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IRIS

Legal Observations
of the European Audiovisual Observatory

IRIS 2017-10

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NATIONAL

AL-Albania

CY-Cyprus

ES-Spain

FI-Finland

FR-France

GB-United Kingdom

HR-Croatia

IE-Ireland

IS-Iceland

IT-Italy

LT-Lithuania

NL-Netherlands

NO-Norway

RO-Romania

RU-Russian Federation

TR-Turkey

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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Axel Springer SE and RTL Television GmbH v. Germany

In a case against Germany, two media companies - Axel Springer SE, a publishing house, and RTL, a broadcasting company - complained about a restriction on publishing pictures of the accused (S.) in a brutal murder case. S. was charged with killing his parents, dismembering their bodies, burning some of the parts, flushing others down the toilet and disposing of the rest by putting them in barrels. S. had already confessed to the police, while a psychiatric expert opinion ordered for the trial had concluded that S. was suffering from a schizoid personality disorder at the time when he had committed the offence. Prior to the start of the court hearings, the presiding judge informed the photojournalists orally that the face of S. would have to be made unidentifiable "in the usual manner" before any images of him were published. Axel Springer and RTL protested against the order, and a week later, a written order was issued confirming that the only media representatives who were permitted to take photographs and make video recordings of S. were those who had previously registered with the court and given an assurance that prior to the publication or forwarding of the material, the face of S. would be disguised by a technical process (for example by pixelization) so that it would only be possible to use the images in such a form. Journalists would be barred from further reporting on the case if they failed to comply with the order. The order stressed the importance of the presumption of innocence, finding that reporting on S. in a way which identified him could have a "pillory effect"; moreover, the wording of the order noted that S. had never been in the public eye and had expressly requested that his identity be concealed. According to the presiding judge, in this case the personality rights of S. clearly outweighed the public interest in being informed of his identity and physical appearance.

After exhausting all national legal channels to have the order suspended, Axel Springer and RTL lodged an application with the European Court of Human Rights (ECtHR), complaining that the judicial order banning the publication of images by which S. could be identified had violated their right to freedom of expression, as provided in Article 10 of the European Convention on Human Rights (ECHR).

The ECtHR starts by referring to its earlier case law, balancing the right to freedom of expression against the right to respect for private life, and to the criteria that have to be taken into account in such cases. It clarifies that the criteria thus defined are not exhaustive and should be transposed and adapted in the light of the specific circumstances of the case, in particular where the presumption of innocence under Article 6 paragraph 2 ECHR comes into play. The Court identifies the following relevant criteria in the context of balancing competing rights: the contribution to a debate of public interest, the degree to which the person affected is known, the influence of the publication of the photographs on the criminal proceedings, the circumstances in which the photographs were taken, the content, form and consequences of the publication, and the severity of the sanction imposed.

The ECtHR acknowledges that the crime at issue was brutal, but had been committed within a family following a private dispute and in a domestic setting. It agrees with the domestic court's assessment that there was only a limited degree of public interest in the case. The judicial order at issue did not restrict the content of reporting but rather concerned the publication of images by which S. could be identified. The ECtHR does not consider that information on S.'s physical appearance could have contributed significantly to the debate on the case, in particular as S. was undoubtedly not a public figure, but an ordinary person who was the subject of criminal proceedings. The ECtHR dismisses the argument that S. no longer benefitted from the presumption of innocence, as he had confessed to the murder: a confession in itself does not remove the protection of the presumption of innocence, and as S. suffered from a schizoid personality disorder, the criminal court had to review carefully the confession in order to satisfy itself that it was accurate and reliable. The Court also refers to the fact that images of an accused person taken in a court room may show the person in a state of great distress and possibly in a situation of reduced self-control. The ECtHR finds that under the circumstances in question there was a strong need to protect S.'s privacy, given that S. had never sought to contact the media nor make any public comments. Furthermore, the ECtHR refers to the harmful effect which the disclosure of information enabling the identification of suspects, accused or convicted persons or other parties to criminal proceedings may have on these persons, and to the negative implications this might have on the later social rehabilitation of convicted persons. It was also in the interest of safeguarding due process not to increase the psychological pressure on S. - particularly in view of his personality disorder. Finally, the ECtHR notes that the judicial order did not constitute a particularly severe restriction on reporting: the taking of images as such was not prohibited, the order banned merely the publication of images from which S. could be identified, and any other reporting on the proceedings was not restricted. Thus, the presiding judge chose the least restrictive of several possible measures in order to safeguard due process and protect S.'s privacy. Therefore, the ECtHR does not consider that the order had a "chilling effect" on the media companies,

contrary to their rights under Article 10 ECHR.

The ECtHR recognises the careful balancing act carried out by the presiding judge, clearly addressing the conflict between opposing interests and carefully weighing the relevant aspects of the case. The ECtHR unanimously concludes that the interference with the media companies' right to freedom of expression was "necessary in a democratic society". Accordingly, there has been no violation of their right to freedom of expression and information, as guaranteed by Article 10 of the ECHR.

• Judgment by the European Court of Human Rights, Fifth Section, case of Axel Springer SE and RTL Television GmbH v. Germany, Application no. 51405/12 of 21 September 2017
http://merlin.obs.coe.int/redirect.php?id=18735 EN

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European Court of Human Rights: Becker v. Norway

A recent judgment of the European Court of Human Rights (ECtHR) emphasises once more the importance of the protection of journalistic sources for press freedom. The ECtHR emphasises that a journalist's protection under Article 10 of the European Convention on Human Rights (ECHR) cannot automatically be removed by virtue of a source's own conduct, and that the principle of protecting a source applies even when that source's identity is known.

The case concerns a journalist, Cecilie Langum Becker, working for DN.no, a Norwegian Internet-based newspaper. Ms Becker was ordered to give evidence in a criminal case brought against one of her sources, Mr X, who was accused of market manipulation. Mr X had confirmed to the police that he had been Ms Becker's source for an article she had written about the allegedly difficult situation being faced by the Norwegian Oil Company (DNO). The price of DNO stock decreased by 4.1% on the first trading day after the publication of Ms Becker's article. Mr X was subsequently charged with using Ms Becker to manipulate the financial market. Ms Becker refused to testify against Mr X, and the courts therefore ordered her to testify about her contacts with him, finding that there was no source to protect as he had already come forward. They also considered that her evidence might significantly assist the courts in elucidating the case. Mr X was, however, convicted as charged before the final decision on Ms Becker's duty to give evidence had been made. Relying on Article 125 of the Norwegian Code of Criminal Procedure and Article 10 of the ECHR, Ms Becker argued that she was under no obligation to give evidence and she refused at any stage of the proceedings to answer questions about possible contact between her and Mr X and other sources. On account of her refusal to comply, the High Court ordered Ms Becker to pay a fine of approximately EUR 3,700 for the offence of impeding the good order of court proceedings, failing which she would be liable to ten days' imprisonment. A short time later Ms Becker lodged an application with the ECtHR, alleging that she had been compelled to give evidence that would have enabled one or more journalistic sources to be identified, in violation of her right under Article 10 of the ECHR to receive and impart information. It took the ECtHR more than five years to decide on the case, but finally, with a unanimous vote, the Fifth Section of the ECtHR on 5 October 2017 found that Norway violated Ms Becker's right to protect her sources.

The ECtHR builds on its earlier case law in which it has developed the principles governing the protection of journalistic sources, such as in Goodwin v. the United Kingdom (see IRIS 1996-4/4) and in Sanoma Uitgevers B.V. v. the Netherlands (see IRIS 2010-10/2), reiterating that "the Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest." The Court reiterated that in Nagla v. Latvia (see IRIS 2013-8/2) it found that the fact that a source's identity had been known to the investigating authorities prior to a search at the premises of a journalist did not remove the journalist's protection under Article 10 of the ECHR and it emphasises that a journalist's protection under Article 10 cannot automatically be removed by virtue of a source's own conduct. The ECtHR furthermore holds that protection afforded to journalists when it comes to their right to keep their sources confidential is "two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest", while in Voskuil v. the Netherlands (see IRIS 2008-4/2) the ECtHR found that the potential significance in criminal proceedings of the information sought from a journalist was insufficient under Article 10 of the ECHR as a reason to justify compelling him to disclose his source or sources. It also emphasised that a "chilling effect" will arise wherever journalists are seen to assist in the identification of anonymous sources.

The ECtHR went on to rule that the possible effects of the order were of such a nature that the general principles developed with respect to orders to disclose a source were applicable to the case, and that Ms Becker's refusal to disclose her source or sources did not at any point in time hinder the investigation of the case or the proceedings against Mr X. On the contrary, there was no indication that Ms Becker's refusal to give evidence attracted any concerns on the part of the Norwegian courts as regards the case or the

evidence against Mr X. It also bore in mind that Ms Becker's journalistic methods had never been called into question and that she had not been accused of any illegal activity. Having regard to the importance of the protection of journalistic sources for press freedom, the ECtHR finds that the reasons adduced in favour of compelling Ms Becker to testify on her contact with Mr X, though relevant, were insufficient. Accordingly, the ECtHR is not convinced that the impugned order was justified by an "overriding requirement in the public interest" and, hence, necessary in a democratic society. The ECtHR accordingly concludes that there has been a violation of Article 10 ECHR.

• Judgment by the European Court of Human Rights, Fifth Section, case of Becker v. Norway, Application no. 21272/12 of 5 October 2017
http://merlin.obs.coe.int/redirect.php?id=18736 EN

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Committee of Ministers: Recommendation on gender equality in the audiovisual sector

On 27 September 2017, the Committee of Ministers of the Council of Europe adopted a Recommendation on gender equality in the audiovisual sector. The new Recommendation follows the Declaration on Gender Equality in the European Audiovisual Industry which was adopted at the Conference "Women in today's European film industry: gender matters. Can we do better?", which was held in Sarajevo in August 2015 (see IRIS 2015-8/2).

The Recommendation begins by noting that the audiovisual sector - which includes cinema, broadcasting, digital media and video games - has a particular role to play in relation to the achievement of gender equality. In particular, the audiovisual sector is well placed to shape and influence perceptions, ideas, attitudes and behaviour prevalent in society; moreover, audiovisual content can either hinder or hasten structural change towards gender equality. Indeed, gender inequalities in society are reproduced not only in audiovisual content, but also within the audiovisual sector - notably women's under-representation in the different professions and in decision-making.

In this regard, the Committee of Ministers made six important recommendations to the governments of member States. Firstly, as a fundamental principle of their activities, governments should adopt policies to promote gender equality in the audiovisual sector and in its institutional organisations, duly taking into account the guidelines contained in Appendix I to the Recommendation. Second, governments should encourage European, national and regional film funds, public and commercial broadcasters and other key stakeholders in the audiovisual sector to monitor the situation with regard to gender equality, drawing on monitoring methods and performance indicators such as those proposed in Appendix II. Thirdly, governments should also encourage European supranational film and audiovisual funds, as well as broadcasters and other key audiovisual sector stakeholders, to address gender equality issues in all their policies, measures and support programmes, such as training, production, distribution, festivals and media literacy initiatives.

Fourth, relevant audiovisual sector organisations should prepare, or revise, regulatory and self-regulatory strategies, collective bargaining agreements and codes of conduct or other frameworks for implementation, taking into account a gender equality perspective. Fifth, governments should disseminate the Recommendation and raise awareness among the relevant stakeholders and those active in the audiovisual sector, in particular in respect of the central role of gender equality as an enabling factor for fully-functioning democracy and the full enjoyment of human rights. Lastly, governments should monitor and evaluate progress in achieving gender equality in the audiovisual sector, and report on a five-year basis to the Committee on the measures taken and progress made in implementing the Recommendation.

The Recommendation also includes three important appendices, with the first containing guidelines for improving gender equality in the audiovisual sector and measures for implementation. In particular, member States are invited to: examine a number of measures, including legislation, regulations and policies; collect, monitor and publish data on gender equality in the audiovisual sector at national level; support research on gender equality in the audiovisual sector; encourage the ongoing development of media literacy; promote gender-sensitive media literacy; enhance the gender equality perspective in media literacy programmes; and enhance accountability processes. The second appendix contains detailed recommended monitoring methods and performance indicators of gender equality in the audiovisual sector, including off-screen performance indicators, on-screen performance indicators. Finally, the third appendix includes a helpful list of reference instruments to guide member States in their implementation of measures to achieve greater gender equality in the audiovisual sector.

• Recommendation CM/Rec(2017)9 of the Committee of Ministers to member States on gender equality in the audiovisual sector, 27 September 2017
http://merlin.obs.coe.int/redirect.php?id=18754 EN FR

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Committee of Ministers: Recommendation on Big Data for culture, literacy and democracy

On 29 September 2017, the Committee of Ministers of the Council of Europe adopted a Recommendation on Big Data for culture, literacy and democracy. The Recommendation provides comprehensive guidelines on how to address the implications of citizens' participation in and access to digital culture. In its Recommendation, the Committee of Ministers encourages member States to engage in identifying challenges and opportunities related to "Big Data" in the digital cultural field, with "Big Data" being defined as the growing technological ability to collect, process and extract new and predictive knowledge from a great volume, velocity and variety of data. The Recommendation stresses the importance of fostering critical digital media and information literacy among citizens. This is to ensure that all individuals are made aware of the processing of cultural Big Data and can thus make informed choices and decisions regarding algorithmic decision-making, which is used to predict cultural attributes, preferences and behaviour.

The Recommendation is composed of three parts: a preambular section, a detailed set of guidelines addressed to States on how to effectively implement the digital policy standards for all entities processing cultural Big Data, and lastly, a glossary providing a comprehensive list of terms and definitions for the purposes of the Recommendation. The guidelines are further divided into three categories: (i) Processing Cultural Big Data, (ii) Critical Digital Media and Information Literacy, and (iii) Multi-stakeholder Dialogue and Action. This three-fold division helps to better conceptualise different aspects of Big Data processing but also supports the digitisation of the existing culture throughout Europe. The Recommendation underlines the fact that a human rights approach is required for all policies on culture, including those which address the digital shift. Subsequently the document intends to increase awareness about cultural and personal big data processing in all layers of the society.

Firstly, the Committee of Ministers recommends that governments of member States support critical digital media and information literacy programmes. This would enable Internet users to better understand and manage algorithmic decision-making applied to cultural Big Data. Such policy would also support the development of a multi-stakeholder policy exchange on the future of culture, having regard to Big Data, critical digital media and information literacy and democracy.

Secondly, the Recommendation encourages member States to implement a number of measures (including a review of the national policy of public cultural institutions) and draw up strategies, policies and practices on cultural Big Data, in particular with regard to the opportunities for and threats to cultural diversity and access to culture. Moreover, member States should ensure that public-service good-governance assessment criteria are applied to the automated dissemination of news by media channels, notably with regard to transparency, openness, responsiveness and responsibility. Further, member States should foster and support digital initiatives in the cultural sector, in conjunction with educational initiatives (including critical digital media and information literacy programmes), to fight online radicalisation and counter "fake news", as they are increasingly data-driven.

Finally, the Recommendation urges the private sector to respect the human rights of Internet users, especially with regard to algorithmic decision-making applied to cultural Big Data, and to cooperate with member States in their reviews of policies and practices related to the processing of cultural Big Data - particularly with regard to the opportunities for and threats to cultural diversity and access to culture.

• Recommendation CM/Rec(2017)8 of the Committee of Ministers to member States on Big Data for culture, literacy and democracy, 27 September 2017
http://merlin.obs.coe.int/redirect.php?id=18756 EN FR

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EUROPEAN UNION

Court of Justice of the European Union: Advocate General Opinion on cloud-based recording of television programmes

On 7 September 2017, Advocate General (AG) Szpunar delivered his opinion on the case of VCAST v. RTI SpA. The case concerns the question of whether the private copying exception covers the services of an online platform that allows users to store copies of free-to-air TV programmes in private cloud storage spaces.

VCAST's platform enables users to record television programmes broadcast by the main digital terrestrial television channels in Italy (such as RTI) and store them in the cloud. After signing in to VCAST's website, the user chooses the programme or timeframe he wishes to record. VCAST then captures the signal through its own antennae and records the broadcast in a private cloud storage space provided by a third party. VCAST brought an action against RTI before the Court of Turin, asking for a declaratory judgment attesting that its service is lawful. Since the decision turns on the interpretation of EU law provisions (namely Article 5(2)(b) of the InfoSoc Directive), the

Court of Turin found it necessary to refer two questions to the Court of Justice of the European Union (CJEU).

Those questions, as noted by AG Szpunar, essentially boil down to one: should EU law be interpreted as allowing the provision, without the rightholder's authorisation, of a cloud-based video recording service such as VCAST's? AG Szpunar began by addressing the issue of whether the InfoSoc Directive's private copying exception should be read as covering the storage of copies of protected works in the cloud. The answer is not clear-cut, since, on the one hand, Article 5(2)(b) only exempts reproductions made by a natural person and, on the other, acts of reproduction in the cloud require the intervention of third parties, and not just of users.

The AG answered the question in the affirmative. Firstly, he noted that the CJEU's case law on compensation for acts of private copying clarifies that these acts may be carried out with the aid of third-party equipment. Secondly, AG Szpunar saw no substantial difference between a copy made by a cloud-based platform upon the user's request and a copy made through a tangible device that the user is able to control directly, such as a printer. What is essential is that the user "takes the initiative in respect of the reproduction and defines its object and modalities".

The AG then turned to the question of access to the copied works, identifying two relevant acts in the context of VCAST's service. Firstly, the service makes works available to the public within the meaning of Article 3 InfoSoc Directive. Secondly, it allows users to order a copy of the programme, which is then accessible in their cloud storage space. In theory, these copies may qualify for the exception in Article 5(2)(b). However, in VCAST's case, the copies fail to meet the requirement of the lawfulness of their source. VCAST's service allows some users to record programmes to which they do not have prior authorised access, either due to a lack of the necessary equipment (e.g. an antenna or a television set) or because users may access the service from abroad, outside the Italian terrestrial TV catchment area. Thus, at least for these users, the service provides the sole means of access to the reproduced works.

Following this logic, the copying acts are only lawful if the act of VCAST making them available (i.e. the source of the reproductions) is also lawful. The AG concludes that it is not. In essence, the conclusion rests on the assessment that VCAST makes available free-to-air television programmes to a "new public", following the established case-law of the Court. The AG argues that VCAST is an organisation other than the original communicator (here, the broadcasters) authorised by the rightholders, which furthermore provides its service for profit. Without its intervention, users would in principle not be able to enjoy the works in this manner, "whether physically within the catchment area of the original broadcasts or not".

In sum, VCAST makes available works without the permission of rightholders, in contravention of the Article 3 InfoSoc Directive. As such, the source of the works reproduced by users through its service is unlawful, and this unauthorised use cannot therefore qualify as a private copy under Article 5(2)(b).

Lastly, the AG assesses whether a service like that of VCAST could be covered by a domestic private copying exception, read in the light of the three-step test in Article 5(5). The AG concludes in the negative. He argues that allowing such a service would encroach upon the exploitation of the right of communication to the public, force copyright holders to "tolerate acts of piracy in addition to private use", affect potential revenues for similar authorised services, and enable unfair competition on the part of VCAST in the advertising market that primarily finances free-to-air broadcasting.

• Opinion of Advocate General Szpunar, Case C-265/16 VCAST Limited v RTI SpA, 7 September 2017
http://merlin.obs.coe.int/redirect.php?id=18737 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: Communication on tackling illegal content online

On 28 September 2017, the European Commission issued a Communication entitled "Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms". The Communication follows the Commission's Communication on a Digital Single Market Strategy for Europe, which included creating a fit-for-purpose regulatory environment for platforms (see IRIS 2015-6/3, 2015-10/4, and 2017-7). This new Communication aims to provide guidelines and principles for online platforms in the fight against illegal content, including incitement to terrorism, illegal hate speech, child sexual abuse material, and infringements of intellectual property rights. The Communication provides guidance on detecting and notifying, removing, and preventing the reappearance of such illegal content.

Firstly, the Communication suggests ways that illegal content can be detected efficiently. Online platforms should act swiftly upon binding orders or administrative decisions issued by the relevant authorities, and cooperate closely with law enforcement officials, while providing adequate safeguards for their users. This cooperation with law enforcement authorities should enable the effective enforcement of takedown requests and establish an alert system to be accessed by the authorities. To achieve this effective

cooperation, online platforms should have the necessary resources to understand the legal field in which they operate, establish points of contact in the EU, and technical interfaces that facilitate such cooperation. Notices issued by trusted flaggers should be fast-tracked by platforms. A trusted flagger is a specialised entity, ideally subjected to criteria based on respect for fundamental rights, which could be part of an EU-wide standardisation framework. Users should have access to a notification system that is user-friendly, enabling sufficiently precise reports.

Concerning the adoption of proactive measures by online platforms and the benefit of the liability exemption provided for in Article 14 of the E-Commerce Directive (2000/31/EC), the Communication clarifies that the proactive measures themselves may not lead to the loss of the liability exemption. Any knowledge obtained from such measures of illegal activities or illegal information, however, may lead to a loss of the liability exemption. It may be recovered, however, if the platform acts expeditiously to remove the content upon obtaining such knowledge. Furthermore, the use and further development of automatic detection technologies is encouraged.

Section 4 of the Communication provides guidelines on the removal of illegal content, which should generally happen as speedily as possible and without impediment to prosecution. Again, there should be robust safeguards concerning the removal of legal content. The meaning of "expeditious" removal, as defined by the E-Commerce Directive, should depend on a case-by-case examination, together with factors such as the contextual information required to determine the legality of content. The Communication suggests that in cases where serious harm is at stake, speedy removal can be subject to specific time frames. Removal times and procedures should be clearly reported in transparency reports, and evidence for criminal offences should be transmitted to law enforcement authorities. Furthermore, the content policy should be explained in the terms of service of the online platform, including information on the procedure for contesting removal decisions. The possibility of contesting such a decision should generally be available to any user whose content has been deleted, with few exceptions. The resolution of disputes by dispute settlement bodies is encouraged. Section 5 concerns preventing the reappearance of illegal content. Measures to prevent such reappearance include the suspension of repeat infringers, a database of reappearing illegal content accessible by all online platforms, and the introduction and further development of automatic re-upload filters. The latter should be subject to a reversibility safeguard and be made transparent in the platform's terms of service.

In its conclusion, the Commission states that this Communication constitutes a "first element" of measures tackling illegal content online. The Commission will monitor progress and assess whether additional measures are needed, including possible legislative measures, which will be completed by May 2018.

• European Commission, Communication on Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms, 28 September 2017
http://merlin.obs.coe.int/redirect.php?id=18760 DE EN FR CS DA EL ES ET FI HU IT LT LV MT NL PL PT SK SL SV HR

• European Commission, Digital Single Market, Illegal Content Online, 28 September 2017
http://merlin.obs.coe.int/redirect.php?id=18762 EN

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UNITED NATIONS

United Nations: Consultation on platform content regulation in the digital age

On 15 September 2017, the UN Special Rapporteur on the promotion and protection of freedom of opinion and expression issued a call for submissions for a thematic report on platform content regulation (for a previous report, see IRIS 2017-1/4). The report will focus on search and social media companies. It scrutinises the standards they apply to content, how they deal with content that infringes standards, and the role of the State's legislative measures and enforcement mechanisms in relation to them.

The expansion of the influence of private actors online, particularly social media platforms and search engines as primary sources of information, has triggered challenges in respect of promoting and protecting freedom of expression. Normally, governments have the duty to act in compliance with international human rights law regarding digital freedom of expression. However, as freedom of expression online is mostly regulated independently of governments by private actors on the basis of vague standards, their operation in respect of freedom of expression necessitates clarification and navigation. The objective of the report is firstly to identify core issues and secondly to issue recommendations to States and private actors for the enhanced protection and promotion of freedom of expression online. The report examines these issues from three basic approaches, namely, company visits, submissions and consultations.

The call for submissions is addressed, in particular, to States, civil society, companies, and all other interested persons or organisations. The Special Rapporteur, in his call, welcomes information from States firstly regarding measures and policies directed at social media and search platforms and/or users to

remove or restrict online content, and secondly regarding "requests or demands, informal or formal, to these platforms to voluntarily remove, restrict, or otherwise regulate content". The Special Rapporteur also seeks an analysis from States on whether the above-mentioned measures, policies and demands are in compliance with Article 19 of the International Covenant on Civil and Political Rights, Article 19 of the Universal Declaration of Human Rights, and other relevant human rights standards.

As for civil society, companies, and all other interested persons or organisations, the Special Rapporteur sets out a detailed list of questions. These questions address, for example, how the global removal of content - where a demand to take down content is made in one jurisdiction so that it is inaccessible in other jurisdictions - should be dealt with, the role of automation in regulating content, whether users are notified regarding content restrictions, takedowns and account suspensions, and the reasons and procedures for objecting to such measures.

The deadline for submissions is 20 December 2017, and the Special Rapporteur plans to issue a report to the Human Rights Council on platform content regulation in June 2018.

• UN Special Rapporteur on the promotion and protection of freedom of opinion and expression, Content Regulation in the digital age, 15 September 2017
http://merlin.obs.coe.int/redirect.php?id=18738 EN

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NATIONAL

AL-Albania

Regulator decides to ban broadcasting of private university's advertising spot

The Audiovisual Media Authority (AMA) issued a statement on September 16 demanding television stations to stop broadcasting an advertising spot for a private university. The advertising spot focused on a call for new student admissions for this academic year. The spot highlighted the quality of education offered in the private university, while at the same time comparing and criticizing the quality of education offered in public universities.

According to the regulator AMA, this advertisement provided information that was not necessarily true and stifled fair competition. AMA's statement read that the content of the advertising spot openly infringes upon consumer rights, providing them with information on the private institution, while scorning the public education system in the country. As a result, the regulator instructed the television stations to immediately stop broadcasting this advertising spot, which was of an unfair commercial nature, as it openly targeted another competitor by identifying and downgrading it.

• *16 Shtator 2017, Të ndalohet reklama që cënon të drejtat e publikut* (Audiovisual Media Authority, decision of 16 September 2017)
http://merlin.obs.coe.int/redirect.php?id=18420 SQ

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CY-Cyprus

Media Law amendments in breach of the European Treaty and the Constitution of Cyprus

Provisions of the Law on Radio and Television Organisations of 2016 violate Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) and they do not come under any allowed exception. The law is in conflict with European Law, which is superior to the Constitution of Cyprus, decided the plenary of the Supreme Court on a reference by the President of the Republic. The decision followed an intermediary verdict in which the Supreme Court rejected an application by the House of Representatives that the case be referred directly to the Court of Justice of the European Union (CJEU) (see IRIS 2017-6/9).

In April 2016, the House of Representatives voted an amendment to Article 12 of the law, making the granting of a new broadcasting licence or the transmission of new programmes conditional. The Authority was given the power to reject the granting of a new licence or the transmission of new programmes on the basis of a justified decision in cases where a study by an accredited audit house finds that a new licence would endanger the financial viability of the existing licensed television organisations. In the same spirit, the House added a new Article 32E which stipulated that audiovisual media services originating from other EU or third countries should be (re)transmitted as per se without "including advertising or/and audiovisual commercial announcements addressed to the territory of the Republic".

The President of the Republic referred the voted law to the Supreme Court in accordance with Articles 140 and 141 of the Constitution. The President requested the Court's opinion on whether the law was in conflict and/or in disagreement with Articles 49 (right to establishment) and 56 (freedom to offer services) of the

TFEU; with Articles 15 (freedom to choose an occupation and right to engage in work) and 16 (freedom to conduct a business) of the European Charter of Fundamental Rights; and Articles 25, 28 and 179 of the Constitution of the Republic of Cyprus.

In its verdict, the Court noted that according to the interpretation of Article 49 of the TFEU, even in a case where measures do not introduce discrimination between nationals of a member state and other member states, such measures should not impede or make less attractive the exercise of the right to establishment. It was also decided, according to the Court, that any provision that subjects the pursuance of any activity on conditions that are connected to economic or social needs to such an activity constitutes a limitation of the right to establishment if these conditions tend to limit the number of service providers, who, under different conditions, could come from other member states. Such a limitation, the Court stressed, should meet the pre-requisites of proportionality and should be justified on the basis of imperative/overriding reasons of public interest. The verdict underlines that the limitations that Article 12 imposes were judged as violating Article 49 of the TFEU, which is a primary law of the Union and cannot be justified on the basis of serving an overriding public interest.

In examining the provision of the new Article 32E, the Court mentioned its decision of April 2017 and noted that imposing the re-transmission of programmes originating from other EU or third countries without the insertion of advertising or/and audiovisual commercial announcements is in breach of Article 56 of the TFEU. The Court recalls that the treaty does not allow limitations that are of a purely economic nature unless they are justified by overriding reasons of public interests, public order, security and health or the exercise of public office. Also, any limitation of the right to provide services is only justified when the national law is based on reasons of imperative public interests, is enforced on all individuals and businesses active on the territory of the member state imposing the constraints, and is necessary to achieve the sought goals without violating the principle of proportionality.

The provision in Article 32E is in breach of Article 56 of the Treaty as it imposes limitations based on economic reasons and cannot be justified in terms of serving overriding public interests, concluded the Court.

In the light of these conclusions, the Court cancelled the amending law without examining an eventual conflict and/or disagreement with articles of the European Charter of Fundamental Rights or of the Constitution of Cyprus.

• ΑΝΩΤΑΤΟ ΔΙΚΑΣΤΗΡΙΟ ΚΥΠΡΟΥ (3213353213463373413213213 41. *5/2016)* Αναφορικά με τα Άρθρα *52* και *140* του 343305375304΄361363μ361304377302. *6* 343365300304365μ362301΄371377305, *2017* (Supreme Court, Case 5/2016, President of the Republic vs The House of Representatives, 6 September 2017)
http://merlin.obs.coe.int/redirect.php?id=18747 EL

Christophoros Christophorou
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Amendments to Public Broadcaster Law in breach of the Constitution of Cyprus

The plenary of the Supreme Court decided that amendments to the law on RIK - the Cyprus Broadcasting Corporation -, L. Chapter 300A, were in breach of Article 28 (equality before the law) of the Constitution of Cyprus. The amendments subject the operation of new channels to the condition that the economic viability of existing audiovisual media service organisations would not be threatened, and further prohibit the inclusion of advertising and commercial announcements addressed to the territory of the Republic of Cyprus in re-transmitted broadcasts from other EU or third countries. The Court decided on a reference by the President of the Republic of the amending Law on RIK of 2016, voted in April 2016 by the House of Representatives. Similar amendments were included in the Law on Radio and Television Organisations L. 7(I)/1998 that governs commercial audiovisual media service providers.

The Supreme Court's verdict was made in the light of its decision, on the same day, which cancelled similar amendments to the Law on Radio and Television Organisations 7(I)/1998, in reference 5/2016. It found those amendments in conflict with Articles 49 and 56 of the Treaty on the Functioning of the European Union (TFEU). Thus, following the aforementioned decision, the parties in the case accepted that the amendments to the law on the public service broadcaster, RIK - Cyprus Broadcasting Corporation, Chapter 300A, could not remain in force. Otherwise, they would be in conflict with the Constitution and namely with Article 28, on equality before the law. This would create a different environment for RIK and for the other providers of audiovisual media services, discriminating against RIK without any justification. According to the court, this would also be in conflict with the Audiovisual Media Service Directive 2010/13/EU and in particular with Article 2 in Part II - General provisions that stipulates that each member state ensures that all audiovisual media services transmitted by providers under its jurisprudence observe the rules of the laws that are in force in that member state. The court also noted that in the preamble of the Directive, member states are expected to establish the same rules for all providers of audiovisual media services in the internal market.

In the light of the above, the Supreme Court concluded that the voted law could not be promulgated because it would be in conflict with the Constitution. Thus, it was cancelled as unconstitutional.

• ΑΝΩΤΑΤΟ ΔΙΚΑΣΤΗΡΙΟ ΚΥΠΡΟΥ (32133532134633734132 1 321341. *4/2016)*32137536130637730137137 2 ΄361 με τα Άρθρα *52* και *140* του 343305375304 ΄361363μ361304377302. *6* 3433653003043 65μ362301 ΄371377305, *2017* (Supreme Court, Case 4/2016, President of the Republic Vs The House of Representatives, 6 September 2017)
http://merlin.obs.coe.int/redirect.php?id=18748 EL

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Broadcaster sanctioned for insults/profanities heard during live broadcast

The Administrative Court upheld a decision of the Cyprus Television Authority to sanction the Cyprus Telecommunications Authority (CYTA) for a broadcast in which insults and profanities were heard during the live coverage of a football match. The live transmission by the channel Cytavision-Sports1 took place between 7 pm and 9 pm, so during the family viewing zone. The Authority found that the broadcaster violated Rule 21.4 of the Normative Administrative Acts KDP 10/2000, which stipulates that broadcasters have the obligation to take measures to ensure that programmes adhere to the generally accepted rules of decency and taste in language and behaviour. They were sanctioned with a warning not to repeat this kind of breach of the law. CYTA based its defense on the argument that each programme should be judged on its true context, distinguishing obligations in respect of live broadcasts and of other programmes. It further argued that it was not given the right to defend itself on the charge related to the use of a delay unit - which could better neutralize external sounds/voices - or a device taking sounds from the speaker's lips.

The Court found that CYTA's claim that the Authority did not take into account the nature of the broadcast, which was a live transmission, could not be supported by the law. The regulation stipulates the obligation to take measures so that programmes adhere to the accepted standards of decency and taste. The definition of the term "programmes" includes live broadcasts, and there is no exception made in the law in respect of that obligation; thus, this type of programme must also adhere to the rules on decency and taste. CYTA's arguments show that they indirectly, albeit clearly accept that they took no measure to exclude insults and profanities from being heard. CYTA's second defense, regarding the technical properties of devices to neutralize external sounds, also failed. The Court noted that there was no charge related to the use of one or other device; the charge was that they failed to respond to the obligation to take measures to ensure that their programmes adhere to the standards of decency and taste.

The court noted that in the present case, the broadcaster Cytavision-Sports1 had the opportunity to take measures in order to adhere to the accepted standards of decency and taste, in particular in programmes watched by minors. The court concluded that, on the basis of their -false - assumption that live broadcasts fell out of the scope of Rule 21.4, the broadcaster had failed to take any measures and had thus violated the law. For the above reasons, the recourse against the Radio Television Authority's decision was dismissed.

• ΔΙΟΙΚΗΤΙΚΟ 32433133232134334432734133133 7, Υπόθεση 361301. *5664/2013, 28* 331377305375 ΄371377305, *2017* (Decision of the Administrative Court on Cyprus Telecommunications Authority vs Radio Television Authority, case 5664/2013, issued on 28 June 2017)
http://merlin.obs.coe.int/redirect.php?id=18746 EL

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ES-Spain

New Spanish Regulation on private copying

In 2006, Spain implemented in its Copyright Law the limitation for private copying as per Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. By virtue of this limitation, a natural person can make a copy of a work already divulged whenever it is for his or her exclusive private use and without direct or indirect commercial purposes. On the other hand, that directive requires a means of ensuring that rightsholders of the reproduced work receive fair compensation. The manufacturers of copying devices opposed the initial Spanish regulation, and in 2011 and 2014 (see IRIS 2014-4/13 and IRIS 2015-1/14), the government decided that the financing of the equitable compensation for private copying should be borne as an item of the annual General State Budgets. The collecting societies suffered a significant reduction in their income and contested that regulation. The recent European and national judicial decisions interpreting Directive 2001/29/EC left that regulation of fair compensation for private copying without effect (see IRIS 2017-1/11), but the limit to the right of reproduction by private copying remained in force.

In general terms, with the new regulation, the former model of equitable compensation financed from the state budget has been replaced by a model based on the payment of an amount by manufacturers and distributors of equipment, apparatus and reproduction media. It is a system that responds in a balanced way to the needs of consumers and the different sectors involved, including the copyright holders,

and which provides for equitable compensation that complies with both European and national law.

The system compensates the investments made by rightsholders of all categories of works (visual arts, books, sound recordings, audiovisual, etc.) in order to exploit the works affected by the validity of the private copy limitation; the debtors obliged to pay equitable compensation are the manufacturers of equipment, apparatuses and supporting material of reproduction based in Spain, as long as they are acting as commercial distributors, and the acquirers of the same outside the Spanish territory for commercial distribution or use within this country.

The current regulation brings the former system back into force, that is to say, setting the compensation as a percentage on the price of the equipment. After consultation with the Council of Consumers and Users and reporting to the Delegate Commission of the Government for Economic Affairs, the government will have to publish an Order specifying which apparatus will be subject to the payment of equitable compensation, as well as the amount thereof.

This compensation shall be determined for each modality, according to the equipment, apparatus and media material suitable for such reproduction, whether manufactured on Spanish territory or acquired outside of it for commercial distribution or use within that territory.

The determination of the amount of equitable compensation shall be calculated on the basis of the damage caused to the creditors.

Within three months of the entry into force of the new regulation, the collecting societies will have to incorporate a company that will manage the debtors' payment, and the repayment to the respective collecting societies, which in turn, will compensate their members.

• *Real Decreto-ley 12/2017, de 3 de julio, por el que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril, en cuanto al sistema de compensación equitativa por copia privada* (Royal Decree Law 12/2017, of 3 July, amending Royal Legislative Decree 1/1996, of 12 April)
http://merlin.obs.coe.int/redirect.php?id=18750 ES

Enric Enrich
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Amendment of the Act regulating public owned television in Spain

Article 20.3 of the Spanish Constitution stipulates that the law shall regulate the organisation and parliamentary oversight of media dependent on the State or any public entity, and shall - respecting the pluralism of society and the different languages of Spain - guarantee access to such media by significant social and political groups. To that end, Act 17/2006 of 5 June on State-owned Radio and Television reflected the requirements of neutrality, transparency and quality, and created the state-owned commercial company RTVE Corporation (see IRIS 2006-6/19). Its administration and government bodies - with the exception of two councillors whose proposal would correspond to the most representative unions at the state level - were appointed by parliamentary vote, with a two-thirds majority.

To the extent that recent constitutional history has thrown up both governments with an absolute majority in the chambers and governments with a simple majority, and given the political and social importance of the RTVE Corporation, Law 17/2006 was intended to ensure that the parliamentary opposition always participated in such an election. In order to comply with this principle, that Act was amended by Act 5/2017 of 29 September "to restore the independence of the RTVE Corporation and pluralism in the parliamentary election of its members". The Board of Directors of the RTVE Corporation shall be composed of ten members, all of them persons with sufficient professional qualifications and experience, respecting the principle of a balanced presence of women and men in its composition. The members of the Board of Directors shall be elected by the Cortes Generales (the Spanish Parliament) at a rate of six by the Congress of Deputies and four by the Senate. The proposed candidates must appear before a public hearing in the Congress and the Senate, and their election will require a two-thirds majority of the corresponding Chamber.

• *Ley 5/2017, de 29 de septiembre, por la que se modifica la Ley 17/2006, de 5 de junio, de la radio y la televisión de titularidad estatal, para recuperar la independencia de la Corporación RTVE y el pluralismo en la elección parlamentaria de sus órganos* (Act 5/2017, of 29 September, to restore the independence of the RTVE Corporation and pluralism in the parliamentary election of its members, 29 September 2017)
http://merlin.obs.coe.int/redirect.php?id=18764 ES

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FI-Finland

Decree on financial support for news and current affairs television content

Finland supports public-interest television news programs. The supplementary State budget for 2017 had a separate EUR 1 million allocated for the purpose, whereas the budget for next year contains double that amount. The support aims at safeguarding pluralism in news production and securing alternative

news sources in linear TV as well as boosting the competitiveness of news and current affairs activity. The state aid covers both the costs of carrying out regular activity and project costs, with criteria and conditions laid down in a new Government Decree on supporting news and current affairs programmes on public interest channels (657/2017). The Decree entered into force on 4 October 2017 and shall remain in force until the end of 2019. The objective is to secure alternative news sources and promote pluralism. In addition, the Decree aims at incentivising the maintenance, widening, or start of news production, as well as securing the nationwide availability of public interest channels.

Under the terms of the Decree, the Ministry of Transport and Communications grants aid on the basis of applications. In Section 3 (which covers "definitions"), the Decree refers to (linear) television broadcasting, while public interest channels correspond to television activity subject to a licence, pursuant to Article 26 of the Information Society Code (917/2014; ISC) (see IRIS 2015-3/11). The aid cannot be granted to operators that rely mainly on public funding. As defined for the purposes of the Decree, news and current affair programmes cover content such as regular news coverage, societal and political talk shows, and morning shows, as well as individual programmes such as election coverage. Section 5 prescribes the different types of aid, referring to services of general economic interest aid, and production support in the form of general aid pursuant to Section 5(2) of the Act on Discretionary Government Transfers (688/2001 (ADGT), and start-up or development support in the form of special aid pursuant to Article 5(3)(4) of ADGT. Support covers Finnish or Swedish editorial material produced or commissioned by the beneficiary, while the conditions include a fixed-term service obligation vested in the beneficiary and a programming licence for public interest television. The minimum requirements for the amount and frequency of news and current affairs programmes are fifteen hours a week, three times a day for eligible production costs and three and a half hours a week for start-up or development. The net costs of service provision may be supported up to a maximum of 25% and the start-up of new or the widening of existing regular activity by a maximum of 50%. In total, the aid may amount to EUR 2 million annually per beneficiary; annual reporting is required.

The reform draws from the report (LVM 3/2017) of a working group set up by Ministry of Transport and Communications last year to assess the funding and future of commercial television news services. The working group noted the crucial role of linear television, despite technology neutrality, and the importance to pluralism of free-to-air commercial television news production.

• *Valtioneuvoston asetus yleisen edun kanavien uutis- ja ajankohtaistoiminnan tukemisesta (657/2017)* (Government Decree to support the news and current affairs of public interest channels, 28 September 2017)
http://merlin.obs.coe.int/redirect.php?id=18739 FI

• *Moniarvoinen uutistoiminta vaatii tekoja. Kaupallisen television uutistoimintaa tarkastelevan työryhmän raportti (Liikenne- ja viestintäministeriö, Raportit ja selvitykset 3/2017)* (Pluralistic news service requires actions. Report of the working group on commercial television news services (Ministry of Transport and Communications, Reports 3/2017), 1 March 2017)
http://merlin.obs.coe.int/redirect.php?id=18765 FI

• *Yleisen edun kanavien uutis- ja ajankohtaistoiminnan tukimalli vahvistettiin* (The model for supporting public interest news and current affairs activity was established, 28 September 2017)
http://merlin.obs.coe.int/redirect.php?id=18766 FI

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FR-France

No fault in an advertising film drawing inspiration from a short film

The famous French film director Claude Lelouch and his company brought court proceedings against Peugeot-Citroën and the company which produced an advertising film intended to promote the Citroën DS5 in China. It was claimed that the latter had engaged in "free-riding" and unfair competition by using the characteristic elements of one of his short films and to have made it known by posting the "making-of" of the advertising film at issue on the Internet. The short film at issue, entitled C'était un rendez-vous and filmed in 1976, shows a man driving a car fast across Paris, ending with his meeting a woman on the steps leading up to the Sacré Cœur Basilica. The advertising film shows an elegant man crossing Paris at the wheel of his car, ending with his meeting a young woman in Montmartre. The defendants contested the claims on the grounds that the applicants provided no proof that the short film was well-known and no proof of the investment made in its creation and promotion, whereas the defendant company had devoted substantial investment to the film. The defendant company added that the elements common to both films (title and theme) were not appropriable, and that there were significant differences between the two films. Lastly, the company held that it could not be faulted for having merely drawn inspiration from Claude Lelouch's short film.

The commercial court rejected the claim brought by the applicants, who then appealed. In its judgment delivered on 12 September 2017, the court of appeal recalled that the law penalised both unfair competition - defined as wrongful behaviour including acts intended to create a risk of confusion in the minds of customers as to the origin of a product - and "free-riding" - defined as wrongful behaviour involving positioning oneself in another person's wake with the intention of taking advantage of that person's efforts, investments and skill at no expense. In the present

case, it is the advertising film posted on the Internet was accompanied by "bonus extras", such as an interview with the CEO of the film's production company in which she said that - like Claude Lelouch's famous scenario for his short film C'était un rendez-vous, the film ended in Montmartre. Even so, the court noted very many differences between the two films: their structure; their soundtrack; the single-sequence shot that comprised the short film (whereas the advertising film is comprised of several cuts); the fact that the advertisement promotes the vehicle as the subject of the film, whereas the short film only shows the car in the final scene; the fact that the characters in the advertisement appear a number of times during the film, whereas they are only shown right at the end of the short film; etc. Moreover, little investment had been necessary to make the short film, as the director himself attested. The court also noted that, unlike Claude Lelouch himself, the short film was not particularly well-known by the general public, contrary to the claim made by the applicant.

Lastly, the court reiterated, as had been rightly found in the initial proceedings, that the fact that the disputed film was inspired by the short film could not be deemed a fault. The fact of drawing inspiration from a pre-existing work did not in itself constitute a fault. In the present case, the inspiration was limited to a theme or idea that was not appropriable - in the present case, a man driving a luxury vehicle fast through Paris and meeting a woman in Montmartre - and the use of the word "rendez-vous" in the title, for which the applicants could hardly claim to have a monopoly, and the fact that there were considerable differences between the two films. In the light of these differences, the risk of confusion or assimilation by the audience concerned - that is to say the mainly Chinese clientele at which the advertisement was directed - was not proven. There was no proof of any acts that constituted unfair competition or "free-riding"; the original judgment was therefore upheld.

• *Cour d'appel de Paris (pôle 5, ch. 1), 12 septembre 2017, C. Lelouch et Les films 13 c/ SAS Le rendez-vous à Paris* (Court of appeal of Paris (unit 5, chamber 1), 12 September 2017, C. Lelouch and "Les Films 13' v. "Le rendez-vous à Paris" S.A.S.) FR

Amélie Blocman
Légipresse

Infringement of copyright on format of variety programme

Court decisions acknowledging the original nature of the format for a television programme are rare, so due attention should be paid to the decision delivered by the regional court in Paris on 20 April 2017.

In 2009, the producer-presenter of a number of variety programmes on television concluded a production contract with France Télévisions for a new musical programme entitled Chabada, which was based on an original idea she claimed was her own. The aim of the programme was to bring together singers and French "chansons" both past and present, with three or four guests, representing three generations of performers, present on the set. The programme was produced and broadcast on France 3 between 2009 and 2013, when the public-sector audiovisual group decided to terminate the contract, citing financial reasons. Since the programmes Les chansons d'abord and "Du côté de chez Dave" (co-produced by a subsidiary of the Lagardère group in conjunction with the public-sector audiovisual group, France Télévisions, and broadcast from 2013 to 2016 on the same channel on the same basis as for Chabada, reproduced the original characteristics of her programme), the producer and her company brought a court case for infringement of copyright, calling for a halt in broadcasting the programmes at fault and claiming EUR 4.5 million in damages.

In its defence, the defendant company held that the applicant could only claim copyright with regard to those characteristics of the original broadcast that were original, whereas the programmes being broadcast were based on elements that were known, habitual and conventional for this type of music programme. The applicant claimed that a combination of ten characteristics made the format for the Chabada programme original; those characteristics included: the presence of five musicians playing live on the set; performers singing songs by different artistes; guests always representing several generations during each programme; archive recordings; regular features on the history of the songs; features on discoveries and favourites; and guests singing rearranged extracts of songs while remaining seated.

The court reiterated that "format" should be understood as meaning some sort of "instructions" describing the constant form of a programme, consisting of a pre-determined succession of sequences involving not only the material form of the programme but also the sequence of situations and scenes and the composition of scenes, and comprising a starting point, action, and a conclusion. The format thus constituted a framework within which a work could be developed.

To examine the original nature of its format, the court accordingly examined Chabada's "memorandum of intent", which listed the combination of the ten elements that the applicant parties claimed was to be found in each of the programmes produced and broadcast between 2009 and 2013. It noted that none of the previously-broadcast programmes cited by the defence had used the full combination. In the light of these elements, the applicant parties showed that they had created a format for a French variety programme with specific characteristics, the aim of which was to "transmit heritage and bring generations together". The format differed from anything previously shown in this type of broadcast and constituted a cre-

ative effort that was sufficient to be covered by the protection of copyright.

Once the court had decided the case was admissible, it went on to examine whether the programmes Les chansons d'abord and Du côté de chez Dave did indeed copy the format of Chabada. It noted that the press release presenting the programme Les chansons d'abord had cited the same "transmission of heritage and mix of generations" concept, presented in a similar way to that of the format for the applicant parties' programme. On viewing extracts from the disputed programmes, the court recognised nine of the ten combined characteristics that made Chabada original. With regard to the programme Du côté de chez Dave, which had taken over from Chabada on the same channel in the same time slot, the court noted that one of the ten original characteristics had been re-used. Differences with regard to the personality of the presenters, the logos and credits were of little importance, given the importance of the similarities between the programmes. The court found that copyright had indeed been infringed.

In their original summons, the applicant parties claimed compensation for the damage caused jointly and severally by the two co-producer companies (subsidiaries, respectively, of Lagardère and France Télévisions). A settlement was subsequently reached with the latter, the details of which were not made known to the court, as the parties concerned preferred to keep the terms of the settlement out of the argument. As the court was not in a position to know whether there was still any damage to be compensated for after this settlement had been reached, the claim for compensation from the Lagardère subsidiary was rejected.

• *TGI de Paris (3e ch. 4e sect.), 20 avril 2017 - Degel Prod c/ Carson Prod* (Regional court in Paris (3rd chamber, 4th section), 20 April 2017 - Degel Prod v. Carson Prod) FR

Amélie Blocman
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Media chronology, combating piracy, audiovisual reform: priority areas for Minister for Culture

Totally in line with the proposals put forward this summer by the Senate's Committee on Culture (see IRIS 2017-8/17), and in an attempt to counter the stalled professional negotiations and address the urgent need for more appropriate regulations, Minister for Culture Françoise Nyssen has set up a mediation process in respect of media chronology. This has been deemed to be "a delicate task" and "a priority for the Government"; it forms part of the next stage in negotiations undertaken by the Centre National du Cinéma et de l'Image Animée (French National Centre for the Cinema and Animated Image - CNC) with a view to reforming the 2009 agreement with the professional cinema organisations, and should carry on from progress already made on the matter. The Minister said she was convinced that "it is the professionals who must reach an agreement". Mediator Dominique d'Hinnin has six months in which to achieve this; if he fails, the Government may well legislate on the basis of the main points raised during the mediation. According to the Minister, "[t]he aim of modernising media chronology is to promote investment in cinematographic creation, giving preferential treatment to those operators who take risks and finance the production of French and European films."

Speaking at the Rencontres Cinématographiques de Dijon conference on 13 October, the Minister reiterated that this revision was also intended to both promote the legal offer and combat piracy. On this last point, the Minister recalled that, in addition to the signing of the agreement between the CNC, the Association de Lutte contre la Piraterie Audiovisuelle and Google to provide for better collaboration between YouTube and rightsholders (see IRIS 2017-9/14), the high authority for the broadcasting of works and the protection of rights on the Internet (Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet - HADOPI) had commissioned a legal study of the possible development of the "graduated response" to piracy. She felt nevertheless that this should be taken further, since illegal streaming currently accounted for most acts of piracy and was not covered by the "graduated response" set up under the regulations in force in France. It was also necessary to educate the public (particularly young audiences) and promote the legal offer.

Modernising the regulations on the audiovisual sector was the third priority area announced by the Minister. This included the regulations on advertising on television and the areas of competence of the CSA, including the new Audiovisual Media Services Directive, which mandates a minimum of 30% of European works. As CNC President Frédérique Bredin recalled, "France's strength lies in the fact that that it can go further than the AMS Directive", and said that the 30% quota "ought to be checked". Lastly, the Minister announced that serious efforts were being made with regard to protecting copyright, reiterating that France had a three-fold objective in the current negotiations on revising a directive: firstly, to defend the principle of the territoriality of rights, which is at the heart of financing for the cinema and audiovisual creation; secondly, the Minister wanted to see a right to fair remuneration for originators; and lastly, value needed to be shared out better among the digital platforms and rightsholders.

• *Discours de Françoise NYSSEN à l'occasion des Rencontres cinématographiques de Dijon, 13 octobre 2017* (Speech by Françoise Nyssen at the "Rencontres Cinématographiques de Dijon", 13 October 2017)
http://merlin.obs.coe.int/redirect.php?id=18752 FR

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GB-United Kingdom

Court of Appeal judgment on enforcement of libel settlement agreement terms

On 31 July 2017, the UK Court of Appeal issued an important judgment on the terms of a "Tomlin Order" preventing the publication of certain facts, and held that the grant of an injunction and an inquiry as to damages was not a disproportionate restriction on the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

During 2012 and 2013, a Greek language newspaper, Demokratia, published articles concerning a businessman, Mr Sabby Mionis, suggesting he was evading tax by holding funds in a Swiss bank. The former French Finance Minister Christine Lagarde had passed a list of Greek citizens who possessed Swiss accounts to the Greek government, which had been subsequently leaked to the media (the "Lagarde list"). Mr Mionis issued libel proceedings against the defendants, including the publisher and journalist. The defendants issued an application opposing the English court's jurisdiction. Before the hearing of this application, the defamation action was compromised by a settlement agreement between the parties comprised of a "Tomlin Order". The agreement included no publication and republication of articles whilst neither party would sue the other. Subsequently, however, two further articles were published and indirectly referred to Mr Mionis. Mr Mionis applied to the High Court asserting breach of the Tomlin Order and seeking an injunction and damages. His application was rejected in the High Court on the grounds that the settlement agreement was too vague and uncertain for it to be enforceable. Furthermore, applying Article 10 ECHR, the terms of the agreement had to be balanced against the public's interest to have the material published.

Mr Mionis appealed to the Court of Appeal, arguing that the High Court judge had failed to properly balance the enforcement of contractual terms against freedom of expression; also, the terms of the Tomlin Order were sufficiently clear to be enforceable. When applying Article 10, consideration had to be given to Section 12 of the Human Rights Act 1998, which states, "This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression." Pursuant to Section 12(4), "The court must have particular regard to the importance of the Convention right to freedom of expression ... and (a) the extent to which (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published." When applying Section 12, the Court stated, "the court can take account of the public interest in receiving information, as well the rights of the parties. However, the fact that the parties have entered into a voluntary agreement restricting their Article 10 rights can be ... an important analysis which Section 12 then requires this court to undertake." Moreover, confidentiality between parties had to be balanced against public interest in freedom of expression.

The parties had entered into an agreement having sought independent legal advice beforehand. The publisher had alternative options, including defending the action; making a financial offer to settle Mr Mionis's claim; or, alternatively, making an offer of amends which, if accepted, did not prevent the publisher from repeating the words complained of or from pleading justification in any future libel action Mr Mionis may bring. Instead, the publisher had entered into a contractual agreement and no evidence was produced to suggest that the contract had been induced by fraud, undue influence, misrepresentation or mistake. The publisher and the other defendants entered into the agreement "voluntarily with their eyes fully open." Applying Section 12, the Court stated that they "have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction." Article 10(2) permits restrictions on freedom of expression for, amongst other reasons, the protection of the rights of others, including the "private rights of the parties under an otherwise validly constituted contract of settlement". The wording of the agreement was sufficiently clear and certain to be enforced, including the indirect reference to Mr Mionis; thus his appeal was upheld. An injunction would be granted and the case remitted to the High Court for an inquiry as to damages.

• Mionis v. Democratic Press SA [2017] EWCA Civ 1194, 31 July 2017
http://merlin.obs.coe.int/redirect.php?id=18740 EN

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Government introduces Data Protection Bill into Parliament

The UK Government has introduced a Data Protection Bill in the House of Lords, which should complete its passage through Parliament and become law next

year. The Bill is intended to implement a commitment in the 2017 Conservative Party manifesto to replace the current data protection laws (which date back to 1998, see IRIS 1998-8/21) to make them suitable for the digital age with ever increasing amounts of personal data being processed. The intention is also to update the law to comply with the EU General Data Protection Regulation (2016/679) (GDPR); after Brexit the GDPR will be retained as part of domestic law. The Bill also implements derogations and exemptions under the GDPR where member states have opportunities to make their own provision.

The Bill proceeds by defining what is meant by the 'controller' of data, supplementing the definition in the GDPR, and the meaning of 'public authority' which the GDPR does not define. It sets out the conditions in which data may be lawfully processed, including those relating to special categories of personal data concerning race, political opinions, health etc. One aim is to secure that sensitive health and safeguarding data can continue to be processed in confidence. It also makes provision for limiting the rights of access of individuals to data in special cases, such as those of regulatory bodies, the judiciary and ongoing investigations.

The Bill extends the scope of the relevant articles of the GDPR to general data outside the scope of EU law. It seeks to make provision for the transposition into UK law of the EU Law Enforcement Directive (2016/680) relating to the processing of personal data by competent authorities for the prevention, investigation, detection or prosecution of criminal offences, including the prevention of threats to national security. It also applies to the domestic processing of personal data for such purposes. Provision is made additionally to regulate the domestic processing of personal data by the security services. This is currently outside the scope of EU law, so the UK approach is based on the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS108).

The Bill re-enacts provisions relating to the Information Commission as the competent authority in this field. The GDPR substantially increases the power of the competent authorities to issue fines for breach of rules; the Bill provides for procedural safeguards in this process, and appeal to the First-tier Tribunal is retained. It also modifies criminal offences for breach, and creates some new criminal offences to deal with emerging threats; for example, the deliberate re-identification to avoid disclosure of individuals whose personal data is contained in anonymised data.

Although the Bill is long and complex, it does not depart radically from the previous scheme in the Data Protection Act 1998, which it will repeal. It remains to be seen to what extent the Bill will be amended during its passage through Parliament.

• Data Protection Bill, HL Bill 66, 13 September 2017
http://merlin.obs.coe.int/redirect.php?id=18767 EN

• Data Protection Bill, Explanatory Notes, 13 September 2017
http://merlin.obs.coe.int/redirect.php?id=18768 EN

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Channel 4 News breached Ofcom's Code concerning its coverage of the Westminster Bridge Attack

Channel 4 News has been found in breach of Ofcom's Broadcasting Code concerning their coverage of the Westminster Bridge attack on 22 March 2017 by wrongly identifying the terror attacker who murdered five people. Channel 4 News is produced by Independent Television News Limited (ITN). Rule 5.1 of the Code states "News, in whatever form, must be reported with due accuracy and presented with due impartiality".

The Channel 4 News Senior Home Affairs Correspondent, Simon Israel, named Abu Izzadeen as the terrorist shot dead in the grounds of the Palace of Westminster after the murder of five persons. Channel 4 News stated that the dead assailant had been known to the security services. However, during the transmission of the programme Abu Izzadeen's brother contacted ITN to say his brother was alive and serving a prison sentence. Towards the end of the bulletin, Channel 4 News announced there was doubt as to their earlier assertion about the attacker's identity. Subsequently, the story was withdrawn from the time shift edition shown on Four +1 and various persons, including Channel 4's News Editor and Simon Israel issued tweets retracting the allegation of Abu Izzadeen being the perpetrator. A further retraction appeared on the 23 March 2017 edition of Channel 4 News.

Ofcom acknowledged that the Channel 4 News production team were working under pressure to report a story of significant national importance. Also, Ofcom acknowledged that ITN and the Channel 4 News production staff had understood that running with a story with only one source of information and at the time no corroboration, was a substantial risk to take. ITN acknowledged that it was unusual to run with one source, but it was a person who was "authoritative and had a credible track record".

However, Ofcom determined that Channel 4 News had failed to comply with its own mandatory internal rules by not referring the decision to broadcast the story to the CEO of ITN. Channel 4 asserted in their representations to Ofcom that due to time pressures, contacting the CEO was "impracticable", but this argument was not accepted by Ofcom, given that the internal procedures envisaged referral to the CEO during broadcast. ITN acknowledged that, with hindsight, the story about the attacker's identity should have been

given less prominence until the facts had been established and corroborated. Furthermore, the wrongful naming had influenced a significant part of the programme's content, with questioning of various interviewees being based around the named person being already known to the security services.

First, Ofcom determined that Channel 4 News had not breached Rule 5.2 which states "Significant mistakes in news should normally be acknowledged and corrected on air quickly ... Corrections should be appropriately scheduled." Ofcom accepted that Channel 4 News had acted quickly to correct a significant mistake. However, Ofcom determined that Rule 5.1 had been breached concerning accuracy. Ofcom "acknowledged that efforts had been made to corroborate the source, although they were ultimately unsuccessful. However, the use of a single source can carry a substantial risk of inaccuracy, which on this occasion was borne out." Ofcom appreciated that broadcasters were, on occasion, under intense pressure and fine judgement was at play when determining what to broadcast. Ofcom concluded "this inaccuracy was of such magnitude and given such prominence that it was not fully mitigated by the later steps taken in the programme to correct the error."

Ofcom observed that this was the fourth case in three years where the regulator had found Channel 4 News in breach of the requirement to report news with due accuracy (see IRIS 2015-7/17, IRIS 2016-1/101, and IRIS 2015-1/16). Channel 4 News will have to read an announcement setting out Ofcom's findings on a date and in words to be determined by the regulator.

• Ofcom Broadcast and On Demand Bulletin, Issue 336, 11 September 2017, p. 6
http://merlin.obs.coe.int/redirect.php?id=18769 EN

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HR-Croatia

National programme for the promotion of audiovisual creativity 2017-2021

According to Article 22 of the Act on Audiovisual Activities and at the proposal of the Croatian Audiovisual Council, the Minister of Culture has adopted the National Programme for the Promotion of Audiovisual Creativity for the period 2017 to 2021. The National Programme establishes the scope and manner of promoting audiovisual activities, as well as complementary and other activities, and of promoting audiovisual culture and creativity significant for the development of the Croatian culture. Furthermore, the programme provides for activities related to participation in EU programmes and other international agreements, as well as for other issues which are important for the development of the audiovisual sector in Croatia.

The National Programme outlines four strategic areas of action: the provision of material conditions for the further development of the overall audiovisual industry as an economic force, as well as the creative growth of Croatian cinematography as an artistic expression; the promotion of film literacy and audience development; the preservation of audiovisual heritage and the promotion of public access to culturally valuable domestic and global audiovisual heritage; and the positioning of Croatia in the process of creating a single European digital market.

• *Nacionalni program promicanja audiovizualnog stvaralaštva 2017.-2021.* (National Programme for the Promotion of Audiovisual Creativity 2017 to 2021)
http://merlin.obs.coe.int/redirect.php?id=18775 HR

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IE-Ireland

High Court makes referral to the CJEU in Facebook Ireland case

The Data Protection Commissioner of Ireland (DPC) has been granted a referral by the Irish High Court to the Court of Justice of the European Union (CJEU) to determine the validity of three decisions of the Europe Commission insofar as they apply to data transfers from the European Economic area (the EEA) to the United States. The referral was granted in the proceedings by the DPC against Facebook Ireland Ltd. and Austrian lawyer Maximilian Schrems. The case was grounded in a complaint made by Mr Schrems in 2013 about the transfer of his personal data by Facebook Ireland Limited (Facebook) outside the European Union to Facebook Inc., in the United States for further processing. Mr Schrems argued that "the legal regime in the United States does not afford his personal data the protection to which he is entitled under European Law."

Facebook informed the DPC that "it transfers data for processing to Facebook Inc, including Mr Schrems's data, largely pursuant to an agreement between Facebook Ltd and Facebook Inc which in turn is based upon a decision of the European Commission Decision 2010/87/EU." This decision "authorises the transfer of data by data exporters from the EEA to data importers outside the EEA on the basis of standard contractual clauses" (SCCs).

The DPC formed the view that Mr Schrems's complaint raised issues as to the validity of the SCC Decisions

having regard to the various provisions of the Charter of Fundamental Rights of the European Union, including Article 7 (respect for private and family life) and/or Article 8 (Protection of Personal Data). In light of the ruling of the CJEU in Schrems v Data Protection Commissioner (see IRIS 2015-10/2), invalidating the US Safe-Harbour Agreement, the Data Protection Commissioner instituted these proceedings in order that the validity of the SCC Decisions may be determined either by the High Court, or on the basis that the High Court makes a reference to the CJEU, which makes a ruling on the validity of the SCC decisions."

Ms Justice Costello in the High Court stated that "the case raises issues of very major, indeed fundamental, concern to millions of people with the European Union", and implications for billions of euros worth of trade between the European Union and the United States.

In a 153-page ruling, the judge found that the High Court had jurisdiction to make a reference to the CJEU for a preliminary ruling on the validity of the SCC Decisions under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The judge reached this decision based on the "well founded concerns" as to the validity of those decisions raised by the DPD with which the High Court agreed. The judge stated that Union law guarantees a high level of protection to EU citizens as regards the process of their personal data within the European Union. Accordingly, EU citizens "are entitled to an equivalent high level of protection when their personal data are transferred outside the EEA."

The judge stated that the arguments advanced by the DPC "that the laws, and indeed the practices of the United States do not respect the essence of the right to an effective remedy before an independent tribunal as guaranteed by Article 47 of the Charter, which applies to the data of all EU data subjects transferred to the United States" are "well founded".

Ms Justice Costello said that the European Commission's adoption of the Privacy Shield decision with the United States in July 2016, (adopted after the CJEU in Schrems v Data Protection Commissioner declared the Safe Harbour Decision invalid), accepting that there is adequate protection for data transferred to the United States under the protocol, did not prevent her from making a referral. Justice Costello added that the introduction of an Ombudsperson mechanism in the Privacy Shield decision did not eliminate the DPC's "well founded" concerns that the Ombudsperson mechanism does not remedy the issues identified regarding individual redress for wrongful interference with data privacy in the United States. The judge stated that a decision by the CJEU is required to determine whether the Ombudsperson mechanism amounts to a remedy.

• The Data Protection Commissioner v. Facebook Ireland Limited & Anor [2017] IEHC 545, 3 October 2017
http://merlin.obs.coe.int/redirect.php?id=18741 EN

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IS-Iceland

Decision on broadcaster's coverage of political parties during election

On 28 June 2017, the Icelandic regulator for the media, Fjölmiðlanefnd (the Media Commission), published an opinion in respect of television programmes featuring three political parties, broadcast on the TV channel Hringbraut, and on the website Hringbraut.is.

Parliamentary elections were held in Iceland on 29 October 2016. Twelve political parties ran in the elections and prior to the elections several election programmes were broadcast on Hringbraut featuring three of the 12 parties. The programmes were also accessible on the Hringbraut.is website.

In October 2016, the Media Commission received an informal tip claiming that the political parties had received offers from Hringbraut to buy advertising packages, including promotion programmes, for a certain price. This information was later confirmed by a majority of the political parties. Most of them had declined the offer; however, three of the parties confirmed that they had accepted Hringbraut's offer: The Independence Party (Sjálfstæðisflokkurinn), The Reform Party (Viðreisn) and The Progressive Party (Framsóknarflokkurinn.)

The abovementioned parties were promoted on Hringbraut, each in three one-hour long programmes that were broadcast and rebroadcast several times on television and also made accessible on the media service provider's website. All editorial decisions in the programmes were made by the political parties and political discussions in the programme were directed by a member of the relevant political party, not an impartial reporter. The programmes were labelled "promotion programmes" but it was not obvious to the viewers that the parties had paid for the promotion.

The Media Act No 38/2011 applies to all media outlets and media service providers established in Iceland which make content available to the Icelandic public. Due to the wording of the definition of commercial communication in the Media Act as "content designed to direct attention, directly or indirectly, towards the products, service or image of a natural or legal entity pursuing an economic activity", there are de facto no restrictions on political advertising in the

Media Act since the definition excludes commercial communication of, for example, political parties or non-profit groups who do not pursue an economic activity. However, there are general rules to be found in Article 26 of the Media Act regarding democratic principles, including balance and impartiality in news and current affairs programmes. According to Article 26, media service providers shall take care to meet requirements regarding impartiality and accuracy in news and current affairs content and ensure that a variety of opinions are expressed. Hringbraut, as a private broadcaster, must comply with Article 26 of the Media Act.

The Media Commission concluded that the political promotion programmes on Hringbraut fell under the concept "news and current affairs". Furthermore, it was the conclusion of the Media Commission that by making payment a prerequisite for access to the election programmes and thereby excluding nine of twelve parties from communicating their views on Hringbraut's TV station and website, the media service provider was in breach of the general rules of objectivity and impartiality as stated in Article 26 of the Media Act.

In its opinion, the Media Commission underlined the importance of the media upholding democratic principles and ensuring impartiality in news and current-affairs content. The Media Commission concluded that these principles were especially important in news-related content broadcast in relation and prior to elections. Hence, the private broadcaster should have provided the public with a rounded picture of the political spectrum in the form of equal access of political parties to the election programmes broadcast on Hringbraut and published on the Hringbraut.is website.

• *Álit nr. 1/2017 um kynningarþætti fyrir framboð til Alþingiskosninga á Hringbraut. Fjölmiðlanefnd 29. júní 2017* (Media Commission, Opinion no.1 1/2017, 29 June 2017)
http://merlin.obs.coe.int/redirect.php?id=18742 IS

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IT-Italy

Three new pieces of legislation on cinema and audiovisual media services

On 2 October 2017, the Italian Government released the draft of three legislative decrees implementing the reform of the legal framework on cinema and audiovisual services started last year (see IRIS 2017-1/23). The new decrees concern the promotion of European and Italian works by audiovisual media service providers; the protection of minors; and employment in the audiovisual sector. Further to the government's preliminary approval, the draft decrees will be submitted to parliamentary committees, the Council of State and the State-Regions Conference in order to seek relevant opinions; the deadline for the final approval is 11 December 2017.

First, the draft decree on the promotion of European and Italian works provides for a progressive increase in the content and investment quotas that all TV broadcasters are required to reserve for European and Italian works. Also, on-demand service providers are required to comply with specific obligations. In relation to content quotas, the percentage of the content quotas in relation to EU works for both national broadcasters and the public service broadcaster, which for the year 2018 reaches 50,01% , will be increased to 55% for the year 2019 and 60% from 2020 on. As for on-demand service providers, 30% of their catalogue has to be recent (that is to say, from the last five years) EU-content. Regarding works of Italian original expression produced anywhere, it is provided that from 2019 on, national broadcasters must reserve a sub-quota of one third of the reserved quotas for EU works, while the relevant sub-quota for the public service broadcaster reaches half of the above-mentioned quotas. On-demand service providers are required to reserve a sub-quota of not less than half of the percentage of 30% mentioned above (that is to say, no less than 15% of the catalogue).

The decree also provides that, on a weekly basis, national broadcasters have to devote 6% of prime time TV (from 6 p.m. to 11 p.m.) to cinema, fiction, animation and/or original documentaries works of Italian original expression produced anywhere. In relation to the public service broadcaster, this percentage is increased to 12%, half of which has to be reserved for the cinema.

All quotas and sub-quotas are calculated net of TV news, sport, quiz, advertising, teletext and teleshopping programmes.

In relation to investment quotas, and in accordance with the decree, 10% of the annual net revenues for 2018 (to be devoted entirely to independent producers) must be reserved by commercial broadcasters to pre-purchase, purchase or produce EU works; this percentage increases to 12.5% for 2019 (5/6 of which for independent producers) and to 15% from 2020 on (5/6 of which for independent producers). As for the public service broadcaster, 15% of the annual total revenues for 2018 (to be devoted entirely to independent producers) reserved for the same above-mentioned purposes will be increased to 18.5% for 2019 (5/6 of which for independent producers) and to 20% from 2020 on (5/6 of which for independent producers).

Furthermore, commercial broadcasters must devote a sub-quota of 3.5% of their annual net revenues to cinematographic works of Italian original expression produced anywhere by independent producers for 2018,

increasing to 4% for 2019 and to 4.5% from 2020 on. As far as the public service broadcaster is concerned, the respective initial sub-quota of 4% of the annual total revenues for 2018 is increased to 4.5% for 2019 and 5% from 2020 on. The decree stipulates that the public service broadcaster's investment in animated works for children's education produced by independent producers should be equal to the sub-quota of 5% of the quota provided for EU works.

On-demand service providers are required to invest 20% of their annual net revenues in Italy in EU works of independent producers, particularly recent ones (that is to say, released in the last five years); a sub-quota of not less than half of such a percentage (that is to say, 10% of the annual net revenues generated in Italy) must be devoted to works of Italian original expression produced anywhere. It is also provided that from January 2019, such a quota must also be met by providers who have the editorial responsibility for offers targeting Italian consumers, even if based abroad. The sanctions for non-compliance, significantly toughened by the decree, range from a minimum of EUR 100,000 to a maximum of EUR 5 million, or up to 2% of annual revenues.

Secondly, the draft decree on the protection of minors enhances the role of providers, who are requested to classify the works appropriately, taking into account the age of the recipient public; amends the provisions on censorship by removing the absolute prohibition of works' release in cinemas as well as releases conditioned to cuts or amendments; and amends the current works' classification system.

Finally, the draft decree on employment regulates employment relationships in the audiovisual and cinematographic environment, consistent with the provisions of the recent reform of the legal framework on employment deriving from the so called "Jobs Act". The decree introduces a national classification of artistic and technical professions into the audiovisual and cinematographic sector; including the production of audiovisual works in those sectors that benefit from derogations with respect to the maximum number of fixed-term contracts.

• *Comunicato stampa del Consiglio dei Ministri n. 47, 2 Ottobre 2017* (Press release issued by the Italian Cabinet, 2 October 2017)
http://merlin.obs.coe.int/redirect.php?id=18743 IT

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Italian Communications Authority orders the disabling of access to IPTV pirate servers

On 19 October 2017, AGCOM (Italian Communications Authority) ordered the internet service providers under Italian jurisdiction, pursuant to its Regulation on copyright protection online (see IRIS 2014-3:1/31), to disable access to two IPTV servers for massive copyright infringements. The decisions were taken in conclusion of two proceedings deriving from complaints presented on 10 October 2017 by Mediaset Premium S.p.A., whose entire pay-TV offer was systematically made available via content delivery network (CDN) selectors.

Access to the pirated service was given upon payment of a fee, which was, however, significantly lower than the legal subscriptions. From a technical point of view, once each user's authentication had been verified through credentials embedded directly in each one of the given URLs, and payment had been made, users were provided with a list of URLs that allowed access to the livestreaming of programmes through HTTP protocol; subsequently, the user was redirected to the so-called "streaming server" of the requested content. Therefore, it was made possible for the user to view a vast quantity of pay-TV offers on all major devices (PCs, smart-TVs, smartphones, tablets).

Moreover, AGCOM found out during its proceedings that the websites used for promoting these illegal offers were using the images and logos of the audiovisual media service providers, and that the programmes made available were often among search engines' first results, even as sponsored content. These elements, as well as the good quality of the programmes, may also have led users to believe that this was a legitimate offer. The findings of the proceedings led AGCOM to determine the occurrence of massive and serious violations: consequently, in compliance with the principles of gradualness, proportionality and adequacy, the preconditions existed for issuing an order to disable access to the websites, by DNS blocking, to be implemented by service providers within two days of the notification of the deliberations.

• *Delibere nn. 223/17/CSP and 224/17/CSP* (Delibere nn. 223/17/CSP and 224/17/CSP, "Decision pursuant to articles 8(2), 8(4) and 9(1d) of the Regulation on copyright protection on the electronic communication networks and proceedings pursuant to legislative decree 9 April 2003, no. 70")
http://merlin.obs.coe.int/redirect.php?id=18770 IT

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LT-Lithuania

LRTK blocks Russian TV channel TVCI for six months

The Lithuanian Radio and Television Commission (LRTK) has decided to restrict the free reception of the Russian television channel TVCI, the international version of Russian channel TVC, for six months.

The LRTK considered that in June of this year, TVCI had broadcast content that incited war and hatred during the programme "The Right to Know", in which Russia's views on foreign policy issues had been expressed. At a hearing held by the LRTK before it issued its decision, the Russian channel's Director of Development, Alexei Guscin, had spoken on the broadcaster's behalf, categorically denying any breach of Lithuanian law.

In the past, a large number of Russian broadcasters were banned in Lithuania on the grounds of biased reporting and political interference. According to politicians and media representatives who advocate such bans, the resulting undisputed restriction of the freedom of expression is an inevitable response to the increasingly aggressive propaganda disseminated by Russian state broadcasters.

The six-month ban will come into force if the LRTK's decision is approved by the Vilnius administrative court.

• LRTK press release, 20 September 2017
http://merlin.obs.coe.int/redirect.php?id=18751 EN

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NL-Netherlands

Supreme Court rules on obligation to hand over unedited hidden camera footage

On 29 September 2017, the Dutch Supreme Court ruled that the claim of the telecom company Pretium to oblige the broadcaster Tros to hand over unedited hidden camera footage would be an impermissible restriction on the right to freedom of speech (see IRIS 2015-7/23). The decision relates to the question of the extent to which hidden camera footage falls within the scope of Article 10 of the European Convention of Human Rights (ECHR), and whether an order to hand over audiovisual material may be rejected if the desired evidence can be obtained by other means.

In 2008, Tros aired an episode of the television programme Tros Radar, which showed hidden camera footage of a training session for Pretium call centre employees. The TV broadcast critically discussed how Pretium attracted clients. Based on Article 843a Rv (the Code of Civil Procedure), Pretium argued that Tros should hand over all unedited footage.

At first instance, The Hague Court allowed Pretium's claim, and compelled Tros to hand over the complete footage that they had obtained during the "'infiltration' of the call centre". In December 2015, The Hague Court of Appeal set aside this interim judgement. The Court of Appeal referred to the Nordisk judgment of the European Court of Human Rights (ECtHR) (see IRIS 2006-3/3), and held that hidden camera footage falls within the scope of Article 10 of the ECHR. It stated that a compulsory handover of hidden camera footage could have a ''chilling effect" on the exercise of freedom of expression.

Therefore, Pretium's claim to compel Tros to hand over unedited footage constituted an interference within the meaning of Article 10 of the ECHR. The Court of Appeal went on to say that such an inference must meet all criteria set out in Article 10 (2) of the ECHR. First, it ruled that Article 843a Rv grants the right to compel the handover of footage, and therefore was prescribed by law. Secondly, it considered that Pretium, prior to bringing an action on the basis of Article 843a Rv, could have obtained evidence by hearing witnesses. Accordingly, it held that in the light of the principles of proportionality and subsidiarity, the interference was not necessary.

Finally, the Dutch Supreme Court decided that the Court of Appeal was correct in its assessment that Pretium's claim must be disallowed based on Tros's right to freedom of expression and access to information - especially in the light of the substantial public interest in freedom of the press in a democratic society - as laid down in Article 10 of the ECHR. The Dutch Supreme Court concluded that the Court of Appeal did not err in law by ruling that Pretium's claim had to be rejected on the basis of the principles of proportionality and subsidiarity of Article 10(2) of the ECHR.

• *Hoge Raad, 29 september 2017, ECLI:NL:HR:2017:2518* (Supreme Court, 29 September 2017, ECLI:NL:HR:2017:2518)
http://merlin.obs.coe.int/redirect.php?id=18744 NL

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Judgment on allegedly unlawful comments made by well-known crime reporter on television

On 26 September 2017, the District Court of Amsterdam dismissed a complaint against a well-known Dutch crime reporter for allegedly unlawful statements made on the television programme RTL Boulevard. The lawsuit was also directed at the producer of the programme, Fremantlemedia Netherlands BV.

The claimant in the case writes and publishes information about crimes in several media outlets. One of the crimes he commented on was the rape and murder of a 16-year-old girl in 1999. The claimant had an alternative reading of the case, and amongst other things, argued that the person convicted of these crimes in

2013 is innocent and was tricked into confessing. Notably, the conviction was based on DNA evidence and a confession, and there had been no appeal. On 7 August 2017, in summary proceedings initiated by family members of the victim, the claimant was ordered to refrain from contacting the victim's mother and to delete and rectify statements on his website and Facebook account.

In a broadcast of the programme RTL Boulevard, the defendant, a well-known crime reporter in the Netherlands, commented on the summary proceedings against the claimant. He named the claimant and said he was crazy ("kierewiet") and that he should be "taken away in a straitjacket." According to the claimant, these comments are factually incorrect, because there is no proof that he has mental health problems, and were therefore unlawful. He also argues that he should have been given the opportunity to reply to the statements in the same television programme, and claimed rectification and damages.

According to the Court, the statements are not unlawful. By commenting in a controversial manner on a high-profile criminal case, the claimant made himself a public figure. As a public figure, he must tolerate criticism more than others. The defendant's unvarnished opinion was a value judgment, which, in the given circumstances, had enough factual basis in order not to be excessive, and also because freedom of expression leaves room for provocation and exaggeration. This was the case here. It is clear that the defendant does not have the power to actually take the claimant away in a strait jacket. A right to reply was not necessary according to the court. This would be about the claimant's view of the murder case, which was not the topic of the television segment. A reply to the defendant's value judgment would not be meaningful.

In sum, the court found a restriction on the defendant's right to freedom of expression not permissible (Article 10 of the European Convention on Human Rights). Based on the circumstances of the case, the defendant's interest in being able to make critical, informative, opinionated and warning comments on matters of public interest defeated the claimant's interest not to be lightly exposed to harmful publicity.

- *Rechtbank Amsterdam 26 september 2017, ECLI:NL:RBAMS:2017:6955* (District court of Amsterdam 26 September, ECLI:NL:RBAMS:2017:6955)
http://merlin.obs.coe.int/redirect.php?id=18745 NL

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Court orders ISPs to temporarily block access to The Pirate Bay

On 22 September 2017, The Hague District Court ordered a preliminary injunction against internet services providers (ISPs) Ziggo and XS4AALL to temporarily block access to The Pirate Bay until the Dutch Supreme Court had issued a judgment in the main proceedings.

This case has to be seen in light of the main proceedings before the Dutch Supreme Court, between the applicant BREIN, a foundation protecting the rights and interests of Dutch copyright holders, and Ziggo and XS4ALL as defendants, both of them ISPs who give their end-users access to The Pirate Bay. The main proceedings were suspended on 13 November 2015 for a preliminary ruling reference by the Court of Justice of the European Union (CJEU), which was issued on 14 June 2017 (see IRIS 2016-1/22, IRIS 2017-3/5, and IRIS 2017-7/4). On 6 July 2017, interim proceedings were initiated by BREIN. It primarily asked the District Court to order the two ISPs to block their customers' access to the domain names and IP addresses through which The Pirate Bay operates. This claim was based on Art 26d of the Dutch Copyright Act and Art 8 sub-paragraph 3 of the EU Copyright Directive, under which intermediaries can be ordered to cease their services used by others for copyright infringements.

The District Court first looked at whether there is an urgent interest at stake for BREIN to obtain an injunction. It concluded that new factual circumstances had occurred and that BREIN had initiated the interim injunction proceedings in an expeditious manner.

The District Court then established that it should align its judgment with the 2012 judgment of the Court of first instance, in which Ziggo and XS4ALL were ordered to block access to The Pirate Bay, and which was later overturned by The Hague Court of Appeal in 2014 (see IRIS 2012-2/31 and IRIS 2014-3/37). The District Court based its reasoning on the interlocutory judgment given by the Dutch Supreme Court in which it was made clear that the appeal judgment was wrong on several points. According to the Supreme Court, the Court of Appeal could not have required that the blocking of access to The Pirate Bay would put an end to the illegal downloading of works by end-users. Furthermore, the Supreme Court found the Court of Appeal's explanation as to why "art works" were not supposed to be the subject of the blocking measure unclear. Finally, in light of the CJEU's preliminary ruling and as opposed to what was said in the appeal judgment, the District Court inferred that the administrators of The Pirate Bay made an "act of communication to the public". Having regard to this, the District Court concluded that the Court of Appeal judgment was not in line with a correct interpretation

of copyright law and, consequently, that it did not take the interests of BREIN sufficiently into account when assessing the proportionality of the measure.

The District Court therefore aligns its proportionality test with the one carried out by the judge of first instance in 2012, in which both the interests of BREIN, the ISPs' subscribers and the ISPs themselves were represented and in which the blocking measure was said to be proportionate. The District Court found that the proportionality of the measure was strengthened by the CJEU ruling in which it was said that the exchanged works were "communicated to the public" and that copyright infringements had thus occurred on the site itself. In light of this, the aim of countering visits to The Pirate Bay should also have been taken into account by the Court of Appeal when assessing the proportionality of the measure. The District Court concluded that the blocking measure was proportionate and ordered the ISPs to block access to The Pirate Bay until the Dutch Supreme Court had issued its judgment in the main proceedings.

- *Rechtbank Den Haag, 22 september 2017, ECLI:NL:RBDHA:2017:10789, Ziggo & XS4ALL/BREIN* (District Court The Hague, 22 September 2017, ECLI:NL:RBDHA:2017:10789, Ziggo & XS4ALL/BREIN)

http://merlin.obs.coe.int/redirect.php?id=18771 NL

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NO-Norway

Tender on commercial public service broadcasting

On 23 June 2017, the Norwegian Ministry of Culture announced a tender on an agreement with the State to deliver commercial public service broadcasting in Norway. The announcement stated that the state would compensate the contractor for the net costs associated with the assignment, and that the grants would be up to NOK 135 million (EUR 15 million) a year for five years. It is the first time in the Norwegian context that the state has been prepared to give direct financial support in exchange for the delivery of public service content by a commercial broadcaster. The arrangement will be organised in line with the group exemption for services of general economic interest (under European Commission Decision 2012/21/EU). The announcement listed a set of required qualifications that the applicants have to fulfil to be considered in the tender. These requirements implied that the applicant must base its programme offers on the principles of public service broadcasting; have a broad programme profile (regarding audiovisual variation in themes and genres); offer programmes for both broad and narrow groups; and ensure that at least 50% of the transmission time consists of programmes in the Norwegian language, using both forms of the Norwegian language. In addition, the announcement stated that the TV channel must have its main editorial office and its main news desk in Norway, and at least 100 km outside Oslo. The term 'main editorial office' is defined as the place where the majority of the TV channel's editorial decisions are made and the majority of the TV channel's editorial employees have their workplace. The majority of the editorial decisions concerning the TV channel's newscasts must be made at the main news desk, the news editor in chief must have his or her workplace there, and the majority of the editorial employees engaged in the newscasts must also have their workplace at the main news desk.

The public service broadcasting remit will primarily include requirements to provide nationwide newscasts, youth and children's programmes, and to invest in Norwegian film and television drama that will be viewed for the first time on the TV channel. The agreement will be made with the applicant who has the best plans for these requirements. The applicant's plans for the public service broadcasting requirements, including the planned level of financial resources, will be binding throughout the term of the agreement, and will be part of the overall broadcasting assignment.

It is a prerequisite that the content is offered on one linear television channel with a minimum of 95% coverage of all households in Norway. In addition, the public broadcasting content must be made available as an on-demand audiovisual service (on the Internet).

By the deadline for entering the tender on 23 September 2017, the Ministry of Culture had received one application, from TV2 AS. TV 2 is a Norwegian commercial TV channel owned by the Danish media corporation Egmont. TV 2 started its first TV broadcasts in Norway in 1992, and since its establishment has held a position as a commercial public service broadcaster, except in 2010, which was the first year after the digitisation of the terrestrial television network in Norway. After this, TV 2 entered into a new agreement with the state to obtain the status of public service broadcaster in exchange for a must-carry obligation. This agreement expired on 31 December 2016.

The Ministry of Culture has stated that a commercial public service broadcaster on television constitutes an important alternative to NRK, which is the state-owned public service media provider in Norway. The Ministry will consider the application from TV2 AS as quickly as possible with an aim to entering into an agreement by December 2017. The agreement will then enter into force no later than eight months after this.

• *Kulturdepartementet, Lyser ut avtale for kommersiell allmennkringkasting, 23.06.2017* (Ministry of Culture, tender announcement on public service broadcasting, the announcement documents, 23 June 2017)
http://merlin.obs.coe.int/redirect.php?id=18772 NO

• *Kulturdepartementet, TV2 AS søker avtale om å drive kommersiell allmennkringkasting, 23.09.2017* (Ministry of Culture, TV2 AS seeks agreement to conduct commercial public broadcasting, 29 September 2017)
http://merlin.obs.coe.int/redirect.php?id=18773 NO

• *Meld. St. 14 (2016-2017) Kommersiell allmennkringkasting* (White Paper to Parliament on Commercial Public Service Broadcasting, 16 December 2016)
http://merlin.obs.coe.int/redirect.php?id=18774 NO

Marie Therese Lilleborge
Norwegian Media Authority

RO-Romania

Problems with the modification of the Law on Public Service Broadcasting

The Legal Standing Committee of the Chamber of Deputies (lower Chamber of Romania's Parliament) decided on 18 September 2017 that the representatives in the Boards of Administration of the public radio and TV services may retain party membership during the exercise of their mandate, but not the leadership role within trade union organisations. The decision is due to put the intended modification of the Law no. 41/1994 on the functioning of the Romanian public radio and television services in accordance with the decisions of the Constitutional Court of Romania (see inter alia IRIS 2013-5/37, IRIS 2013-10/36, IRIS 2014-1/38, IRIS 2014-2/30, IRIS 2014-4/25, IRIS 2014-6/30, IRIS 2014-7/30, IRIS 2015-6/33, IRIS 2015-8/26, IRIS 2016-5/28, IRIS 2017-3/26, IRIS 2017-8/31).

At the same time, the Legal Standing Committee of the Chamber of Deputies decided to withdraw an article which provided for the appointment of new Boards of Administration within 90 days from the date of entry into force of the new form of Law no. 41/1994. On 12 July 2017, the Constitutional Court of Romania, seized by the Liberal and Popular opposition parties, ruled that some articles of the intended modification of Law no. 41/1994 were not constitutional. The Legal Committee's decisions must be voted in the plenary of the Chamber of Deputies and then discussed in the Senate, the upper Chamber, whose vote is decisive.

On the other hand, on 27 September 2017, the Romanian Parliament rejected the 2016 annual activity report of TVR, the Romanian public television, and dismissed its Board of Administration. The Parliament appointed Mrs Doina Gradea, member of the dismissed Board of Administration, as the Interim General Director for a mandate of up to 6 months. The Parliament reproached the former Board of very poor financial management, even after the payment of TVR's historical debts (around EUR 145 million), with the help of a record state budget allocation at the beginning of 2017. The MPs blamed the roll-out and the increase in debts; the lack of valuable acquisitions; the neglect of production; the underfunding; and the internal and external disinterest in the institution for bringing national television to the brink of collapse. The National Liberal Party and the Popular Movement Party (opposition) declared that they did not accept that the TVR activity report was discussed too fast, and in a hurry. The new TVR Interim Director General, Doina Gradea, has a long journalistic and managerial experience in private media (TVs: Canal 31, ProTV, Pro TV International, as well as the Mediafax news agency).

At the same time, on 27 September, the Romanian Parliament appointed the new Board of Administration of Radio România, the public service. Mr Georgică Severin, a former Social Democrat member of the Senate, was elected as President and CEO of Radio Romania for a mandate of 4 years. He has been the Interim General Director of Radio Romania since 26 April 2017, when the Parliament dismissed the radio broadcaster's Board of Administration for poor management.

• *Propunere legislativă pentru modificarea şi completarea Legii nr.41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune - forma adoptată de Senat* (Draft Law for amending and completing the Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television Broadcasting Corporation - form adopted by the Senate)
http://merlin.obs.coe.int/redirect.php?id=18776 RO

• *Hotărârea nr. 65/2017 a Parlamentului României pentru respingerea Raportului de activitate şi a Contului de execuţie bugetară ale Societăţii Române de Televiziune pe anul 2016* (Decision no. 65/2017 of the Parliament of Romania for the rejection of the Activity Report and the Budget Execution Account of the Romanian Television Society for 2016)
http://merlin.obs.coe.int/redirect.php?id=18777 RO

• *Hotărârea nr. 66/2017 a Parlamentului României privind desemnarea membrilor Consiliului de administraţie al Societăţii Române de Radiodifuziune* (Decision no. 66/2017 of the Parliament of Romania regarding the appointment of the members of the Board of Administration of the Romanian Broadcasting Society)
http://merlin.obs.coe.int/redirect.php?id=18778 RO

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Radio Romania International

RU-Russian Federation

TV broadcaster CNN breaches Russian laws

According to a decision issued by the Russian media regulator Roskomnadzor, American TV broadcaster CNN International infringed Russian laws through its

reporting. The authority did not initially reveal any further details of the alleged offences.

The regulatory body announced that a review of CNN International's programmes broadcast in the Russian Federation had shown that it had breached Russian mass media legislation and was liable under Russian administrative law. Roskomnadzor has therefore summoned representatives of the broadcaster to a hearing at which further information would be given. It said it would then decide whether to caution the broadcaster for infringing a law and breaching the conditions of its TV broadcasting licence. Roskomnadzor also stressed that compliance with Russian legislation would continue to be monitored, no matter where companies operating mass media registered under Russian law were based.

• Представители *«CNN International»* вызваны в Роскомнадзор для рассмотрения административных дел в отношении телеканала *, 29/09/2017* (Press release of the Roskomnadzor media regulator, 29 September 2017)
http://merlin.obs.coe.int/redirect.php?id=18779 RU

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TR-Turkey

Turkish broadcasting authority suspends Iraqi Kurdish TV channels

Turkey's private broadcasting regulator (RTÜK) has ordered the removal of three Iraqi Kurdish TV channels from the Turkish satellite system. It said that the three channels Rudaw, Kurdistan 24 and Waar TV should no longer be available in Turkey. Rudaw was particularly of note because of its perceived close relationship with Massud Barzani.

Barzani, a Kurdish politician and president of the autonomous northern Iraqi region of Kurdistan since 13 June 2005, had helped to organise an independence referendum in Iraqi Kurdistan. Despite being banned by the supreme court of northern Iraq, the referendum had gone ahead on 25 September 2017, both in the autonomous region of Kurdistan and in other provinces claimed and largely controlled by it, but which are officially under the control of the Iraqi central government. According to the electoral commission, 92% of voters in the Iraqi part of Kurdistan voted for independence in the referendum. However, the referendum was not legally binding and the Turkish government opposed it on the grounds that it would destabilise the region.

The RTÜK explained that its decision to ban the Iraqi Kurdish channels, which was taken on the day of the referendum, was made because the three broadcasters were not based in Turkey and did not hold a Turkish broadcasting licence. In recent months, RTÜK has taken a number of measures against Kurdish channels.. In October of last year, TV broadcasters Med Nuce TV and Newroz TV were embroiled in a legal dispute over their transmission via the Eutelsat Hot Bird satellite. Ronahi, Sterk and the News Channel, which were carried via the same satellite, were banned in Turkey by the RTÜK in May.

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UA-Ukraine

EBU concerned about underfunding of public broadcasting in Ukraine

The European Broadcasting Union (EBU) has expressed concern about the financial situation of public broadcasting in Ukraine, where the 2018 state budget provided only around half of the funding stipulated in the Law on Public Television and Radio Broadcasting. According to the law, 0.2% of the state budget should be spent on public broadcasting, which amounted to around EUR 40 million last year. The EBU stressed that this was already one of the smallest budgets in Europe, with public broadcasters in other countries enjoying much greater financial means even though some of them covered smaller populations and regions.

The EBU members stressed that establishing a sustainable public service media landscape was an important strategic aim of Ukraine in the light of recent political reforms. Operating robust and independent broadcasters was a crucial weapon in the fight against corruption and a tool to promote respect for the rule of law. Independent broadcasting was also important for Ukraine's European integration.

The Public Broadcasting Company of Ukraine (UA:PBC) also expressed concern that the small budget could limit its ability to provide free, critical and independent reporting, which was especially significant on the eve of forthcoming elections. The UA:PBC Director General said that public broadcasters were suffering very hard times. However, it was a time of reform, and the greatest challenge was to transform a former state company into an independent public service broadcaster. The lack of required funding undermined the whole reform process and the very future of Ukrainian broadcasting.

The EBU is therefore urging the Ukrainian Government to ensure appropriate, fair and unconditional funding

for UA:PBC, in line with Ukrainian law and European standards.

The EBU played a crucial role in the creation of UA:PBC, sending a delegation to Kyiv in 2014 to advise the Ukrainians on how to merge the country's existing public broadcasting organisations.

• EBU calls on Ukrainian Government to ensure proper funding for UA:PBC (EBU press release), 19 September 2017
http://merlin.obs.coe.int/redirect.php?id=18780 EN

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Agenda

Book List