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of the European Audiovisual Observatory

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Publisher:
European Audiovisual Observatory 76, allée de la Robertsau F-67000 STRASBOURG
Tel. : +33 (0) 3 90 21 60 00 Fax : +33 (0) 3 90 21 60 19
E-mail: obs@obs.coe.int www.obs.coe.int
Comments and Contributions to:
iris@obs.coe.int
Executive Director:
Susanne Nikoltchev
Editorial Board:
Maja Cappello, Editor • Francisco Javier Cabrera Blázquez, Sophie Valais, Deputy Editors (European Audiovisual Observatory)
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Council to the Editorial Board:
Amélie Blocman, Victoires Éditions

Documentation/Press Contact:
Alison Hindhaugh
Tel.: +33 (0)3 90 21 60 10
E-mail: alison.hindhaugh@coe.int
Translations:
Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Paul Green • Katherine Parsons • Marco Polo Sarl • Nathalie Sturlèse • Brigitte Auel • Erwin Rohwer • Sonja Schmidt • Ulrike Welsch
Corrections:
Sabine Bouajaja, European Audiovisual Observatory (co-ordination) • Sophie Valais et Francisco Javier Cabrera Blázquez • Aurélie Courtinat • Barbara Grokenberger • Jackie McLelland • James Drake
Distribution:
Nathalie Fundone, European Audiovisual Observatory
Tel.:
+33 (0)3 90 21 60 06
E-mail: nathalie.fundone@coe.int
Web Design:
Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com
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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Fuchsmann v. Germany

On 19 October 2017, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Fuchsmann v. Germany, which concerned the online version of a New York Times article accessible in Germany. The applicant in the case is an internationally active entrepreneur in the media sector, and holds the position of Vice-President of the World Jewish Congress. In June 2001, the New York Times published an article about an investigation into corruption against R.L. The article was entitled "[L] Media Company Faces a Federal Inquiry", and included the statements that the applicant had "ties to Russian organized crime, according to reports by the FBI and European law enforcement agencies", and a "1994 FBI report on Russian organized crime in the United States described [the applicant] as a gold smuggler and embezzler, whose company in Germany was part of an international organized crime network. He is barred from entering the United States."

In July 2002, the applicant sought injunctions against certain parts of the article, including the statements above. Ultimately, in 2011, the Düsseldorf Court of Appeal granted the injunction in so far as the article stated that the applicant had been banned from entering the US. As regards the rest of the statements, the Court of Appeal held that there was a great informational interest on the part of the public in reporting that the applicant, as a German businessman internationally active in the media sector, was suspected by the secret service of being involved in gold smuggling, embezzlement and organised crime. This assessment was not changed by the fact that the criminal offences mentioned had occurred more than sixteen years previously. The court furthermore considered that the reporting made it sufficiently clear that only insights from FBI reports and the law-enforcement authorities were being reported. The court concluded that the defendant had complied with the required journalistic duty of care and that the reporting had relied on sources and background information, which the journalist could reasonably consider reliable. The injunctions were thus refused.

The applicant made an application to the ECtHR, claiming that the domestic courts had failed to protect his reputation under Article 8 of the European Convention on Human Rights (ECHR). In this regard, the Court first held that allegations that the applicant was involved in gold smuggling, embezzlement and organised crime were allegations grave enough for Article 8 to come into play. The Court then considered that the case required an examination of whether a fair balance had been struck between the applicant's right to the protection of his private life under Article 8 and the newspaper's right to freedom of expression under Article 10. The relevant criteria within the context of balancing these competing rights were: the contribution to a debate of public interest; the degree to which the person affected was well-known; the subject of the news report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; and the content, form and consequences of the publication.

Firstly, the Court agreed that the article had contributed to a debate of public interest and that there had been a public interest in the alleged involvement of the applicant and mentioning him by name. The Court also held that a public interest also existed in the publication of the article in the online archive of the newspaper, and noted "the substantial contribution made by Internet archives to preserving and making available news and information". Secondly, the Court held that the Court of Appeal's assessment that there was a certain interest in the applicant as a German businessman internationally active in the media sector, was in compliance with the ECtHR's case law. Thirdly, the Court reiterated that that the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. The Court observed that the main source for the statements regarding the applicant was an internal FBI report and not an officially published report. The Court agreed that there was a sufficient factual basis for the remaining statements at issue. Fourthly, the Court agreed with the Court of Appeal that the article was free from polemical statements and insinuations, and made it sufficiently clear that only insights from reports by the FBI and other law-enforcement authorities were being reported. Moreover, the Court found that the information disseminated had mainly concerned the applicant's professional life and had not divulged any intimate private details. The ECtHR also noted that the Court of Appeal found that the online article was accessible only as a result of a directed search with an online search engine. Therefore, the Court accepted the conclusion of the domestic courts that the consequences of the article in Germany were limited. In conclusion, the Court considered that the Court of Appeal, in balancing the right to respect for private life with the right to freedom of expression, had taken into account and applied the criteria set out in the Court's case-law. Thus, there had been no violation of Article 8.

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• Judgment by the European Court of Human Rights, Fifth Section, case of Fuchsmann v. Germany, Application no. 71233/13 of 19 October 2017
http://merlin.obs.coe.int/redirect.php?id=18863 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

European Court of Human Rights: Frisk and Jensen v. Denmark

On 5 December 2017, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Frisk and Jensen v. Denmark. The applicants in the case were journalists with the public broadcaster Danmarks Radio (DR), and had produced the documentary "When the doctor knows best", broadcast in September 2008. The documentary concerned the treatment of pleural mesothelioma cancer at Copenhagen University Hospital, where consultant S was in charge of treatment. It focused on two types of chemotherapy medication (Alimta and Vinorelbine) used by the hospital, and followed four patients and relatives, and a narrator spoke as a voice-over. During the programme, the narrator stated that "doctors chose to treat her with a substance that has not been approved [in cases of such a diagnosis], and whose effect on pleural mesothelioma cancer is not substantiated". While "there is only one treatment which, in comparative studies, has proved to have an effect on pleural mesothelioma cancer", S "chose not to use that medication on his patients", and "the question remains: why does S carry out tests with Vinorelbine." It "turns out that S has received more than DKK 800,000 over the last five and a half years from the company F. This is the company behind the test medication Vinorelbine. The money has been paid into S's personal research account."

Following the broadcast, the hospital and consultant S instituted defamation proceedings against DR's director, and the two applicants (the journalists concerned), claiming that the programme had made accusations of malpractice. In 2010, the Copenhagen City Court found that the applicants and DR's director had violated Article 267 of the Penal Code, and sentenced them each to fines totalling DKK 10,000 (EUR 1,340), and the applicants jointly liable for costs of DKK 62,250 (EUR 8,355). The High Court of Eastern Denmark upheld the judgment, finding that the programme had given "the impression that malpractice has occurred at Copenhagen University Hospital, in that S deliberately used medication (Vinorelbine) which is not approved for treatment of pleural mesothelioma cancer; the test medication has resulted in patients dying or having their lives shortened; and the clear impression has been given that the reasons for this choice of medication (Vinorelbine) were S's professional prestige and personal finances". The applicants were ordered to pay costs to the hospital and S, totalling DKK 90,000 (EUR 12,080). The applicant journalists made an application to the ECtHR, claiming a violation of their right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The main question for the ECtHR was whether a fair balance had been struck between the right to respect for private life and the right to freedom of expression, and reiterated the criteria for this assessment: the contribution to a debate of general interest; how well-known the person concerned is and what the subject of the report is; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed.

Firstly, the Court held that the programme had dealt with issues of legitimate public interest, namely that it had involved a discussion about risk to life and health, as regards public hospital treatment. Secondly, the criticism had been directed at S and Copenhagen University Hospital, who were vested with official functions, and there was a need for wider limits for public scrutiny. Thirdly, however, the Court noted that the domestic courts had found that the applicants had made allegations that S and the hospital had administered to certain patients suffering from mesothelioma improper treatment, resulting in their unnecessary death and the shortening of their lives to promote the professional esteem and personal financial situation of S., and that those accusations rested on a factually incorrect basis. The Court held that it had "no reason to call into question those conclusions". The Court rejected the applicants' argument the impact of the programme had had various important consequences, inter alia, a public demand for Alimta therapy and a change in practice at Copenhagen University Hospital. The Court stated that the reason why the public demand for Alimta therapy may have increased and Copenhagen University Hospital changed its standard therapy for operable patients to Cisplatin in combination with Alimta, was that the programme, on an incorrect factual basis, had encouraged patients to mistrust Vinorelbine therapy. Fourthly, in respect of the method of the obtaining of the information and its veracity, the Court noted that the domestic courts did not dispute that the applicants had conducted thorough research, over a period of approximately one year. However, the Court held that it had no reason to call into question the High Court's conclusion that the applicants had made accusations resting on a factually incorrect basis, of which they must be deemed to have become aware through the research material. Finally, the Court held that it did not find the conviction and sentence to have been excessive or of such a kind as to have a "chilling effect" on media freedom. Furthermore, the decision that the applicants should pay legal costs did not appear unreasonable or disproportionate. In conclusion, the Court held that the reasons relied upon were both relevant and sufficient to show that the interference complained of was "nec-

essary in a democratic society". Thus, there had been no violation of Article 10 of the Convention.

• Judgment by the European Court of Human Rights, Second Section, case of Frisk and Jensen v. Denmark, Application no. 19657/12 of 5 December 2017
http://merlin.obs.coe.int/redirect.php?id=18862 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

European Court of Human Rights: MAC TV s.r.o. v. Slovakia

On 28 November 2017, the European Court of Human Rights (ECtHR) delivered its judgment in MAC TV s.r.o. v. Slovakia, which concerned the fining of a broadcaster over a television programme's commentary on the death of the late President of Poland. The case involved MAC TV, which operates two private television channels, and broadcasts the television programme "JOJ PLUS". During an episode of the programme broadcast in April 2010, following the fatal plane crash in which the President of Poland, Lech Kaczynski, had been travelling, a commentary was delivered entitled "Compassion in Accordance with Protocol". The commentary included the statement that "Jews, homosexuals, liberals, feminists and left-oriented intellectuals are bitterly sorry for the death of a man who represented an extreme Polish conservativism, and who was a symbol of a country where people who are not white heterosexual Catholic Poles were born as a punishment. I am sorry, but I do not pity Poles. I envy them."

Following the broadcast, the Broadcasting Council initiated administrative proceedings against MAC TV under section 19(1)(a) of the Broadcasting and Retransmission Act, which stipulates the protection of human dignity. The Broadcast Council found that the broadcaster had breached its obligations under the Broadcasting Act, in that the manner of processing and presenting the content of the commentary had interfered with the dignity of the late Polish President, and imposed a fine of EUR 5,000. In particular, the Broadcasting Council concluded that the manner in which the commentator had presented his opinion - that is to say his lack of regret for the Polish President's death - had contravened the duty to respect his human dignity. Moreover, the degree of sarcasm and irony in the broadcast commentary had been so high that its content and the manner in which the author's opinion had been presented had dishonoured the late President. The Broadcasting Council's decision was ultimately upheld by the Supreme Court. MAC TV then lodged an application with the ECtHR, claiming a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) The ECtHR first noted that the Broadcasting Council's decision had constituted an interference with the applicant company's right to freedom of expression, had been prescribed by law under the Broadcasting Act, and pursued the legitimate aim of the protection of the reputation or rights of others (the Court held that it was not required to reach a general conclusion on whether or not the interference created by a measure concerning a deceased person's reputation pursued a legitimate aim). Thus, the main question was whether the interference was "necessary in a democratic society".

Firstly, the ECtHR emphasised that under Article 10 ECHR, very strong reasons were required to justify restrictions on political speech. Secondly, the ECtHR noted that the applicant's reaction to the political governance of the late President and his political conservatism gave rise to a matter of public interest, and the late President, as a public figure, was subject to wider limits of acceptable criticism. Thirdly, the ECtHR noted that the domestic authorities had essentially based their conclusions predominantly on the closing remarks in the commentary ("I am sorry, but I do not pity the Poles. I envy them"). However, in this regard, the ECtHR reiterated that one criterion of responsible journalism is that it should recognise the fact that it is the commentary (or article) as a whole that the reporter presents to the public. The ECtHR held that the domestic authorities' assessment was narrow in scope, and had not been conducted within the wider context of the commentary. The Court considered that the impugned commentary, seen within its context, could not be understood to have constituted a gratuitous personal attack on, or insult to Lech Kaczynski. While it had contained a sarcastic tone that had been unsympathetic to the political ideology of the late President, it had remained within the acceptable degree of stylistic exaggeration used to express the journalist's opinion concerning the political views that the late President had represented. The Court reiterated that journalistic freedom also covered possible recourse to a degree of exaggeration, or even provocation. Thus, the Court considered that nothing in that commentary suggested that the applicant company had overstepped the limits of freedom of expression tolerated under Article 10 ECHR by using a sarcastic tone and ironic language. The Court concluded that the domestic authorities had failed to demonstrate that the interference with the applicant company's Article 10 rights had been necessary, and that there had accordingly been a violation of Article 10. In addition, the ECtHR awarded the applicant company EUR 5,000 in respect of pecuniary damage, EUR 5,850 in respect of non-pecuniary damage, and EUR 6,900 in costs.

• Judgment by the European Court of Human Rights, Third Section, case of MAC TV s.r.o. v. Slovakia, Application no. 13466/12 of 28 November 2017
http://merlin.obs.coe.int/redirect.php?id=18861 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

Parliamentary Assembly: Resolution on the status of journalists in Europe

On 4 December 2017, the Committee on Culture, Science, Education and Media of the Parliamentary Assembly of the Council of Europe unanimously adopted a draft Resolution on the status of journalists in Europe. The Resolution addresses the increasing precariousness of the journalistic profession in the light of the collapse of traditional finance models following technological changes and the development of online media, among other issues. According to the Resolution, the precarity of the profession of the journalist is reflected in several factors: the undermining of editorial independence or staff layoffs; the booming number of freelance journalists; a deterioration in working conditions; and inequality between women and men in the profession.

The rapporteur's explanatory memorandum to the Resolution reflects more deeply on matters relating to journalists' status. As a starting point, the rapporteur's report reflects on how the emergence of blogs, social networks, interaction with users and exchange of information in real time is diminishing previous differences between journalists, experts or mere citizens. Moreover, the status of journalists varies widely from one country to another, bringing the question of how possible or necessary it is to actually definite what a journalist is. The rapporteur's report gives a brief review of journalists' status in Europe, which is defined by law in several countries such as France, Belgium, Georgia and Turkey. Other countries, such as Germany and Poland do not have a legal definition of a journalist. The memorandum also reviews the requirement of press cards and the existence of self-regulatory bodies throughout Europe. According to the report, despite technological developments, professional journalism has remained in essence the same, Hence, the official status of journalists has remained the same. New sources of information have emerged. Moreover, journalists' daily lives are changing by the requirement of new task and skills regarding social media. Furthermore, job insecurity and an explosion in the number of freelancers also poses challenges. Finally, another matter addressed by the memorandum is the gender inequality in media. Among other issues is the pay gap: in the European Union, women journalists earn 16% less than men, while the difference is as high as 24% in countries such as Belgium, where only 30% of journalists are women.

Having regard to these challenges, the Resolution recommends that Member States, among other measures, review their domestic legislation to identify areas to be updated and take into account recent technological and economic developments. Moreover, the Resolution recommends the exploration of avenues for the alternative funding of media, such as the redistribution of advertisement revenue; including freelancers in the scope of labour legislation in terms of minimum pay,; and institutionalising innovatory crowdfunding initiatives. Furthermore, the Resolution establishes measures to be taken in order to tackle gender inequality in media, such as drawing up studies and introducing mechanisms to incite employers' organisations to tackle the problem in the long term. The Resolution also called on trade unions and journalists' organisations to undertake different measures on this subject, such as promoting membership to journalists' trade union, particularly among young people, women and providers and managers of content; promoting the mentoring of young journalists (particularly young female journalists) in order to better equip them against discrimination; stimulating dialogue between professional journalists and other content-provider professions; diversifying themes and fields of training; representing journalists in collective bargaining and agreements; and defending the rights of freelancers in the workplace and within social legislation.

- Parliamentary Assembly of the Council of Europe, Committee on Culture, Science, Education and Media, Laws on the status of journalists in Europe need to be revised, 4 December 2017
http://merlin.obs.coe.int/redirect.php?id=18899 EN FR
- Parliamentary Assembly of the Council of Europe, Committee on Culture, Science, Education and Media, The status of journalists in Europe, 4 December 2017
http://merlin.obs.coe.int/redirect.php?id=18865 EN FR

Emmanuel Vargas Penagos
Institute for Information Law (IViR), University of Amsterdam

EUROPEAN UNION

Court of Justice of the European Union: Judgments on State aid and digital terrestrial television operators in Spain

On 20 December 2017, the Court of Justice of the European Union (CJEU) delivered three judgments concerning measures implemented by Spain for the deployment of digital terrestrial television ("DTT") in remote and less urbanised areas of Spain. All three judgments concerned a 2013 European Commission decision which found that the Spanish system of granting aid to the operators of the terrestrial television platform for the deployment, maintenance and operation of DTT in remote and less urbanised areas was incompatible with EU state aid rules (see IRIS 2013-7/5). The Commission found that the measure did not respect the principle of technological neutrality, it was not proportionate and was not an appropriate instrument for ensuring that the residents of the areas received free-to-air channels. Notably, the

Commission ordered the recovery of incompatible aid from DTT operators.

The first judgment (Joined Cases C-66/16 P to C-69/16 P) concerned the appeal by the Autonomous Communities of the Basque Country, Galicia and Catalonia, and a number of DTT operators. The CJEU rejected all six grounds of appeal put forward by the appellants, which mainly concerned arguments that the General Court, which had upheld the Commission's decision, had erred in its analysis of Member State discretion to define services of general economic interest ("SGEI"), and the first condition laid down in the landmark Altmark judgment that the recipient undertaking must have public service obligations and that the obligations must be clearly defined (see IRIS 2004-7/4 and 2009-5/5). The CJEU held that the General Court had not misconstrued the scope of the review that it had had to carry out in respect of the categorisation of a service as an SGEI by a Member State, since it held that, in the absence of a clear definition of the service at issue as an SGEI in national law, the first Altmark condition was not satisfied. In the second judgment (Case C-81/16 P), the CJEU similarly rejected Spain's appeal in respect of the Commission's decision.

However, in the final judgment (C-70/16 P), the CJEU upheld the appeal by the Autonomous Community of Galicia and the operator Retegal. In particular, the appellants took issue with the General Court for confirming the Commission's analysis concerning the selectivity of the measure at issue, arguing that the Commission's statement of reasons in that connection was inadequate. The CJEU noted that EU law prohibits selective aid - that is to say aid that, under a particular legal regime, favours certain undertakings or the production of certain goods over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. It added that the examination of the condition relating to the selectivity of an aid measure must be supported by sufficient reasons for allowing a full judicial review of the question of whether the situation of the operators benefiting from the measure was comparable with that of the operators excluded from it. The CJEU observed that the General Court considered that the Commission's statement of reasons indicated that the measure in question benefited only the broadcasting sector and that, within that sector, the measure in question applied only to undertakings active on the terrestrial platform market. The CJEU pointed out that neither the Commission's decision nor the General Court's judgment contained any indication of the reasons why (a) undertakings active in the broadcasting sector should be regarded as being in a factual and legal situation comparable to that of undertakings active in other sectors, and (b) undertakings using terrestrial technology should be regarded as being in a factual and legal situation comparable to that of undertakings using other technologies. The Commission argued that no reasoning was necessary in that regard, because the selectivity condition is automatically satisfied if a measure applies exclusively to a specific economic sector or to undertakings in a particular geographic area. The CJEU noted in that regard that a measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective. It is selective only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others (either in a different sector or the same sector) which are, in the light of the objective pursued by that regime, in a comparable factual and legal situation. In the light of this conclusion, the CJEU set aside the judgment of the General Court and annulled the Commission's 2013 decision, on the basis of the infringement of essential procedural requirements.

• Judgment of the Court (Fourth Chamber), Joined Cases C-66/16 P Comunidad Autónoma del País Vasco and Itelazpi v Commission, C-67/16 P Comunidad Autónoma de Cataluña and CTTI v Commission, C-68/16 P Navarra de Servicios y Tecnologías v Commission and C-69/16 P Cellnex Telecom and Retevisión I v Commission, 20 December 2017
http://merlin.obs.coe.int/redirect.php?id=18866 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Judgment of the Court (Fourth Chamber), Spain v Commission, Case C-81/16 P, 20 December 2017
http://merlin.obs.coe.int/redirect.php?id=18867 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Judgment of the Court (Fourth Chamber), Comunidad Autónoma de Galicia and Retegal v Commission, Case C-70/16 P, 20 December 2017
http://merlin.obs.coe.int/redirect.php?id=18868 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

• Commission Decision of 19 June 2013 on State aid SA.28599 (C 23/10 (ex NN 36/10, ex CP 163/09)) implemented by the Kingdom of Spain for the deployment of digital terrestrial television in remote and less urbanised areas (outside Castilla-La Mancha)
http://merlin.obs.coe.int/redirect.php?id=18869 DE EN FR
CS DA EL ES ET FI HU IT LT LV MT
NL PL PT SK SL SV HR

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

European Commission: Member States referred to the Court of Justice of the European Union over collective rights management Directive

On 7 December 2016, the European Commission decided to refer Bulgaria, Luxembourg, Romania and Spain to the Court of Justice of the European Union (CJEU) for their alleged failure to notify the complete transposition of the Collective Rights Management Directive (Directive 2014/26/EU) into their national laws (see IRIS 2014-4/4). The Directive aims to coordinate national rules concerning access to the online music sector by enhancing the workings of collective

management organisations and by increasing transparency. The deadline for its transposition into national law was 10 April 2016.

According to the European Commission, these Member States failed to notify the Commission of the laws, regulations and administrative provisions necessary to comply with the Collective Rights Management Directive. The European Commission sent the Member States a formal letter of notice in May 2016 informing them of the commencement of infringement procedure. The European Commission has proposed daily fines of EUR 19,121 for Bulgaria, EUR 12,920 for Luxembourg, EUR 42,377 for Romania, and EUR 123,928 for Spain. The Commission considered that by failing to notify such provisions to the Commission by 10 April 2016, these Member States had "failed to fulfil their transposition obligations under Article 43 of this Directive."

In a separate infringement case involving Romania, the Commission has also decided to send a letter of formal notice over the implementation of the mandatory collective management system of musical works in May 2016. The Commission considers that Romanian law fails to comply with the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) and the Collective Rights Management Directive.

• European Commission, Collective Rights Management: Commission refers Bulgaria, Luxembourg, Romania and Spain to the Court of Justice, Brussels, 7 December 2017
http://merlin.obs.coe.int/redirect.php?id=18870 DE EN FR
CS DA EL ES ET FI HR HU IT LT LV
MT NL PL PT SK SL SV

Bojana Kostić
Institute for Information Law (IViR), University of Amsterdam

European Commission: Communications on intellectual property rights enforcement

On 29 November 2017, the European Commission published two notable Communications on intellectual property rights enforcement, in particular relating to Directive 2004/48/EC on the enforcement of intellectual property rights ("the Enforcement Directive") (see IRIS 2004-6/3). The Directive provides a minimum set of measures, procedures and remedies allowing the effective civil enforcement of intellectual property rights. The Commission also published an accompanying (72-page) Evaluation of the Directive.

The first Communication, entitled "A balanced IP enforcement system responding to today's societal challenges", describes a package of measures to further improve the application and enforcement of intellectual property rights within EU Member States, at EU borders, and internationally. In this regard, the Communication is divided into four main sections: the first concerns measures to make it easier for IP stakeholders to benefit from a homogeneous, fair and effective judicial enforcement system in the EU, and includes actions and recommendations to further enhance judicial capacity and predictability in the EU. These measures include the Commission providing a new Guidance (described below) on the interpretation and application of the measures, procedures and remedies provided for by the Enforcement Directive. Furthermore, the Commission calls on Member States to encourage the specialisation of judges in IP- and IP-enforcement-related matters, and to systematically publish judgments rendered in IP enforcement case. The second set of measures concerns support for industry-led initiatives to combat IP infringements, such as voluntary agreements with intermediaries, including the conclusion of a new memorandum of understanding aimed at withholding advertising on IP infringing websites. The third and fourth measures concern enhanced administrative cooperation between authorities in different Member States, and how the Commission seeks to combat IP infringements on a global scale by promoting best practices and stepping up cooperation with third countries.

The second Communication is a new (32-page) Guidance to clarify provisions of the Enforcement Directive. The Commission notes that since the Directive provides for minimum harmonisation, there is no uniform interpretation of the Directive's provisions. Thus, the Guidance seeks to facilitate the Directive's interpretation and application by competent judicial authorities and other parties involved in the enforcement of intellectual property rights ("IPR") in proceedings before those authorities. The Guidance focuses on a number of provisions in the Directive, including those relating to scope, general obligation, entitlement to apply for measures, procedures and remedies, the presumption of authorship or ownership, injunctions, corrective measures, and the calculation of damages. The Guidance also seeks to clarify the concept of an intermediary, stating that economic operators which provide a service capable of being used by other persons in order to infringe IPR can, depending on the facts, be categorised as intermediaries within the meaning of Articles 9(1)(a) and 11 of the Directive, also in the absence of a specific relationship, such as a contractual link, between those parties. Finally, the Guidance also discusses the scope of injunctions, and that judicial authorities may, where appropriate, issue injunctions which entail specific monitoring obligations.

The Commission also published an Evaluation of the functioning of the Enforcement Directive. The Evaluation concluded that it has achieved the objective of approximating the legislative systems of the Member States for the civil enforcement of IPR, but also recognises that that there are differences in the way Member States apply certain provisions of the Directive (such as those on injunctions, damages and le-

gal costs) across the Single Market, thereby limiting the effectiveness of the Directive. It would benefit from more best practices for public exchange, more transparency on IP-related case law and more national judges able to deal with IPR infringement claims.

• Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A balanced IP enforcement system responding to today's societal challenges, COM(2017) 707 final, 29 November 2017
https://ec.europa.eu/docsroom/documents/26581 DE EN FR

• Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, COM(2017) 708 final, 29 November 2017
http://merlin.obs.coe.int/redirect.php?id=18904 DE EN FR

• Commission Staff Working Document, Evaluation accompanying the document Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, SWD(2017) 431 final
http://merlin.obs.coe.int/redirect.php?id=18905 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

NATIONAL

AT-Austria

Free Stream does not violate net neutrality

On 18 December 2017, the Telekom-Control-Kommission (Telecom Control Commission - TKK), Austria's regulatory body for the telecommunications market, decided that the 'Free Stream' telecommunications service provided by A1 does not violate net neutrality. 'Free Stream' is a so-called zero-rating service, which means that data is streamed to customers for specific services free of charge. Users can stream videos and music from specific partners (for example, YouTube or Spotify) without the data coming out of the allowance stipulated under their contract. After the service was notified to the TKK, the latter instigated proceedings against A1 on the grounds that the service could be violating the net neutrality principle enshrined in Regulation (EU) 2015/2120.

In its decision of 18 December 2017, the TKK ruled that the so-called 'traffic shaping' operated by A1 infringed Article 3(3)(3) of Regulation (EU) 2015/2120. This involves throttling the speed of streaming services provided as part of the 'Free Stream' service in order to reduce the picture quality of some videos. The TKK considered this a form of manipulative interference in data traffic; it was to the detriment of users and did not fall under any of the exceptions mentioned in Article 3(3) of Regulation (EU) 2015/2120. In this respect, A1 was instructed to improve the service within eight weeks, although it could appeal against the decision.

However, the TKK did not object to the zero-rating itself and did not think the 'Free Stream' service violated net neutrality. It ruled that Regulation (EU) 2015/2120 did not explicitly ban such services. Such agreements would only be inadmissible under Article 3(2) of the regulation if they amounted to a 'commercial practice' that materially reduced end-users' choice concerning available services, applications or content (according to Recital 7 of the regulation).

With this ruling, the TKK aligned itself with a series of decisions by European regulatory authorities that found zero-rating services compatible with net neutrality.

• *Bescheid der Telekom-Control-Kommission vom 18. Dezember 2017 (R 5/17-11)* (TKK decision of 18 December 2017 (R 5/17-11))
http://merlin.obs.coe.int/redirect.php?id=18915 DE

Sebastian Klein
Institute of European Media Law (EMR), Saarbrücken/ Brussels

Media policy in government programme

Austria's new People's Party/Freedom Party coalition has unveiled its government programme for the legislative period until 2022, which contains a number of elements related to media policy.

The programme describes the media landscape as being in a period of radical change, digitisation as progressing rapidly and the resulting upheavals as so serious that media policy needs to be completely overhauled. In particular, it says that politicians must ensure that the media provide specifically Austrian content.

The government programme lists five objectives in this regard: the further development of the public service remit; the active promotion of Austrian content; the creation of fair conditions in a global digital market; the structural reform of media institutions and authorities; and a public debate on basic media policy issues.

In order to further develop the public service remit, the programme aims to ensure that high-quality news content is offered to as many people as possible in order to strengthen democratic public debate. The focus should be not only on Austrian content, but also on protecting Austria's identity by promoting Austrian artists, sportsmen/women, and producers.

With regard to the second objective, the active promotion of Austrian content, the government is committed to comprehensive digitisation as far as this is possible in the expansion of online media, in particular in television, radio and the press. This would be achieved by creating a modern legal framework and adapting aid mechanisms in order to give Austrian media companies freedom to innovate and flexibility for the necessary processes of change. Support for up-and-coming journalists through training provided by Austrian media companies will also play a prominent role.

Fair conditions in a global digital market would be created through measures designed to establish a level playing field in all areas of competition. This will require close alignment with EU law. However, if this proves unfeasible, the necessary steps will, as far as possible, be taken through Austrian legislation. The Republic of Austria will therefore strive, if necessary, to provide the initial impulse for a pan-European solution in order to create the basic conditions for international media companies that will enable national media companies to survive in the market.

In order to achieve the fourth objective, that is, the structural reform of media institutions and authorities, the different sources of funding will be streamlined and made clearer, including in the field of film aid. Companies and authorities with outsourced responsibilities, such as the RTR (regulatory authority for broadcasting and telecommunications) and KommAustria, will be restructured. The Medientransparenzgesetz (Media Transparency Act) will also be evaluated with the aim of reducing bureaucracy.

Since all these media policy reforms are highly relevant to democracy, the widespread involvement of stakeholders and of the public as a whole will be sought. For this reason, the government is planning, in preparation for the package of media measures, to organise a comprehensive media enquiry involving all stakeholders and civil society.

Another aspect of the programme that is relevant to media policy is the digital policy that is designed to enable Austria to take a leading role in future global competition.

• *Regierungsprogramm 2017-2022* (Government programme 2017-2022)
http://merlin.obs.coe.int/redirect.php?id=18914 DE

Bianca Borzucki
Institute of European Media Law (EMR), Saarbrücken/ Brussels

BG-Bulgaria

Amendments to the Radio and Television Act

Two amendments were made to the Radio and Television Act (RTA) in December 2017. One of the changes concerns the reduction of the administrative burden for applicants who want to provide media services. The amendments envisage for the Council for Electronic Media (CEM) to officially request (ex officio) electronically from the National Revenue Agency, the Customs Agency and the municipalities information for the respective candidate on the presence or absence of obligations to the public authorities, and they come into effect as of 1 January 2018 (published on 17 November 2017 in the Official Gazette, issue 92).

At the same time, another amendment to the RTA came into force on 1 January 2018 (published on 12 December 2017 in the Official Gazette, issue 99). In section 2, paragraph 4 of the Transitional and Final Provisions of the RTA, it is envisaged that from 1 January 2019, the state budget subsidy for the Bulgarian National Radio (BNR), the Bulgarian National Television (BNT) and the Council for Electronic Media be entirely replaced by funding from the Radio and Television Fund.

In its original design (in 1998), the law provided that the funding for public service media and the CEM be made entirely by the Radio and Television Fund after 2007 and not by the state budget:

The resources of the Radio and Television Fund shall be disbursed for: the financing of the BNR and the BNT; the financing of the Council for Electronic Media; the financing of projects of national importance involving the implementation and use of new technologies in radio and television broadcasting activities; the financing of significant cultural and educational projects; the financing of projects and activities designed to extend the audience and/or territorial reach of radio and television programme services; the management of the Fund; and the National Electric Company EAD, in connection with the collection of the fees (Article 103, paragraph 1 of the RTA).

According to Article 102, paragraph 1 of the RTA, the resources in the Radio and Television Fund shall be raised from: the monthly fees charged for the reception of radio and television programme services; the initial and annual licence fees or registration fees, as the case may be, as collected by the Council for Electronic Media; the interest on the resources raised in the Fund; donations, legacies and bequests; or from other sources as specified in a statute.

A monthly fee shall be charged for the purpose of financing public-service radio and television broadcast-

ing activities on the basis of each registered electric meter (Article 93, paragraph 1 of the RTA). The fee herein shall be paid together with the sums due for electricity consumption according to the applicable procedure through the pay desks of the power supply utilities of the National Electric Company EAD (Article 95 of the RTA). However, the National Electric Company EAD was privatised, and over the years no fund-raising mechanism has been set up. That is why the legal text about the financing of the BNR, BNT and CEM annually postpones funding from the Radio and Television Fund after 2007. It is expected that the reform for the financing of the public service media in Bulgaria will be carried out with the changes in the RTA after the transposition of the Audiovisual Media Services Directive in the national legislation.

• ЗАКОН ЗА РАДИОТО И ТЕЛЕВИЗИЯТА (Radio and Television Act (consolidated version))
http://merlin.obs.coe.int/redirect.php?id=18913 BG

Rayna Nikolova
New Bulgarian University

CH-Switzerland

SSR's new licence put into circulation

On 19 December 2017 the Federal Department for the Environment, Transport, Energy and Communication (DETEC) circulated the draft of the new licence for the Swiss public broadcasting company (Société Suisse de Radiodiffusion et Télévision - SSR). The draft implements the recommendations made on 17 June 2016 by the Federal Council in its report on public service broadcasting (see IRIS 2016-8:1/6). The new licence increases the demands made of the SSR in the fields of information, culture, training, entertainment and sport. In particular, the draft stipulates that expenditure devoted to news should represent at least 50% of the revenue collected from the licence fee. It also lays down specific demands regarding the quality of the content broadcast by the SSR, mainly by requiring entertainment programmes to be clearly distinguishable from programmes broadcast by the commercial channels.

The SSR will be required to strengthen its exchange schemes with the various language regions of Switzerland. It will also have to step up its efforts to integrate of people with a migrant background and people with sensory disabilities. The new licence also requires the SSR to target young people more closely, by offering them - particularly on social networks - programming offers that correspond to their specific requirements. To bring down the average age of its audiences, the SSR is invited to take more risks with regard to creation and innovation, making use of the potential offered by the new technologies.

The draft licence requires the SSR to collaborate more closely with private Swiss broadcasters in the fields of sport and entertainment. The SSR should also strengthen its collaboration with press editors by developing content-sharing. The SSR will also be required to step up its dialogue with the public: the new licence requires that it communicate regularly on its programming policy, assess the application of its policy, and discuss the results in public.

The political parties, the Swiss cantons, and other interested parties have until 12 April 2018 to send in their comments on the draft of the licence. It will be a transitional licence, entering into force on 1 January 2019 and remaining valid until the end of 2022, when it will be replaced by a new licence once the legislation on the electronic media that is currently being drawn up replaces the current Radio and Television Act (loi sur la radio et la télévision - LRTV). The draft of the new licence will be abandoned, however, if the Swiss population accepts the "No Billag" initiative on 4 March 2018. The initiative calls for the abolition of the licence fee and any other form of public funding for radio and television. Apart from the SSR, thirty-four regional radio stations and television companies currently receive part of proceeds from the licence fee.

It should also be noted that in October 2017 the Federal Council decided to lower the annual amount of the licence fee from the current CHF 451 to CHF 365, starting in 2019, when the new system for collecting the fee comes into force. The Federal Council has also capped at CHF 1.2 billion per year the proportion of the licence fee to be made over to the SSR; this is CHF 50 million less than under the present arrangement.

• *Projet de concession SSR et rapport explicatif du DETEC du 19 décembre 2017* (Draft concession for the SSR and explanatory report by the DETEC of 19 December 2017)
http://merlin.obs.coe.int/redirect.php?id=18917 DE FR IT

Patrice Aubry
RTS Radio Télévision Suisse, Geneva

CZ-Czech Republic

Czech television starts transition to DVB-T2-Standard

The Czech public service broadcaster, Česká televize (ČT), has announced the start of its transition to the DVB-T2 HEVC standard following a delay caused by an amendment to the Electronic Communications Act

that only came into force on 2 September 2017. Under the amended timetable, technical preparations are now due to take place between January and March 2018, before the broadcaster can begin using the transition multiplex. By the end of June 2018, 95% of the population will be able to receive the new broadcast standard, and the switch to DVB-T2 HEVC should be complete throughout the Czech Republic by June 2020. Transmitters using the outdated DVB-T standard, which is still currently in use, will be gradually shut down from mid-2019 onwards.

The two chambers of the parliament in Prague had originally approved the switch to the new DVB-T2-HEVC standard, which is necessary in order to prevent potential disruption around the German and Austrian borders. Many Czech viewers need to buy new TV sets, which the government estimates will cost around EUR 200 each.

The Czech Parliament had adopted the Electronic Communications Act on 22 February 2005. The main changes brought in by the Act were designed to facilitate market access through the introduction of a new system for issuing and cancelling licences. In compliance with EU regulations, individual licences only covered the use of frequencies and telephone numbers. Another important innovation was the introduction of regular analysis of relevant markets, which make it possible to implement flexible, transparent regulatory measures for the electronic communications market.

The act also increased some of the powers of the Czech Telecommunications Office (ČTÚE), an independent monitoring body for the telecommunications sector that performs regulatory functions and routine administrative tasks, mainly in relation to the application of the Telecommunications Act. As the independent national regulator responsible for electronic communications, the ČTÚE monitors infrastructure-related aspects of electronic communications networks and services. Another important part of its role is to arbitrate in disputes related to broadcasting. Under the new law, it has flexible powers to impose special obligations on providers with substantial market power.

• *Část diváků ČT musí přeladit. Kvůli přechodu na druhou generaci digitální televize, 13.12.2017* (Press release of 13 December 2017)
http://merlin.obs.coe.int/redirect.php?id=18881 CS

Ingo Beckendorf
Institute of European Media Law (EMR), Saarbrücken/ Brussels

DE-Germany

Federal Supreme Court rules on admissibility of Tagesschau app

In a decision of 14 December 2017, the Bundesgerichtshof (Federal Supreme Court - BGH) rejected an application for permission to appeal filed by Norddeutscher Rundfunk (NDR) concerning the long-running proceedings relating to the Tagesschau app.

The case concerned the nature of the Tagesschau app on a specific date: 15 June 2011. The plaintiffs are publishing companies that sell newspapers in printed form and/or as Internet- and app-based services. Their argument against the providers of the Tagesschau app, the ARD, and NDR in particular, was that the app was too 'press-like'.

The case was initially heard in 2013 by the Oberlandesgericht Köln (Cologne Appeal Court - OLG Köln), which rejected the complaint (case no. 6 U 188/12). The plaintiffs' 2015 appeal to the BGH was successful as regards NDR. In its subsequent ruling of 30 September 2016, the OLG Köln declared that the Tagesschau app on the aforementioned date had been unlawful and banned the distribution of that version of the app. NDR's subsequent application for permission to appeal has now also been rejected, as a result of which the OLG Köln's 2016 ruling has full legal effect.

The plaintiffs had accused the defendants, ARD and NDR, of infringing Articles 11d and 11f of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), which should be treated as rules on market behaviour in the sense of Article 4(11) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG), and of failing to properly apply the three-step test required under the RStV.

The BGH ruled that the aforementioned three-step test had only been applied to the abstract concept of the app, but not to its practical form. Furthermore, the test had only been applied to one of the earlier versions of the online service. The second half-sentence of Article 11d(2)(1)(3) RStV had been breached and, since this was a rule on market behaviour, claims could be justified under the UWG. The approval granted by the Niedersächsische Staatskanzlei (Lower Saxony State Chancellery) had only been based on the abstract concept and was therefore not legally binding in the procedure at hand. In this respect, the BGH agreed with the plaintiffs.

The OLG Köln now had to decide whether the service in question had been 'press-like'. The BGH explained that the determining factor was not whether individual content was press-like, but whether, when viewed as a whole, the content available via the Tagesschau

app on 15 June 2011 should be categorised as press-like. This would be the case if it mainly comprised written text.

According to the appeal ruling, the benchmark when deciding whether a telemedia service was press-like was its similarity to "printed editions of newspapers and magazines".

In the end, the OLG concluded that the app had, when viewed as a whole, been press-like on the selected date and banned its distribution, as mentioned above.

• *Urteil des OLG Köln vom 20. Dezember 2013, Aktenzeichen 6 U 188/12* (Ruling of the Cologne Appeal Court of 20 December 2013, case no. 6 U 188/12)
http://merlin.obs.coe.int/redirect.php?id=18916 DE

• *Pressemitteilung des BGH zur Revision vom 30. April 2015* (Press release of the Federal Supreme Court on the appeal of 30 April 2015)
http://merlin.obs.coe.int/redirect.php?id=18882 DE

• *Urteil des OLG Köln vom 30. September 2016* (Ruling of the Cologne Appeal Court of 30 September 2016)
http://merlin.obs.coe.int/redirect.php?id=18883 DE

Maike Servas
Institute of European Media Law (EMR), Saarbrücken/ Brussels

ES-Spain

CAC adopts its first report on pluralism in current affairs debates programmes

On 29 November 2017, the Catalan Audiovisual Council (CAC) adopted a Report on pluralism in current affairs debates programmes. It is the first report from the Catalan authority which analyses the level of current affairs debates programmes broadcast in Catalonia, and it is considered as a methodological model for possible systematisation and inclusion in the global analysis of pluralism carried out by the Council in their monthly reports.

The 100-page report responds to Motion 63/XI of the Parliament of Catalonia, approved unanimously by all parliamentary groups, which urged the CAC to analyse the plurality, the weighting of the diversity of voices, and the gender parity in all the current affairs programmes broadcast by the Catalan Broadcasting Corporation, with special attention being paid to the spaces for opinion, such as discussions, debates or interviews.

In this framework, the CAC report presents the results of the methodological analysis of pluralism of opinion between 11 September 2017 and 30 September 2017 in the current affairs debates broadcast by TV3, 3/24, TVE in Catalonia, La1, Canal 24H, Telecinco, Antena 3 TV and La Sexta. A total of 125 debates and special programmes were analysed. For each programme analysed, the CAC report states the people who participated in the debates, the topics related to the object of analysis and the positioning of the participants in relation to a specific analysis question.

• *Consell de l'Audiovisual de Catalunya, El pluralisme als espais d'opinió de la televisió* (Catalan Audiovisual Council, report on pluralism in the current affairs debates programmes, 29 November 2017)
http://merlin.obs.coe.int/redirect.php?id=18880 CA

Mònica Duran Ruiz
Catalan Audiovisual Council

FR-France

Television film infringe copyright of works by a Resistance author

On 22 December 2017, the court of appeal delivered a noteworthy decision reiterating the conditions defining infringement of copyright when an audiovisual work is an adaptation of a literary work. In the case at issue, the holders of rights in respect of the work of Charlotte Delbo, an iconic figure in the French Resistance and author of six books detailing her time spent as a political prisoner in La Santé prison, at Auschwitz, and in the Raisko commando, brought proceedings for infringement of copyright against France Télévisions, one production company, and two scriptwriters. They claimed that twelve characteristic scenes of the works in question had been used in a script and a television film entitled Rideau Rouge à Raisko and that descriptions of very characteristic places and objects, together with characteristic expressions and turns of phrase, had also been used. The main argument advanced by the producer and the co-scriptwriters was that the disputed points referred to historic events which Charlotte Delbo had experienced in person but which could not be covered by copyright. The court rejected the claim that copyright had been infringed, and the rightsholders lodged an appeal.

The court reiterated that in respect of literary matters, the re-use of an idea or theme did not constitute infringement of copyright - but only the reproduction of the expression used, or the form in which an idea or theme was expressed (particularly with regard to the composition of the subject, the sequence of situations or scenes, and original characteristics that gave the work its own specific physiognomy. However, although historical events could not be covered by copyright, the same did not apply to the original narration of such historical events by an author. It was noted that, in the case at issue, while what Charlotte Delbo wrote did indeed relate to the time she spent in concentration camps, the events in question were nevertheless recounted in a literary fashion, and in a form that was specific to her and unrelated to a

collection of historical facts or even a documentary narrative.

Furthermore, an adaptation of the works of Charlotte Delbo had been claimed clearly in a director's project note and in a letter of commitment on the part of France Télévisions, so the respondents could not claim that the books had not been their main source of inspiration for the audiovisual adaptation of the scenario at issue - even though the scriptwriters had manifestly also researched the subject for themselves. Moreover, even if it were limited to a professional audience, the showing of the film constituted dissemination, including the dissemination of the scenario. The court also referred specifically to the analytical tables describing and comparing scenes from the books with scenes from the film. It found that although Charlotte Delbo's deportation did indeed constitute a historical fact, infringement of copyright with regard to the six books, as originally claimed, had been constituted by: the repeated similarities in the composition of the works at issue (as noted); the development and organisation of ideas; the use of original turns of phrase from the initial works; the adoption of the approach that is specific to those works; the use of specific expressions employed by the author in her writings; and the use of particular situations and metaphors. The similarities did indeed concern original elements for which the author had constructed her own narrative and descriptive choices which went beyond the mere narration of historical facts. Nor could the respondent production company claim the exception for "short quotation", since the borrowings were repeated and the film at issue and its script did not constitute a critique of Charlotte Delbo's works (nor an instrument used in argument, nor an educational, scientific or informative work), but rather a fictional programme directed at the general public.

Regarding remedial measures, the court found a ban on using the disputed scenario disproportionate, since the use made of the works at issue had been only partial. Nor could a ban on the commercialisation and broadcasting of the television film be upheld, since the case did not concern all the co-authors. Taking into account the fact that the use made of the original works was partial, that the disputed film has only been shown to professional audiences, and that this showing of the television film constituted a dissemination of its definitive script, the court found it could not concur with the appellants' claim for a flat-rate sum of EUR 250,000 each in respect of the financial loss suffered. The respondents jointly and severally were ordered to pay EUR 40,000 euros to the rightsholders as compensation for their loss.

• *Cour d'appel de Paris (pôle 5, ch. 2), 22 décembre 2017 - Les Editions de Minuit, Y. Riera et a. c/ Native, France Télévisions et a.* (Court of appeal of Paris (section 5, chamber 2), 22 December 2017 - Les Editions de Minuit, Y. Riera and others v. Native, France Télévisions and others) FR

Amélie Blocman
Légipresse

Decree concerning the ban on advertising in children's programmes on public TV

On 22 December 2017, a decree was adopted amending several elements of the terms of reference of France Télévisions. The first, main amendment concerns the entry into force of Act no. 2016-1771 of 20 December 2016 banning commercial advertising in children's programmes on public television (see IRIS 2017-1/13). As of 1 January 2018, France Télévisions programmes aimed primarily at children under the age of 12 no longer contain advertising (other than generic messages promoting goods or services related to children's health and development or general interest campaigns). This restriction applies during and for fifteen minutes before and after these programmes. It also applies to all messages transmitted on the websites of these same national television services that offer programmes aimed primarily at children under the age of 12. Without listing the Act's provisions concerning the services in question, the decree states, in the new Article 27-1 of the terms of reference, that commercial advertising will be banned during programmes aimed primarily at children under 12 provided to the public by the on-demand audiovisual media services and online public communication services of France Télévisions. This concerns commercial messages directly associated with programme viewing - in particular pre-roll advertising - on France Télévisions' digital platforms, such as france.tv. It also covers on-demand audiovisual media services and online public communication services - or parts thereof - that are aimed primarily at children under 12. In particular, these include the Ludo and Zouzous platforms and applications, as well as sections or tabs of public platforms such as france.tv specifically dedicated to children under 12. This therefore concerns all forms of commercial messages, including banners and pre-roll ads.

The decree also amends, in the terms of reference, the extent of the rights granted by producers to France Télévisions concerning animated works in order to take into account their most recent professional agreement of 31 March 2017. For all works, the text also specifies that, with regard to the part of the contribution that is not dedicated to the development of independent production and that is made with independent production companies, the company will respect the exploitation conditions set out in professional agreements.

Finally, the decree changes the extent of the rights granted for documentary and live entertainment programmes in order to comply with the latest professional agreements between France Télévisions and organisations representing the producers of audiovisual works.

• *Décret n°2017-1746 du 22 décembre 2017 portant modification du cahier des charges de la société nationale de programme France Télévisions* (Decree no. 2017-1746 of 22 December 2017 amending the terms of reference of national broadcaster France Télévisions)
http://merlin.obs.coe.int/redirect.php?id=18920 FR

Amélie Blocman
Légipresse

Public audiovisual reform bill announced

On 3 January 2018, at his new year reception for the media, the President of the Republic, Emmanuel Macron, confirmed that a public audiovisual reform bill would be tabled in 2018. He thought it was "necessary to hold a detailed and very dispassionate review of public audiovisual regulations". Therefore, by the end of the first quarter of 2018, the committee working on behalf the Minister of Culture, Françoise Nyssen, will submit shared, costed and structured proposals for the "ambitious transformation of the public audiovisual sector" that she announced on 21 December 2017. Input will be provided from various sources: interviews will be conducted with audiovisual stakeholders in France and abroad, consultations will be held with the parliamentary working group set up to examine this issue and meetings will take place with the heads of the public audiovisual institutions. The Minister of Culture described five areas of work to be covered by the proposals, as well as a timetable: 1) recapturing young audiences ("thinking about editorial content, as well as media and new types of use"); 2) international cooperation ("in particular, developing foreign-language programmes, coproductions and cooperation in relation to distribution"); 3) local services ("increasing cooperation between regional television and radio networks"); 4) joint online services ("treating public broadcasters as global media"); 5) strengthening synergies on common public audiovisual resources ("especially training - a major factor for dealing with changes to the audiovisual sector"). The main question concerns content and how public broadcasters reach their audiences. Their governance does not appear to be a priority at the present time.

The President of the Republic also castigated the so-called "fake news" phenomenon, especially during election campaigns, and promised that a new bill to combat it would soon be tabled. "During elections, content on Internet platforms will not be subject to the same rules," he announced. Emmanuel Macron also said that, following a full review, the CSA (the national audiovisual regulator) would be given extra powers during 2018 "to fight any destabilisation attempt by television channels controlled or influenced by foreign states". In particular, taking into account all their content, including Internet-based output, the audiovisual regulator will be able to refuse to sign agreements with such channels. It will also be able to suspend or cancel such agreements if any attempt is made to affect the election result, whether during the pre-election or election period. These new measures will require technical intermediaries to respond quickly by removing any illicit content as soon as it is brought to their attention.

• *Discours du Président de la République Emmanuel Macron à l'occasion des vœux à la presse, 3 janvier 2018* (Speech of the President of the French Republic, Emmanuel Macron at his new year reception for the media, 3 January 2018)
http://merlin.obs.coe.int/redirect.php?id=18886 FR

Amélie Blocman
Légipresse

CSA defends respect for women

The national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) has taken the high moral ground in its supervision of the way women are treated in the audiovisual media. At its latest plenary assembly, on 20 December 2017, it announced a record fine of EUR 1 million against the youth-oriented radio station NRJ, and served formal notice to France Télévisions to comply with its undertakings with regard to combating violence against women. The fine imposed on NRJ follows the broadcasting - during the "C' Cauet" programme on 9 December 2016 - of a hoax telephone call during which the perpetrators made comments deemed "degrading" about the physical appearance of the woman who was being hoaxed, together with insults and derogatory remarks about her private life. During the broadcast, a listener phoned her sister-in-law to announce that she had had sexual relations with the latter's spouse, referring to her as, among other things, a "fat sow". The radio station had already been served formal notice at the end of 2016 for "serious failings" concerning its lack of respect for the image of women and the protection of children in a number of broadcasts of the same programme. The presenter was sacked last summer.

The CSA held firstly that what was said constituted a serious disregard for the provisions of Article 3-1 of the Act of 30 September 1986, under which the CSA is required to ensure respect for women's rights in the field of audiovisual communication. It must pay special attention to the way in which women are portrayed in programmes, with a view in particular to combating stereotypes, sexist prejudice, degrading images, violence against women and violence within couples. The public audiovisual services are also tasked with combating sexist prejudice and violence against women by broadcasting programmes about these subjects. To achieve this, they are to pay particular attention to programmes broadcast by audiovisual communication services that are directed at children and young people. The CSA also considered

that, since the victim of the hoax had been publicly humiliated and placed in a manifestly distressing and vulnerable position, the broadcasting of this sequence constituted a failure to comply with the stipulations of Article 2-6 of the licence of the NRJ radio station of 2 October 2012. Moreover, the allegedly humorous nature of the sequence could not exonerate the editor of its responsibility, any more than could consent on the part of the victim to the broadcasting of the sequence. NRJ has announced that it has appealed to the Conseil d'État against the fine, "which it considers to be unfair and totally disproportionate".

The CSA has also issued a formal notice against France Télévisions, further to the broadcasting on the programme "On n'est pas Couché" broadcast on 30 September 2017 of a sequence showing Sandrine Rousseau, a former EELV party MP, who had come to present her work on the sexual aggression she had suffered. After viewing the sequence, the CSA noted that while the guest had wanted to highlight the shortcomings she had witnessed in the care of victims of sexual assault and to offer solutions to help women victims of sexual assault, the programme's commentators had virulently, systematically and at length questioned the usefulness of her actions, without taking into account her manifest vulnerability, and without respect either for what she had to say or for her commitment to the issue. More specifically, several remarks by the presenter Laurent Ruquier had manifested an indulgent attitude towards the prejudice displayed by the programme's commentators in respect to what was a particularly serious and painful subject.

The CSA also found that France Télévisions had deliberately chosen not to broadcast a sequence during which the programme's female commentator, Christine Angot, had left the set. The company had, however, retained the sequences during which the guest had not managed to control her emotion when faced with Ms Angot's attitude and what the two commentators were saying. This deceptive mode of editing had been such as to prevent viewers gaining a proper understanding of how the debate had proceeded.

The CSA accordingly served formal notice on the company France Télévisions on the grounds of its failure to comply with the combined provisions of Articles 3-1 and 43-11 of the Act of 30 September 1986 (which give France Télévisions particular responsibility with regard to combating violence against women), together with those of Article 35 of the mission statement of France Télévisions. It also stressed that the national programme company France Télévisions, by virtue of the public-service missions entrusted to it, had a particular duty to abide by its duty to be exemplary in its treatment of matters involving violence against women. In the event, France Télévisions did not wait for the formal notice to be served: it announced last week that the presenter, "Tex", had been sacked after making jokes about battered wives.

• *CSA, assemblée plénière, décisions du 20 décembre 2017* (CSA, plenary assembly, decisions adopted on 20 December 2017)
http://merlin.obs.coe.int/redirect.php?id=18919 FR

Amélie Blocman
Légipresse

GB-United Kingdom

ITV had not breached an individual's privacy by identifying her partner who was a police suspect

On 18 December 2017, Ofcom issued its notable decision concerning privacy and the identification of individuals mentioned in criminal investigations. On 20 April, 2017, theindependent commercial television channel, ITV, broadcast an episode of Detectives, which is a factual programme that follows police detectives as they investigate crimes. In this episode, they show extracts of a police interview with Mr Lazenby, who is suspected of committing rape. During the police interview, the detectives ask Mr Lazenby whether he is in any relationships and whether they involve sexual intimacy. Mr Lazenby mentions Mrs T, whom he had met through a dating agency. Mrs T's name is obscured in the broadcast material. One of the questions asked is "Okay, are you still in a sexual relationship with [name obscured]". During the police interview, Mr Lazenby tried to deny the sexual relationship with Mrs T but then changed his mind. The programme producers considered that this aspect of the police interview was crucial to the investigation and relevant for inclusion in the broadcast. Mr Lazenby was charged and subsequently found guilty of rape and sexual assault against the third party. The court trial and conviction occurred prior to the April 2017 broadcast.

Prior to the broadcast, the producers contacted Mr Lazenby's partner, Mrs T, about the content and assured her that her name would not be mentioned. Mrs T asked that the section not be shown, that Mr Lazenby's name not be mentioned, or that his face be obscured. Mrs T considered that there was sufficient detail to reveal her identity, as people in the vicinity to where they lived would recognise Mr Lazenby and associate him with Mrs T, and she was concerned that this may lead to retribution, as well as have a negative impact on her private life and work life. The broadcaster argued that the programme makers had to carefully weigh the element of public interest in the broadcast against Mrs T's privacy. Mrs T's name was obscured and some of the questions, such as the one asking when Mr Lazenby and Mrs T last had sex, were excluded from the broadcast. However, the broadcaster was fully entitled to identify Mr Lazenby, especially as prior to broadcast he had been convicted at

court and the trial had been covered by the media. As such, information about Mr Lazenby and Mrs T at the time of broadcast was no longer private, given the prior extensive press coverage of the trial. The broadcaster considered it highly likely that prior to broadcast, anyone who knew Mrs T would be aware of her relationship with Mr Lazenby.

Ofcom, when exercising its statutory duties concerning broadcast standards, had to provide adequate protection to members of the public and all other persons from unjust treatment and unwarranted infringement of privacy in, or in connection with obtaining material included in, programmes. Further, Ofcom applied Rule 8.1 of its Code of Conduct which "states that any infringement in privacy in programmes, or in connection with obtaining material included in programmes, must be warranted". The Code of Conduct at section 8 contains practices to be followed by broadcasters, but as Ofcom observed, following these practices did not mean a breach of privacy would be avoided. If the practices are not followed, then there will only be a breach of privacy where it results in an unwarranted infringement of privacy. Each case had to be assessed on its own facts and circumstances. Ofcom considered that Mr Lazenby would have been recognised and the association with Mrs T would have been known to a limited number of people who knew him and Mrs T and already knew of their relationship. Certain details were omitted and Mrs T's name was not mentioned; in any event, a publicised court trial occurred ahead of transmission. In the circumstances, Mrs T did not have a legitimate expectation of privacy concerning the information revealed in the programme, and it was not necessary for Ofcom to consider whether any infringement of privacy was warranted, so her complaint was dismissed.

• Ofcom, Broadcast and On Demand Bulletin, Issue number 344, 18 December 2017, p. 23
http://merlin.obs.coe.int/redirect.php?id=18908 EN

Julian Wilkins
Blue Pencil Set

Claim of joint authorship rejected by the IPEC in the Florence Foster Jenkins case

On 22 November 2017, the Intellectual Property Enterprise Court (IPEC) in London, which is part of the Business and Property Court of the High Court of Justice, considered in Martin & Anor v Kogan & Ors the nature and extent of the defendant's contribution to the writing of a screenplay, and whether that contribution was sufficient to give rise to joint authorship in a copyright work within the meaning of section 10(1) of the Copyright, Designs and Patents Act 1988.

The dispute arose between Nicholas Martin, a professional writer of film and television scripts, and Julia Kogan, a professional operatic singer, over the screenplay of the critically acclaimed film Florence Foster Jenkins, a comedy drama starring Meryl Streep. Mr Martin and Ms Kogan lived together as partners when the idea about the film was born and when early drafts of the screenplay were written. It was accepted that the couple frequently discussed the project. By the time Mr Martin produced the final draft used to shoot the film, their relationship had gone irreversibly sour. The film premiered in April 2016, crediting Mr Martin as the screenplay's sole author.

The claimants, Mr Martin and his company, sought a declaration that the first claimant was the sole author of the screenplay for the film. The defendant counterclaimed for a declaration that she was joint author of the screenplay and that both claimants had infringed her copyright in it. Ms Kogan contended, in particular, that her creative work, originally contained within the first three drafts of the script, had found its way into the fourth and final version, of which it formed a substantial part. She was thus entitled to claim joint authorship of the final screenplay and sought a proportion of Mr Martin's income from the film. The High Court judge, Hacon J., rejected Ms Kogan's contention, holding that she failed to satisfy two of the three conditions for joint authorship under the 1988 Act, namely, the condition of "collaboration" between two or more authors and "sufficient contribution" needed to qualify her as a joint author of the work. It was not in dispute in this case that the third criterion concerning absence of distinction in contributions was met.

Based on documentary evidence, Hacon J. found that the shooting script was written after Mr Martin and Ms Kogan had parted ways. Unlike previous drafts, the parties had not discussed the final version and there had been no collaboration between them in creating it. Ms Kogan's consent to the use of her material generated for the first to third drafts in the final screenplay was "no doubt necessary for collaboration, but not sufficient." There must have been a "common design", that is, "co-operative acts by the authors at the time the copyright work in issue was created." Moreover, Ms Kogan's textual and non-textual contributions to the first three drafts "never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions." As such, these were insufficient to qualify her as a joint author of the final screenplay, "even had those contributions all been made in the course of a collaboration" to create it. Mr Martin was therefore entitled to a declaration that he was the sole author of the screenplay and that the claimants had not infringed the copyright in it.

The judgment provides a useful overview of the principles of when joint authorship arises in England and Wales. Previous cases suggest that constructive criticism, proof-reading or minor editing changes are insufficient to demonstrate collaboration. In addition, according to Hacon J., the significance of the contribution which went to the creation of the work depends

on the "type of skill" employed in making that contribution. The judge supported this by making a new distinction between "primary skills" (for example, physically writing) and "secondary skills" (for example, inventing plot and characters). Whilst this differentiation does not imply that the latter are less important in the creative process, "it may often be harder to establish joint authorship by reference to secondary skills."

• Martin & Anor v Kogan & Ors [2017] EWHC 2927 (IPEC), 22 November 2017
http://merlin.obs.coe.int/redirect.php?id=18871 EN

Alexandros K. Antoniou
University of Essex

Government designates regulator for age verification of online pornography

The Digital Economy Act 2017 includes provisions requiring that age verification measures be put in place for pornographic websites. If pornography is made available on a commercial basis without such measures, the publisher will become liable to a number of penalties, including fines and requiring Internet service providers to block access, including access to other material of the publisher (IRIS 2017-117). The UK Government has now taken steps to designate the regulator responsible for implementing and enforcing these provisions: the British Board of Film Classification (BBFC). The Board is responsible for the age classification of films, videos and DVDs, and more recently has been given responsibility for classifying material for mobile network operators to help them in restricting access to materials unsuitable for those under the age of 18.

The Government has issued a proposed designation under the Digital Economy Act; this requires approval by Parliament. It designates the BBFC as the regulator and will give it power to require information from Internet service provides or any other person it believes to be involved in making pornographic material available on the Internet on a commercial basis. The BBFC will also be given the power to issue enforcement orders that will be enforceable by the courts to prevent the infringement of statutory provisions and the power to give notice of breaches to payment-services providers such as credit card companies or PayPal so that they can withdraw their services. It will also acquire the power to require Internet service providers to block access to material, including material other than that which has breached the age verification procedures; such an order will be enforceable by the courts. The only exception to this power is where this would be detrimental to national security or to the prevention or detection of serious crime, including sexual offences.

The minister has issued draft guidance to the regulator on the use of its powers, and guidance will also be issued by the regulator itself. An appeal mechanism will enable aggrieved parties to appeal against the regulator's decisions to an Independent Appeals Panel.

• Department for Digital, Culture, Media & Sport, 'Particulars of Proposed Designation of Age-Verification Regulator, 12 December 2017
http://merlin.obs.coe.int/redirect.php?id=18906 EN
• Draft Guidance to the Regulator: Digital Economy Act - Part 3: Online Pornography, March 2017
http://merlin.obs.coe.int/redirect.php?id=18907 EN

Tony Prosser
University of Bristol Law School

IE-Ireland

Public broadcaster pays damages over unverified tweet during election debate

On 19 December 2017, the public broadcaster RTÉ settled the ongoing legal proceedings that had been initiated by a former presidential candidate against RTÉ over a 2011 televised election debate. The claim centred on RTÉ's 2011 election debate, when the presenter questioned the candidate about a statement concerning him that had just been made on the supposed official Twitter account of another candidate. It later turned out that the tweet had been attributed, in error, to the official Twitter account of the other candidate. In March 2012, the Broadcasting Authority of Ireland (BAI) held that the programme had been in breach of section 39(1)(b) of the Broadcasting Act 2009, being "unfair" to the candidate (see IRIS 2012-5/27). However, the BAI decided that the complaint was not of such a serious nature as to warrant an investigation or public hearing.

The candidate, who was not elected, initiated legal proceedings against RTÉ in January 2013, claiming that RTÉ had acted negligently in putting the question to him over the tweet, and had sought to undermine his credibility. The candidate also claimed that RTÉ had directed the debate with the improper aim of altering the course of the election, that RTÉ had promoted the electoral chances of another candidate, and that RTÉ's conduct was targeted malice intended to damage him. Mr Gallagher also claims damages, including aggravated or exemplary damages, or both, against RTÉ for negligence and breach of duty (including breach of statutory duty). In April 2017, the High Court dismissed RTÉ's application to have the claim struck out (see IRIS 2017-6/21).

In the High Court on 19 December 2017, RTÉ issued an apology to the candidate, and informed the Court

that the proceedings could be ended. In its statement to the Court, RTÉ

acknowledged that it had failed to comply with its statutory duty under section 39 of the Broadcasting Act in the course of the Presidential Election Debate programme which was broadcast on 24 October 2011. The broadcaster acknowledged that it should have verified the origin of a tweet to which reference was made during that broadcast and that the tweet should not have been erroneously attributed to another candidate's Twitter account.

Further, RTÉ stated that it had failed in its obligation of fairness to the candidate under the Broadcasting Act, and in particular (i) in the broadcast of the tweet without verification; (ii) in the failure to provide clarification on the provenance of the tweet within the same programme and (iii) in the failure likewise to provide clarification of the provenance of the tweet in a subsequent radio broadcast on 25 October 2011. Finally, RTÉ paid "substantial damages" in settlement of the legal action, although the exact terms of the settlement were confidential.

Ireland is due to hold a presidential election in October 2018.

• RTÉ, "RTÉ apologises and pays Gallagher settlement over tweet," 19 December 2017
http://merlin.obs.coe.int/redirect.php?id=18909 EN

Ronan Ó Fathaigh
Institute for Information Law (IViR), University of Amsterdam

IT-Italy

New legislation on promotion of European and Italian works by audiovisual media service providers released by the Italian Government

On 28 December 2017, the final version of the legislative decree implementing the reform of the legal framework on cinema and audiovisual services with respect to the promotion of European and Italian works (Legislative Decree No. 204 of 7 December 2017) was published on the Official Journal (the draft of this decree was included in IRIS 2017-10/24). Yet, some significant amendments have been introduced to the relevant provisions, especially with regard to the decree governing the promotion of European works, which provides for a progressive increase of the content and investment quotas.

As regards the content quotas binding on national broadcasters and the public service broadcaster to promote EU works, this increase has been made more gradual. This percentage will be increased to 53% for 2019, to 56% for 2020 and to 60% from 2021 on. No increase will apply in 2018, unlike the original provisions. The final version of the decree also confirms the sub-quota of one third of the quotas for EU works (half thereof for the public service broadcaster) to be reserved for works of Italian original expression produced anywhere from 2019 on. In addition to the above, national broadcasters shall reserve, on a weekly basis, 6% of the Prime Time for cinema, fiction, animation and/or original documentaries of Italian original expression produced anywhere. The percentage has been raised to 12% for the public service broadcaster.

With respect to on-demand service providers, the decree confirms that a quota amounting to 30% of the catalogue has to be reserved for recent EU works and a sub-quota of 15% of the catalogue to content of Italian original expression produced anywhere.

In addition to content quotas, the decree regulates investment quotas. The final version of the text confirms that 10% of the annual net revenues for 2018 (to be devoted entirely to independent producers) has to be reserved by commercial broadcasters for the pre-purchase, purchase or production of EU works; the same percentage is increased to 12.5% for 2019 (five sixths of which for independent producers) and to 15% from 2020 on (five sixths of which for independent producers).

A significant amendment affects the sub-quota that commercial broadcasters are required to reserve for cinematographic works of Italian original expression produced anywhere by independent producers. The said percentage has been amended and now amounts to 3.2% (instead of 3.5%) of the annual net revenues. This is increased to 3.5% for 2019, to 4% for 2020 and to 4.5% from 2021 on.

Other important changes have been made with respect to the percentage of the relevant sub-quotas for the public service broadcaster. In fact, on the one hand the decree confirms that 15% of the annual total revenues for 2018 has to be devoted to the pre-purchase, purchase or production of EU works; and this percentage is increased to 18.5% for 2019 (five sixths of which for independent producers) and to 20% from 2020 on (five sixths of which for independent producers). On the other hand, the sub-quota reserved for works of Italian original expression produced anywhere amounts to 3.6% for the year 2018, while it is increased to 4% for 2019, to 4.5% for 2020 and to 5% from 2021 on.

For on-demand service providers, an investment quota of 20% of the annual net revenues in Italy has to be reserved for EU works of independent producers, particularly recent ones (that is, released in the last five years), while a sub-quota of not less than half of such a percentage (that is, 10% of the annual net revenues made in Italy) is provided for works of Italian

original expression produced anywhere. The final version of the decree also stipulates that from January 2019, the said quota shall be binding on providers having the editorial responsibility for offers targeting Italian consumers, even if based abroad. Finally, the decree, in accordance with the draft version, establishes sanctions ranging from EUR 100 000 to EUR 5 000 000; however, the maximum has now been reduced from 2% to 1% of the annual revenues if the same exceeds the threshold of EUR 5 000 000.

• *Decreto legislativo 7 dicembre 2017, n. 204 - Riforma delle disposizioni legislative in materia di promozione delle opere europee e italiane da parte dei fornitori di servizi di media audiovisivi, a norma dell'articolo 34 della legge 14 novembre 2016, n. 220* (Legislative Decree no. 204 of 7 December 2017 - Reform of the legislative provisions on the promotion of European and Italian works by audiovisual media service providers, pursuant to Article 34 of the Law of 14 November 2016, n. 220)
http://merlin.obs.coe.int/redirect.php?id=18872 IT

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

NL-Netherlands

Court of Appeals judgment on the rectification and removal of news programme episode

In December 2017, the Arnhem-Leeuwarden Court of Appeals (Gerechtshof Arnhem-Leeuwarden) ruled on the question of whether broadcaster AVROTROS acted unlawfully towards a person by giving a distorted picture of a high-profile neighbours' dispute in an episode of the television programme EenVandaag. The Court considered whether the respondent's right to respect for private and family life, including his honour and good name, as guaranteed under Article 8 of the European Convention of Human Rights (ECHR), outweighed the right to freedom of expression of AVROTROS under Article 10 ECHR. The case followed the judgment in preliminary relief proceedings of the Court of Midden-Nederland (Rechtbank Midden-Nederland).

The episode of EenVandaag on the neighbours' dispute discussed the negative image of one of the neighbours (neighbour A), who had been portrayed as the "Leersum monster" in the Dutch media. The claimant (neighbour B), applied to the judge in preliminary relief proceedings, claiming that AVROTROS had painted a "too rosy" image of neighbour A, and had acted unlawfully towards him (uncritically letting interviewees speak, and consciously not hearing both sides). The Court of Midden-Nederland ruled that Article 8 ECHR outweighed Article 10 ECHR, and held that the reporter had not asked any critical questions or made any critical comments, and AVROTROS had consciously refrained from hearing both sides. It obliged AVROTROS to remove the entire episode from its website and archives, and to publish a rectification on the EenVandaag website.

Subsequently, AVROTROS appealed against the judgment. First, the Court of Appeals considered whether AVROTROS should have heard both sides in the episode. The Court did not agree with AVROTROS's argument that the episode must be viewed in the context of prior episodes, in which neighbour A (the respondent) did speak. The Court of Appeals held that due to the long period of time between the episodes, it was unlikely that the viewer would perceive this episode as the final episode of a series. Thereafter, the Court of Appeals determined that the respondent was not a public figure, but rather a person who received a lot of media attention due to a private conflict. It also held that the episode made little contribution to the public debate, and was limited to showing the "other side" of the neighbours' dispute.

The Court of Appeals also noted that it fell within the journalistic freedom of EenVandaag to only present certain facts, and allow the interviewees to tell their side of the story. However, as AVROTROS's chosen format consciously prevented the respondent from responding to any possible inaccuracies, the Court of Appeals agreed with the lower court that such a format implies that the presented facts must be correct, and give a reliable picture of the situation. It proceeded by establishing that the reporter made an inaccurate statement about the right of way and the accessibility of neighbour A's house. Consequently, the episode gave a distorted picture of the neighbours' dispute and the role of the respondent. As such, AVROTROS misrepresented the respondent as the party that had caused the neighbours' dispute by his own unreasonable behaviour. The Court of Appeals concluded that the presented image was not supported by facts, and formed a major violation of the respondent's right to respect for his private life, including his honour and good name. It found that the lower court had correctly ruled that his right outweighed AVROTROS's right to freedom of expression. Nevertheless, the Court of Appeals did not allow all claims granted by the lower court, as it stated that the removal of the entire episode was not necessary and proportionate. It held that the legitimate interest of the respondent (to be safeguarded from the ascertained infringement), could also be fulfilled by only removing the inaccurate statement.

• *Rechtbank Midden-Nederland, 9 oktober 2017, ECLI:NL:RBMNE:2017:5079* (Court of Midden-Nederland, 9 October 2017, ECLI:NL:RBMNE:2017:5079)
http://merlin.obs.coe.int/redirect.php?id=18874 NL

• *Gerechtshof Arnhem-Leeuwarden, 19 december 2017, ECLI:NL:GHARL:2017:11182* (Arnhem-Leeuwarden Court of Appeal, 9 December 2017, ECLI:NL:GHARL:2017:11182)
http://merlin.obs.coe.int/redirect.php?id=18875 NL

Melanie Klus
Institute for Information Law (IViR), University of Amsterdam

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Legal Observations
of the European Audiovisual Observatory
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EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

Author of false Google reviews ordered to pay damages

On 25 October 2017, Amsterdam District Court ordered an author who posted false reviews concerning a day-care centre on the Google platform Google Maps to pay EUR 2 702 in damages to the owners of the day-care centre. On Google Maps, internet users can post reviews of locations they have visited. Between April 2015 and February 2016, the author wrote several negative reviews of the day-care centre using different accounts. In the reviews, he claimed that the day-care centre was unstructured, and described the situation as "hysterical". He also claimed that the day-care centre was unhygienic, that crying children were ignored, and he accused the organisation of the day-care centre of being solely money-oriented.

The owners of the day-care centre requested Google to remove the reviews, but Google refused to do so. In a subsequent judgment on preliminary relief proceedings in February 2016, Amsterdam District Court ordered Google to provide the owners with the IP addresses of the computers that were used to create the accounts under which the reviews had been posted, as well as all information (telephone numbers, names and email addresses) these users had provided when creating the account. It followed from this data that all user accounts belonged to a person with whom the owners of the day-care centre had had a disagreement in late 2014, early 2015. The author suffered from psychological distress and was under treatment by a therapist.

In the present judgment of 25 October 2017, Amsterdam District Court declared the Google reviews unlawful, since the author did not refute the owners' claim in a reasoned way. The court ordered the author to pay damages to the owners of the day-care centre. The author was ordered to pay EUR 2 702 in material damages, the amount the owners claimed for the wage costs of the directors of the day-care centre for the time that they were unable to spend on their actual work, and EUR 11 000 for legal costs incurred to find out who had posted the false reviews. The court rejected the claim for damages for reputation loss, considering this claim as insufficiently substantiated.

- *Rechtbank Amsterdam, 25 oktober 2017, ECLI:NL:RBAMS:2017:8063* (District Court of Amsterdam, 25 October 2017, ECLI:NL:RBAMS:2017:8063)
http://merlin.obs.coe.int/redirect.php?id=18912 NL
- *Rechtbank Amsterdam, 29 februari 2016, ECLI:NL:RBAMS:2016:987* (District Court of Amsterdam, 29 February 2016, ECLI:NL:RBAMS:2016:987)
http://merlin.obs.coe.int/redirect.php?id=18876 NL

Susanne van Leeuwen
Institute for Information Law (IViR), University of Amsterdam

New Code on YouTube advertising transparency

On 17 November 2017, a self-regulatory code on transparency in YouTube advertising was announced by the Dutch Media Authority (Commissariaat voor de Media). A large group of YouTube users who create professional online video content have developed, with the help of the Dutch Media Authority, the Social Code: YouTube, in order to be more transparent about advertising in online videos. The Social Code: YouTube was a response to the results of research by the Dutch Media Authority on the frequency with which products and brands are visually shown in videos on YouTube. During the development of this Code, several parties, including the Dutch Advertising Code Authority (Stichting Reclame Code), Multi-Channel Networks (third-party service providers for YouTube channels), media agencies and interest groups, were given the opportunity to submit views. The Code was also informed by a study on how to enhance transparency in advertising, commissioned by the Dutch Media Authority.

In this Code, YouTube video creators have established guidelines about how to indicate advertisements in their videos. For example, the Code includes guidance to video creators on how to indicate in videos when they are paid to promote a particular product or brand. The guidelines are not official rules, but are tools for creators of videos that want to be transparent about advertising in their videos. These online creators of videos can join the Social Code: YouTube on the website desocialcode.nl, where the guidelines and the other YouTube users that have already joined the Code are included. In order to join the Code, video creators must (i) apply the provisions of the Code from the date of registration; (ii) announce that they apply the Code, (iii) agree to be supervised, and (iv) contacted about the Code. The website is funded by a group of promoters and the Dutch Media Authority.

The Code attempts to create clarity for online creators of videos, but also for viewers, parents of underage viewers, companies representing YouTube users and advertisers. It is also designed to help YouTube users to prepare for any possible future legislation, including at EU level (see, for example, IRIS 2017-10/7, IRIS 2017-8/7 and IRIS 2016-6/3), that might extend the supervision of the Dutch Media Authority to online platforms such as YouTube. In this regard, the Dutch Media Authority will support the initiators in monitoring the functioning of the Code. A first evaluation of the Social Code: YouTube by the Dutch Media Authority is planned for the spring of 2018.

- *Social Code: Richtlijnen voor reclame in online video, 17 november 2017* (Social Code: Guidelines for advertising in online video, 17 November 2017)
http://merlin.obs.coe.int/redirect.php?id=18910 NL

• *Commissariaat voor de Media, "YouTubers ontwikkelen met hulp van Commissariaat voor de Media een code om transparanter te zijn over reclame," 17 November 2017* (Dutch Media Authority, "YouTubers develop a code with the help of Dutch Media Authority to be more transparent about advertising," 17 November 2017)
http://merlin.obs.coe.int/redirect.php?id=18911 NL

M.J.A. Hanhart
Institute for Information Law (IViR), University of Amsterdam

PL-Poland

Dispute over TVN fine intensifies

Poland's National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji - KRRiT) has refuted concerns expressed by the US State Department in relation to a fine imposed against the broadcaster TVN. TVN is owned by the American company Scripps Networks Interactive, which is soon to be taken over by Discovery Communications.

The disagreement follows the KRRiT's decision to fine TVN around EUR 352 000 for allegedly biased and distorted reporting on demonstrations outside the Polish Parliament. The US State Department expressed concern about how the fine might affect the Polish media landscape. Department spokesperson Heather Nauert said that Poland was a close ally and fellow democracy whose media freedom could be undermined by the KRRiT's decision; free and independent media were essential to a strong democracy. Societies built on good governance, strong civil society, and an open and free media were more prosperous, stable and secure, she added. Nevertheless, she remained confident in the strength and ability of Poland's democracy to ensure Poland's democratic institutions were fully functioning and respected.

The KRRiT refuted this criticism, stressing that the fine was based on a thorough, long-term analysis of six TV channels for which TVN was responsible. Although many of the programmes monitored had contained fierce criticism of the government majority, this criticism was not, as had been alleged, the reason for the fine; rather, in the KRRiT's opinion, TVN's reporting had infringed the Polish Broadcasting Act. It pointed out that the KRRiT rarely punished broadcasters. TVN was entitled to express sympathy with the opposition; however, in the present case, there had been a danger that the reporting concerned could have fuelled aggression and jeopardised public security and order. In order to exercise freedom, society also needed to take responsibility. The KRRiT also stated that the punishment had been very mild, amounting to only 0.1% of the broadcaster's annual revenue and 1% of the maximum possible penalty.

However, the KRRiT also said that its legal department had, when reviewing the decision, not found anything illegal in TVN's conduct. It was therefore seeking the advice of an outside expert for a definitive assessment of the decision.

Following discussions between TVN and the KRRiT, the fine has now been withdrawn. At the same time, the KRRiT announced plans to set up a media round table in order to develop self-regulatory mechanisms in consultation with broadcasters and journalistic and scientific organisations.

• *Uzasadnienie kary dla TVN 24, 13.12.2017* (Grounds of the KRRiT's decision, 13 December 2017)
http://merlin.obs.coe.int/redirect.php?id=18884 PL

Tobias Raab
Stopp Pick & Kallenborn

RO-Romania

Governmental Aid for Cinematography

On 29 November 2017, the Romanian Government discussed and approved a memorandum for the modification of both the de minimis aid scheme for participation in domestic and international film festivals and fairs, and the de minimis aid scheme for the distribution and exploitation of Romanian films of all kinds (see IRIS 2004-2/35 and IRIS 2011-2/5).

The memorandum was adopted in application of the provisions of Government Ordinance No. 39/2005 with regard to cinematography, approved with amendments and completions by Law No. 328/2006, with further modifications and completions. The memorandum aims at giving de minimis aid for the promotion of Romanian films by increasing the budget allocated to participation in domestic and international film festivals and fairs from EUR 585 000 to EUR 750 000 (the equivalent in the national currency lei). The budget for the distribution and exploitation of Romanian films has been increased from EUR 547 000 to EUR 1 000 000. The money comes from the Cinematography Fund, powered by sources established by Article 13 paragraph (1) of Government Ordinance No. 39/2005, without involving financial resources from the state budget.

The validity of the scheme in which the de minimis aid will be granted is five years after the initial scheme was approved by decision of the Director-General of the National Cinema Center (CNC), until 8 December 2019 respectively. The CNC, subordinated to the Ministry of Culture and National Identity, is the initiator, provider and administrator of the de minimis aid scheme. Non-reimbursable financial support is

granted through a contract between the beneficiary and the Center, and the date of signing the contract is considered the date of granting this form of support. The de minimis aid payments will be made by 2020. Ineligible expenditure will be borne entirely by the beneficiaries.

Eligible beneficiaries are Romanian companies legally established and operating in Romania, registered in the Registry of Cinematography, which do not record debts to the state budget, special budgets or local budgets and which also have to meet the specific conditions specified in the field regulations. With the increase in the budgets allocated to the two de minimis schemes, the estimated number of beneficiaries increases; in the case of the distribution and exploitation of Romanian films, there is a 100% increase, from 75 to 150 beneficiaries. The measure envisaged by the Government is based on several domestic and international documents that focus on the protection and promotion of cultural diversity, including the EU Treaty of Lisbon, the October 2005 UNESCO Convention and the Government Program of the Romanian ruling coalition. At the same time, the Executive aims at stimulating Romanian cinematography, which has achieved outstanding success in recent years at international level: over the period 2012-2016, 77 Romanian films have won over 250 prestigious awards in international film competitions.

• *The Memorandum cu tema: modificarea schemei de ajutor de minimis pentru participarea la festivaluri și târguri de filme, interne și internaționale, precum și a schemei de ajutor de minimis pentru distribuirea și exploatarea filmelor românești de toate genurile* (Memorandum for the modification of the de minimis aid scheme for participation in domestic and international film festivals and fairs as well as of the de minimis aid scheme for the distribution and exploitation of Romanian films of all kinds)
http://merlin.obs.coe.int/redirect.php?id=18877 RO

Eugen Cojocariu
Radio Romania International

The PBS Act, back to the Parliament

On 18 December 2017, the Romanian President, Klaus Iohannis, sent the Act for amending and completing Law No. 41/1994 on the organisation and functioning of the Romanian Radio Broadcasting Society and the Romanian Television Society (see 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 and IRIS 2017-10/31) to Parliament for review.

We should recall that the two chambers of the Romanian Parliament, the Senate and the Chamber of Deputies, had re-examined and adopted the Law for amending and completing Act No. 41/1994 on 27 November 2017 and, respectively, on 11 October 2017, accepting all the objections of the Constitutional Court of Romania, which had rejected some modified articles of the mentioned act on 12 July 2017.

The law establishes new rules with regard to the appointment and removal from office of the members of the governing bodies of the two public broadcasters, the applicable incompatibilities and their attributions. In the form transmitted for promulgation, President Iohannis considered that the law contained provisions that are either unclear or may affect the functioning of the two societies. Iohannis draws attention to the unclear, imprecise, non-quantified criteria (on managerial experience and decision-making; knowledge of public radio and TV broadcasting legislation, as well as audiovisual legislation; and knowledge of at least one foreign language of international circulation) that the persons who can be appointed as members of the Board of Administration of Radio Romania and the Romanian Television, respectively, must meet.

The President also considered that the obligation for members of the Board of Administration to give up membership of the governing bodies of trade unions should be extended, consistent with the obligation for members of the Board to give up leading positions within a political party. At the same time, the interdiction for members of the Board of Administration to hold leading positions in commercial societies acting in the audiovisual field and to have shares in commercial societies which have business relations or opposite interests with the public broadcasters, should be extended to members of the Board of Directors (the Steering Committee - the executive management body).

According to the President, another weak point is that the act only regulates the interim management of the public broadcasters in the event of the dissolution of the Board of Administration and has no provisions with regard to the interim management (Director General plus Board of Directors) in the event of the Board of Administration's dismissal as a result of the Parliament's rejection of the annual report. The act does not cover the hypothesis that the interim Director General resigns after the dissolution/dismissal of the Board of Administration. The President argued that for some of the duties of the Board of Administration, of its Chairman and those of the Director General, it is unclear who would exercise them because some of them are repeated, while other tasks are not correlated with the legal provisions in force.

The President mentioned that in the new draft law, the appointment of the members of the Board of Directors will be carried out without competition; he considers that the membership of this forum should be based on objective criteria, which can only be ensured by organising a competition.

Concerning the composition of the committee to select the management projects of the candidates for

the position of Director General, there are no clear criteria for at least 4 of the 7 members (proposed by the President of the Council and approved by the Council) that go beyond the political sphere; they may even be people working on rival radios, televisions or publications, which could affect the proper functioning of the two public companies. In addition, the Head of State said that the law should also circumscribe the areas from which these specialists can come.

According to President Iohannis, in order to ensure the clarity, precision and predictability of the law, the objective causes of weak management from which the Director General may be removed from office before the expiration of his mandate by the majority vote of the Board of Administration, should be clearly defined and listed according to the type of liability (criminal liability, administrative-disciplinary liability or contractual liability).

• *Cerere de reexaminare asupra Legii pentru modificarea și completarea Legii nr. 41/1994 privind organizarea și funcționarea Societății Române de Radiodifuziune și Societății Române de Televiziune* (Request for review of the Act on amending and completing the Act no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Corporation and the Romanian Television Society)
http://merlin.obs.coe.int/redirect.php?id=18878 RO

Eugen Cojocariu
Radio Romania International

TR-Turkey

Turkish Constitutional Court made a precedent decision on a Bizim FM Radio station case

Radio stations and television broadcasting history date back to the 1920s in Turkey. For approximately 40 years, Turkish channels were only allowed to broadcast under state supervision. During the 1990s, private channels also started broadcasting in Turkey, and their legal status was clarified in the Constitution in 1993. Upon the amendment, the Turkish Radio and Television Supreme Council was due to provide channel and broadcasting licences to private and state channels. Around a thousand applications were received and the eligible applicants were licensed by the Supreme Council.

Due to changes in Law No. 3984 of 1995 on the Establishment of Radio and Television Enterprises and their Broadcasts and Law No. 6112 on the Establishment of Radio and Television Enterprises and their Media Services, which came into force in 2011, there has to be a frequency auction to start new radio channels. However, there has been no auction by the administration until today, so effectively, all broadcasting stations either have have been broadcasting since before 1995, or they have received special permission from the administration.

Bizim FM was one of the radio stations that was granted a broadcasting licence in 1995. It was the channel owner himself who voluntarily suspended broadcasting activities until 2011. When the owner wanted to resume radio broadcasting activities, he applied to the Supreme Council for a broadcasting licence, which is needed to broadcast at national level. The Council rejected his application without legal motivation. The Bizim FM owner went on to apply to the related administrative court. Upon the dismissal, he appealed the case at the Council of State, which decided in favour of the applicant; however, the Supreme Council, as a defendant, requested a revision of the decision. As a result of the revision, the Council of State turned from its decision and approved the first instance administrative court. Finally, the applicant filed an individual application to the Constitutional Court.

The Constitutional Court referred to Article 10 of the European Convention of Human Rights (ECHR) with regard to the Turkish Constitution.

Article 26 of the Turkish Constitution, in line with Article 10 of the ECHR, refers to freedom of speech and thought.

In addition, the Constitutional Court referred to Article 28 of the Constitution which ensures freedom of the press.

Based on these articles, the Constitutional Court ruled that the administration had failed to ensure effective pluralism of the media and secure freedom of press and information, as well as freedom of expression and thought. Therefore, the decision was made in favour of the applicant and it was held that the judgement shall be sent to the Radio and Television Supreme Council (RTÜK) to remove the violation of the structural problems and the previously named constitutional rights.

• Press release of the Constitutional Court, 19 December 2017
http://merlin.obs.coe.int/redirect.php?id=18879 EN

Gizem Gültekin Várkonyi
University of Szeged, Faculty of Law and Political Science

Agenda

Book List