IRIS
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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EDITORIAL

New Executive Director for European Auiovisual Observatory

With this issue of IRIS we say goodbye to Mr Silvo, the Executive Director of the European Audiovisual Observatory. Mr Silvo has been the Executive Director of the Observatory since its establishment by the Committee of Ministers of the Council of Europe. Under his responsibility and with his enthusiastic support, it became possible to start and develop IRIS to what it is today: a monthly newsletter, published in the framework of the Observatory's legal information area, which has proved to be an indispensable reference source for legal advisers of the audio-visual industry, managers, investors, producers, distributors, media authorities and other public authorities. Mr Silvo left his mark, since he was in fact the person who suggested the name 'IRIS' to be given to this monthly newsletter. Since 1 February 1997, Mr Silvo is heading the digital television projects of the Finnish public broadcaster YLE. We wish him all the best in this new function and thank him for the trust that he had in the work of the editorial board and for letting us do our work independently in the framework of general editorial policy guidelines.

At the same time, we welcome the Observatory's new Executive Director, Mr Nils A. Klevjer Aas, who comes from the Norwegian Film Institute. Mr Aas has gained extensive experience at the European level of audio-visual policy as, *inter alia*, member of the Coordinators' Committee of Audiovisual EUREKA and representative of Norway in the Executive Council of the European Audiovisual Observatory. We are all looking forward to a long and fruitful period of close collaboration and wish him success.

Ad van Loon
IRIS Coordinator

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
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IViR Institute for Information Law
EMR Institut für Europäisches Medienrecht
NYLS

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IRIS
LEGAL OBSERVATIONS
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The Global Information Society

Information Technology Agreement: The latest state of affairs

In IRIS 1997-1: 3 we reported on a framework Information Technology Agreement (ITA) which had been negotiated in December 1996 during a ministerial conference in Singapore. The ITA comncerns the abolition by the year 2000 of customs duties on products related to information technology.
On 31 January, a meeting took place in Geneva, under the auspices of the World Trade Organisation to assess the progress that had been made since December.
As EUROPE reports, almost thirty countries representing around 83% of world trade in IT products, had agreed on the essebtial temrs of the ITA. therefore, it seems that the pre-condition for the ITA to be concluded (that the parties to the agreement represent together around 90% of world trade before 15 March 1996) may be met. Currently, parties are trying to convince Malaysia (which represents 5% of the IT market), Thailand (2%), India and Mexico to join the ITA.
See EUROPE Nº 6908 (n.s.) of 6 February 1997.

European Commission: Website offering documents and links to sites relating to the issue of illegal and harmful content

In IRIS 1996-10: 4 we reported on a Communication by the European Commission on illegal and harmful content on the Internet and on the European Commission's Green Paper on the protection of minors and human dignity in audio-visual and information services. In addition to these documents, in an attempt to prevent harmful content being distributed on the Internet, the Commission is promoting initiatives which are aimed at increasing the general awareness among parents, teachers, public sector and the information industry about how to deal with the issue in practical terms.
Under the heading 'Promoting best use, preventing misuse', the Commission has recently published, on one of its Web sites, a set of documents and established a set of relevant links to other internet locations, relating to:
- Legal and policy issues
This section covers international and national initiatives to prevent illegal and harmful contents on the Internet. It contains infomration on Children's Rights, relevant European Commission initiatives, and relevant national initiatives in France, Germany, the UK, Switzerland, the USA, Canada and Australia.
- Industry codes of conduct
- Rating Systems
- Advice to parents and teachers
- Software filters
- Hotlines and instructions on how and where to complain about illegal nd harmful material in Austria, Belgium, The Netherlands, Sweden, the UK, Norway, the USA and, in addition, address information of some relavant global initiatives.
- Views and Talk Back: documents on how to deal with illegal and harmful contents plus an invitation to participate in an Internet discussion forum on the issue
- An overview of other relevant ressources
European Commission, 'Promoting best use, preventing misuse', located at URL http://www2.echo.lu/best_use/best_use.html in English.

(Ad van Loon,
European Audiovisual Observatory)

European Commission: A new step towards the information society. Draft notice on access in the telecommunications sector and investigation into access issues related to the Internet

In December 1996, the Commision adopted a Draft Notice on the application of the competition rules to access agreements in the telecommunications sector. The notice forms part of the Commission's Action Plan for the Information Society and clarifies the role that the competition rules will play in resolving problems of access (the notice had been announced in the Communication by the Commission to the European Parliament and the Council on the Green Paper on the liberalization of telecommunications infrastructure and cable television networks, (COM(95)158 final of 3 May 1995).
The Commission wishes to achieve three things with the notice: (i) to set out access principles stemming from EC competition law in order to create greater market certainty and more stable conditions for investments and commercial initiative in the telecoms and multimedia sectors, (ii) to define and clarify the relationship between competition law and sector specific legislation, and (iii) to explain how competition rules will be applied in a consistent way across the converging sectors involved in in the provision of new multimedia services and gateways.
One of the basic premises underlying the notice is that what is important is not so much the manner in which the goal of fair market access is pursued, via which legal instrument and through which institution, but that the two existing legal frameworks (competition law and sector specific legislation including ONP rules) and the interventions by all national and EC authorities involved are coordinated, mutually reinforcing, coherent and efficient. Preference is however given to the decentralized application of EC law by national authorities to problems of access to facilities (which may have a physical or other nature) controlled by market operators which occupy strong positions in so called "access markets". According to the Draft Notice, such access must be ensured under fair terms and specific attention must be given in this respect to the timing, the technical configuration and the pricing of the access which are essential elements which can be manipulated by the access providers.
The publication of the Draft Notice in the Official Journal, which was scheduled for mid-february, is followed by a period for public consultation after which the Commission will adopt the final version of the notice.
It is also reported that in January 1997 the Competition Directorate of the European Commission already started an investigation at its own initiative into access for Internet providers and providers of online services to the facilities of telecommunication operators. The investigation would at least cover four EU Member States (namely: Belgium, France, Germany and the United Kingdom). In addition, it is understood that the Commission is also reviewing certain specific cases related to possible anti-competitive practices stemming from agreements on the use of Web browsers.
European Commission Draft Notice on the application of the competition rules to access agreements in the telecommunication sector, COM(96)649 final of 10 December 1996. Available in English from the Observatory. Also available at http://europa.eu.int/en/comm/dg04/libera/other.htm in PDF format.

(Dirk Van Liedekerke,
COUDERT, Attorneys at Law, Brussels)

USA/THE NETHERLANDS:
Tariff structures for the use of music on the Internet

Nobody knows what the value of content on the Internet should be. Until now no customs in the pricing of the content have been developed. Mostly the rights on each copyrighted work have to be negotiated separately. Not surprisingly the collecting societies, who already have a pricing structure for the 'old fashioned' analogue uses of music, are the first to come up with a tariff structure for the on-line use of music.
In the Netherlands the collecting societies for performing and mechanical rights on music (Buma and STEMRA) jointly issued an experimental license for the on-line use of music. Web site operators ('content providers' as Buma/STEMRA call them), as opposed to service and access providers, can apply. The term of the license is three months and it can subsequently be prolonged or terminated after every period of three months. Companies, and private persons who use more then 5 minutes of music, are charged a flat fee of 100 guilders a month, private persons who use less then 5 minutes, 10 guilders. One of the conditions is that the web site owner acquires no fee for neither the access or listening to the music files nor the downloading or copying of those. If it does, the collecting societies will probably claim a percentage of the revenues, but up to now this situation has never occurred.
Notably the neighbouring rights are not covered by the license and because the Dutch collecting society for neighbouring rights (SENA) did not yet develop a tariff structure for the licensing of on-line use, these rights will still have to be negotiated separately.
A more elaborate, but still experimental, royalty scheme for the on-line use of copyrighted works has been developed by ASCAP, one of the performing rights collecting societies in the United States. After reviewing the different business models and the ways music is used on the Internet, ASCAP came up with four different rate schedules which it feels reflect the value of the music to the web site operator.
Rate schedule A. is based on the total revenue the web site operator generates with the web site. Three types of revenues are distinguished: (i) Revenues made of users of the service, like subscriber fees and connect time charges, (ii) revenues coming from advertisers and sponsors and (iii) as ASCAP calls it: 'promotional revenue'. The latter concerns the total of the costs the web site operator has in developing and operating the site. Inclusion of promotional revenue is designed to take into account a situation in which a web site does not derive revenue directly but still receives a value for the use of its site to promote goods and services that it offers other than the computer on-line service itself. The royalties consists of 1,615 % of the total revenue.
Rate schedule B. can be used by web site operators who use technology to track how often the different pages of its site are visited. The revenue of which 2,42 % is taken exists of (i) all payments which are made by users for accessing the areas of the site which contain music, (ii) all the income derived of sponsors or advertisers in those areas, (iii) the 'promotional revenue' of those areas and (iv) a part of the same revenues generated of the home page. ASCAP feels it has a right to these because the music will attract visitors to the home page and therefore it deserves a part of the revenues generated there as well.
Those operators who not only track the use of music in general, but also ASCAP music uses, can apply to rate schedule C. Prior to charging a 4,46 % royalty the revenue as calculated in rate schedule B. is multiplied by the proportion of the use of ASCAP music as compared to the total music use.
Rate schedule D. has been developed for non-profit organisations. These organisations have a choice between a 1,615 % royalty over the total operating budget or, if they use tracking technology, a 2,42 % royalty over the operating budget multiplied by the amount of visitors of the music containing areas divided by the total amount of visitors. The operating budget is the total budget for the computer service.
ASCAP can only grant performance rights in the songs, therefore the reproduction rights, probably necessary for copying the song on a server, are not included. Furthermore, ASCAP cannot license the recently statutorily assigned 'digital transmission rights' on sound recording performances.

See http://www.buma.nl/buma/cont1.htm (the Dutch system - in Dutch)
and http://www.ascap.com:80/new/nmts/licensing/licensing.html (the US system - in English)

(Kamiel Koelman,
Institute for Information Law at the University of Amsterdam)

Council of Europe

State of Signatures and Ratifications on 1 February of the:
European Convention on transfrontier television
European Convention on cinematographic co-production

In IRIS 1996-5: 10 we published an overview of the State of Signatures and Ratifications of all European Conventions and other international treaties that are relevant to the audio-visual sector.
In IRIS 1996-7: 5, IRIS 1996-8: 6 (September issue), IRIS 1996-9: 7 (October issue), IRIS 1996-10: 5 and in IRIS Special 1996 we updated this overview.
We can now report that in the meantime, Slovakia ratified the European Convention on transfrontier television. Slovakia, which signed this Convention on 11 September 1996, ratified it on 20 January 1997. Consequently, the date of entry into force will be 1 May 1997. As indicated in IRIS 1996-9: 7 (October issue), Slovakia made a reservation when it signed the Convention. Slovakia reserves the right to oppose any retransmission on its territory of programmes containing advertising for alcoholic beverages that is not in conformity with Slovakia's national legislation.
In IRIS 1996-10:5 we updated the State of Signatures and Ratifications of the European Convention on cinematographic co-production until 1 November 1996. Since then, this Convention entered into force on 1 February 1997 for Hungary, which acceded to it on 24 October 1996. On the same date, it entered into force for Spain, which signed it on 2 September 1994 and ratified it on 7 October 1996. The Convention will enter into force for Portugal on 1 April 1997, which signed it on 22 July 1994 and ratified it on 13 December 1996. Turkey signed the Convention on 10 January 1997.

European Union

European Commission: Communication relating to exclusive broadcasting rights to major (sports) events

On 5 February 1997 the European Commission adopted, on the initiative of Commissioner Marcellino Oreja, a Communication on exclusive rights for TV broadcasting of major (sports) events. The Communication states the position that the Commission will adopt during the imminent conciliation procedure with the European Parliament and the Council of Ministers on the 'Television without Frontiers II' Directive (*see* IRIS 1997-1: 8).
The directive 'Television without Frontiers' should, in the view of the Commission, represent a guarantee for full reciprocal respect between the Member States of their national rules on broadcasting. The approach adopted by the Commission aims to prevent that the general public is excluded from watching televised events of substantial importance, the rights of which have been acquired by pay-TV services. At the same time, Member States remain competent to adopt national rules in this field. The position of the Commission leaves no doubt about its consistency with the amendment adopted by the European Parliament under article 189b of the Treaty, last November, concerning the access of the public to major (sports) events on in-the-clear television.
Having consideration for the difficulties involved in the harmonization of this particular sector of the broadcasting industry, the Commission concludes that special attention is required in dealing with national legal measures, also taking account of the very particular nature of major (sport) events.
The proposed solution concerns the exercise of exclusive rights as opposed to the acquisition of those rights.
According to the Commission, Member States should be entitled to preserve their capacity to take appropriate measures with regard to particular events of special value for its nationals as well as against the exclusion of a sizeable portion of the national audience from watching the events live on TV.
A Committee of Member States, as set up by the amendment of the 'Television without frontiers' directive, is to act as advisory organ for the Commission.
Where major events are broadcast from another Member State, the State where the broadcast originates (the so-called 'transmitting State') is to ensure, on a *quid pro quo* basis, that exclusive rights to major events are exercised in such a manner that no major exclusion of public results in the 'receiving State'.

Communication from Mr Oreja to the Commission of 3 February 1997 on 'Exclusive Rights for TV Broadcasting of Major (Sports) Events. Available at URL http://www.europa.eu.int/en/record/other/tvbroad.htm or via the Document Delivery Service of the Observatory.

(Marina Benassi,
Institute for Information Law of the University of Amsterdam)

National

CASE LAW

AUSTRIA: Judgment by the Constitutional Court repealing the ban on advertising for cable television

On 08.10.1996 the Austrian Constitutional Court (VfGH) repealed the previous total ban on advertising for cable television companies, based on Section 24, paragraph 2 of the Broadcasting Regulation.
The judgment enables cable operators in Austria - some 270 in all - to accept advertising slots in their programmes from now on. The corresponding conditions were repealed by the VfGH on the grounds of being contrary to the Constitution, as the total ban on advertising constituted an extremely serious infringement of the freedom of expression of opinion and the freedom to exercise an economic activity. The explanatory reasons for the judgment state that a decision of any other tenor could have led to proceedings before the European Court of Human Rights.
The VfGH reached this conclusion further to a complaint by 17 cable operators, following the repeal by the VfGH at the end of September 1995 of the conditions contained in the Austrian Broadcasting Regulation prohibiting private active cable broadcasting (*see* IRIS 1996-6: 8 and IRIS 1995-8: 8).
The VfGH judgment also instructed the legislator to create new basic legislation for cable television broadcasting by 31 July 1996, but even if the legislator produced nothing by the deadline, active cable television broadcasting in Austria would still be possible after 01 August 1996, although in the interim it would not be able to include advertising.
In the opinion of the VfGH, the reasons justifying the advertising ban only applied to a transitional period and since 01.08.1996 have now become contrary to the Constitution.

Judgment of the Austrian Constitutional Court on 08.10.1996 in cases G 93/96-9 to G 100/96-9 and 230/96-6 to 238/96-6. Available in German via the Document Delivery Service of the Observatory.

(Andrea Schneider,
Institut für Europäisches Medienrecht - EMR)

IRIS LEGAL OBSERVATIONS
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GERMANY: Federal Constitutional Court decision on media concentration

On 18 December 1996, the Federal Constitutional Court rejected several constitutional appeals by the Berlin-Brandenburg Media Authority (*Medienanstalt Berlin-Brandenburg* - MABB) as inadmissible. The appeals referred to legal disputes concerning the licensing of the German Sports Television Channel (*Deutsches Sportfernsehen* - DSF), which is part of the Kirch group. Although several *Land* media authorities had suggested that licensing DSF might be incompatible with the ban on concentrations contained in the 1991 Agreement on Broadcasting between the Federal States in United Germany, the Bavarian Regional Office for New Media (*Bayerische Landeszentrale für neue Medien* - BLM) had issued the licence. The MABB applied to the administrative courts (*see* IRIS 1995-8: 10) and the Bavarian Constitutional Court to set this decision aside. Appeal proceedings in the Federal Administrative Court are still pending. The constitutional appeals were directed against decisions in which the Bavarian Constitutional Court had deferred or anulled the suspensive effect (confirmed by the administrative courts) of the application brought by the MABB against the decision of the BLM to license the DSF.
In its constitutional appeals, the applicant claimed that basic rights under Article 5, para. 1, sentence 2, Article 19, para. 4, and Article 101, para. 1, sentence 2 of the Basic Law (the Federal Constitution) had been violated. It argued that the Bavarian Constitutional Court had used Article 111 a of the Bavarian Constitution to reduce the basic right enshrined in Section 5, para. 1, sentence 2 of the Basic Law to a subjective organisational freedom for the BLM. This had the effect of consolidating undesirable developments concerning concentrations in the private broadcasting sector, while making it impossible for the applicant to take court action to rectify them. This undermined the fundamental conditions laid down by the Basic Law for the licensing of private broadcasters.
The Federal Constitutional Court rejected the constitutional appeals on formal grounds. It found that legal remedies had not been exhausted, since the applicant was still free to apply, using the urgent procedure, for judicial protection to the Federal Administrative Court, before which the main proceedings were pending.
It is true that the Federal Constitutional Court's decision says nothing on the main issue, but it does give the Federal Administrative Court some clear indications. It states that an urgent application of this kind is by no means hopeless, and refers to its own case-law, which has never in the past left any doubt that plurality of opinion in broadcasting is important for the formation of individual and collective opinion, and thus for the development of personality and the maintenance of democratic order (BverfGE 12, 205; 57, 295; 73, 118; 83 238). In the present decision, too, it says that compliance with the rule on protecting plurality of opinion is "imperative", and adds that recent developments have in no way reduced that rule's importance. Among such developments, it speaks of the trend towards horizontal integration of the television market, and vertical integration of broadcasting bodies, production firms and the owners of film and sports transmission rights, and also towards the privatisation of transmission facilities. Finally, in its reasons, it explains that compliance with this rule is important because, once things have gone wrong in this sphere, the influence which this gives certain parties - and which can also be exerted politically - makes it very hard to put them right.

Federal Constitutional Court, decision of 18 December 1996, -1 BvR 748/93-, -1 BVR 616/95-, -1 BvR 1228/95-. Available in German via the Document Delivery Service of the Observatory.

(Valentina Becker
Institut für Europäisches Medienrecht - EMR)

GERMANY: What makes a cable operator? Bavarian court decides

The applicant operates several broad band cable facilities in Bavaria, using them to relay radio and television programmes received on his personal satellite installation to connected, fee-paying households. On 23 May 1996, he lodged a complaint against the notification requirement embodied in Section 38 I of the Bavarian Media Act and the requirement, embodied in Section 38 II of the Act, that contracts on the retransmission of satellite programmes be concluded with two media operating companies responsible in this area. He argued that he was not an operator within the meaning of Section 38 I of the Act, since clients decided which programmes they wanted to receive. He also argued that the ten- household threshold, above which notification was required, violated basic rights.
In its decision of 9 September 1996, the Bavarian Administrative Court found that the applicant was a cable operator within the meaning of Section 38 I of the Bavarian Media Act, even if he described himself as "a sound and television reception and distribution service renter" to clients and concluded rental contracts with them on that basis. It argued that, as the owner and renter of his cable facilities, he had free disposal over them. It was true that his clients decided how much of the service they wanted to take, but they could take only what he offered them. The applicant decided, on the basis of his reception facilities, which programmes would be offered, and this made him an operator within the meaning of Section 38 I of the Act.
The requirement that retransmission to ten or more households be notified, laid down in Section 38 II of the Act, was lawful and did not violate either Articles 5 and 12 or Article 3 I of the Basic Law. The Bavarian Regional Office for New Media had public responsibilities which obliged it to discharge its duties (Section 2 I of the Act) concerning the operation of private cable services, particularly by ensuring that the principles enshrined in Sections 40 and 41 of the Act were respected. It could do this only if cable network operators fully respected the notification requirement of Section 38 I of the Act. The principle of equality was not violated, since small service operators were treated in the same way as the owners of personal satellite reception facilities. Nor was the principle of equality violated by the fact that the rule applied only to satellite reception facilities, since other retransmission systems were of little account and could thus be ignored by the legislator.

Bavarian Administrative Court, decision of 9 September 1996, 7 CS 96.1818. Available in German via the Document Delivery Service of the Observatory.

(Katrin Drumm
Institut für Europäisches Medienrecht - EMR)

GERMANY: Judgment by the Bavarian Administrative Court on illegal levying of a participation fee

On 09.01.1997 the Bavarian Administrative Court delivered a second-court judgment against the the Bavarian Regional Office for New Media (*Bayerische Landeszentrale für neue Medien* - BLM) setting aside its judgment on the basis of the Bavarian Media Act (BayMG) on 26.05.1994 and the corresponding appeal judgment.
This also amended the judgment of 16.10.1995 by the Administrative Court in Würzburg.
A private cable operator, the *überlandwerk Unterfranken AG*, had complained that it had been obliged by the BLM to conclude an agreement with the media operating company according to which the latter could demand a participation fee. The legal foundation for this is Article 38, paragraph 2 of the BayMG, according to which private cable installation operators must conclude an agreement with the appropriate media operating company for the purchase of specific programmes. On the basis of Article 38, paragraph 3(1) of the BayMG, a participation fee is then charged, which the installation operator in turn demands from its participants. The fee is intended as payment for the wider potential use of private broadcasting out of Bavaria and other private broadcasting channels compared with terrestrial reception.
In its judgment the Administrative Court raised considerable doubts as to the constitutionality of the participation fee. This could be treated as a special form of licence fee, as fee-payers were owners of a cable connection and were charged regardless of actual use. According to the legal interpretation of the Federal Constitutional Court, licence fees are legally justified only for ensuring the maintenance and working order of public broadcasting in order to provide the population with a basic service.
In the opinion of the Administrative Court these provisions under constitutional law cannot be automatically applied to the participation fee.
Suspension of the decision in question was however upheld by a further consideration - infringement of the fundamental right of equality.
Article 38, paragraph 3 of the BayMG could be interpreted directly and restrictively according to the purpose and in view of the participation fee to mean that such a fee could only be charged to operators also able to re-broadcast regional or local programmes which can only be transmitted by cable or terrestrially (but not, however, by satellite). The participation fee imposes an additional public service duty on participants which can only be justified by an increased potential for use. Participants who are connected to the complainant cable installation company do not have any more potential than participants who have an individual reception installation, as regional and local broadcasts cannot be retransmitted via the complainant. Such programmes can only be retransmitted by installations which are connected to *Deutsche Telekom's* broad-band cable network.
The court held that the unequal treatment resulting from this situation of participants with an individual satellite reception installation and those connected to a private cable installation was in no way justified. It was also irrelevant that the participation fee was for the time being levied by the operators, as these were in the end required to refund their participants.

Judgment of the Bavarian Administrative Court of 9.1.1997, Az. 7B 95.4230. Available in German via the Document Delivery Service of the Observatory.

(Mareike Steighörst,
Institut für Europäisches Medienrecht - EMR)

FRANCE:
Appeal Court rejects TF1's demand to declare the acquisition of NETHOLD BV by CANAL PLUS illegal

On 29 January 1997, the Paris Appeal Court (*Cour d'appel de Paris*) rendered judgement in a case involving the French private broadcasters TF1 and Canal Plus.
Canal Plus is in the process of taking over NETHOLD BV. NETHOLD BV exploits a number of thematic television channels. Amongst those are a number of channels which are totally dedicated to sports events: Supersport Belgium, Supersport The Netherlands, Nordic Supersport (for Denmark, Finland, Norway and Sweden) and Télépiù 2.
TF1, on the one hand, is involved in the EUROSPORT consortium, which operates a transnational sports channel by the name of EUROSPORT. Canal Plus, on the other hand, participates in a competitive sports channel, called SCREENSPORT.
In 1993 TF1, Canal Plus and other interested parties agreed that their sports channels would no longer compete, but that they would make a joint effort to develop the EUROSPORT channel. The agreement prohibits the parties, *inter alia*, to acquire an interest in any competitive television service which fills more than 75% of its broadcasting time with sports programmes.
In the present case, TF1 felt that the attempts by Canal Plus to acquire NETHOLD BV was a breach of this non-competition agreement. Canal Plus reacted by stating, *inter alia*, that the intention behind the non-competition clause was to facilitate the collaboration between SCREENSPORT and EUROSPORT with the sole objective of protecting EUROSPORT. According to Canal Plus, it was not the intention to avoid competition with TF1. The interpretation given to the non-competition clause by TF1 would be contrary to EC competition law, notably Article 85 of the EC Treaty (prohibition of cartel agreements and concerted practices).
TF1 of its part, reckoned that the European Commission had agreed to exempt the non-competition clause from the application of Article 85 EC. This was confirmed by the Court of Appeal. Although the European Commission did not yet adopt a formal decision in the matter, it had clearly indicated on several occasions, that it intended to do so.
Furthermore, the Court came to the conclusion that Canal Plus did act in breach of the clear and precise terms of the non-competition agreement. TF1 demanded that the Court of Appeal would immediately suspend all operations which had been undertaken in relation to the acquisition of NETHOLD BV by Canal Plus.
The Court, however, realised the severe consequences for NETHOLD BV and its shareholders (who are not a party in the conflict that opposes Canal Plus and TF1) if it would decide to declare all transactions that had taken place in relation to the acquisition of NETHOLD BV by Canal Plus illegal. The objective of such a decision would be to make Canal Plus respect its obligations *vis à vis* TF1, an objective which the Court deemed not to be proportionate to the consequences that would result from such a decision. Therefore, the Court rejected the measures demanded by TF1.

Paris Appeal Court, First Chamber, Section A, Decision of 29 January 1997 in the Case of TF1 and CANAL PLUS. Available in French via the Document Delivery Service of the Observatory.

(Ad van Loon.
European Audiovisual Observatory)

BELGIUM: Who owns the electronic rights?

Electronic rights are the rights needed to exploit a copyrighted work in a digital environment. In the Copyright Acts of several EU Member States, the author of a work is protected against a too broad transfer of rights. The consequence of this is that there can be uncertainty about who owns the electronic rights if earlier copyrights are granted. Are the rights on future forms of exploitation, like the electronic exploitation, included in the grant of rights? A Belgium court decided in such a matter.
In Belgium newspaper publishers started an on-line service called 'Central Station' in which they offered articles to the public which had been published in their papers. The journalists felt the publishers owed them a renumeration for this (re-)use of their works.
Under the old Belgium Copyright Act (replaced in 1994) a work-for-hire doctrine did not exist. Though employers could obtain rights implicitly. The employment contracts with the journalists involved were made before 1994, so on these the old Copyright Act was applicable. Belgium case law learns an implicit transfer of rights has to be interpreted strictly and in favor of the author of a work. The employer therefore only obtains those rights which he needs for the normal activities of his enterprise (*activité normal de l'entreprise*). Consequently the judges had to determine whether the on-line distribution of articles is a normal activity of a newspaper publisher.
They decided it is not. Because (i) the articles had to be adapted to be used on-line, (ii) they were being offered to a larger, more international and different public and (iii) because of the way users of the service could access the articles, namely by stating a well defined subject, while in a newspaper the articles are a placed according to broadly stated social phenomena (like sports or economics). Moreover: The on-line service was not meant to replace the old-fashioned newspaper, but aimed at a new target group. So the journalists were judged to be the owners of the rights for on-line exploitation of their articles and 'Central Station' was shut down.

Tribunal de Premiere Instance de Bruxelles, 16 October 1996, Number 96/6601/A. Available in French via the Document Delivery Service of the Observatory.

(Kamiel Koelman,
Institute for Information Law at the University of Amsterdam)

NETHERLANDS ANTILLES: Broadcast monopoly does not violate Article 10 ECHR

On 15 November 1996, the Dutch Supreme Court (*Hoge Raad*), the competent court of cassation for the Netherlands Antilles, ruled that the existence of a broadcast monopoly on the Netherlands Antilles is not (yet) in violation with the rights guaranteed in paragraph 1 of Article 10 of European Convention on Human Rights.
At the Netherlands Antilles, a relatively small group of Caribbean Islands and an autonomous part of the Kingdom of the Netherlands, the stated-owned company ATM has an exclusive right to exploit a nationwide cable system. TDS, a subsidiary of ATM, holds a similar license for a pay-per-view system. Both licenses are granted for a period of 10 years. In 1994 Multivision filed an application for a license to exploit a second pay-per-view system by satellite, intended to relay foreign programmes alternated with local Antillean programs. Since TDS has been granted an exclusive right till 2001, the Governor of the Netherlands Antilles rejected the application.
Both the Court of Law and the Court of Appeal of the Netherlands Antilles dismissed Multivision's complaint on the refusal. Multivision therefore lodged an appeal against these decisions with the court of cassation, the Dutch Supreme Court.
In all cases Multivision appealed to Article 10 ECHR and especially referred to the European Court of Human Rights judgement in the *Lentia* case in which the Austrian public broadcast monopoly has deemed disproportionate. In the wake of that decision the Netherlands Supreme Court ruled that the restriction of the freedom of expression, by granting monopolistic broadcast rights -although bound to a time limit- is only allowed when there is a pressing need. Contracting States however, enjoy a margin of appreciation in assessing the need for such an interference. Interesting part of this decision is the conclusion of the Supreme Court that as a result of this margin of appreciation, normally referring to the contracting states, the national Courts itself have to be reticent with respect to the policy choices of the national administration. As a result, the Supreme Court as well as the Antillian Court of Appeal feel, without further investigation, obliged to respect the State's statement that it is financially and economically impossible to exploit a nation-wide pay-television system if at the same time a second license would be granted. The Supreme Court accepted the period of 10 years, in which period TDS will be able to recover its initial costs and fulfil its obligation to build and provide a public nation-wide pay-per-view system, as being reasonable. The granting of more licenses within this time could result in a ruinous competition between the operators, which would not be in the consumer's interest. Under these circumstances a proportionality exits between the infringement of article 10 ECHR and the protected interest, namely the prevention of disorder (i.c. ruinous competition between providers of pay television) and the protection of right of others (i.c. TDS). Therefore, the refusal was justifiable in principle and proportionate.
Notably, this case has been settled in a summary proceeding, resulting in a limited judicial review. In its verdict, the Antillian Court of Appeal noted that in a normal procedure the result could be different, especially because in this procedure Multivision did not adduced enough arguments to refute the State's assertion that it is financially and economically impossible at the Netherlands Antilles to exploit a second license before the exclusive right of TDS expires.

Hoge Raad 15 november 1996, *Multivision* vs. *De Nederlandse Antillen.* Available in Dutch via the Document Delivery Service of the Observatory.

(Patrick Burger,
Institute for Information Law at the University of Amsterdam)

NETHERLANDS: No Trade Mark protection for EURO 7'S "7"

The Amsterdam Court of Appeal has refused to grant trademark protection to the "Euro 7" trade mark used by the Dutch cable channel of the same name. According to Euro 7 the use of the number "7" by newcomer "Sport 7", a Dutch sports channel, caused confusion in the television market place and thus amounted to trademark infringement. Both the President of the Amsterdam District Court, judging in first instance, and the Court of Appeal rejected Euro 7's claim. The use of a channel number as part of a television station's name was considered standard practice. Moreover, the Court of Appeal observed, it is not uncommon that different stations carry the same channel numbers (e.g. TV5 and AT5). Comparing both trademarks concerned (Euro7 and Sport7) in their entirety, the Court did not find sufficient similarity. Thus, trade mark protection was denied.

President of the District Court of Amsterdam, 9 May 1996, Mediaforum 1996-6, B95-96; Court of Appeal Amsterdam, 24 October 1996, Mediaforum 1996-11/12, B145. Available in Dutch via the Document Delivery Service of the Observatory.

(Bernt Hughenholtz,
Institute for Information Law at the University of Amsterdam/
STIBBE SIMONT MONAHAN DUHOT, Attorneys at Law)

USA: District Court upholds legislation designed to protect children from sexually explicit adult cable programming

A U.S. federal district court has rejected a request for a preliminary injunction and upheld the constitutionality of section 505 of the Communications Decency Act of 1996 ("CDA"), enacted 8 February 1996 (*see* IRIS 1996-3: 7-10), as Title V of the comprehensive Telecommunications Act of 1996. The purpose of section 505 of the CDA was to prevent children from viewing sexually explicit adult programming ("adult programming") through "signal bleed", the incomplete scrambling of the video or audio portion of a program. The CDA requires cable operators to either fully scramble both the video and audio portions of adult programming or restrict transmission of such programming to times that children are less likely to see it (a practice known as "time channeling"). In a previous rulemaking, the Federal Communication Commission ("FCC") has established the period between 10 p.m. and 6 a.m. as a "safe harbor" when children are less likely to view the material.

The plaintiffs, Playboy Entertainment Group, Inc. and Graff-Pay-Per-View Inc. are content providers that distribute adult programming over "premium" and "pay-per-view" cable channels. (Premium channels are those which a subscriber pays an additional monthly charge to receive on top of basic cable service, while pay-per-view channels are unscrambled only for the length of an individual pre-ordered program.) The plaintiffs requested a judgment enjoining the enforcement of section 505 of the CDA based on the assertion that enforcement of the CDA violated their First and Fourteenth Amendment rights and would cause the plaintiffs irreparable financial harm. The plaintiffs argued that customers would be less likely to order the programming provided by the plaintiff if cable operators chose to time channel the plaintiffs programming in order to avoid costly scrambling techniques. In *Playboy v. United States*, decided 8 November 1996, the court found that the plaintiffs failed to meet their burden of proof of financial harm since the evidence demonstrated that most pay-per-view orders involved programming shown around the "safe harbor" hours.

The plaintiffs claimed that the CDA violated their First Amendment rights because it did not meet the U.S. judicial precedent for content-based regulation -- that such legislation addresses a "compelling interest" through means "narrowly tailored" for that purpose. The court had little trouble finding that keeping adult programming from children was a substantial government purpose. And despite evidence that many scrambling techniques were prohibitively expensive to many cable operators, the court found that section 505 was a permissible limitation on constitutionally protected speech because all cable programmers had the option of using time channeling. Since most orders for adult programming occurred during the "safe harbor" hours, the court found that the CDA had been properly designed to keep adult materials away from children while still allowing adults to view constitutionally protected speech.

The plaintiffs also claimed that the CDA violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution as it required scrambling of channels dedicated solely to adult programming, but not in cases were sexually explicit scenes made up only a small part of the programming on a particular channel. The court noted that the cause of secondary effects that the CDA was designed to prevent were primarily traced to the sex-dedicated networks, thus making it reasonable for Congress to focus on those networks in enacting section 505 of the CDA. Finally, the court rejected the assertions that the CDA contained constitutionally vague terminology in regulating "indecent" programming. The court noted that U.S. case law, including precedent cited explicitly in the CDA itself, had clearly established the boundaries of "indecent" materials.

United States District Court for the District of Delaware, Playboy v. U.S., 8 November 1996, 945 F. Supp. 772 (1996). Available in English via the Document Delivery Service of the Observatory.

(Fredrik Cederqvist, Esq.
Communications Media Center, New York Law School)

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

LEGISLATION

SPAIN: Government issues Decree on digital television

On 2 February 1997 the Spanish Government issued a Decree on the outline conditions for marketing digital television programmes. The Decree came into force on publication, although it had yet to be approved by the Spanish Parliament.
An important feature of the Decree is the regulation according to which a single decoder must be able to receive more than one channel. In this respect the Spanish Government considers the Decree as the transposition into domestic law of Directive 95/47/EC of the European Parliament and the Council of 24 October 1995 on the application of standards for the transmission of television signals (*see* IRIS 1996-2: 5). The first to be affected by the new regulation could be the sole Spanish digital television broadcaster, *Canal Satelite Digital* (CSD), which provides its subscribers with a specially-produced decoder. The Government holds that this does not comply with the relevant European provisions, as it is not technically possible to receive signals from more than one channel.
The new legal regulation also requires pay-TV companies to register with the Telecommunications Market Commission, a public authority. This commission will have extensive powers; it will be responsible for checking that the decoders available comply with the conditions of the Decree. It will also have a supervisory function in the field of pay-TV as regards monopoly law. Where a company has a market-controlling position, the commission will be able to bring its influence to bear on the subscription charges.
In addition, the Decree increases VAT on the charges for pay-TV from 7% to 16%, the tax rate for luxury goods.

Real Decreto-ley 1/97 de 31 enero 1997 por el que incorpora al Derecho español la Directiva 95/47/CE de 24 octubre de la Comisión Europea, sobre el uso de normas para la transmisión de señales de televisión y se aprueban medidas adicionales para la liberalización del sector. Available in Spanish via the Docuyment Delivery Service of the Observatory.

(Wolfgang Cloß,
Institut für Europäisches Medienrecht - EMR)

LAW RELATED POLICY DEVELOPMENTS

UK: ITC draft code of conduct on electronic programme guides

The Independent Television Commission (ITC) has issued a draft code of conduct on licensing (analogue and digital) Electronic Programme Guides (EPG), for which the consultation period ran until 7 February 1997. In broad terms, an EPG service has two main functions. It allows a broadcaster to promote and provide information about his programme or additional services and to market and package them in manner which is likely to be more convenient for viewers. It is also seen as the only manageable way to select a programme in the near future with the expansion of the number of television services through digital transmission. Oftel, who will also regulate EPGs insofar as they relate to the use of the conditional access system (CAS), already expressed in its consultative document on CAS (*see* IRIS 1997-1:15) that "a single EPG under the control of an organisation linked to a broadcaster could potentially have powerful anti-competitive effects" (Section 21). Section 2(2) of the Broadcasting Act 1990 requires the ITC to discharge its functions in the manner which it considers is best calculated to ensure that a wide range of services is available throughout the UK and to ensure fair and effective competition in the provision of licensed services and services connected to them. The purpose of this Code is to ensure this statutory duty of the ITC in relation with EPG services. In most cases the provision of a EPG service will require a television programme service, a digital additional services or an additional services license from the ITC or is considered as a connected service, when it carries information about programme services which are themselves licensed by the ITC. The ITC also considers it appropriate to ensure that the access for broadcasters to EPG services and, through EPGs, viewers' access to television programme and additional services facilitates the provision of a wide range of such services.

Draft ITC Code of Conduct on Electronic Programme Guides. London: ITC, January 1997. (ITC, Tel. +44 1962 848675, Fax. +44 1962 848603).

(Stefaan Verhulst
School of Law, University of Glasgow)

GERMANY: Bill on Information and Communication Services in legislative procedure

A decision of 11 December 1996 by the Federal Cabinet has sent a Bill regulating the framework conditions for information and communication services (IuKDG) on to the Federal Council for its opinion. As reported in IRIS 1996-6:5 and IRIS 1996-8 (September issue):5, the proposed legislation takes the form of a number of framework regulations and is intended, in conjunction with the National Media Services Agreement to be elaborated by the *Länder*, to lay down the legal framework for the multimedia field. The draft being submitted now to the Federal Council is only slightly different from the original November 1996 draft, mainly as regards the copyright law aspects. Thus a section has been added on the protection of producers of databases under which investments in creation and development would be protected for a period of fifteen years, and the proposed amendment to the Act protecting distance education has been dropped.

Decision by the Federal Cabinet on 11 December 1996: draft legislation regulating the framework conditions for information and communication services (IuKDG); Federal Council document (BR-Drs 966/96). Available in German via the Document Delivery Service of the Observatory.

(Wolfgang Cloß,
Institut für Europäisches Medienrecht - EMR)

NETHERLANDS: Guidelines on television and youth

The Dutch Media Authority (*Commissariaat voor de Media*) has published new guidelines on the subject of television and youth (*Beleidslijn televisie en jeugd*). The guideline in particular clarifies the existing rules on scheduling films for television and gives additional rules on this topic. It also clarifies the supervisory role of the Media Authority.
According to article 22 of the EC Directive on 'Television without frontiers', Member States have to take appropriate measures against programmes which might be harmful to the youth. The Dutch Media Act doesn't allow the broadcast of films which aren't suitable for children before 20.00 h or 21.00 h, depending on the classification of the film.
In its guideline, the Media Authority states that in principle the rules on the broadcasting of films also applies to clips of those films. Adapted tv-versions of films also need to pass the classification tests again, because of the possible difference between the cinema and tv-version. The Media Authority underlines that non-classified films en programmes have to respect the same rules.
Furthermore, the broadcasters have to inform the audience in a clear way about the classifications of films. This has to be done at the beginning of the film. Also, as a consequence of the guideline, the broadcasters have agreed to publishes the classification of films in their TV guides.
The Media Authority will evaluate the new guideline and doesn't rule out the possibility that it will review its supervisory rules. It also might seek further improvements of the regulatory framework as laid down in the Media Act.

Guideline Television and Youth (Beleidslijn televisie en jeugd), *Commissariaat voor de Media* (Media Authority), 17 December 1996, Staatscourant 1996, No 249: 44.

(Nico van Eijk,
Institute for Information Law at the University of Amsterdam)

NETHERLANDS: Access to cable update

In addition to the decisions summarized in IRIS 1997-1: 13), the Dutch Media Authority *(Commissariaat voor de Media)* has made three other rulings in disputes over access to cable networks. With regard to the complaint of MTV, in which case the Authority made an interim decision on 30 July 1996 (*see* IRIS 1996-8 (September issue): 14), the Authority made a final ruling on 20 December 1996 which is similar to the rulings regarding NetHold and Arcade. Because the cable distributor (in the case of MTV *Stichting CombiVisie Regio*) refused to submit data that would enable the Authority to verify whether the requested distribution fee is reasonable and fair, the Authority set the distribution fee on zero. The Media Authority was barred from demanding information from cable distributors by the President of the District Court of Den Bosch (ruling of 2 October 1996; *see* IRIS 1996-10: 19), who ruled that the Media Authority only has the supervisory power to decide whether and how a complainant should be admitted to a certain cable network (in the USA referred to as 'cable system') and is *not* entitled to request data from a cable operator. The zero rate is set for the period until 1 April 1997. This date was chosen because the Minister of Economic Affairs decided on 17 December 1996 that *Kabeltelevisie Amsterdam* (KTA), the distributor of the programmes of NetHold and Arcade, must review its tariff structure within three months, *i.e.* before 1 April 1997. Although those ministerial decisions did not apply to the distributor of MTV *(Stichting CombiVisie Regio)*, the Media Authority decided nevertheless to let the 'free distribution' expire on that date. The Media Authority made an identical decision regarding the complaint of the Dutch association of commercial radio stations (NVCR) and 11 commercial radio stations; a distribution fee of zero until 1 April 1997. This complaint and subsequent ruling are directed agaist KTA, who is forced by the Minister's ruling to revise its tariff structure before 1 April 1997. The third ruling of the Authority regarded the complaint of *Wegener Kabel TV* against the cable network of the municipality of Veendam *(Stichting Kabelnet Veendam)*. Here the Media Authority ruled that the distribution of Wegener's cable information service may not be discontinued after 1 January 1997. Decisive factors were that sufficient distribution capacity is available and that the grounds for discontinuation - the wish for a higher distribution fee - are not objective and reasonable.
On 10 January 1997, the *Commissariaat voor de Media* presented an evaluation of its rulings regarding access to cable. The report recommends to continue the Authority's supervisory power after 1 January 1998. On departemental level plans are being developed to establish a new regulatory authority to supervise competition issues like access to cable networks (*i.e.* cable systems).

Beschikkingen Commissariaat voor de Media (Decisions by the Media Authority) of 20 December 1996 in the cases of *MTV Europe vs. Stichting CombiVisie Regio, NVCR c.s. vs. KTA and Wegener Kabel TV vs. Stichting Kabelnet Veendam. 'Het Commissariaat voor de Media en de toegang tot de kabel - Artikel 69 van de Mediawet in de praktijk',* 10 January 1997.
Available in Dutch via the Document Delivery Service of the Observatory.

(Marcel Dellebeke,
Institute for Information Law, University of Amsterdam,
BOEKEL DE NERÉE, Attorneys at Law, Amsterdam)

UKRAINE: Regulation on using broadcasting channels

On 8 May 1996 the Ukrainian National Committee for Broadcasting Matters (NC) adopted a temporary regulation on the procedure of using broadcasting channels in cable and air-cable broadcasting systems based on the Ukrainian Broadcasting Act of 21.12.1993 as amended on 02.06.1995 (*see* IRIS 1996-6:10 and IRIS 1995-10:10). Under this temporary regulation, the aim of which is to promote the development and distribution of programmes and organise the reception of subscription television, cable television companies using broadcasting channels will require a licence. On the basis of bilateral agreements, cable networks (in the USA referred to as 'cable systems' will be permitted to retransmit broadcasts received by satellite if these are included on a special list of programmes which may be broadcast by cable. The list - to be drawn up by the NC in collaboration with the Ministries of Foreign Affairs and Culture - should also set out the ranking of input. Allocation of a licence will be subject to applicants meeting specific conditions, including agreement on the part of the network (*i.e.* system) the event of a number of potential operators applying in respect of the same area, a decision will be made on the basis of tendering for the allocation. Lastly, the regulation also contains rules on the ratio of Ukrainian works to total broadcasting time and the retransmission of satellite programmes containing advertising.

Temporary Regulation on the Procedure of Using Broadcasting Channels in Cable and Air-Cable Broadcasting Systems of 8 May 1996. Now available in English via the Document Delivery Service of the Observatory.

(Alexander Scheuer,
Institut für Europäisches Medienrecht - EMR)

News

Information on law related policy developments which may have legal consequences but of which no documents or other texts are available yet.

SWEDEN: Renewed license for terrestial broadcaster TV4 in Sweden

TV4, the only terrestrial private commercial TV channel in Sweden and the Swedish Government agreed on a new broadcasting licence which took effect on 1 January 1997. The new licence is formulated as a permission to broadcast rather than an agreement between two equal parties as was the case before.
The changes in substance as compared to the previous licence agreement are as follows:
- The previous detailed quotas on programming have been abolished. The quotas have been replaced by less detailed obligations, such as the obligation to widen TV4's responsibility for the promotion of Swedish culture.
TV4 will no longer be obliged to maintain the present 16, often loss making, editorial offices and staff on different locations in the country, but its programming is not to be dominated by Stockholm views and events, the place where TV4 is mainly established. Its programming is to continue to present the views and events of other places in the country.
In addition, the news and current affairs programmes are to present the different views and interests, for example, in the fields of religion and science. The only quota rule which remains is the obligation to broadcast at least five hours of children's programmes. At least half of these have to be produced originally in Swedish or any other Nordic language. The change regarding to this quota rule is that a programme originally produced for more than 50% in the Swedish language is eligible to be considered as a Swedish programme.
- The obligation of presenting a variety of programming of high quality recognises the fact that TV4 is a private commercial company. The programming of TV4 will no longer be compared to the programming of Sweden's public television broadcasting service which is financed by means of a licence fee and different other funds.
- Ownership control of TV4 will be less strict under the new licence. The new licence stipulates that ownership and influence in TV4 must not substantialy change to the extent that concentration of ownership in the Swedish media sector increases.
The license will be made available in Swedish at the Observatory upon publication of the official version, which will be announced in IRIS.

(Helene Hillerström,
TV4)

UK: Government sets BBC License fee formula for the next five years

The UK Government has now announced details of the formula for increases over the next five years in the licence fee which funds the BBC. The fee is payable annually by all users of television sets, irrespective of viewing habits, and permits the BBC to be free of the commercial pressures of advertising as no advertisements are carried on its services. The current figure for a colour television licence is £89.50 per year.
In order to minimise governmental pressure which could occur if the funding were renegotiated each year, the new formula is linked to the annual inflation rate, determined by the change in the Retail Price Index (RPI). The formula is as follows:

Year One	(1997-8)	RPI
Year Two	(1998-9)	RPI plus 3%
Year Three	(1999-2000)	RPI plus 0.5%
Year Four	(2000-2001)	RPI minus 1%
Year Five	(2001-2002)	RPI minus 2.5%

The higher figures in earlier years reflect the need for expenditure on new digital services, whilst the lower later figures are affected by proceeds from the sale of the BBC's transmitters and planned increases in efficiency savings and commercial income.

See Department of National Heritage Press ReleaseDNH 408/96. Available at URL http://www.worldserver.pipex.com/coi/depts/GHE/coi5214c.ok or via the Document Delivery Service of the Observatory.

(Prof. Tony Prosser,
School of Law, University of Glasgow)

GERMANY: Broadcasting time for "independent third parties"

The entry into force on 1 January 1997 of the Agreement on Broadcasting between the Federal States in United Germany in the form of its third amendment dated 26 August - 11 September 1996 (RfStV) introduces rules in the Federal Republic's broadcasting regulations which use various instruments in order to protect diversity of opinion in private broadcasting (*see also* IRIS 1996-8 (September issue): 12).
Included in this complex of standards is a measure to ensure diversity (Section 30, no.1 in conjunction with Section 31 of the RfStV) by allowing broadcasting time to third parties which are independent of the main programme organiser. According to Section 31, paragraphs 1 and 3 of the RfStV the presentation of television programmes (cf. Section 25, paragraph 4(1) of the RfStV) must be editorially independent of the main programme; the supplier of the window may not be legally dependent on the main programme organiser. It us now disputed whether the ancillary supplier of a programme broadcast by the window organiser must also be legally independent of the main television organiser as stipulated in the legislation.
The debate arises mainly in respect of programmes broadcast by the DCTP (Development Company for Television Programs) via the private broadcaster RTL. As these magazine programmes are produced by major German publishing houses which, either directly or through their parent companies, are at least part-owned by the broadcaster or the DCTP, it is questionable whether these programmes are in fact produced by an independent party. In this context the merger of CLT and UFA in mid-January should perhaps also be looked into. CLT-UFA is an undertaking covering some 20 radio and television stations throughout Europe, including RTL. Moreover, UFA's parent company Bertelsmann, via its subsidiary publishing house *Gruner & Jahr*, owns one of the television magazines and has a minority holding in *Spiegel*, which in turn part-owns DCTP.
The matter is settled by the regulations contained in the RfStV on the attribution of programmes (Section 31, paragraph 3 in conjunction with Section 28 of the RfStV). This covers very different forms of participation which may be established by applying the principles of company law, taxation law and commercial law.
The Conference of Directors of Regional Media Authorities (*Direktorenkonferenz der Landesmedienanstalten* - DLM) has now drawn up a guideline on the interpretation of these conditions according to which ancillary suppliers must also be independent of the companies. Because this interpretation is not shared by all the regional media institutions, whose supervisory boards have still to approve the proposed guideline, final clarification of the problem is still awaited.

(Alexander Scheuer,
Institut für Europäisches Medienrecht - EMR)

NETHERLANDS: Proposal for only one public broadcaster after the year 2000

On 8 November 1996 the Dutch Government approved a proposal to grant after the year 2000, only one broadcasting licence for all the broadcasters broadcasting at present in the public broadcasting system of the Netherlands.
At the moment, the different broadcasters in the public broadcasting system have a licence for five years which will expire in 2000. The proposal of the Dutch Under-Secretary of State for Culture is a reaction to the recommendations on the future of the public broadcasting system made in June of this year by the *Commissie Ververs* (*see* IRIS 1996-7: 11).
The Government underlines the Commission's conclusion that a radical transformation of the public broadcasting system is essential for its survival. Contrary to the Commission's proposal, the Government chooses to create one strong public broadcaster, in which the different broadcasters will have to cooperate, and whose programmes are aimed at a broad public.
The Government plans to achieve the reorganisation of the public broadcasting system in two steps. The first part of the amendment to the Media Act *(Mediawet)*, which aims at restructuring the management system of the broadcasters in the public broadcasting system, has already been sent to the State Council *(Raad van State)* for evaluation and is planned to take effect in the course of 1997. The second stage - the introduction of one licence - is to be enacted before the year 2000. The exact substance of this amendment and its consequences are vague at the moment, but will be worked out by the Ministy of Culture in the near future. The Government also intends to give the public more influence on the programming. How this will be achieved is as yet uncertain, but `broadcaster elections' (suggested by the *Commissie Ververs*) are deemed to have possible negative effects on the cooperation between the public broadcasters. Other possible forms of consultation will therefore be taken into consideration as well.
Also part of the Government's plans are measures to improve the efficiency of the broadcasters to secure the financing of the public broadcasting system in the year 2000.
The text of the legislative proposal (first stage) is not available yet, since it is with the State Council for consultation. As soon as the proposal is made public, it will be announced in IRIS and made available at the Observatory.

(Marcel Dellebeke,
Institute for Information Law at the University of Amsterdam,
BOEKEL DE NEREE, Attorneys at Law, Amsterdam)

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

NORWAY: Developments in local broadcasting

Local TV

In January 1996 the Mass Media authority (*Statens Medieforvaltning*) handed out 30 seven-year licenses for local public service TV. There is one license holder for local TV in each of the 30 license areas Norway is divided into. The 30 license areas together cover all of Norway, including Spitzbergen. Newspapers and other media organisations are shareholders in most of the TV licences. According to Norwegian law, no single owner can control more than 1/3 of the total Norwegian market for local TV and local radio respectively.

When processing applications for local TV licences, substantial weight was put on the applicants economic situation, knowledge of TV production, and public service ambitions. Several of the applicants that were turned down complained. In September, the Ministry of Cultural Affairs finalized the processing of the complaints, sustaining all of the Mass Media Authority's earlier conclusions.

The license holders are now establishing their stations, a process which includes the building of their terrestrial transmission systems.

It is a requirement that the local TV stations broadcast local programs each day. In addition, they may broadcast, unchanged and direct, programmes received via satellite. When it comes to networking, a single programme distributor may not reach more than 75 percent of the households in Norway via a network of local TV stations. In early 1997, there was only one programme distributor interested in delivering programmes to the local TV stations. This program-distributor, *TVNorge*, is currently establishing an additional programme distribution company with the intention of serving the remaining 25 percent of the local TV stations. Because of the 75 percent rule referred to earlier, the Mass Media Authority requires the new programme distribution company to be independent and to deliver different types of programmes than *TVNorge*. This distributor will have been established by the end of March 1997.

Each local broadcaster holds a legal responsibility for the programmes it distributes, including for the programmes received via satellite.

Norwegian cable networks (in the USA referred to as 'cable systems') are obliged to carry everything that is broadcast by local TV stations.

In addition to the 30 licenses mentioned above, four licenses were given for the broadcasting of educational programmes. These programmes are to be distributed via the transmission systems of the local public service TV stations.

In 1996, the national public service broadcaster, NRK, which is financed by means of a licence fee, started a second nationwide TV station, NRK2. Non-commercial organisations were, because of that, given the opportunity to apply for special licenses for local TV to be distributed via NRK2s transmission system when NRK2 itself does not broadcast. Each licence is valid for one of the local areas covered by NRK2s transmission system. Advertising is not allowed during their broadcasts, and the licenses do not embrace the right to broadcast a teletext service. Sixteen local "NRK2 licenses" were granted in December 1996, and the broadcasts were excepted to start in February/March 1997. Some of the applicants that were turned down, complained and their complaints are currently being processed by the Mass Media authority.

Another way of being able to broadcast local TV in Norway, is to apply for a license to broadcast through a local cable network (*i.e.* cable system). Cable networks (*i.e.* cable systems) are not obliged to carry such broadcasts, so those that want to apply for a cable network (*i.e.* cable systems) license, need a promise in advance from the cable network (*i.e.* cable systems) owner, stating that he will carry the TV station.

It is expected that during 1997, the local TV business in Norway will undergo a substantial transformation. The local public service broadcasters have in particular directed their efforts towards building up a sustainable business. It has for example been allocated substantial resources for the purpose of building up daily local news updates. As part of this process, *TVNorge* will undergo a major change from being a channel distributed by satellite only, to a terrestrial channel possibly able to reach as many as 75 percent of the Norwegian households.

Local radio

In November 1996, the Mass Media Authority granted 308 five-year licences for local radio broadcasting. The total number of applicants were 404. In the preceding license period, there were 355 licence holders distributed over a total of 198 licence areas. In the new license period, the number of licence areas were reduced to 161. Ten licence areas have more than one frequency available for local radio, Oslo having the most with six frequencies available.

In areas with more than one frequency available, the Mass Media Authority decides what frequency the different licence holders should broadcast on. When deciding, the Mass Media Authority, however, attached great importance to the local wishes. When placed on a frequency, it is up to the licence holders of that particular frequency to divide the available broadcasting time amongst them. If no agreement is reached, the case may be referred to the Mass Media Authority which then decides upon each licence holders airtime.

When processing applications, the applicant's economic situation and radio broadcasting skills were among the criteria taken into consideration. It was also considered reasonable to give existing radio stations, that fulfilled the minimum criteria, preference to new applicants.

The Mass Media Authority received complaints on turned down licence applications, frequency assignment and the coverage of licence areas. In addition, there have been cases of disagreement on the division of airtime that have been brought before the Mass Media Authority. The Mass Media Authority is currently processing these complaints.

According to regulations that are currently being finalized, local radio broadcasters may now co-broadcast with radio broadcasters in neighbouring license areas. To stimulate co-operation among local radios, financial support will be given to local radio broadcasters that have agreed on some sort of binding co-operation between them.

(Liv Daae Gabrielsen,
Statens Medieforvaltning, Norway)

USA: Audio-visual Industry Announces Ratings Scheme

On 19 December 1996, the U.S. audio-visual industry announced plans to rate television programmes according to six categories. The action came as a result of the "V-chip" requirement in the Telecommunications Act of 1996 ("Act") which essentially provided the audio-visual industry with a choice between adopting their own standards or having the Federal Communications Commission ("Commission") form a committee to do so. Not surprisingly, the industry chose self-regulation.

The six categories developed by the industry are: (i) TV-Y (suitable for all children); (ii) TV-Y7 (suitable for children seven years of age and above); (iii) TV-G (suitable for all ages); (iv) TV-PG (parental guidance suggested - material may be inappropriate for younger children); (v) TV-14 (parents strongly cautioned - material may be inappropriate for children under fourteen years of age); and (vi) TV-M (mature audiences only - material may be inappropriate for those under seventeen years of age).

All broadcast and cable networks are expected to begin using the new ratings by the end of January 1997. Applicable ratings will appear on the upper corner of the screen for 15 seconds at the beginning of each program. News and sports programs, however, will not be rated.

As stated, the new ratings were necessitated by the Telecommunications Act of 1996, signed into law on 8 February 1996 (*see* IRIS 1996-3: 7-10). The Act directs the Federal Communications Commission to establish an advisory board to develop a rating system for television programmes unless the industry voluntarily establishes a ratings system that is acceptable to the Commission.

The Commission has received conflicting messages from the executive and the legislative branches (jointly responsible for passage of the Act) on whether the Commission should accept the industry's proposal. President Clinton has stated that the new ratings should be tried for 10 months and then modified if necessary. However, Congressman Ed Markey, chief architect of the Act's requirement of a rating system, complains that the new ratings do not actually tell parents what type of offending material is contained in particular programming. Markey and many consumer groups prefer a rating system that would use letters such as "V", "S" and "L" to signify violent content, explicit sexual content and adult language, respectively.

Critics of the industry's ratings system charge that the ratings are intentionally ambiguous in order to protect revenue from advertising that may be lost if parents had more specific information as to the content of broadcast programming. The industry responds that more explicit ratings would become either unmanageable because of the amount of programming that would need to be reviewed or inaccurate due to the inability to account for the degree of violence, sexual conduct, or adult language contained in particular programming. The industry has warned that a modification of their rating system could trigger a First Amendment claim for violation of their free speech rights.

Beginning in 1998, television sets (13 inches or greater in diameter) must be manufactured with a "V-chip" that will allow parents to program the television set to block out programming that they have determined will be inappropriate for their children. Present versions of the V-chip, however, do not block individual programs -- but rather general types of materials with certain ratings. The proposed ratings thus may become a means of censoring broad categories of programming. While the television industry hopes its ratings will be used, many consumer groups can be expected to work diligently to convince the FCC that more explicit ratings are necessary to allow parents the adequate information necessary to safeguard their children.

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AGENDA

Neue TK-Infrastrukturen: Internet, Satellit, TV-Kabel
5-6 March 1997
Organiser: EUROFORUM Deutschland GmbH
Venue: Radisson SAS Hotel, Düsseldorf
Fee: DM 2,495 + 15% VAT
Information & Registration:
Tel.: +49 211 96863
Fax: +49 211 9686502
E-mail:
100550.1410@CompuServe.com

Rechtsfragen des Internets
7 March 1997
Organiser: Verlag C.H. Beck, Munich
Venue: Arabella Westpark Hotel, Munich
Fee: DM 590 + 15% VAT
Information & Registration:
Tel.: +49 89 51960

Copyright and Related Rights in the 21st Century
22 March 1997
Venue: Berkeley Court Hotel, Dublin
Information & Registration:
Tel.: +353 1 6614844
Fax: +353 1 6763125
E-mail:
Eamon.Shackleton@imro.ie

Electronic Programme Guides. The Gateway to Next Generation Television
21-23 April 1997
Organiser:
IBC UK Conferences Limited
Venue:
Le Meridien Hotel, London (21-22 April 1997)
Marriott Hotel, London (23 April 1997)
Fee:
£1098 +17.5% VAT (3 days)
£899 +17.5% VAT (22-23 April 1997)
Information & Registration:
Tel.: +44 1714532700/ +44 171 6374383
Fax: +44 171 6361976/ +44 171 6313214

Droit d'auteur, directive communautaire et loi française
24 April 1997
Organiser:
Association des avocats du Droit d'auteur - IFC
Venue:
Maison du Barreau, Paris
Tel.: +33 1 44070385
Fax: +33 1 40510956

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