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IRIS
Legal Observations
of the European Audiovisual Observatory

IRIS 2017-6

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## INTERNATIONAL

## COUNCIL OF EUROPE

### European Court of Human Rights: Ólafsson v. Iceland

According to the European Court of Human Rights (ECtHR), Iceland has breached the right to freedom of expression of the editor of a web-based media site, by holding him liable for defamation. The applicant in this case is Mr. Ólafsson, editor of the web-based media site Pressan. He published articles alleging that a political candidate ('A.') had sexually abused children. The allegations were based on statements made by relatives of 'A.' who had declared that he had sexually abused them when they were children. These allegations were also forwarded to the police and the child protection services, but for an unknown reason, the police had not instigated an investigation.

The Supreme Court of Iceland held Mr. Ólafsson liable for defamation, because statements in the articles had indeed insinuated that 'A.' was guilty of having abused children. Whilst the Supreme Court accepted that candidates for public service had to endure a certain amount of public scrutiny, it held that this could not justify the accusations of criminality against 'A.' in the media, particularly because A. had not been found guilty of the alleged conduct and had not been under criminal or other investigation for it. The Supreme Court also held that Mr. Ólafsson, as an editor, had a supervisory obligation which entailed that he should conduct his editorial duties in such a way that the published material would not harm anyone by being defamatory. Mr. Ólafsson was ordered to pay, under the Tort Act, EUR 1,600 for non-pecuniary damages, and compensation for 'A."s legal costs of EUR 6,500. Under Article 241 of the Penal Code the statements at issue published on Pressan were declared null and void.

Mr. Ólafsson complained to the ECtHR of a violation of his right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). The ECtHR found that it has been adequately established that Mr. Ólafsson's liability was prescribed by domestic law within the meaning of Article 10 § 2 of the ECHR, and that the interference complained of pursued the legitimate aim of the protection of the reputation or rights of others. The ECtHR however found the arguments for the interference with Mr. Ólafsson's right to freedom of expression as an editor insufficiently convincing. In doing so the ECtHR referred to the standards and principles that the ECtHR has developed when considering disputes requiring an examination of the fair balancing of the right to respect for private life under Article 8 and the right to freedom of expression. The ECtHR recalled that in order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and its manner must cause prejudice to personal enjoyment of the right to respect for private life. The criteria which are relevant when balancing the right to freedom of expression against the right to respect for private life are: (1) the extent to which the impugned statement contributes to a debate of general interest; (2) how well known the person concerned is and what the subject of the report is; (3) his or her prior conduct; (4) the method of obtaining the information and its veracity; (5) the content, form, and consequences of the publication and (6) the severity of the sanction imposed.

The ECtHR confirmed that the general public had a legitimate interest in being informed about 'A."s running for general election and of such serious matters as child abuse. It also considers that, by running for office in general elections, 'A.' must be considered to have inevitably and knowingly entered the public domain and laid himself open to closer scrutiny of his acts. The limits of acceptable criticism are accordingly wider than in a case of a private individual. Next the ECtHR referred to the obligation for journalists to rely on a sufficiently accurate and reliable factual basis which can be considered proportionate to the nature and degree of their allegations, such that the more serious the allegations, the more solid the factual basis has to be. The ECtHR accepted that the journalist tried to establish the credibility and the truth of the allegations by interviewing several relevant persons, and that the impugned articles offered 'A.' an opportunity to comment on the allegations. The Court reiterated that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult, or provoke others, or damage their reputation, is not reconcilable with the press's role of providing information on current events, opinions, and ideas and that "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so". The ECtHR was of the opinion that Mr. Ólafsson acted in good faith and made sure that the article was written in compliance with ordinary journalistic obligations to verify a factual allegation.

Although the ECtHR agreed that the allegations were of such nature and gravity as to be capable of causing harm to 'A."s honour and reputation, it emphasised that the disputed statements did not originate from Mr. Ólafsson himself nor from the journalist who wrote the articles, but from the alleged victims. Insofar as Mr. Ólafsson's conviction may have been in the legitimate interest of protecting 'A.' from the impugned defamatory allegations made by the alleged victims, that interest was, in the Court's view, largely

preserved by the possibility available to him under Icelandic law to bring defamation proceedings against the persons who made the claims. The ECtHR regarded it as significant that 'A.' opted to institute proceedings against Mr. Ólafsson only. 'A.' had indeed chosen not to sue the persons making the claims, and that might have prevented Mr. Ólafsson from establishing that he had acted in good faith and had ascertained the truth of the allegations. With regard the proportionate character of the order by the Iceland Supreme Court to pay compensation and costs, the ECtHR considered that what matters is the very fact of judgment being made against the person concerned, even where such a ruling is solely civil in nature. It emphasised that any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions.

The ECtHR concluded that the Supreme Court had failed to strike a reasonable balance between the measures restricting Mr. Ólafsson's freedom of expression, and the legitimate aim of protecting the reputation of others. The ECtHR held, unanimously, that there had been a breach of Mr. Ólafsson's freedom of expression and that the Icelandic judicial authorities had violated Article 10 ECHR.

• Judgment by the European Court of Human Rights, First Section, Ólafsson v. Iceland, Application no. 58493/13, 18 March 2017
http://merlin.obs.coe.int/redirect.php?id=18501 EN

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## European Court of Human Rights: Orlovskaya Iskra v. Russia

In Orlovskaya Iskra v. Russia the European Court of Human Rights (ECtHR) has further developed its case law regarding freedom of expression and press freedom during election periods. The case concerns the application of a specific provision in Russian electoral law restricting the freedom of media reporting at election time. The Court's judgment deals with the applicant's conviction for an administrative offence for publishing critical articles about a politician during the 2007 parliamentary election campaign in Russia.

The applicant is a non-governmental organisation that publishes Orlovskaya Iskra, a newspaper in the Orel Region, a region south-west of Moscow. The Communist Party of the Russian Federation and the People's Patriotic Union of Russia were listed as the Orlovskaya Iskra's founders. This information was specified on the front page of the newspaper. During the 2007 parliamentary election campaign the newspaper published two articles criticising the then governor of the Orel Region, who stood as first candidate on the regional list of the United Russia political party. The Communist Party was one of the main opposition parties at those elections. The articles contained accusations of corrupt and controversial practices and focused on the fact that the governor had closed down a publicly-owned newspaper. The Working Group on Informational Disputes of the regional Electoral Committee examined both articles and concluded that the articles contained elements of electoral campaigning, because they were critically focused on one candidate. It found that the articles had not been paid for by the official campaign fund of any political party participating in the election campaign, as was required by the Russian Electoral Rights Act. For that reason Orlovskaya Iskra was found guilty of an administrative offence and fined. It complained under Article 10 of the European Convention of Human Rights (ECHR) about the classification of the material it published as "election campaigning" and the fine imposed for failure to indicate who had commissioned the publication of this material. Joint submissions as third-party interventions in support of Orlovskaya Iskra were produced by the Media Legal Defence Initiative and the Mass Media Defence Centre.

The ECtHR accepted that the applicable provisions of the Russian Electoral Rights Act were aimed at transparency of elections, including campaign finances, as well as at enforcing the voters' right to impartial, truthful and balanced information via mass media outlets. The Court found however that the application of the Electoral Rights Act impinged upon Orlovskaya Iskra's freedom to impart information and ideas during the election period, and that the interference with its freedom of expression was not shown to achieve, in a proportionate manner, the aim of running fair elections.

The ECtHR reiterated that free elections, as guaranteed by Article 3 of Protocol No. 1 to the EHCR, and freedom of expression, together form the bedrock of any democratic system. The two rights are interrelated and operate to reinforce each other, freedom of expression being one of the "conditions" necessary to ensure free elections. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. According to the ECtHR in the case at issue there was little scope for restrictions, especially on account of the strong interest of a democratic society in the press exercising its vital role as a public watchdog. The content of the publications was part of the normal journalistic coverage of a political debate in the print media. The ECtHR stated that it saw no reason to consider that any candidates or political parties were at the origin of the impugned articles and it considered that that the publication of the articles constituted a fully-fledged exercise of Orlovskaya Iskra's freedom of expression, namely the choice to publish the articles, thus imparting informa-

tion to the readers and potential voters. According to the ECtHR it has not been convincingly demonstrated, and there was certainly no sufficient basis for upholding the Government's argument, that the print media should be subjected to rigorous requirements of impartiality, neutrality and equality of treatment during an election period. The ECtHR recognised however that in certain circumstances the rights under Article 10 ECHR and Article 3 of Protocol No. 1 may conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions on freedom of expression, of a type which would not usually be acceptable, in order to secure the "free expression of the opinion of the people in the choice of the legislature". It also considers that unfavourable publications before Election Day can indeed damage one's reputation. However the focus of the domestic legislation was not on the falsity or truth of the content or its defamatory nature. In the opinion of the ECtHR the "public watchdog" role of the press, also at election time, is not limited to using the press as a medium of communication, for instance by way of political advertising, but also encompasses an independent exercise of freedom of the press by mass media outlets such as newspapers on the basis of free editorial choice aimed at imparting information and ideas on subjects of public interest. In particular, discussion of the candidates and their programmes contributes to the public's right to receive information and strengthens voters' ability to make informed choices between candidates for office. In addition, the ECtHR stated that any damage caused to reputation could be addressed, possibly before Election Day, by way of other appropriate procedures.

The ECtHR concluded that, in view of the regulatory framework, Orlovskaya Iskra was restricted in its freedom to impart information and ideas. By subjecting the expression of comments to the regulation of "campaigning" and by prosecuting the applicant with reference to this regulation, there was an interference with Orlovskaya Iskra's editorial choice to publish a text taking a critical stance and to impart information and ideas on matters of public interest. The Court affirmed that no sufficiently compelling reasons had been shown to justify the prosecution and conviction of Orlovskaya Iskra for its publications at election time. Therefore the ECtHR concluded that there had been a violation of Article 10 ECHR.

• Judgment by the European Court of Human Rights, Third Section, Orlovskaya Iskra v. Russia, Application no. 42911/08, 21 February 2017
http://merlin.obs.coe.int/redirect.php?id=18502 EN

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## EUROPEAN UNION

### Court of Justice of the European Union: Judgment on sale of multimedia players enabling streaming of illegal content

On 26 April 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in Stichting Brein v. Wullems, concerning the sale of multimedia players which enable easy access to illegal audiovisual content on the Internet. The case arose in 2014, when Stichting Brein, the Dutch foundation for copyright holders, brought a court action against Mr. Jack Wullems to prevent him from selling certain media players, including on his own website, www.filmspeler.nl. The media players, when connected to the Internet and a television, are able to stream audiovisual material from the Internet. In these media players, add-ons were installed, which link to streaming websites, including sites providing unauthorised access to copyright-protected films and series. The defendant advertised the media players, proclaiming "Never again pay for films, TV-series and sports!" and "Netflix is a thing of the past!".

The Rechtbank Midden-Nederland (District Court, Midden-Nederland) referred a number of questions to the CJEU (see IRIS 2015-10/26). The first and second questions related to whether there was "a communication to the public" under Article 3(1) of Directive 2001/29/EC by selling the media players with add-ons. The Court then applied the reasoning of the recent GS Media case (see IRIS 2016-9/3), and held that there was a communication to the public because the sale of the "filmerspeler" multimedia player was made in full knowledge of the fact that the add-ons containing hyperlinks pre-installed on that player gave access to works published illegally on the Internet. Moreover, the advertising of that multimedia player specifically stated that it made it possible to watch on a television, freely and easily, audiovisual material available on the Internet without the consent of the copyright holders. Finally, the multimedia player was supplied with a view to making a profit, the price for the player being paid in particular to obtain direct access to protected works available on streaming websites without the consent of the copyright holders.

The third and fourth questions concerned whether the temporary reproduction on a multimedia player of a copyright-protected work obtained by streaming is exempt from the right of reproduction under Article 5 of the Directive. An act of reproduction is exempt from the right of reproduction if it satisfies five conditions, namely: (a) the act is temporary; (b) it is transient or incidental; (c) it is an integral and technical part of a technological process; (d) the sole purpose of that process is to enable a transmission in a network be-

tween third parties by an intermediary or a lawful use of a work or subject matter; and (e) that act does not have any independent economic significance. However, the Court held that purchasers of the media player accessed a free and unauthorised offer of protected works deliberately and in full knowledge of the circumstances. Finally, the temporary act of reproduction on the media player at issue adversely affects the normal exploitation of those works and causes unreasonable prejudice to the legitimate interests of the rightsholder, and would usually result in a diminution of lawful transactions relating to the protected works, which would cause unreasonable prejudice to copyright holders.

• Judgment of the Court (Second Chamber), Stichting Brein v. Wullems, Case C-527/15, 26 April 2017
http://merlin.obs.coe.int/redirect.php?id=18503 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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## European Commission: Decision on 21st Century Fox's proposed acquisition of Sky

On 7 April 2017, the European Commission gave its approval to the proposed acquisition of Sky by Twenty-First Century Fox (Fox). According to this decision, this transaction will not lead to competition concerns. If the proposed transaction of 18.5 billion GBP takes place, it will combine the main pay-TV operator of Austria, Germany, Ireland, Italy, and the UK, namely Sky, with a relevant TV channel operator as well as one of the six major Hollywood studios, Fox.

Fox already controls 39% of Sky. Moreover, Sky has three board members who are part of Fox, including James Murdoch, who acts as Sky's chairman and Fox's chief executive.

The competition between both companies is mainly in the acquisition of TV content and the wholesale supply of basic pay-TV channels. The Commission considered that this transaction only leads to a limited increase of Sky's share of these two markets.

The Commission's assessment focused on three concerns that could rise in the relevant member states: (a) the possibility of Fox preventing or significantly limiting access of Sky's competitors to its films and TV content; (b) the possible incentive of Sky to cease purchasing Fox's competitors' content; and (c) the possibility for Sky to prevent competing channels from accessing its platform.

First, the Commission concluded that the parties' audience share remains limited and pay-TV distributors could still access content from Fox's competitors and alternative channels with comparable audiences and programming. Second, according to the Commission, Sky is unlikely to have the mentioned incentive as it would reduce the quality of their product offering. Third, the Commission found that the possibilities of both companies affecting Fox's rivals is limited by three factors: the existing regulations in the UK, Germany and Austria; the contractual protection that some competitors have; and the lack of dependence from some competitors on Sky's retail platform in the relevant member states.

This transaction, which was notified to the Commission on 3 March 2017, does not have a full green light yet. The decision of the Commission only focuses on competition issues, and under Article 21 of the EU Merger Regulation, member states can take measures to protect other legitimate interests. The UK Secretary of State for Culture, Media, and Sport, Karen Bradley, issued a European intervention notice. This procedure requires that the relevant UK authorities investigate and report by 16 May 2017 on the possible concerns of this transaction in relation to the public interest. In March, when the transaction was notified to the Commission, Ms. Bradley declared that she had "concerns that there may be public interest considerations that are relevant to this proposed merger that warrant further investigation".

• European Commission, Commission clears 21st Century Fox's proposed acquisition of Sky under EU merger rules, 7 April 2017
http://merlin.obs.coe.int/redirect.php?id=18504 EN FR

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## European Commission: Decision on Lithuania suspending transmission of Russian-language TV channel "RTR Planeta"

On 17 February 2017, the European Commission issued a decision on the temporary suspension of the retransmission of a television channel in Lithuania. On 16 November 2016 the Lithuanian Radio and Television Commission adopted a decision pursuant to the Law on Provision of Information to the Public, which suspended for three months the retransmission, including on the Internet, of the Russian TV channel "RTR Planeta." The decision entered into force on 21 November 2016 after the settlement with the Swedish authorities as the transmitting member state and broadcaster was not reached. This is not the first time that the Lithuanian authorities have taken action against "RTR Planeta." In 2014 their programme was suspended because of dissemination of bias and tendentious information, which was justifying violence (see IRIS 2014-6/25).

This time the Lithuanian authorities referred to the content of three programmes in their decisions: the content of the first programme of 29 November 2015 incited hatred against Turkey and Ukraine, while the second programme of 14 February 2016 promoted violence and physical destruction of United States, Turkey, and the Baltic States. The third programme of 6 October 2016 referred to a future occupation and destruction of Romania and other EU member states. The content of these programmes was considered as incitement of hate speech, fostering the feeling of animosity and tension. In their response, "RTR Planeta" claimed that two of the three programmes were talk shows expressing the views of the guests, thereby outside the broadcaster's editorial responsibility. Furthermore, "RTR Planeta" argued that such a decision would be contrary to the standards of freedom of expression and that incitement to hatred is difficult to be defined, while society has a right to be informed since it is a part of daily life.

In its decision on 17 February 2017, the European Commission approved the decision and established that Lithuania "sufficiently demonstrated" that the content of the programmes exceeded the limitations imposed by the Audiovisual Media Services Directive. It has found that the proposed measures are not "discriminatory and are proportionate" with the principle that content of the media services programme should not contain any incitement to hatred on the ground of race and nationality.

• Commission Decision of 17 February 2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services
http://merlin.obs.coe.int/redirect.php?id=18505 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

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## NATIONAL

### AT-Austria

**International jurisdiction of national court regarding satellite television**

In a decision of 21 February 2017 (case no. 4 Ob 137/16z), the Oberste Gerichtshof (Supreme Court) ruled that the courts of the state in which satellite broadcasts are received have jurisdiction to hear complaints about copyright breaches relating to works from the catalogue of a collecting society based in the receiving state.

An Austrian collecting society filed a complaint with the national courts about a Luxembourg-based company, claiming an injunction and financial compensation because the company had offered customers in Austria access to encrypted and unencrypted television programmes broadcast via satellite by selling them, via the Internet, an access key that enabled them to decrypt the broadcast signal. The plaintiff owned the rights to some of the broadcast programmes. The lower courts rejected the complaint on the grounds that they lacked international jurisdiction. In an appeal procedure, the plaintiff requested, inter alia, that the defendant's claim of insufficient jurisdiction should be dismissed.

In its decision, the Supreme Court rejected the claim of insufficient international jurisdiction and referred the case back to the first instance court, which must now conduct the proceedings without reference to the jurisdiction claim.

The Supreme Court explained its decision by stating that the "country of origin" principle enshrined in the Satellite and Cable Directive did not regulate international jurisdiction because it neither described international jurisdiction nor governed conflicts of national law. It should also be borne in mind that it did not contain any procedural provisions, including any that regulated international jurisdiction; rather, it was designed to harmonise different national laws and to prevent the cumulative application of several national laws to a single broadcast.

According to the Supreme Court's explanation, international jurisdiction was governed by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which stated that international jurisdiction depended on where the offence had been committed. In the case at hand, the alleged offence had been committed in Austria because it had comprised the infringement of the exploitation rights of rightsholders represented by the plaintiff and the company's failure to pay compensation. With regard to compensation claims, the offence had taken place in Austria because financial debts had to be discharged at the domicile of the creditor, that is to say, that of the collecting society in this case.

Moreover, according to European Court of Justice case law relating to intellectual property rights, international jurisdiction lay with the courts of the country in which the infringed right was protected. This also suggested that the Austrian courts had international jurisdiction to hear all the claims in this case.

• *Beschluss des Obersten Gerichtshofs vom 21. Februar 2017 (Az. 4 Ob 137/16z)* (Decision of the Supreme Court of 21 February 2017 (case no. 4 Ob 137/16z))
http://merlin.obs.coe.int/redirect.php?id=18519 DE
• *Mitteilung des Obersten Gerichtshofs über den Beschluss* (Press release of the Supreme Court concerning the decision)
http://merlin.obs.coe.int/redirect.php?id=18520 DE

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## KommAustria approves ProSiebenSat.1Puls4 takeover of ATV

The Austrian media regulator, KommAustria, has decided that the takeover of the ATV and ATV2 television channels by operator ProSiebenSat.1Puls4 GmbH does not contravene the relevant provisions of Austrian broadcasting and media concentration law and has therefore given the takeover the green light. KommAustria had to check, firstly, whether the operator would still be able to broadcast in accordance with broadcasting law and, secondly, whether the new company would breach media concentration law.

When examining whether the takeover conformed with broadcasting law, the regulator had to ensure first of all that ProSiebenSat.1Puls4 GmbH could offer technical, financial and organisational guarantees that it could operate the channels in accordance with the detailed conditions set out by the Bundeswettbewerbsbehörde (Federal Competition Authority - BWB) during the proceedings. The purpose of these conditions was to ensure the survival of ATV, which should remain an Austrian broadcaster with its own programming style. Although ProSiebenSat.1Puls4 GmbH would, to a certain extent, be allowed to harness synergies produced as a result of the takeover, in future, ATV and ATV2 would need to broadcast their own Austrian productions and operate an independent news service. From a financial point of view, the purchaser also provided KommAustria with a clear plan showing how, while fulfilling the numerous programming and structural conditions laid down, it would meet the financial requirements for operating the channels in spite of ATV's financial problems.

In terms of media concentration law, KommAustria also had to ensure that the new company would not provide more than 33% of the terrestrial TV channels available in any Austrian broadcast region. To this end, KommAustria took into account all terrestrial channels, including the ORF channels, as well as all foreign public service channels. It concluded that the new company would not exceed the aforementioned 33% media concentration threshold.

Now that both KommAustria and the BWB have sanctioned the takeover of ATV and ATV2 by ProSiebenSat.1Puls4 GmbH, no further investigations or decisions are required to approve the takeover; however, the authorities will continue to monitor the company's compliance with the aforementioned conditions.

• *Änderung der Eigentumsverhältnisse der ATV Privat TV GmbH & Co KG (aktualisiert am 05.04.2017)* (Amendment of the ownership structure of ATV Privat TV GmbH & Co KG (updated on 5 April 2017))
http://merlin.obs.coe.int/redirect.php?id=18540 DE

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# BG-Bulgaria

## FILMAUTOR brings a suit against BLIZOO for infringement of movie copyrights

Article 21, paragraph 2 of the Bulgarian Copyright and Neighbouring Rights Act (CNRA) provides that the permission to re-transfer works by means of all other electronic communication networks simultaneously with the broadcasting or transfer in full and in an unmodified form by a different organization, may be granted only through an organization for collective management of copyrights. FILMAUTOR is an organization for the collective management of copyright. It has the right to conclude contracts on the use of the works of the authors in one or more ways and to collect moneys due, stemming from these contracts or from statutory stipulations. The organization may represent their own members before all juridical or administrative bodies whenever the rights they manage need to be protected. For the protection of these rights, the organization may take any legal action on their behalf, including filing claims (Article 40, paragraph 7 of CNRA).

After the negotiations with BACCO, the organization representing cable operators, which had been conducted for more than three years, FILMAUTOR initiated the protection of rights of its members - screen writers, directors and cinematographers. The retransmission of movies in the broadcasting programs was one of the main controversial points. The law determines that the author shall be entitled to the exclusive right to use the work created by him and to permit its use by other persons. The use includes cable transmission and retransmission of the work (Article 18, paragraph 2, section 5 of CNRA). The cable operators stated that there are not different types of use (TV broadcasting and cable operator retransmission) because they both occur on the same territory. They refused to sign a contract with FILMAUTOR for this type of use.

In 2013, FILMAUTOR brought a lawsuit against BLIZOO for copyright infringement of three Bulgarian movies, broadcasted by bTV and rebroadcasted by the cable operator to its subscribers, without being entitled to

it: 'The Goat Horn', 'A time of trouble - the threat', and 'A time of trouble - a time of violence'. bTV had settled the rights for this type of use. bTV was broadcasted by a great number of cable operators, including BLIZOO, which used the protected contents in the program to generate profit. In the course of the case, FILMAUTOR stated explicitly that they would however not have claims against bTV.

The Sofia City Court, the Sofia Appeals Court, and the Supreme Court of Cassation explicitly stated that FILMAUTOR had provided the broadcasting rights of the movies to bTV, but this right would not include the right of operator to grant permission for retransmission through a cable operator or any other technical means. FILMAUTOR reserved its right to grant permission for retransmission from the cable operator of bTV programs directly to the cable operators by requiring them to pay copyright fees. As there was no such contract between FILMAUTOR and the cable operator, in re-broadcasting the three movies, BLIZOO had infringed upon the rights of producers, screenwriters, and operators.

• Решение на Софийски градски съд (Decision of the Sofia City Court)
http://merlin.obs.coe.int/redirect.php?id=18511 BG

• Решение на Софийски апелативен съд (Decision of the Sofia Appeals Court)
http://merlin.obs.coe.int/redirect.php?id=18512 BG

• Определение на Върховен касационен съд (Decision of the Supreme Court of Cassation)
http://merlin.obs.coe.int/redirect.php?id=18513 BG

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## CY-Cyprus

### Supreme Court rejects request to refer media law case to the CJEU

In a pretrial decision the Supreme Court rejected on 5 April 2017 a request by the House of Representatives of the Republic to seek the opinion of the Court of Justice of the European Union (CJEU) on a number of pretrial questions related to media issues. The Court found that the questions were formulated in a generic manner, while in the application of the House of Representatives, the reason(s) the interpretation of the CJEU was sought were not precisely determined as requested by the rules of pretrial reference. Moreover, "the formulation of the questions refers and seeks the opinion of the ECJ on the compatibility of national law with the Convention, not solely an interpretation of articles of the Convention". This would constitute a claim for "the enforcement by the Court (ECJ) of the proposed law on the facts [04046] in a non-acceptable manner".

The case related to a referral by the President of the Republic to the Supreme Court concerning a law voted by the House of Representatives amending the Law on Radio and Television Organizations L. 7(I)/1998. The President sought the opinion of the Supreme Court on whether the amending law was in conflict or discrepancy with several articles of the Constitution, namely Article 25 (right to employment), Article 28 (equality before the law, non-discrimination) and Article 179 (Constitution as the supreme law, compliance of laws with it); Articles 49 and 56 of the European Convention as well as Articles 15 and 16 of the European Charter of Fundamental Rights.

The amending law, voted on 4 April 2016 by the House of Representatives, introduced Article 12(2) in the basic law providing that the Cypriot Radio Television Authority would not grant new television licenses if the financial viability of existing licensees was endangered. It further provided that services from EU or third countries retransmitting in Cyprus should not include advertisements or commercial messages addressed to the territory of the Republic. When the President referred the voted law to the Supreme Court, the House of Representatives made the request for referral to the ECJ on the grounds that "there is reasonable doubt with respect to the right interpretation of the respective provisions of the European Law". The questions raised by the House of Representatives focused on whether the European Convention, the Charter, or the AVMS directive allowed (or prohibited) member states to regulate in a specific direction or to adopt the provisions voted by the Parliament.

The Supreme Court endorsed the objections and arguments of the President of the Republic that the request did neither make substantive reference to Articles 49 and 56 of the Convention, nor to Articles 15 and 16 of the European Charter, and further failed to include the reason(s) for which the request was made. The Supreme Court held that the exceptions to the free establishment of persons and legal entities established by the case law of the Court would not include restrictions on grounds of general economic interests. The same would apply to the free provision of services within the EU. Furthermore, the protection of interests of a purely economic nature would not be among the reasons that could justify restrictions to freedoms in the name of public interest.

The Court noted that "it is obvious from the formulation of the questions that they are all founded and are reasoned on [04046] the economic viability of the existing licensed television organisations"; this purely economic basis of the proposed regulation would be contrary to the case law of the CJEU, the Court concluded. In summary, it endorsed the argument that the application of EU Law was clear and that the existing interpretation of EU Law by the CJEU demonstrated the validity of the principle of an "acte éclairé". Thus, re-

ferral to the CJEU seeking interpretation was not justified.

• Αναφορά 321301. *5/2016, 5 Απριλίου 2017* (Decision by the Supreme Court, request of pretrial reference, case Reference President of the Republic v. The House of Representatives #5/2016, 5 April 2017)
http://merlin.obs.coe.int/redirect.php?id=18514 EL

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## CZ-Czech Republic

### Amendment of the Copyright Act

The Parliament of the Czech Republic approved an amendment to the Copyright Act (Act no. 121/2000 Coll., On copyright, rights related to copyright and amending some laws, as amended) The amendment to the Copyright Act has two main reasons. The first is the obligation to implement Directive 2014/26/EU on the collective management of copyright and related rights and the granting of multi-territorial licenses for the rights to musical works online in the Internal Market and in the framework of the Czech legal order to better regulate collecting societies. The second reason is the intention of legislators to adjust some other issues of copyright based on the experience of its application in practice. These adjustments are in many aspects related to the collective management of rights, but the directive is not the main impetus for their solution. This legislation is trying to achieve the implementation of EU rules and to remove existing problems. The aim of the amendment is to achieve a comprehensive and balanced regulation of rights and obligations of the collective management. On the one hand, rightsholders (authors, performers, and others), whose interests are usually represented by the collective management societies, would obtain more legal certainty. On the other hand, users of protected objects and licensees would benefit from a more coherent framework. The second objective of the proposed amendment is to solve specific problems regarding the application of collective management. The legislation spells out some rules of conduct for collective management societies and users to better secure collective management, both in terms of safeguarding the interests of rightsholders, whose rights are managed by the collective management societies and the interests of users and other stakeholders. For example, the modification of tariffs obliges collective management societies to provide for greater transparency, while ensuring that users have the opportunity to participate in the negotiation of rates of remuneration. Newly introduced administrative fines increase the enforceability of the obligations of collective management societies and the efficiency of supervision.

• *Zákon č. 102/2017 Sb., kterým se mění zákon č. 121/2000 Sb., o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon), ve znění pozdějších předpisů* (Act Nr. 102/2017 Coll. amending the Law Nr. 121/2000 Coll. On copyright)
http://merlin.obs.coe.int/redirect.php?id=18515 CS

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## DE-Germany

### Twitch.tv channel requires broadcasting licence

At its meeting in Berlin on 21 March 2017, the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision - ZAK) of the Landesmedienanstalten (regional media authorities) decided that the PietSmietTV Internet streaming channel should be banned unless it applies for a broadcasting licence by 30 April. The channel mainly streams Let's Play, that is to say, video game footage, 24 hours a day, 7 days a week, on the Twitch.tv Internet platform. According to the ZAK, it is a broadcasting service and should therefore be licensed.

Generally speaking, the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement) defines broadcasting as a linear information and communication service aimed at the general public. It comprises the distribution of selected content on the basis of a programme schedule which the user cannot influence in terms of either the timing or content of the transmission. The media watchdogs consider that PietSmietTV meets these criteria. The ZAK hopes that its decision will draw the provider's attention to the fact that it is infringing licence obligations and prompt it to apply to the relevant regional media authority, the Landesanstalt für Medien Nordrhein-Westfalen (North Rhine-Westphalia regional media authority - LfM), for a licence in the near future.

However, Internet users who upload videos to on-demand services such as YouTube do not require a broadcasting licence. Licences are only required by linear services, that is to say, those that are transmitted live or, in any case, simultaneously for all users. Normal online video services therefore do not need a licence. However, a licence may be needed for streaming services, especially if they are provided on a regular basis. The service must also have an editorial basis, since broadcasting must follow a programme schedule. If such a basis exists, the individual case is examined.

In practice, the exemption for services with fewer than 500 potential users is hardly relevant because it is not

the actual number of users that counts. The mere possibility that more than 500 users are able to access the service can suffice. The exemption therefore only applies if the number of users is limited in advance, such as by technical means. Since none of the main streaming services impose such a limit, the minimum threshold can only be observed in practice by users with private servers that do not permit more than 500 viewers.

In view of the sharp rise in the number of Internet streaming services, which are similar to broadcasting, the ZAK is currently devoting a lot of attention to this issue. At the start of the year, it had complained about live Internet coverage of the 2017 World Handball Championship for the same reasons (see IRIS 2017-5). It believes the Internet is full of services similar to broadcasting and that the law should be changed in the near future so that the same conditions apply online as for offline broadcasting services.

Against the background of technical and content-related changes to streaming services, many experts are asking whether the concept of broadcasting defined in the Rundfunkstaatsvertrag is outdated, and whether these streaming services should be licensed. The media authorities have repeatedly suggested that the concept of broadcasting should be adapted to the ongoing development of the media market.

• *Erläuterungen zur PietSmiet TV-Entscheidung der ZAK* (Explanation of the ZAK's PietSmiet TV decision)
http://merlin.obs.coe.int/redirect.php?id=18521 DE

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## Newspaper publishers bring class action against Rundfunk Berlin Brandenburg online service

A number of newspaper publishers from Berlin and eastern Germany have brought a class action before the LG Potsdam (Potsdam District Court), claiming that the Internet service of Rundfunk Berlin Brandenburg (Berlin and Brandenburg public service broadcaster) is press-like and, in its current format, infringes the case law of the Bundesgerichtshof (Federal Supreme Court) and the provisions of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV).

The second section of the RStV regulates public service broadcasting. Article 11d(1) RStV allows public service broadcasters to offer telemedia that are journalistic and editorial in nature. According to Article 11d(2)(3) RStV, this includes telemedia that are not related to a specific programme, provided they undergo the procedure described in Article 11f RStV. However, the same article prohibits press-like services that are not related to a specific programme.

In its 2015 ruling on the admissibility of the Tagesschau app (judgment of 30 April 2015 - I ZR 13/14 - Tagesschau-App; see IRIS article at http://merlin.obs.coe.int./iris/2015/7/article6.en.html), the Bundesgerichtshof explained that online services should be considered press-like if, when viewed as a whole, they provided press-like services not related to a specific programme. This would be the case if the service mainly comprised written text, for example, but not if only individual pieces of content were considered press-like.

The publishers' latest action against Rundfunk Berlin Brandenburg appears to have been triggered by the broadcaster's refusal to give a cease-and-desist declaration after it had been issued with a written warning. Only after receiving the warning did it begin to establish a link between its online service and its programmes.

• *Pressemitteilung zu dem Thema* (Press release on this subject)
http://merlin.obs.coe.int/redirect.php?id=18522 DE

**Bianca Borzucki**
*Kanzlei Ory*

# ES-Spain

## Competition issues in relation to advertising in certain Spanish TV Channels

TNT and 13 TV are two channels managed and controlled by Mediaset España. Its major Spanish competitor, Atresmedia, filed a claim before the Spanish Competition Authorities, the Comisión Nacional de los Mercados y la Competencia (National Commission for Markets and Competition - CNMC), requesting a review of the conditions under which Mediaset managed the advertising of these channels, because Atresmedia considered that they altered the competitive conditions of the TV advertising market in Spain.

The CNMC dismissed the review requested by Atresmedia, considering that there were no indications of infringement of the competition rules in the agreements for the management of the advertising of these channels by Mediaset España.

The CNMC also dismissed a request by Atresmedia of the conditions that prevent it from marketing the advertisement of open channels of third parties. The CNMC maintained the conditions derived from the merger process of Antena 3 and La Sexta (see IRIS 2015-8/13) by not admitting, as Atresmedia intended, that a substantial and sustained modification

of the conditions of competition in the television advertising market in Spain had taken place as a result of the agreements between Mediaset España and 13TV and TNT.

The CNMC concluded that the contract with 13TV had no restrictive effects on the television advertising market given the low commercial weight of the channel, the short duration of the agreement signed, and the conditions themselves with regard to the establishment of the commercial policy by Mediaset España. With regard to the agreement signed with TNT, the CNMC considered that the potential risk of a restrictive competition agreement was much lower, given that it is a pay-TV channel the commercial strategy of which is not based on obtaining advertising revenue and which has a much lower audience than any open television channel.

• *Competencia desestima la denuncia de Atresmedia a Mediaset por la comercialización de 13TV y TNT, 20 abril 2017* (Competition authority dismisses Atresmedia's complaint against Mediaset over advertising of 13 TV and TNT", 20 April 2017)
http://merlin.obs.coe.int/redirect.php?id=18506 ES

**Enric Enrich**
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**Telefónica will have to compensate competitors for the rental of football pay-TV channels**

On 10 May 2017, Spain's Comisión Nacional de los Mercados y la Competencia (National Authority for Markets and Competition - CNMC) decided that Telefónica must compensate some of its competitors, namely Vodafone, Telecable and Total Channel, for miscalculations in the amounts they have paid as a guaranteed minimum cost by the wholesale distribution of Canal + Liga and Canal + Partidazo football channels in the 2015/2016 season. The CNMC has also decided that Telefónica had undercharged Orange and Open Cab for the guaranteed minimum cost of the said pay-TV channels.

The CNMC issued this Resolution as part of its monitoring carried out to verify whether Telefónica is complying with the commitments resulting from its acquisition of the DTS pay-TV platform in 2015 (see IRIS 2015-6/13). CNMC's authorisation of the merger of TELEFÓNICA / DTS included a number of commitments by Telefónica relating to the pay-TV market, the wholesale marketing of content and channels, and the access to its Internet network. In the case of pay-TV channels, Telefónica must have a wholesale offer so that its competitors can access its pay-TV channels with premium content and offer them through their own pay-TV platforms. To calculate the price of that (wholesale) offer, Telefónica takes into account several elements. One of them is the so-called guaranteed minimum cost, a fixed cost that must be paid by all operators and which covers the risk assumed by Telefónica when a.o. acquiring exclusive rights in Spain of football, Formula 1 or Moto GP events.

After analysing the different data sent by Telefónica and the rest of the operators, the CNMC determined that Telefónica must make certain adjustments on the way the calculation of the guaranteed minimum cost assigned to each operator is made. Accordingly, Telefónica must immediately compensate the operators that it had overcharged. The CNMC also recognizes the right of Telefónica to demand the payment of additional amounts to operators who have been undercharged for this guaranteed minimum cost.

Telefónica and Total Channel may enter into a specific bilateral agreement, given that Total Channel has not effectively exploited the football channels of the wholesale offer of Telefónica. However, such an agreement must not entail a direct or indirect prejudice for the rest of the operators.

• *Press release of the CNMC, Telefónica deberá compensar a algunos de sus competidores por el alquiler de sus canales de televisión de pago de fútbol* (Telefónica will have to compensate competitors for the rental of its football pay-TV channels)
http://merlin.obs.coe.int/redirect.php?id=18539 ES

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## FR-France

**Docu-fiction on a court case: no invasion of privacy, abuse of a person's image, or infringement of the main character's right to be forgotten**

On 27 March 2017, the Court of Appeal in Paris delivered an interesting judgment involving the right to control over the use made of a person's image and the right to privacy of a woman involved in a criminal case that was the subject of a 'docu-fiction'. The television programme at issue was based on a case in which, in 2009, a woman was found guilty of complicity in the murder of her husband and sentenced to 20 years in prison. The programme was constructed using interviews of the people involved in the court case and journalists, and was illustrated with photographs and videos. The woman in question contested that the broadcasts of the programme had infringed her right to privacy, her right to control over the use made of her image, and her right to be forgotten. The court of first instance had rejected her applications.

Firstly, the woman contested that the public nature of the debates resulting in her conviction justified repeating the elements relating to her private life

brought up in court (her past as an "escort girl", her previous family situation, her address, etc.). The Court of Appeal concurred with the court of first instance, finding that the programme contained no new information about the woman's past in addition to those elements brought up during the proceedings and debated publicly before the criminal court, which the woman did not contest. She also claimed that the programme's subject matter was not a topical news item. The Court nevertheless observed that while the facts seemed relatively distant at the time of the judgment, in October 2010 they were recent, given that the sentence was handed down in February 2009; also, the publicity given to the case - both when the crime was committed and when the sentence was handed down - made it legitimate to recall the case as part of a news programme. The original judgement rejecting any infringement of the woman's privacy was therefore upheld.

Regarding the alleged infringement of the woman's right to control over the use made of her image, she claimed, on the basis of quotations from Parliamentary work and legal doctrine, that Article 41 of the French Prisons Act of 24 November 2009 was intended to protect images of prisoners generally, not only those taken inside prison. The Court did not agree, on the grounds that prisoners did not have any more or less right that anyone else to exercise control over the use made of images of them in respect of photographs taken before or after their imprisonment. The Court therefore found that the only limitation on such a right was the right to information, with depended on the status or past of the persons concerned. Furthermore, the observations regarding the alleged infringements of the woman's privacy also applied to her right to control over the use made of images of her, which was a constituent element. It was also noted that the woman was not alleging that the images at issue infringed her dignity.

Lastly, the woman invoked her right to be forgotten. However, the Court held that she did not produce any proof that the disputed broadcast was preventing her rehabilitation in any way, recalling once again that the programme was broadcast in 2010.

The judgment was upheld on all counts.

• *Cour d'appel de Paris (pôle 2, ch. 7), 29 mars 2017, Mme J. M'. B. c/ Edi TV et Capa Presse* (Court of Appeal in Paris (section 2, chamber 7), 29 March 2017, Ms J. M'. B. v. Edi TV and Capa Presse) FR

**Amélie Blocman**
*Légipresse*

**Presidential election: CSA issues three warnings and one order to comply for failure to observe equal speaking time for presidential candidates**

On 26 April, the plenary assembly of the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) drew up its report on both speaking time and air time during the first period of equality (from 10 to 21 April) in the presidential campaign, and on observance of the 'period of reserve'. The CSA had noted substantial inequalities during the first week of the period of equality, but noted that radio and television broadcasters had undertaken to correct the imbalance by the end of the first round of the election campaign on the evening of Friday 21 April.

On completing its report covering the entire period, the CSA issued three warnings and one order to comply: the radio station France Inter and the continuous news channels BFMTV and CNews received warnings for their patent failure to abide by the principle of equality. The records of speaking time available on the CSA's website show that BFMTV devoted more than 16 hours of air time to Jean-Luc Mélenchon, 14.5 hours to François Fillon, and 13 hours each to Marine Le Pen and Nicolas Dupont-Aignan. The 'minor' candidates, Jean Lassalle and Philippe Poutou, each had fewer than five hours of airtime. CNews was in the same position (7 hours of airtime for Emmanuel Macron, and 5.75 hours for Marine Le Pen), as was France Inter.

The radio station Radio Classique was issued with an order to comply for its disregard for the rules during the 'period of reserve'. Under Article L.49 of the Electoral Code, from midnight 24 hours before the start of an election day, broadcasting any election advertising or allowing it to be broadcast to the public by any means of communication or electronically is prohibited. Television channels may nevertheless broadcast images showing the candidates casting their vote, on condition that such sequences cover all the candidates and do not allow them to make any intervention. In the case at issue, however, a radio slot moderated by a declared supporter of one of the candidates - and criticising statements made by another candidate - entitled 'Les mots de la philo' was broadcast twice on Saturday 22 April, the day before voting, on the radio station Radio Classique.

The CSA stressed nevertheless that in general the radio stations and television channels had made a good effort to abide by the applicable rules, including the principle of equality, in the run-up to the second round of the election. In a report on the new applicable rules, presented on 10 May 2017, the CSA said it was aware of the difficulties the television channels and radio stations may have encountered. It stated that it would therefore be presenting its thoughts on the

changes it felt were necessary to the rules applicable to presidential elections, particularly with regard to the number of candidates, by the end of July. Within the same timeframe, to fully ensure the guarantee of diversity, the CSA will be required to pronounce on the new questions raised by the evolving political context, and on the increase and multiplication of sources of communication and information.

The CSA will continue to supervise speaking time during the campaign for the parliamentary elections, to be held on 11 and 18 June, in accordance with its Recommendation of 26 April 2017, which applies to all radio and television services regardless of their mode of broadcasting (including by means of electronic communication) for the period from 1 May 2017 up to the day on which the results are announced.

**Amélie Blocman**
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### Better framework for economic regulation of 'unlimited cinema cards'

An Order adopted on 4 May 2017 has simplified a number of the provisions contained in the Code for Cinema and Animated Image (CCIA), which had not been amended since 2009, and introduced a number of broader reforms. The Freedom of Creation Act of 7 July 2016 authorised the French Government to adopt measures amending the Code without requiring legislation approved by Parliament.

The first aim of the text is to simplify the scheme that provides a framework for the activity of cinema theatre operators. A cinema theatre that makes changes will only need to apply for new approval if the changes are substantial. There is also a new possibility for a waiver of the technical specifications required for approval. The current arrangement for travelling cinema screenings in favour of itinerant operators will continue.

The Order also reforms the arrangement for the economic regulation of cinema access schemes entitling a cinemagoer to multiple entries ('unlimited cards'), the number of which is not defined in advance. As a result, the financial guarantee obtained by some operators associated with a cinema access scheme will henceforth be the same as the reference price per seat. This has to be determined in order to serve as the basis for both the remuneration received by distributors and rightsholders and the tax levied on cinema tickets. The CCIA does in fact define the operation of cinema access schemes entitling cinemagoers to multiple entries, the number of which is not defined in advance. These schemes give cinemagoers the benefit of unlimited access to the cinemas owned by the issuing operators and their associates, in return for a subscription fee. The basic principle of the arrangement providing a framework for these schemes is that the mechanisms adopted to regulate the schemes should be as similar as possible to those for traditional ticketing. The principle applies to 'card tickets' used at the cinema theatre where the card was issued and at those of associated operators, whether or not the operator is covered by the guarantee arrangement. That is why a reference price per seat must be determined, in order to serve as the basis for the remuneration paid to distributors and rightsholders, both for issuer operators and for guaranteed operators. Similarly, this reference price will also serve as the basis for the tax on cinema tickets. The Act thus makes the reference price in general - which replaces the sale price of a traditional ticket - the basis of the entire arrangement. In this way it is possible to ensure identical treatment with regard to the various taxes and to the sharing of revenue with distributors between a 'card ticket' and a conventional ticket, as they will have the same value.

Lastly, the Order substantially amends Book IV of the CCIA, reforming the arrangements for checking compliance with the obligations imposed by the Code, and laying down the administrative sanctions that may be imposed in the event of failure to comply. The reform makes it possible not only to set up a simpler, more effective scheme of sanctions, but also to improve the system for investigation, while preserving the guarantees of independence and impartiality of the parties involved in the procedure.

• *Ordonnance n°2017-762 du 4 mai 2017 modifiant la partie législative du code du cinéma et de l'image animée* (Order No. 2017-762 of 4 May 2017 amending the legislative part of the Code for the Cinema and Animated Image (CCIA))
http://merlin.obs.coe.int/redirect.php?id=18541 FR

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## GB-United Kingdom

### Fox News breaches Ofcom Code by failing to ensure sufficient distinction between advertising and editorial content

On 6 March 2017, Ofcom determined that Fox News, a USA news channel and broadcast as a digital satellite channel, had breached Rules 9.4 and 9.5 of Ofcom's Broadcasting Code by allowing advertising material or promotional material to be screened as if editorial content. During its Hannity show on 5 and 6 August 2016, Fox News broadcast short segments each lasting about two minutes entitled Fox Extra. These segments covered various subjects including cooking,

health, technology, and travel, as well as guest interviews. On 5 August, a health section lasting about two minutes comprised of an extract from Masalabody.com - a website run by a fitness coach who uses spices to aid weight loss - plus a further 10 seconds on the "Matcha Miracle" recipe book by Mariza Snyder recommending powdered tea to aid weight loss. The segment was voiced by Dr Manny Alvarrez of Fox News. The section ends with Dr Alvaraz giving viewers direction to visit the Masalabody's website. On 6 August 2016, a segment also voiced by Dr Alvaraz provided details of a new fitness programme, Precision Running, devised by fitness instructor David Silk of Equinox Gym. There was also a technology segment presented by Douglas Kennedy of Fox News and a representative of Sailo, which rents boats and charter yachts.

Upon Ofcom's enquiry, Fox News confirmed there was no commercial arrangement between the brands and the news company. Fox confirmed there had been no commercial or financial incentive and the featuring of the brands was an editorial decision. Fox News contended the aim of the content was not the promotion of a product, service, or trademark, but instead to report on new "methods and techniques" that viewers may wish to learn or use. Fox News said that Masalabody, Sailo, and David Silk's book were used for "reporting and illustration purposes only [and] motivated by the news and information prerogatives of" Fox News. Fox also stated the features had a very limited running length with no time to provide comparators, and the purpose of the pieces was to provide viewers "a worthwhile and valuable experience". Fox also referred to Article 10 of the European Convention on Human Rights (ECHR), which enshrines the right to freedom of expression as to how they present their programme; concentrating on one particular business in a particular market segment did not make it promotional or advertising material.

Rule 9.4 of the Broadcasting Code states "Products, services and trademarks must not be promoted in programming", and Rule 9.5 requires "No undue prominence may be given in programming to a product, services or trade mark. Undue influence may result from the presence of, or reference to, a product, service or trademark where no editorial justification; or the manner in which a product, service, or trademark appears or is referred to in programming". Ofcom considered the Masalabody.com segment more akin to advertising than editorial content, and it promoted the website rather than being content about healthy eating in general. Ofcom reached a similar determination regarding the Precision Running segment, which focused solely on David Silk and his Precision Running programme. Whilst Ofcom stated that it did not expect every claim about a product or service to be challenged by the broadcaster, the lack of any challenge was not editorially justified. Sailo's section was about promoting a company than about hiring vessels for recreational purposes, for instance the prominence given to the company's pricing and Fox expressing favourable comments about their service. Ofcom considered there was insufficient editorial justification to refer to one company's services; such references were unduly prominent and constituted a breach of Rule 9.5. Ofcom considered all three segments promoted particular companies rather than explained a specific lifestyle or health option, and as such breached Rules 9.4 and 9.5.

• Ofcom, Ofcom Broadcast and On Demand Bulletin, Issue number 324, 6 March 2017, p. 8
http://merlin.obs.coe.int/redirect.php?id=18531 EN

**Julian Wilkins**
*Blue Pencil Set*

## Regulator issues note to broadcasters for upcoming general election

On 24 April 2017, Ofcom, the UK communications regulator, issued a Note to broadcasters on election programming for the General Election taking place on 8 June 2017. It follows Ofcom's statement in 9 March 2017 that it had amended its rules relating to coverage of elections with new rules in relation to party broadcasts and rules applying to the BBC for the first time (see IRIS 2017-5/6).

The Note reminds broadcasters that Ofcom's Broadcasting Code requires that the coverage of elections and referendums complies with rules requiring due impartiality and a number of other special provisions. In addition, parties have been given the right to election broadcasts and party political broadcasts to counteract the effect of the ban on political advertising in the UK and to offset the different ability of parties to attract campaign funds. The new rules from March 2017 reflect a growing fragmentation of political support by removing the concept of larger parties from the rules and instead requiring broadcasters to use their own judgment based on the criteria of past or current electoral support for different parties. It will remain possible to complain to Ofcom about such decisions by broadcasters, and Ofcom will publish an annual digest of evidence of electoral support to assist smaller broadcasters in taking such decisions. Ofcom has also set out the factors it takes into account in weighing different types of evidence of support.

Ofcom has now taken over regulation of the content of BBC programmes, and Section 6 of the Broadcasting Code will now apply to BBC broadcast and on-demand services. Among other things, it requires that discussion and analysis of election issues must end when the polls open; that election candidates must not appear as news presenters, interviewers or presenters of any type of programme during the election period; and that no new appearances of candidates in non-political programmes should be arranged during the

election period. The rules will also regulate the participation of election candidates in broadcast items about the electoral area, in which all candidates with significant support must be offered the opportunity to participate.

Finally, the Note states that the "election period" for the general election commences with the dissolution of Parliament on 3 May 2017. Ofcom will consider any breach from election-related programming to be potentially serious. Further, if a complaint is made that in Ofcom's view might require action before the election, the Note states Ofcom will act quickly to determine the issue in a proportionate and transparent manner before the election.

• Ofcom, "Note to Broadcasters: Election programming", Ofcom Broadcast and On Demand Bulletin, Issue number 327, 24 April 2017, p. 5.
http://merlin.obs.coe.int/redirect.php?id=18532 EN

• Ofcom, "Ofcom's Rules on Due Impartiality, Due Accuracy, Elections and Referendums", 9 March 2017
http://merlin.obs.coe.int/redirect.php?id=18484 EN

**Tony Prosser**
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## Government decides not to privatise Channel 4

Karen Bradley, government minister serving as Secretary of State for Culture, Media, and Sport, has announced that after an 18-month review, public service broadcaster (PSB) Channel 4 will not be privatised and will remain in public ownership. The terrestrial channel was launched in 1982 to provide greater diversity and appealing to tastes and interests not normally catered by the other independent terrestrial channel ITV, launched in 1955. Both ITV and Channel 4 are funded primarily through advertising, and in the case of Channel 4 profits are reinvested into programme making. Channel 4 has helped see a significant growth in the UK's independent production sector. Channel 4 has since 1982 developed its own unique character, and Broadcast magazine has for two consecutive years awarded it Channel of the Year. Channel 4 has developed a number of successful spin-off businesses, including Film 4, which in 2015 helped fund films that received 15 Oscar nominations. Channel 4's other businesses are E4, More 4, 4 Music, and All4.

However, despite Channel 4's creative and financial success, the Government raised concerns as to whether its current structure was robust enough to deal with a changing media climate, including the very future of linear and terrestrial TV itself, given the shift to watching online and disrupters in the market place such as Netflix and Amazon.

Restrictions to Channel 4's business model include that it cannot produce content for its own main channel, the so-called publisher broadcaster model, and its limited access to capital. The Government, having considered various business models, including full privatisation, consider on balance that it is better to maintain the status quo and by doing so it enforces its commitment to public service broadcasting. As such the Government will not give further consideration to privatisation "at this time".

However, there is one area the Government is considering and that is whether Channel 4 headquarters should be based outside London, or at least have a much greater presence outside the capital. Channel 4 has approximately 820 staff, but only around 30 are located outside central London. As a consequence, the Government has launched a consultation paper and consultation period to seek a wide variety of views as to whether Channel 4 should relocate. The Consultation paper states "Channel 4 rightly prides itself in being different, in providing alternative views and new perspectives". The issue is whether this characteristic will be further enhanced by being located away from London, including the potential stimulus to production companies and creative talent. Apart from location, the Government will also consider Channel 4 taking bigger financial stakes in regional production companies.

Following the consultation period, the Government will consider the evidence and then have discussions with Channel 4 before taking any necessary legislative steps concerning location and necessary financial structuring to "ensure Channel 4 maximises its delivery of public value to the country as a whole". The consultation will run for 12 weeks closing at 5pm on Wednesday, 5 July 2017. Views are sought from broadcasters, production companies, individuals, and local authorities.

• Department for Culture, Media & Sport, Increasing the Regional Impact of Channel 4 Corporation, 12 April 2017
http://merlin.obs.coe.int/redirect.php?id=18530 EN

**Julian Wilkins**
*Blue Pencil Set*

# IE-Ireland

## High Court refuses to strike out presidential candidate's claim over televised election debate

On 11 April 2017, the High Court delivered a judgment in Gallagher v. RTÉ, concerning a presidential candidate's legal action against the public broadcaster RTÉ

over a 2011 televised election debate. The claim centred on RTÉ's 2011 election debate, when the presenter had questioned the candidate about a statement concerning him that had just been made on the supposed official Twitter account of another candidate. It later turned out that the tweet had been attributed, in error, to the official Twitter account of the other candidate. In March 2012, the Broadcasting Authority of Ireland (BAI) held that the programme had been in breach of section 39(1)(b) of the Broadcasting Act 2009, being "unfair" to the candidate (see IRIS 2012-5/27). However, The Committee decided that the complaint was not of such a serious nature as to warrant an investigation or public hearing.

Nonetheless, in the High Court action, the candidate, who had not been elected, claimed RTÉ had acted negligently in putting the question to him over the tweet, and sought to undermine his credibility. The candidate also claimed RTÉ directed the debate with the improper aim of altering the course of the election, that RTÉ promoted the electoral chances of another candidate, and that RTÉ's conduct was targeted malice that was intended to damage him.

Many legal claims against Irish media result in protracted and expensive proceedings, and while the candidate's legal action had been initiated in 2013, it was still ongoing in 2017. Therefore, RTÉ sought an order dismissing the action, due to a failure of the candidate to make proper discovery to RTÉ (i.e. disclose relevant documentation). RTÉ claimed that the candidate had failed to make voluntary discovery over a year after RTÉ made the request, and six months after a court order.

In its judgment, the High Court held that two of candidate's affidavits were deficient, he had failed to swear an affidavit in the appropriate form, failed to make discovery of certain relevant metadata that he holds, and had failed, more generally, to make proper discovery of the documentation (including electronically stored information) in his possession or power. The High Court judge stated that "while I do not find that default to be wilful or contumelious, I am driven to the conclusion, in the context of the evidence I have sought to summarise, that it was negligent. Nonetheless, I do not think that it has yet compromised the prospect of a fair trial to the extent that the justice of the case warrants an order striking out the proceedings". Therefore, the Court dismissed RTÉ's request for the claim to be struck out. Instead, the Court ordered that the proceeding should continue, made various orders compelling the candidate to make proper discovery, and ordered both parties to indemnify 50% of the costs.

• Gallagher v. RTE [2017] IEHC 237
http://merlin.obs.coe.int/redirect.php?id=18507 EN

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## Decision on fairness and impartially rules for television documentaries

On 26 April 2017, the Broadcasting Authority of Ireland (BAI) delivered a decision on the fairness and impartiality rules applicable to documentaries under the Broadcasting Act 2009, and the BAI Code on Fairness, Objectivity and Impartiality in News and Current Affairs. The decision concerned a documentary broadcast on the RTÉ One television channel in July 2016 entitled "Peacekeepers: The Irish in South Lebanon". It detailed the experience of the Irish Defence Forces operating in South Lebanon during the 1970s until the present.

A complaint was submitted under section 48(1)(a) of the Broadcasting Act 2009, and the BAI's Code on Fairness, Objectivity and Impartiality in News and Current Affairs, arguing that the documentary was unfair and biased. In particular, it was claimed that the documentary presented the views of prominent critics of Israel without any balancing voices, failed to mention that the Palestinian Liberation Organisation killed more Irish soldiers than the Israelis, and unfairly implied that Israelis on the Blue Line constituted a major problem for Irish troops.

However, RTÉ argued that the documentary should not be classified as a current affairs programme, subject to the rules on fairness and impartiality. It argued that it was human interest documentary, and very clearly not a historical account of the war in the Middle East or in Lebanon nor a current affairs documentary on the contemporary political or military situation there. RTÉ continued to state that it was a human interest documentary focused on the experience of members of the Irish Defence Forces who have served as peacekeepers in South Lebanon, and on their families. In this context, broadcasters have the editorial independence to choose both the topics and the perspective on those topics.

The BAI's Executive Complaints Forum agreed with RTÉ, and held that the programme was a documentary with a predominate "human interest angle", and not a current affairs documentary. As such, the BAI held that rules on fairness, objectivity, and impartiality were not applicable. The BAI had regard to the fact that given the role of the Irish peacekeepers in a conflict zone, it was natural for the programme makers to provide some historical information so as to provide context for the personal experiences of those featured in the programme and to illustrate the history and role of peacekeepers in South Lebanon. As such, there had been no violation of the Broadcasting Act 2009 nor the BAI Code on Fairness, Objectivity and Impartiality in News and Current Affairs.

• Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, April 2017, p. 37
http://merlin.obs.coe.int/redirect.php?id=18508 EN

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## IT-Italy

### Court of Turin rules YouTube liable for copyright infringements

On 7 April 2017, the Court of Turin delivered a significant judgment affecting Internet service providers' (ISPs) liability for the removal of copyrighted content published without authorisation of the rightsholders.

In particular, the decision followed prior proceedings in 2014 in which YouTube had been ordered to take-down the content that constituted copyright infringement referenced by the plaintiff (DeltaTV) through the relevant URL, and to adopt the necessary technical steps in order to prevent users from again uploading the same content.

According to the Court of Turin, the evolution of the nature of the Internet services may not call into question the passive and neutral role and, accordingly, the legal regime applicable, to providers operating video-sharing platforms. The advent of new characteristics (including the supply of advertising messages related to the content or the classification of the same into different categories), indeed, may not deprive ISPs of the liability exemptions for third parties' content or activities.

In the case at hand, DeltaTV complained that YouTube had not actually removed the copyrighted content set forth in the injunction dated 2014. Indeed, the videos at issue were not removed but rather "hidden" from the Italian version of the website. Thus, the same were still accessible from any country other than Italy. Furthermore, Italian users could still access this content through the use of appropriate devices to change their IP address and, accordingly, hide their respective location.

According to the Court of Turin, once a specific and detailed notice of copyright infringement has been filed, and the uploader has brought no evidence to claim his/her right over the relevant content, the ISP is deemed to have actual knowledge of the existence of a copyright infringement. As such, it is expected to take the necessary steps in order to comply with the relevant provisions implementing the E-Commerce Directive into the domestic legal order.

In the view of the Court, then, an ISP that is notified of a copyright infringement is no longer "neutral" and shall act accordingly, by preventing users from uploading the same material.

As DeltaTV brought evidence that the content listed by the 2014 order had been displayed even after having been removed from the Italian version of YouTube, the Court of Turin found these measures to be inappropriate, and ordered YouTube to pay DeltaTV EUR 250,000 damages for having permitted users to display the said copyrighted materials.

• *Tribunale di Torino, sezione prima - impresa, sentenza n. 1928 del 7 aprile 2017* (Court of Turin, first section (companies court), decision no. 1928 of 7 April 2017) IT

**Ernesto Apa, Portolano Cavallo**
*Marco Bassini, Bocconi University*

### AGCOM orders Vivendi to comply with a statutory ban to simultaneously hold qualified minority stakes in Telecom and Mediaset

On 18 April 2017, the Autorità per le garanzie nelle comunicazioni (the Italian Communications Authority - AGCOM) issued a decision by which - for the first time ever - it has applied the ban set forth in Article 43, paragraph 11, of the Italian Code on Audiovisual Media Services (CAMS). That provision was introduced in 2004, and applies to undertakings that achieve a turnover exceeding 40% of the overall combined sales in the electronic communications services markets. The provision prevents such undertakings from holding either a controlling stake or a qualified minority stake (a "collegamento") in undertakings which achieve a turnover exceeding 10% of the overall combined sales in the media, advertising, and publishing markets (Integrated System of Communications or SIC). Telecom Italian SpA and Mediaset SpA, which are both publicly listed on the Italian Stock Exchange (Borsa Italiana), fall within the former and latter categories of undertakings respectively.

On 21 December 21 2016, AGCOM began an investigation after Vivendi SA, which was already holding a 23.94% (subsequently raised to 24.68%) stake in Telecom, acquired a 25.75% (subsequently raised to a 29.9%) stake in Mediaset through a hostile takeover. In particular, the issue AGCOM had to decide on was twofold: first, whether Vivendi's stakes in Telecom and Mediaset gave Vivendi de facto "control" (i.e. to have a "decisive" or "dominant" influence over) over any of the two companies or, rather, conferred a mere "collegamento" (i.e. a "material influence", which under Italian law is presumed if the minority stake is of at least 10%) over the same two companies. Second, AGCOM had to decide whether Article 43(11) of the CAMS can be interpreted as prohibiting a company

from just holding a "collegamento" in both Telecom and Mediaset or, rather, controlling at least one of the two companies can be deemed indispensable to trigger the prohibition of having a "collegamento" with the other.

In its decision, AGCOM has affirmed that Vivendi's stakes confer a mere "collegamento" in the form of "material influence", pursuant to Article 2359 of the Civil Code, over both Telecom and Mediaset, as there is insufficient evidence to substantiate a control in the form of "dominant influence" pursuant to the same provision of the Civil Code. Notably, AGCOM held that, in matters pertaining to Article 43(11) of the CAMS, only Article 2359 of the Civil Code is applicable to the notions of control and "collegamento". Nonetheless, AGCOM has held that Vivendi has breached Article 43(11), since the ban set forth therein also applies to a company holding a mere "material influence" over both Telecom and Mediaset. As a consequence, AGCOM has ordered Vivendi to comply with the ban set forth in Article 43(11) within 12 months, and to report to AGCOM a detailed action plan for that purpose within 60 days. Vivendi has announced that is appealing the decision.

• *Autorità per le Garanzie nelle Comunicazioni, Delibera N. 178/17/CONS del 18 aprile 2017, ACCERTAMENTO DELLA VIOLAZIONE DELL'ART. 43, COMMA 11, DEL DECRETO LEGISLATIVO 31 LUGLIO 2005, N. 177* (Italian Authority for Communications, Resolution N. 178/17/CONS of 18 April 2017, assessing infringement of Article 43, para. 11, of Legislative Decree 31 July 2007, n. 177)
http://merlin.obs.coe.int/redirect.php?id=18533 IT

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## NL-Netherlands

**Court dismisses complaint against public broadcaster NOS for not including political party in election debates**

On 28 February 2017, the District Court of Amsterdam dismissed a complaint by the newly-founded political party Forum voor Democratie (Forum for Democracy - FvD) against the public broadcaster NOS for not being invited to participate in the election debates that NOS organised and broadcast. The Court held that NOS acted in accordance with the Mediawet (Dutch Media Act), that it did not abuse its journalistic freedom, and had not unjustly restricted FvD's right to political expression nor acted unlawfully in any other way.

NOS organised a radio and television election debate that took place on 24 February 2017 and 14 March 2017 (the night before the election) respectively. On 2 February 2017, NOS announced that 14 of the 28 parties in total participating in the elections were selected to take part. Because they were not selected for either debate, FvD started preliminary relief proceedings in which they demanded that NOS be ordered to retake their selection decision. Both parties relied on their freedom of expression. FvD argued that their freedom of political speech was restricted without justification by their exclusion from the debates. NOS argued that they had journalistic freedom to organise their programmes, including these debates, at their discretion.

The Court considers that, on the basis of the Dutch Media Act (Mediawet) public broadcaster NOS has a wide margin of discretion in shaping their media content. However, their conduct will be unlawful when they make unreasonable choices, infringe rights and freedoms of others, and/or abuse their journalistic freedom (for example, by trying to influence the elections). The Court first held that NOS did not act unlawfully against FvD through its selection process. FvD complained in particular that NOS made their selection at a premature moment, because at the time of the decision FvD was not yet been included in a combined poll and had not yet started its campaign, and NOS did not await publication by the kiesraad (electoral council) of the final list of parties participating in the election. FvD also complained that NOS included current seats of political parties as a selection criterion. The Court did not find the decision-making process of NOS to be unlawful because of these circumstances. The criteria used by NOS were predetermined, objective, and clear. The Court held that the choices were sufficiently neutral, not unreasonable, and made in a transparent fashion.

The Court went on to consider whether FvD's freedom of political speech was restricted by NOS. It held that, although FvD was prevented from communicating its views in the debates organised by NOS, FvD was not prevented from effectively expressing its political views altogether. FvD was at liberty to communicate its political message through other channels. Moreover, it was not established that NOS systematically excluded FvD in their (online) coverage of the elections.

• *Rechtbank Amsterdam, 28 februari 2017, ECLI:NL:RBAMS:2017:1151* (District Court of Amsterdam, 28 February 2017, ECLI:NL:RBAMS:2017:1151)
http://merlin.obs.coe.int/redirect.php?id=18534 NL

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## PT-Portugal

### Study released by media regulator shows that Portuguese children are increasingly digital

Portuguese homes in which children grow up are increasingly digital. This is one of the main conclusions of the study released in February 2017 by the state media regulatory body, ERC ("Entidade Reguladora para a Comunicação Social"), entitled "Growing up between screens: Use of electronic devices by children (3-8 years)". The study was focused on the use of electronic media by children aged three to eight years old and sought to identify the environments of screens, in which children live (namely television, computers, consoles, mobile phones, tablets), their modes of access and uses, as well as parents' guidance of these uses, their attitudes and concerns.

The empirical work was comprised of two parts: a national survey in 656 homes (including questionnaires to both parents and children) and a complementary direct observation in 20 households with children of these ages who made use of the Internet.

According to the results of the research, Portuguese children aged three to eight years old are digital natives and the technological apparatus at home gives them a wide range of possibilities. The national survey pointed out that television is the most common screen at home (99% of the houses have at least one), followed by mobile phone (92%), laptop (70%), and tablet (68%). Television plays mostly an entertainment role and there is an intense and frequent viewing by parents and children, in particular in common family spaces (as the living room and the kitchen). At the same time, there is also the "babysitting" role performed by television, as parents assume the tendency to use it when they need to take care of domestic tasks. In fact, 94% of the children in the study watch television on a daily basis. On average, they spend 1 hour and 41 minutes watching television, and this period increases on weekends.

In two thirds of the homes where there is a tablet children use it, and in 63% of the cases it is a personal device. While 38% of the children access the Internet, the tablet is the most frequent device used for this purpose. The segment of children who play more games are those aged six to eight years old. The type of games depends on the device used (tablet, smartphone, or other) but, when it is on laptops, there is a greater level of supervision by siblings or adults. Another finding illustrated by this study is that parents are also very familiar with digital devices: 80% of them state that they are Internet users, and in 68% of the cases it is a daily use, mostly at home.

Most of the parents are concerned about the unsupervised use of different gadgets. They specifically focus on the children's use of Internet and time spent watching television, mainly due to violent and sexual content, inappropriate language, and nudity.

• ERC, "Growing up between screens: Use of electronic devices by children (3-8 years)", February 2017
http://merlin.obs.coe.int/redirect.php?id=18538 EN

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## RO-Romania

### National Audiovisual Council - Sanctions and Licenses

The Consiliul Național al Audiovizualului (National Audiovisual Council - CNA) imposed fines worth 1,167,500 lei (˜EUR 259,400) in 2016 for breaches of the audiovisual rules (see inter alia IRIS 2008-5/27, IRIS 2009-1/29, IRIS 2010-8/42, IRIS 2011-1/44, IRIS 2011-6/31, IRIS 2012-1/39, IRIS 2012-4/36).

According to the CNA 2016 Annual Report, unanimously adopted on 4 April 2017, the Council imposed 176 sanctions last year, of which 42 fines, 133 public warnings, and a decision to broadcast the text of the sanction for 10 minutes.

Most sanctions were imposed for breaches of the legal framework with regard to: the protection of human dignity and of the right to own image, as well as of human fundamental rights and freedoms (43 sanctions); providing accurate information and pluralism observation (35 sanctions); modification of the program grid, the ownership, or the social headquarters without the Council's approval (31 sanctions); the electoral campaign for the 2016 local elections (23 sanctions); and not requiring the modification of the authorization decision within the statutory period (23 sanctions).

The sanctions were issued for breaches of the following legal acts: Law no. 504/2002 of the Audiovisual Code (Decision no. 220/2011); CNA Decision no. 277/2013 with regard to granting, modification, and extension of the license; Law no. 115/2015 for the election of the authorities of the public local administration, for the modification of Law no. 215/2001 on the local public administration, as well as for the modification and completion of Law no. 393/2004 with regard to the status of the local elected representative; CNA Decision no. 244/2016 with regard to the rules for the audiovisual electoral campaign for the

2016 local elections; Law no. 208/2015 on the election of the Senate and of the Chamber of Deputies, as well as for the organization and functioning of the Permanent Electoral Authority; and CNA Decision no. 592/2016 with regard to the rules for the audiovisual electoral campaign for the 2016 Senate and Chamber of Deputies election.

Most sanctions were issued for Romania TV (commercial, news station), Antena 3 (commercial, news station), Realitatea TV (commercial, news station), B1 TV (commercial, news station), Pro TV (commercial, generalist), and Antena 1 (commercial, generalist).

In 2016 CNA was involved in 150 litigations, 89 of which were settled out. In 75 cases the CNA won the litigations, 12 cases were lost by the CNA, and in 2 cases the Council was obliged to reduce the fines.

On the other hand, in 2016 the Council issued a total of 113 audiovisual licenses for terrestrial radio program services and 10 licenses for radio programs broadcast via satellite, 68 licenses for TV programs broadcast via satellite, and 99 licenses for TV programs broadcast through other types of communications networks. A total of 1,003 radio and TV licenses, belonging to 407 companies, were valid as of 31 December 2016.

• *CNA - Raport de activitate pe anul 2016* (CNA - 2016 Annual Activity Report)
http://merlin.obs.coe.int/redirect.php?id=18516 RO

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## RU-Russian Federation

### Online cinemas restricted

The State Duma of the Russian Federation adopted on 21 April 2017 amendments to the Federal Statute on Information, Information Technologies and Protection of Information (see IRIS 2014-3/40) that introduce a prohibition of foreign and restrictive regulation of national online cinemas.

The act provides the notion of "the owner of an audiovisual service" and enumerates its responsibilities. Such an “owner” is defined as “the owner of a website and/or the website page on the Internet, and/or an information system, and/or a computer programme that are used to form and/or organize the distribution of a set of audiovisual works on the Internet, if the access to them is provided for a fee and/or subject to viewing advertising aimed at attracting the attention of consumers located on the territory of the Russian Federation and the number of such users on the territory of the Russian Federation that get an access to them within a day exceeds one hundred thousand” (Article 10-5).

According to the same new article, foreign participation in the ownership or control of an audiovisual service shall be limited to 20 %. Even that is subject to a decision of the Governmental Commission (to be established) that shall be “guided by the interests of the audiovisual market in Russia”.

Among other things, owners of the audiovisual services shall be prohibited from disseminating certain content such as election campaigning, “extremist materials”, “propaganda of pornography”, “cult of violence”, and obscene words. They should abide by the Russian rules on age ratings of audiovisual products (see IRIS 2012-9:1/37) and generally follow other Russian laws such as the Statute on Mass Media. They are prohibited from rebroadcasting TV channels and programmes that have not been registered as mass media outlets in Russia.

Roskomnadzor (see IRIS 2012-8/36) obtains additional rights to obtain relevant information and compile a Register of audiovisual services. Once in the Register the owner shall within two months provide to Roskomnadzor a pledge of abidance to the restrictions on foreign participation and/or control. If the owner does not abide Roskomnadzor shall appeal to the Moscow City Court as the first instance with the demand that access to the service is blocked in Russia.

Search engines, media outlets registered in accordance with the Russian statute on the Mass Media, and some user-generated online media shall be exempted from these new provisions.In addition, the law introduces administrative liability for violations of the new provisions.

The statute enters into force on 1 July 2017.

• О внесении изменений в Федеральный закон " Об информации , информационных технологиях и о защите информации " и отдельные законодательные акты Российской Федерации (On Amendments to the Federal Law of the Law on Information, Information Technologies and Protection of Information and particular legal acts of the Russian Federation), Federal Statute No 87-FZ of 1 May 2017)
http://merlin.obs.coe.int/redirect.php?id=18517 RU

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### Online broadcast rules for criminal proceedings adopted

The State Duma of the Russian Federation adopted on 15 March 2017 amendments to the Criminal Procedural Code of the Russian Federation (No. 174-FZ of 18 December 2001) that significantly affect online reporting of court trials.

In particular, paragraph 5 of Article 241 of the code ("Openness") (see IRIS plus 2014-2, p.8) now has an addendum that states: "transmission of an open court session via radio, television or online shall be admissible only with the permission of the presiding justice of the court. Transmission of an open court session at the pre-trial stage via radio, television or online shall be prohibited."

If permitted the actions to provide such transmissions, as well as filming and photography of the trial, shall not violate the court order and the court has the right to limit the time of the broadcast or specify the exact spot from where these actions may be conducted, taking into account the opinion of the participants in the trial (new paragraph 5 of Article 257 "Regulations of the Court Proceedings").

Paragraph 5 of Article 259 ("Minutes of the Court Proceedings") was amended to prescribe that in the case of transmission of the trial the official court minutes shall record the title of the mass media outlet or of the website used for the transmission.

• О внесении изменений в Уголовно - процессуальный кодекс Российской Федерации (Federal Statute of 28 March 2017 N 46-FZ On amendments to the Criminal Procedure Code)
http://merlin.obs.coe.int/redirect.php?id=18510 RU

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## UA-Ukraine

### National cinematography will receive state support

On 20 April 2017, President Petro Poroshenko of Ukraine signed the "State Support of Cinematography in Ukraine Statute", which is aimed at the state provision and stimulation of the national film production industry. The document presents the national policy of development and enables promotion of Ukrainian cinematography.

Previously, in 2015, Ukrainian Parliament imposed a possibility to refuse the issue of new permits for the exhibition and other forms of distribution, including via TV, of films in a number of cases related to the Soviet and Russian works (see IRIS 2015-5/26).

The Statute introduces significant changes into the regulation of relations between the state and filmmakers; they involve detailing the measures to support the production and exhibition of Ukrainian films, as well as their distribution on television and online. These include preferential terms for advertising national films, alongside an obligation for the TV broadcasters to screen "national films" for at least 15 % of airtime used to show films (to be raised to 30 % from 2022). There will be efforts to provide state support in the building of cinemas in small towns and the purchasing of equipment for mobile cinemas in rural areas.

The term "national film" includes those works that were made (produced) partially or completely in Ukraine, in Ukrainian or in Crimean Tatar language, and passed a "cultural test" to estimate their cultural and production relevance as defined in addendum No. 1 to the Statute.

New regulations on financing films increase the share of the state subsidies that should provide an impetus for the modernization of the industry. Feature and animation films are eligible for the subsidies of up to 80 % whilst TV shows are eligible for up to 50 %. Production of documentary, educational, independent, animation, and children's films can now be completely funded by the state.

State subventions are granted to all film studious, regardless of their public or private nature, if they are involved in the production of a "national film".

Provisions of the statute also aim at attracting foreign investments by providing a 16.6 % refund for financing film production and 4.5-10 % refund for the payment of royalties.

It is envisaged that the sources of funding will come from the state budget revenues and the Ukrainian Cultural Foundation (UCF) established by the statute to select, support, and monitor the implementation of national cultural and artistic projects.

The statute enters into force from the day of its official publishing.

• Про державну підтримку кінематографії в Україні (State Support of Cinematography in Ukraine Statute of 23 March 2017, N 1977-V406406406. Published in the official daily Holos Ukrainy on 25 April 2017 - N 75 (6580))
http://merlin.obs.coe.int/redirect.php?id=18509 UK

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## US-United States

### Compulsory licenses for cable systems do not apply to TV streamers

The 9th Circuit issued a ruling on 21 March 2017 that the website FilmOn X ("FilmOn"), which streams television shows over the Internet, is not a cable system eligible to reproduce the copyrighted works pursuant

to a compulsory license under the Copyright Act. Section 111 of the Copyright Act provides that a cable system is eligible for a compulsory license that allows it to retransmit "a performance or display of a work" originally broadcast by someone else without having to secure the consent of the copyright holder by paying a de minimis fee for each use. FilmOn provides a service that uses antennas to capture over-the-air broadcast programming - much of it copyrighted - and then uses the Internet to retransmit this programming, utilizing both subscription and advertisement-based methods of revenue generation. Essentially, it enables users to watch television on their computers. The case, Fox Television Stations v Aereokiller, arose when a group of broadcasters, including Fox, NBC Universal, ABC, CBS, and Disney, filed suit alleging that FilmOn is not a cable system and should be required to negotiate the royalties for each reproduction of a copyrighted work.

The Court deferred to the Copyright Office's long held interpretation of the statute that Internet-based retransmission services are not cable systems in reaching its conclusion, explaining that the language of the statute is ambiguous and that the Copyright Office is institutionally better equipped to understand and interpret Congressional intent and the Act's legislative history. The Court gave deference to the Copyright Office's position that "a provider of broadcast signals [must] be an inherently localized transmission media of limited availability to qualify as a cable system," particularly since Congress has been aware of this interpretation for years and has not taken any steps to change the language of the statute.

• US Court of Appeal for the Ninth Circuit, No. 15 56420, 21 March 2017
http://merlin.obs.coe.int/redirect.php?id=18535 EN

**Jonathan Perl**
*Locus Telecommunications, Inc.*

## Fair Play Fair Pay Act

Two bipartisan bills have recently been introduced in the United States House of Representatives to establish a public performance right for sound recordings on terrestrial radio. Under current copyright law, satellite and Internet radio are required to pay royalties to the owners of the copyrighted works, whereas terrestrial radio is exempt from this requirement. This has resulted in a disadvantage for webcasters like Pandora and iHeartRadio.

The Fair Play Fair Pay Act, which was originally introduced in the United States House of Representatives in April 2015, but never passed, was referred to the House Committee on the Judiciary on 30 March 2017. The bill aims to remedy the competitive disadvantage by ensuring "all radio services play by the same rules and all artists are fairly compensated." Its sponsors explained the change was long overdue because "the current system disadvantages music creators and pits technologies against each other by allowing certain services to get away with paying little or nothing to artists". The bill faced immediate backlash from the National Association of Broadcasters (NAB), the radio industry's leading trade group, which opposes the bill. Its president and CEO lambasted the bill for imposing "a job-killing performance royalty on America's hometown radio stations".

A similar proposal called the PROMOTE Act was referred to the United States House of Representatives Committee on the Judiciary on 5 April, 2017. The PROMOTE Act takes a slightly different approach: it provides that if radio stations are offering artists promotion rather than payment, the artists should have the right to decline the promo and ask that their records not be played. The bill's proponent argues that his approach is a "workable solution that would allow those who would otherwise be paid a performance right to opt out of allowing broadcasters to play their music if they feel they're not being appropriately compensated", and is a "a win-win that helps solve this decades long problem in a way that's fair to both parties".

• STATUS AND DATE PROMOTE ACT
http://merlin.obs.coe.int/redirect.php?id=18536 EN
• FAIR PLAY FAIR PAY ACT
http://merlin.obs.coe.int/redirect.php?id=18537 EN

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# DE-Germany

## KJM approves several solutions for age verification for closed user groups on the Internet

Since June 2015, the Commission for the Protection of Minors in the Media (KJM), an organ of the federal states media authorities in Germany, has approved several solutions for the age verification (AVS submodule) of German companies for closed user groups in telemedia. These include the modules "IDnow Video Ident" of IDnow GmbH from Munich and "Postident by Videochat" of Deutsche Post AG, but also the "DE-Mail" system of 1 & 1 De-Mail GmbH.

Due to the Interstate Treaty on the Protection of Minors (JMStV), pornographic content, certain listed (indexed) content and content which obviously seriously impairs minors may be distributed in the internet only on the condition that the provider ensures that access to the content is possible only for adults by means of a closed user group. In order to provide legal and

planning security to the telemedia providers, KJM offers the companies to check whether their concepts for technical media protection meet the legal requirements.

The systems of IDnow GmbH and Deutsche Post AG are two modules (partial solutions) at the level of identification, which enable a "face-to-face control" via webcam. Whoever wants to use the respective offerings of the companies in the telemedia must go through a series of safety levels. Thus, besides the mere identification via webcam as an initial age check additional backup measures are taken for a repeated usage process, which offer a sufficient reliability according to the KJM guidelines. The user is identified by a combination of the transmission of the customer data by the content provider and the input of the personal identification data in the identification system.

Subsequently, the identity of the user is verified in a video conferencing with trained employees of the companies, in which the identification document and the conformity of the data are checked. Thereafter, a TAN is sent to the customer, through whose input the identification is completed. Only if all steps have been successfully completed and no inconsistencies occur, the user receives the access key for the product he wishes.

After the examination of the concepts, the KJM came to the conclusion that they are suitable as a partial solution at the level of identification in the sense of the KJM criteria for ensuring a closed user group. However, the modules alone are not sufficient to guarantee a closed user group, they must be applied as part of an overall concept.

The De-Mail system of 1 & 1 De-Mail GmbH is a complete concept for an AVS, which was also approved by the KJM in October 2016. The use of "de-mail" as AVS is achieved by the integration of the function "log-in with De-Mail" in telemedia services, which require a closed user group. Prior to identification, the user requests his / her mailbox by providing his / her personal data and identification data. Afterwards, these data are verified by a face-to-face verification by a certified auditor of an external data processing company either in a shop ("shop ident") or at a location of the users choice ("home ident"). If the personal data of the user were correct, the user receives his individual access data from the 1 & 1 De-Mail GmbH and a password to the deposited e-mail address. The account can only be activated after the input of an mTAN, which was previously sent to the deposited mobile phone number.

In total, there are currently 43 concepts or modules for AV systems positively evaluated by KJM (as of May 2017). In addition, there are currently six overarching child protection concepts with AV systems as subcomponents.

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## Agenda

## Book List