

## INTERNATIONAL

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## INTERNATIONAL

### COUNCIL OF EUROPE

#### **European Court of Human Rights: Rubio Dosamantes v. Spain**

The European Court of Human Rights (ECtHR) has, once again, clarified that media freedom and entertainment news must respect the right of privacy of individuals, including when commenting on the private life of media celebrities. The case of *Rubio Dosamantes v. Spain* deals with an application by the Mexican pop singer whose artist name is Paulina Rubio, complaining that her reputation and private life had been harmed by remarks in various Spanish TV programmes. The ECtHR held that the dismissal of Dosamantes' claims by the Spanish courts was a breach of Article 8 of the European Convention on Human Rights (ECHR). The fact that the singer was well known to the public and that rumours about her private life and sexuality had been widely circulated, including on the Internet, did not justify the broadcast of interviews about her relationships and sexuality, merely repeating such rumours. The ECtHR found that Ms. Rubio's fame as a singer did not mean that her activities or conduct in her private life should be regarded as necessarily falling within the public interest.

In 2005 Ms. Rubio's former manager gave interviews on three television programmes concerning various aspects of the singer's private life. Ms. Rubio brought a civil action, seeking protection of her right to honour and to privacy, against her former manager and various television presenters and staff members, television production companies, and television stations. The first-instance court, and later the court of appeal, dismissed Ms. Rubio's claims. They found that the comments concerning the drug use of Ms. Rubio's boyfriend, R.B., had related solely to the state of their relationship and had not alleged that Ms. Rubio had incited him directly to take drugs. As to the references to Ms. Rubio's sexual orientation, the Spanish courts considered that they had not impugned her honour, as homosexuality should no longer be considered dishonourable. Furthermore Ms. Rubio herself had tacitly consented to the debate on the subject. Lastly, the Spanish courts found that the remarks concerning Ms. Rubio's alleged ill-treatment of R.B. were likewise not damaging to her reputation. Further appeals were declared inadmissible by the Supreme Court, and finally also by the Constitutional Court.

In her complaint lodged with the ECtHR, Ms. Rubio alleged that the remarks made about her during the disputed TV programmes had impugned her honour and

breached her right to respect for her private life, as protected by Article 8 of the Convention. As in former cases dealt with by the ECtHR (see IRIS 2012-3/1 and IRIS 2016-1/3), the question was whether a fair balance had been struck by the national courts between the right to respect for private life, including her right to reputation, and the right of the opposing party to freedom of expression. The ECtHR refers to the relevant criteria applied in other cases in this balancing, and focuses on (1) the contribution to a debate of public interest and the degree of notoriety of Ms. Rubio; (2) the prior conduct of Ms. Rubio; and (3) the content, form, and consequences of the comments uttered in the TV programmes at issue.

The ECtHR observed that the domestic courts had based their decisions merely on the fact that Ms. Rubio was famous, while emphasising that a public figure well known as a singer also has a right of privacy with regard to activities or conduct in his or her private life. According to the ECtHR, the TV programmes in question, based as they were on strictly private aspects of Ms. Rubio's life, did not have any public interest that could legitimise the disclosure of the information, in spite of her fame, as the public had no legitimate interest in knowing certain intimate details about her private life. Even assuming that there had been a public interest, in parallel to the commercial interest of the television channels in broadcasting the programmes, the ECtHR found that those interests were outweighed by a person's individual right to the effective protection of his or her privacy. Next the ECtHR found that the fact that Ms. Rubio had earlier benefitted from extensive media attention did not authorise the TV channels to broadcast unchecked and unlimited comments about her private life. It reiterated that certain events of private and family life were given particularly careful protection under Article 8 of the Convention, and that therefore journalists and media had to show prudence and precaution when discussing them. The Spanish courts had therefore had a duty to assess the TV programmes in question, in order to distinguish between, and to weigh in the balance, those matters which were intimately part of Ms. Rubio's private life and those which might have had a legitimate public interest. The ECtHR however observed that the national courts had not carefully weighed those rights and interests in the balance, but had merely taken the view that the comments in question had not impugned Ms. Rubio's honour. They had not examined the criteria to be taken into account in order to make a fair assessment of the balance between the right to respect for freedom of expression and the right to respect for a person's private life. Having regard to the margin of appreciation afforded to the domestic authorities when it came to weighing up the various interests, the ECtHR found unanimously that they had failed in their positive obligations to ensure the protection of Ms. Rubio's privacy. There had therefore been a violation of Article 8 (see also IRIS 2016-6/1).

• *Arrêt de la Cour européenne des droits de l'homme, troisième section, affaire Rubio Dosamantes c. Espagne, requête n° 20996/10, 21 février 2017* (Judgment by the European Court of Human Rights, Third Section, Rubio Dosamantes v. Spain, Application no. 20996/10, 21 February 2017)

<http://merlin.obs.coe.int/redirect.php?id=18400>

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## European Court of Human Rights: **Selmani and Others v. the former Yugoslav Republic of Macedonia**

On 9 February 2017, the European Court of Human Rights (ECtHR) delivered an important judgment, condemning the forcible removal of journalists from the national parliament gallery where they were reporting on a parliamentary debate in the former Yugoslav Republic of Macedonia. During the debate a group of opposition members of parliament (MPs) had started creating a disturbance in the parliamentary chamber, and had been ejected by security officers. The applicants, all accredited journalists, had refused to leave the gallery but were finally forcibly removed by security officers. The journalists brought proceedings before the Constitutional Court to complain about the incident, and contested the fact that there was no oral hearing in order to challenge the facts as disputed between them and the government. They submitted that the parliamentary debate, and the related events regarding the approval of the State budget, had been of particular public interest, and that the intervention of the parliament security officers had been neither “lawful” nor “necessary in a democratic society”. The Constitutional Court dismissed the journalists’ complaint, emphasising that in the circumstances of the case at issue, the Parliament security service was entitled to move the journalists to a safer place, where they would not be in danger. Such an assessment should not be viewed as conflicting with the journalists’ right to attend parliamentary proceedings and report on events they witnessed. In fact, the journalists published their reports in the evening editions of their newspapers, which implies that there was no violation of their freedom of expression.

The journalists lodged an application with the ECtHR, complaining about their forcible removal from the parliament gallery from where they had been reporting. In its judgment, the ECtHR agreed with the government that the removal of the journalists was “prescribed by law” and pursued the “legitimate aim” of ensuring public safety and the prevention of disorder. The ECtHR however was of the opinion that the government had failed to establish that the removal of

the journalists was “necessary in a democratic society”. In particular, there was no indication that there had been any danger from the protests which had taken place outside the parliament building on the day of the incident, either from the journalists themselves (who had neither contributed to nor participated in the disturbance in the chamber), or from the MPs who had been at the origin of the disorder. Nor was the ECtHR convinced that the journalists had effectively been able to view the ongoing removal of the MPs, a matter which had been of legitimate public concern. In its reasoning the ECtHR referred to the crucial role of the media in providing information on the authorities’ handling of public demonstrations and the containment of disorder, such as in the present case. It reiterated that the “watchdog” role of the media assumes particular importance in such contexts, since their presence is a guarantee that the authorities can be held to account for their conduct vis-à-vis the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order. Any attempt to remove journalists from the scene of demonstrations must therefore be subject to strict scrutiny, especially “when journalists exercise their right to impart information to the public about the behaviour of elected representatives in Parliament and about the manner in which authorities handle disorder that occurs during Parliamentary sessions”. According to the ECtHR, it was not presented with any evidence that the disturbance in the chamber had been violent or that anyone, in the chamber or elsewhere, had sustained an injury as a result of that disturbance. The journalists’ removal, on the other hand, entailed immediate adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in the chamber. The Court found that these are important elements in the exercise of the applicants’ journalistic functions, of which the public should not have been deprived in the circumstances of the present case. Against this background, the ECtHR considered that the government failed to establish convincingly that the journalists’ removal from the gallery was necessary in a democratic society, and came to the conclusion that there has been a violation of Article 10 of the European Convention on Human Rights (ECHR). It also found a breach of Article 6 of the ECHR, as the journalists were refused an oral hearing before the Constitutional Court, without being provided any reasons for this refusal.

• Judgment by the European Court of Human Rights, First Section, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, Application no. 67259/14, 9 February 2017

<http://merlin.obs.coe.int/redirect.php?id=18401>

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## Parliamentary Assembly: Resolution on online media and journalism

On 25 January 2017, the Parliamentary Assembly of the Council of Europe (PACE) adopted a new Resolution entitled “Online media and journalism: challenges and accountability”. The Resolution begins with some general observations on the benefits and risks associated with new online media. On the one hand, the Resolution notes new online media “create[s] more media pluralism”, offers everybody the possibility to disseminate information and views to the public at large, and enables the public to become aware of human rights violations in places that attract little media attention.

However, the Assembly expressed its concerns about the “weakening of professional media” and “exponential growth in internet media which do not adhere to professional standards of journalism”. Further, “disinformation and manipulation” frequently occur, and the Parliamentary Assembly noted with concern the number of online media campaigns designed to misguide portions of the public through intentionally biased or false information, hate campaigns against individuals and also personal attacks, often in a political context, with the objective of harming democratic political processes.

The Assembly welcomes the fact that large online media have established a policy whereby users can identify factual errors or factually false posts by third parties on their websites, such as on Facebook News Feed or through Google’s “webpage removal request tool”.

The Assembly then makes a number of recommendations to member states. These include that public service broadcasters should make full use of the technical possibilities offered by online media, but should exercise the greatest editorial diligence with regard to user-generated or third-party content. Further, member states should: ensure “the traceability” by law-enforcement authorities of users of online media when they violate the law; co-operate with online media and internet service providers in order to set up codes of conduct to counter illegal hate speech online; and develop “clearer rules” on the liability of site owners for content posted by third parties.

The Assembly also called upon the European Federation of Journalists and the Association of European Journalists to ensure that professional journalistic media uphold their editorial standards in their internet presence, including third-party content, as well as user generated content. The Parliamentary Assembly stated, “all third-party content posted on the internet presence of professional media falls under the editorial responsibility of these media”. Finally, the Assembly recommends that the European internet Services Providers Association develop ethical quality

standards regarding their transparency and the due diligence of their media services; allow users to report false information to service providers; to voluntarily correct false content, or publish a reply in accordance with the right of reply, or remove such false content; and to set up alert mechanisms against people who regularly post insulting or inflammatory text.

• Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017  
<http://merlin.obs.coe.int/redirect.php?id=18441>

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## EUROPEAN UNION

### Court of Justice of the European Union: Enforcement Directive and hypothetical royalties

On 25 January 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in *OTK v. SFP*, concerning the issue of the Enforcement Directive (2004/48/EC) and “hypothetical royalties”. The case arose following a dispute between the Polish broadcaster *Oławska Telewizja Kablowa (OTK)*, and *Stowarzyszenie Filmowców Polskich (SFP)*, an organisation collectively managing copyright in Poland, in particular audiovisual works. As part of the proceedings, the Polish Supreme Court referred a question to the CJEU on whether Article 79(1)(3)(b) of Poland’s copyright law was compatible with EU law. Article 79(1)(3)(b) provides that a rightholder may request a copyright infringer to remedy the loss based on payment of a sum corresponding to two or three times the amount of the fee which would have been due had permission for use been given.

First, the CJEU noted that since the reference had been made, the Supreme Court had found that Article 79(1)(3)(b) was partially unconstitutional insofar as the article allowed a rightholder to claim a sum three times the amount of the appropriate fee. Therefore, the CJEU considered the question before it to be whether the Polish provision providing the possibility of demanding payment of a sum corresponding to twice the appropriate fee (“the hypothetical royalty”) was compatible with Article 13 of the Enforcement Directive.

The CJEU first noted that the Directive lays down a “minimum standard” concerning the enforcement of intellectual property rights, and did not prevent member states from laying down measures that are

“more protective”. Thus, the Directive “must be interpreted” as not precluding national legislation allowing a rightholder to claim payment of a sum corresponding to twice the amount of a hypothetical royalty. The Court rejected the argument that compensation calculated on the basis of doubling the amount of the hypothetical royalty would not be “proportional to the loss actually suffered”, finding that such a characteristic “is inherent in any lump-sum compensation”. Moreover, the CJEU held that even though the Directive does not impose an obligation on member states to provide for “punitive” damages, this did not mean that the Directive prohibited introducing such measures.

Finally, the CJEU held it was “not evident” that the Polish provision at issue entailed an obligation to pay punitive damages. This was because “mere payment” of a hypothetical royalty is not capable of guaranteeing compensation in respect of all the loss actually suffered, given that it would not, in itself, ensure reimbursement of costs, compensation for possible moral prejudice, or payment of interest on the sums due. In this regard, the CJEU referred to OTK’s admission that payment of twice the amount of the hypothetical royalty is equivalent in practice to compensation of an amount remaining below what the holder would be able to claim on the basis of “general principles”. However, the CJEU did admit that “in exceptional cases, payment for a loss calculated on the basis of twice the amount of the hypothetical royalty will exceed the loss actually suffered so clearly and substantially that a claim could constitute an abuse of rights, prohibited by Article 3(2) of Directive 2004/48.

• Judgment of the Court of Justice of the European Union in Case C-367/15 *Stowarzyszenie ‘Oławska Telewizja Kablowa’ v. Stowarzyszenie Filmowców Polskich*, 25 January 2017

<http://merlin.obs.coe.int/redirect.php?id=18403> DE EN FR  
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## NATIONAL

### AL-Albania

#### National digital network licences issued

On 27 January 2017, the Audiovisual Media Authority (AMA) decided to grant the fifth and final national commercial license for national terrestrial digital networks. In its meeting, the regulator voted to grant the

final license to the company ADTN, with four votes in favour and three votes against the decision. Previously, following legal battles in Court and after a successful attempt to abolish media ownership limitations for national operators, the regulator had issued four other licenses. The licenses went specifically to the two national commercial broadcasters TV Klan and Top Channel TV, to the multiplex Digitalb, and to the company Media Vizion.

Other operators, mainly Ora News TV and Tring TV, which had also applied for the license, but which were disqualified, opposed the decision on the fifth license and took the matter to court. Awarding the license to the company ADTN was a source of concern as regards the strengthening of monopoly positions in this market, since ADTN was recently established and is owned by Digitalb, the oldest digital platform in the country. Furthermore, some of its owners own Top Channel TV, the other TV station that received a national digital license.

According to the Authority’s statement, granting the fifth license concluded the full regulation of digital broadcasting in terms of national networks that already existed in the country, but were not regulated. The next step is expected to be the transition to digital broadcasting of existing local analogue stations in the area of Tirane-Durres, the most densely populated area in the country.

• *AMA dhe KQZ nënshkruajnë marrëveshje bashkëpunimi* (The notification of the Audiovisual Media Authority on the completion of licensing for national digital networks)

<http://merlin.obs.coe.int/redirect.php?id=18420>

SQ

• *NJOFTIM PËR MEDIA* (The Audiovisual Media Authority decision to grant the fifth national license)

<http://merlin.obs.coe.int/redirect.php?id=18421>

SQ

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#### Regulator issues warning about broadcasting of political advertising spots

On 15 February 2017, the Audiovisual Media Authority (AMA) issued a warning to all broadcasters that were broadcasting an advertising spot that AMA considered political. The advertising spot was an announcement and a call for a protest that the largest opposition party had planned to hold in the capital on 18 February 2017.

The AMA’s statement reminded all operators that based on Law 97/2013 “On Audiovisual Media in the Republic of Albania”, it is not allowed to broadcast political advertising spots. Such content is only allowed during electoral campaigns, based on the Electoral Code. More specifically, AMA quoted Article 39 of the Electoral Code, which describes the criteria for

labelling an advertising spot as a political one. According to Article 39 of the Electoral Code, one of the criteria for considering advertising as political advertising is when the spot “endorses interests of political parties, political groups or political leaders, looking for political purposes.” Another criterion is the nature and profile of the person or organisation that has requested the broadcasting of the advertising spot, meaning that if “political parties and institutions and organizations aiming to endorse or organize political activities have commissioned the broadcasting” the spot will be considered a political one.

While establishing that the advertising spot qualified as political advertising according to Article 39 of the Electoral Code, the regulator also highlighted that, based on Article 41 paragraph 2 of the Electoral Code, the media cannot broadcast such advertising unless during an electoral campaign period: “The media service provider shall not broadcast advertising spots for political ends or that are related to a judicial dispute.” In sum, the regulator asked all broadcasters to pay attention to these legal obligations and to respect the rules for broadcasting political advertising spots.

• *Transmetimi i reklamave politike është i ndaluar me ligj* (The notification of the Audiovisual Media Authority)  
<http://merlin.obs.coe.int/redirect.php?id=18422>

SQ

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## CZ-Czech Republic

### Application of the GS Media ruling

In a ruling of 16 January 2017, the Prague Regional Court found that the operator of a website was not liable for embedded hyperlinks if it did not operate the site commercially (case no. 33 T 54/201).

The case at hand concerned a website created by the Czech Pirate Party in protest against previous court decisions concerning website operators’ liability for embedded hyperlinks. Visitors to the website, [sledujserialy.cz](http://sledujserialy.cz), could post their own links to episodes of various TV programmes. At the request of the rightsholders concerned, the Prague Regional Court examined whether the website was lawful.

As part of the Prague Court’s analysis of the case law of the Court of Justice of the European Union (CJEU) relating to liability for hyperlinks, it examined the CJEU’s decision in the GS Media case (IRIS 2016-9/3). The Prague Court ruled that, for this decision to be applicable, the main criterion was whether the website on which links to third-party sites that infringed copyright had been posted without the rightsholders’ consent was being operated commercially. The Prague

Court held that the operator of a website that was not being operated for profit should be presumed not to know or to be expected to know that the linked websites were illegal. On the other hand, it should be presumed that operators of commercial websites did, in principle, know that the third-party websites were illegal. Since, in the case at hand, the disputed website did not contain any advertising and the website operator, the Czech Pirate Party, did not intend to make any profit from the site in any other way, including through the sale of merchandise, the Prague Court classified the website as non-commercial. Although the Czech Anti-Piracy Union (CAPU) had informed the Pirate Party that the hyperlinks on its website led to sites that infringed copyright, it had failed, despite repeated requests, to show that it was acting on the rightsholders’ behalf. In the Prague Court’s view, the Pirate Party could therefore not be presumed to know that the hyperlinks were illegal.

In summary, the Prague Regional Court interpreted the criterion of commerciality in line with a current business model. In the Court’s opinion, a website is operated commercially if it contains advertising in order to generate profit. Meanwhile, the Court also applied very strict standards when determining whether website operators could be presumed to know that content was illegal. It concluded that the Pirate Party, which operated the website as a form of protest, could not be accused of being certain that the links were unlawful.

• *USNESENÍ Spisová značka: 33 T 54/2016* (Ruling of the Prague Regional Court of 16 January 2017 (case no. 33 T 54/2016))  
<http://merlin.obs.coe.int/redirect.php?id=18451>

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## DE-Germany

### Supreme Court finds use of ARD trademarks anti-competitive

In a judgment of 26 January 2017, the Bundesgerichtshof (Federal Supreme Court - BGH) found that a public service broadcaster had breached competition law by giving a publishing company the right to publish a printed work bearing its protected trademarks (case no. I ZR 207/14).

The decision followed an action for an injunction brought by the Bauer publishing company against broadcaster SWR and one of its subsidiaries. The plaintiff, Bauer, which publishes cookery and lifestyle magazines, complained that SWR had, in relation to its programme “ARD Buffet” and as (co-)owner of



the trademarks “ARD Buffet”, “ARD”, and “Das Erste”, through its subsidiary, granted to the Burda publishing company the right to use its trademarks in the magazine “ARD Buffet - das monatliche Magazin zur erfolgreichen TV-Sendung” (ARD Buffet - the monthly magazine about the successful TV programme). The plaintiff had claimed that the defendants were in breach of Article 11a(1)(2) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), according to which public service broadcasters are only permitted to publish printed material with programme-related content. It had also argued that this was a provision intended to regulate market conduct within the meaning of Article 3a of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG) and that a breach of Article 11a(1)(2) was therefore anti-competitive. After the complaints of the Bauer publishing company were rejected in the first instance (LG Hamburg, ruling of 19 September 2011, case no. 315 O 410/10) and on appeal (OLG Hamburg, ruling of 15 August 2014, case no. 5 U 229/11), its application to the BGH was successful.

The BGH considered that Article 11a(1)(2) RStV definitely was a provision intended to regulate market conduct in the interest of market participants. An infringement could therefore justify a claim under competition law because the rule was designed to restrict the conduct of public service broadcasters in the press market in the interest of publishing houses. It was true that SWR had not infringed the ban on publishing printed material itself, since the “ARD-Buffer” magazine was published by Burda. However, the BGH found that Article 11a(1)(2) RStV should also be interpreted as prohibiting public service broadcasters from supporting third-party publication of such material. The wording of the rule should be broadly interpreted, meaning that broadcasters, when publishing printed material, should not interfere in the press freedom of publishing houses to a greater extent than was necessary to fulfil their remit. If, as in this case, the broadcaster did not publish the printed material itself, but supported its publication by a third party, it interfered in competition between publishing houses and gave an advantage to whichever it supported. Such was the case here, since the SWR subsidiary had granted the right to use the aforementioned SWR trademarks to Burda and not to the plaintiff.

Since the plaintiff’s injunction application was insufficiently precise, the BGH could not issue a final decision itself. It therefore quashed the Appeal Court ruling and referred the matter back to the Oberlandesgerichts (Higher Regional Court, OLG) of Hamburg for re-examination and a new decision. The Bauer publishing house now has the opportunity to submit a sufficiently precise action for an injunction.

• BGH zum Urteil des BGH vom 26. Januar 2017 (Az. I ZR 207/14) (Judgment of the Federal Supreme Court of 26 January 2017 (case no. I ZR 207/14))  
<http://merlin.obs.coe.int/redirect.php?id=18429>

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### Supreme Court rules on illegal sale of bot software (World of Warcraft II)

On 12 January 2017, the Bundesgerichtshof (Federal Supreme Court - BGH) ruled that the sale of the so-called “bot software” that allows players of an online role-playing game to automatically enhance their avatars is illegal. It also prohibited the software developer Bossland GmbH from continuing to sell bot software for the popular online game “World of Warcraft” (case no. I ZR 253/14).

Blizzard Entertainment, developer of the online role-playing games “World of Warcraft” and “Diablo III”, had complained about the sale of Bossland bots “Honorbuddy” and “Gatherbuddy”. Blizzard Entertainment claimed that the sale of such bots was unlawful under competition law because the developer’s general terms and conditions, which banned the use of automation software, were binding on players of the game. In response, Bossland GmbH had argued that the general terms and conditions did not form an effective part of the contractual relationship between the provider and the player. It claimed that, when purchasing the client software on a physical data carrier, the buyer had no knowledge of the relevant terms and conditions.

The BGH rejected the argument of Bossland GmbH, and found that it was necessary to distinguish between the purchase of client software on the one hand and online registration to participate in the game on the other. The player firstly entered into an agreement with the distributor to purchase the client software required to access the online game, which needed to be installed on his or her computer. When creating a player account, the player then entered into an agreement with the game organiser on the use of software stored on its server, which was used to create the virtual game world and to constantly update and coordinate players’ moves. Agreements on different computer programs were often structured in different ways. Despite the economic nature of the agreements, even if the terms and conditions for the use of online functions were not communicated to players until they created an account, they still formed an effective part of the aforementioned relationship. If a player flouted the game rules contained in the terms and conditions, which prohibited the use of bot software, the sale of such software was also illegal because it represented a deliberate obstruction



of a competitor, within the meaning of Article 4(4) of the of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG), and was therefore an act of unfair competition. According to the BGH, from a general point of view, an impact on a competitor's product should be classified as unfair if it circumvented a protective measure specifically designed to prevent such an impact.

In a previous ruling, the BGH had also decided that it was unlawful to copy Bossland's bot software (ruling of 6 October 2016, case no. I ZR 25/15, "World of Warcraft I", see IRIS 2017-4/10). Both of these precedent-setting BGH decisions are very significant for computer game developers in Germany and for players of online role-playing games. Players who use bot software in the future can now expect their player accounts to be permanently suspended.

• *Urteil des Bundesgerichtshofs vom 12. Januar 2017 (Az.: I ZR 253/14)* (Ruling of the Federal Supreme Court of 12 January 2017 (case no. I ZR 253/14))

<http://merlin.obs.coe.int/redirect.php?id=18428>

DE

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### Supreme Court rules on bot software

In Germany it is illegal to copy the so-called "bot software" that allows players of online role-playing games to automatically enhance their online characters. In a recently published decision of 6 October 2016, the Bundesgerichtshof (Federal Supreme Court - BGH) decided that the use of such bot software for commercial purposes infringes the copyright of the developers of the online games concerned (case no. I ZR 25/15).

Blizzard Entertainment, developer of the online role-playing games "World of Warcraft" and "Diablo III", had filed a lawsuit against Bossland GmbH, which had developed a form of automation software that, at the player's request, took control of his or her game character and enhanced it without the player actually taking part in the game. The software enabled the online character to solve problems ("questing") or collect virtual points ("gathering") independently, in order to progress much faster than human players, who had to complete all tasks in the manner intended by the game's developers.

The plaintiff claimed that the defendant had, either itself or via a third party, copied the online game software without its permission in order to develop the automation software. The BGH upheld the complaint and largely confirmed the opinion of the lower-instance courts (OLG Dresden, 20.01.2015, case no. 14 U 1127/14; LG Leipzig, 15.07.2014, case no. 5 O 1155/13), finding that the defendant had illegally

used the copyrighted online game software on user devices (client software) for commercial purposes, even though it had only been granted the right to use it privately. Since the client software had been permanently downloaded onto the PCs used for the games, and the audiovisual game data had been temporarily uploaded to the PCs' working memory and video memory while the games were being played, the client software had been copied. The copies had been made partly for commercial reasons, in particular in order to produce and adapt the automation software for the games.

According to the BGH, the defendant could not justify its actions by referring to Article 69d(3) of the Urhebergesetz (Copyright Act - UrhG), under which only the computer program could be copied, not the audiovisual game data of the client.

In 2014, the Oberlandesgerichts (Higher Regional Court, OLG) of Hamburg had decided that such manipulation software should not be used because it seriously infringed the game developer's rights (ruling of 6 November 2014 - case no. 3 U 86/13). It had found that the use of such bot software could significantly damage sales for the game developer. It also reduced the chances of success for players who were not using the software. The Court found that paying customers would stop playing the game because it was less enjoyable if they could not play it successfully without cheating.

• *Urteil des Bundesgerichtshofs vom 6. Oktober 2016 (Az.: I ZR 25/15)* (Ruling of the Bundesgerichtshof (Federal Supreme Court) of 6 October 2016 (case no. I ZR 25/15))

<http://merlin.obs.coe.int/redirect.php?id=18427>

DE

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### Extension of retention period for videos in ARD media library

On 2 February 2017, after conducting a three-step test, the BR-Rundfunkrat (Broadcasting Council of Bayerische Rundfunk - BR) approved the telemedia concept "Alignment of the retention period for fictional format categories on DasErste.de with the ARD retention period concept". In the test, which lasted more than 12 months, experts assessed whether the telemedia concept met the democratic, social, and cultural needs of society and promoted media competition, as well as studying its financial impact on the market.

Two factors determine for how long videos remain available in the ARD media library and whether a programme can be offered in the media library at all

after it has been broadcast: firstly, the legal situation of the programme concerned (image and music rights, personality rights, licensing rights, and much more); and, secondly, the legal framework described in the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement).

In principle, within the ARD, BR has the primary responsibility for the telemedia offering of the website "DasErste.de". In the future, television series and other entertainment programmes will remain available in the ARD media library for a much longer period of up to six months. Under the BR decision, fictional programmes will be stored in the ARD media library for the same period of time as other programmes. For example, daily entertainment programmes will be available for up to three months after they have been broadcast. Until now, they have only been available for a maximum of seven days. Fictional programmes produced in-house by the ARD will now be available to viewers for up to six months. These include weekly entertainment series that were previously only kept for a maximum of six weeks after broadcast. The same period applies to "other entertainment series that are especially likely to promote political and social debate and contribute to individual freedom of opinion". In general, the ARD offers access to around 90% of all its programmes in its media library after they are broadcast. Meanwhile, almost all programmes can be watched live on the Internet, i.e. at the same time as they are broadcast (only a few foreign films are excluded). Viewers can scroll back for up to 30 minutes during "DasErste.de" live streaming so that they can catch up if they miss the start of a programme, even if it is not available via video-on-demand.

The next stage of the process is a legal examination by the Bayerische Staatsministerium für Bildung und Kultur, Wissenschaft und Kunst (Bavarian State Ministry of Education and Culture, Science and Art). If approved, the telemedia concept will be published in the Official Gazette. The BR Broadcasting Council will be responsible for permanently ensuring that the actual service matches the approved concept.

• *Pressemitteilung über den Beschluss des Rundfunkrats* (Press release on the Broadcasting Council's decision)  
<http://merlin.obs.coe.int/redirect.php?id=18430>

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## ES-Spain

### YouTube removes four videos following request from CAC

On 6 February 2017, the video-sharing platform YouTube removed four copies of a video in which a user appears in Barcelona offering a beggar biscuits filled with toothpaste. Although the user already removed the video, the Consell de l'Audiovisual de Catalunya (Catalan Audiovisual Council, CAC) noted the same video had been again uploaded through four other YouTube accounts.

On 27 January 2017, the CAC contacted YouTube asking them to remove these four copies of the original video, on the basis that the content showed in the video violated the fundamental rights of a person, in particular the beggar's right to dignity. YouTube proceeded to remove the four copies of the video. This is the second time that YouTube removed content at the request of the CAC. YouTube previously removed five videos that the CAC and the Department of the Presidency of the Catalan Government denounced for inciting violence against women (see IRIS 2017-2/13).

Since 2014, the CAC has been promoting actions in the field of audiovisual content on the Internet by preparing reports about online hate speech against women, child pornography, and anorexia and bulimia. The CAC has just finished a fourth report analysing the presence of online betting related content.

• *Consell de l'Audiovisual de Catalunya, YouTube retira, a petició del CAC, còpies del vídeo on apareix un captaire rebent unes galetes amb pasta de dents, 06/02/2017* (Catalan Audiovisual Council, YouTube removed, at the request of CAC, copies of the video where it appears a beggar getting some cookies with toothpaste, 6 February 2017)  
<http://merlin.obs.coe.int/redirect.php?id=18412>

CA

**Mònica Duran Ruiz**  
*Catalan Audiovisual Council*

### White paper on broadcasting in Catalonia presented by CAC in Parliament of Catalonia

The White Paper on broadcasting in Catalonia issued by the Consell de l'Audiovisual de Catalunya (Catalan Audiovisual Council, CAC), and presented in the Parliament of Catalonia, proposes a strategic plan to foster the sustainable development of the Catalan broadcasting system in the coming years. It achieves this by addressing the challenges of ensuring the economic sustainability of public media; consolidating the commercial content providers and making them

competitive, particularly in the local sector; strengthening the cultural industries; increasing Catalan language in broadcasting overall; and ensuring competitiveness in light of the technological convergence process.

The preparation of the White Paper, that was a task given to the CAC (approved unanimously by all parliamentary groups), included the participation of seven experts that drafted specific reports on language and culture, public service, local communications, economy and industry, advertising, regulation, and market trends.

In the White Paper there is an overarching diagnosis of the situation of the audiovisual sector in Catalonia, as well as the analysis and comparison with international trends. The strategic plan sets out 53 actions, 22 of which concern structuring. These actions are divided into 135 activities or recommendations. Regarding the diagnosis, the White Paper analyses the proliferation of TV offerings, the growth of pay-TV; the new global players; the success of the video-sharing platforms and use of videos on social media; the new screens through which audiovisual content can be consumed; the advertising market; the advertising investment in Catalan media; the audience share of television in Catalan; the audience share of the Catalan Broadcasting Corporation (CCMA); and the audience share by age segments.

Some of the proposals stated in the White Paper to address the challenges identified increase the public contribution to the CCMA to meet the public contributions of the average level of similar-sized European countries. The increase of public funds from the rise of the public contribution should only be spent on content production, especially in fiction, as well as in new distribution services. As for the latter, the White Paper proposes to create an on-demand video service managed by the CCMA and open to other national and local providers (public and commercial), as well as production companies. The aim of the new platform is to give more presence to Catalan audiovisual production in the market.

Regarding the presence of the Catalan language in television services, the White Paper states that the share of television audience in Catalan has gradually decreased to 18.5%, while the remaining 81.5% is in Spanish. The audience declining is particularly relevant in the case of the children segment (4 to 12 years). In this regard the White Paper proposes strengthening channels and content targeting strategic audiences, such as children, youth, and young adults. The White Paper also proposes measures to encourage an increase in programming content in Catalan to all providers that broadcast in Catalonia. The aim is to correct the existing supply deficit and ensure citizens' right of access to audiovisual content in Catalan.

Regarding local DTT, the White Paper notes that only 50 channels (11 public and 39 commercial) out of the

96 allocated programmes are currently active. Therefore, it is proposed to draw up a new map of districts that respects the uniqueness of each region, and to boost the Xarxa Audiovisual Local (XAL) service aimed at promoting initiatives and local TV streaming and on-demand content. With regard to the audiovisual industry, the White Paper proposes improvements in taxation, especially corporate tax and VAT to stimulate the investment and consumption in these activities.

Finally, in terms of broadcasting regulation, the White Paper proposes Catalonia is given more competences in the management of the spectrum, in order to ensure appropriate planning according to the industry needs and that the CAC becomes a convergent authority also with competences in the telecommunications field.

• *Consell de l'Audiovisual de Catalunya, Llibre blanc de l'Audiovisual de Catalunya, 23/01/2017* (Catalan Audiovisual Council, White Paper on Broadcasting in Catalonia, 23 January 2017)  
<http://merlin.obs.coe.int/redirect.php?id=18411>

CA

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## FI-Finland

### New Act on Collective Management of Copyright

The Finnish Act on Collective Management of Copyright (1494/2016; CMA) entered into force on 1 January 2017. The act implements the requirements of Directive 2014/26/EU on collective rights management and the multi-territorial licensing of rights in musical works for online use in the internal market (CMD).

The CMA covers issues such as the rights of rightsholders (Chapter 2) and members (Chapter 3) as well as their relations to users (Chapter 7). Management of rights revenue is regulated in Chapter 5, while transparency and informational duties are also covered (Chapter 8). Multi-territorial licensing of rights in musical works for online use is regulated in a dedicated Chapter 9. Collective management organisations are primarily covered by the CMA, but other complementary legislation also applies (section 3(1)), such as the Associations Act (503/1989) and the Foundations Act (487/2015). The CMA also does not affect the application of the Competition Act (948/2011) (section 3(2)).

According to the Act, the monitoring of collective management organisations and of the compliance of the CMA is allotted to the Finnish Patent and Registration Office (PRH) (section 54). The Office may be



requested to take action in alleged breaches of the CMA, while it may also act on its own initiative (section 56). It will cooperate with the Finnish Competition and Consumer Authority (FCCA) where necessary, while also operating together with the Ministry of Economic Affairs and Employment and the Ministry of Education and Culture (section 55). Collective management organisations must notify the Patent and Registration Office prior to operation (section 53); whereas those already in operation had to submit a notification within one month of the entry into force of the CMA (section 69(1)). In Finland, seven organisations manage copyright and related rights, including Teosto and Gramex in the field of music, and Tuotos in the field of audiovisual production.

The CMA differentiates between “collective management organizations” and “independent management organisations” (subsections 2 and 4). As opposed to the former, the latter are for-profit organisations neither owned nor controlled by rightsholders. The provisions on the rights of rightsholders, relations to users, informational duties and monitoring, among others, are applied to independent management organisations (section 4(2)). With regard to the first two, the Finnish Act goes further than the minimum requirements of the CMD. Furthermore, the provisions on the multi-territorial licensing of rights in musical works for online use are applied only to collective management organisations representing rightsholders of musical works (section 4(1)). However, the CMA does not implement some of the CMD provisions related to members and auditors, among others, which are already included in other laws. Moreover, the current national alternative dispute resolution procedures were deemed such as to satisfy the requirements of the CMD and to surpass the minimum level.

- *Laki tekijänoikeuden yhteishallinnoinnista (1494/2016)* (Act on Collective Management of Copyright (1494/2016))

<http://merlin.obs.coe.int/redirect.php?id=18416>

FI

- *Hallituksen esitys eduskunnalle laiksi tekijänoikeuden yhteishallinnoinnista ja eräiksi siihen liittyviksi laeiksi (HE 119/2016 vp)* (Government bill for an Act on Collective Management of Copyright and Certain Related Acts)

<http://merlin.obs.coe.int/redirect.php?id=18446>

FI

- Finnish Patent and Registration Office to monitor copyright organisations from 1 January 2017

<http://merlin.obs.coe.int/redirect.php?id=18447>

EN

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## FR-France

**CSA can require radio station operator to protect public safety**

In a ruling of 10 February 2017, the Conseil d’Etat (Council of State) confirmed that the national au-

diovisual regulatory authority in France, the Conseil supérieur de l’audiovisuel (CSA), had acted lawfully by issuing a formal notice to a radio station that had broadcast information likely to endanger the lives of people being held hostage during a terrorist attack.

On 9 January 2015, while terrorist acts were being committed simultaneously at different locations, the radio station Europe 1 had broadcast live information concerning police attempts to catch the terrorists responsible for the Charlie Hebdo massacre, who were in hiding in Seine-et-Marne. It had broadcast this information even though another terrorist had threatened to kill the hostages he was still holding in the Hyper Cacher supermarket in Vincennes unless the other terrorists were freed. Considering that the station had endangered the life of the hostages in Vincennes, the CSA issued the radio station operator with a formal notice requiring it, in accordance with Article 1 of the Law of 30 September 1986, to respect “elementary rules of caution designed to maintain public safety and safeguard law and order”. The company requested the annulment of the formal notice and of the CSA’s decision to reject its informal appeal.

The Conseil d’Etat ruled, in particular, that the CSA had not committed an error of law by considering that the broadcast of information likely to endanger the life of hostages was contrary to Article 1 of the Law of 30 September 1986, under which the freedom of communication may be limited if necessary in order to safeguard law and order. It did not think the rule infringed the European Convention on Human Rights (ECHR), which guarantees freedom of expression. Furthermore, by warning the complainant not to broadcast information in similar circumstances in the future in a decision that, incidentally, did not take the form of a sanction but was merely designed to remind the recipient of its obligations, the CSA had not interpreted the obligations resulting from Article 1 of the Law of 30 September 1986 in a way that was incompatible with Article 10 ECHR. Finally, the Conseil d’Etat noted that the facts stated in the formal notice were correct. The Europe 1 operator’s request that the formal notice be annulled was therefore unfounded.

- *Conseil d’Etat (5e et 4e sous-sect. réunies), 10 février 2017, Lagardère Active Broadcast* (Council of State (5th and 4th subsections combined), 10 February 2017, Lagardère Active Broadcast)

FR

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**Any injured party may call on the CSA to apply its power to order compliance**

On 7 February, the Conseil d’Etat delivered an interesting decision, recalling that anyone may refer a failing on the part of an operator to the national audiovisual regulatory body (Conseil Supérieur de



l'Audiovisuel - CSA) with a view to the CSA ordering it to comply with its obligations.

In the case at issue, a militant environmentalist notified the CSA of a number of failings he felt had been committed by the company Radio France with regard to the rules on broadcasting advertising messages laid down in Articles 32, 34 and 42 of its terms of reference which, at the time, did not authorise the company to broadcast advertising messages unless they were 'collective advertising and of general interest', and required the advertising messages to be clearly announced and identified as such. The complainant called on the CSA to embark on the actions within its remit in order to oblige the company to comply with its obligations. The complainant appealed to the Conseil d'Etat to cancel the implicit decisions by which the CSA refused to take the requested action against Radio France as provided for in Articles 42-10 and 48-1 et seq. of the Act of 30 September 1986, on the grounds that it had abused its powers.

The Conseil d'Etat recalled that under Article 48-1 of the version of the Act of 30 September 1986 in force at the time of the decisions at issue: 'The CSA may order the companies indicated in Article 44 to comply with the obligations imposed on them by legislation and regulations, and by the principles defined in Articles 1 and 3-1./ The CSA shall make public such orders to comply. The representative professional and trade union organisations in the audiovisual communication sector and the French national council for regional languages and culture (Conseil National des Langues et Cultures Régionales), the family associations recognised by the French national union of family associations (Union Nationale des Associations Familiales) and associations for the defence of women's rights may refer matters to the CSA so that it may instigate the procedure provided for in the first paragraph of this Article'.

The Conseil d'Etat, as the highest administrative tribunal, considered that apart from the organisations and associations referred to in the Act, 'anyone who notes behaviour on the part of an operator which infringes his/her interests is entitled to call on the CSA to exercise its power to issue an order to comply'. The CSA was therefore not in a position to reject the complainant's request on the grounds that he was not included on the list of parties authorised to refer matters to it under the Act of 30 September 1986.

The CSA will therefore have to reconsider the complainant's application for the issue of an order to comply to Radio France.

• *Conseil d'Etat (5e et 4e sous-sect. réunies), 7 février 2017, M. Avrillier (Conseil d'Etat (5th and 4th sub-sections jointly), 7 February 2017, Mr Avrillier)*

FR

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## CSA opinion on draft legislation organising ethical committees in the public audiovisual sector

On 22 February the Conseil Supérieur de l'Audiovisuel (French national audiovisual regulatory authority - CSA) delivered an explanatory opinion in response to notification from the Ministry of Culture of draft legislation amending the terms of reference of the national companies in the public audiovisual sector (France Télévisions, Radio France, and France Média Monde, the company responsible for France's audiovisual presence outside France) with a view to defining the operating methods of the ethical committees instituted by the Act of 14 November 2016. The CSA qualified the new legislation as the 'focal point' of the arrangements with which the legislator hoped to 're-build trust' between the audiovisual media and the general public.

The Media Independence Act (Loi «Indépendance des médias») adds an Article 30-8 to the Act of 30 September 1986, providing for a committee on honesty, independence, and diversity of information and programmes, with independent members. Committees must be set up for every nationwide generalist radio station or TV channel broadcasting political and general news programmes terrestrially. The committees' operating methods must be laid down in the agreements concluded between the editors and the CSA.

With this draft legislation, the Government intends to set up one committee for each national programme company. The CSA believes, however, that when a company edits a large number of broadcasting centres it might be better to have more than one committee. The CSA also recommends setting up one committee for each continuous news service, because of the specific nature of programming.

The draft legislation provides that each committee should have five members, appointed by the board of directors, who would designate a chair from among their number. The CSA feels that, given the committee's field of competence, which is by nature extensive, there should be more committee members, and that it would be preferable for the members, who must be independent of the editor as required by law (Article 30-8 (2) of the 1986 Act), to elect their own chair. The CSA also suggests that the committee should be able to propose that the board of directors terminate the term of office of any member failing to abide by the statutory criteria for independence. Lastly, while the draft legislation gives a company's board of directors the possibility of paying committee members an allowance, the CSA feels that this is not compatible with the independence their status requires.

The text submitted to the CSA provides that the committee should meet at least once every six months,

but the CSA feels it is 'essential' for meetings to be held at least once a quarter, given the importance of the missions entrusted to the ethical committee and the number of referrals or consultations it is likely to have to handle.

The CSA also proposes supplementing several points in the draft Decree. The first one concerns the need to add safeguards to ensure the confidentiality of the committee's procedure for investigating cases, particularly with regard to the managing bodies. The second concerns the timetable for publication and the content of the ethical committee's annual report. Lastly, the CSA advocates the possibility of the committee publishing a number of its decisions, which could help to make its work more effective.

Once these committees have been set up, they may receive referrals from 'the editor's managing bodies, the mediator if there is one, or any other person' and give their opinion on observance of the requirements within their remit.

• *Avis n°2017-05 du CSA du 22 février 2017* (CSA Opinion No. 2017-05 of 22 February 2017)

<http://merlin.obs.coe.int/redirect.php?id=18453>

FR

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### Television sponsorship scheme made more flexible

A Decree adopted on 15 February 2017 has altered the scheme for television sponsorship that results from the Decree of 27 March 1992. This Decree was adopted to permit application of Articles 27 and 33 of the Act of 30 September 1986 and to lay down the general principles defining the obligations incumbent on service editors with regard to publicity, sponsorship, and tele-shopping.

The new text henceforth authorises the sponsor to include the presentation of 'its products and services' among the means used to identify it (whereas previously only 'its activities' were covered) and, more generally, adopts the provisions of Directive 2010/13/EU on audiovisual media services with regard to the various mentions of the sponsor in television programmes. Sponsors may now be identified 'by the name, logo or other symbol or the sponsor, for example by a reference to its products or services, a distinctive sign, or an advertising slogan'. Sponsored television broadcasts may not, however, directly incite viewers to purchase or rent the product or services of the sponsor or of any third party.

This increased flexibility in identifying the sponsor includes the possibility of mentioning the sponsor during the sponsored programme and in trailers. How-

ever, to protect viewers by ensuring a clear distinction between editorial and commercial content, the Decree maintains the present ban on presenting the sponsor's products and services and repeating its advertising slogan when mentioning the sponsor during the actual broadcast, that is to say, apart from a reminder after a break in the broadcast. Lastly, the occasional discreet mention of the sponsor during the broadcast and in trailers will still be permitted, apart from the reminder after a break in the broadcast.

The Union des Annonceurs (the French advertisers union) has welcomed the text, which 'makes it possible not only to end a discrepancy in the regulations applicable to linear and non-linear media services', but also 'bridges the gap between the French regulations and the European legal framework which authorises the presence of product sponsorship and advertising slogans on-screen'.

According to assessments carried out by the Ministry of Culture, the new provisions ought to generate 30 million euros and benefit more than 420 television service editors. Income from sponsorship amounted to 155 million euros in 2015, 8% less than in 2014.

• *Décret n°2017-193 du 15 février 2017 portant modification du régime du parrainage télévisé* (Decree No. 2017-193 of 15 February 2017 altering the scheme for sponsorship on television)

<http://merlin.obs.coe.int/redirect.php?id=18452>

FR

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### Public consultation on observance of obligations to broadcast European works and works made originally in the French language

On 10 March 2017, the Ministry of Culture and Communication launched a public consultation to gather observations from the stakeholders concerned on the amendment of the definition of peak times for television service editors' observance of obligations to broadcast European works and works made originally in French.

Under Articles 27 and 33 of the Act of 30 September 1986, these obligations amount to at least 60% for European works and 40% for works made originally in the French language. Adopted in application of these provisions, Article 7 of the Decree of 17 January 1990 defines the 'peak times' to which these broadcasting obligations apply. Thus, the second paragraph of Article 7-II defines peak times as being 'between 8.30 and 10.30 p.m. For editors of cinema services and editors of pay-per-view services, however, peak times are deemed to be from 6 p.m. to 2 a.m'.

The national audiovisual regulatory body (Conseil Supérieur de l'Audiovisuel - CSA) has noted that some

service editors declare works they start broadcasting between 10.20 and 10.30 p.m. as part of their peak-time quota. This method of calculation may in some cases result in peak-time quotas being observed only by the inclusion of works broadcast later in the evening, with only a few minutes falling within the peak timeslot.

This has encouraged the Ministry of Culture to consider the advisability of amending Article 7 of Decree No. 90-66 in order to ensure, as initially envisaged, good early-evening exposure for European cinematographic works and works made originally in the French language. The first option consists of re-centring peak viewing times to earlier in the evening, by stating in the Decree that 'works are considered broadcast at peak times if broadcasting commences between 8.30 and 9.30 p.m., or perhaps 10 p.m.'. Another possible option would be to simply disregard late programmes starting between 10.20 and 10.30 p.m.. The first option was the one adopted for this consultation.

The stakeholders concerned are invited to comment on this proposed amendment and, if they are in favour, to say whether they feel it is necessary to apply the same amendment to Article 8 of the Decree, which imposes an annual ceiling of 144 works.

Replies to the consultation should be sent in no later than Friday, 31 March 2017.

**Amélie Blocman**  
*Légipresse*

### **Media chronology: CNC makes proposals for reform**

Plans to reform media chronology are back in the news, with the proposals the Centre National du Cinéma et de l'Image Animée (French National Centre for the Cinema and Animated Image - CNC) presented to the cinematographic sector on 15 February. A lot is at stake (piracy, extra-territoriality, series not subject to chronology, etc), and there are potentially very many obstacles.

Under the agreement of 6 July 2009, the time-lag for being able to circulate a film once it has been screened in a cinema is four months for videos (DVD or pay-per-view VOD), ten months for premier cinema services which have concluded an agreement with the professional cinema organisations, and twelve months otherwise. It is 22 months for unencrypted television services and for pay services other than cinema which apply coproduction undertakings amounting to at least 3.2% of their turnover for the previous financial year. The time-lag is 30 months for unencrypted channels with no coproduction undertaking,

and 36 months (three years) for subscription video on demand (SVOD).

To ensure better pre-financing of works and efficient use of the works on the various distribution media, the CNC has made a number of proposals. Firstly, it would like to bring forward the window for definitive downloading after cinema screening (currently four months) to three months. After four months, the film would be available for unlimited physical purchase, VOD or rental. The next proposal is to bring forward all the distribution windows calculated from the first airing on pay television by two months. This would begin at eight months, according to their agreements, for pay television channels such as Canal + and OCS. This would bring the time-lag down to 20 months for TF1, France 2, France 3 and M6, which are subject to the undertaking to fund coproductions with at least 3.2% of their annual turnover. For the other channels, the time-lag would be 28 months. The CNC also proposes bringing 'virtuous' subscription video on demand (SVOD) into line - the concept is still to be defined, based mainly on the criteria set out in the Decree on On-Demand Audiovisual Media Services (AMs) (see IRIS 2011-1/26) for television services, reducing the time-lag for subscription video on demand from 36 to 28 months. Lastly, the CNC proposes setting up a system of 'sliding' windows. This would alter the distribution window by between one and no more than three months, depending on the financial contribution to the production made by the entity wanting to broadcast the film. This mechanism would enable Canal + to broadcast a film just six months after its first showing in a cinema; the time-lag for the main unencrypted channels would come forward to 17 months, and for the other services to 25 months. Furthermore, the three-month waiver for films with low box-office numbers would be abandoned.

The CNC still has to obtain the opinion of the parties involved - it is likely to be a long negotiation procedure.

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### **GB-United Kingdom**

### **Co-regulatory code to demote pirated material on search engines**

An agreement has been reached to make it less likely that consumers will be led by search engines to copyright-infringing websites. The agreement has been brokered by the UK Intellectual Property Office, the UK governmental body responsible for intellectual



property rights, with the assistance of the UK Government Department for Culture, Media and Sport. Implementation will be monitored by the Minister of State for Universities, Science, Research and Innovation.

Despite this involvement of official bodies, the code of practice is voluntary and not directly enforced by government. Its effect is to ensure that websites that contain pirated materials will be demoted from the first page of results in search engines. The code will accelerate such demotion of illegal sites following notices from rights holders, and establishes ongoing technical consultation, increased co-operation and information-sharing to develop and improve on the process. It will also enable new practices to be adopted where needed. The Code was agreed on 9 February 2017 and came into force immediately. It sets targets for reducing the visibility of infringing content in search engines by 1 June 2017.

The Code has been signed by Bing, BPI (the record labels' association), the Motion Picture Association, and Google, although Google stated that it already has sufficient measures in place to tackle piracy and does not plan any immediate policy changes. A number of other organisations, including the Premier League and the Publishers' Association, have also indicated agreement as members of the Alliance for IP, representing trade associations across the creative, branded and design industries.

The Code will work alongside existing anti-piracy measures, such as court-ordered site blocking, work with brands to reduce advertising on illegal sites, and work on the "Get it Right from a Genuine Site" consumer education campaign, which encourages fans to value the creative process and directs them to legal sources of content.

• Intellectual Property Office, "Search Engines and Creative Industries Sign Anti-Piracy Agreement", 20 February 2017  
<http://merlin.obs.coe.int/redirect.php?id=18445>

EN

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technical information. Such information might cover lap times, statistics, or a scoreboard.

On 23 January 2017, Ofcom published a Note which sets out general Guidance, without purporting to be exhaustive, regarding the types of technical information concerned, listing factors which the regulator is likely to consider on a case-by-case basis:

First, the technical information should enhance the viewer experience by providing a broader understanding of what is being viewed (for example, match statistics) or information which is integral to the enjoyment and/or understanding of the item being viewed (for example, lap times).

Secondly, the purpose of providing the technical information should not be to promote the information provider - hence credits should be "brief and secondary".

Generally, information concerning betting odds would not constitute technical information; however, in limited circumstances it may be justifiable (for instance, when there is a close association between an event and betting, as with horseracing). Even so, to avoid undue prominence being given to any one provider, a range of providers' information or an average from a range of providers should be provided.

It is particularly sensitive where a broadcaster credits a provider of technical information with which it has a commercial arrangement (for example, product placement or sponsorship) for the same programme; in such circumstances it will be "more difficult" to justify that references to services, products or trademarks are editorially justified.

• Ofcom Broadcast and On Demand Bulletin, References to providers of technical information in sports programming on television, 23 January 2017, p. 10

<http://merlin.obs.coe.int/redirect.php?id=18450>

EN

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## References to providers of technical information in sports programming

In general, the Ofcom Broadcasting Code permits "commercial references" in programming; however, section 9.5 cautions against "undue prominence" of a product, service or trademark, be it because there is no editorial justification or because of the manner of the reference.

It is an industry convention, though not explicitly referred to in the Code, that broadcast coverage of sports events may include (as editorially justified) a brief, on-screen acknowledgement of the provider of

## IE-Ireland

### Statutory inquiry established investigating police disclosures to media

On 17 February 2017, the Minister for Justice and Equality established a statutory Tribunal of Inquiry to investigate allegations made by Irish police officers under Ireland's whistleblower law, the Protected Disclosures Act 2014. Of particular importance is the fact that the Tribunal's terms of reference include investigating certain aspects relating to the Irish media.



First, the Tribunal will examine a police officer's allegation that he was directed "to contact the media to brief them negatively" against a police whistleblower, to brief the media that the officer "was motivated by malice and revenge," and "to encourage the media to write negatively about the police whistleblower. Second, the Tribunal will also investigate the same police officer's allegation that he was directed to "draw journalists' attention" to an allegation of criminal misconduct made against police whistleblower. Third, the Tribunal will investigate contacts between members of the Irish police force (An Garda Síochána) generally and media and broadcasting personnel.

In relation to the Irish public broadcaster RTÉ, the Tribunal will investigate whether the police commissioner "influenced or attempted to influence broadcasts on RTÉ on the 9th of May, 2016, purporting to be a leaked account of the unpublished O'Higgins Commission Report, in which Sergeant McCabe was branded "a liar and irresponsible".

The Tribunal will be chaired by an Irish Supreme Court judge, Justice Peter Charleton, and is established under the Tribunals of Inquiry (Evidence) Act 1921. In his opening statement, Justice Charleton stated that during the inquiry it may be necessary to determine, among other issues relating to the media, whether "journalistic privilege" attaches to communications to a journalist where that communication by the source "may not be in the public interest but, instead, where the source is perhaps solely motivated by detraction or calumny".

• Disclosures Tribunal, Terms of Reference, 17 February 2017  
<http://merlin.obs.coe.int/redirect.php?id=18408>

EN

• Disclosure Tribunal, Opening statement of Mr Justice Peter Charleton, 27 February 2017  
<http://merlin.obs.coe.int/redirect.php?id=18409>

EN

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## Authority partially upholds complaints over cancer charity's advertising campaign

The Advertising Standards Authority of Ireland (ASAI) has partially upheld complaints concerning elements of the Irish Cancer Society's "I want to get Cancer" advertising campaign. The advertisements proved particularly controversial, with 92 complaints submitted under various sections of the ASAI's Code against the six advertisements, which featured in various media including television and radio. The campaign started with a "teaser" advertisement "where the advertisers were not identified" and the wording "I want to get cancer" featured. The following day the "reveal" adverts appeared and "the identity of the Irish Cancer Society was revealed". The campaign featured two

advertisements for television, which included several vignettes. One vignette featured a man sitting at a kitchen table visibly upset as he states "I want to get cancer and wring its neck".

The ASAI noted that "a common theme running through the complaints" was that the wording used "I want to get cancer" was "offensive, insensitive, disrespectful and upsetting". Some complainants stated that the initial "teaser" part of the campaign "had not identified who the advertiser was or the premise behind the advertisements", and only through the "reveal" part of the campaign was it evident "that the phrase had been a play on words".

In response to the ASAI, the Irish Cancer Society stated inter alia that the "campaign had been created as a public awareness campaign, designed to save lives, similar to the way the Road Safety Authority had undertaken hard-hitting campaigns to reduce the number of road deaths". The ASAI Complaints Committee in their assessment noted that the campaign started with "teaser" adverts followed by "reveal" adverts, and observed that while the Irish Cancer Society had indicated one of the main objectives of the Campaign had been "to create awareness among people of the things they could do to reduce of risk of getting cancer [04046] the Campaign had not centred on these factors." The Committee considered that while "there was a tolerance in society for charity advertising to be more provocative than commercial advertising" nonetheless "care was needed when addressing such an emotive issue as cancer, particularly when using provocative copy." In reaching its decision the Complaints Committee "noted the level of complaint" and "the distress that had been caused to complainants", and held the "teaser" element of the campaign to be in breach of sections 3.3 (social responsibility), 3.20 (Decency and Propriety), and 3.23 (Fear and Distress) of the ASAI Code. In relation to the "reveal" element of the campaign, the Committee noted that while "some of the vignettes were very clear in explaining the context of the message", "other vignettes in the television adverts" had been unclear as to what the individuals meant by wanting to "get cancer", and were therefore likely to cause distress to consumers and were accordingly in breach of the Code.

• Advertising Standards Authority of Ireland, Bulletin 17/1, Reference 27424, 21 February 2017

<http://merlin.obs.coe.int/redirect.php?id=18404>

EN

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## BAI publishes new Strategy Statement

On 22 February 2017, the Broadcasting Authority of Ireland (BAI) published its new Strategy Statement

2017-2019. The publication sets out the BAI's strategic themes and objectives for the forthcoming period, and follows a statutory review of its previous strategy and a public consultation. The Statement sets out five strategic themes, namely: promoting diversity and plurality; achieving excellence and accountability; communicating and influencing; empowering audiences; and enhancing innovation and sectoral sustainability. Under each of these themes, the BAI has a set of objectives and outcomes to be delivered by 2019.

First, in relation to promoting diversity and plurality, the BAI aims to increase the production and availability of culturally relevant audiovisual content for Irish audiences, and ensure that Irish audiovisual media is more diverse in terms of its content and those involved in its production. Second, in order to achieve excellence and accountability, the BAI will regulate to achieve a responsible and accountable broadcasting sector, and ensure the BAI and the broadcasting sector are recognised as models of good governance and corporate responsibility. This will include implementing and reviewing a compliance action plan that supports robust compliance and governance practices by all licensed broadcasters and funding contractors.

Third, under its theme of communicating and influencing, the BAI states that it will develop, implement and review an annual communications action plan which informs and engages its stakeholders, especially the public, in a relevant and timely manner. Fourth, in order to empower audiences, the BAI will ensure that audiences in Ireland are supported to develop a greater understanding of, and participation in, the production and dissemination of audiovisual content.

Finally, to enhance innovation and sectoral sustainability, the BAI will ensure that sustainable funding models are developed for the Irish audiovisual sector. This will be achieved by working with stakeholders to support the achievement of greater sustainability for the Irish audiovisual sector.

This is the first Strategy Statement of the current board of the BAI.

- Broadcasting Authority of Ireland, BAI Strategy Statement 2017-2019, 22 February 2017  
<http://merlin.obs.coe.int/redirect.php?id=18405> EN
- Broadcasting Authority of Ireland, Broadcasting Authority launches three-year strategy statement, 22 February 2017  
<http://merlin.obs.coe.int/redirect.php?id=18406> EN
- Broadcasting Authority of Ireland, Work Plan 2017-2019, 22 February 2017  
<http://merlin.obs.coe.int/redirect.php?id=18407> EN

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## IT-Italy

### Court of Rome rules on professional press reviews and publishers' copyright

On 18 January 2017, the Court of Rome handed down an awaited decision in a copyright and unfair competition case between Data Stampa and Eco della Stampa, two professional news agencies, and FIEG and Promopress, two associations representing Italian newspaper publishers. The lawsuit arose out of the publication, by Data Stampa and Eco della Stampa, of an on-demand and customised press review that included articles retrieved from newspapers or parts of the same.

According to the publishers, selecting pieces of newspapers to create a separate press review did amount to an act of reproduction or communication to the public. The latter is prohibited pursuant to the Italian Law on Copyright (Law no. 633/1941), unless the publisher omitted to reserve the right to reproduce or use the article. The newspaper publishers thus argued that, in the absence of their consent, the retrieval of articles constituted copyright infringement. In their opinion, the free speech exception provided by Article 65 of the Italian Law on Copyright should be limited to the reproduction of pieces on journals and newspapers for public information.

On the other hand, the news agencies maintained that the service they operated merely consisted of the cutting-out of articles from paper publications to form a report the content of which was customized with a view to meeting the specific needs of their subscribers. Then, no act of reproduction or communication to the public was at hand and, accordingly, no copyright infringement occurred.

The Court of Rome was then asked to take a position on a very controversial point, lacking a specific framework - at either domestic and EU law level - applicable to press reviews and to the use of articles by third parties after their publication in the relevant newspapers.

According to the Court, the restrictions and exceptions to the rightholders' copyright laid down by the Italian Law on Copyright are subject to strict interpretation. As a consequence of that, while allowing the free circulation of articles published in newspapers and journals unless the publisher reserved the exclusive right to reproduce or communicate to the public the same, Article 65 should not be applied when it comes to different means of information. Behind the restriction posed by Article 65, in fact, is the aim to prevent acts of unfair competition by making available content already published to the public.

The Court of Rome ruled that Article 65 applies to acts of reproduction and communication to the public occurring through the same means and targeting the same market. A press review, however, has a different target, as it aims to meet specific customers' demands rather than a general request of information that may be satisfied by a paper publication. On the contrary, according to the Court, a press review circulated to the public through a paper or online publication would fall within the scope of Article 65 and constitute an act of unfair competition.

In other words, the services provided by news agencies, which consist of the retrieval of articles already published in newspapers, is different from the one operated by publishers.

Then, the Court of Rome found that Data Stampa and Eco della Stampa had the right to use articles as well as parts of articles published by newspapers to provide customised press reviews without infringing their copyright.

• *Tribunale di Roma, sezione nona - impresa, sentenza n. 816 del 18 gennaio 2017* (Court of Rome, ninth section (companies court), decision no. 816 of 18 January 2017)

<http://merlin.obs.coe.int/redirect.php?id=18410>

IT

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## MA-Morocco

### HACA adopts new procedures for licensing and authorisation of audiovisual services

The Conseil Supérieur de la Communication Audiovisuelle (Higher Council of Audiovisual Communication - CSCA), the deliberative body of the Haute Autorité de la Communication Audiovisuelle (Moroccan High Authority for Audiovisual Communication - HACA), adopted two decisions on 19 and 25 January 2017 concerning the licensing and authorisation of audiovisual services.

These two decisions help to implement two laws that entered into force in August 2016, amending certain aspects of the legal framework of the Moroccan audiovisual sector, that is to say, Law no. 11-15 on the reorganisation of the High Authority for Audiovisual Communication and Law no. 66-16 amending and supplementing Law no. 77-03 on audiovisual communication.

The decision of 19 January lays down the process for awarding licences to companies setting up and operating audiovisual communication services. It defines the procedure for the submission and processing of

applications received in response to calls for expressions of interest and calls for tender. In accordance with Article 23 of Law no. 77-03 on audiovisual communication, the HACA issues calls for expressions of interest through a decision of the CSCA, at the request of the government authority responsible for communication, with a view to the creation of audiovisual communication services. It issues a call for tender if more than one bid or expression of interest is received with the aim of providing the same type of service or covering the same geographical area, for example (Article 24 of Law no. 77-03).

The decision in question also describes the process for awarding licences through a direct negotiation procedure, which the HACA uses when it only receives a single expression of interest, application or bid. This procedure is also automatically applied to bids for the creation and operation of audiovisual communication services based on non-terrestrial transmission methods.

The CSCA's decision of 25 January, meanwhile, lays down the procedure for authorising the transmission of audiovisual programmes by organisers of short-term cultural, artistic, commercial, social or sporting events; the distribution of conditional access services; the distribution of on-demand audiovisual services; and the creation and operation of audiovisual communication networks on an experimental basis.

• *Décision du CSCA N°04-17 DU 20 RABII II 1438 (19 janvier 2017) portant adoption de la procédure d'attribution de licence pour l'établissement et exploitation de services de communication audiovisuelle* (CSCA decision no. 04-17 of 19 January 2017 on the adoption of the licensing procedure for the creation and operation of audiovisual communication services)

<http://merlin.obs.coe.int/redirect.php?id=18431>

FR

• *Décision du CSCA N°05-17 DU 26 RABII II 1438 (25 janvier 2017) portant adoption de la procédure des autorisations* (CSCA decision no. 05-17 of 25 January 2017 on the adoption of the authorisation procedure)

<http://merlin.obs.coe.int/redirect.php?id=18431>

FR

• *Dahir n°1-16-155 du 21 kaada 1437 (25 août 2016) portant promulgation de la loi n°66-16 modifiant et complétant la loi n°77-03 relative à la communication audiovisuelle* (Decree no. 1-16-155 of 25 August 2016 promulgating Law no. 66-16 amending and supplementing Law no. 77-03 on audiovisual communication)

<http://merlin.obs.coe.int/redirect.php?id=18432>

FR

• *Dahir n°1-16-123 du 21 kaada 1437 (25 août 2016) portant promulgation de la loi n°11-15 portant réorganisation de la Haute Autorité de la communication audiovisuelle* (Decree no. 1-16-123 of 25 August 2016 promulgating Law no. 11-15 on the reorganisation of the High Authority for Audiovisual Communication)

<http://merlin.obs.coe.int/redirect.php?id=18438>

FR

**Department for Legal Information**  
*European Audiovisual Observatory*



## NL-Netherlands

### Dutch Supreme Court applies Google Spain and overturns lower court judgments

On 24 February 2017, the Dutch Supreme Court handed down its first application of the EU Court of Justice's Google Spain judgment (see IRIS 2014-6:1/3). The Supreme Court overturned lower judgments, holding that rights based on Articles 7 (private life) and 8 (personal data) of the Charter of Fundamental Rights of the European Union in principle outweigh not only the economic rights of search engines, but also the "justified interests" of internet users to access search results.

The judgment follows earlier proceedings in lower courts (see IRIS 2014-10/25 and IRIS 2015-5/25), and concerns the following facts: the plaintiff in question is currently appealing against a conviction for attempted incitement to assassination. When the full name of the plaintiff is entered as a Google search query, the search engine displays many results, some of which link to online shops selling a book; this book is a work of "faction" (fiction mixed with facts) in which a murder is in fact committed and the name of the main character is identical to the plaintiff's name. Furthermore, internet users can also be linked to a newspaper article covering the same book. The plaintiff had requested that Google remove the links, a request with which Google had not complied. Subsequently, the plaintiff commenced proceedings.

At first instance, the Amsterdam District Court applied Google Spain and ruled that the right of the general public to access information about serious criminal acts, and therefore the prosecution and conviction of the plaintiff, outweighed the rights of the plaintiff under Article 7 and 8 of the EU Charter (see IRIS 2014-10:1/25). On appeal, the plaintiff argued to no avail that Google had deliberately infringed his rights through Google Search's autocomplete function. The Amsterdam Court of Appeal accepted Google's claim that suggestions by Google Search's autocomplete function are derived from popular search queries, demonstrating the public's interest in receiving the imparted information (see IRIS 2015-5:1/25).

Finally, the plaintiff appealed to the Supreme Court. The Court commenced its judgment by addressing a conditional appeal raised by Google. After citing paragraphs 80, 81, 88 and 97 of the Court of Justice of the European Union (CJEU) judgment, the Court concluded that in principle, rights under Articles 7 and 8 of the EU Charter prevail over the economic rights of search engines and the justified interests of internet users to access search results. According to the Court, an exception to this general rule only exists in specific

cases where special reasons justify an infringement of the right to privacy.

Thereafter, the Court discussed three grounds raised by the plaintiff: first of all, it ruled that the Amsterdam Court of Appeal had failed to discuss the interest of the public to receive information about the plaintiff's conviction when searching for the plaintiff's full name; secondly, the Court of Appeal was reprimanded for failing to discuss whether or not the plaintiff played a role in public life, and if so, which role; and thirdly, the lower judgment was rebuked for failing to estimate the nature and extent of the interest of the plaintiff, including the fact that the criminal conviction was not definitive, and for failing to weigh the plaintiff's interests against the other interests in detail. In conclusion, the lower judgments were overturned and referred to a different Court of Appeal for further proceedings.

• *Hoge Raad*, 24.02.2017, ECLI:NL:HR:2017:1116 (Supreme Court, 24 February 2017, ECLI:NL:HR:2017:1116)  
<http://merlin.obs.coe.int/redirect.php?id=18415>

NL

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### Court refuses request to order Google to remove search results concerning an individual investigated for fraud

On 12 January 2017, The Hague District Court refused an applicant's request to order Google Inc. to remove ten hyperlinks from its search engine results. The search results concerned the applicant, a real-estate entrepreneur against whom a criminal investigation had been conducted in 2005 for mortgage fraud.

Of the ten search results which were allegedly shown when the applicant's name was entered in Google Search, two had already been removed by Google. A further five search results had not been obtained by entering the applicant's name; therefore the Court only considered the three remaining URLs which were shown when the applicant's name was entered in Google Search. These URLs contained news articles on claims for damages which the applicant had brought against the municipality of Rotterdam concerning the criminal investigation that had been conducted against the applicant.

The applicant based his request primarily on the grounds of unlawful processing of personal data on criminal offences, and on the grounds that none of the exceptions to the prohibition to process personal data on criminal offences apply (Articles 16, 22 and 23 of the Dutch Data Protection Act). Google argued that only the search results themselves should be considered, and not the source pages to which they link.



Google also argued that it did not process personal data on criminal offences. The Court accepted this defence and stated that the search results should be assessed, and not the content of the source pages to which Google linked.

The Court considered that Google did not process personal data on criminal offences as the three search results did not contain information which gave rise to a presumption more serious than a reasonable suspicion of committing a criminal offence. The Court refused to grant the request on the applicant's primary claim.

The applicant's subsidiary claim was that the processing by Google was incompatible with the Dutch Data Protection Act and the Privacy Directive. The applicant stated that the processing by Google violated Articles 7 and 8 of the EU Charter of Fundamental Rights, the right to private life and data protection, whilst referring to the Court of Justice of the European Union (CJEU) judgment in *Google Spain* (see IRIS 2014-6/3).

The Court considered that Google's right to freedom of expression and information, as well as that of its users (Articles 11 EU Charter, 10 ECHR, 7 Dutch Constitution), weighed more heavily than the applicant's "right-to-be-forgotten" since the news articles to which Google linked were caused by the applicant's own behaviour. Furthermore, the Court stated that the real-estate sector and developments concerning fraud are part of a public debate. As a result, the Court refused to grant the request on the applicant's subsidiary claim.

• *Rechtbank Den Haag*, 12 januari 2017, ECLI:NL:RBDHA:2017:264 (District Court of The Hague, 12 January 2017, ECLI:NL:RBDHA:2017:264)

<http://merlin.obs.coe.int/redirect.php?id=18413>

NL

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### **Court partially grants request against Google to remove search results concerning an individual with a criminal conviction**

On 24 January 2017, Overijssel District Court partially granted an applicant's request to order Google Inc. to remove four hyperlinks from its search engine results when the applicant's name was entered in Google Search. The search results concerned the applicant, who was convicted of child abuse and given a prison sentence of 12 months and a probationary period of 6 months.

The applicant's request concerned four hyperlinks which were shown when the applicant's name was entered in Google Search: one of the hyperlinks led to a

Facebook page containing the applicant's personal information; two other hyperlinks contained videos and photos of the applicant and his former company; and the last hyperlink contained the applicant's name and a photo of him.

The applicant primarily based his request on the grounds of unlawful processing of personal data on criminal offences and on the grounds that none of the exceptions to the prohibition to process personal data on criminal offences apply (Articles 16, 22 and 23 of the Dutch Data Protection Act). Google argued that the assessment of the application should only concern Google.nl and not the international versions of Google. The Court rejected this defence and stated that users in the Netherlands could also access international versions of Google by changing their preferences. The Court refused to limit the scope of the case to Google.nl.

Google also argued that only the search results themselves should be considered, and not the source pages to which they linked. Google's secondary argument was that the mere act of linking to a source page which contains personal data on criminal offences does not entail a processing of that personal data on criminal offences by Google. The Court did not accept Google's argument, and stated that the Facebook page to which Google linked contained information on the applicant, which gave rise to a presumption more serious than a reasonable suspicion of committing a criminal offence. Furthermore, the Court stated that even if only the search results were concerned, the search result which led to the Facebook page contained personal data on criminal offences.

The Court stated that the processing of personal data on criminal offences is, in principle, not allowed, unless an exception applies. The Court stated that none of the exceptions of Article 22 of the Dutch Data Protection Act applies. The Court therefore ordered Google to remove the search result which led to the Facebook page.

As far as the remaining three URLs are concerned, the applicant claimed that the search results contained photos of him, and that these photos should be considered as personal data on race. The Courts accepted this and stated that Google did not claim to process personal data on race on one of the exceptions of Article 18 of the Data Protection Act.

Google argued that the photos were made public by the applicant himself and that Google could therefore process the photos based on Article 23(1) sub. d of the Dutch Data Protection Act. The Court accepted Google's defence and stated that the applicant clearly intended the photos to be made public, as they were used in the promotion of his former company. The Court refused to grant the order to remove the remaining three search results.

• *Rechtbank Overijssel*, 24 januari 2017, ECLI:NL:RBOVE:2017:278 (District Court of Overijssel, 24 January 2017, ECLI:NL:RBOVE:2017:278)  
<http://merlin.obs.coe.int/redirect.php?id=18414>

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## RO-Romania

### Modifications of the Audiovisual Code

On 14 February 2017, the National Audiovisual Council (Consiliul Național al Audiovizualului, CNA) adopted Decision no. 63 for the modification and completion of the CNA Decision no. 221/2011 with regard to the Audiovisual Code for audiovisual content (see inter alia IRIS 2006-4/33 and IRIS 2014-5/28). The main goal of the modification to the Audiovisual Code was to afford better protection to minors. The Decision will enter into force 30 days after its publication in the Official Journal of Romania Part I, except the new Article 117 a1), which will enter into force in 6 months' time.

In the Code, the reference to children up to 14 years of age was modified to refer to minors.

The definition of obscene audiovisual productions was extended to trivial, vulgar or obscene productions, and definitions for physical violence, psychological violence and violent language were introduced in Article 1 (1). The situations in which minors shall not be exposed to audiovisual productions was extended to social campaigns, except regulated public interest messages - new Article 3 (4). According to the new Article 5 (3), the providers of audiovisual media services shall not broadcast interviews and statements of minors about intimate family problems or problems exceeding its power of judgment.

Article 11 on discrimination was enforced. The interdiction of defamatory references in connection with origin, race, nationality, religion, potential disability (and, as a new provision, the appearance of someone) was added to the interdiction of pejorative and discriminatory reference.

The prohibition to broadcast programmes, other than fiction products and documentaries, which include descriptions, reconstructions or representations of homicides/suicides, mutilations/self-mutilation, murder techniques, occult practices, domestic violence or rape was extended from 6 a.m.-10 p.m. to 6 a.m.-11 p.m., in Article 17 (1).

According to the amended Article 18 (1), it is forbidden to broadcast productions between 6 a.m.-

11 p.m. which present repeated, intense or extreme physical or psychological violence or violent language, or people in degrading situations, even if they have given their consent. The new Article 18 (2) regulates the exceptions from paragraph (1): feature films, series and documentaries, if they observe Article 12 (viewing is restricted by a conditioned access control system or is possible only between the hours allowed under the programmes classification).

According to the amended Article 32 (2), not every interest of the public should be satisfied: the mere invocation of the right to information cannot justify the violation of the rights to dignity, to self-image and to privacy as they are recognized and protected by the Civil Code, and reference to the person's prior consent cannot justify the violation of the rights and freedoms of others, public order or morals and cannot remove the responsibility of the supplier of audiovisual media services for content.

According to Article 40 new paragraph (11), the audiovisual media service provider must observe the principle of *audiatur et altera pars* (right to be heard), if during an audiovisual programme accusations are made against a person for illegal or immoral acts or behaviour. The provider must ensure the accused person's right to express himself or herself until the end of that programme. If the person concerned refuses to present a point of view, this should be stated. The new paragraph (12) provisions that any pre-recorded product which entails accusations against a person for illegal or immoral acts or behaviour must include the opinion of the accused person. If the person concerned refuses to present a point of view, or could not be contacted after repeated attempts, this should be stated.

The amended Article 44 (2) regulates that the identity of persons who are victims of sexual offenses shall not be disclosed in any manner, except in cases where the victim has given written consent prior to broadcasting. The prior agreement cannot justify violations of rights and freedoms of others, public order or morals, nor can it remove the responsibility of the audiovisual media service provider for the content of the programme.

Article 47 on the prohibition of anti-semitic and xenophobic content and the interdiction of discrimination based on race, religion, nationality, sex, sexual orientation and ethnicity was significantly extended; now, it includes the prohibition of incitement to commit genocide, crimes against humanity and war crimes, as well as the prohibition to discriminate based on age, citizenship, level of education, social status and physical or medical conditions.

Article 79 was amended and now regulates that the audiovisual media service providers will ensure accessibility for persons with impaired hearing as provided in Article 421 of the Audiovisual Law.

Article 93 on advertisement and commercial communication was extended and enforced: (1) commercial communications are not allowed to use unfair, misleading or aggressive trade practices; (2) it is prohibited to show sexual content prejudicial for the respect of human dignity, affecting the image of a person or groups of individuals in the public and/or private domain; (3) in advertising it is forbidden to use gender stereotypes, and to show situations where people, regardless of their gender affiliation, are shown in degrading, humiliating and pornographic attitudes.

Article 117 refers to food advertising and the new paragraph a1) of Article 117 regulates that food advertising shall not encourage food consumption by using minors aged from 3 to 15.

In Article 120, the syntagma „foodstuffs intended for particular nutritional uses” was replaced with „products and food supplements”. A new paragraph (11) regulates that advertising and teleshopping for dietary supplements may contain exclusively information from the leaflet of the product, endorsed by legal bodies.

• *Decizia nr. 63 din 14 februarie 2017 pentru modificarea și completarea Deciziei Consiliului Național al Audiovizualului nr. 220/2011 privind Codul de reglementare a conținutului audiovizual* (Decision no. 63 of 14 February 2017 for the modification and completion of the CNA Decision no. 221/2011 with regard to the Audiovisual Code for the audiovisual content)

<http://merlin.obs.coe.int/redirect.php?id=18425>

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## Fourth digital terrestrial television auction completed

On 20 February 2017, two new local multiplexes were awarded in Iasi (northeast of Romania) and Timisoara (west of Romania) in the fourth DTT auction held by the National Authority for Management and Regulation in Communications (Autoritatea Națională pentru Administrare și Reglementare în Comunicații, ANCOM) (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, IRIS 2015-7/28, and IRIS 2017-2/28). M PLUS INVESTMENTS S.R.L., headquartered in Iasi, won the Iasi local multiplex, for which it must pay a licence fee amounting to EUR 8 000, while NOVA MEDIA S.R.L., headquartered in Timisoara, won the local multiplex for Timisoara, and it also has to pay a licence fee of EUR 8 000.

The licence fees, amounting to a total of EUR 16 000, must be paid to the state budget within 90 calendar days from the date the result was announced. The Government established the licence fee level in February 2014.

The two multiplexes will be awarded for a 10-year period, the winners being able to launch service as soon as they receive their licence from ANCOM. The winners will be obliged to launch one transmitter into operation within a year of the licence being issued.

Following the 4 auctions organised by the ANCOM, so far 3 national multiplexes have been awarded to the state owned National Broadcasting Company (Societatea Națională de Radiocomunicații, RADIOCOM). The company won the free-to-air multiplex and two other multiplexes in the UHF band. On the other hand, 12 regional multiplexes and 3 local multiplexes have also been awarded. The reason behind the fourth auction round had been to award a total of two national, 26 regional and 18 local digital terrestrial television multiplexes which had not been awarded in the previous selection procedures.

• *ANCOM finalizează cea de-a patra licitație pentru multiplexurile de televiziune digitală terestră- comunicat de presă* (ANCOM Completes the Fourth Auction for Digital Terrestrial Television Multiplexes - press release)

<http://merlin.obs.coe.int/redirect.php?id=18424>

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## UA-Ukraine

### Information security doctrine approved

The Information Security Doctrine of Ukraine ( Доктрина інформаційної безпеки України ) was approved by the Decree of the President of Ukraine on 25 February 2017 following the relevant decision of the Council of National Security and Defence of Ukraine (RNBU) of 29 December 2016.

It is stipulated that the aim of the Information Security Doctrine is to create preconditions for the development of Ukraine's information potential in order to avoid negative influences and counteract the ongoing hybrid aggression targeted at the country.

With respect to the media and information field, the Doctrine envisions inter alia the following steps:

- Stimulating the national production of audiovisual content, in particular by establishing systems of quotas and conducting tenders for state grants, thus establishing a system of state support for the production of national audiovisual products;
- Enabling the Public Television and Radio of Ukraine to function, in particular through appropriate funding;
- Establishing community broadcasting;



- Developing legal instruments to enable access to information;
- Developing support for media self-regulation on the basis of social responsibility;
- Increasing media literacy in society and facilitating professional instruction;
- Replacing analogue broadcasting with digital and online broadcasting throughout the Ukraine and providing everyone with equal opportunities to access information via Internet;
- Disseminating propaganda, in particular through audiovisual media such as public advertising campaigns which focus on the main steps and experience in nation-building, and on the values of freedom, democracy, patriotism, national unity and the protection of Ukraine from internal and external threats.

The Ministry of Information Policy of Ukraine's main task, as specified in the Doctrine, is to monitor the media and the national segment of Internet in order to detect information prohibited for dissemination in Ukraine, as well as to develop "strategic narratives" and methods for their dissemination.

The draft Doctrine was reviewed in 2015 by the OSCE Representative on Freedom of the Media and raised a set of concerns.

- Доктрина інформаційної безпеки України (Information Security Doctrine of Ukraine, approved by the Decree of the President of Ukraine on 25 February 2017, N. 47)

<http://merlin.obs.coe.int/redirect.php?id=18417>

UK

- Legal Analysis of the Draft Information Security Concept of Ukraine Commissioned by the Office of the OSCE Representative on Freedom of the Media and prepared by Professor Dr. Katrin Nyman Metcalf

<http://merlin.obs.coe.int/redirect.php?id=18418>

EN

- Draft Ukraine Information Security Concept

<http://merlin.obs.coe.int/redirect.php?id=18419>

EN

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searches and seizures. The Court found that there was "no meaningful interference" with the account holder's "possessory interest" in the data sought. Furthermore, the court found that "the crux of the issue before the court is as follows: assuming the focus of the Act is on privacy concerns, where do the invasions of privacy take place? To make that determination, the court must analyse where the seizures, if any, occur and where the searches of user data take place." The court noted that Google transfers data between its domestic and international servers all the time and that none of these transfers is a seizure within the meaning of the Fourth Amendment, and that the account holders' privacy is not invaded until the government reviews the data. It thus concluded that any actual infringement of privacy would only occur at the time of disclosure in the United States rather than through the retrieval of the electronic data by Google from its data centres abroad.

The ruling stands in contrast with a ruling the 2nd U.S. Circuit Court of Appeals in New York issued on 14 July 2016, that Microsoft could not be forced to turn over emails stored on a server in Dublin, Ireland that U.S. investigators sought in a narcotics case. Both cases involved warrants issued under the Stored Communications Act, which was passed in 1986 in part to extend the protections of the Fourth Amendment to emails. Google argued that it had complied with the precedential ruling set by the Microsoft case because it had turned over all data known to be stored in the United States. It vowed to appeal the case and to continue to push back on overbroad warrants.

- Google Ruling from 3 February 2017

<http://merlin.obs.coe.int/redirect.php?id=18448>

EN

- Microsoft Ruling from 14 July 2016

<http://merlin.obs.coe.int/redirect.php?id=18449>

EN

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## US-United States

### Search warrants for emails stored on servers outside the US

In an opinion issued on 3 February 2017, a US judge ordered Google to comply with search warrants seeking customer emails stored outside the United States. The court ruled that transferring emails from a foreign server so that FBI agents can review them locally as part of a domestic fraud probe did not qualify as an illegal seizure in violation of the Fourth Amendment of the United States Constitution. The Fourth Amendment to the US Constitution prohibits unreasonable



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# iris

Legal Observations  
of the European Audiovisual Observatory

**Agenda**

**Book List**

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