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EDITORIAL

This first newsletter of the year comes with a plethora of interesting articles which deal with many different topics. Certainly, the most important development in the previous weeks has been the adoption of the revised Audiovisual Media Services Directive (AVMSD). In a very telling way, the title of the revised directive hints at the amendments being introduced "in view of changing market realities". And indeed, there have been market changes since the adoption of the original AVMSD in 2010, notably in the way people access audiovisual content. Obviously, these changes pose new regulatory questions. For example, does a video channel operated for promotional purposes on the YouTube Internet platform constitute an audiovisual media service in the sense of the AVMSD? In response to this question, the German Federal Supreme Court answered with a clear *nein* in September. Are live streams provided by the digital version of a newspaper to be considered broadcasting? Again, the answer in German is *nein*, according to the Berlin Administrative Court's ruling of October.

As market developments have changed the way people access audiovisual content, so too have they changed the way the same content is distributed. The traditional system of media windows regulating when a film appears on cinema screens, TV or video, has been subject to changes in different countries. Even though this system is mostly self-regulated by the industry, there are countries in which the state still intervenes. This is now the case in Italy, where the Minister of Cultural Heritage and Activities announced an upcoming Ministerial Decree which will represent the first regulatory intervention in Italy on theatrical windows. In France, the signature of an agreement between cinema organisations and Canal+ will pave the way for a new system of media windows.

Market changes have also allowed for so-called "fake news". To counter this worrying phenomenon, representatives of online platforms, leading social networks, advertisers and the advertising industry have agreed on a self-regulatory Code of Practice to address the spread of online disinformation and fake news. At legislative level, France has adopted a set of laws aimed at fighting against the manipulation of information, despite claims that the new legislation impinges upon freedom of expression. And on the subject of restrictions to this fundamental right, the European Commission published its proposal for a Regulation on preventing the dissemination of terrorist content online.

We also report on two interesting cases concerning blasphemy, which is a restriction of freedom of expression in order to protect religious freedom. In Ireland, the criminal offence of blasphemy was recently removed from the Irish Constitution after a referendum on this matter. From now on, the publication or utterance of blasphemous matter in Ireland shall not be an offence punishable by law. Also, a recent judgment of the European Court of Human Rights dealt with the issue of blasphemy in Austria, where this is still a criminal offence. The Strasbourg court decided in *E.S. v. Austria* that expressions that go beyond the

limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance – for example in the event of an improper or even abusive attack on an object of religious veneration – may be legitimately considered as incompatible with respect for the freedom of thought, conscience and religion, as protected by Article 9 of the European Convention on Human Rights.

You will find all this and much more in the pages of our publication, which we hope will make the start of your year a very exciting one. And if you still have enough energy left to read, I recommend our latest IRIS Plus on "The legal framework for international co-productions".

Maja Cappello, editor
European Audiovisual Observatory

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AUSTRIA

European Court of Human Rights: E.S. v. Austria

Dirk Voorhoof
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Over the last 25 years the European Court of Human Rights (ECtHR) has been regularly asked to decide whether specific interferences with certain forms of religion, or specifically worded insults directed at a religion or the spreading of religious enmity were protected under the right to freedom of expression established by Article 10 of the European Convention on Human Rights (ECHR) (see, inter alia, Otto-Preminger Institut v. Austria, IRIS 1995-1/1; Wingrove v. the United Kingdom, IRIS 1997-1/8; I.A. v. Turkey, IRIS 2005-10/3; Giniewski v. France, IRIS 2006-4/1; Tatlav v. Turkey, IRIS 2006-7/2; Klein v. Slovakia, IRIS 2007-1/1; Fouad Belkacem v. Belgium, IRIS 2017-9/1; and Mariya Alekhina and Others v. Russia (Pussy Riot), IRIS 2018-8/2). In line with its earlier case law the ECtHR recently reiterated that expressions that seek to spread, incite or justify hatred on the basis of intolerance (including religious intolerance) do not enjoy the protection afforded by Article 10 of the ECHR. The ECtHR confirms that people with a religious conviction - irrespective of whether they belong to a religious majority or a minority - cannot expect to be exempt from criticism and must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, expressions that go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance - for example in the event of an improper or even abusive attack on an object of religious veneration - may be legitimately considered as incompatible with respect for the freedom of thought, conscience and religion, as protected by Article 9 ECHR. In such situations the state can take proportionate restrictive measures. According to the ECtHR, there is a general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 of the ECHR by the holders of such beliefs - including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.

In the case of E.S. v. Austria the ECtHR decided on whether a criminal conviction was necessary in respect of someone found guilty of disparaging religious doctrines in application of Article 188 of the Austrian Criminal Code. The applicant, E.S., held seminars entitled "Basic Information on Islam" at the right-wing Freedom Party Education Institute. At one such seminar, referring to the marriage that Muhammad concluded with Aisha, a six-year old, and consummated

when she was aged nine, she stated, inter alia, that “Muhammad liked to do it with children”. And she added: “What do you call that? Give me an example? What do we call it, if it is not paedophilia?” An undercover journalist who attended the seminar recorded these statements and requested that a preliminary investigation be opened against E.S. The Vienna Public Prosecutor brought charges against E.S., which eventually led to her criminal conviction for disparagement of religious precepts, pursuant to Article 188 of the Criminal Code. She was sentenced to pay a fine of EUR 480, or to serve 60 days’ imprisonment in the event that she failed to pay the fine.

E.S. complained to the ECtHR that this conviction had violated her right to freedom of expression under Article 10 of the ECHR. She stressed that by stating that Muhammad had had sexual intercourse with a nine-year-old, she had cited a historically proven fact and questioned whether this could be regarded as paedophilia. Furthermore, through the impugned statements, she had expressed criticism concerning Islam, within the framework of an objective and lively discussion, which the domestic courts had failed to take into account. In essence, E.S. argued that the impugned statements had formed part of a criticism of a religion, contributing to a public debate, without the aim of defaming the Prophet of Islam.

The ECtHR, however, was of the opinion that the Austrian courts had extensively explained why they considered that the statements uttered by E.S. had been capable of arousing justified indignation, as they had not been made in an objective manner aimed at contributing to a debate of public interest, but in a manner that could only be understood as being intended to demonstrate that Muhammad was not a worthy subject of worship. The domestic courts found that (i) E.S. had subjectively labeled Muhammad as someone whose general sexual preference was that of paedophilia, and (ii) she had failed to neutrally inform her audience of the relevant historical background - consequently there could have been no serious debate on the issue. The ECtHR also referred to its findings in other cases where the impugned statements had not only offended or shocked, or had expressed a “provocative” opinion, but had amounted to an abusive attack on a religious group. In such cases a criminal conviction was considered necessary in order to protect the freedom of religion of others. Indeed, owing to their positive obligations under Article 9 of the ECHR, member states’ authorities are to enable the peaceful co-existence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. The ECtHR agrees with the Austrian courts’ approach - that is to say, that presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which is one of the bases of a democratic society. Furthermore, the fine imposed was at the lower end of the statutory range of punishments, and could therefore not be considered as constituting a disproportionately severe sanction. In conclusion, the ECtHR found that the Austrian courts had comprehensively assessed the wider context of E.S.’s statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected and the need to have religious peace preserved in Austrian society. By considering the impugned

statements as going beyond the permissible limits and containing elements of incitement to religious intolerance, the Austrian courts put forward relevant and sufficient justification for the interference with E.S.'s rights under Article 10 ECHR. Hence the interference corresponded to a pressing social need and was proportionate to the legitimate aim pursued, and the domestic courts did not overstep their wide margin of appreciation when convicting E.S. of disparaging religious doctrines. Accordingly, the ECtHR finds that there has been no violation of Article 10 of the ECHR.

Judgment by the European Court of Human Rights, Fifth Section, case of E.S. v. Austria, Application nos. 38450/12, 25 October 2018

https://hudoc.echr.coe.int/eng?i=001-187188

GERMANY

European Court of Human Rights: Annen (No. 6) v. Germany

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In a new judgment with regard to Internet content, the European Court of Human Rights (ECtHR) found that a criminal conviction for insult was a justified interference with the right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR). The case of Annen (No. 6) v. Germany concerns a conviction for posting a press release on the Internet and distributing leaflets with insulting statements about a German professor at the University of Bonn, professor B., who was conducting embryonic stem cell research. Annen is a campaigner against abortion and operates an anti-abortion website. In line with the criticism of a catholic Bishop, Annen referred to the similarity between the team of scientists around professor B. carrying out stem cell research and the Nazis who had performed experiments on humans. The text mentioned that professor B. 'uses embryos - people - that were murdered in Israel and then sold to Germany for significant sums of money for research purposes at the University of Bonn. During Nazi times, German scientists performed research experiments on Jews and then murdered them'. Annen's press release also expressed the opinion that the professors of Bonn University 'appear to have forgotten that these experiments were performed in Nazi times by willing doctors and scientists. These doctors and scientists, who were clearly in bondage to the rogue State and subservient to it, also carried out their research solely 'for the good of the people'. The research performed during the Nazi regime took place at a later stage of human life. The present-day research takes place at an earlier stage of human life.'

Annen was convicted of insult and sentenced to a penalty of thirty daily fines of EUR 15 each. This sentence was imposed by a district court and later confirmed by the regional court. The German courts acknowledged Annen's right to freedom of expression and to impart to others his beliefs that the fusion of an egg and a sperm represented the beginning of human life and that research using imported stem cells from terminated embryos involved the destruction of human life. They also acknowledged that his statements contributed to a debate of public interest. The courts however found that referring to professor B. by name and to the criminal and dehumanising medical experiments under the Nazi-regime had been equivalent to linking his professional conduct to the atrocities committed by the Nazis, which represented a serious infringement of his personality. After exhausting all national remedies in Germany, Annen complained to the ECtHR that his criminal conviction for insult had violated his right to freedom of expression as provided in Article 10 ECHR.

At the outset, the ECtHR observed that the criminal conviction interfered with Annen's right to freedom of expression, that it was prescribed by law - namely Article 185 of the Criminal Code - and that it pursued the legitimate aim of protecting the reputation or rights of others. It therefore remained to be determined whether the interferences were 'necessary in a democratic society'. It further reiterated that the right to protection of reputation is guaranteed by Article 8 ECHR as part of the right to respect for private life, and that in order for Article 8 ECHR to come into play, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life. The ECtHR also repeated that it had to ascertain whether the domestic authorities had struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10 ECHR, and on the other the right to respect for private life enshrined in Article 8 ECHR. It also emphasised that a clear distinction had to be made between criticism and insult: 'If the sole intent of a particular form of expression is to insult a person, an appropriate sanction would not, in principle, constitute a violation of Article 10 ECHR'. The ECtHR referred in particular to some statements in Annen's press release expressing a comparison between modern-day stem cell research and experiments carried out on humans during the Nazi regime, with a reference to Auschwitz. Given these statements, the ECtHR saw no reason to call into question the domestic courts' conclusion that Annen did indeed directly link the work of the scientists - and in particular of professor B. - to the atrocities committed during Nazi times. Even if, as in the instant case, regarded as value judgment, such serious and particularly offensive comparisons demand a particularly solid factual basis. While the ECtHR accepted that the moral responsibility of scientists was the issue discussed, this alone did not provide a solid factual basis for personally targeting professor B.'s scientific work. The ECtHR found the comparison with the Nazi atrocities not only shocking and disturbing, but also transgressing the limits of any acceptable criticism. It found that even though the intention behind Annen's press release was not mainly to defame the scientists, by naming professor B. it still had a stigmatising and defaming effect. Furthermore, in the German historical context, the attack on professor B.'s reputation was serious. Notwithstanding the fact that Annen's statements sought to contribute to a public debate and that professor B. had entered the public stage to a certain degree, the ECtHR concluded that the German courts had provided relevant and sufficient reasons for the criminal conviction of Annen. It found that the decisions by the domestic courts were based on a reasonable assessment of the statements in question, the rights of professor B. and of the circumstances of the present case. Lastly, the ECtHR observed that the sanction was criminal in nature, which is - in view of the existence of other means of intervention and rebuttal, particularly through civil remedies - one of the most serious forms of interference with the right to freedom of expression. The ECtHR recalled that criminal sanctions for insult or defamation must not be such as to dissuade the press or others who engage in public debate from taking part in the discussion of matters of legitimate public concern. The ECtHR noted however that Annen was sentenced (only) to a penalty of 30 daily fines of EUR 15 each and thereby to a sentence at the lower end of the possible

criminal sanctions for insult. The ECtHR found this penalty moderate, having regard to the seriousness of the violations of professor B.'s personality rights and the nature of the personalised attacks, when seen in the historical context. Therefore, there had been no violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Fifth Section, case of Annen (no. 6) v. Germany, Application no. 3779/11, 18 October 2018

https://hudoc.echr.coe.int/eng?i=001-186788

EUROPEAN UNION

Council of the EU: Publication of the Revised AVMSD in the Official Journal

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European Platform of Regulatory Authorities

On 28 November 2018, the consolidated text of the revised “Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the Audiovisual Media Services Directive) in view of changing market realities” was published in the Official Journal of the European Union.

The last substantive amendment to the Council Directive 89/552/EEC, subsequently codified by Directive 2010/13/EU of the European Parliament and of the Council, was made in 2007 with the adoption of Directive 2007/65/EC of the European Parliament and of the Council. Since then, the audiovisual media services market has evolved significantly and rapidly due to the ongoing convergence of television and Internet services. This convergence of media required an updated legal framework in order to reflect developments in the market and to achieve a balance between access to online content services, consumer protection and competitiveness.

On 6 May 2015, the European Commission adopted a communication entitled ‘A Digital Single Market Strategy for Europe’ (see IRIS 2015-6/3) in which it announced its intention to review the Directive 2010/13/EU by widening in particular its scope and modifying the rules related to the promotion of European works, the protection of minors and the commercial communications applicable to all market players. As part of this “Digital Single Market Strategy for Europe”, on 25 May 2016 (see IRIS 2016-6/3), the Commission submitted a draft for the revision of the Directive and, since then, the latter has been the subject of intense negotiations between the co-legislators. On 18 May 2017, the European Parliament gave a mandate to the Committee on Culture and Education (CULT) to begin talks with the European Council on the new directive (see IRIS 2017-7/6).

With the Commission's support, the negotiations were concluded with the informal agreement on the proposed rules, which was reached on 6 June 2018 (see IRIS 2018-8/7). The European Parliament adopted its report on the provision of audiovisual media services on 2 October 2018, and on 6 November 2018, the European Council adopted the revised AVMS Directive, marking the final step of the legislative process.

Among the new provisions introduced by the Directive is a strengthened Country of Origin Principle (which states that providers only need to abide by the rules of a member state rather than in multiple countries) with more clarity on which member state's rules apply, aligned derogation procedures for both TV broadcasters and on-demand service providers as well as possibilities for derogations in the event of public security concerns and serious risks to public health. In addition, certain audiovisual rules extend to video sharing platforms: services such as YouTube, as well as audiovisual content shared on social media services such as Facebook, are covered by the revised Directive. The Directive also provides for a better protection of minors against harmful content in the online world: the new rules strengthen the protection on video-on-demand services and extend the obligation to protect minors also on video sharing platforms, which now need to put in place appropriate measures. Furthermore, it provides for a reinforced protection on TV and video on demand against incitement to violence or hatred and public provocation to commit terrorist offences. Video sharing platforms are also required to take appropriate measures to protect people from incitement to violence or hatred and content constituting criminal offences. In relation to the promotion of European works, the Directive introduces increased obligations for on-demand services, who need to have at least a 30% share of European content in their catalogue and to ensure the prominence of this content. Concerning television advertising, the Directive introduces more flexibility: instead of the current 12 minutes per hour, broadcasters can choose more freely when to show advertisements throughout the day, with an overall limit of 20% of broadcasting time being maintained between 6 a.m. and 6 p.m. and the same share allowed during prime time (from 6 p.m. to midnight). On the other hand, it strengthens the provisions to protect children from inappropriate audiovisual commercial communications for foods high in fat, salt and sodium, and sugars, including by encouraging codes of conduct at EU level, where necessary. Video sharing platforms also have to respect certain obligations for the commercial communications they are responsible for and to be transparent about commercial communications that are declared by the users when uploading content that contains such commercial communications. Finally, the independence of audiovisual regulators is reinforced in EU law by ensuring that they are legally distinct from their government and functionally independent from the government and any other public or private body.

Further to Article 3, the text will officially enter into force on the twentieth day following that of its publication, namely on 19 December 2018. Member states will then have 21 months in order to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive, that is, no later than 19 September 2020. They shall immediately communicate the text of those provisions to the European Commission.

Publication of the revised Audiovisual Media Services Directive (EU) 2018/1808 in the Official Journal of the European Union

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.303.01.0069.01.ENG&toc=OJ:L:2018:303:TOC

European Commission: Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online

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On 9 September, 2018, the European Commission published its proposal for a Regulation on preventing the dissemination of terrorist content online. The proposal addresses the need for a higher level of protection against the misuse of the Internet to prepare, inspire and facilitate terrorist activity; to groom and recruit supporters; and to instil fear in the general public. The Regulation aims to overcome the limitations encountered by the EU Internet Forum, which was launched in December 2015 under the European Agenda on Security to stimulate the voluntary cooperation of EU member states and hosting service providers in order to detect and respond to online terrorist content. Furthermore, in March 2018, the European Commission issued a Recommendation on measures to effectively tackle illegal content online (see IRIS 2018-4/9), which included a specific chapter outlining measures to stem the uploading and sharing of terrorist propaganda online.

As stated in its Explanatory Memorandum, the proposal seeks to establish a clear and harmonised legal framework to prevent the misuse of hosting services for the dissemination of terrorist content online in order to guarantee the smooth functioning of the Digital Single Market and ensure trust and security. The proposal aims to clarify the responsibility of hosting service providers in taking appropriate, reasonable and proportionate actions to ensure their services' safety and to be able to detect and remove, in an efficient and swift manner, terrorist content online, while still offering remedies and complaint mechanisms so that users may challenge the removal of their content. In this sense, it sets a minimum set of obligations for hosting service providers and member states, and offers safeguards, taking into account the need to respect fundamental rights such as freedom of expression and information, as well as judicial redress possibilities. The duties of transparency aim to increase trust among citizens and Internet users, as well as to improve the accountability and transparency of companies' actions. The member states' obligations, besides contributing to these objectives, benefit the relevant authorities when taking appropriate action against terrorist content online. Member states may impose penalties to non-compliant hosting service providers.

The scope of the proposal affects hosting service providers offering their services within the European Union, irrespective of their place of establishment or their size. The proposal, drawing on the Directive to Combat Terrorism, defines terrorist content as information which is used to incite and glorify the commission of terrorist offences, encouraging the contribution to and providing instructions for committing terrorist offences, as well as promoting the activities of and

participation in terrorist groups. The Regulation also gives the member states' competent authorities power to issue, through an administrative or judicial decision, removal orders requiring the hosting service provider to remove terrorist content or disable access to it, which the hosting service provider has an obligation to do within one hour. In addition, the Regulation establishes minimum requirements in order for the member states' competent authorities or EU bodies to send referrals to hosting service providers concerning terrorist content, so that the latter may assess the content identified in the referral against its own terms and conditions and decide whether to remove or disable access to it. Furthermore, the proposal requires that hosting service providers, where appropriate, take effective and proportionate proactive measures to remove terrorist material from their services, including by deploying automated detection tools, taking into account factors such as the risk and level of exposure to terrorist content and the fundamental rights of the users. All terrorist content removed or disabled on the basis of these provisions must be preserved for a period of six months, which acts both as a safeguard against incorrect removal of non-terrorist content and as insurance for evidence in the prevention, detection, investigation and prosecution of terrorist offences.

The proposal also provides for a number of transparency obligations aimed at ensuring accountability towards users, citizens and public authorities, as well as safeguards regarding the use and implementation of proactive measures, such as human oversight and verifications where appropriate. Besides that, the proposal allows users to challenge the removal of their content, establishing that hosting service providers shall examine complaints that they receive and reinstate the content without undue delay where the removal or disabling of access is found to be unjustified. Lastly, there are also provisions concerning cooperation between competent authorities, Union bodies and hosting service providers, and obligations for member states to ensure that their competent authorities have the necessary capability and resources to fulfil their obligations under the Regulation.

European Commission, Recommendation on measures to effectively tackle illegal content online, 1 March 2018, COM(2018) 640

https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640_en.pdf

Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM(2018) 640 final, 12 September 2018

https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640_en.pdf

European Commission: Walt Disney Company's proposed acquisition of 21st Century Fox approved subject to conditions

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On 6 November 2018, the European Commission announced its approval, under the EU Merger Regulation, of Walt Disney Company's proposed acquisition of 21st Century Fox Inc., subject to compliance with certain commitments.

Walt Disney Company and 21st Century Fox Inc. are both US-based global media companies, and both are primarily active in the distribution of films, the supply/licensing of audiovisual content, and the operation and wholesale supply of television channels. In the European Economic Area (EEA), both companies are active as providers of audiovisual content and television channels to broadcasters and distributors.

In September 2018, the European Commission was notified of a proposed transaction whereby the Walt Disney Corporation would acquire 21st Century Fox, including its film and television studios and its cable and international television businesses. However, the Fox Broadcasting network and its stations - Fox News Channel, Fox Business Network, FS1, FS2 and Big Ten Network - were not part of the proposed transaction.

The Commission examined the effects of the proposed transaction on those markets where the activities of the two companies overlap. The first issue was the effect on the production and distribution of films for release in movie theatres, the distribution of content for home entertainment, and the licensing of films and other television content. In this regard, the Commission found that the proposed transaction would raise no competition concerns because the merged entity would continue to face significant competition from other players, such as Sony, Universal and Warner Bros.

The second issue was the effect on the wholesale supply of television channels. In this regard, the Commission found that the proposed transaction would eliminate competition between two strong suppliers of "factual channels" in several EEA Member States. Factual channels are channels which mainly broadcast documentaries, drama and scientific-themed entertainment programmes, such as the National Geographic channels and the History channels. Therefore, in order to address competition concerns, the Walt Disney Company committed itself to divesting its interest in all factual channels that it controls in the EEA, namely the History, H2, Crime & Investigation, Blaze and Lifetime channels. These channels are currently controlled by A+E Television Networks, which is a joint venture between Disney and Hearst. The Commission considered that the commitments fully removed the overlap between Disney and Fox's activities in the wholesale

supply of factual channels in the EEA.

The Commission concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns. The decision is conditional upon the Walt Disney Company fully complying with the commitments.

European Commission, Mergers: Commission approves Disney's acquisition of parts of Fox, subject to conditions, IP/18/6312, 6 November 2018

http://europa.eu/rapid/press-release_IP-18-6312_en.htm

Online platforms and the advertising industry deliver EU Code of Practice on disinformation

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Representatives of online platforms, leading social networks, advertisers and the advertising industry have agreed on a self-regulatory Code of Practice to address the spread of online disinformation and fake news. The 'Code of Practice on Disinformation', which was initiated by the European Commission, was published on 26 September 2018. The signing of this code represents a commitment for industry parties to implement a range of voluntary measures to counter the spread of disinformation and 'fake news' within the European Union. It is a non-legally binding agreement listing relevant measures to be taken in five key areas. Its implementation will be actively reviewed in the coming 12 months by both industry and the Commission. Further signees may still adopt the Code of Practice.

The code, initiated and led by the European Commission, is the most recent step in a host of initiatives to tackle fake news in the European Union (see also 'Factsheet on Tackling online disinformation'). The process included the launch of the EEAS East Strategic Communications Task Force (March 2015); a multi-stakeholder event and dialogue in the member states (November 2017); and the forming of the High Level Expert Group ('HLEG') on Fake News and Online Disinformation (January 2018). After the publication of this body's Final Report (see both IRIS 2018-5:1/7 and IRIS 2018-1:1/8), a public consultation was held (both March 2018) and the Commission published its Communication of April 2018: "Tackling online disinformation: a European Approach" (see IRIS 2018-6:1/8). The now published Code of Practice is the result of industry parties translating the Final Report of the HLEG and the Communication by the European Commission into concrete measures they can take to handle disinformation.

The new Code of Practice adopts the HLEG's definition of 'disinformation' as being "verifiably false or misleading information which, cumulatively, (a) Is created, presented and disseminated for economic gain or to intentionally deceive the public; and (b) "May cause public harm", described as "threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security". The code also explicitly lists four types of content which should not be considered as disinformation, namely: misleading advertising, reporting errors, satire and parody and clearly identified partisan reporting.

Signees to the Code of Practice commit to taking relevant action in five specified fields: disrupting the advertising revenues of those spreading disinformation; making political and issue-based advertising more transparent; addressing fake

accounts and online bots; empowering consumers and the research community. An annex with 'best practices' from company regulations and policies (stemming from Google, Facebook, Twitter, Mozilla and several advertising interest groups) has been added to provide examples. What follows is a summary of the key measures to be taken by signees in the specified fields if applicable to the signee's business. Please refer to the full report for full explanations and rationales.

Scrutiny of ad placements (a commitment to adopt policies and processes to disrupt the advertising and monetisation of disinformation);

Political and issue-based advertising (make a clear distinction between ads and editorial content; public disclosure of information on political advertisements; working towards a shared definition of 'issue-based advertising'

Integrity of services (a commitment to implement policies on the identity and misuse of automated bots and on enforcement; the creation of policies on and communication to EU-users about the impermissible use of automated systems on platforms)

Empowerment of consumers (investment in: effective indicators of the trustworthiness of sources; the prioritisation of relevant, authentic and authoritative information in automatically ranked distribution channels (for example search results, feeds); the accessibility of content from a plurality of perspectives; partnership with governments and educational institutions to support critical thinking and media literacy; a commitment to choices made in content selection)

Empowerment of the research community (supporting research efforts into disinformation and independent fact-checking networks by sharing datasets and doing joint research; no prohibition or discouragement of such research; the organisation of an annual event for academia, the fact-checking community and others)

All signing industry parties commit to writing an annual report on their efforts in relation to the Code of Practice. These reports should be reviewable by an independent third party. Relevant industry associations will provide aggregate reporting for their industries.

EU Code of Practice on Disinformation, September 2018

https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation

ANNEX to the EU Code of Practice on Disinformation - Best Practices, September 2018

https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54455

European Commission DG CONNECT, Factsheet on Tackling online disinformation, April 2018

https://ec.europa.eu/digital-single-market/en/news/factsheet-tackling-online-disinformation

BELGIUM

European Commission: Infringement proceedings concerning the transposition of the directive on the use of copyrighted printed material for blind and visually impaired people

Sophie Valais
European Audiovisual Observatory

On 26 November 2018, the EU Commission initiated proceedings for infringement of the Treaty on the Functioning of the European Union against 17 member states for non-compliance with the Directive requiring the transposition into national law of the Marrakesh Treaty (Directive (EU) 2017/1564) (see IRIS 2017-9/4 and IRIS 2016-9/4).

The Marrakesh Treaty is a WIPO-administered convention that was signed on 27 June 2013 and entered into force on 30 September 2016, after the first 20 ratifications. The Treaty facilitates access to print works in formats adapted for persons who are blind, visually impaired or otherwise print disabled, through the creation of copyright limitations and exceptions to allow the creation of copies of protected works accessible to such persons, where such limitations and exceptions are not otherwise provided for.

As a member of both WIPO and the WTO, the European Union has authority to sign and ratify treaties on behalf of its member states and to then require their implementation into national law via EU instruments such as directives or regulations. On 30 April 2014, the European Union signed the Marrakesh Treaty, which is the first international treaty in the field of copyright that the European Union became part of on the basis of its exclusive external competence. The European Union ratified the Marrakesh Treaty on 1 October 2018, during an extraordinary session of the WIPO General Assembly.

At European level, on 13 September 2017, the European Union adopted the Directive 2017/1564 to be applied among EU member states, and the Regulation (EU) 2017/1563 (see IRIS 2017-9/4 and IRIS 2016-9/4), to regulate the application of the Treaty between EU member states and non-EU-countries; both amend the existing legislative framework in the Union by providing a mandatory exception to the harmonised rights which they will affect under the Marrakesh Treaty articles. The deadline for member states to transpose the Directive into national law ended on 11 October 2018. The Regulation entered into application on 12 October 2018.

Not all member states complied by this deadline, whereby the EU Commission introduced infringement procedures against them for non-compliance. The list of the non-compliant countries is as follows: Belgium, Cyprus, the Czech Republic,

Estonia, Germany, Greece, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia and the United Kingdom.

For the time being, the Commission has not published details regarding the claimed non-compliance by the countries listed, which may concern the failure to introduce the exceptions in full, but also the scope of such exceptions where implemented.

European Commission Infringement procedure database

http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=true&active_only=0&noncom=0&r_dossier=&decision_date_from=01%2F09%2F2018&decision_date_to=24%2F11%2F201

European Commission press release, The European Union joins the Marrakesh Treaty, 1 October 2018

https://ec.europa.eu/digital-single-market/en/news/european-union-joins-marrakesh-treaty

UNESCO

Unesco: IGF 2018 delivers key messages to address Internet governance challenges

Agata Witkowska
Patpol

The thirteenth edition of the Annual Meeting of the Internet Governance Forum (IGF) took place at the UNESCO headquarters in Paris from 12 to 14 November 2018. This multi-stakeholder event, held under the guidance of the United Nations (UN), where states represented by their governments gather together with intergovernmental organisations, civil society and the private sector (hi-tech industry, press and media, among others) as well as with scholars and academics, aims at facilitating discussions about Internet governance.

This year's edition was marked by the governments' willingness to engage in the process of governance, as the IGF was called to play a more significant role with regard to regulation and policy making. While reaffirming the need to keep the Internet as a neutral, open and non-centralised space, the IGF stressed the need to secure it in order to protect and safeguard democracies, societies and economies, in the wake of the past two eventful years.

Like the previous 2017 edition held in Geneva, the IGF 2018 delivered a set of messages summarising the main highlights and outcomes of its 2 sessions, which are "The new challenges of the Internet governance" and "Strengthening the Internet governance and the IGF". The key messages were as follows:

- The need to foster trust in digital innovation, while taking into account the rising concerns regarding Artificial Intelligence (AI) and algorithms, in terms of ethics, transparency and accountability, as to the use and processing of personal data, among other things.

- Regulation alone is not enough to tackle the risks of information disorders (that is to say, misinformation, mal information and disinformation). Preserving media independence and developing and promoting education and media literacy are equally as important.

- Increasing the level of digital security by involving all concerned stakeholders and taking into consideration the importance of striking a balance between privacy and security are central to an effective protection of individuals online.

- Adopting a multi-stakeholder approach shall be inclusive by engaging with developing countries and SMEs, as they also have an impact on a largely globalised cyberspace.

- ICT offer considerable opportunities but also raise multiple challenges in terms of employment and competition in the different markets. Also, regulation should care for both businesses and individuals as employees and customers, as they are all integral parts of the digital economy.

- Protecting fundamental human rights online is more vital than ever, with particular emphasis on the most vulnerable groups such as children, women, refugees, persons with disabilities and sexual minorities. There is a need to promote greater gender equality and equal opportunities by addressing structural barriers.

- Adapting to the latest innovations and trends by implementing technical standards is a key to better security, interoperability and accountability, and hence better governance.

- Using AI to ensure inclusion and accessibility is a top priority, notably by raising awareness among developers and by actively mobilising citizens and communities.

Information and communication technologies (ICT), including the Internet, are high on the UN's 2030 Agenda, which aspires to advance its Sustainable Development Goals, adopted by all UN members states in 2015.

The fourteenth IGF will be hosted by Germany; it will be held in Berlin from 25 to 29 November 2019.

IGF 2018, Paris messages for the IGF 2018

http://igf2018.fr/wp-content/uploads/2018/11/WIP-Paris-Messages-.pdf

NATIONAL

BELGIUM

[BE] CSA opinion on “must-carry” rules in French-speaking Belgium

Olivier Hermanns
Conseil Supérieur de l’Audiovisuel Belge

In accordance with Article 31(1) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (the Universal Service Directive), the Belgian audiovisual regulatory authority (the Conseil supérieur de l’audiovisuel - CSA) recently issued an opinion on the review of “must-carry” obligations in the French-speaking part of Belgium.

Under the directive, these obligations must be reviewed periodically. The CSA’s most recent consolidated review had been conducted in 2014. As part of the latest review, the regulatory body began by summarising the current situation (in part 2 of the opinion). It then conducted an impact analysis in order to revisit the reasons for establishing a “must-carry” system (part 3), before looking at different ways in which it might evolve in the future (part 4). In conclusion, the CSA made a number of practical proposals, addressed to the Belgian public authorities, regarding the future legislative amendments that will be necessary in order to transpose both the new AVMS Directive and the European Electronic Communications Code.

In French-speaking Belgium (apart from the Brussels Capital region), “must-carry” obligations are currently imposed on the cable network operators (coaxial and bifilar) Brutélé, Nethys, Telenet and Proximus. In theory, they also apply to operators of satellite networks and electronic communications networks other than ether-based television and electronic communications networks; in practice, however, no operators currently meet this definition.

Those audiovisual media services that currently benefit from “must-carry” status are, in practice, the linear television services of the Belgian public broadcasters (RTBF, two Dutch-language VRT channels, one German-language BRF channel, and local channels broadcasting in their respective areas), as well as the French-language TV5 Monde channel for France, Belgium and Switzerland. A number of linear public radio stations also have “must-carry” status. Plans to extend the system to include non-linear Belgian public services (radio and television) have also been set out in legislation but are yet to be implemented. On the other hand, even though the directive allows it, the legislator has not broadened the “must-carry” rules to include complementary services designed to make programmes more accessible to people with sensory impairments, preferring to promote

accessibility in other ways.

The CSA stressed that the “must-carry” system continues to achieve several general interest objectives and plays an important role for various disadvantaged groups.

However, according to the regulator, there is still room for improvement. The CSA suggested several possible areas for consideration. For example, the reciprocal “must-offer” obligation for audiovisual service providers that benefit from “must-carry”, should be better defined. In addition, since a large number of users in French-speaking Belgium still receive their television and radio programmes in analogue form via cable, the CSA recommended that the legislator devise a separate scheme for this method of broadcasting (in line with recital 310 of the new European Electronic Communications Code). It could be a case of limiting “must carry” obligations for analogue services to areas where they remain indispensable due to the absence of a modernised cable network and/or competition. However, if the legislator was thinking of removing “must-carry” obligations for analogue services, the CSA recommended that users be given a free analogue converter. The regulator thought these recommendations suitably took into account the interests of both operators and users.

The CSA submitted its opinion to the Government of the French-speaking Community of Belgium and published it on its website on 30 October 2018.

CSA, Collège d’autorisation et de contrôle, Avis n°90-2018, réexamen du régime de distribution obligatoire « must-carry »

http://www.csa.be/documents/2920

CSA review of the “must-carry” system

BULGARIA

[BG] Disclosure of ownership and funding of media service providers

Rayna Nikolova
New Bulgarian University

An amendment to the Law on the Compulsory Deposit of Printed and Other Works and the Announcement of the Distributors and Providers of Media Services was published in issue 94 of State Gazette (dated 13 November 2018). Such “distributors” and “providers” are (i) public and commercial providers of media services under the Radio and Television Act and (ii) online news service providers (electronic newspapers, magazines, news agencies and other electronic publications, excluding social networks - such as Facebook and Twitter - and personal blogs).

By 30 June each year, each provider must submit to the Ministry of Culture a declaration (i) identifying its actual owner and indicating whether that owner occupies a public position, (ii) specifying any funding received during the previous calendar year, its volume and other details (including the person who contributed the funding). Where the provider is a public company (within the meaning of the Public Offering of Securities Act or under national law) the mention of the institution under whose supervision the company operates shall be deemed to constitute information identifying the actual owner. When the person who actually controls the content of the media service in question and/or the editorial policy is different from the actual owner of the media service provider, that fact must be stated in the declaration.

The declaration must indicate all contracts (and their value) concluded by the media service provider in the previous calendar year with state or local authorities or companies in whose capital there is state or municipal participation; this includes instances where such participation is the result of (i) public procurement, (ii) the involvement of political parties, (iii) advertising contracts with entities engaged in activities subject to regulation, or (iv) contracts that have received funding from the European Structural and Investment Funds or from other international financial institutions and donors. The declaration must be submitted electronically to the Ministry of Culture and the Registry Agency and must be announced in the relevant register. For non-observance of the law, the Minister of Culture shall impose a sanction of between BGN 10,000 and BGN 15,000. In the case of a repeated violation, the fine shall amount to between BGN 20,000 and BGN 30,000.

Законът за задължителното депозиране на печатни и други произведения и за обявяване на разпространителите и доставчиците

на медийни услуги

https://lex.bg/bg/laws/ldoc/2134956545

Law on the Compulsory Deposit of Printed and Other Works and the Announcement of the Distributors and Providers of Media services

CZECHIA

[CZ] The Supreme Administrative Court upheld the fine

Jan Fučík
Česká televize

On 17 September 2013, the Broadcasting Council of the Czech Republic issued decision no. 4143/2013 (pursuant to Section 8a (2) (g) and 8a (6) b) of Act no. 40/1995 Coll., on advertising regulation), establishing setting a fine of CZK 250000 (EUR 10000) for a breach of one of the rules laid down in section 5d (2) b) of the said law.

The defendant, Biopol, broadcast a commercial during the teleshopping programme "Sunday Recipient Extra" on 11 November 2012 on the Prima television channel advertising the possible preventive and curative effect of a diet supplement (manufactured by Biopol), Barny's Kolostrum.

The Council stated in the reasoning for its decision that Biopol misled consumers by claiming that its diet supplement possibly had both a preventive and curative effect. In particular, the Council pointed to the fact that the commercial represents Barny's Kolostrum as affording protection against viruses and bacteria; it also represents it as facilitating easier treatment of (and quicker recovery from) related diseases, thus claiming that it has curative properties. Viewers were informed that manifestations such as a cough and rhinitis are symptoms that can be pre-empted by using Barny's Kolostrum. The Council also pointed out that the commercial’s message indicated the possibility of using the product for the treatment of certain symptoms (such as a cough or a runny nose) and that the use of the product made it easier to tackle those diseases. The term "easier to deal with disease" has been interpreted by the Council as amounting to a claim that the product facilitates the healing process - and hence a cure

Appeals against the Council's decision were unsuccessfully lodged with the Municipal Court in Prague and the Supreme Administrative Court. Both courts upheld the fine.

Rozsudek nejvyššího správního soudu č.j. 5 As 317/2017 ze dne 12.9.2018

https://www.rrtv.cz/cz/files/judikaty/ce499239-292c-41b7-b92a-48cd1343f0be.pdf

Decision of the Supreme Administrative Court Nr. 5 As 317/2017 from 12 September 2018

GERMANY

[DE] Berlin Administrative Court decides Bild live streams are not broadcasting

Christina Etteldorf

In a ruling of 18 October 2018 (case VG 27 L 364.18), the Verwaltungsgericht Berlin (Berlin Administrative Court - VG) upheld an emergency application from a publisher that sells the Bild newspaper and operates several Internet video services on the Bild website against a prohibition order issued by the Medienanstalt Berlin-Brandenburg (Berlin-Brandenburg media authority - mabb), which is responsible for monitoring broadcasting in the region. After a summary examination of the factual and legal elements of the case, in which the publisher's interest in suspending the order was weighed against the mabb's interest in enforcing it, the court concluded that the video services did not constitute broadcasting.

The case concerned the Internet video services "Die richtigen Fragen", "BILD live" and "BILD-Sport - Talk mit Thorsten Kinhöfer", which are streamed live on the Bild website and various social media such as Facebook and YouTube. In July 2018, the Medienanstalt Berlin-Brandenburg decided that this constituted unauthorised broadcasting because the services were linear audiovisual information and communication services aimed at the general public and designed for simultaneous reception. After filing an objection, the mabb prohibited the organisation and distribution of the live video stream unless, by 3 September 2018, an application was submitted for a licence, which is required to distribute broadcasting in Germany.

The publisher lodged an action against this decision and, at the same time, requested that the action be given suspensive effect under a summary procedure in order to delay the legal effect of the decision pending a final ruling on the principal complaint. The VG Berlin granted this request. It established that the video services concerned were, in accordance with the concept of broadcasting defined in the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement), designed for simultaneous reception by the general public using electromagnetic oscillations. However, it was debatable whether they were provided "within a schedule", which is also a necessary part of the German concept of broadcasting. This aspect was controversial and had not yet been conclusively clarified by the courts. In particular, there was no consensus over whether, in order to meet this criterion, programmes had to be a certain length, there had to be a certain number of them, or whether they had to directly follow one another. It was also questionable whether the distribution of individual linear programmes should be classified as broadcasting, or whether they should be treated as a collection of individual linear programmes instead. There was insufficient time in a summary procedure to provide definitive answers to such difficult legal questions. Therefore, it was decided that the effects of the decision should at least be

postponed, as otherwise the publisher might lose audience reach and its activity, which was protected under the Basic Law, could be temporarily restricted, and this carried more weight than the mabb's interest in the enforcement of broadcasting law.

Beschluss der 27. Kammer des VG Berling vom 18.10.2018 (VG 27 L 364.18)

https://www.berlin.de/gerichte/verwaltungsgericht/presse/pressemitteilungen/2018/pressemitteilung.750889.php

Decision of the 27th chamber of the Berlin Administrative Court, 18 October 2018 (VG 27 L 364.18)

[DE] Federal Supreme Court decides that YouTube promotional channels and videos are not audiovisual media services

Christina Etteldorf

In a judgment of 13 September 2018 (I ZR 117/15), the Bundesgerichtshof (Federal Supreme Court - BGH) decided that neither a video channel operated for promotional purposes on the YouTube Internet platform nor a video available on that channel constitute an audiovisual media service in the sense of the Audiovisual Media Services Directive (AVMSD - 2010/13/EU). In the specific case heard by the BGH, this meant that a video advertising new cars on a YouTube promotional channel had to contain information on the vehicles' official fuel consumption and CO^2 emissions because the relevant obligation in the Verordnung über Verbraucherinformationen zu Kraftstoffverbrauch, CO2-Emissionen und Stromverbrauch neuer Personenkraftwagen (Regulation on consumer information on fuel consumption, CO^2 emissions and energy consumption of new passenger cars - Pkw-ENVKV) only exempted audiovisual media services from the information obligations.

The decision follows a legal dispute between car manufacturer Peugeot Deutschland GmbH and the environmental and consumer protection organisation Deutsche Umwelthilfe e. V. Peugeot runs a channel on the YouTube platform, on which it posted a video lasting approximately 15 seconds with the title "Peugeot RCZ R Experience: Boxer" in early 2014. Deutsche Umwelthilfe brought an action against it, claiming that the failure to provide information on the official fuel consumption and CO^2 emissions of the new vehicle model advertised in the video infringed Article 5(1) of the Pkw-ENVKV, which required such information to be provided. However, Peugeot Deutschland GmbH had claimed that the exemption from information obligations for audiovisual media services under Article 5(2) Pkw-EnVKV should apply. Although the lower-instance courts agreed with the plaintiff, the BGH asked the Court of Justice of the European Union (CJEU) for a preliminary ruling. On 21 February 2018 (case C-132/17, see IRIS 2018-4:1/6), the CJEU decided that a YouTube promotional channel could not be classified as an audiovisual media service in the sense of Article 1(1)(a) AVMSD, referring primarily to the purely commercial nature of the service, whose function to inform, entertain or educate viewers was secondary at best. Such videos could also not be classified as audiovisual media services in the form of audiovisual communications since they were not included in a programme.

These findings formed the basis of the BGH's decision to reject Peugeot's appeal against the ruling of the 6th civil chamber of the Oberlandesgericht Köln (Cologne Appeal Court) of 29 May 2015. The principal purpose of the YouTube channel was not to offer programmes designed to inform, entertain or educate the general public via electronic communications networks, but to advertise goods or services for purely commercial purposes. It therefore did not meet the definition contained in Article 1(1)(a)(i) AVMSD. This interpretation of EU law was also compatible with Article 11 of the EU Charter of Fundamental Rights, since the different treatment

of promotional videos and non-promotional programmes was justified on the grounds that they had different objectives. The videos could also not be classified as audiovisual media services in the form of audiovisual commercial communications (Article 1(1)(a)(ii) in conjunction with (h) AVMSD). The video channel only contained individual videos that were independent of one another and therefore did not constitute or form part of a programme. Furthermore, since the video as a whole was promotional in nature, it could not be seen as a programme and the individual images added at the beginning and end could not be classified as an audiovisual commercial communication.

The federal legislator will now need to decide whether to respond to the inclusion of video-sharing platforms like YouTube within the scope of the recently amended AVMSD by extending the exemption set out in Article 5(2) Pkw-EnVKV.

Urteil des BGH vom 13.9.2018, Rechtssache I ZR 117/15

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=89033&pos=0&anz=1

Judgment of the Federal Supreme Court of 13 September 2018, case I ZR 117/15

[DE] Media authorities publish guidelines on labelling of influencer marketing

Jan Henrich
Institute of European Media Law (EMR), Saarbrücken/Brussels

At the #watchdog18 social media conference, the German Landesmedienanstalten (regional media authorities) presented a new “labelling matrix” for advertising in social media. The matrix contains recommendations for providers of content on YouTube, Instagram, Twitter and Facebook, for example, but also covers platforms such as Twitch and Pinterest for the first time. The guidelines, which were designed to provide practical advice in the field of influencer marketing, were introduced following an increase in infringements and court procedures linked to the inadequate labelling of advertising and product placement in social media.

Under the German broadcasting and telemedia law governing the separation of advertising and editorial content and the labelling of advertising, a distinction is made between video and photographic content on the one hand and text-based content on the other. Where video content is concerned, Article 58(3) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV) states that the provisions of Articles 7 and 8 RStV concerning separation and labelling apply. For photographic and text-based content, the less intensive advertising rules of Article 58(1) RStV and Article 6(1)(1) of the Telemediengesetz (Telemedia Act - TMG) apply. Influencers must also observe the advertising rules contained in Article 6 of the Jugendmedienschutz-Staatsvertrag (Inter-State Agreement on the protection of minors in the media - JMStV). These provisions contain labelling obligations and advertising restrictions designed to shield the editorial independence of programmes against third-party interference, protect users and viewers, and safeguard minors from unlawful advertising on the Internet.

The recently published guidelines explain how these legal requirements also apply to influencers. For example, Instagram posts about products that are published in return for a consideration must be labelled as advertisements at the start, while affiliate links must be indicated on YouTube videos.

Videos about products used or made available free of charge, but whose publication is linked to an agreement, must be clearly and permanently marked with the word “Werbevideo” (promotional video) if the product is the main subject of the video.

The guidelines have considerable practical significance for the influencers concerned. The regional media authorities are responsible for monitoring compliance with broadcasting legislation. This applies not only to licensed television and radio services and the protection of minors from online advertising, but also, in most Länder, to other advertising laws governing audiovisual online media and social media. The responsible authority is always the one in whose Bundesland the Internet-based service operator is domiciled. The media

authorities can open supervisory procedures and impose fines when the rules are infringed.

Kennzeichnungs-Matrix der Landesmedienanstalten vom 15. November 2018

https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Richtlinien_Leitfaeden/Leitfaden_Medienanstalten_Werbekennzeichnung_Social_Media.pdf

Labelling matrix of the regional media authorities, 15 November 2018

FRANCE

[FR] CSA orders Canal Plus to broadcast message

Amélie Blocman
Légipresse

At 7 a.m. on 22 December 2017, the TV channel Canal Plus broadcast a programme about Togo, explaining in particular that this African state, in which Vincent Bolloré, the channel's owner at the time, has numerous interests, has "modern infrastructure" and "an ambitious development policy that encourages investment from all over the world". The programme, which was just under seven minutes long and resembled an "infomercial", had not been listed in the schedule and did not contain any opening or closing credits. Viewers were therefore uninformed about its nature or its purpose. As a result, the national audiovisual regulatory authority (the Conseil supérieur de l'audiovisuel - CSA) opened an investigation.

Following the investigation, it became clear that no information had been given concerning the origin of the images shown, some of which had come from the state's own corporate films. The channel had previously been issued with a formal notice requiring it to respect the integrity of information, in accordance with its licence. Indeed, Article 15 of the licence stated that: "The integrity requirement applies to all programmes broadcast by the service. The company will verify the validity and sources of information. As far as possible, its origin must be indicated. Uncertain information must be reported in the conditional tense." Furthermore, under Article 51 of the licence, "if the obligations laid down in this licence are breached, the Conseil supérieur de l'audiovisuel may order that a message be broadcast under terms and conditions that it shall lay down".

In view of the circumstances, the CSA considered that the broadcast of the disputed programme, without viewers being given any context or information about its origin, constituted a breach of the channel's licence.

The CSA therefore punished the channel by ordering that a message be read out on Canal Plus "by a presenter in a studio once, not at the weekend, in the free-to-air programmes of the Canal+ service, within eight days of it being notified of the CSA decision". The channel broadcast the message at 8.15am on 31 October on CNews, the group's news channel.

Décision du CSA du 24 octobre 2018 portant sanction à l'encontre de la société d'édition de Canal Plus

https://www.csa.fr/Arbitrer/Espace-juridique/Les-textes-reglementaires-du-CSA/Les-decisions-du-CSA/Decision-du-24-octobre-2018-portant-sanction-a-l-encontre-de-la-societe-d-edition-de-Canal-Plus

CSA decision of 24 October 2018 sanctioning the Canal Plus television channel

[FR] CSA publishes its annual report on the application of its Food Charter

Amélie Blocman
Légipresse

On 29 October 2018 the national audiovisual regulatory authority, the Conseil Supérieur de l'Audiovisuel (CSA), published a report, which will be sent to the national parliament; the aim of the report is to assess the action taken by the audiovisual communication services in respect of (and to determine the level of compliance with the obligations contained in) its Food Charter. The principle of compiling a report on this area, in order to provide better information regarding television channels' actions, was incorporated into the Act of 30 September 1986 by the Act of 20 December 2016, which abolished commercial advertising during programmes on public television aimed at children and young people.

In 2009, in the light of the increasing prevalence of food-related health problems, the CSA proposed that audiovisual stakeholders should adhere to a charter intended to promote "healthy eating and regular physical activity". Thus, in return for the maintenance of the legislative and regulatory provisions governing food advertising in force as at the date of signature, editors, advertisers, producers and agencies undertook voluntarily to take action in support of national policy on public health. A new Charter, signed at the end of 2013 and to remain valid for a period of five years, added further undertakings in an effort to combat obesity and preventing cardiovascular disease. The Charter took account of new methods of broadcasting television programmes (websites and catch-up TV), and its scope was widened to include overseas channels. The minimum volume of programmes devoted to a healthy lifestyle has also been increased. Subsequently, the adoption of the "Gattolin Act", which abolished commercial advertising before, during and after programmes aimed at children and young people on France Télévisions channels, provided new impetus for more intensive thinking about better eating and combating obesity.

In its report, the CSA welcomed the results achieved, indicating that the volume of programmes promoting a healthy lifestyle had increased from 1 410 to 1 637 hours per year over the period covered by the report. Areas for improvement have nevertheless been identified and will be taken into account when drawing up the Charter for 2019-2023. The CSA intends, for instance, to extend its scope to include new issues related to unhealthy lifestyles, and to pay particular attention to the issue of addictions.

Communiqué de presse du CSA, « Charte alimentaire » : publication du rapport annuel destiné au Parlement, 29 octobre 2018

https://www.csa.fr/Informer/Espace-presse/Communiques-de-presse/Charte-alimentaire-publication-du-rapport-annuel-destine-au-Parlement

Press release issued by the CSA: Food Charter - publication of the annual report to the Parliament, 29 October 2018

[FR] Laws to combat manipulation of information finally adopted

Amélie Blocman
Légipresse

On 20 November 2018, having been firmly rejected twice by the Senate, draft ordinary and organic laws on the fight against the manipulation of information have been adopted following the final reading by the National Assembly.

Under the new law, an emergency procedure can be used to stop the dissemination, during election campaigns, of “inaccurate or misleading allegations or statements likely to affect the sincerity of the vote” when they are “disseminated on a massive scale in a deliberate, artificial or automated manner via an online public communication service”.

Digital platforms are also subject to new obligations concerning cooperation (to combat “fake news”) and transparency. For example, those “whose activity exceeds a certain number of connections on French soil” will be required to “provide users with accurate, clear and transparent information about the identity of any natural person, or the name, headquarters and purpose of any legal entity, or of that on whose behalf it is acting, that pays the platform to promote information linked to a debate of general public interest”. Failure to respect these obligations may be punished by a year’s imprisonment and a EUR 75 000 fine.

The new law also amends the law of 30 September 1986 on freedom of communication. The national audiovisual regulatory authority (the Conseil supérieur de l’audiovisuel - CSA) will be able to prevent, suspend or prohibit the distribution of television services controlled by a foreign state that “harm the fundamental interests of the nation, including the smooth functioning of its institutions - particularly by disseminating false information”. The law in particular establishes an exceptional procedure for administrative suspension of the distribution of a licensed broadcasting service during election campaigns.

In the wake of the adoption of the law by the National Assembly, the prime minister and more than 60 senators, including some from the presidential majority, appealed to the Constitutional Council, claiming that Article 1 and the new emergency procedure unnecessarily, inappropriately and disproportionately contravened the freedom of expression and communication. They also argued that the newly created offence of infringing the new transparency obligations of online platforms violated the constitutional principle of the legality of offences and penalties.

“The manipulation of information is not only a threat but a widespread reality,” Minister of Culture Franck Riester warned the National Assembly on the day of the vote. “France cannot wait for the European Union,” he added, although he admitted that “Regulation needs to happen at EU level.” Meanwhile, the rapporteur, Bruno Studer, stressed the balanced nature of the law, “which

guarantees the freedom of the press" and could be in force in time for the next European elections. However, other MPs have criticised the definition of "false information", stating that it is "neither clear nor protective" and that they are "sceptical" about the effectiveness of the measures and fearful of "self-censorship", "thought police" and "breaches of press freedoms".

The Constitutional Council validated the two laws in two decisions of 20 December 2018 (Decisions no. 2018-773 DC and 2018-774 DC), after some reservations concerning interpretation in order to guarantee the balance between the limits to freedom of expression, the need for a sincere vote and the principle of clarity of the electoral vote.

Proposition de loi relative à la manipulation de l'information, enregistrée à la Présidence de l'Assemblée nationale le 21 mars 2018

http://www.assemblee-nationale.fr/15/pdf/propositions/pion0799.pdf

Bill on the manipulation of information, registered at the office of the president of the National Assembly on 21 March 2018

Communiqué de presse du ministère de la Culture, Fake news : Les enjeux de la loi contre la manipulation de l'information, 21 novembre 2018

http://www.culture.gouv.fr/Actualites/Les-enjeux-de-la-loi-contre-la-manipulation-de-l-information

Ministry of Culture press release: 'Fake news: issues linked to the law against the manipulation of information', 21 November 2018

Décision du Conseil constitutionnel n° 2018-773 DC du 20 décembre 2018, concernant la loi relative à la lutte contre la manipulation de l'information, JORF n°0297 du 23 décembre 2018

https://www.conseil-constitutionnel.fr/decision/2018/2018773DC.htm

Decision of the Constitutional Council n° 2018-773 DC of 20 December 2018, concerning the ordinary law on the fight against the manipulation of information, JORF n°0297 of 23 December 2018

Décision du Conseil constitutionnel n° 2018-774 DC du 20 décembre 2018, concernant la loi organique relative à la lutte contre la manipulation de l'information, JORF n°0297 du 23 décembre 2018

https://www.conseil-constitutionnel.fr/decision/2018/2018774DC.htm

Decision of the Constitutional Council n° 2018-774 DC of 20 December 2018, concerning the organic law on the fight against the manipulation of information, JORF n°0297 of 23 December 2018

[FR] Molotov TV: HADOPI delivers opinion on the private copying exception for television programmes reproduced by remote access

Amélie Blocman
Légipresse

On 29 October 2018, France's high authority for the broadcasting of works and the protection of rights on the Internet, the Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet (HADOPI), delivered its opinion on the effective implementation of the private copying exception with regard to television programmes received via the Molotov TV platform. It is HADOPI's mission to ensure that the technical restrictions implemented by online services do not have the effect of depriving anyone of the effective benefit of the private copying exception.

Molotov TV, which offers the distribution of audiovisual services on the Internet ("over-the-top" services), is the only television service distributor in France to provide a remote storage and copying service. The matter had been referred to HADOPI by a subscriber to the platform who drew attention to the restrictions placed on certain recording functions in respect of some of the programmes broadcast - including a limit on capacity for the recording of channels in the TF1 and M6 groups at 20 hours (aggregated by group), the limited possibility of scheduling recordings, and the impossibility of copying recorded files onto other media. The HADOPI therefore had to determine whether, despite these restrictions, the requirement that it be possible to make a private copy was met with regard to Article L. 3319 of France's Intellectual Property Code, which acknowledges the right to make a private copy of television programmes on digital media.

Meeting on 25 October 2018, the HADOPI's board held that the "private copying exception with regard to linear programmes assumed, a minima, the possibility of the beneficiary being able to copy the programmes received within the limit of the storage capacity acquired, against payment of a fee. It follows from all these elements that the threshold of 20 hours applied in limiting recording capacity in respect of the programmes of any one group of channels for Molotov's paying subscribers may be regarded as unjustified, as it is over-restrictive." The HADOPI felt that, provided that the copy made remained protected from unauthorised use, users should be able to dispose of them fully and freely. This also implied the possibility, as far as this was feasible, of viewing them at any time - including in the absence of an Internet connection and on any other medium. However, regarding the other restrictions referred to by the applicant (including the fact that it was not possible to schedule recordings more than two weeks ahead and the impossibility of recording more than one programme simultaneously), the HADOPI found that these limitations did not infringe the private copying exception. The HADOPI emphasised that its opinion referred exclusively to the service currently provided by Molotov TV and could not be held to reflect its position should any new services be introduced.

Avis n° 2018-01 relatif à l'exception de copie privée des programmes télévisés reproduits par voie d'accès à distance

https://hadopi.fr/sites/default/files/sites/default/files/ckeditor_files/CP%20avis/20181029_avis_exceptioncopieprivee_progtelevises_reproduitsadistance.pdf

Opinion no. 2018-01 on the private copying exception with regard to television programmes reproduced by remote access

[FR] Signing of agreement between cinema organisations and Canal+ paves the way for new media chronology

Amélie Blocman
Légipresse

Discussions have been ongoing for the past few months between French television Canal+ and the country's film-industry professional organisations regarding the channel's future investment in French films. Canal+, the leading player in financing for French cinema (EUR 160 million 2017), has the benefit of exclusive "exploitation windows" in respect of the works that it pre-finances. After talks broke down a few weeks ago, an agreement hailed by the Ministry of Culture as "very positive for the entire branch" was finally reached on 6 November 2018. The provisions of the agreement include the renewal of the channel's undertakings regarding the French cinema sector for a four-year period (i.e. until 31 December 2022) and the continuance of the channel's generalist model focused on cinema and sport. The agreement paves the way for the signing of a new agreement on media chronology which will afford the public speedier access to works on both television and the other platforms. "This is a major agreement that provides support for [the] creation [of new works]. It will make it possible to harness the vitality and diversity of our country's cinema," explained Frédérique Bredin, General Manager of France's Centre National de Cinématographie et l'Image Animée (Centre for the Cinema and Animation).

At the same time, the Canal+ and TF1 groups brought an end to a conflict that had resulted in Canal+ depriving some of its subscribers of the TF1 channel early in the year. The groups announced that they had signed a broadcasting agreement allowing channels such as TF1, TMC, TFX and LCI to be made available on all the channels broadcast by Canal+. The agreement consolidates the partnership between the two groups by enabling the offer of enriched services to all subscribers to Canal+ packages. It also heralds a new, broader partnership between TF1 and Dailymotion, which - like Canal+ - belongs to the Vivendi group. TF1, wishing to realise a financial advantage from the broadcasting of its channels by third parties, had already managed to reach an agreement with the four telecom groups in France (Bouygues Telecom, Free, Altice-SFR and Orange), but not with Canal+. France's audiovisual regulatory authority, the Conseil Supérieur de l'Audiovisuel (CSA), and the Government became more insistent and a few days later Canal+ gradually restored the signal for TF1 in its offers and said that it was prepared to negotiate with TF1.

Communiqué de presse du Ministère de la culture, Signature de l'accord entre les organisations du cinéma et Canal+, 8 novembre 2018

http://www.culture.gouv.fr/Presse/Communiques-de-presse/Signature-de-l-accord-entre-les-organisations-du-cinema-et-Canal

Press release issued by the Ministry of Culture on 8 November 2018: Signing of agreement between cinema organisations and Canal+

Communiqué de presse du Groupe Canal +, Le groupe CANAL+ annonce un nouvel accord avec le cinéma français et la signature imminente de l'accord sur la chronologie des médias, 8 novembre 2018

https://www.vivendi.com/wp-content/uploads/2018/11/20181108-Communique-Groupe-CANAL-Nouvel-accord-avec-le-Cinema-Francais-et-signature-imminente-de-laccord-sur-la-chronologie-des-medias.pdf

Press release issued by the Canal+ Group on 8 November 2018: Canal+ Group announces new agreement with French cinema sector and imminent signing of agreement on media chronology

UNITED KINGDOM

[GB] Channel 5 News held in breach by Ofcom for newscaster inaccurately reporting facts and the broadcaster not correcting the error in a timely manner.

Julian Wilkins
Wordley Partnership and Q Chambers

Channel 5 News, produced by Independent Television News Limited (ITN), was found in breach of rules 5.1 and 5.2 by Ofcom when its newscaster incorrectly stated during its bulletin on the 6th September 2018 that former Russian spy Sergei Skripal and his daughter, Yulia Skripal, who were victims of a Novichok (a nerve agent) attack which occurred in Salisbury, England on 4th March 2018, had died from their poisoning, when in fact they had survived. Furthermore, the news channel had failed to act quickly, taking over a week to broadcast a correction.

Rule 5.1 of the Ofcom Code states: “News, in whatever form, must be reported with due accuracy and presented with due impartiality.” Whilst Rule 5.2 says: “Significant mistakes in news should normally be acknowledged and corrected on air quickly [...] Corrections should be appropriately scheduled...”

According to Channel 5 News, they had prepared the script to be read from the autocue by its newscaster. The script correctly said: “Alexander Petrov and Ruslan Boshirov - believed to be from Russian military intelligence - were named as the main suspects that poisoned former spy Sergei Skripal in March using the deadly nerve agent Novichok...”

Instead, for some inexplicable reason, the presenter deviated from the agreed script stating: “Alexander Petrov and Rusian Boshirov were named as the main suspects that killed former spy Sergei Skripal and daughter Yulia in March.”

Channel 5 News did not realise their mistake nor did they receive any complaints from the public. It was only after receiving notification from Ofcom that Channel 5 corrected the inaccurate reporting and apologised during their 9 p.m. Channel 5 News Update broadcast on 13 September 2018.

Channel 5 explained to Ofcom that it had a rigourous compliance procedure for fact checking and ensuring regulatory compliance, including a duty editor and a duty solicitor as well as ITN running regular internal training.

Although Ofcom recognised that a mistake had occurred, they considered that it was vital for a news channel to ensure due accuracy. Due accuracy means adequate or appropriate to the subject and nature of the programme. The approach may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to the content, and the extent to which the content and approach is signalled to the audience. Ofcom recognised the need for a news organisation to have freedom of expression

pursuant to Article 10 of the European Convention on Human Rights as to how they presented a story and challenged participants in a story.

Section Five of the Code reflected Ofcom's duties under the Communications Act 2003 to ensure accuracy and impartiality in order to maintain the viewers' trust that the facts of the news, and the factual background to it, are reported with appropriate accuracy. Ofcom stated in their decision that these principles "go to the heart of the relationship of trust between a news broadcaster and its audience."

There was an underlying need to ensure accuracy and to correct mistakes quickly. ITN had failed on both these accounts on this occasion.

Ofcom appreciated that ITN had good editorial policies for Channel 5 News and that the editorial team, including the newscaster, had subsequently undergone additional training, including how one should not improvise scripts but adhere to the agreed autocue text. Nevertheless, Channel 5 News was held in breach of Rule 5.1 and Rule 5.2 for lack of due accuracy and failing to correct the error in a sufficiently timely manner.

Issue 365 of Ofcom's Broadcast and On Demand Bulletin dated 5th November 2018

https://www.ofcom.org.uk/__data/assets/pdf_file/0030/125688/issue-365-broadcast-on-demand-bulletin.pdf

[GB] TV ad ruling overturned after review

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deeJgee Research/Consultancy

The issue concerned the showing of an advertisement for a granola product placed by the Kellogg Marketing and Sales Company (UK) Ltd. The advertisement appeared between episodes of the Mr Bean cartoon. The complainant was the Obesity Health Alliance which argued that it was an ad for a product that was high in fat, salt or sugar (HFSS product) that was advertised in programmes commissioned for, principally directed at or likely to appeal to audiences below the age of 16. As such, it infringed the Broadcasting Committee of Advertising Practice's (BCAP) Code rules 32.5. and 32.5.1, namely:

These products may not be advertised in or adjacent to programmes commissioned for, principally directed at or likely to appeal particularly to audiences below the age of 16 (32.5) and food or drink products that are assessed as high in fat, salt or sugar (HFSS) in accordance with the nutrient profiling scheme published by the Food Standards Agency (FSA) on 6 December 2005.

The Advertising Standards Authority (ASA) found the ad to be in breach of those articles of the Code. Kellogg's lodged an appeal for an independent review of the decision. To be accepted, it needed to be established that there was a "substantial flaw" in the initial ruling. This is a relatively uncommon occurrence. It is relatively uncommon for the ASA to be forced into overturning a decision like the one made in the Kellogg's case, the last being in November 2017; in that year, the ASA dealt with over 27 000 complaints about more than 19 000 ads.

Originally, the ASA had accepted the proposition that the use of the branding character (Kellogg's famous Coco the monkey character) and music meant that the product in the ad, even if it was not in itself HFSS, meant that the context brought the ad into the infringing territory. However, the company argued that (i) the ad did show the granola product as being clearly differentiated from the core Coco Pops range; (ii) ASA rules state that it is fine to use a brand character usually associated with a sugary food to promote a healthy one and (iii) its original Coco Pops range has now been reformulated with a 40% reduction in sugar, which means that it is no longer officially classified as a junk food.

Following the independent review, the ASA has cleared the ad of breaking any UK advertising rules on the grounds that "We considered that Coco Pops Granola was the focus of the ad throughout, including through the use of close-up shots of the product and product pack, and that, although the ad drew attention to the milk 'turning chocolatey', a phrase used in ads in relation to Coco Pops original cereal and other [junk food] products in the range...we considered it would be clear to both adult and child viewers that the product being advertised was Coco Pops Granola."

ASA Ruling on Kellogg Marketing and Sales Co Ltd (UK) Ltd

https://www.asa.org.uk/rulings/kellogg-marketing-and-sales-company--uk--ltd-a18-1.html

The nutrient profiling model

https://www.gov.uk/government/publications/the-nutrient-profiling-model

[GB] The High Court determines jurisdiction in online trademark infringement case

Alexandros K. Antoniou
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On 21 November 2018, the High Court of Justice in England held in EasyGroup Ltd v Easy Fly Express Ltd & Chowdhury that a court had erred in granting permission to serve the Claim Form and Particulars of Claim on the defendants outside the jurisdiction. This was because the claimant had no real prospect of establishing that the defendant had targeted the UK and EU markets.

The claimant in this case was the well-known proprietor of several "easy-" prefixed registered UK and EU trademarks, including the words "EasyJet" and "easyFlights", registered in relation to the transportation of goods by air. The defendants were Easy Fly, a Bangladeshi airline company and Mr Chowdhury, its chairman, who offer and provide airline cargo services under the sign "EasyFly". At the date of issue of the claim, Mr Chowdhury was also the registrant of the domain name www.easyfly-express.com from which Easy Fly marketed its services.

EasyGroup contended that the similarity between their registered trademarks and the defendants' sign was "striking" and that the defendants "imitated" EasyGroup's get-up (including their branded aeroplanes and distinctive house style). As such, the defendants' use of the "EasyFly" sign allegedly infringed the trademarks of the claimant company and amounted to passing off. In September 2017, Deputy Master Lloyd granted permission to serve a trade mark infringement claim on the defendants outside the jurisdiction in Bangladesh. The defendants' case was, however, that the court had no jurisdiction to do so.

Considering that the defendants' company is established in Bangladesh, the High Court in England had to apply three key criteria before granting permission to serve out of the jurisdiction, as established in AK Investment CJSC v. Kyrgyz Mobil Tel Ltd (2011), namely the claimant was required to satisfy the court that: first, there was a "real" (as opposed to a fanciful) prospect of success on the claim; secondly, there was "a good arguable case" that the claim against the foreign defendant could pass through at least one of the so-called jurisdictional "gateways" for service of proceedings outside the jurisdiction (as set out in the Civil Practice Directions); and thirdly, that in all the circumstances, England was "clearly or distinctly the appropriate forum" for the dispute.

As regards the first criterion, the High Court concluded that EasyGroup did not have in the instant case a real prospect of establishing that the defendant's airline had targeted the European Union and the United Kingdom specifically. Easy Fly had never offered flights to anywhere in Europe and had no plans to do so. The bulk of its business was transporting food within Bangladesh and its customers were predominantly Bangladeshi companies. Also, it had never had a customer from anywhere in Europe. Arnold J. was "unimpressed" with

EasyGroup's claim that the defendants' website and Facebook page were in English. The judge observed that English was widely spoken in business in Bangladesh and was the dominant language used on websites worldwide. Moreover, it was obvious from the defendants' website that Easy Fly did not have "anything remotely resembling a global reach" and was at the time "only targeting China and the Middle East." The resemblance between Easy Fly's sign and the EasyGroup's trademarks and get-up was a relevant factor, but it was not sufficient to lead the average UK or EU consumer to believe that the defendants' website or Facebook page were targeted at them. Finally, the recent Google search relied upon by EasyGroup, which generated the defendants' website as the second result when searching for "cargo flight Bangladesh," did nothing to suggest that the service was aimed at Europe.

As regards the remaining AK Investment CJSC criteria, the High Court held that EasyGroup had an "unanswerable case" in relation to one or more of the gateways relied upon, that is, EasyGroup sought an injunction to restrain the doing of acts within the United Kingdom; they relied upon UK registered trademarks, which were property situated within the United Kingdom; and lastly, the English High Court was an EU Trade Mark Court and thus had jurisdiction to hear claims related to EU trade marks. In terms of the third criterion above, it was plain in Arnold J.'s view that, had EasyGroup had a real prospect of success, England would have been the appropriate forum for the trial of the claim.

For all these reasons, Arnold J. acceded to the defendant's application for an order that the High Court had no jurisdiction to hear EasyGroup's claim.

EasyGroup Ltd v Easy Fly Express Ltd & Anor [2018] EWHC 3155 (Ch) (21 November 2018)

https://www.bailii.org/ew/cases/EWHC/Ch/2018/3155.pdf

AK Investment CJSC v Kyrgyz Mobil Tel Ltd & Ors (Isle of Man) (Rev 2) [2011] UKPC 7 (10 March 2011)

https://www.bailii.org/uk/cases/UKPC/2011/7.html

[GB] The Law Commission publishes report on abusive and offensive online communications

Alexandros K. Antoniou
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On 1 November 2018, the Law Commission, an independent body set up by Parliament in 1965 to promote the reform of the law of England and Wales, published its Scoping Report on Abusive and Offensive Online Communications.

The Commission reviewed the current criminal law in order to identify any gaps or deficiencies that cause problems in tackling online and social media-based abuse. Terrorism offences, liability of social media platforms, child sexual exploitation offences, online fraud and contempt of court were excluded from the scope of this review. The report analysed the scale of online offending and indicated that the groups most likely to be affected by abusive communications online include women, young people, ethnic minorities and LGBTQ individuals. The damaging impact on victims was also considered.

The Commission concluded that abusive online communications are, “at least theoretically, criminalised to the same or even a greater degree than equivalent offline offending.” However, it stressed that the current criminal law is not keeping pace with technological changes and that reforms are required to protect victims of online abuse and hold perpetrators to account.

More specifically, the report indicated that the applicable offences fail to reflect the nature of offending in an online environment and the degree of harm caused, stressing the need for more effective and proportionate criminal offences. According to the Commission, not all harmful online conduct is pursued as seriously as its offline equivalents. Several barriers were identified as impeding effective law enforcement in this context, including the wide scale of offending, the limited resources available to enforcement agencies and a persistent cultural tolerance of online abuse.

In addition, the review found that the available offences are, in certain respects, both over- and under-inclusive. For instance, although “false communications” are criminalised under, for example, public safety laws and electoral laws, there is currently no general criminal offence in England and Wales targeting the creation or spreading of false information under the guise of news reporting. This is despite the fact that the proliferation of “fake news” is recognised as an increasingly serious public danger. The Commission also highlighted the fact that the large number of overlapping offences, especially in the area of threatening and menacing communications, can become a source of confusion.

The report also underlines the ambiguity of the elements of some offences in respect of how they apply to online communications. It is unclear, for example, whether cyberspace could be considered as a “public place” for the purposes of

the common-law offence of “outraging public decency.” The use of vague terms in describing offences - such as “grossly offensive,” “obscene” or “indecent” communications - arguably means that the definition of certain criminal offences may be perceived as being flexible enough to encompass a wide range of online harmful activity and capable of adaptation to cover future developments. However, offences couched in imprecise terms pose issues of indeterminacy and legal interpretation, which can in turn prove “problematic for respect of rule of law values and principles such as predictability, consistency, equality, certainty and non-retroactivity.”

Lastly, the Commission observed that “the criminal law is having little effect in punishing and deterring certain forms of group abuse” and drew attention to the phenomenon of “pile on” harassment, whereby online harassment is coordinated against an individual by multiple people. It also raised concerns about the responses of criminal law to online abuses of privacy such as “outing” or “doxing” and questioned whether the current law provides adequate remedies for the most serious breaches of privacy. The Department for Digital, Culture, Media and Sport will now analyse the report and decide on the next steps to be taken regarding tackling online abuse.

Law Commission, Abusive and Offensive Online Communications: A Scoping Report (Law Com No 381)

https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2018/10/6_5039_LC_Online_Comms_Report_FINAL_291018_WEB.pdf

CROATIA

[HR] Hate speech in the media: scale, stakeholders and approaches

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The judiciary, national regulatory authorities, self-regulatory bodies, and media literacy programmes play an important role in combating hate speech in the media, as the international conference held in Zagreb on 6-7 November 2018 showed. The event was organised by the Council of Europe (CoE) and the Agencija za elektroničke medije (Croatian Agency of Electronic Media - AEM). It gathered together more than 130 participants and speakers from 28 CoE member states, the European Court of Human Rights (ECtHR) and UNESCO. The big tech industry was represented by the market leader, Facebook.

The conclusions of the conference emphasised the scale of hate speech affecting ethnic, religious and sexual minorities, immigrants and other groups in Europe, and stressed that the fight against it is a complex and multidimensional process requiring the coordination of various stakeholders, including institutional and non-institutional actors, politicians, legislators, regulators, judges, prosecutors, media, digital intermediaries, journalists, civil society organisations and academia. It was stressed that media literacy programmes can raise awareness about the risks hate speech poses to democracy, while empowering citizens of all demographic groups with a critical understanding of the media, as well as engaging in dialogue, counter-speech and alternative narratives. The possibility of the reassessment and further development of the currently applicable CoE standards on hate speech was also indicated, with a view to developing approaches capable of addressing the multi-faceted nature of the phenomenon and providing graduated responses and guidance to the member states and other relevant stakeholders.

Facebook’s representative provided information on the ongoing hiring of thousands of moderators and on large investments in solutions combining AI and human resources. The policies and measures presented attracted a lot of attention, but also criticism from some conference participants, who found the responses of the largest social media to hate speech and disinformation insufficient.

Regulators, on the other hand, cannot increase their staff significantly. Even if they did, the unprecedented amount of content cannot be tackled by traditional regulatory approaches. Therefore, they too will be looking into new, technology-based approaches, while also engaging in media literacy, encouraging people to be critical, and building partnerships with other stakeholders. A special challenge to which many do not see answers at the moment is the issue of jurisdiction related to the recent extension of the scope of the AVMSD to video sharing

platforms (VSP). The fact that many regulators struggle with interferences to their work gives rise to particular concerns. The debate confirmed that although the situation is changing, the key prerequisites for effective regulation remain the same, namely independence, the transparency of regulators and appropriate punitive mechanisms. It was also emphasised that, besides hate speech concerns, equal attention must be paid to freedom of expression.

The debate on the role of the judiciary highlighted the importance of high standards of scrutiny for the utilisation of criminal laws. Hate speech should be interpreted in a limited manner and criminal offences precisely defined and used in a very restricted mode. The judiciary, struggling with the complexities of cases and constantly evolving case law, also has a need for expertise, including a better understanding of the broader hate speech context. Judges and prosecutors do not only ensure the impartial application of the laws, but also enforce moral and ethical standards in the course of the proceedings. However, they should not deal with allegations of hate speech on the basis of what they personally like or dislike. Their actions should be completely neutral.

Judging from the diverse and vibrant group of governance initiatives, ranging from established forms of media self-regulation to new forms of civil society responses, the digital challenges evoked a range of approaches. As demonstrated by the examples presented, these are not often limited to one activity, but engage in a multitude of actions, often including training and awareness-raising initiatives, or bring together a multitude of stakeholders, as for example in the case of the joint effort initiated by Reporters sans frontières (Reporters without borders - RSF). The need to reinforce and reinvent press councils to become gatekeepers of quality journalism in the digital world was also flagged up.

Activities and research to promote media literacy, as discussed at the conference, showed that media literacy is also a dynamic concept that evolves in response to challenges arising from changes in the digital environment, often differing from country to country and from sector to sector. Since media technology keeps evolving, this life-long learning and behaviour-changing journey has to be supported by a range of different stakeholders and long-term funding. As illustrated by the participants, there are numerous successful approaches with good results; however, media literacy should not be treated as a panacea for all media (and social media) ills.

Council of Europe, International conference "Addressing hate speech in the media: the role of regulatory authorities and the judiciary," organised by the Council of Europe in partnership with the Croatian Agency for Electronic Media Zagreb, Croatia, 6-7 November 2018, Activity Report (with policy conclusions and recommendations for future activities)

https://rm.coe.int/zagreb-2018-hate-speech-conference-report/16808f0167

IRELAND

[IE] Complaint on court report in news programme upheld in part

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In October 2018, the Compliance Committee of the Broadcasting Authority of Ireland (BAI), by majority, upheld a complaint in part regarding a report of court proceedings broadcast by public service broadcaster RTÉ One on their Six-One News, a news programme broadcast each evening at 6.01 p.m.

Under section 48 of the Broadcasting Act 2009, individuals may make a complaint to the Authority that a broadcaster failed to comply with the broadcasting codes. The complainant referred to a report of court proceedings at a district court in which the complainant appeared as the defendant. The complainant was of the view that the manner in which the case was reported on the Six One News programme, with the inclusion of only some facts which were known at the time, meant that the programme was not presented with “due accuracy” and did not include “all available facts." The complainant asserted that “the exclusion of the acquittal in particular, rendered the report “misleading and unfair” and that the report was not “accurate, objective or impartial” thus violating Rules 4.1, 4.2, 4.17 and 4.19 of the BAI Code of Fairness, Objectivity and Impartiality in News and Current Affairs 2013.

In response to the complaint, RTÉ submitted that the report was based on a court copy supplied by a freelance journalist, received at 1.51 p.m. that day, detailing the morning’s court proceedings, and the Six-One News was based on this copy. A further copy was received at 6.23 p.m., which “was too late for the report to be updated before being aired” however, full details were made available on the RTÉ website. The broadcaster maintained that the report was “accurate and fair having regard to the circumstances and facts known at the time of preparing and broadcasting the content.” With regard to the complainant’s objection to some facts being excluded from the report, RTÉ stated that it “cannot cover every detail pertaining to court proceedings” and was of the view that “the contents of the Six-One News and the later updated online report accurately and impartially reported on proceedings of the court and that there was no misrepresentation of the facts.”

The BAI’s Compliance Committee, in making its determination, was “mindful that the information contained in the short news broadcast was factually accurate at the time of preparation.” However, the Committee noted that the report was prepared several hours before the broadcast and “did not feel that sufficient steps were taken by the broadcaster to ensure that the accuracy of the report was adequate and appropriate with regard to the circumstances at the time of the broadcast.” The Committee further noted that the Code of Fairness, Objectivity

and Impartiality in News and Current Affairs provides that “accuracy is a fundamental principle associated with the broadcast of news and current affairs content and should always take priority over the speed with which content can be delivered”. The Committee observed that RTÉ “did not include the updated information, nor did the report include reference to the fact that the trial was ongoing at the time of preparation.” It was the view of the Committee that RTÉ “did not take sufficient steps to ensure that it complied with the principle of accuracy which underpins the Code.”

The Committee further noted that the other main aspect of the complaint was the complainant’s belief that the omission of aspects of the defence case had led to an unfair and misleading broadcast. The Committee stated that “there is no requirement for fairness in news.” Moreover, the Committee stated that “there is no requirement for the broadcaster to cover every aspect of a story and, in this instance, the Committee did not agree that the report was misleading.”

In reaching its decision, the BAI’s Compliance Committee found that the programme had infringed some requirements as set out in Section 4.2 of the Code of Fairness, Objectivity and Impartiality in News and Current Affairs and, as such, decided to uphold the complaint in part under this section.

Broadcasting Authority of Ireland, Broadcasting Complaint Decisions, 30 October 2018, pp. 5-6.

http://www.bai.ie/en/media/sites/2/dlm_uploads/2018/10/20181016_ComplaintsPublicationDoc_AR.pdf

[IE] Referendum removes blasphemy from Irish Constitution

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On 26 October 2018, a referendum was held in Ireland on whether the offence of blasphemy should be removed from the Bunreacht na hÉireann (Irish Constitution); 65% voted in favour and 35% voted against. As a result, Article 40.6.1 of the Irish Constitution no longer provides that the publication or utterance of blasphemous matter is an offence which shall be punishable by law. Following the referendum, the Irish Minister for Justice and Equality commented that the Irish people had sent a "message to the world - a strong message that laws against blasphemy do not reflect Irish values and that we do not believe such laws should exist".

In July 2018, the Irish government introduced the Thirty-seventh Amendment of the Constitution (Repeal of the offence of the publication or utterance of blasphemous matter) Bill 2018, which was enacted by the Irish parliament in September 2018. It provided that the word "blasphemous" be removed from Article 40.6.1 of the Irish Constitution, which read: "The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law".

Notably, the particulars of the offence of blasphemy are contained in Sections 36 and 37 of the Defamation Act 2009 (see IRIS 2009-10/19); following the referendum result, the Minister for Justice and Equality announced the Irish government would now move to repeal those provisions. Section 36(2) defines blasphemous matter as "grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, [with the intention], by the publication or utterance of the matter concerned, to cause such outrage".

However, it is a defence for a defendant to prove that a reasonable person would find genuine literary, artistic, political, scientific, or academic value in the matter to which the offence relates. The offence carries a penalty of a fine not exceeding EUR 25,000.

There has never been a successful prosecution for blasphemy in Ireland. However, in 2017, a widespread public debate on the issue occurred following a complaint made to the police over an interview with the writer Stephen Fry on the subject of God, broadcast by the public broadcaster RTÉ. Following a two-day police investigation, no further action was taken.

Thirty-seventh Amendment of the Constitution (Repeal of offence of publication or utterance of blasphemous matter) Bill 2018, No. 87 of 2018

https://data.oireachtas.ie/ie/oireachtas/bill/2018/87/eng/ver_a/b8718d-as-passed-by-both-houses.pdf

ITALY

[IT] Competition Authority finds collecting society SIAE abused its dominant position

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Portolano Cavallo

On 25 September 2018, the *Autorità Garante della Concorrenza e del Mercato* (Italian Competition Authority - AGCM) condemned the *Società Italiana degli Autori ed Editori*(Italian Society of Authors and Publishers –SIAE) to pay a symbolic fine of EUR 1 000 for abusing its dominant position in breach of Article 102 TFEU in the markets for (i) the provision of services for the management of copyrights to authors; (ii) the licensing of copyrights to users; and (iii) the provision of services for the management of copyrights on behalf of foreign collecting firms. The AGCM alleges that, since at least 1 January 2012, the SIAE has implemented a unitary, exclusionary strategy aimed at extending and preserving a legal exclusivity, which, until full implementation in Italy of the so-called Barnier Directive (2014/26/UE), was granted to the SIAE by Article 180 of Law No. 633/1941. According to the AGCM, the contested conducts hindered the ability of new-entrant collecting firms to offer services outside the scope of the legal monopoly or even in the absence of any legal monopoly (following its complete suppression in October 2017). More specifically, the set of conducts of which the SIAE is accused consists of:

(a) obliging authors, as a condition for the SIAE supplying any copyright's management service, to exclusively assign to SIAE the task of managing and protecting all kinds of authors' rights over all the authors' present and future works, without limiting the exclusivity to rights covered by the legal monopoly or to certain works only (for example, bundling the managing of rights for off-line uses together with online uses and with services for protection against plagiarism); (b) restricting the authors' ability to revoke or limit the licence to the SIAE over certain works or rights only, by imposing on the rightsholders a contractual and statutory prohibition (and/or objective impossibility) to split the rights and services covered by the licence to the SIAE as well as by invoking a principle of non-severability of the joint ownership of a single copyrighted work; (c) *de facto*managing and collecting all the rights of all co-authors of copyrighted works, even where certain co-authors refused to assign their rights to the SIAE and explicitly demanded that certain rights be managed by a competing collecting firm or by the authors themselves; (d) prohibiting live concert organisers from paying copyright fees to a competing collecting firm (or any third-party) by alleging that that would constitute a breach of the legal exclusivity and threatening to use its special powers (granted to the SIAE by Article 164 Law 633/41) to enforce the collection of payments from users, even though the rightsholders clearly mandated the very same task to a competing collecting firm; (e) hindering the ability of TV broadcasters to deal with competing collecting firms

and/or directly with the rightsholders (even in case of a clear will and demand from them to this effect) by either proroguing outdated licence agreements designed under the statutory monopoly (which assigned the SIAE 100% of the collecting rights over all broadcasted works of all authors) or by imposing on broadcasters a method of calculating the copyrights uses (and fees) based on flat rate, statistical presumptions which do not reflect the actual reality of the copyrights' uses by broadcasters or of the authors' representation by the SIAE; (f) hindering the ability of foreign collecting firms to deal directly with authors or with competing collecting firms in Italy, also in connection with works of foreign authors that have never been covered by the legal monopoly, by either falsely affirming the continuing existence (and extension to all rights and works) of the legal monopoly to the foreign collecting firms or by proroguing outdated reciprocal exclusive representation agreements with such firms.

It is worth highlighting that the AGCM rejected the SIAE's argument that the relevant market should have been defined as a unique, two-sided market for the intermediation of services for the licensing, collection and management of copyrights between authors and users. Instead, the AGCM affirmed that there can be a separate product market for each service provided by collecting societies and, further, for each type of rights managed on each side of the market. The geographic scope of the market is still deemed national by the AGCM, although it recognises that it is set to evolve to an EEA-dimension. In addition, the AGCM rejected the argument that the contested conducts were objectively justified by the former legal monopoly and related public mission (invoking Article 106 TFEU) or by any technical obstacle. The AGCM argued that the contested conducts were disproportionate and unnecessary for any possible public mission, even when the legal exclusivity was in force, and that new and readily available technological tools enabled the analytical calculation of the actual time of both the copyrights' use and of the authors' representation. However, the AGCM conceded that the novelty of the infringement represented a mitigating circumstance that justified a symbolic fine.

Autorità Garante della Concorrenza e del Mercato, Delibera del 25 settembre 2018 nella procedura A508 - SIAE / SERVIZI INTEREMDIAZIONE DIRITTI D'AUTORE

http://www.agcm.it/dettaglio?db=41256297003874BD&uid=82BB58EFA22C0C68C1258335005ACA48&view=&title=-SIAE/SERVIZI%20INTERMEDIAZIONE%20DIRITTI%20D%27AUTORE&fs=Abuso%20di%20posizione%20dominante

Competition Authority, Resolution of 25 September 2018 in proceeding A508 - SIAE / COPYRIGHTS INTERMEDIATION SERVICES

[IT] New rules on theatrical windows for Italian movies

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On 14 November 2018, the Italian Minister of Cultural Heritage and Activities announced an upcoming Ministerial Decree - which he was about to sign to be sent to the competent supervisory bodies - adopted pursuant to Law No. 220/2016 (see IRIS 2017-1/23), representing the first law intervention in Italy on theatrical windows.

Until now, this matter was ruled in accordance with a well-established and largely respected practice, which the Decree enshrines, basically, into law.

Firstly, it is worth highlighting that the scope of the Decree is limited to Italian works and that it does not include foreign productions, for which the aforementioned gentlemen's agreement remains applicable.

Between a film's first screening in theatres and its availability on other platforms, a time lag of 105 days is to be respected. However, the Decree introduces two main exceptions to reducing this period.

The first case is that of films released in less than 80 theatres and having gained less than 50 000 viewers within the first 21 days: in this case, the Decree allows a shortening of the time lag to 60 days.

The second hypothesis is short-time released films (3 days or less in theatres, excluding the weekend): in this case, the window's length is reduced to only 10 days.

These reductions are intended to allow smaller (Italian) productions to circulate more quickly and easily on other platforms while possibly reducing the opportunity for piracy.

In case of violations of these provisions, the productions might not be admitted to the tax credit or other fiscal or financial benefits for cinematographic productions.

D.M. 531 29/11/2018 - MODIFICHE AL D.M. 14 LUGLIO 2017 recante individuazione dei casi di escluisione delle opere audiovisive dai benefici previsti dalla legge 14 novembre 2016 n.220, nonchè dei parametri e requisiti per definire la destinazione cinematografica delle opere audiovisive

https://www.beniculturali.it/mibac/multimedia/MiBAC/documents/1544799193923_registrato_d.m._29_novembre_2018_rep._531.pdf

Ministerial Decree no 531 of 29 November 2018

NETHERLANDS

[NL] Dutch State liable for statements made by former State Secretary about downloading from illegal sources

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On 5 September 2018, the District Court of The Hague delivered its judgment in a class action lawsuit filed by several film producers against the Dutch State. The Court ruled that the Dutch State was liable for statements made by a former State Secretary for Security and Justice about the permissibility of reproducing material from illegal sources.

The statements concerned the question of whether, under the implementation in Dutch law of the Directive 2001/29/EC (Copyright Directive), reproductions from illegal sources fell within the scope of the private copying exemption. In short, this exemption provides an exception to the exclusive right for authors to authorise or prohibit reproduction of their works for reproductions made by a natural person for private use. From its implementation in Dutch law in 2004, it had been assumed that the scope of the exemption encompassed reproductions made from both legal and illegal sources. This position was thus also recorded in the explanatory memorandum to the Dutch Copyright Law. On several occasions during his term of office, the State Secretary had propagated this position accordingly, both in the parliamentary debate and in the public debate and media.

In 2014, however, the scope of the exemption was significantly narrowed with the judgment by the Court of Justice of the European Union (CJEU) in the ACI Adam/Stichting de Thuiskopie case (IRIS 2014-6:1/4). There, the CJEU ruled that the private copying exception cannot cover reproductions made from unlawful sources.

In light of this development, the film producers argued in court that some of the statements made in 2011 and 2012 by the State Secretary had been unlawful because these entailed an incorrect interpretation of the private copying exemption and raised the suggestion that downloading from illegal sources was permitted in the Netherlands. In doing so, the State Secretary had helped establish a climate in which downloading from illegal sources was justified and had come to be considered as an acquired right. In the film producers' opinion, this was unlawful, and prejudicial to them.

The Dutch State, besides raising prescription and objections to admissibility as a defence, argued that the State Secretary could rely on parliamentary immunity. It argued that this constitutionally-granted immunity also stretched to statements made in the public debate and the media, as the substance of those statements corresponded to the ones the State Secretary had made in parliament.

In its judgment, the Court partly went along with the argument made by the Dutch State. The State Secretary's immunity, however, did not stretch to statements made in the public domain and in the media, even though the substance of those statements corresponded to statements made during the parliamentary debate. The Court ruled that the unlawfulness of the statements lay in the fact that they were presented as policy standards and thereby could have led to infringements of the rights of the film producers. It therefore held that the Dutch State was liable for these statements.

The Court did not assess the amount of damages suffered by the film producers. The causal relationship between the statements and the amount of damages will have to be determined at a later stage.

Rechtbank Den Haag 5 September 2018, ECLI:NL:RBDHA:2018:10645

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2018:10645

District Court of The Hague, 5 September 2018, ECLI:NL:RBDHA:2018:10645

[NL] Professional online influencer mother must not feature children in content

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On 1 October 2018, the District Court of The Hague resolved a case concerning the question of whether two children - aged four and two - could be included in the video logs and messages (together: content) that their mother, a professional online influencer, had uploaded to and posted on her social media accounts. After considering the children's best interests (Article 1:253a Dutch Civil Code (Burgerlijk Wetboek; DCC)), the Court ruled in the negative. Consequently, the Court ordered the mother to permanently delete all previously uploaded and posted content concerning the children. Moreover, the Court prohibited the mother from uploading and posting similar content in the future.

The underlying dispute was between the father and mother of the children - now divorcees. The father argued that his ex-wife had violated their children's right to privacy and their best interests. In particular, he feared that the content would, eventually, have adverse consequences for the children. For example, he expressed his fear that the children would become the objects of bullying or paedophilia. Consequently, he petitioned to have the mother permanently delete the previously uploaded and posted content, and to prohibit her from uploading and posting similar content in the future. The father added that he consented to his ex-wife uploading and posting content concerning their children on private social media accounts that have no more than 250 "friends". Lastly, the father petitioned to have the Court impose a coercive fine on the mother to make sure that she complies with the aforementioned obligations.

The mother contested her ex-husband's arguments; most notably, she argued that the children had yet to experience any adverse consequences. Furthermore, the mother claimed that she had started her online influencer career with the full consent, knowledge and cooperation of her ex-husband. Lastly, she attached much importance to social media's integration in society.

Before considering the parents' arguments, the Court noted that the instant case concerned a matter which parents should, in principle, decide together. As the parents showed themselves incapable of doing so, the Court subsequently determined what was in the best interests of the children (Article 1:253a DCC). In its assessment, the Court considered the children's ages - four and two - and, with that, their sense of understanding and immediate surroundings, and held that the children could not have been consciously exposed to the potential adverse consequences of the content. However, it was deemed possible - even likely - that this would be different in the future. Ultimately, the Court concluded that the mother's practices did indeed pose a threat to the children's right to privacy and, consequently, were not in the best interests of the children.

Consequently, the Court granted the father his petition. The Court did specify that the mother was only allowed to upload to and post content on private social media accounts that have no more than 250 friends - the Court speaks of “visitors” - who are known and authorised by the mother. Regarding the coercive fine, the Court specified that the mother had to pay EUR 500 for each day that she was in non-compliance with the Court’s order, up to a maximum of EUR 25 000.

Rechtbank Den Haag 1 oktober 2018, ECLI:NL:RBDHA:2018:13015

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2018:13105

District Court of The Hague 1 October 2018, ECLI:NL:RBDHA:2018:13105

ROMANIA

[RO] New members of the National Audiovisual Council

Eugen Cojocariu
Radio Romania International

On 14 November 2018, the Romanian Parliament validated seven new members of the Consiliul Naţional al Audiovizualului (National Audiovisual Council - CNA), the audiovisual watchdog (see, inter alia, IRIS 2015-10/27).

The seven new members will occupy seats that have been left vacant. A seat was left vacant after the recent resignation of a CNA member, and six mandates expired on 20 December 2018. The new members are Cristina Pocora (appointed by the presidential administration), Răsvan Popescu (nominated by the Romanian Government), Nicolae Bălaşa, Monica Gubernat and Elena Sorescu (all three proposed by the Social Democrat Party - the main ruling party), Alexandru Cristea (proposed by the National Liberal Party - the main opposition party), and Eva Borsos Orsolya (proposed by the Hungarian Democratic Union of Romania - another of the parliamentary opposition parties). They will have a six-year mandate.

A total of 20 candidates were heard by Parliament's joint culture committees. Only seven out of 20 received a favourable majority opinion. Ms Gubernat and Mr Popescu are members of the acting can, and they will continue to work within the CNA for an additional mandate. Mr Popescu is the current vice-president of the CNA.

The CNA is composed of 11 members and is appointed for a term of six years. Under Audiovisual Law no. 504/2002 and subsequent amendments thereto, the National Audiovisual Council is the guarantor of the public interest with regards to the audiovisual sector.

Aviz comun asupra propunerilor Senatului, Camerei Deputaţilor, Guvernului şi Preşedintelui României pentru Consiliul Naţional al Audiovizualului

http://www.cdep.ro/pdfs/oz/20181114_pct09.pdf

Joint opinion on the proposals of the Senate, the Chamber of Deputies, the Government and the President of Romania in respect of the National Audiovisual Council

[RO] New modifications of the Audiovisual Law

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The President of Romania, Klaus Iohannis, on 2 November 2018 promulgated Law no. 246/2018 on the modification and completion of the Audiovisual Law (no. 504/2002) on the protection of hearing-impaired persons. On the other hand, the Chamber of Deputies adopted on 14 November 2018 a modification to the Audiovisual Law's provisions regarding the need to draw a clear distinction between opinions and facts within a broadcast or a programme that addresses health issues (see, inter alia, IRIS 2013-3/26, IRIS 2014-1/37, IRIS 2014-7/29, IRIS 2014-9/26, IRIS 2015-10/27, IRIS 2016-2/26, IRIS 2016-10/24, IRIS 2017-1/30, and IRIS 2017-7/28).

According to the first draft Law, a new paragraph 4 was added to Article 421 of the Audiovisual Law. It stipulates that "in order to ensure the right of access to audiovisual media services of hearing-impaired people, television programmes with national coverage broadcast by any technical means, in digital packages, will broadcast Romanian cinematographic productions, short or long, as well as documentaries, subtitled in the Romanian language, the obligation to subtitle being the exclusive task of the copyright owner." Under a new paragraph (5), the technological solution adopted for the implementation of the provisions of paragraph (4) must allow the possibility of removing the subtitles on screen.

The draft Law was adopted by the Chamber of Deputies (the lower chamber of the Romanian Parliament) on 13 June and by the Senate (the upper chamber) on 8 October 2018. The Law will enter into force on 1 January 2019.

In another development, the Chamber of Deputies adopted on 14 November 2018 a modification to Article 26 of the Audiovisual Law under which paragraph 26 was amended to include a provision that: (1) For reasons of public health and in order to ensure that the public is given objective information within a broadcast or a programme that addresses health issues, broadcasters have the obligation to make a clear distinction between opinions and facts, to encourage the presentation of evidence-based medical arguments, and to include within the content of a programme the opinion of a specialist in the subject in question, and (2) to ensure the correct application of the provisions of paragraph 1, the Council shall issue binding rules, check compliance therewith, and impose sanctions for the violation thereof.

The draft Law has yet to be discussed by the Romanian Senate, whose decision will be final.

Propunere legislativă pentru modificarea şi completarea Legii audiovizualului nr. 504/2002 - forma adoptată de Camera Deputaţilor

http://www.cdep.ro/pls/proiecte/docs/2018/cd089_18.pdf

Draft Law for the modification and completion of the Audiovisual Law no. 504/2002 - form adopted by the Chamber of Deputies

Propunere legislativă pentru modificarea şi completarea art.261 din Legea audiovizualului nr.504/2002 - forma adoptată de Camera Deputaţilor

http://www.cdep.ro/pls/proiecte/docs/2018/cd374_18.pdf

Draft Law for the modification and completion of Article 261 of the Audiovisual Law no. 504/2002 - form adopted by the Chamber of Deputies

RUSSIAN FEDERATION

[RU] Co-regulation on copyright protection online launched

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On 1 November 2018, Roskomnadzor (the Federal Service for Supervision in the Sphere of Telecoms, Information Technologies and Mass Communications - a governmental watchdog authority) (see IRIS 2012-8/36) - hosted a ceremony at which major Russian audiovisual content owners co-signed (along with providers of online search engines and owners of web resources that allow for video hosting) a memorandum that aims to strengthen the protection of intellectual property of online audiovisual products.

A database of copyright-infringing webpages and audiovisual content in Russia is being established by content owners who are parties to the memorandum. This shall relate only to content owned by these parties. This non-public database should be consulted by the participating web-service providers, initially every hour, and then, after six months, every five minutes. Whenever pirated content happens to be uploaded by users of their services, it shall be removed - without a court decision - from search engines (within six hours), while access to it in Russia shall be blocked (within 24 hours).

The memorandum was co-signed by companies such as Gazprom-Media, All-Russian State Broadcasting Company, 1st Channel, Yandex, Rambler, Mail.Ru and Vkontakte in the presence of the chairman of Roskomnadzor. While Roskomnadzor is not a party to the memorandum, it agreed to be an “honest broker” in the event of disagreements between the parties.

The memorandum is open for signing by other relevant market players, and shall remain in force until 1 September 2019. No Western companies have signed it so far.

Меморандум о сотрудничестве в сфере охраны исключительных прав в эпоху развития цифровых технологий

https://www.vedomosti.ru/technology/articles/2018/11/01/785408-kak-budut-borotsya

Memorandum on Cooperation in the field of protection of exclusive rights in the era of developing digital technologies, signed 1 November 2018

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European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE