the issue without any further action, on the basis that the BBC did have a compliance policy in place to carry out pre-airing risk-assessment of the likelihood of guests using offensive language. Furthermore, in this case, the guest was given a briefing reminding him not to use such language.

• Ofcom Broadcast and On Demand Bulletin, Issue number 305, 23 May 2016, p. 54
http://merlin.obs.coe.int/redirect.php?id=18057 EN

David Goldberg
deeJgee Research/ Consultancy

White Paper sets out proposed reforms to the BBC Royal Charter

On 12 May 2016, a White Paper was presented to the British Parliament by the Secretary of State for Culture Media and Sport, setting out the core proposed changes to reform and modernise the BBC. This would create the basis for the ninth BBC Royal Charter, as the current one ends in December 2016 (for the previous Royal Charter, see IRIS 2006-5/22 and IRIS 2005-7/23). The Royal Charter is the constitution of the BBC.

The White Paper is a consequence of wide-ranging consultation with the public and the creative industries. The proposed reforms for the new Charter are to enhance the BBC's public service broadcasting remit by producing distinctive, high quality and impartial content, which appeals to a wide and diverse audience both nationally and internationally.

The main proposed structural change is that the internal governance of the BBC will alter from a board of governors to a unitary board of directors, with the intention that at least half of these directors are appointed by the BBC. Further, the BBC will no longer be effectively self-governing, with the role being given to the communications regulator Ofcom who will have extensive powers to investigate matters and have the authority to impose sanctions. Such authority will include investigating relatively minor activities, which may over time have an influence on the effectiveness and impartiality of the BBC.

Ofcom will have a licensing role whereby an operating licence will be granted and sanctions will be made available for any breaches. In addition, the National Audit Office will become the BBC's auditor and hold the broadcaster accountable for its significant annual public funding.

There are a number of notable developments. First, the BBC will have freedom as to how it spends the funding, without any of the current prescriptive requirements. However, one area where funding will remain ring-fenced is in respect to BBC World service. Further, the BBC will be empowered to commission work from outside the BBC without any quotas or requirements for in-house production by the broadcaster. One exception which cannotbe delegatedis news and current affairs production. Second, the BBC will also be enabled to create its own freestanding commercial production house - known as BBC Studios - subject to it meeting standards that are compatible with the BBC's impartial public service remit. Third, the BBC's relationship with its commercial subsidiaries such as Global News and Stationworks needs to be reviewed, including loss-makers, in terms of what value they provide to the public interest. Also, whether the public service broadcaster is in effect subsiding its private sector arm. This includes consideration of how the BBC promotes itself and uses its airtime for self-promotion. Fourth, the BBC will have a budget of £20m per annum to create opportunities for other broadcasters and producers also making public service content, and the government will seek consultation in autumn 2016. Funds will be provided to ensure the BBC works with local news organisations, for instance local newspapers. Moreover, the BBC will have a responsibility to produce programmes that appeal to all audiences, both for its domestic and international market. As part of this process the BBC will be encouraged to work with as many collaborators and partners as possible.

Fifth, and in relation to the licence fee, the BBC will be empowered to collect the TV licence not only from traditional viewers watching via terrestrial TV, but also those who use the online services such as its very popular catch-up service BBC iPlayer. The iPlayer service will be given greater flexibility so that British residents who pay the licence fee may have access online when away in another EU country. The BBC will also consider ways of collecting licence fees and the sanctions against those who fail to pay, making the system fairer and more proportionate, especially for people living on limited financial means. Although the over 75 years of age exemption will continue, those above that age who are able and wish to will be encouraged to pay the licence fee.

Apart from the revenues the BBC generates from licence revenues, and the sales of its programmes and formats worldwide, the broadcaster will be enabled to run pilots for different forms of subscription services.

Notably, as part of the remit to preserve and bolster the BBC's impartiality, the Charter period will be every 11 years with a mid-point review, so it can be free of the political cycle given that Britain has fixed 5-year parliaments.

Finally, the proposed mission statement set out in the White Paper states the BBC is "To act in the public

interest, serving all audiences with impartial, high-quality and distinctive media content and services that inform, educate and entertain."

• Department for Culture, Media & Sport, A BBC for the future: a broadcaster of distinction, May 2016, Cm 9242
http://merlin.obs.coe.int/redirect.php?id=18081 EN

Julian Wilkins
Blue Pencil Set

IE-Ireland

Interview concerning abortion violated broadcasting rules

In a majority decision, the Broadcasting Authority of Ireland (BAI) has upheld a complaint concerning an interview with a couple on the topic of abortion, broadcast by the public service broadcaster RTÉ (for previous decisions, see IRIS 2016-3/20, IRIS 2016-2/14, and IRIS 2014-2/23). The complaint concerned an October 2015 edition of The Ray D'Arcy Show, a lifestyle and entertainment programme, broadcast weekday afternoons on RTÉ Radio 1.

The programme featured an interview with a well-known television writer and his wife, concerning their experience of receiving a diagnosis that their first baby would not survive beyond birth. The interview also featured discussion of the couple's views on the Irish laws on abortion.

The complainant argued that the "presenter promoted his personal view in respect of abortion during this discussion" and "allowed his guests to make a number of comments in respect of abortion which should have been challenged," thus violating the Broadcasting Act 2009 and the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs. Under Section 39(1)(b) of the Broadcasting Act 2009, broadcasters must ensure that the broadcast treatment of current affairs "is fair to all interests concerned and that the broadcast matter is presented in an objective and impartial manner and without any expression of his or her own views". However, if it is "impracticable in relation to a single broadcast to apply this paragraph, two or more related broadcasts may be considered as a whole, if the broadcasts are transmitted within a reasonable period of each other". The broadcaster argued that the interview was a "human-interest item", and that "the focus of the interview was primarily on the personal trauma endured by the couple." RTÉ stated that it canvassed for and received separate statements from the Pro-Life Campaign and Every Life Counts, which were read out during the interview. The presenter also offered alternative viewpoints to the couple throughout the interview."

Having considered the submissions, the BAI Compliance Committee decided to uphold the complaint. First, the Committee stated that it "did not agree with the characterisation of the interview by the broadcaster as predominantly human interest in nature." It noted that the interviewees had created a video for a campaign to decriminalise abortion in Ireland, and while the interview did include "an exploration of the experiences of the interviewees, these views were secondary and set out so as to encourage support for the Amnesty International campaign" to change Irish abortion law. Second, the Committee noted that "the interviewees also criticised opposing views to their own, describing such views as 'fundamentalist', 'simplistic' and 'childish', and characterised the actions of politicians on this matter as 'particularly cowardly'." While the interviewer had "made references to other choices that couples had made when faced with a pregnancy where the foetus had a fatal foetal abnormality or a life-limiting condition", "the treatment of these other views during the item as cursory and the issues highlighted by those statements were not examined in any detail by the presenter with his guests." In conclusion, the Committee held that "other perspectives provided were insufficient, particularly where there were no other contributions via interviewees and where the presenter did not challenge in any significant manner the views of the interviewees." Thus, there had been a violation of the Broadcasting Act 2009 and the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, May 2016
http://merlin.obs.coe.int/redirect.php?id=18059 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

Programme containing hate speech had no editorial justification

In a majority decision, the Compliance Committee of the Broadcasting Authority of Ireland (BAI) has upheld a complaint against a broadcaster over a programme featuring a contributor being "given repeated opportunities to air" extremely racist views.

The complaint concerned a November 2015 edition of a late night chat/entertainment programme broadcast each weekday evening after 9pm by FM 104. The programme is led "by audience interaction", and is "characterised by often controversial and trenchant views often stated using coarse and offensive language." The episode of the programme aired on 12 November 2015 concerned a contributor who was concerned

about a request, from her ex-partner and father of her child, to bring the child to visit his family in his home country of Nigeria. The caller was concerned that she might not see the child again if she granted this request. The broadcaster invited listeners to contact the programme with their opinions. It included contributions that dealt with this topic, but it also included one caller, who expressed a number of opinions, including that "Africans/Nigerians were only in relationships with Irish women so as to secure passports" and "sponge off the welfare", were "parasites", and were "contaminating our gene pool and outbreeding us 2-1."

Under Section 48 of the Broadcasting Act 2009, individuals may make a complaint to the BAI that a broadcaster failed to comply with the broadcasting rules. The complainant argued that "the programme permitted persons to express hatred and racism against other nationals," and was "disrespectful, offensive and biased," in breach of a number of broadcasting rules, including: Section 48(1) of the Broadcasting Act (fairness, objectivity and impartiality in current affairs), Section 48(1)(b) of the Broadcasting Act (harm and offence), Rules 4.1 and 4.2 of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs (fairness, objectivity and impartiality) and Principle 5 of the BAI Code of Programme Standards (respect for persons and groups in society).

In response, the broadcaster stated that the programme carries a warning at the beginning, as "some views expressed on air by callers can be extreme." The broadcaster argued that "the programme is well known as one which contains robust debate carried out by contributors who often hold extreme views which some may find offensive." However, the extreme views "were constantly challenged, disagreed-with and effectively belittled, with those who expressed these opinions called out and basically shamed on air for daring to hold them - by both the presenter and many other callers."

The Compliance Committee decided to uphold the complaint. First, the Committee noted that the programme was broadcast after the "watershed", and regular listeners "are familiar with the style and tone" of the programme. However, while these factors were relevant for context, "they do not remove the obligation on the broadcaster to put limits on content that would reasonably be expected to cause undue offence." In particular, the Committee held that the views expressed by the caller concerning race "had no evident editorial relevance to the discussion since the issue of race was not highlighted by the caller who was facing the dilemma that was the focus of the programme." In addition, the Committee held "that the caller was invited throughout the programme to air his views and was permitted to make continuous racist remarks throughout the majority of the programme, and in circumstances where the comments had no editorial relevance." Finally, the Committee accepted that whilst "the comments of this caller were challenged throughout the programme", nonetheless "the caller's views were extremely racist in nature and amounted to hate speech and the caller was given repeated opportunities to air these views, views which the Committee believe should not have been broadcast in such an extensive manner and because they had not editorial justification."

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, May 2016, p. 15
http://merlin.obs.coe.int/redirect.php?id=18059 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

IT-Italy

Data protection authority finds bloggers deserve same treatment as journalists

The Autorità Garante per la protezione dei dati personali (Italian Data Protection Authority, "Garante"), through Resolution no. 29 of 27 January 2016, has stated that hen bloggers report news and comments in their blog, in absence of the data subjects' consent, they do not commit any unlawful act as long as they respect the rights, fundamental freedoms and dignity of the person on which they write.

In this resolution the Garante declared groundless the complaint of a well-known public figure who had asked a blogger to remove an article reporting certain information concerning her personal life and judicial proceedings (for previous decisions, see IRIS 2008-7/26).

In particular, the complainant on one hand had stated that her personal data had been unlawfully disseminated online; on the other hand, she had contested the applicability of the provisions provided for by the Legislative Decree no. 196/2003 (the Data Protection Code) to the specific case, with regard to the protection of freedom of expression.

However, Garante ruled that the provisions of the Data Protection Code relating to journalism also apply to bloggers who carry out informative activities. Indeed, Articles 136 ss. of the Data Protection Code extend the applicability of the legal provisions concerning the personal data processing carried out by journalists to other activities involving freedom of expression which are not carried out by professional journalists.

In light of the above, Garante has stated that the bloggers who run informational websites may process personal data without the data subjects' consent, with the condition that bloggers are required to respect the

rights, fundamental freedoms and dignity of the subject of the writing.

• *Autorità Garante per la protezione dei dati personali, provvedimento n. 29 del 27 gennaio 2016 [doc. web n. 4747581]* (Italian Data Protection Authority, Resolution no. 29 of 27 January 2016 - web document no. 4747581)
http://merlin.obs.coe.int/redirect.php?id=18060 IT

Ernesto Apa, Adriano D'Ottavio
Portolano Cavallo

NL-Netherlands

Court orders Google Inc. to remove search results concerning a lawyer's criminal conviction in 2012

The District Court of Rotterdam has ordered Google Inc. to remove two hyperlinks from its ".nl" and ".com" search engine that refer to a blog post about the applicant's foreign conviction in 2012 for illegal possession of a weapon.

The applicant worked as a lawyer outside the Netherlands in 2012 and 2013. In 2012 he was criminally convicted of illegal gun ownership and given a suspended prison sentence and community service. A local blogger wrote about the judgment, thereby disclosing the applicant's name and picture. This blog post could be found on Google Search by entering the applicant's name. In 2015 Google declined the applicant's request to remove this search result.

The Court established that this case concerns the processing of personal data. The Court found Google Inc. to be the controller of the personal data, because it decides the purposes and means of the processing. Furthermore it held that it is sufficiently established that Google Inc. uses automatic equipment situated in the Netherlands. The application against Google Netherlands is inadmissible because they are not the controller, and therefore do not process personal data: their role is focused on sales support.

The applicant's primary argument was that the processing is unlawful because it concerns sensitive personal data, namely criminal data, and that none of the exceptions to the prohibition on processing sensitive data apply (Articles 16, 22 and 23 of the Dutch Data Protection Act). Google argued that the URLs cannot be qualified as criminal data, and that the substantive assessment of the application only covers the search results and not the content of the websites that are listed. The Court rejects this defence. The request concerns sensitive data that may not be processed unless an exception applies, which is not the case in this instance. The removal request of the applicant must therefore be granted. The Court stated that it is aware of the profound implications of this finding for the processing of criminal data by search engine operators, but that the conclusion is inevitable.

The applicant's subsidiary claim was that the processing was incompatible with data protection legislation, and that the processing violated Articles 7 and 8 of the EU Charter of Fundamental Rights (the right to private life and data protection, respectively). In addition, the Court observes that applicant's request would also have been granted on this subsidiary basis. Explicitly referring to the CJEU judgment in Google Spain v Mario Costeja Gonzaléz (see IRIS 2014-6/3), the Court considers that the applicant's "right to be forgotten" weighs more heavily than Google's interest to produce a relevant search result and the public interest to find such results. The Court rejected Google's argument that the applicant's capacity as a lawyer was of special weight, because it is excessive to assume that every lawyer has such a role in society that the public must always be aware of any criminal conviction. Of relevance was that the conviction did not relate to the applicant's professional abilities. The Court also attached weight to a "conviction spent" declaration submitted by applicant, which indicated that he was given a "clean slate" by the authorities in the foreign jurisdiction.

• *Rechtbank Rotterdam, 14 april 2016, ECLI:NL:RBROT:2016:2395* (District Court of Rotterdam, 14 April 2016, ECLI:NL:RBROT:2016:2395)
http://merlin.obs.coe.int/redirect.php?id=18061 NL

Karlijn van den Heuvel
Institute for Information Law (IViR), University of Amsterdam

RS-Serbia

New Advertising Law in effect as of 6 May 2016

The new Advertising Act ("Official Gazette of RS", No. 6/2016), which was adopted by the Serbian Parliament on 26 January 2016, became effective as of 6 May 2016. The new law supersedes the former Advertising Act, which has been in force since 2005 ("Official Gazette of RS", No. 79/2005). According to the statements made by the representatives of the Serbian Ministry of Trade, Tourism and Telecommunications, the new law aims to harmonise with the relevant European legislation, as well as to establish a legal framework that would be able to withstand technological challenges. The new law is applicable to all forms of commercial advertising, irrespective of the medium used. It covers print, outdoor and online advertising, and incorporates the rules regulating audiovisual commercial communications that were harmo-

nized with the EU Audiovisual Media Services Directive in the Law on Electronic Media 2014 ("Official Gazette of RS", No. 83/2014).

The noteworthy changes introduced by the law include a new set of rules regulating misleading, comparative and surreptitious advertising; the recognition of the importance of self-regulation and co-regulation (especially in the field of advertising products with high levels of fat, sugar or salt); new rules for advertising directed towards children below the age of 12, and minors, below the age of 18; the implementation of the mere conduit and notice and takedown principles from the Directive on electronic commerce 2000/31/EC for online advertising; a new advertising regime for alcoholic beverages, that is to some extent liberalised compared to the old law; the clear prohibition of the advertising of tobacco products and electronic cigarettes; and a new set of rules regulating gambling and new monitoring mechanisms.

However, some of the bylaws that were due to be adopted, and would allow the full and proper implementation of the new law, are still lacking. The most important of those will regulate the manner of advertising on broadcast media in more detail (TV/radio advertising, teleshopping, product placement, etc.). It is expected to be passed by the Regulatory Authority for Electronic Media in the near future.

On the other hand, the Serbian Chapter of the International Advertising Association (IAA) has already drafted the Code of Marketing Communicationsin 2013. The Code will now be followed by the introduction of the first self-regulatory body in the field of advertising, aiming to enhance the responsibility and ethics of marketing communications and provide an important supplement to the new rules introduced by the Advertising Act.

• *Zakon o oglašavanju ("Sl. glasnik RS", br. 6/2016)* (Advertising Act ("Official Gazette of RS", No. 6/2016))
http://merlin.obs.coe.int/redirect.php?id=18067 SR

• *KODEKS MARKETINŠKIH KOMUNIKACIJA* (The Code of Marketing Communications)
http://merlin.obs.coe.int/redirect.php?id=18068 SR

Slobodan Kremenjak
Živković Samardžić Law Office, Belgrade

SE-Sweden

Supreme Court rules linking was a breach of broadcaster's signal right but not copyright

The Swedish Supreme Court has decided that a hockey game does not reach the originality threshold to receive copyright protection. The hockey game in question was made available to the public on C More through linear broadcast on its television channel, as well as its pay-per-view service online. To view the game the viewers had to register, accept the user terms and pay for the game.

The hockey game on C More's website was linked to by a private individual. The Court of Appeal for Southern Norrland had previously established that the linking was a making available and that the linking breached the signal rights of C More (see IRIS 2011-1/47 and IRIS 2011-9/33). C More appealed the decision and claimed that the linking also breached the copyright of the game. The Supreme Court had asked the Court of Justice of the European Union (CJEU) whether member states may "give wider protection to the exclusive right of authors by enabling 'communication to the public' to cover a greater range of acts than provided for in Article 3(2) of [Directive 2001/29 'InfoSoc Directive']". The CJEU ruled in 2015 that member states could extend the definition of "communication to the public" to give wider protection to authors and broadcasters (see IRIS 2015-5/2).

The Supreme Court had to evaluate whether the game constituted a copyright protected work. The judges of the Court disagreed, but the majority did conclude that a hockey game could not reach the threshold of originality. The linking did not breach the copyright, but only the neighbouring signal right of the broadcaster.

• *Högsta domstolen, Mål B 3510-11, 29/12/2015* (Supreme Court in Stockholm, Mål B 3510-11, 29 December 2015)
http://merlin.obs.coe.int/redirect.php?id=18070 SV

Helene Hillerström Miksche
Com advokatbyrå, Stockholm

Depicting art work online not covered by an exception but subject to artists' exclusive rights

The Swedish Supreme Court has ruled on the scope of an exception in the Swedish Copyright Act. According to the exception, a work of art that is permanently placed in a public location, can be depicted without the permission of the creator. The exception is motivated by the public interest in freely depicting art in public space without being limited by copyright to art works that are placed in such public spaces.

Wikimedia, a non-profit association, had launched a database of pictures of public art works in Sweden where information on the art work was displayed with a photograph, along with information on where the art work is placed geographically and the name of the artist. The site was freely accessible to users online, and the photographs were uploaded by the users themselves. The aim of the site was to provide the

public, educational and tourist sectors with information on public art in Sweden.

The Supreme Court in the case had to interpret whether the notion of depict ("avbilda") included the making available of photographs on a website presented as a database of information. According to the preparatory work for the Copyright Act, the exception allowed for reproduction of an art work through a painting, drawing, photography or other technique through which the art work could be depicted in a two dimensional fashion. The exception has enabled post cards with public art to be sold without the permission from, or payment to, the artists.

The exception was introduced into the Copyright Act when the Internet was unknown. In the latest review of the Act (SOU 2011:32), it was said that the notion had been subject to discussion and that there were reasons to clarify it. The review in this part never led to any legislative change.

The Supreme Court interpreted the application of the exception in light of the three-step-test and considered that the old notion of depicting art work did not apply to the database of pictures that Wikimedia made available to the public. Whether the making available was commercial or not had no impact according to the Court. In conclusion the Supreme Court's ruling mean that Wikimedia cannot make available pictures of art works in its database without the consent of the artists concerned.

• *Högsta domstolen, mål nr Ö 849-15, 04/04/2016* (Supreme Court, decision of 4 April 2016, mål nr Ö 849-15)
http://merlin.obs.coe.int/redirect.php?id=18071 SV

Helene Hillerström Miksche
Com advokatbyrå, Stockholm

Agenda

Book List