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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: *Kaos GL v. Turkey*

The case of *Kaos GL v. Turkey* is an example of a case whose findings breach Article 10 of the European Convention on Human Rights (ECHR) on the right to freedom of expression of a particular kind. The case concerns the seizure of all the copies of a magazine published by *Kaos GL*, a cultural research and solidarity association for lesbian, gay, bisexual, and transgender people (“LGBT”). The European Court of Human Rights (ECtHR) found that the aim of protecting public morals relied upon by the Turkish authorities had been insufficient to justify the prior-censorship of the LGBT-magazine for more than five years. The judgment also shows the European Court’s willingness to extend the protection of Article 10 ECHR to sexually explicit expression, while demonstrating the need for proportionate interferences with the right to freedom of expression in the light of the protection of minors against sexually explicit content. In 2006, the Criminal Court of First Instance of Ankara, at the request of the Chief Prosecutor, ordered the seizure of the 375 copies of issue 28 of the magazine *Kaos GL* with a view to launching criminal investigations. The issue in question contained articles and interviews on pornography related to homosexuality, illustrated with explicit images. The Criminal Court considered that the content of some of the articles and some of the images published were contrary to the principle of protection of public morals. An appeal against this decision was dismissed, while the president and editor-in-chief of *Kaos GL* magazine, Mr Güner, was subsequently charged with publishing obscene images via the press, an offence punishable under Article 226 § 2 of the Turkish Penal Code. In particular, a painting reproduced in the magazine, which showed a sexual act between two men whose sexual organs were visible, was considered obscene and pornographic. In 2007, however, the Ankara Criminal Court acquitted Mr Güner of the charge against him. It held that not all the factors constituting the offence were present. It also ordered the return of all the copies of the magazine seized, although the execution of this order was not implemented by the Turkish authorities. In 2012, the Court of Cassation upheld the judgment of the Ankara Criminal Court. In the meantime, relying on its right to freedom of expression, *Kaos GL* lodged an application before the ECtHR, complaining of the seizure and continued confiscation of its issue 28 and the criminal proceedings brought against Mr Güner.

While the European Court decided that *Kaos GL*’s

complaint about the criminal proceedings against Mr Güner was inadmissible *ratione personae*, it substantially evaluated whether the seizure and confiscation of the magazine amounted to a justified interference with the magazine’s right to freedom of expression guaranteed by Article 10 ECHR. While there was no doubt that the seizure of all copies of the magazine was prescribed by law and pursued the legitimate aim of protecting morals, the European Court considered that the reasons given by the domestic court were not convincing with regard to the necessity and the proportionate character of their seizure and confiscation. According to the Court, there was nothing in the decision of the Criminal Court to seize the magazines to suggest that the judge had examined in detail the compatibility of the magazine’s content with the principle of protection of public morals. Nor did the Criminal Court’s decision to dismiss the appeal against the seizure decision set out any further relevant details or reasoning. The European Court accordingly considered that the protection of public morals argument, advanced in such a broad, unreasoned manner, had been insufficient to justify the decision to seize and confiscate all the copies of issue 28 of *Kaos GL* for over five years. Based on its own analysis of the impugned publication, having regard to the content of the articles and referring to the explicit nature of some of the images in the magazine at issue, the Court expressed the opinion that issue 28 of *Kaos GL* could be considered as a publication specifically aimed at a certain social category. Despite its intellectual and artistic characteristics, some of the content could indeed be considered as possibly offending the sensitivities of a non-warned public. The Court accepted that the measures taken to prevent access by specific groups of individuals - including minors - to this publication might have met a pressing social need. However, it emphasised that the domestic authorities had not attempted to implement a less harsh preventive measure than the seizure of all the copies of the magazine, for example by prohibiting its sale to persons under the age of 18 or requiring special packaging with a warning for minors. Even if the issue seized, accompanied by a warning for persons under the age of 18, could have been distributed after the return of the confiscated copies, that is to say after the Court of Cassation judgment of 29 February 2012, the Court held that the confiscation of the copies of the magazine and the delay of five years and seven months in distributing the publication could not be considered as proportionate to the aim pursued. The Court therefore held that the seizure of all the copies of issue 28 of the magazine *Kaos GL* amounted to a disproportionate interference with the exercise of *Kaos GL*’s right to freedom of expression and had not been “necessary in a democratic society”. The Court is unanimous in finding that therefore there has been a violation of Article 10 ECHR.

• *Arrêt de la Cour européenne des droits de l'homme, deuxième section, affaire Kaos GL c. Turquie, requête n° 4982/07, 22 novembre 2016* (Judgment by the European Court of Human Rights, Second Section, case of Kaos GL v. Turkey, Application no. 4982/07, 22 November 2016)

<http://merlin.obs.coe.int/redirect.php?id=18309>

FR

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Parliamentary Assembly: Report adopted on attacks against journalists and media freedom

On 8 December 2016, the Parliamentary Assembly of the Council of Europe (PACE) Committee on Culture, Science, Education and Media adopted a Report on “Attacks against journalists and media freedom in Europe”. The Report was prepared by Rapporteur Volodymyr Arieu, and details the operation of the Council of Europe’s “Platform to promote the protection of journalism and the safety of journalists”, which became operational in April 2015. The Platform allows the compilation of alerts on serious concerns about media freedom and the safety of journalists in Council of Europe member States by certain Partner Organisations. Member States may then post reports on action taken in response to those alerts.

The Report states that since January 2015, 230 alerts in 32 member States have been reported on the Platform; 95 of those alerts have received official replies by the member State concerned and 23 cases have been resolved. According to the Report, “the numbers show how important it is that media freedom and the safety of journalists are a priority for the Council of Europe”. Notably, the Report found that 16 journalists have “died violently” in member States since January 2015.

The Report then focuses on a number of individual member States, including Azerbaijan, Georgia, Hungary, Italy, the Russian Federation, Turkey and Ukraine, with details of fact-finding visits undertaken by the Rapporteur to Hungary and Turkey. The Report goes on to discuss the Platform alerts “which are particularly serious”: the deaths of journalists; physical attacks against journalists; threats to journalists in conflict zones; police authorities targeting the media; and legislative action which threatens media freedom.

The Report then draws a number of conclusions, including the following: that in countries where there is a situation of military conflict, governments “have difficulty controlling the situation as regards media freedom”; that the “extraordinary situation” of the failed

military coup d’état in Turkey “has seriously affected the media situation in Turkey”; that the “stricter security measures” adopted in Belgium, France and Turkey in response to “terrible acts of terrorism” must be proportionate, and “media freedom must be respected in order to allow the public to receive all information necessary in a democratic society”; and that a number of countries received alerts on their law and practice regarding national public service broadcasters, with “further assistance, and practical cooperation with those countries” necessary.

• Parliamentary Assembly of the Council of Europe Committee on Culture, Science, Education and Media, “Concern about the situation of the media and journalists in many European countries”, 8 December 2016

<http://merlin.obs.coe.int/redirect.php?id=18311>

EN FR

• Parliamentary Assembly of the Council of Europe, Report: Attacks against journalists and media freedom in Europe, 8 December 2016

<http://merlin.obs.coe.int/redirect.php?id=18312>

EN FR

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

<http://merlin.obs.coe.int/redirect.php?id=18345>

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EUROPEAN UNION

Court of Justice of the European Union: Tele2 Sverige AB v Post-och telestyrelsen

On 21 December 2016, the Court of Justice of the European Union (CJEU) delivered a judgment in joined cases *Tele2 Sverige AB v. Post-och telestyrelsen* and *Secretary of State for the Home Department v. Tom Watson and Others* (Cases C-203/15 and C-698/15). This judgment concerns the interpretation of Article 15(1) of the e-Privacy Directive (2002/58/EC) (see IRIS 2002-7/10) in light of Articles 7 (respect for private life) and 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union (the Charter).

The judgment addresses two requests for a preliminary ruling from the Swedish Administrative Court of Appeal (Kammarrätten i Stockholm) and the Court of Appeal of England and Wales following the invalidation of the Data Retention Directive (2006/24/EC) by CJEU in the *Digital Rights Ireland* case (C-293/12). In the latter judgment, the CJEU held that the general obligation to retain traffic data and location data that member States could impose on the public telecommunications and network services providers under the Data Retention Directive constituted a serious interference with the fundamental rights laid down in Articles 7 and 8 of the Charter. This interference was

not limited to what was strictly necessary and, therefore, could not be justified under Article 52(1) of the Charter on the limitation of rights.

The requests for a preliminary ruling concerned national legislation of Sweden, and England and Wales that transposed the invalidated Data Retention Directive. Similar to the invalidated Directive, this legislation contained general obligations for electronic communications service providers to retain data, pertaining to those communications, and allowed access by competent authorities to the retained data. The courts essentially asked whether such legislation could be justified under Article 15 of the e-Privacy Directive that allows member States to introduce exceptions to the principles of confidentiality of personal data and corresponding obligations referred to in articles 6 (traffic data), 8 (calling identification) and 9 (location data).

Relying on its settled case law and, specifically on the judgment in *Digital Rights Ireland*, the CJEU held that Article 15 of the e-Privacy Directive does not justify national legislation that requires general and indiscriminate retention of all traffic and location data of all subscribers and registered users with respect to all means of electronic communications, even with the purpose of fighting crime. The CJEU also clarified that this Article, read in the light of Articles 7, 8, 11 and Article 52(1) of the Charter, could, however, justify national legislation that requires “as a preventive measure, the targeted retention of traffic and location data, for the purpose of fighting serious crime, provided that the retention of data is limited, with respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted, to what is strictly necessary.” To meet the necessity test, such legislation must first “lay down clear and precise rules governing the scope and application of such a data retention measure and impose minimum safeguards.” Secondly, such legislation must “meet objective criteria that establish a connection between the data to be retained and the objective pursued.” In addition, such a connection must be based on “objective evidence.”

The CJEU also ruled that Article 15 of the e-Privacy Directive equally precludes national legislation from granting the competent national authorities access to retained data, unless such legislation pursues the objective proportionate to the seriousness of the interference in fundamental rights entailed by such access, and that such access is “limited to what is strictly necessary.” The CJEU underscored that in the area of the prevention, investigation, detection and prosecution of criminal offences, only the objective of fighting serious crime meets the proportionality test. In order to meet the necessity requirement, the national legislation must lay down “the substantive and procedural conditions governing the access of the competent national authorities to the retained data.” In particular, “access of the competent national authorities to retained data should, as a gen-

eral rule 04046 be subject to a prior review carried out either by a court or by an independent administrative body.” Furthermore, the national legislation must require that the data is within the European Union and is subject to irreversible destruction at the end of the data retention period.

In conclusion, it should be noted that the CJEU judgment only gives an interpretation of the relevant EU law. It is for the referring courts to determine whether, and to what extent the national legislation concerned meets the requirements stemming from Article 15 of the e-Privacy Directives, as interpreted by the CJEU in the light of the Charter.

• Judgment of the Court of Justice of the European Union in Joined Cases C-203/15 *Tele2 Sverige AB v Post-och telestyrelsen* and C-698/15 *Secretary of State for the Home Department v Tom Watson and Others*, 21 December 2016

<http://merlin.obs.coe.int/redirect.php?id=18342>

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NL	PL	PT	SK	SL	SV	HR						

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European Parliament: Resolution on the situation of journalists in Turkey

On 27 October 2016, the European Parliament adopted a Resolution on the “Situation of journalists in Turkey”. The resolution was adopted following an attempted coup d’état in Turkey in July 2016, when more than 250 people were killed, and 2 100 injured. The European Parliament “strongly condemns” the attempted coup, and “deplores the high number of casualties”. It also expressed its “solidarity with the victims and their families”. The Resolution also acknowledges that the Turkish Government has the “right and responsibility” to respond to the coup attempt, and that Turkey faces a “real threat from terrorism”.

However, the Resolution notes that, according to the European Federation of Journalists and the Turkish Journalists’ Association, following the coup in July 2016, Turkish police “have arrested at least 99 journalists and writers, most of whom have had no charges brought against them to date, bringing the number of media workers detained on charges believed to be related to their exercise of the right to freedom of expression to at least 130”. In this regard, the European Parliament stresses that the attempted coup cannot be used as an “excuse” for the Turkish Government to “prevent journalists and the media in their peaceful exercise of freedom of expression through disproportionate and illegal actions and measures”. The Resolution states that the European Parliament is “seriously concerned” about the closure

of 150 media outlets, and “calls for them to be reopened, their independence restored and their dismissed employees reinstated in accordance with due process”. The Resolution also calls on the Turkish authorities to “end the practice of misusing provisions in the penal code to appoint trustees to private media organisations, and to halt executive interference with independent news organisations, including interference in editorial decisions, the dismissal of journalists and editors, and employing pressure and intimidation against critical news outlets and journalists”. Moreover, the Resolution “condemns the attempts by the Turkish authorities to intimidate and expel foreign correspondents”.

Furthermore, the Resolution calls on the Turkish government to “release those journalists and media workers being held without compelling evidence of criminal activity”; “to narrow the scope of the emergency measures”; and it states “that the broadly defined Turkish anti-terrorism legislation should not be used to punish journalists for exercising their right of freedom of expression”. Finally, the Resolution calls on the European External Action Service (EEAS) and the member States to continue to closely monitor the practical implications of the state of emergency and to ensure that all trials of journalists are monitored. The Resolution is also to be forwarded to the President, Government and Parliament of Turkey.

• European Parliament resolution of 27 October 2016 on the situation of journalists in Turkey (2016/2935(RSP))

<http://merlin.obs.coe.int/redirect.php?id=18344>

DE EN FR

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NATIONAL

AL-Albania

Regulator issues four commercial national digital licenses

On 3 November 2016 and 29 December 2016, after a long impasse in the digital switchover process, the Audiovisual Media Authority (AMA) issued four of five licenses for national terrestrial digital networks.

The decisions came after two parallel and successful legal battles of commercial operators to abolish the legal limitations for ownership of shares in national

media companies, as well as opposing previous administrative decision of AMA, which failed to grant digital licenses to any of the applicants. On 13 May 2016, the Constitutional Court of Albania notified that it had ruled in favour of the request filed to this court by the Association of Albanian Electronic Media seeking to abrogate paragraph 3 of Article 62 of the Law 97/2013 “On Audiovisual Media in the Republic of Albania” regarding limitations for media ownership (see IRIS 2016-7/6).

Three months earlier, on 7 March 2016, the Administrative Court had ruled in favour of granting a national digital license to Digitalb, while ordering AMA to change its decision and grant a national digital license also to TV Klan and Top Channel TV. Both these decisions paved the way for the licensing of the main contenders for digital national terrestrial licenses.

Following the court rulings, AMA executed the Administrative Court decision and granted licenses for using the national digital terrestrial networks to TV Klan and Top Channel on 3 November 2016. On the same day, the regulator also started the call for applications for the two remaining national networks.

On 29 December 2016, AMA decided to grant the fourth national license to Media Vizion company. The fifth and last national digital terrestrial network has yet to be awarded. At the end of December 2016, AMA decided not to grant it to another applicant, while concluding that the other applicants (ADTN company, ABC News, Tring TV, and ORA companies) did not qualify for the license. The granting of the national digital network licenses to private operators came after long disputes and after the official deadline set for the digital switchover, namely 17 June 2015.

• *Njoftim per media 03-11-2016* (The decisions of the Audiovisual Media Authority from 3 November 2016)

<http://merlin.obs.coe.int/redirect.php?id=18322>

SQ

• *Njoftim per Media 29-12-2016* (The decision of the Audiovisual Media Authority from 29 December 2016)

<http://merlin.obs.coe.int/redirect.php?id=18323>

SQ

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Albanian Media Institute

Public broadcaster adopts editorial guidelines

The public broadcaster Radio Televizioni Shqiptar (RTSH) has approved its first editorial guidelines. RTSH presented the editorial guidelines in a meeting on 18 November 2016, before receiving the approval of the Steering Board. Previously, the draft guidelines had been consulted internally and with stakeholders and civil society organizations focusing on media, while OSCE enabled the external assistance of EBU. The guidelines were based on the BBC rules

of conduct and the Slovenian public broadcaster editorial rules. The guidelines cover not only radio and television, but also online media and the online presence of RTSH. In addition, they do not only apply to RTSH staff, but also to persons or companies cooperating and co-producing with RTSH.

The editorial guidelines try to list as many ethical dilemmas as possible, since they aim to cover in detail even cases not covered in the general Code of Ethics. In this respect, the guidelines cover several areas, such as the editorial and professional standards, diversity and balanced reporting, electoral campaigns, reporting on politics and parliament, production standards, relations with state authorities, imitation and anti-social behaviour, investigative reporting, elaboration of information, respecting values of the public, programmes for groups with special interest, portraying specific social groups, children and minors in RTSH programmes, etc.

The guidelines also attempt to regulate in detail the relations and conduct of staff within the newsroom, especially relating to censorship and self-censorship, conflict of interest, and chain of responsibility. In this aspect the guidelines address problems related to interference, the right to reply, the role of the Council of Viewers and Listeners, the obligatory references, legal aid to journalists and editors, dress code, conflict of interest and obligations, feedback from audience, and role of social and online media.

- The news on RTSH meeting presenting the guidelines

<http://merlin.obs.coe.int/redirect.php?id=18324>

EN

- *Parimet editoriale të RTSH-së* (The editorial guidelines of RTSH)

<http://merlin.obs.coe.int/redirect.php?id=18359>

SQ

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CZ-Czech Republic

Gambling Advertising

On 1 January 2017, the new gambling law took effect. Each provider of gambling has to obtain a basic operating permit, which is issued by the Ministry of Finance. The gambling provider must therefore apply for the relevant authorization. Unauthorized gambling should not be broadcasted or advertised.

Exempted from the new Gambling law is gambling in the form of consumer competitions and other prize competitions. These forms of gambling are now considered to be normal business practice. The law allows the assessment of consumer competition as business practice in general.

Games in the form of calls, SMS, or multimedia messages, which require a registration for participation, are now considered gambling. The law also considers the increased costs for these electronic communications services as well as the stake in gambling.

The law also regulates the advertising of gambling. Advertising of gambling and other incentives to participate in gambling must not contain communications that give the impression that participation in gambling can be a source of obtaining income similar to a salary or other financial means. Advertising for gambling must not be aimed at minors, minors should not be displayed in such advertising, and the use of elements, means or actions that appeal to minors should not be used. Advertising of gambling must include information on the ban on the participation of minors in gambling and a visible and clear warning as follows: "The Ministry of Finance warns: Participation in gambling can be addictive!" A violation of this provision is an administrative offence. The regulatory authority for advertising in radio and TV broadcasts and on-demand audiovisual media services is the Broadcasting Council.

- *Zákon č. 186/2016 Sb. o hazardních hrách* (Act no. 186/2016 Coll. On Gambling)

<http://merlin.obs.coe.int/redirect.php?id=18354>

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DE-Germany

Federal Administrative Court finds broadcasting licence fee for business premises and commercial vehicles compatible with the Constitution

After hearing a total of four appeal procedures, the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) decided, in rulings of 7 December 2016 that have not yet been published in full, that the levying of the broadcasting licence fee for business premises and commercial vehicles does not infringe the German Constitution (case nos. 6 C 12.15, 6 C 13.15, 6 C 14.15 and 6 C 49.15).

The Rundfunkbeitragsstaatsvertrag (Inter-State Agreement on the broadcasting licence fee - RBStV), which entered into force on 1 January 2013, requires owners of business premises and commercial vehicles to pay the broadcasting licence fee. The amount due depends on the number of premises, employees, and vehicles used, and is based on information provided by company owners concerning the size of their workforce and the number of relevant vehicles. If companies that paid the licence fee until the end of

2012 fail to provide this information, the broadcasting authorities are entitled to charge them a so-called interim fee, equivalent to the sum that they were previously paying, until they meet their obligations.

The BVerwG confirmed that the provisions of the RBStV did not infringe the Constitution because the licence fee was a non-fiscal, broadcasting-specific levy over which the Länder had regulatory control and for which there was particular justification. The fee was justified because the broadcasting freedom enshrined in the Constitution included a guarantee to finance public service broadcasting, and the licence fee entitled the holder to receive broadcasting services. Basing the fee on the number of business premises and commercial vehicles used was a suitable way of measuring the benefit that businesses derived from broadcasting services, which included help with carrying out operational tasks and use by employees and customers.

According to the BVerwG, the legislator was entitled to assume that broadcasting services were typically received in business premises and commercial vehicles, and that business owners benefited from these services in a specific way, since the virtually universal presence of traditional and new types of reception device in business premises and commercial vehicles was statistically proven. Charging the licence fee with no exemption for companies that did not own any reception devices was also justified under the Constitution. It is no longer possible to measure with sufficient certainty whether or not multifunctional reception devices are used in business environments, casting doubt over the equality of treatment within the licence fee system.

Finally, the court dismissed the plaintiffs' view that the rules on calculating the licence fee for business premises and commercial vehicles infringed the principle of equal treatment. Under the RBStV, the fee was quite rightly based on the benefit to the owner of being able to receive broadcasting services. The progressive reduction of the licence fee for business premises was objectively justified on account of the benefit to the business resulting not only from employees' use of broadcasting services but also from that of customers and the fulfilment of operational tasks. The linear calculation of the fee applicable to vehicles was also compatible with the Constitution.

• *Pressemitteilung zu den Urteilen des BVerwG vom 07. Dezember 2016 (Az.: 6 C 12.15; 6 C 13.15; 6 C 14.15; 6 C 49.15)* (Press release on the decisions of the Federal Administrative Court of 7 December 2016 (case nos. 6 C 12.15, 6 C 13.15, 6 C 14.15 and 6 C 49.15))
<http://merlin.obs.coe.int/redirect.php?id=18327>

DE

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Hamburg District Court increases link liability after CJEU Playboy ruling

In a decision of 18 November 2016, the Landgericht Hamburg (Hamburg District Court - LG) ruled that posting a link to an image illegally made accessible by a third party could constitute a breach of copyright (case no. 310 0 402/16).

In the case at hand, the defendant, who sold self-published learning materials through his website, had posted a link to a photo. The image concerned had been edited in breach of the terms of its Creative Commons licence, since various UFOs had been added without any indication that the image had been edited. Although photos can, in principle, be edited in accordance with the Creative Commons licence concerned, it must be made obvious that they have been edited. According to the LG Hamburg, this also applies if the viewer assumes that the image does not show actual UFOs, but a photomontage, since the viewer cannot tell from this circumstance alone whether the montage was created by the original rights holder or added later. The court found that this condition had not been met and that the requirement laid down in paragraphs 4.c) i. and iv. of the licence, i.e. that reference be made to the author and to the fact that the image had been edited, had also been breached. This infringement led to the licence being withdrawn under paragraph 7.a).

The LG Hamburg classified the defendant's website as commercial because he used it to sell self-published learning materials. Commercial use was not dependent on the link being provided in pursuit of financial gain. Rather, the crucial factor was whether the website itself was commercial in nature.

In September 2016, the Court of Justice of the European Union (CJEU) restricted the freedom to post links and decided that operators of commercial websites could infringe copyright simply by posting links to illegally uploaded content (see IRIS 2016-9/3). In its decision - the first by a German court to refer to the CJEU's ruling - the LG Hamburg ruled that the defendant should have known that the linked content had been uploaded illegally. Although this was a strict standard of fault, the defendant, who was acting in pursuit of financial gain, could be expected to take steps to ensure that the content had been legally published.

• *Entscheidung des LG Hamburg vom 18. November 2016 (Az. 310 0 402/16)* (Decision of the Hamburg District Court of 18 November 2016 (case no. 310 0 402/16))
<http://merlin.obs.coe.int/redirect.php?id=18355>

DE

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Munich District Court refuses exemption for online video recorder

In a ruling of 28 September 2016, the Landgericht München I (Munich District Court - LG) decided that the provider of an online video recorder cannot benefit from the private copy exemption provided in Article 53(1)(1) of the Urhebergesetz (Copyright Act - UrhG) (case no. 37 O 1930/16).

The online video recorder "YouTV" enables its users to record all programmes on all TV channels with a single click and to watch them within 24 hours. Users cannot record individual programmes or channels. The service is free to use, although a fee is charged to extend it to a 7-day catch-up service. In order to provide the service, the "YouTV" operator receives the broadcast signals and transmits them to a server, where they are permanently stored and made available for users to download. Rather than obtain licences from the broadcasters, the operator relied on the private copy exemption enshrined in Article 53(1)(1) UrhG, which was disputed by a TV broadcaster.

The LG München I held that the transmission and storage of signals for download by users constitutes a form of reproduction that infringes the copyright of the TV broadcasters concerned. The provider of "YouTV", rather than its users, should be considered the "producer" of these reproductions. A private copy within the meaning of Article 53(1)(1) UrhG would only exist if users themselves could individually choose which programmes to record. However, this was not the case here, and users were also unable to delete individual recordings.

Another reason why the private copy exemption did not apply was the fact that users only had limited access to the stored programmes. In particular, it was not possible to watch recorded programmes free of charge more than 24 hours after they had been broadcast.

The defendant must now disclose how much it receives in user fees, as well as its other gross income. Since YouTV.de did not acquire any rights from licensors, reasonable compensation will also have to be paid to the applicant broadcaster.

• *Urteil des LG München I vom 28. September 2016 (Az. 37 O 1930/16)* (Decision of the Landgericht München I (Munich District Court - LG) of 28 September 2016 (case no. 37 O 1930/16))
<http://merlin.obs.coe.int/redirect.php?id=18328>

DE

Tobias Raab

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Unmarked TV programme spots in advertising block are unlawful

In two decisions of 17 November 2016, the seventh chamber of the Verwaltungsgericht Hannover (Hanover Administrative Court - VG) rejected two appeals by RTL against decisions issued by the Niedersächsische Landesmedienanstalt (Lower Saxony media authority) following breaches of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV).

The advertising-related provisions of the Rundfunkstaatsvertrag set out, in a general way, the obligation to separate editorial content from advertising, lay down limits for broadcast advertising, and provide a basis for the prosecution of those who infringe them. Exactly how a TV channel should separate advertising from programme material, what a sponsor reference should look like, and the point at which an infringement occurs, have been summarised by the regional media authorities in the Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring - sowohl im Fernsehen als auch im Hörfunk (Joint Guidelines of the regional media authorities on advertising, the separation of advertising and programme material, and sponsorship on television and radio).

In the first case (case no. 7 A 430/16), during a labelled advertising break, RTL had broadcast a spot advertising the "Toggo" (www.toggo.de) children's programme window shown on the Super RTL channel, which is part of the RTL group. First broadcast in 2001, "Toggo" is aimed at 6- to 13-year olds. The administrative court agreed with the media watchdogs and considered the advertisement, a form of cross-promotion, as a breach of the Rundfunkstaatsvertrag. Under Article 7(3) RStV, advertising must be readily recognisable as such, and clearly distinguishable from editorial content. However, under the case law of the Bundesverwaltungsgericht (Federal Administrative Court), spots advertising programmes are considered neither editorial content nor advertising. Article 45(2) RStV states that they do not count towards the admissible duration of television advertising. Viewers should therefore always be able to recognise when advertising resumes after such a spot. If commercial advertising follows without the insertion of a corresponding logo, there is no separation between advertising and editorial content. The administrative court therefore rejected the private broadcaster's appeal against the media authority's decision.

In the second case (case no. 7 A 280/15), also during a labelled advertising break, RTL had broadcast a spot advertising the programme "Yps" on the RTL NITRO channel, which is also part of the RTL group. "Yps" is a science magazine show for children, based on the

printed magazine of the same name. This spot was linked to a commercial spot for a programme guide in the form of a so-called 'combi-spot'. The court also considered this a breach of the requirement to separate advertising and editorial content. It argued that a 'combi-spot' infringed the Rundfunkstaatsvertrag by its very nature. If a 'combi-spot' was separated into a programme ad and commercial advertising, an advertising logo should be shown at the relevant time. Since it considered this case to be fundamentally important, the court decided that its ruling could be appealed before the Niedersächsische Oberverwaltungsgericht (Lower Saxony Administrative Appeal Court).

• *Pressemitteilung des VG Hannover vom 18. November 2016* (Hanover Administrative Court press release of 18 November 2016)
<http://merlin.obs.coe.int/redirect.php?id=18339>

DE

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Parliament adopts new Film Support Act

On 10 November 2016, the Bundestag (lower house of the German parliament) adopted an amendment to the Filmförderungsgesetz (Film Support Act - FFG). The new version entered into force on 1 January 2017 and is valid for five years. As a result, film subsidies will be concentrated on fewer films, focusing on films with a greater chance of success, from January 2017 onwards. The funding bodies will also become more streamlined, more professional, and more gender-balanced.

In general terms, the FFG is the legal basis for the provision of film support by the Filmförderungsanstalt (Film Support Agency - FFA). It first came into force in 1968 and has since been amended several times, most recently through the Siebte Gesetz zur Änderung des Filmförderungsgesetzes (Seventh Act Amending the Film Support Act), which entered into force on 1 January 2014. In addition to the Act, directives and other instruments also regulate film support. Film subsidies are funded by the so-called "film levy", which is charged based on income from film exploitation. It is mainly paid by cinemas, but also by video industry companies, including video on-demand providers, TV broadcasters, and pay-TV operators.

Under the revised FFG, one of the main newly subsidised areas is screenplay development, with a corresponding increase in the amount of funding available for scriptwriters. Distribution, sales, and video subsidies will be merged in the future. The new law will also make it easier for people with disabilities to watch films at the cinema.

The FFA's remit is also more clearly defined and includes a duty to ensure that employees working in

the film industry are employed in a socially responsible manner. The FFA's income from the film levy is also guaranteed. It funds feature films at all stages of production and exploitation: from screenplay development to production, to distribution, sales and video. Further funds are used to support cinemas, the preservation of the cinematographic heritage, the reception and promotion of German films abroad, and film education. As the central service provider for the German film industry, the FFA also regularly collates, analyses, and publishes key market data relating to Germany's film, cinema, and video industries.

• *Gesetz über Maßnahmen zur Förderung des deutschen Films (Filmförderungsgesetz - FFG) vom 23. Dezember 2016* ([U+F020]Act on measures to promote the German film industry (Film Support Act - FFG) of 23 December 2016)

<http://merlin.obs.coe.int/redirect.php?id=18329>

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ES-Spain

YouTube removes five videos denounced by CAC for inciting violence against women

The video-sharing platform YouTube removed five videos that the Catalan Audiovisual Council (CAC) and the Department of the Presidency of the Catalan Government denounced for inciting violence against women. The CAC reported on five videos, including *Cómo pegar a una mujer* ("How to beat a woman"), and 10 blogs, including *Dominación Machista* ("Male Domination"), *El Rincon del macho* ("Macho corner") and *La Cueva del misógino* ("Misogynist's cave").

The 15 videos and blogs were reported to the State Attorney in Barcelona, who has opened investigation proceedings concerning their content. In parallel to the presentation of the complaint, the CAC also addressed letters to the companies that hosted the 15 sexist videos and blogs to report the contents and to ask the companies to remove them. Consequently, YouTube removed the five videos and Google Hispavista removed the five blogs that they were hosting. The company hosting the other five blogs mentioned in the CAC report stated that it would not remove the blogs on the basis of freedom of speech.

The content inciting violence against women had significant viewing figures. The five videos now removed had a total of 228,192 views and four of the blogs had a total of 1,357,940 visitors. According to the denouncement sent to the State prosecutor, incitement to violence against women is considered as conduct that could be constitutive of an offence under Article 510 of the Spanish Criminal Code.

In this regard, the CAC has expressed its willingness to work closely with the Computer Crimes Unit of the Catalan Police (Mossos d'Esquadra) in order to tackle illegal content on the Internet.

Furthermore, the CAC, within the framework of the current revision of the Audiovisual Media Services Directive (IRIS 2016-6/3), calls for more tools to monitor the adequacy of the rules contained in both video-sharing platforms and social networks, as the latter are including tools to post more and more audiovisual content.

The report on the analysis of online hate speech against women is the third report prepared by the CAC on risk content on the Internet, after those relating to child pornography and anorexia and bulimia.

• *Consell de l'Audiovisual de Catalunya, YouTube retira els cinc vídeos que el CAC i el Departament de la Presidència van denunciar per incitar a la violència masclista, 4 d'octubre de 2016* (Catalan Audiovisual Council, "YouTube removes five videos denounced by the CAC and Department of the Presidency for inciting violence against women", 4 October 2016)

<http://merlin.obs.coe.int/redirect.php?id=18313>

CA

• *Catalan Audiovisual Council, Analysis of online hate speech against women, 8 June 2016*

<http://merlin.obs.coe.int/redirect.php?id=18358>

EN

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Catalan Audiovisual Council

FR-France

Administrative Court confirms '12' rating for "Sausage Party"

On 14 December 2016, the Administrative Court of Paris issued a particularly amusing decision concerning the age classification of the American animated film "Sausage Party", which was released in France in the autumn. In the film, products on sale in a supermarket realise the senselessness of their subservience to humans. This entertaining spoof traces the story of foodstuffs with human personalities from the moment they discover the reality of their condition until they finally win their freedom, particularly in the domain of sex and religious beliefs. A number of organisations called for the immediate suspension of the decision taken by the Ministry of Culture on 29[^{U+202F}]September to award the film a '12' rating. They thought the film should have been rated '16' or at least carried a public warning on account of its sexual content, bad language and portrayal of violence and hard drug use.

The court held, firstly, that if an appeal was lodged against the awarding of a '12' rating, it should, as part of the summary proceedings, explore whether the film promoted violence, seriously infringed human dignity

or was likely to corrupt minors. If the court did not find this to be the case, given the state of the proceedings, it would need to weigh up whether the age classification was sufficient to protect children and young people,

The complainants argued, first of all, that the film promoted violence and was likely to corrupt minors because it depicted rape and incited sexual activities prohibited under the Criminal Code. However, the court ruled that "if a furtive sequence mimics sexual relations between a box of oatmeal and a box of crackers, it does not appear, given the state of the proceedings, to represent a racism-inspired rape". Similarly, the court held that the final scene of the film, which lasts three minutes and shows foodstuffs and other consumer products clearly simulating various sexual practices, was set in an imaginary world and could not be interpreted as inciting children to imitate what they had seen. Therefore, given the state of the proceedings, the film "Sausage Party" could not be regarded as promoting violence, infringing human dignity or likely to corrupt minors in violation of Article 227-22 of the Criminal Code.

Secondly, the complainants claimed that the film ignored the best interests of children and the protection of young people in so far as it contained scenes of a sexual nature, showed acts of violence, presented drug use in a positive light and used crude and obscene language. The court held that the disputed scenes were not at all realistic, violent or degrading, and that they fitted coherently into the overall tone of the film, which was designed to depict the rebellion of consumer goods against human domination and oppression in a humorous and deliberately outrageous way. Similarly, it did not consider that the use of drugs hinted at in two scenes was presented in a positive light, but rather as a degrading and mind-numbing activity. Finally, the use of crude dialogue, often based on double-entendres, and foul or obscene language was not thought likely to shock minors aged over 12. All in all, the court did not think the certificate awarded could be regarded as having offered inadequate protection to children and young people. The request for a separate warning in addition to the '12' rating was also rejected on the grounds that the '12' rating itself, which was unusual for an animated film, provided sufficient warning. It was also pointed out that the film's title and promotional poster, which featured phallic symbols, clearly demonstrated its "subversive" nature, which was expressly mentioned, and the omnipresence of sexual connotations. The applications were dismissed.

• *Tribunal administratif, Paris, (ord. réf.), 14 décembre 2016, Association Promouvoir et autres* (Administrative Court of Paris (under the urgent procedure), 14 December 2016, Association Promouvoir and others)

FR

Amélie Blocman
Légipresse

New tax on video distribution of audiovisual content

By adopting an amendment to the Finance Act on 29 December 2016, French MPs defied the government by including the advertising income of websites offering free or paid video content in the sum of revenue generated from video sale and rental on which the so-called 'video and VoD tax' is levied to fund the National Centre for Cinema (Centre national du cinéma - CNC). The tax will be paid by providers of on-demand audiovisual media services and social platforms (such as YouTube or Dailymotion) that offer access to audiovisual content.

The tax will therefore apply to any operator, wherever it is based, offering a service in France that provides or enables access to cinematographic or audiovisual works or any other audiovisual content, whether for payment or free of charge. The 2% tax rate increases to 10% for advertising or sponsorship revenue linked to "the distribution of cinematographic or audiovisual content and works of a pornographic or violent nature".

The tax is payable on the total sum, excluding VAT, paid by advertisers and sponsors to the providers themselves or to advertising and sponsorship agencies for the dissemination of their advertisements and sponsorship messages. These sums are subject to a flat-rate deduction of 4%, or 66% in the case of services which provide or enable access to audiovisual content created by private users for the purposes of sharing and discussion via a social platform. For on-demand audiovisual media services, the tax is due on the sum received in return for access to cinematographic and audiovisual works. It is not levied on payments made by advertisers and sponsors for the dissemination of their advertisements and sponsorship messages on catch-up TV services, which are already subject to a separate tax.

Services in which audiovisual content is of secondary importance, such as newspaper websites, services "mainly devoted to information", and services designed to provide the public with information about audiovisual works (trailers, for example) are excluded.

• *Nouvel article 1609 sexdecies B du Code général des impôts, issu de la loi n°2016-1918 du 29 décembre 2016 de finances rectificative pour 2016* (New Article 1609 sexdecies B of the General Tax Code, Act no. 2016-1918 of 29 December 2016 amending the Finance Act for 2016)

<http://merlin.obs.coe.int/redirect.php?id=18357>

FR

Amélie Blocman
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First CSA warning issued to producer of on-line programme

The second season of "Les recettes pompettes", an entertainment programme imported from Quebec and broadcast via YouTube, in which famous guests are, according to its strapline, invited to "cook and drink alcohol", began in November. However, the Ministry of Health had asked the programme's producers not to broadcast the first episode, claiming that it "encouraged excessive consumption of alcohol", before referring the matter to the Autorité de Régulation Professionnelle de la Publicité (Professional Advertising Regulatory Authority -ARPP). In June of last year, the national audiovisual regulatory authority in France (Conseil Supérieur de l'Audiovisuel - CSA), informed Studio Bagel Productions (Canal Plus), the producer of the eponymous YouTube channel dedicated to "Les recettes pompettes", that the channel was subject to Article 2 of the Act of 30 September 1986 which governs on-demand audiovisual media services (on-demand AVMS). Despite the producer's observations, the CSA did not find any reason to question this analysis and, in a decision published on 13 December 2016, confirmed that the channel was indeed an on-demand AVMS. As such, the producer is therefore obliged to respect the obligations applicable to this type of service, in particular by applying both the provisions of the decree of 12 November 2010 concerning on-demand AVMS and the decision of 20 December 2011 concerning the protection of young viewers, ethics and the accessibility of programmes via on-demand AVMS.

After having watched the first episode of "Les recettes pompettes", which was made available online on 13 April 2016, the CSA noted that it contained numerous references to alcohol. It considered that the programme, by presenting alcohol in a manner likely to encourage its consumption, amounted to a form of propaganda promoting alcohol, which is contrary to the provisions of Article L. 3323-2 of the Public Health Code. The announcements broadcast before each programme - "This programme [may] not be suitable for young viewers" and "Alcohol abuse can damage your health, consume with moderation" - were deemed to be inadequate.

• *CSA, communiqué de presse du 13 décembre 2016* (CSA, press release of 13 December 2016)

<http://merlin.obs.coe.int/redirect.php?id=18361>

FR

Amélie Blocman
Légipresse

TF1 and M6 warned by CSA to limit politicians' speaking time

On 11 January 2017, the national audiovisual regulatory authority in France (Conseil Supérieur de l'Audiovisuel - CSA) announced that it had issued a "stern" warning to TV channels TF1 and M6 for persistently giving excessive airtime to the parliamentary opposition. In the run-up to the forthcoming presidential elections on 23 April and 8 May, the CSA must scrupulously monitor the application of the rules governing electoral news broadcasts. To this end, every fortnight it publishes on its website how much speaking time has been given to politicians in news and information bulletins, magazine shows and other programmes. On 15 December 2016, the CSA calculated the relevant figures for the period between 1 August and 31 December 2016. The campaign for the primary elections of the Republican Party candidate (the party currently in opposition to the presidential and parliamentary majority) took place during this period and there is no specific legislation governing the coverage of these elections by audiovisual media. The CSA therefore announced that speeches by the primary candidates would be taken into account on the same basis as those of other politicians: it was necessary to ensure the balanced representation of all political parties on television.

Although political news in the autumn focused strongly on the right-wing and centre-right primaries, in November, the CSA had already highlighted some huge imbalances on certain radio and television stations. It had asked the channels concerned to make the necessary changes as quickly as possible. On 11 January 2017, the CSA announced that it had taken note of the efforts made by most audiovisual media to ensure that the balance required under current regulations was respected. The imbalances previously observed had already been largely corrected by many radio and television stations. Nevertheless, the disproportionate coverage on TF1 and M6 remained "extremely significant", with excessive exposure given to the parliamentary opposition. For this reason, the CSA warned both channels to ensure that these "profound imbalances are urgently rectified in view of the brevity of the remaining period". From 1 February 2017, the CSA recommendation of 7 September 2016 will govern the rules specific to the presidential election for all radio and television providers, in accordance with the rules laid down in the Act of 25 April 2016 updating the rules applicable to the election. The CSA distinguishes between three periods for the calculation of speaking time and airtime. The fair coverage principle applies from the moment the list of candidates is published to the day before the "official" campaign. Only the last two weeks before the election are subject to equal speaking time in the audiovisual media.

• *Bilan des temps de parole des personnalités politiques (août-décembre 2016), communiqué du CSA du 11 janvier 2017* (Overview of politicians' speaking time (August to December 2016), CSA press release of 11 January 2017)

FR

Amélie Blocman
Légipresse

GB-United Kingdom

Ofcom updates plans to make Openreach independent of BT for the benefit of all UK telecom providers

On 29 November 2016, Ofcom updated its plans to reform the structure of Openreach, which is a wholly owned subsidiary of the BT (British Telecom) Group. Openreach develops and maintains the United Kingdom's main telecoms network, including broadband, and its infrastructure is used by other providers such as Sky, Talk Talk, Vodafone and BT's own retail business.

In February 2016, in its Strategic Review of Digital Communications in the United Kingdom, Ofcom expressed its concern that Openreach was not sufficiently independent of BT, that it favoured BT in its dealings, and that this was anti-competitive towards BT's rivals (see IRIS 2016-4/16). As a consequence of the Strategic Review, BT was invited by Ofcom to make proposals to create an independent Openreach.

Ofcom's November announcement revealed that BT had failed to offer voluntary proposals to address the regulator's concerns for providing an autonomous Openreach which works in favour of all telecom providers. As such, Ofcom proposes that Openreach become a distinct company with its own board of directors, including non-executive directors who, in the majority, would not be affiliated to BT. Such an independent board would have the autonomy to make their own impartial strategic investment decisions, particularly with regard to the development of a full fibre broadband.

As part of the process, on 28 November 2016, Ofcom gave written notification to the European Union that they intended to impose an exceptional remedy on BT, requiring the separation of Openreach. The letter also flagged that Ofcom was preparing a notification on which it intended to seek consultation during the early part of 2017; it would then quickly submit the notification to the European Commission once it had taken account of all consultation responses, in accordance with the procedures set out under Article 8(3) of the Access Directive. The Directive states "Where an operator is designated as having significant market power on a specific market as a result of a market

analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate". Articles 9 to 13 refer respectively to obligations of transparency; non-discrimination; accounting separation; access to and use of the network facilities; and price control and cost accounting obligations. Subject to the Commission's decision, Ofcom would implement its reforms as soon as possible.

In its November announcement, Ofcom made it clear that throughout the process they would remain open to voluntary commitments from BT that addressed the competition concerns.

Whilst some of those responding to the Strategy Review raised concerns about the cost of separation and the effect on the BT Pension Scheme, Ofcom considered, on balance, that separation was in the wider public interest; it also believed that the possible effect upon the pension fund had been overstated.

Ofcom also indicated that if legal separation between BT and Openreach did not engender independence without undue influence from the BT Group, then it may mean a full structural break up, whereby Openreach ceases to be part of the BT Group altogether.

- Ofcom, Update on plans to reform Openreach, 29 November 2016 <http://merlin.obs.coe.int/redirect.php?id=18347> EN
- Ofcom, Letter to the European Commission, 29 November 2016 <http://merlin.obs.coe.int/redirect.php?id=18348> EN

Julian Wilkins
Blue Pencil Set

BBC publishes response to report on culture and practices in relation to serious sexual misconduct by celebrities

The BBC has now published its response to Dame Janet Smith's review of its culture and practices in relation to serious sexual misconduct by celebrities, notably Jimmy Saville and Stuart Hall (IRIS 2016-5/18). It sets out the current position and the rules and policies which are in place to prevent a repetition of the major organisational failures criticised in the report, including failings in audience controls, sharing of information and the attitude of staff in general towards sexual harassment.

A new child protection policy has been introduced, supported by a code of conduct which applies to all staff and anyone in a contractual relationship with the BBC. This policy sets out explicitly the behaviour to be expected of any adult who has contact with children, and is supported by a network of 45 trained child protection advisors. A bullying and harassment policy has also been introduced, and the policy on audience controls has been reviewed and updated; it now

requires that all under-18s in audiences attend with an adult. Complaints procedures have also been revised and clarified; where a child is involved, staff are guided to contact their divisional child protection officer as soon as possible. There is also a dedicated Support at Work Team in HR which handles all formal claims of bullying and harassment, and there are dedicated whistle-blowing channels.

The BBC continues to work with outside organisations such as the National Society for the Prevention of Cruelty to Children and the National Association of People Abused in Childhood to enhance its child protection strategy. Two reviews of its policies have been undertaken by consultants; the GoodCorporation examined policies and practices against a best practice audit framework.

As regards the culture of the BBC and communication within it, both of which were heavily criticised in the report, cohesion and coordination have been increased by reducing the complexity of decision making, including a 64% reduction in the number of boards forming part of the decision-making processes. The role of team managers has been clarified, and management training improved. On the key issue of attitudes to "talent" (that is to say, performers and celebrities), the attitudes and allowances of the past are no longer acceptable, and policies on bullying and harassment and on child safeguarding are highlighted in their contractual terms; breaches of these policies are regarded as a serious breach of contract and could place continued engagement with the BBC at risk.

Policies and practices will be reviewed once more in 12-18 months' time.

- BBC Response to the Dame Janet Smith Review, December 2016 <http://merlin.obs.coe.int/redirect.php?id=18335> EN

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IE-Ireland

Broadcaster's prank call violated public official's privacy

On 21 December 2016, the Broadcasting Authority of Ireland (BAI) held that a prank call made by a broadcaster to a state agency employee violated Principle 7 of the BAI Code of Programme Standards on respect for privacy. The programme concerned was the Nick Richards Show, which is a music-driven show broadcast on weekday mornings. During a July 2016 broadcast, a prank call was made to an employee of the State Examinations Commission (SEC) by a member of the show, as part of a pre-recorded daily comedy

spot featuring prank calls. The call usually ends with the presenter revealing the prank nature of the call; however, on the occasion in question, the SEC employee ended the conversation before the “reveal”.

The SEC made a complaint to the BAI on behalf of its employee, as it had a “duty of care to protect the interests of its employees”. It argued that its employee had not been informed before or after the call that it had been recorded, and the employee “would not have consented” to the material being broadcast. It was argued that the broadcast violated the employee’s right to privacy recognised under Principle 7 of the BAI Code of Programme Standards.

The BAI’s Compliance Committee decided to uphold the complaint. First, the Committee noted that Principle 7 of the BAI Code of Programme Standards recognises that individuals have a right to privacy. As such, “broadcasters are required to respect, and not unreasonably encroach upon the privacy of the individual, either in the manner in which programmes are made or broadcast”. Secondly, the Committee also noted that under Principle 7, “broadcasters are obliged to have due regard for the concept of individual consent and ensure that participants in a broadcast are generally aware of the subject matter, context and the nature and format of their contribution so that their agreement to participate constitutes informed consent”. The BAI held that, having regard to the fact that the recording of the caller was broadcast without the caller’s consent, “the caller’s privacy was encroached upon unreasonably. There had thus been a violation of the Code of Programme Standards.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, December 2016, p. 18

<http://merlin.obs.coe.int/redirect.php?id=18314>

EN

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BAI issues Warning Notice to broadcaster over abortion coverage

On 21 December 2016, the Broadcasting Authority of Ireland (BAI) upheld a complaint concerning an interview on abortion, broadcast by the public service broadcaster RTÉ. The programme concerned a June 2016 edition of The Ray D’Arcy Show, a lifestyle and entertainment programme broadcast on weekday afternoons on RTÉ Radio 1. Notably, the BAI issued a Warning Notice to RTÉ as this was the “third occasion” on which complaints had been upheld concerning the programme’s coverage of abortion (see IRIS 2016-7/22, IRIS 2016-2/14 and IRIS 2014-2/23).

The programme featured an interview with a couple on their experience of the termination of a pregnancy,

where a fatal foetal abnormality was present, and their views on a United Nations Human Rights Committee (UNHRC) finding concerning Ireland’s abortion law which had been issued that day. A complainant argued that the interview violated the Broadcasting Act 2009 and the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs, as it was a “personal story with a political campaigning message tagged on”; that opposing viewpoints were “treated in a cursory manner”; and that the presenter had failed to point out that the couple were “part of a campaigning group” to reform Ireland’s abortion law.

The BAI’s Complaint Committee unanimously upheld the complaint. First, the Committee held that the programme segment “was predominantly a news and current affairs item rather than a human interest story”, noting that the presenter spent five minutes on the UNHRC finding, prior to the interview. Moreover, “while the interviewees spoke about their own personal experience and the item had clear human interest elements as a result, the interviewees are members of the organisation Termination for Medical Reasons, whose objectives include changing Irish laws on abortion”. The Committee was of the opinion that adherence to broadcasting regulations required that “the audience be made aware that the interviewees were members of an organisation seeking to change Irish law”. It followed that “their views on this matter of current public debate should have been examined rather than simply facilitated, without other views being presented to the guests”. Secondly, the Committee “did not believe that the reading of some texts that were critical of the UNHRC decision or reading extracts from statements of ‘pro-life’ organisations were given equal prominence or were sufficient to ensure that the item met with the news and current affairs requirements set out in the 2009 Act or the BAI’s Code”. Thirdly, the Committee rejected RTÉ’s argument that a second programme was a “related broadcast” which would satisfy the “fairness, objectivity and impartiality” requirement over two broadcasts. The Committee held that “the presenter did not link the second broadcast to the findings of the UNHRC”, and “the content of this second interview was focused almost exclusively on the personal experiences of the interviewee and did not discuss in an analogous manner the law in respect of abortion in Ireland”. In light of these findings, the Committee held that the broadcast did not comply with the fairness, objectivity and impartiality requirements of the Broadcasting Act 2009. Finally, the Committee noted that it was the third occasion that complaints had been upheld in respect of the programme, and that this was “a matter of concern for the Committee”. Consequently, a Warning Notice was issued to make the broadcaster aware “that the matter is considered to be relatively serious”, and unless resolved, may result in “formal sanctions”.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, December 2016, p.4
<http://merlin.obs.coe.int/redirect.php?id=18314>

EN

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Advertising Authority decision on sports star appearance in alcohol advertisement

On 30 November 2016, the Advertising Standards Authority of Ireland (ASAI) issued its decision concerning a television alcohol advertisement featuring a mixed martial arts (MMA) star. The decision sets out the ASAI's approach to determining whether a sports star may be considered to have "hero/heroine of the young status".

The advertisement for Budweiser beer featured MMA champion Conor McGregor, walking through a Dublin housing estate, with a voice over "Dream as big as you dare", and accompanied by the Budweiser logo. The advertisement included the text "Dream Big - Enter at BudDreamBig.ie, ROI Residents 18+, Get the facts. Be Drink Aware, Visit drinkaware.ie".

A complaint was made under the ASAI Code of Standards for Advertising and Marketing Communications in Ireland, in particular Section 9.7, which states that "Marketing communications should not be directed at children or in any way encourage them to start drinking", and 9.7(c) which provides that marketing communications should not use or refer to identifiable heroes or heroines of the young. The complainant argued that it is "inappropriate to link Conor McGregor, who they considered to be a role model/hero for many young children, especially boys, to advertising for an alcohol product alongside the invitation to enter a competition and "Dream Big".

The ASAI's Complaints Committee decided to uphold the complaint. First, the Committee noted that the advertiser (Diageo/Budweiser) provided details of McGregor's profile on Facebook, Twitter and the television viewing figures. The advertiser argued that this data demonstrated a profile with an "overwhelming adult focus". However, the Committee held that "while social media metrics may have relevance, they could only be considered as indicators of a person's popularity and were not a definitive measure in determining hero/heroine of the young status". Second, the Committee considered that the achievement of a highly publicised sporting title (i.e. becoming a world champion) would increase an individual sportsperson's profile to a very significant level, and that "in such circumstances, it was highly likely that the subsequent fame attaching to such a sporting personality would result in him or her becoming a hero

of the young". In this regard, the Committee held that "Conor McGregor had become a World Champion and in conjunction with his steadily increasing following from an under-18 audience, they concluded that, when the advertising ran, he had become a hero of the young". Thus, the Committee concluded that the advertisement breached section 9.7(c) of the Code of Standards for Advertising and Marketing Communications in Ireland.

• Advertising Standards Authority of Ireland, Complaints Bulletin 16/6, Complaint reference 25831, 30 November 2016
<http://merlin.obs.coe.int/redirect.php?id=18315>

EN

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IT-Italy

Court annuls Italian Competition Authority's EUR 66M fine for an alleged cartel in the assignment of Serie A football TV rights.

On 23 December 2016, the Regional Administrative Tribunal for Lazio (TAR) annulled a decision of the Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority - AGCM), which imposed fines totalling EUR 66 million on the broadcasters Mediaset and Sky Italy, the Italian Football League (IFL) and the latter's advisor Infront for rigging an auction for the assignment of the rights of TV Series A football for seasons from 2015 to 2018.

On 19 April 2016, the AGCM found that Sky Italy, RTI/Mediaset, IFL and Infront had breached Article 101 TFEU on the prohibition of anticompetitive agreements by negotiating a scheme for the allocation of the rights for the audiovisual reproduction of the Series A matches of seasons 2015-2018, thus altering the natural outcome of the statutory tender procedure, held in 2014, for the assignment of the said rights.

Sky Italy placed the highest bids for the two most valuable packages (namely, A and B). Packages A and B granted exclusive rights to broadcast 65% of the Series A matches, including the matches of the 8 most followed teams, on, respectively, the satellite (DTH) and digital terrestrial (DTT) platforms, plus Internet and mobile. Notably, Sky Italy operates a satellite platform and historically has held the dominant share of the Italian pay-tv market. RTI/Mediaset - which is the second Italian pay-tv operator with the DTT platform Mediaset Premium - placed the highest bid on package D, which granted exclusivity on the remaining 35% of matches for all platforms. However, Mediaset conditioned the validity of the bid for D to the

assignment of either A or B. IFL and Infront raised concerns as to the compatibility of such an outcome with the no-single-buyer rule set out in Legge Melandri, therefore IFL assigned A (exclusive rights for DTH) to Sky, and B (exclusive rights for DTT) and D to RTI/Mediaset, which then sub-licensed D to Sky with the required AGCM's authorisation.

Nonetheless, the AGCM argued that such an arrangement restricted competition "by object", as the parties intentionally substituted the natural outcome of the statutory tender with a concerted allocation of the rights. Instead they should have resorted to a new tender to possibly overcome competition concerns. Consequently, the authority maintained to be under no duty to provide evidence of actual anticompetitive effects to substantiate a breach of Article 101 TFEU in this circumstance.

In annulling the decision and the fines, the TAR stated, inter alia, that the AGCM failed to provide evidence of actual adverse effects for competition in the relevant markets since, considering the overall legal and economic context, the private arrangement did not restrict competition "by object". According to the TAR, the assignment of both A and B to Sky Italy would have been, at a first look, either incompatible with the statutory limitations to dominant positions set forth in Legge Melandri or, in any case, more harmful for competition than the allocation made by IFL. The TAR further argued that the AGCM's decision lacked a proper analysis of the "counterfactual" scenario: the authority should have substantiated that it was "plausible" that a new auction might have generated a more favourable outcome for competition and consumers than that generated by the private arrangement.

• *Autorità Garante della Concorrenza e del Mercato, Provvedimento n. 25966 del 19 aprile 2016, I790 - VENDITA DIRITTI TELEVISIVI SERIE A 2015-2018* (Italian Competition Authority, Resolution no. 25966 of 19 April 2016, I790 - SALE OF SERIE A TELEVISED RIGHTS 2015-2018)
<http://merlin.obs.coe.int/redirect.php?id=18316> IT

• *Tribunale Amministrativo Regionale per il Lazio, sentenza n. 12816/2016* (Regional Administrative Tribunal for Lazio, decision no. 12816/2016)
<http://merlin.obs.coe.int/redirect.php?id=18349> IT

• *Tribunale Amministrativo Regionale per il Lazio, sentenza n. 12814/2016* (Regional Administrative Tribunal for Lazio, decision no. 12814/2016)
<http://merlin.obs.coe.int/redirect.php?id=18350> IT

• *Tribunale Amministrativo Regionale per il Lazio, sentenza n. 12812/2016* (Regional Administrative Tribunal for Lazio, decision no. 12812/2016)
<http://merlin.obs.coe.int/redirect.php?id=18351> IT

• *Tribunale Amministrativo Regionale per il Lazio, sentenza n. 12811/2016* (Regional Administrative Tribunal for Lazio, decision no. 12811/2016)
<http://merlin.obs.coe.int/redirect.php?id=18352> IT

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NL-Netherlands

Dutch Supreme Court dismisses Ryanair's appeal in cassation against broadcaster KRO

On 23 December 2016, the Dutch Supreme Court dismissed Ryanair's complaints against the Court of Appeal's finding that KRO's television programme regarding the airline was not unlawful (see previous decisions, in IRIS 2015-10/23 and 2013-7/20). KRO had aired in late 2012, and early 2013, two episodes of a programme in which the business practices of Ryanair were said to compromise flight safety. More specifically, it was said that pilots were encouraged to fly with the absolute minimum of fuel and that they felt obliged to fly whilst feeling unwell. In July 2014, the Amsterdam Court of Appeal upheld an earlier District Court decision that the critical statements made in the programme regarding Ryanair were not unlawful. The Supreme Court has now held that the complaints do not raise legal issues concerning the unity or certainty of law. The case is therefore dismissed on the basis of Article 81 RO (the Judiciary Organization Act), so that no further rationale is necessary.

The Advocate General (AG) discussed the case more thoroughly. Ryanair's complaints in cassation can be briefly outlined as follows: (1) the Court of Appeal did not decide their rectification claim on the basis of Article 6:167, paragraph 2 of the Dutch Civil Code; (2) in case the Court of Appeal did decide this issue, they decided wrongly.

Article 6:167 of the Dutch Civil Code provides a judge with the possibility to order a rectification for a publication of facts that were either false or misleading due to missing information. Such a rectification order is possible in two situations: (1) the defendant is liable for the publication, because it constitutes an unlawful act; (2) the defendant is not liable for the publication, because defendant was not aware of the falsity or incompleteness of the publication. The second possibility generally involves the situation that the defendant has done sufficient research.

The AG explains that the Court of Appeal held that KRO's television broadcasts did not contain false or misleading statements. Therefore, the AG concludes, there is no room for a rectification order on the basis of either grounds of Article 6:167 of the Dutch Civil Code. The Court of Appeal did decide the issue. The AG further dismisses all arguments made by Ryanair claiming that this decision was wrong.

• *Hoge Raad, 23 december 2016, ECLI:NL:HR:2016:2996* (Supreme Court, 23 December 2016, ECLI:NL:HR:2016:2996)
<http://merlin.obs.coe.int/redirect.php?id=18317> NL

• *Parquet bij de Hoge Raad, 4 november 2016, ECLI:NL:PHR:2016:1118* (Procurator General's Office at the Supreme Court, 4 November 2016, ECLI:NL:PHR:2016:1118)

<http://merlin.obs.coe.int/redirect.php?id=18318>

NL

• *Gerechtshof Amsterdam, 14 juli 2015, ECLI:NL:GHAMS:2015:2887* (Amsterdam Court of Appeal, 4 July 2015, ECLI:NL:GHAMS:2015:2887)

<http://merlin.obs.coe.int/redirect.php?id=18319>

NL

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PL-Poland

Regulations amending the Broadcasting Act partially unconstitutional

On 13 December 2016, the Polish Constitutional Tribunal issued a judgment on the assessment of the constitutionality of the Act of 30 December 2015 amending the Broadcasting Act (case no. K 13/16). The act changed, in particular, the manner of electing the executives of state-owned broadcasting companies and terminated the mandates of the current members of the management and supervisory boards of said companies (see IRIS 2016-2/22). The judgment was published in the Journal of Law on 29 December 2016. The applications for investigating the constitutionality of the act have been filed both by a group of Deputies of the Sejm (lower house of the Polish Parliament) and by the Commissioner for Citizens' Rights.

While assessing the sole legislative procedure, the Constitutional Tribunal decided that the allegation in this regard has not been sufficiently justified by the applicants. Thus, the Constitutional Tribunal discontinued the review proceedings with regard to this allegation - without a substantive examination of said issue. This way, the Tribunal did not make any final decision on the constitutionality of the legislative procedure, while not ruling out the possibility of a substantive examination in the event of any future proceedings on the basis of another application.

In principle, the Constitutional Tribunal declared the majority of the amendments introduced to the act admissible on the grounds of the Polish Constitution. For instance, the Tribunal allowed for electing the executives of state-owned broadcasting companies without a competition procedure. Similarly, what the Tribunal deemed compliant with the Constitution is that said executives shall be appointed without specifying their terms of office. The Tribunal also did not question the decrease in the number of members of the particular bodies of state-owned media companies. The Tribunal decided that the abovementioned amendments, as such, do not undermine the constitutional position of the National Broadcasting Council.

What the Tribunal deemed unconstitutional are in turn those provisions of the act that deprive the National Broadcasting Council of any influence over the process of electing members of the bodies of state-owned broadcasting companies. However, the Tribunal allowed here for a broad judicial discretion to be exercised by the ordinary legislator. As indicated by the Tribunal, if the Constitution provides in Article 213(1) that the National Broadcasting Council shall safeguard freedom of speech, the right to information, as well as the public interest regarding radio broadcasting and television, it arises, therefrom, that the National Council has to participate in the process of electing members of the bodies of state-owned broadcasting companies (while not prejudging on the form of such participation).

In addition, the Constitutional Tribunal has questioned depriving the National Broadcasting Council of its powers to grant consent to modifications in the articles of the association of state-owned broadcasting companies. The Tribunal found that the constitutional position of the National Council requires that any amendments to the articles of association of state-owned media companies are made solely upon the consent of the authority in question.

Therefore, as a result of the issued ruling, another amendment to the Polish regulations regarding the appointment of executives of state-owned broadcasting companies will certainly be necessary.

• *Press release of the Constitutional Tribunal from 13 December 2016* (Press release of the Constitutional Tribunal from 13 December 2016)
<http://merlin.obs.coe.int/redirect.php?id=18326>

PL

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RO-Romania

Government Emergency Decree on the Cinematography Law modification

On 12 December 2016, Government Emergency Decree no. 91/2016 on the modification and completion of Government Decree no. 39/2005 on cinematography and on establishing some measures in the cinematography area ('the Act') came into force. The Romanian Government adopted the Act on 29 November 2016 (see IRIS 2003-2/23 and IRIS 2016-10/23).

The Act aims at securing the functioning of the film production, making it more dynamic, and ensuring the access of the public to Romanian and European films. The Act changes the previous regulation in the way cinema production is financed through the Cinema Fund, by: transforming the refundable direct credit

in a non-refundable financial support for production and project development; reforming the organization and the transparency of the cinematography projects contest; ensuring reciprocal obligations at European level on international co-productions; and gaining the support of audiovisual education. The producers' obligation to return the percentage of the profits equivalent to the percentage of the obtained production budget remains in force. The money will go to the Cinematographic Fund to support the funding of other film projects.

The Act also intends to support young creators through a contest category designed for the directors of first and second feature films, a contest for micro-budget films (with budgets up to EUR 60,000), as well as to encourage the distribution of Romanian film, through increasing the mandatory percentage of such productions in the movie theatres from 5% to 10%.

The National Films Archive is no longer under the supervision of the National Film Centre, but under the supervision of the Ministry of Culture to protect the national cinematographic heritage.

At the same time, the Act provides additional measures to unblock the process of taking over the cinema halls and open-air cinemas by local authorities from the Autonomous Administration for Films Distribution and Exploitation of „Romanian Film”, under the provisions of Law no. 303/2008. The Autonomous Administration for Films Distribution and Exploitation of „Romanian Film” is a major distribution authority under the authority of the Ministry of Culture and national heritage. According to Law no. 328/2006, for the approval of the Government Ordinance no. 39/2005 with regard to cinematography, the cinemas and the open-air cinemas - including the land and the related movable goods - which belonged to the private domain of the state and of the Autonomous Administration for Films Distribution and Exploitation of „Romanian Film”, passed free of charge into the public domain of local administrative-territorial units and in the administration of the local councils concerned. The local councils also took over the related personnel of the cinemas, under the provisions of the Labour Code. At the same time, once the real estate transfer took place, the local councils took over the assets and liabilities for each facility they received in administration. According to the Act, the deadlines for the local authorities to revitalize and modernize the theatres taken over is extended to four years, with additional obligations to constantly show films in those cinemas (at least once a week). The measure aims at keeping the cinemas in the cinema circuit. The local authorities can apply for financial support for upgrading the cinemas, as well as for modernizing the cinemas and compiling cinema programmes.

For the first time, the Act provides funding for making Romanian films more accessible for people with disabilities.

- *Ordonanța de urgență nr. 91/2016 pentru modificarea și completarea Ordonanței Guvernului nr. 39/2005 privind cinematografia, precum și pentru stabilirea unor măsuri în domeniul cinematografiei* (Government Emergency Decree no. 91/2016 on the modification and completion of the Government Decree no. 39/2005 on cinematography and on establishing some measures in the cinematography area) <http://merlin.obs.coe.int/redirect.php?id=18338>

RO

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ANCOM launches the fourth digital terrestrial television auction

On 15 December 2016, the Autoritatea Națională pentru Administrare și Reglementare în Comunicații (National Authority for Management and Regulation in Communications - ANCOM) has launched a new auction for awarding the two national, 26 regional and 18 local digital terrestrial television multiplexes not awarded in the previous three selection procedures (see IRIS 2010-3/34, IRIS 2010-7/32, IRIS 2010-9/35, IRIS 2013-6/30, IRIS 2014-4/26, IRIS 2014-5/29, IRIS 2014-9/27, IRIS 2015-5/33, and IRIS 2015-7/28).

An applicant must be a Romanian or foreign legal person (company), it must accurately submit all the required documents, and the operation period provided in the articles of incorporation should be at least 10 years from the entry into force of the radio frequencies usage rights. A bidder for the national multiplexes must have a minimum average turnover of EUR 2,000,000 for the past 3 years, or for the period since its establishment if the company is younger than 3 years. Companies belonging to the same group cannot take part in the auction separately.

As established by the strategy approved by the Government on the transition from analogue terrestrial television to digital terrestrial television, the multiplexes shall be awarded by a competitive selection procedure. Each bidder should submit an initial offer indicating the categories and the number of multiplexes they wish to acquire.

Where the demand exceeds the number of multiplexes available, supplementary auction rounds will be organised. In those cases the multiplexes will be awarded to the bidders depending on the additional amounts they are willing to pay. For the rest of the categories, the multiplexes will be awarded based on the initial offer of the bidders.

The minimum licence fee (the starting price for each national multiplex) is EUR 300,000, whereas for the regional and local multiplexes it ranges from EUR 1,000 for a multiplex awarded within a locality that is not a county capital, to EUR 10,000. The Government established the licence fees in February 2014.

All the multiplexes will be awarded for a 10-year period. The winners can start the provision of commercial television broadcasting services immediately after obtaining the licence from ANCOM, and will have to put into operation at least 36 transmitters within 2 years from the licence issuance for the national multiplexes, and at least one transmitter within one year in each assigned area, for regional or local multiplexes.

The interested applicants could submit an offer until 27 January 2017. By mid-February 2017, ANCOM will announce the first winning offers and whether the auction stage needs to be organised for certain categories of multiplexes.

Following the 3 auctions organized so far, between March 2014 and March 2015, 3 national multiplexes have been awarded to the Societatea Națională de Radiocomunicații (National Broadcasting Company - RADIOCOM). This company was awarded the free-to-air multiplex and two other multiplexes in the UHF band for a EUR 1,020,002 licence fee. Moreover, 12 regional multiplexes and one local multiplex have been awarded.

• ANCOM lansează a patra licitație pentru alocarea multiplexurilor de televiziune digitală terestră - comunicat de presă (ANCOM launches the fourth auction for granting the digital terrestrial television multiplexes - press release)

<http://merlin.obs.coe.int/redirect.php?id=18337>

RO

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RU-Russian Federation

Court bans access to LinkedIn

LinkedIn, the major global professional social network, has been banned in Russia after a Moscow City Court upheld an earlier court decision taken upon a claim by Roskomnadzor, the governmental supervisory authority in media, communications and personal data traffic (see IRIS 2012-8/36). LinkedIn stood accused of failing to comply with a 2014 federal law requiring Internet companies that process Russian citizens' personal information to store their user data on servers located in Russia (see IRIS 2014-8/35). Reportedly LinkedIn had more than 6,000,000 users in Russia.

The court of first instance found violations and ordered to obligate Roskomnadzor to effectively limit Internet access to the LinkedIn websites and services at linkedin.com.

The court of second instance found no reasons to uphold the appeal of LinkedIn Corporation. It confirmed that the plaintiff violated "the rights and legitimate interests of the citizens of the Russian Federation as

subjects of personal data by collecting information on the users of the website as well as on other citizens of the Russian Federation who are not its users, by processing these data and by their dissemination, including via the website in question, without necessary permissions as well as with violation of the law of the Russian Federation in the field of personal data".

• *Decision by the Tagansky District Court on case 02-3491/2016. 4 August 2016 (Decision by the Tagansky District Court on case 02-3491/2016. 4 August 2016)*

<http://merlin.obs.coe.int/redirect.php?id=18320>

RU

• *Appeals Decision by the Judicial Collegium on Civil Cases of the Moscow City Court on case 33-38783/16, 10 November 2016 (Appeals Decision by the Judicial Collegium on Civil Cases of the Moscow City Court on case 33-38783/16, 10 November 2016)*

<http://merlin.obs.coe.int/redirect.php?id=18360>

RU

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US-United States

Jury must decide whether Star Trek fan film infringed copyright

On 3 January 2017, the U.S. District Court of the Central District of California decided that a jury should decide whether a Star Trek fan film has subjective substantial similarity to the Star Trek franchise and therefore infringes copyright (case no. 2:15-CV-09938-RGK-E).

The film producer Paramount Pictures Corporation and TV broadcaster CBS Studios Inc. own the copyright to the Star Trek science fiction franchise. The defendant used a crowdfunding campaign to raise money to set up Axanar Productions Inc. in order to produce a 20-minute Star Trek fan film, "Star Trek - Prelude to Axanar", which was released on YouTube. The plaintiffs believed the release of the film infringed their copyright and applied for a summary judgment.

In the case, which is still ongoing, the court ruled that a jury should decide whether an ordinary, reasonable person would find the fan film substantially similar to previous Star Trek films and television series. It noted that the fan film bore strong similarities with the franchise, that the action took place in the same fictitious settings such as the planets Axanar, Qo'nos and Vulkan, and involved the same fictitious alien species, i.e. Klingons and Vulkans. The defendants had deliberately introduced these similarities because they had wanted to create an authentic and independent Star Trek film that stayed true to the original. However, in order for copyright to be breached, it had to be determined that an ordinary, reasonable person would find the total concept and the feel of the works to be substantially similar (the so-called 'intrinsic test'). In any

case, the court found that this question was best left to a jury.

In the court's opinion, the defendants were not entitled to a fair use defence, so the outcome of the case depended on the jury's decision.

• District Court of California, decision of 3 January 2017 (case no. 2:15-CV-09938-RGK-E)
<http://merlin.obs.coe.int/redirect.php?id=18356>

EN

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