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EDITORIAL

A conundrum shared by every media legislator in Europe nowadays is how to regulate freedom of expression in broadcasting and on the Internet. The challenges are indeed numerous, and the present newsletter bears witness to all of them. Take the so-called “fake news” phenomenon: in our electronic pages you will be able to read about the first reports by the signatories to the “Code of Practice on Disinformation”, signed in October 2018 by a number of global companies, namely Google Inc, Facebook Inc, Twitter Inc, and Mozilla Corp, and a number of trade associations representing online advertising companies, in order to identify actions that could be put in place to address the challenges related to “disinformation" online. You will also find material about two major reports: one by the European Regulators Group for Audiovisual Media Services (ERGA) concerning internal media plurality in the audiovisual area, and the other by the Media and Internet Governance Division of the Council of Europe on European practices of the regulatory authorities of electronic media regarding media literacy.

Another topic linked to freedom of expression that still gives courts of law a headache is that of copyright in the online environment. Here it seems that the “safe harbour” protection of Article 14 of the eCommerce Directive seems to be less safe than it used to be. For example, in Italy, the Court of Rome ruled Vimeo liable for multiple copyright infringements concerning audiovisual content on its platform. In a similar case, the District Court of Amsterdam ruled that Facebook did not fall within the scope of the safe harbour of Article 14 of the eCommerce Directive with regard to advertisements infringing a third party’s trademarks. In Germany, the Cologne Regional Court of Appeal decided that domain registrars are liable for copyright infringements on filesharing platforms if they fail to shut down a domain reported by a copyright holder.

Otherwise, if you want to read about the hottest topics of the moment, we report on Italy’s progress on drafting national strategies on artificial intelligence and blockchain, and on the latest Brexit news.

Enjoy your read!

Maja Cappello, editor
European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

AZERBAIJAN

European Court of Human Rights: Khadija Ismayilova v. Azerbaijan

Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

A recent judgment delivered by the European Court of Human Rights (ECtHR) reveals how powerful persons and their entourage sometimes use clearly illegal and immoral techniques to intimidate investigative journalists in order to make them stop critically reporting on their actions, policy or corruptive activities. The judgment in the case of Khadija Ismayilova v. Azerbaijan once more illustrates the practice of harassment and intimidation, and the blatant lack of respect for the rights of journalists to critically report on the government or the president in Azerbaijan (see IRIS 2010-8/2, IRIS 2015-3/1 and IRIS 2017-7/1). The case mainly concerns a smear campaign against a well-known journalist who is reporting on corruption and human rights violations in her country. Khadija Rovshan qizi Ismayilova worked as a staff reporter and director at the Azerbaijani service of Radio Free Europe/Radio Liberty Azadliq Radio, whose broadcasts were often critical of the government. In addition, she trained journalists in investigation techniques and cross-border reporting, and she has received a number of international awards for her journalistic activity. After publishing a series of articles on government corruption involving the president of Azerbaijan and his family, she began receiving threats and was subject to acts of intimidation and gross violations of her privacy, all designed to prevent her from pursuing her journalistic work. In particular, she was sent a letter threatening her with public humiliation if she did not stop her investigative reporting. When she refused, a video recorded with a hidden camera featuring scenes of a sexual nature involving her and her then boyfriend was posted on the Internet. Around the same time, newspapers ran stories accusing her of anti-government bias, immoral behaviour and being involved in “sex scandals”. A short time later, Ismayilova discovered several hidden cameras in her flat. She reported the threats and the intrusion into her privacy to the authorities, complaining that she felt intimidated in connection with her journalistic activity, and asking the prosecution authorities to ensure her safety, to investigate the matter, and to hold those responsible for the threat and the video accountable. About a month later, Ismayilova published a press release in which she criticised the authorities for failing to conduct an adequate investigation, and she lodged a complaint against the officials of the Baku City Prosecutor’s Office. Instead of effectively investigating the threats and the gross violation of her privacy, the authorities published a status report, referring to a number of investigative steps which had been taken. The report also

criticised Ismayilova for spreading false information and it disclosed more private information not only about her, but also about some of her friends and family. Having received no effective redress from the Azerbaijani authorities, and after exhausting all relevant national judicial remedies, in September 2013, Ismayilova petitioned the ECtHR.

The ECtHR was in no doubt that the covert filming of highly intimate aspects of Ismayilova's life in her own home clearly concerned a matter of "private life", a concept that covers the physical and moral integrity of a person, as well as his or her sexual life. But the ECtHR found no sufficient evidence "beyond reasonable doubt" that the state itself was responsible for the very serious invasion of Ismayilova's privacy. Her arguments were based on circumstantial evidence or on assertions requiring corroboration and further investigation. According to the ECtHR, the question of whether state agents had abused their official power remains an open one, although it emphasised its concerns as regards the answer to that question, referring to Ismayilova's credible allegations and the contextual information provided by reports from various international and regional human rights organisations, including the Council of Europe, the OSCE and the United Nations, who had repeatedly called upon the Azerbaijani authorities to improve respect for the rights of journalists who report on human rights violations or critically report on the government.

The ECtHR specifically focused on the authorities' positive obligation under Article 8 of the European Convention of Human Rights (ECHR) to secure respect for private life, and it found that there had been significant flaws and delays in the manner in which the authorities had investigated the case. By failing to conduct an effective criminal investigation, the Azerbaijani authorities had not fulfilled their duty to adequately protect Ismayilova against such a serious, flagrant and extraordinarily intense invasion of her private life. The ECtHR also found that Article 8 ECHR had been violated through the public disclosure of confidential and personal information in the status report published by the authorities. By not effectively investigating the flagrant invasion of her privacy and by acting carelessly in further compounding the already existing breach of Ismayilova's privacy, the Azerbaijani authorities had clearly interfered with her right to private life in an unjustified manner.

In connection with the incidents involving the threatening letter, the unauthorised installation of wires and hidden cameras in her flat, the dissemination of the covertly filmed videos on the Internet, the publication of newspaper articles about her in pro-government newspapers, the ineffectiveness of the investigation and the lack of remedies against the inaction of the prosecuting authorities, as well as the publication of the status report by the investigating authorities, Ismayilova also complained that the Azerbaijani State authorities had breached their obligations under Articles 10 ECHR, which guaranteed the right to freedom of expression. The ECtHR reiterated that it had repeatedly stressed that interference with freedom of expression may have a "chilling effect" on the exercise of that freedom and even more so in cases of serious crimes committed against journalists, making it of utmost importance for the authorities to check a possible connection between the crime and the journalist's professional activity. Therefore, the ECtHR examined the entirety of Ismayilova's complaint from the standpoint of

the positive obligations of the Azerbaijani State under Article 10 ECHR. Referring to its findings under Article 8 ECHR and emphasising that the acts of a criminal nature committed against Ismayilova were apparently linked to her journalistic activity, the ECtHR was of the opinion that the authorities had failed to comply with their positive obligation to protect her in the exercise of her freedom of expression. The ECtHR referred to the significant flaws and delays in the criminal investigation, the articles published in the newspapers, and the unjustified public disclosure in the status report on the criminal investigation. In the context of many other reported violations of journalists' rights in Azerbaijan, the ECtHR unanimously came to the conclusion that the authorities had acted "contrary to the spirit of an environment protective of journalism", and that, accordingly, there had been a violation of Article 10 ECHR. The Azerbaijani Government was ordered to pay the journalist EUR 15 000 in respect of non-pecuniary damage and EUR 1 750 for the costs and expenses of the proceedings before the ECtHR.

Judgment by the European Court of Human Rights, Fifth Section, case of Khadija Ismayilova v. Azerbaijan, Application nos. 65286/13 and 57270/14, 10 January 2019

https://hudoc.echr.coe.int/eng?i=001-188993

COE: MEDIA DIVISION

Report on best media literacy practices

Elena Sotirova
European Platform of Regulatory Authorities

On 20 December 2018, within the context of an event held in Belgrade, Serbia, the Media and Internet Governance Division of the Council of Europe presented a study on European practices of the regulatory authorities of electronic media regarding media literacy. The publication was authored by Robert Tomljenović, Vice-Chairperson of the Croatian Agency for Electronic Media (AEM) and was prepared thanks to the support of the joint project of the European Union and the Council of Europe on "Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe" (JUFREX), at the request of the Serbian Regulatory Authority for Electronic Media (REM). The study aimed to provide an analysis of the best examples of European practices for promoting media literacy, putting special focus on the role of regulatory authorities in order to inspire and encourage the Serbian Regulatory Authority for Electronic Media.

The publication showcases some examples of the best European practices and the respective regulatory bodies' commitment to strengthening media literacy, alongside a special review and case study featuring Finland, the most successful European country in this field. It also provides examples of the broadcasting media regulators' work in Ireland and Croatia.

The study puts forward some recommendations for the REM: in order to improve its engagement in the field, the Serbian regulator should set up an interdepartmental institutional body that will implement media literacy projects and a social discourse on the needs and goals of media literacy education, and develop a national media literacy policy or strategy. The REM should take a more active role in working on media literacy given its important social role and complementarity with certain aspects of media content regulation and the protection of minors and consumers, as well as its preventive approach. The REM should set its internal goals and adopt an understanding of the media literacy project, as well as find funds for regular research on its citizens' media habits and literacy, particularly when it comes to youth and children. Identifying, encouraging and involving various stakeholders from educational institutions, academia, media and libraries to state institutions and civil society is one of the main roles that REM could play when working on the media literacy project.

According to the study, good results and self-sustainable projects can only be produced by including more partners, by acquiring a common understanding of issues and goals and by sharing and exchanging knowledge and resources. The REM should create a platform for gathering a wide variety of social stakeholders and encourage the establishment of diverse partnerships, as well as coming up with and supporting various projects, such as launching a web portal, publishing

brochures, conducting research, and organising workshops and lectures. Finally, the study underlines the fact that it is essential to include the media in these projects, and especially public service broadcasters such as Radio Television of Serbia (RTS), who should be actively working on improving the citizens' media literacy skills.

Regulatorna tela za elektronske medije i medijska pismenost

https://rm.coe.int/regulatory-authorities-for-electronic-media/1680903a2a

Regulatory Authorities for Electronic Media and Media Literacy

https://rm.coe.int/regulatory-authorities-for-electronic-media/1680903a2a

EUROPEAN UNION

EU: EUROPEAN COMMISSION

European Commission: Reports on the Code of Practice on Disinformation

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On 29 January 2019, the European Commission published the first reports by the signatories to the "Code of Practice on Disinformation", signed in October 2018 (IRIS 2019-1/7). The Code is a non-binding agreement between a number of companies, namely Google Inc, Facebook Inc, Twitter Inc, and Mozilla Corp, and a number of trade associations of online advertising companies, to identify actions that could be put in place to address the challenges related to "disinformation" online. The companies also agreed to regularly report on their progress and the implementation of the Code, and to cooperate with the European Commission in assessing the reporting on the functioning of the Code. As such, the European Commission also published its "Summary of the signatories' first reporting - January 2019".

The companies' reports all detail progress made in relation to specific commitments to address "disinformation" under the Code, namely (a) the scrutiny of ad placements, (b) political advertising and issue-based advertising, (c) the integrity of services, (d) empowering consumers, and (e) empowering the research community. The Commission stated that Google had taken or was taking measures towards the implementation of all the commitments of the Code, including enforcing global policies that allow advertisers to assess media buying strategies and helping them to monitor the placement of ads. It also stated that "work is still in progress" with regard to Google's political ads tool, which will be rolled out in advance of May 2019 and will include an Election Ads Transparency Report. However, the Commission noted that other tools that may help improve users' online experience, such as Breaking News and Top News, were available only in a small number of member states, and that more clarity on future deployment plans was needed.

In relation to Facebook, the Commission stated that Facebook subscribed to all the commitments of the Code and, overall, its report showed that it had taken or was taking measures towards the implementation of virtually all of them. In particular, its political ads transparency tool would be available across the member states in advance of the 2019 European Parliament elections. The report also provided insights into a number of tools designed to help consumers make decisions when they encounter online news that may be false, or to make it easier to find diverse information. However, the Commission noted that Facebook's

cooperation with fact-checkers had not yet been deployed throughout the European Union, and more clarity on deployment plans would be welcome.

In relation to Twitter, the Commission stated that it had taken or was taking measures towards the implementation of most of the commitments to which it had subscribed. Twitter had prioritised measures designed to act against malicious actors harnessing the vulnerabilities of its services, and, in particular, the closure of fake or suspicious accounts and automated systems/bots used to spam or increase the distribution of inauthentic content and disinformation. However, the Commission noted that Twitters' report did not sufficiently discuss how its advertising policies restrict purveyors of disinformation from promoting their tweets and thus achieving greater visibility.

Finally, the Commission welcomed the efforts of the trade association signatories from the online advertising sector to raise awareness of the Code and promote its uptake among their respective memberships. However, the Commission noted the absence of corporate signatories and stressed the important role advertisers play in the efforts to demonetise purveyors of disinformation.

The Commission stated that it would conduct a comprehensive assessment at the end of the Code's initial 12-month period, and "should the results prove unsatisfactory, the Commission may propose further actions, including of a regulatory nature".

European Commission, First results of the EU Code of Practice against disinformation, 29 January 2019

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

European Commission, Code of practice on Disinformation: Summary of the signatories' first reporting - January 2019, 29 January 2019

https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=57040

European Commission, Code of Practice against disinformation: Commission calls on signatories to intensify their efforts, 29 January 2019

http://europa.eu/rapid/press-release_IP-19-746_en.htm

ERGA

EU: EUROPEAN COMMISSION

Internal media plurality report

Michal Hradický
Office of the Council for Broadcasting and Retransmission, Bratislava

A major report by the European Regulators Group for Audiovisual Media Services (ERGA) has been published. The report looks at internal media plurality from the perspective of all the EU national regulatory authorities (NRAs) in the audiovisual area. Firstly, the report provides a comprehensive analysis of the framework and application of the rules on news and current affairs programmes and electoral media campaigns available to independent audiovisual media regulators in the EU. The report thereby offers a rare opportunity to look into the internal functioning and thinking of NRAs in this area. Secondly, the report contrasts this overview with the current challenges posed by shifts in the media and information landscape. The analysis includes, for the first time, the observations of NRAs regarding these challenges - notably in respect of disinformation.

ERGA, as an advisory body of the European Commission regarding the implementation of the EU's Audiovisual Media Services Directive ("AVMS Directive"), brings together the representatives of all of the EU national audiovisual regulatory bodies. ERGA has, since its establishment more than five years ago, produced many reports on various topics. As part of its different avenues of work, in 2018 ERGA concentrated also on the issue of internal media plurality. The final report, which was approved by ERGA and then published this January, is divided into four major areas. The first sets out the conceptual framework. The second considers the current state of regulation of internal media plurality during (and also outside of) election periods, providing not only a full catalogue of available measures, but also looking closer at their application (this includes an overview of the cases in this area). The third part considers changes in the media landscape (both general challenges stemming from the evolving media landscape and disinformation - including an overview of the existing and planned initiatives at the EU, Council of Europe and national level) and their impact on the existing rules. The final part offers a look at media plurality from a cross-border perspective.

The extensive report comprises 112 pages and offers findings based on internal ERGA data gathered from the NRAs covering the whole EU. Among the main findings of the report are the following. All NRAs implement some general measures aimed at protecting internal media plurality outside of an election period. Of course, not all categories of measures are available in all countries. A similar situation has been observed in respect of measures undertaken during

election periods, when almost all countries have specific regulations, aimed at traditional broadcasters, regarding electoral campaigns. Moreover, most countries have additional measures aimed at preserving internal plurality that are applied to public service broadcasters. In half of the countries concerned, existing measures aimed at supporting media plurality only apply to specific genres of programmes - mainly news, political, and current affairs programmes as specific genres.

From the extensive part of the report looking at the current challenges, it is clear that most NRAs agree that there is not enough evidence to properly assess the need for regulatory intervention to secure internal plurality in the fact of changes to the media landscape; accordingly, they call for more research in respect of this phenomenon. It also seems that there have been discussions and calls for changes at the national level - indeed concrete proposals are already being made in this regard in some countries. Several general trends in the changing media landscape are observed in the report, whose analysis of the issue of disinformation shows that the question of regulatory intervention is a sensitive topic. The responses that were gathered by this report suggest that “NRAs have not identified radical changes that relate to disinformation but that the regulators and the public are fully aware of this phenomenon; NRAs have recently been expanding research in this field … Disinformation can have important consequences on political debate and on decision-making processes; most countries have no measures in place tackling the issue of disinformation per se, and those that do almost never employ legislative measures … The vast majority of NRAs consider that there is not enough evidence to assess the need for regulatory intervention in this field. However, the number of proposals to tackle the problem of disinformation is growing; The vast majority of member states and NRAs favour self-regulation to address this issue; more and more actors (states, NRAs, market players, etc.) are working to address this phenomenon. There is recognition that achieving plurality depends on a series of measures. There are some published and other planned initiatives at the national, European and international level.” The last challenge that was analysed was the cross-border dimensions. Cross-border cases involving traditional audiovisual media services and media plurality seem to be rare and, when they arise, cooperation between NRAs seems to offer solutions. A question has also been raised regarding the possible challenges posed by new services (for exemple, video sharing platforms and social media) in the context of internal plurality.

Building on this work ERGA has already decided to continue the work of the subgroup that prepared the 2018 report and include in its 2019 work schedule an additional special taskforce complementing the subgroup to concentrate on case studies - focusing on disinformation in the context of the forthcoming EU elections. In connection with this, it is worth noting that ERGA will play a role in the EU Action Plan against Disinformation published on December 5th 2018. Pillar 3 of the Action Plan identifies a role for ERGA in assisting the Commission to monitor the implementation of the commitments given by signatories to the EU Code of Practice on Disinformation and to assess the overall effectiveness of the Code.

Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices (ERGA Report)

http://documents.rvr.sk/_file_system/ERGA-2018-07_-_SG1_-_Report_on_internal_plurality.pdf

NATIONAL

AUSTRIA

[AT] Storage media tax threshold is unconstitutional

Gianna Iacino
Legal expert

In a ruling of 29 November 2018 (G 296/2017-10), the Österreichische Verfassungsgericht (Austrian Constitutional Court) stated that a rule on the Austrian storage media tax was unconstitutional because the upper limit of 6% of the typical price level violated the principle of equal treatment.

The Austro-Mechana collecting society had submitted a claim against a sole trader who sold blank CDs for payment of the storage media tax provided for in Article 42b of the Copyright Act (UrhG). The storage media tax, which is levied on the initial sale of recordable storage media, is designed to provide copyright holders with fair compensation for the production of private copies. The sum claimed by the collecting society exceeded 6% of the sale price. However, the sole trader refused to pay it on the grounds that Article 42b(4)(8) UrhG limited the tax to 6% of the price. The collecting society's claim was upheld in the first instance. After the defendant appealed, Austro-Mechana asked the Constitutional Court to examine the law in question.

The Constitutional Court decided that the disputed law was unconstitutional because it was incompatible with the principle of equal treatment, which prevents the legislator from adopting rules that are factually unjustifiable. The 6% threshold was factually unjustifiable. The purpose of Article 42 UrhG was to create a legal basis for fair compensation for copyright holders. Fair compensation had to be based on the damage caused to copyright holders by lawful private copying. This damage depended on the capacity, access speed, average length of use and robustness of the storage media concerned. However, since the price of storage media was falling all the time, the rate of tax needed to be increased accordingly in order to compensate for the damage caused by private copying. The system was not sustainable if an upper limit was laid down in law. Since enforcement of the 6% threshold therefore impeded the appropriate compensation of copyright holders, it was factually unjustifiable.

Urteil des Verfassungsgerichtshofs vom 29. November 2018 - G 296/2017-10

https://www.vfgh.gv.at/downloads/VfGH_Entscheidung_G_296_2017_Speichermedienverguetung.pdf

Constitutional Court decision of 29 November 2018 - G 296/2017-10

BELGIUM

[BE] RTBF generally respected its public-service obligations in 2017

Olivier Hermanns
Conseil Supérieur de l'Audiovisuel Belge

The regulatory body for the audiovisual sector in the French-speaking community in Belgium (Conseil Supérieur de l'Audiovisuel Belge - CSA) has issued an opinion regarding the extent to which the Belgian French-language public broadcasting body (Radio-Télévision Belge de la Communauté Française - RTBF) met its public-service obligations during 2017. The CSA carries out an annual check on the RTBF's actions on the basis of the RTBF's annual report on its activities, and gathers its observations in the form of an opinion. This was published on 18 January 2019.

The obligations incumbent on the RTBF are defined in the Decree of 14 July 1997 on the status of the RTBF (Decree on Audiovisual Media Services, as consolidated on 26 March 2009) and by a "management contract" - a multi-year agreement between the RTBF and the government of the French-speaking community. The Decree firstly lays down in detail the RTBF's objectives in terms of its public-service obligations; secondly, it determines the (mainly financial) resources that it is to be allocated by the Government in order to achieve them. If the CSA notes that the RTBF has failed to meet its obligations, it may impose a sanction.

In its opinion, the CSA describes all the RTBF's television and radio media services, which comprise three television channels, seven radio stations, 19 Internet radio stations, and one audiovisual platform. The CSA then uses 13 "factsheets" to review the various aspects of its offer.

According to the CSA, the RTBF generally met - and indeed often exceeded - its obligations in 2017. This was the case in respect of its "own productions, investments to be made in both independent production and the fund for aiding new radiophonic works, the accessibility of programmes, web creation, broadcasting quotas, and its ongoing mission to provide information and education'.

In other areas, however, the CSA felt that the RTBF could make improvements by exceeding the strict quotas imposed on it. Thus, it noted that the RTBF ought to "broaden the scope of its cultural output in order to expose it to as wide a public as possible" - i.e. the RTBF ought to increase the cultural programming on its most popular channel and in general broadcast cultural programmes more frequently in early evening slots. The CSA added that the RTBF should also reflect to a greater extent the dynamism of the dance sector in the French-speaking part of Belgium by increasing the number of choreographic shows that it broadcasts.

Lastly, in keeping with a line laid down previously, the CSA felt that the obligation to broadcast “large-scale cultural programming” broadcast “on a regular basis and directed at a broad public” had been met in the case of several short “multidisciplinary” programmes.

Regarding sports broadcasts, the CSA felt that the RTBF should pay “more attention to sports less covered by the media - particularly sports played by women and sports played by handicapped people”.

The RTBF also has an obligation to broadcast a mediation programme at a reasonable time on one of its television services. The RTBF does so, thereby complying with its management contract. The CSA therefore concluded that the obligation was formally being met, and also noted “a renewed dynamism in fulfilling this public-service mission”.

Lastly, the CSA would like to see the RTBF promote diversity among its staff, and has assessed its plans to promote gender equality. More particularly, it feels “that the initiatives are concentrated more on-screen than among its own human resources”. To bring about a change in that situation, the CSA intends to discuss this with the RTBF in 2019; the CSA now aims to decide which data the RTBF would be required to provide and the form its assessments might take.

Collège d’autorisation et de contrôle du Conseil supérieur de l’audiovisuel de la Communauté française de Belgique, Avis RTBF 2017,

http://www.csa.be/documents/2980

Authorisation and supervision college of the audiovisual regulatory authority for the French-speaking community of Belgium; Opinion on the RTBF in 2017

GERMANY

[DE] Berlin Appeal Court on influencers' obligation to label advertising

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In a ruling of 8 January 2019, the Kammergericht Berlin (Berlin Court of Appeal - KG Berlin) addressed the question of when influencers should label social media posts as advertising. It decided that posts containing links to product providers do not generally need to be labelled as advertising. Rather, the question of whether the content of a post is functionally linked to the promotion of the company concerned should be checked on a case-by-case basis. The judgment is the first to set out principles for distinguishing between advertising and the editorial content of influencers and is relevant to their activities on both social media and video-sharing platforms.

In the case at hand, a registered association whose activities included fighting unfair competition had applied for emergency injunctions under competition law against an Instagram blogger and influencer. According to the association, the latter had carried out commercial advertising in three posts by including links to other companies' websites without labelling them as such, thereby infringing the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG). On 24 May 2018, the Landgericht Berlin (Berlin District Court) had granted a temporary injunction, prohibiting the blogger from publishing such posts with links to the websites of product providers without labelling them as advertising. The blogger had subsequently labelled all her posts as advertising.

The KG Berlin upheld the appeal against the injunction with regard to one of the three posts concerned. The influencer was able, by submitting an affidavit, to establish that she had not received any payment from the companies concerned or any other parties. The post had only contained information about particular items of clothing and accessories produced by the manufacturer. The court therefore did not consider that it should be labelled as advertising.

Regarding the other two posts, the court could not see any connection between the content and the links provided. The only apparent purpose of the links had been to make readers curious about the company websites concerned. If they clicked on the links, they would be confronted with advertising. The blogger could not therefore claim that this was editorial content protected under the Basic Law.

The ruling therefore gives influencers a little more clarity over the possibility of inserting links to certain brands in their posts without having to label them as advertising, as long as they are posts with editorial content and there is no cooperation with the company concerned.

The Direktorenkonferenz der Landesmedienanstalten (Conference of Regional Media Authority Directors - DLM) welcomed the decision. The regional media authorities monitor radio, television and telemedia in Germany. Cornelia Holsten, the DLM Chair, said in a press release: “The court’s decision had been eagerly anticipated by the industry and shows that it was worth the wait. Advertising requirements must be the same for all types of media, whether print, online, television or radio, even if they are sometimes based on different laws. Differing standards harm transparency and irritate users because they water down the definition of advertising.”

Pressemitteilung des KG Berlin vom 23. Januar 2019

https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2019/pressemitteilung.777446.php

Berlin Court of Appeal press release of 23 January 2019

[DE] Cologne Appeal Court rules that domain registrars share liability for copyright infringements

Christina Etteldorf

In a ruling of 31 August 2018 (Case no. 6 U 4/18), the Oberlandesgericht Köln (Cologne Regional Court of Appeal - OLG Köln) decided that domain registrars are liable for copyright infringements on filesharing platforms if they fail to shut down a domain reported by a copyright holder.

The case concerned copyright breaches committed on the filesharing platform "The Pirate Bay". The Court of Justice of the European Union had previously examined this platform in 2017 (Case no. 610/15, see IRIS 2017-7:1/4), when it had decided that the making available and management of an online filesharing platform should be considered as an act of communication to the public for the purposes of the EU Copyright Directive (2001/29/EC). Unlike the CJEU procedure, which had examined Dutch court decisions concerning the liability of Dutch Internet access providers Ziggo and XS4ALL, the OLG Köln's decision was directed against the domain registrar with which the second-level domain 'thepiratebay' and various top-level domain endings are registered. The role of domain registrars is to register domains with the relevant registries. The holders of the exclusive rights to exploit the film 'Victoria', which had been made available for download by other users on the online filesharing platform without the rightsholders' permission in November 2011, had applied for an injunction against the domain registrar, requiring it to shut down the domain concerned and to refrain from reallocating it until the film 'Victoria' had been removed from the platform. The application was primarily based on the notion that an action against the domain registrar was the only suitable way of effectively preventing the copyright infringements, since the registrant (domain owner) and the hosting provider could not be reached and this situation was unlikely to change. The domain registrar, on the other hand, had argued that it was not required to check or monitor content stored in the domain; besides, it was unable to carry out such checks because domain registration was - indisputably - an automatic process that took place without any human intervention. However, the first-instance court upheld the complaint and its decision was confirmed on appeal by the OLG Köln.

The OLG Köln held that the download registrar could not be liable as either a perpetrator or an accessory because it had not itself made the film available to download and had not knowingly or willingly contributed to the copyright infringement. In particular, liability as an accessory could not be based simply on the fact that the complainant had informed the domain registrar about the possible infringement. However, an injunction could be granted on the grounds of the registrar's liability as a so-called 'interferer' because, by keeping the domain open, it had made a sufficient causal contribution to the copyright infringements and was in a similar position to an access provider. It was true that domain registrars could not be generally required to check the content of registered websites because they had no influence on their content and could not verify its legality in advance because the registration process was automatic. However, a

duty to inspect and act could arise if a domain registrar was made aware of a clear, easily identifiable infringement. In particular, the OLG pointed out that it was unnecessary to make a claim against other third parties such as the domain owner or hosting provider before taking action against the domain registrar. The domain registrar had more extensive inspection obligations than the registry, which allocated domain names, because unlike the latter, it operated as a business, aimed to make a profit and had a contractual relationship with the domain owner.

Urteil des OLG Köln vom 31. August 2018 (Az.: 6 U 4/18)

https://www.justiz.nrw.de/nrwe/olgs/koeln/j2018/6_U_4_18_Urteil_20180831.html

Judgment of the Cologne Regional Court of Appeal, 31 August 2018 (Case no. 6 U 4/18)

[DE] Depiction of violence in Ultimate Fighting formats: Bavarian authority lodges constitutional complaint

Christina Etteldorf

The Bayerische Landeszentrale für neue Medien (Bavarian New Media Authority - BLM), one of 14 German regional media authorities which licenses and monitors private radio and television services in Bavaria, has lodged a constitutional complaint against two Bavarian court rulings in which its decision to ban the broadcast of various Ultimate Fighting programmes on German television had been declared unlawful.

The case concerns various broadcasting formats featuring the Ultimate Fighting Championship (UFC), a well-known US mixed martial arts organisation owned by the Las Vegas-based American sports promotion company Zuffa LLC. UFC events and competitions, in which fighters from different martial arts regularly compete against each other, are broadcast on television, sometimes in edited form, including on the FOX network in the United States of America. Until 2010, UFC series such as “The Ultimate Fighter”, “UFC Unleashed” and “UFC Fightnight” were broadcast by German channel Deutsches Sportfernsehen (DSF, now called sport1), with approval granted by the BLM most recently in 2009. However, in 2010, the BLM banned the broadcasts on the grounds that they had a high potential to depict violence in an explicit and graphic way, infringing the guiding principles of public service broadcasting in Bavaria. The broadcaster DSF had complied with this decision, but Zuffa LLC had disputed the ban and had actions upheld by the Verwaltungsgericht München (Munich Administrative Court, decision of 9 October 2014, Case no. M 17 K 10.1438) in 2014 and by the Bayerische Verwaltungsgerichtshof (Bavarian Administrative Court, decision of the 7th chamber of 20 September 2017, Case no. B 16.1319) in 2017.

In its judgment, the Bavarian Administrative Court ruled that, in view of the freedom of broadcasting guaranteed under Article 5 of the Grundgesetz (Basic Law - GG), with programming freedom at its core, and the freedom to exercise a profession enshrined in Article 12 GG, the BLM was not entitled, for content-related reasons, to take direct action against individual formats of an approved television programme and to require changes to be made without the relevant statutory authorisation. This was true even if the BLM was correct in its opinion that the programme infringed programming principles because it glorified violence and was harmful to minors. According to the court, no suitable authorisation had been granted in this case. Even the fact that, according to Article 111a(2) sentence 1 of the Bayerische Verfassung (Constitution of Bavaria - BV), broadcasting in Bavaria was operated under public responsibility and by a public-law institution, did not give the BLM the power to take direct action against an approved programme if it identified an infringement of programming principles.

The BLM has now lodged a constitutional complaint on the grounds that the courts’ decisions undermine the principle of public mandate enshrined in Article 111a of the Bavarian Constitution, according to which broadcasting in Bavaria is

operated under public responsibility and by a public-law institution.

Pressemitteilung der BLM vom 23. Januar 2019

https://www.blm.de/infothek/aktuell/aktuell-2019-01-23-rechtsstreit-um-ultimate-fighting-geht-weiter-blm-erhebt-verfassungsbeschwerde-11186

BLM press release of 23 January 2019

Verwaltungsgerichtshof (Urteil des 7. Senats vom 20. September 2017, Az.: B 16.1319)

http://www.vgh.bayern.de/media/bayvgh/presse/urteil_ufc_7._senat_vom_20.09.2017.pdf

Bavarian Administrative Court, decision of the 7th chamber of 20 September 2017, Case no. B 16.1319

[DE] Programme banned on account of surreptitious advertising

Christina Etteldorf

On 21 January 2019, the Bayerische Landeszentrale für neue Medien (Bavarian New Media Authority - BLM), one of 14 German regional media authorities that monitor radio, television and telemedia services, announced that it had prohibited Amazon Instant Video Germany GmbH from broadcasting an episode from a German series with immediate effect because it infringed the ban on surreptitious advertising.

The case concerns the German-produced sitcom “Pastewka”, which depicts the day-to-day struggles of the protagonist, Bastian Pastewka. The first seven series were broadcast by German TV channel Sat.1 until 2014. The eighth series has been available on-demand from Amazon Prime since 2018. Part of the fourth episode of the eighth series, entitled “Das Lied von Hals und Nase”, was filmed in front of and inside a branch of the German electronics store “Media Markt”, whose logo is frequently shown and whose name is mentioned during the episode. The BLM considered these frequent, blatant references to the Media Markt brand as unjustifiable from a dramatic point of view and therefore classified them as surreptitious advertising. Under Article 7(7), sentence 1, in connection with Article 58(3) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV), this form of advertising in on-demand audiovisual media services such as Amazon Prime is unlawful. The BLM therefore not only formally objected to the episode being made available, but banned it in order to prevent further breaches of broadcasting law. It based its jurisdiction on the fact that the company Amazon Instant Video Germany, which had editorial responsibility for German Prime Video content, had its headquarters in Munich, so it was irrelevant that Amazon was an American company and that the German-language website Amazon.de was operated by Luxembourg-based Amazon EU S.à.r.l.

According to media reports, Amazon has already announced its intention to take legal action against the decision. The disputed episode remains available on Prime Video. However, Amazon said it would replace the episode with an edited version in which the disputed references would no longer be visible.

Pressemitteilung der BLM vom 21. Januar 2019

https://www.blm.de/infothek/aktuell/aktuell-2019-01-21-schleichwerbung-bei-pastewka-blm-untersagt-folge-das-lied-von-hals-und-nase-auf-amazon-prime-video-11157

BLM press release of 21 January 2019

[GB] British TV broadcasters take precautions against Brexit

Christina Etteldorf

In a referendum on 23 June 2016, 51.89% of UK voters decided that their country should leave the European Union. The precise conditions of the United Kingdom's departure are still being negotiated. Only recently - on 15 January 2019 - did the British Parliament reject the Brexit agreement that Prime Minister Theresa May had negotiated with the European Union by 432 votes to 202. Fears of a 'no deal' or 'hard' Brexit without an agreement to govern the future relationship between the European Union and the United Kingdom are therefore growing.

A 'hard Brexit' would have a significant impact on the audiovisual media industry in Europe, since 29% of all European television channels are based in Great Britain. As well as numerous other related issues such as the portability or licensing of audiovisual content, if the provisions of the Audiovisual Media Services Directive (AVMSD), on which the regulation of the European television market is based, are ditched and not replaced, there will be serious consequences for the European television market. Of particular note is the 'country of origin' principle, enshrined in the AVMSD, which enables a service provider established in an EU member state to provide its services in other EU member states without having to meet requirements other than those applicable in its country of origin.

For these reasons in particular, many British broadcasters are currently looking to lay down roots and acquire licences in other EU countries.

On 20 December 2018, for example, the British-licensed streaming service DAZN applied to the Medienanstalt Berlin-Brandenburg (Berlin-Brandenburg Media Authority) for a licence for its channels DAZN 1 Bar HD and DAZN 2 Bar HD, which would be valid in Germany, Austria, Italy and Spain. Turner Broadcasting System and NBC Universal Global Networks also want to move to Germany - to Bavaria, to be precise. They recently applied to the Bayerische Landeszentrale für neue Medien (Bavarian New Media Authority - BLM) for licences to broadcast special-interest TV channels TCM (Ireland/Malta), TCM (Greece), TCM (France), WBTV (France), TNT (Poland) and TNT (Romania), as well as Syfy, E! Entertainment (French feed), 13 Ulica, SCIFI, DIVA and E! Entertainment (EURA feed). All the licences were granted subject to the approval of the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision - ZAK) of the regional media authorities, whose decision is still pending.

According to media reports, the BBC, on the other hand, intends to look for a suitable base in Belgium, Ireland or the Netherlands from where it will apply for EU licences for channels including BBC World, BBC Entertainment, BBC First and BBC Earth.

Discovery Communications will open its European headquarters in the Netherlands for its pay-TV channels and will therefore apply for EU licences in the

Netherlands for its pay-TV services across Europe.

Pressemitteilung der BLM vom 14. Dezember 2018

https://www.blm.de/infothek/pressemitteilungen/2018-12-14-erste-brexit-lizenzen-fuer-tv-spartenprogramme-von-turner-und-nbc-blm-praesident-schneider-weitere-staerkung-des-medienstandorts-bayern-11018

BLM press release of 14 December 2018

KEK - DAZN-Verfahrensstatus

https://www.kek-online.de/medienkonzentration/verfahren/kek-996/

KEK - DAZN Procedural status

SPAIN

[ES] Public consultation in Spain on the implementation of the AVMS Directive

Enric Enrich
Enrich Advocats, Barcelona

The Spanish Ministry of Economy and Business has opened a public consultation process to gather the opinions of stakeholders in the audiovisual industry and other interested parties on the implementation of the EU's Audiovisual Media Services Directive ("the AVMS Directive"), which will modify Law 7/2010 on Audiovisual Communication (the AVMS Directive).

The Ministry seeks the participation of audiovisual-sector agents, public administrations, agents from other sectors linked to the audiovisual sector, representatives of consumer associations and user associations, and members of society in general.

The consultation raises specific questions on the amendments that the AVMS Directive incorporates that are more relevant to the Spanish audiovisual regulatory framework, such as the need to strengthen the protection of minors and viewers, the harmonisation of rules applicable to linear services and on-demand services, the promotion of European audiovisual works, the flexibility of the advertising regime, and the inclusion of video-sharing services in the scope of platforms.

The questions included the following:

Question 3 - How do you consider the inclusion of video-sharing services through platforms and certain social networks in the field of application of audiovisual regulations?

Question 4 - What do you think of the reinforcement of the independence of the audiovisual regulators and formalisation of ERGA as an advisory body to the European Commission?

Question 14 - Do you consider that the current framework in respect of the promotion of European audiovisual works is adequate? Do you consider that the anticipated financing of the European production of films and series for cinema and television by providers of audiovisual communication services - which is covered by the current law - adequately promotes the production and promotion of European audiovisual content?

Question 20 - Taking into account the degree of flexibility available to member states in carrying out the implementation, what modifications introduced by the new Directive do you believe should be developed with a greater degree of detail or ambition than that which appears in the Directive? With what general

objectives and in what way?

Question 21 - What other changes, even if not directly inspired by the new Directive, should be undertaken?

Interested parties had until 22 February to submit their contributions.

Consulta pública sobre la modificación de la Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual

https://avancedigital.gob.es/es-es/Participacion/Documents/consulta-publica-previa-Ley-7-2010.pdf

Public consultation on Law 7/2010, 31st March, on Overall Audiovisual Communication

[ES] Spain goes further than the GDPR when adapting its data protection law

Miguel Recio
CMS Albiñana & Suárez de Lezo

More than a year after the draft bill was submitted to the Congress on 14 November 2017, Spain finally adopted its Organic Law No. 3/2018 of 5 December on the Protection of Personal Data and the Guarantee of Digital Rights. The law entered into force on the day following its publication in the Official Gazette of 6 December 2018, Constitution Day in Spain.

The law applies to the public and private sector, is organised into ten chapters and includes ninety-seven articles, one repealing the provision as well as several additional, transitory and final provisions. It repeals Organic Law No. 15/1999 of 13 December on the Protection of Personal Data, with the exception of several articles related to the processing of personal data by the police and judicial sectors until a law adopts Directive (EU) No. 2016/680 of the European Parliament and of the Council of 27 April 2016 protecting personal data when being used by police and criminal justice authorities; the Royal Decree-Law No. 5/2018 of July 27 on urgent measures to adapt Spanish Law to EU regulations on data protection; and any other regulations that contradict, oppose or are incompatible with the General Data Protection Regulation (GDPR) and this law.

In addition to adapting the Spanish legal system on data protection to the GDPR, the law includes an additional Chapter X - Articles 79 to 97- on guaranteeing the digital rights of citizens and employees beyond the GDPR. This chapter was included during the processing of the draft bill in Congress.

One of the most interesting amendments that the law introduces into the Spanish legal system on data protection, which goes further than the GDPR, and which was included during the parliamentary procedure, is one which provides political parties with the possibility of processing personal data obtained from webpages and other public sources. The Spanish data protection authority published a relevant legal report in answer to a query from its own director.

With regard to data protection, the law includes some specifications and restrictions as provided in the GDPR. For example, on transparency and information, Article 11 of Organic Law No. 3/2018 states that the controller may provide, as a minimum, some information on the processing of personal data and indicate to the data subject an electronic address or any other means which would allow access to additional information.

Another relevant specification is included in Article 13(3) of Organic Law No. 3/2018. Following Article 12(5) of the GDPR, the law specifies that a request for the right to access information shall be considered as excessive, on the basis of its repetitive character, when submitted “more than once during a period of six

months, unless there is a legitimate reason."

The law also specifies that the data processor, on behalf of the data controller, may attend the exercise of the data subject´s rights when it is stated in the contract or other legal act that binds them (Article 12(3) of Organic Law No. 3/2018). Furthermore, as stated in Article 33 of Organic Law No. 3/2018, at the end of the processing procedure, the data processor may retain "duly blocked" personal data "as long as responsibilities could be derived from its relationship with the data controller."

Other relevant specifications are, for example, the obligation to block personal data when rectified or deleted during the term within which liability derived from the processing may be required; specific cases in which a data controller or processor has the obligation to designate a data protection officer, such as providers of information society services when profiling users on a large scale, or private security companies.

In line with Article 83(7) of the GDPR, the Organic Law establishes that public authorities and bodies established in Spain are not subject to administrative fines. Article 77 of Organic Law No. 3/2018 includes applicable provisions to data controllers and processors that are public authorities or bodies and provides that when they infringe the law, the competent authority shall issue a resolution sanctioning them with a warning and establishing as well the measures that must be adopted to cease the infringement or correct the effects of the infringement that has been committed.

For the purposes of the prescription of infringements, in its Articles 72 to 74, the law classifies the infringements as very serious, serious and minor. In these articles, the law specifies some actions considered as infringements, in addition to the ones included in Article 83 of the GDPR.

Finally, the chapter on digital rights, beyond the GDPR, includes, among others, provisions on Internet neutrality, universal access to the Internet, digital security, digital education, the right to privacy and the use of digital devices in the workplace, the right to digital disconnection outside the workplace, the right to privacy against the use of video surveillance devices and sound recording in the workplace, the right of privacy against the use of geolocation systems in the workplace and the right to a digital testament. In any case, these are rights outwith the scope of the GDPR that will need further regulation.

Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos y garantía de los derechos digitales

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-16673

Organic Law 3/2018, of December 5, on the Protection of Personal Data and the Guarantee of Digital Rights

Informe Jurídico 210070/2018 sobre el tratamiento de opiniones políticas por partidos políticos

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2018-16673

Legal report 210070/2018 on the processing of political opinions by political parties

FRANCE

[FR] HADOPI study on the pirating of cultural goods

Amélie Blocman
Légipresse

France's high Authority for the Broadcasting of Works and the Protection of Rights on the Internet (Haute Autorité pour la Diffusion des Œuvres et la Protection des Droits sur Internet - HADOPI) has updated its analysis of the piracy ecosystem that it first undertook in 2012. The new study covers all services that enable or facilitate illegal access to copyright-protected cultural goods, not only in the audiovisual sector (films, series, television programmes, music), but also in the e-book and video-game industries. Services offering the retransmission of sports events are also analysed. A number of lessons emerged from the study. For example, many different stakeholders are now involved in the piracy ecosystem and the interactions between them are becoming increasingly numerous, reducing the transparency of how they operate. Whereas hosting providers and referencing sites were at the heart of the system in 2012, many more stakeholders now appear to be involved. The key players have been joined by upstream providers of the services that they use, such as technical intermediaries and payment services. A new category of stakeholders has also emerged: downstream services used by consumers to access pirated works more easily or to bypass anti-piracy measures (VPN, seedbox).

Moreover, while the economic model used by referencing sites and hosting providers remains largely based on advertising and subscriptions, new income streams (which are still relatively small) are emerging.

Lastly, although the illegal streaming of live television is growing, it remains limited. These sites offer programme streams or illegal packages, often containing hundreds or even thousands of television channels from all over the world. Packages can be put together and offered to Internet users directly by the illegal services that distribute them. They can also be offered by "assemblers" who sell them to illegal services, which in turn become simple distributors. There can therefore be financial links between package "assemblers" and "distributors", and in some cases suppliers of multimedia boxes who tend to sell their devices by offering subscriptions to illegal packages (either directly or via illegal package distributors). The study also concluded that the economic model adopted by providers of illegal live television streaming packages is the most complex. As well as the money paid to technical and advertising intermediaries, the interactions between hosting providers and package distributors result in numerous cross-financing flows, since they are able to buy and sell content (package subscriptions) among themselves. The economic models for these services are mainly based on viewer subscriptions and the audience generated.

L'écosystème illicite de biens culturels dématérialisés, Hadopi, janvier 2019

https://hadopi.fr/sites/default/files/sites/default/files/ckeditor_files/2019_01_22_Hadopi_etude_modele_economique_1.pdf

The illicit ecosystem of dematerialised cultural goods, HADOPI, January 2019

[FR] Image rights and permission to use an interview filmed for a documentary

Amélie Blocman
Légipresse

On 11 January 2019, the urgent applications judge of the Paris regional court issued a decision that demonstrates the difficulties that can arise when someone gives written permission to be interviewed for a film. In the case in question, a psychoanalyst had given an interview, parts of which were used in a film entitled “Le Mur” on the subject of developmental disorders (psychosis and autism). The film’s producer then embarked on a second film, entitled “Le Phallus et le Néant”, which included further excerpts from the interview and was due to be broadcast in January 2019. The interviewee considered that the distribution of the poster, trailer and the film itself infringed her image rights, since she had not given permission for any further exploitation of the interview. She therefore lodged an application for the initiation of urgent proceedings against the production company and producer of the film in order to stop the trailer being shown on any media unless the parts containing her voice and image were removed.

In his decision, the judge, having read the document in which the psychoanalyst gave permission for her image and voice to be used, noted that, contrary to the latter’s claims, she had not only agreed to be interviewed, but had given express written permission that covered not only “Le Mur”, but also exploitation “in ... several episodes” and for any “work adapted or derived from the principal work”. Regarding the image contained in the poster, the judge noted that the defendants were right to observe that the express permission that had been given included the option to use all or part of her image on any media “free of charge”. In the judge’s opinion, the plaintiff had therefore clearly given permission for the company that produced the film “Le Mur” to use the interview in more than one episode and in any adapted work. He therefore dismissed the application and ruled that there was no need for interim measures.

TGI de Paris (ord. réf.), 11 janvier 2019, Jacqueline S. c/ SARL Océan Invisible Productions et a.

Paris regional court (interim order), 11 January 2019, Jacqueline S. v SARL Océan Invisible Productions et al.

[FR] Minister for Culture gives details of upcoming audiovisual reform

Amélie Blocman
Légipresse

On 31 January 2019 during a New Year address, the Minister for Culture, Franck Riester, announced that he would be submitting new legislation reforming the audiovisual sector to the Council of Ministers in the summer. This will consist of three parts: one governing regulation, one in respect of Act No. 86-1067 of 30 September 1986, as amended, on Freedom of Communication, and one on the public audiovisual sector. The Minister had earlier announced that the bill would be debated in Parliament after the summer recess, in September or October - at any rate no later than the start of 2020. He explained that he wished to retain the scheme for funding new audiovisual works, and reiterated the need to adapt it in order to compel the VODS platforms to contribute to funding for new works in the light of the transposition of the Audiovisual Media Services Directive (AMSD). The Minister has also announced his “desire to rebalance the tax scheme underpinning the National Centre for Cinematography and Animation (Centre National de la Cinématographie et de l’Image Animée - CNC) between the traditional stakeholders and new arrivals” and at the same time to allow “the traditional players more room for manoeuvre in seeking new sources of funding and returning to a growth situation”. He added: “Reforming the 1986 Act should enable us to adapt our regulations to the new challenges of the digital era [because] the people of France don’t understand why the television channels and radio stations have to keep to strict rules protecting the public when hate-speak, racist, anti-Semitic and homophobic slurs and “fake news” are constantly being broadcast on the Internet with no supervision whatsoever.” The transposition of the AMS Directive would make it possible to extend the jurisdiction of the national audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA), enabling it to combat hateful content on video-sharing platforms. Recalling France’s position on the subject, Mr Riester added that he wanted to go even further and dislodge the platforms from their principle of not taking any responsibility. The announced reform of the audiovisual sector will also include an important section on the transformation of the public audiovisual sector: the Minister wants to “transform the governance and organisation of the sector to render it stronger in carrying out its redefined missions” with an “programming that is distinctive, demanding and attractive, [and] more digital and closer to the man in the street”.

Lastly, parallel to stressing the need to combat the broadcasting of “fake news”, the Minister reiterated the current thinking regarding the creation of an ethics body for the press. In October 2018, a mission on setting up a council to oversee ethical standards in news-gathering was entrusted to Emmanuel Hoog by the previous Minister for Culture. The mission’s conclusions are to be presented by the end of February. “I think that such a body could be useful both for the profession and for our democracy. But nothing has been decided yet. Everything

will be done in cooperation with the professionals", said the Minister for Culture.

Discours de Franck Riester, ministre de la Culture, prononcé à l'occasion de la cérémonie des vœux aux professionnels de la culture, 31 janvier 2019,

http://www.culture.gouv.fr/Presse/Discours/Discours-de-Franck-Riester-ministre-de-la-Culture-prononce-a-l-occasion-de-la-ceremonie-des-voeux-aux-professionnels-de-la-culture-jeudi-31-janvier-2019

Address by Minister for Culture Franck Riester at a New Year ceremony on 31 January expressing his good wishes for professionals in the culture sector,

UNITED KINGDOM

[GB] BBC Asian Network head cleared over role in naming victim of sexual abuse

Alexandros K. Antoniou
University of Essex

On 18 January 2019, Sheffield Magistrates' Court acquitted the BBC Asian Network head of news Arif Ansari of breaching the Sexual Offences (Amendment) Act 1992 after a reporter named a rape victim live on air.

Ansari was the editor of a radio programme when a reporter, Rickin Majithia, revealed in a live news bulletin the identity of a female victim of sexual abuse whilst reporting on the trial of her abuser in February 2018 outside Sheffield Crown Court. Majithia had wrongly assumed that the name read out in court was a pseudonym. Although Majithia was in error, the charge was brought against Ansari because output is the responsibility of the head, who had checked his reporter's script ahead of the live report.

Ansari was charged, in particular, with breaching the Sexual Offences (Amendment) Act 1992. In order to encourage victims of sexual offences to come forward, but also to protect them from suffering further trauma when testifying in court, the media in the United Kingdom are prevented from identifying such victims when reporting news stories. Section 1 of the 1992 Act states that after an allegation of a sexual offence is made, no matter relating to that victim (or alleged victim) shall be included in any publication if it is likely to lead members of the public to identify him or her as the victim (or alleged victim) of the offence. It is important to note that anonymity is automatic and lifelong and applies from the time a claim is made by the alleged victim or anyone else (for instance, where a parent alleges that their child was abused).

The prohibition imposed by section 1 applies to traditional media as well as to online media and individual users of social media websites. More specifically, the ban includes (if likely to lead to that person being identified): their name or address, the identity of any school or other education establishment they attend, the identity of any workplace, and any still or moving picture of them. Broadcasting or otherwise publishing information which is not on this list can also breach the act if it is likely to lead to the identification of the individual concerned. Breaching section 1 is punishable on summary conviction by a fine. Anonymity for complainants in rape cases was first introduced by section 4 of the Sexual Offences (Amendment) Act 1976. Since then, it has been extended to victims (or alleged victims) of virtually all offences with a sexual element and more recently to victims (or alleged victims) of "human trafficking for exploitation" under section 2 of the Modern Slavery Act 2015.

Ansari entered a not guilty plea in October 2018 and was granted unconditional bail to appear before Sheffield Magistrates' Court on 17 January 2019. At his trial, Ansari stated that he had not questioned Majithia's script (which revealed the victim's real name), as he trusted his reporter. Majithia was a senior journalist but had never reported on a court case before. Ansari, however, was not aware of this and only found out about his lack of experience in this regard after the error had occurred. The victim concerned was listening to the radio broadcast when her real name was read out and was reported to have gone into "full meltdown."

Following a two-day trial, District Judge Naomi Redhouse said the broadcast was an "honest mistake" and found Ansari not guilty. She could not conclude that Ansari had "reasonable suspicion" to believe that the report was likely to identify the victim when he reviewed the script before it was delivered on air. After the verdict, Majithia apologised to the victim in a statement he made. The BBC also apologised for the "serious mistake". However, it criticised the decision to prosecute line manager Ansari rather than the corporation, stating that this could result in "a climate of fear for editors reporting in the public interest." This was the first time a BBC editor had been charged with violating anonymity provisions under the 1992 Act.

BBC Asian Network: Arif Ansari denies naming abuse victim (11 October 2018)

https://www.bbc.co.uk/news/uk-england-south-yorkshire-45827413

BBC Asian Network editor found not guilty of "honest mistake" (18 January 2019)

https://www.bbc.co.uk/news/uk-46920537

[GB] Ofcom publishes its report entitled Children and parents: Media use and attitudes report 2018

Julian Wilkins
Wordley Partnership

Ofcom has published its Children and parents: Media use and attitudes report 2018 ("the Report"). Ofcom's definition of media literacy is the ability to use, understand and create media and communications in a variety of contexts.

The Report is a consequence of Ofcom's responsibility under The Communications Act 2003 to promote and to carry out research into media literacy. In fulfilment of this responsibility, the Report focuses on children and parents.

Ofcom used its quantitative Children and Parents' Media Literacy Tracker to gather detailed evidence regarding media use, attitudes and understanding among children and young people aged 5-15. Moreover, Ofcom acquired detailed information about media access and use by young children aged 3-4, as well as findings submitted by parents regarding their children's media use and the ways that those parents seek to (or decide not to) monitor or limit the use of different types of media.

The Report also relies on several other research sources to provide an overview of children's media experience in 2018. The findings include that television sets and tablets dominate device use, but that time spent watching TV on a television set (whether in the form of broadcast or on-demand services) is decreasing, with half of 5-15-year-olds watching OTT ("Over The Top") television services such as Netflix, Amazon Prime Video and Now TV. The research determined that generally consuming content is becoming a more solitary activity, with many children watching on their mobiles.

YouTube is becoming the viewing platform of choice, with rising popularity, particularly among 8-11-year-olds, with vloggers as an increasingly important source of content and creativity - for instance, "Dan TDM" was a popular source of Fortnite and Minecraft tutorials. Social media brought a combination of social pressures and positive influences, with those pressures being particularly felt among girls. Girls aged 12-15 with a social media or messaging profile are more likely than boys to feel pressure to look popular on these sites "all of the time". 2018 saw girls choosing more glamourised or aesthetic Snapchat filters. The negative pressures are balanced by the positive side of social media - nine in ten social media users aged 12-15 state that social media has made them feel happy or helped them feel closer to their friends.

Television and social media are important sources of news, but many children have concerns over the accuracy and trustworthiness of news on social media. The most popular specific news source used to read, watch, listen to or follow news stories was BBC One/BBC Two (used by 45%), followed by Facebook (34%). Although the BBC was the most popular and most important news source among

12-15-year-olds, social media sources dominated the list of the top ten news sources.

Despite social media sites being a very popular source of news for young teens, this group ranks them as the least trustworthy and accurate source (conversely, television news ranks most highly in respect of these attributes). Eight out of ten had heard of the concept of “fake news.” Six in ten of those who were aware of fake news said they would undertake some action if they saw a fake news story online, with a third saying they would tell their parents or other family members.

A majority of online users aged 12-15-year-olds think critically about websites that they visit, but only a third correctly understood search engine advertising. About 65% of those aged 12-15 are aware that some vloggers are paid to endorse a product. Children are still being exposed to unwanted experiences online, but almost all recall being taught how to use the Internet safely.

There has been an increase in parents of 12-15-year-olds (and in 12-15-year-old children themselves) who say that controlling screen time has become harder; however most 12-15-year-olds consider they have a struck a good balance between this and doing other things.

Parental concerns about the Internet are rising, with a steady decline over the past few years in the proportion of parents of online 5-15-year-olds who agree that “the benefits of the Internet for my child outweigh any risks” - just over half (54%) agree with this now, compared to two-thirds in 2011.

Some parents are becoming less likely to moderate their child’s activities through technical overrides preferring to use other mediation strategies (like supervision, having rules or talking to their child) or because they trust their child to be sensible (48%). Online gaming is increasingly popular, with three-quarters of 5-15-year-olds playing such games.

Ofcom’s Children and parents: Media use and attitudes report 2018

https://www.ofcom.org.uk/__data/assets/pdf_file/0024/134907/Children-and-Parents-Media-Use-and-Attitudes-2018.pdf

[GB] RT failed the impartiality Code of Conduct on their coverage of the Sergei Skripal poisoning incident

Julian Wilkins
Wordley Partnership

Ofcom determined that RT failed the impartiality Code of Conduct for having lacked impartiality on seven out of the ten complaints arising from their coverage of the Sergei Skripal and his daughter Yulia poisoning incident in Salisbury on 4 March 2018 - broadcast on RT over a period of approximately seven weeks between 17 March 2018 and 4 May 2018 (see IRIS 2018-7/18). The Ofcom licence for the RT service is held by the autonomous non-profit organisation TV-Novosti.

The programmes subject to complaint were: Sputnik, RT, 17 March 2018, 7.30 p.m.; Sputnik, RT, 7 April 2018, 7.30 p.m.; Worlds Apart, RT, 1 April 2018, 11.30 p.m.; Crosstalk, RT, 13 April 2018, 8.30 p.m.; Crosstalk, RT, 16 April 2018, 8.30 p.m.; Crosstalk, RT, 20 April 2018, 8.30 a.m.; News, RT, 18 March 2018, 8 a.m.; News, RT, 30 March 2018, 6 p.m.; News, RT, 26 April 2018, 8 a.m.; and News, RT, 4 May 2018, 8 a.m.

The complaints arose from viewers and Ofcom's own monitoring. Ofcom considered that the programmes raised issues warranting investigation, given that television news is required to be presented with due impartiality, pursuant to section 5 of the Ofcom Broadcasting Code ("the Code"), derived from the Communications Act 2003 ("the Act").

Rule 5.1 states: "News, in whatever form must be reported with due accuracy and presented with due impartiality." Rule 5.12 states :"...due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service [...] in each programme or in clearly linked and timely programmes."

Section 5 of the Code is supported by Ofcom's Guidance, which states that it is for the broadcaster, using a range of editorial techniques, to ensure that due impartiality is preserved, as well as compliance with the Code.

When determining the Code's due impartiality rules, section 320 of the Act requires Ofcom to particularly include the need to ensure the preservation of impartiality in relation to matters of major political or industrial controversy, and major matters relating to current public policy.

Ofcom considered that seven of the ten investigated programmes were dealing with matters of major political controversy and major matters relating to current public policy. This meant that RT should have ensured that an appropriately wide range of significant views were included and given due weight in each programme, or in clearly linked and timely programmes. Views and facts must not be misrepresented.

The Guidance further states: “that the broadcasting of comments either criticising or supporting the policies and actions of any political organisation or elected politician is not, in itself, a breach of due impartiality rules. Any broadcaster may do this provided it complies with the Code.” Nevertheless, depending on the circumstances, as well as providing the context in an appropriate way, alternative viewpoints are necessary to ensure compliance with the Code. Upholding impartiality does not mean giving equal time to opposing views.

Ofcom acknowledged balancing the broadcaster’s and audience’s right to freedom of expression under Article 10 of the European Convention of Human Rights with compliance with impartiality rules. Ofcom watched all the programmes and took account of all the relevant information, including the individual facts of each case and the various representations made by RT. The following programmes were held in breach of the Code: Sputnik, RT, 17 March 2018, 7.30 p.m.; Sputnik, RT, 7 April 2018, 7.30 p.m.; Crosstalk, RT, 13 April 2018, 8.30 p.m.; Crosstalk, RT, 16 April 2018, 8.30 p.m.; Crosstalk, RT, 20 April 2018, 8.30 a.m. ; News, RT, 18 March 2018, 8 a.m.; and News, RT, 26 April 2018, 8 a.m. For each programme, Ofcom gave reasons in full as to why they were in breach. Although each complaint against RT was considered on its individual merit, a common response by the broadcaster to many of the complaints was that some of its programmes, such as Sputnik, which is presented by the controversial politician George Galloway, were designed to ask challenging questions, and that their overall audience was looking to see matters presented more from a Russian perspective. Whilst Ofcom recognised that a broadcaster had the discretion as to how they presented their programmes, including meeting audience expectations, this did not detract from ensuring that each party’s perspective was reflected, even if not with an equal time allocation. A number of the programmes subject to complaint asked questions or presented opinions in such a way as to suggest that the British Government was deliberately placing blame on the Russian Government or besmirching its reputation. Ofcom considered that RT had failed to ensure that the British Government was given sufficient airtime or the opportunity to respond to the allegations against them. One of the programmes found to be in breach was Crosstalk, broadcast on 16 April 2018 at 8.30 p.m.; this broadcast contained a critique of the US and British stance on the Syrian conflict. RT was held in breach for failing to adequately represent the US and British standpoint in the light of other opinions presented in the programme.

Otherwise, the following three programmes were not found to be in breach of the Code: Worlds Apart, RT, 1 April 2018, 11.30 p.m.; News, RT, 30 March 2018, 6 p.m.; and News, RT, 4 May 2018, 8 a.m. The programmes Worlds Apart, broadcast on 1 April 2018, and News, broadcast on 4 May 2018, were also not considered to be in breach of section 5 of the Code.

Ofcom considered that seven breaches in respect of news and current affairs programmes broadcast within the six-week period from 17 March 2018 to 26 April 2018 constituted a serious failure of compliance. Subject to receiving RT’s representations, Ofcom is likely to impose statutory sanctions.

If it decides to impose statutory sanctions, Ofcom will follow published procedures whereby RT can make written and oral representations before any decision on sanctions has been taken.

Any sanction imposed needs to be proportionate and fair, taking into account all the relevant circumstances, RT's representations and any relevant previous cases.

Since Ofcom's decision, RT has declared it would seek a judicial or court review of Ofcom's findings. The determination of any Ofcom sanctions awaits the outcome of the judicial review.

Issue 369 of Ofcom's Broadcast and On Demand Bulletin 20 December 2018

https://www.ofcom.org.uk/__data/assets/pdf_file/0020/131159/Issue-369-Broadcast-and-On-Demand-Bulletin.pdf

ITALY

[IT] Ministry of Economic Development sets up two groups of experts to provide support in drafting national strategies on artificial intelligence and blockchain.

Francesca Pellicanò
Autorità per le garanzie nelle comunicazioni (Agcom)

In September, the Ministry of Economic Development launched two calls for applications for the selection of up to 30 members of a group of experts to draft a national strategy on artificial intelligence (hereinafter AI) and 30 members of a group of experts to draft a national strategy on distributed ledger technologies (hereinafter DLTs) and blockchain.

The ministry considers that it is a crucial priority for Italy, as mentioned by the Minister of Economic Development, Mr. Luigi Di Maio, last July in his programmatic lines, to deepen the knowledge of AI, DLTs and the blockchain and the related juridical issues, and to boost public and private investments in the related technologies.

Against the background set by the initiatives of the European Union (a coordinated approach for AI, and an EU partnership for DLTs), the ministry set up these two groups of experts, whose first meetings were held on 21 January of this year, to provide it with technical and scientific support in the drafting of the AI and DLTs National strategies, addressing policies and tools to reach the following goals:

A: For artificial intelligence:

- improve, coordinate and strengthen research in the field of AI;

- promote public and private investments in AI;

- attract talents and develop business in the field of AI;

- encourage the development of the data-economy, paying particular attention to the spreading and valorisation of non-personal data, by adopting better standards of interoperability and cybersecurity;

- undertake a comprehensive review of the legal framework, with specific regard to issues of safety and responsibility related to AI-based products and services;

- conduct analyses and evaluations of the socio-economic impact of the development and widespread adoption of AI-based systems, along with proposals for tools to mitigate the issues encountered.

B: For DLTs and blockchain:

- monitor and analyse private initiatives which already exist at national level, as well as their developments and their socio-economic impact;

- determine the cases in which DLTs can be used in the public sector in order to promote and support their spreading;

- determine the conditions required to promote research on and the development, use, adoption and maintenance of the decentralised structure of DLTs and blockchain in order to increase and accelerate their spreading in public and private services;

- elaborate the necessary tools to create and grant economic, political and regulatory conditions in such a way that citizens and enterprises, particularly SMEs and start-ups, can seize the potential of these technologies and their functionalities;

- elaborate technical and legal tools to encourage the spreading of smart contracts.

In order to ensure a holistic and multi-perspective approach to AI and DLTs, the groups, chaired by the Minister of Economic Development or his delegate, are composed of ten members representing enterprises operating in the fields of AI and DLTs, respectively; ten representing research centres, academics, think-tanks and public administrations; and ten representing the labour market, the professionals, the third sector, consumers and, in general, civil society, as well as the minister's representatives.

The groups are expected to conclude their activities within the next six months. To ensure full transparency and to be able to benefit from the contribution of all the interested stakeholders, the National strategies, once drafted, will be submitted to public consultation, after which they will be adopted in their final version by the ministry.

Intelligenza artificiale: verso una strategia nazionale

https://www.mise.gov.it/images/stories/documenti/strategia_nazionale_Intelligenza_Artificiale%201%20incontro%20gruppo%20esperti%2021_01_2019.pdf

Documents presented at the Group's first meetings (Artificial Intelligence)

Blockchain: verso una strategia nazionale

https://www.mise.gov.it/images/stories/documenti/strategia-nazionale-blockchain%20-%201%20incontro%20gruppo%20esperti%2021_01_2019.pdf

Documents presented at the Groups first meetings (DLTs and blockchain)

[IT] AGCOM releases regulation governing the promotion of European works

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On 12 December, 2018, by way of Resolution No. 595/18/CONS, AGCOM issued the Regulation governing programming and investment obligations for the promotion of European works and works by independent producers ("the Regulation"). The Regulation was adopted pursuant to Article 44-quinquies of the AVMS Code (Legislative Decree No. 177 of 31 July, 2005), as recently amended by Legislative Decree No. 204 of 7 December, 2017 as part of the so-called Franceschini Reform (Law No. 220 of 14 November, 2016). On 22 January, 2019, the Regulation was amended by AGCOM Resolution No. 24/19/CONS to take into account the modifications provided for - in the meanwhile - by the 2019 Budget Law (Law No. 145 of 30 December, 2018), which had delayed the entry into force of some of the obligations (see IRIS 2019-2/1).

The Regulation introduces some specific provisions in addition to the general content of the AVMS Code. First of all, the Regulation provides for the definition of the term "independent producer" and establishes new sub-quotas applicable to private broadcasters. Broadcasters shall reserve at least 3% of the so-called eligible hours for content targeting minors and at least 10% of the eligible hours for programmes designed to be viewed by children and adults. Both sub-quotas are calculated on an annual basis. The notion of eligible hours includes 'the overall amount of broadcasting hours and hour fractions, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping'.

Another new provision concerns the subjective scope of application of the sub-quotas for the promotion of works of Italian original expression which are binding on private broadcasters. In fact, pursuant to the AVMS Code, the latter must reserve a quota for cinematographic works of Italian original expression, produced anywhere by independent producers. This quota amounts to 3.2% but will be increased to 3.5% between 1 July and 31 December, 2019, to 4% for 2020 and to 4.5% from 2021 onwards. However, the Regulation provides that these sub-quotas shall not apply to catalogues that have broadcast less than 52 cinematographic works in the course of the previous year. This amount excludes reruns, with the threshold fixed at 104 transmissions and re-transmissions of cinematographic works.

Furthermore, with respect to the investment obligations applicable to broadcasters, the Regulation clarifies that the notion of "production activities" is meant to include both the promotion and the distribution of works, on the condition that the relevant agreements contain mechanisms ensuring the remuneration of producers throughout the different release windows. As a result, the expenses and investments incurred for the distribution of works must also be considered when assessing compliance with the relevant investment obligations.

Autorità per le garanzie nelle comunicazioni, All. B, Modifiche al regolamento in materia di obblighi di programmazione ed investimento a favore di opere europee e di opere di produttori indipendenti di cui alla delibera n. 595/18/CONS

https://www.agcom.it/documents/10179/13446572/Allegato+25-1-2019+1548410333594/0a5e9c51-a64e-4a65-b0a9-3c40f3331f56?version=1.0

Resolution No. 595/18/CONS

[IT] AGCOM's evaluation of media pluralism in the Integrated Communications System (SIC) for 2017

Francesca Pellicanò
Autorità per le garanzie nelle comunicazioni (Agcom)

The Autorità per le garanzie nelle comunicazioni (Italian Communications Authority - AGCOM), pursuant to Article 43 of the Italian AVMS Code (Legislative Decree No. 177/2005), has to periodically conduct a specific analysis to estimate the resources included in the so-called SIC (Sistema Integrato delle Comunicazioni - Integrated Communications System). The provision aims at ensuring pluralism in the communications field by preventing dominant positions from being attained in the sector, meaning that providers registered as communications operators cannot collect, either directly or indirectly, more than 20% of the total revenues of the SIC.

The SIC is defined by the aforementioned Article 43 as the economic sector determined by the process of convergence between traditional broadcasting, newspapers and magazines, press and publishing (also online), radio and audiovisual media services, cinema, and advertising, both above and below the line. In 2012, the definition was amended following the explicit request of intervention made by AGCOM to the legislator in order to expand the scope, which now includes online advertisements and advertising on different platforms, including revenues derived from search engines, social networks and content-sharing platforms.

In January 2019, AGCOM approved, with Deliberation No. 9/19/CONS, the assessment regarding the economic dimensions of the SIC referred to for the year 2017. The resources included in the SIC in 2017 reached the amount of EUR 17.5 billion (1.01% of the gross domestic product), showing an overall decrease of 0.9% compared to the 2016 results.

The broadcasting sector is the best-performing one, accounting for 51% of the total, while the press sector (newspapers, magazines, press agencies) dropped to 22%. Electronic publishing and online advertising rose to 14%, while the cinematographic sector dropped below 5%. There were no major changes in the other sectors, such as external advertising (2%) and below-the-line advertising (7%).

On the basis of the information obtained, AGCOM determined the quotas of the main subjects in the SIC, proving that no one reached the maximum threshold allowed (20%).

The aggregated revenues of the top ten groups operating in the SIC represent 62% of the total, amounting to almost EUR 11 billion. The highest shares are held by Comcast Corporation/Sky (15.4%), Fininvest (15.2%), RAI Radiotelevisione Italiana (14.1%), Google (4.1%), Cairo Communication (3.8%), GEDI Gruppo Editoriale (3.2%), Facebook (2.7%), Discovery (1.3%), Italiaonline (1.3%) and Gruppo 24 Ore (1.1%).

Delibera No. 9/19/CONS - "Chiusura del procedimento per la valutazione delle dimensioni economiche del Sistema Integrato delle Comunicazioni (SIC) per l'anno 2017"

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_ls3TZlzsK0hm&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_ls3TZlzsK0hm_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_ls3TZlzsK0hm_assetEntryId=13582797&_101_INSTANCE_ls3TZlzsK0hm_type=document

Agcom's Deliberation No. 9/19/CONS, Conclusion of the procedure for the evaluation of the economic dimensions of the integrated communications system (SIC) for 2017

[IT] Court of Rome rules Vimeo liable for copyright infringement

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On 10 January 2018, the Court of Rome handed down another judgment in the ongoing saga on the Internet Service Providers' liability for third-party illegal content and activities. The Court ordered Vimeo to pay damages amounting to EUR 8.5 million to the national broadcaster RTI because of multiple copyright infringements concerning the latter's audiovisual content which occurred on the Vimeo platform.

The Court drew this conclusion addressing the debated qualification of modern hosting providers as active rather than passive operators as a prerequisite for the applicability of the liability exemptions laid down by Legislative Decree No. 70/2003 (hereinafter also "E-Commerce Decree"), which implemented the E-Commerce Directive (Directive 2000/31/EC) into the Italian legal order.

Italian courts have shown a controversial attitude vis-à-vis the legal regime governing hosting providers. Some courts (especially the Court of Milan and the Court of Turin) have maintained that elements such as the organisation of content or the arrangement of internal search engines by ISPs do not imply the existence of an editorial activity; therefore, there would be no reason for excluding liability exceptions as enshrined in the E-Commerce Directive. In turn, other courts (most notably, the Court of Rome) have endorsed a different approach, considering ISPs as active providers, that is, providers that, being "more sensitive" to third-party content, would have access to a limited exemption from liability.

In RTI v. Vimeo, the Court of Rome has adhered to the latter view in respect of the role played by Vimeo, which was found to meet the conditions to qualify as an active provider. In the view of the Court of Rome (and consistently with its prior case law), in fact, the E-Commerce Directive granted liability exemptions to ISPs on the assumption that the service operated is of a merely technical, passive and neutral nature. When these characteristics are no longer met by an ISP, these cannot be eligible for the same immunity from liability as the passive ISPs.

According to the Court of Rome, the service provided by Vimeo went far beyond the simple processing of the content uploaded by users. In reaching this conclusion, the court considered various factors, including, among others: the requirement that users had to sign up to become members of the community; the setting up of an internal search engine; the fact that the content uploaded by users was organised, indexed and categorised; the display of advertisements whose content reflected, for example, the keywords used to retrieve certain videos.

The Court of Rome thus concluded that the operations carried out by Vimeo were not merely aimed at making the management of content more efficient but were of such a nature as to vest in Vimeo a degree of control over and knowledge of this content.

These findings were sufficient, in the view of the court, to exclude the application of the liability exemptions but not to require Vimeo to carry out an ex ante monitoring of the content.

In order to determine whether the provider was responsible for the copyright infringements claimed by RTI, the court focused on whether Vimeo could be considered 'on notice' of the illegal content. In this specific case, Vimeo had been served with a generic notice mentioning only one URL as an example of one among many other items of content subject to infringements. But in respect of the other content for which RTI claimed the unauthorised publication, Vimeo had received no specific request. The level of detail of the notice which is required to trigger the obligation to take down content is another debated point in the case law of Italian courts. The Court of Rome, despite the absence of a specific and analytic reference to all the URLs of the content over which RTI claimed a copyright infringement, found that the said notice was nonetheless sufficient to urge Vimeo to take necessary action. Indeed, the techniques implemented by Vimeo based on video fingerprinting would have allowed it to both remove content found to be illegal (ex post) and to prevent the publication of illegal content right from the beginning (ex ante). Since these techniques were familiar to Vimeo and used by it, it was reasonable to expect that under the specific circumstances of the case, even a generic notice could trigger an obligation for the ISP to carry out the necessary controls. The Court of Rome thus presumed that, without prejudice to the absence of a general obligation to monitor, an active provider implementing such functions is required to search and remove content allegedly illegal; so that failure to do so results in ISP liability for not having promptly acted to cease the claimed violations.

Tribunale di Roma, sez. XVII civile, 10 gennaio 2019, n. 623

http://www.medialaws.eu/wp-content/uploads/2019/02/Trib.-Roma-Vimeo.pdf

Tribunale di Roma, sez. XVII civile, 10 January 2019, n. 623

MOLDOVA

[MD] New Audiovisual Code

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After several setbacks, on 18 October 2018, the Parliament of the Republic of Moldova adopted in its final reading the Audiovisual Media Services Code of the Republic of Moldova, which creates the framework required for implementation of the EU's Audiovisual Media Services Directive ("the AVMS Directive"). As the President refused to sign it, it was promulgated on 8 November 2018 by the chairman of the Parliament.

The new law replaces an earlier Audiovisual Code from 2006 (see IRIS 2006-9/27). It brings national legislation more into line with the AVMS Directive, especially in the fields of the protection of minors, the protection of consumers (commercial communications), incitement to hatred, events of major importance, the right of reply, material scope, jurisdictional issues, non-linear audiovisual media services, and the promotion of European works.

In particular, it regulates the balance of views and accuracy of facts in news programmes and current affairs talk shows (Article 13). In order to protect the "national audiovisual space and ensure the security of information", the Code allows providers and distributors of media services to broadcast "informational and current affairs, military-political television and radio programmes" produced in the European Union member states, in the United States and Canada, and in other countries that have ratified the European Convention on Transfrontier Television (paragraph 4 of Article 17). According to an earlier decision of the Constitutional Court of Moldova this provision establishes a blanket ban on broadcasters and service distributors disseminating such programmes if they have been produced in states other than those listed therein.

The Audiovisual Media Services Code traditionally regulates the establishment and status of the public service media, rules governing licensing, the status of the national media regulator (the Council on Television and Radio), and the use of national language.

The Code, apart from a few provisions, entered into force on 1 January 2019.

When presenting a legal review of Moldova's Audiovisual Code while it was still a draft, the OSCE Representative on Freedom of the Media, Harlem Désir, called for further legal certainty and commitment to international standards: "It is further recommended that the Code provide greater legal certainty vis-à-vis the services that are actually included or excluded, and that the definitions of the Code be improved in order for them to be fully in line with international standards."

COD Nr. 174 din 08.11.2018 serviciilor media audiovizuale al Republicii Moldova Publicat : 12.12.2018 în Monitorul Oficial Nr. 462-466 art Nr: 766 Data intrarii in vigoare : 01.01.2019

http://lex.justice.md/viewdoc.php?action=view&view=doc&id=378387&lang=1

Code of the Republic of Moldova on Audiovisual Media Services, nr. 174 of 8 November 2018. Officially published on 12 December 2018 in Monitorul Oficial Nr. 462-466

The Court Examined the Constitutionality of Certain Provisions of the Audiovisual Code on State Informational Security, 4 June 2018, Constitutional Court.

http://constcourt.md/libview.php?l=en&idc=7&id=1210&t=/Media/News/The-Court-Examined-the-Constitutionality-of-Certain-Provisions-of-the-Audiovisual-Code-on-State-Informational-Security

OSCE Representative presents a legal review of Moldova's Audiovisual Code, calls for further legal certainty and commitment to international standards, Vienna, 20 June 2018

https://www.osce.org/representative-on-freedom-of-media/385245

MALTA

[MT] Paid advertisements broadcast on nationwide radio stations for the European parliamentary elections

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On 25 January 2019, the Broadcasting Authority issued a new directive to radio broadcasters which is totally innovative in so far as it allows - for the very first time in Maltese broadcasting history - paid electoral advertisements on nationwide radio stations. However, the advertisements allowed are restricted to the announcement of information meetings to be held by prospective electoral candidates not to serve as “propaganda” for these candidates.

The directive allows national radio stations to provide airtime to Maltese candidates standing for election to the European Parliament. National radio stations have been authorised to receive requests for paid advertising from European parliamentary election candidates in respect of meetings organised for the purposes of disseminating information.

Such advertisements must comply with the following requirements:

- The advertisements may only deal with information meetings organised by candidates. The advertising has to be candidate-oriented and not originated by the respective political parties.

- No advertisement may last longer than 30 seconds.

- The radio station broadcasting such an advertisement has to broadcast it within two particular transmission time bands. These have been set at between 9 a.m. and 10 a.m. and between 6 p.m. and 7 p.m.

- Each candidate is allowed one advertisement per hour during the two hours allotted to this scheme - that is to say, no more than two advertisements per day may be broadcast per electoral candidate.

- Each radio station is obliged to establish a fair and transparent procedure regarding the order of broadcast of such advertisements.

- In the event that the scheme is renewed until the EU Parliamentary elections, such advertising has to cease at midnight on Thursday 23 May.

- The station’s editorial policy cannot be used as a basis for discrimination between one candidate and another.

- Any exclusion of an advertisement from being broadcast should be reasonably justified.

- All other broadcasting legislation continues to apply during the transitional period, in conjunction with this scheme.

This scheme began on 1st February 2019 and ended on 28th February 2019. The Authority will consider renewing the scheme. In order to evaluate the situation in time, and should the scheme continue, in order to avoid interruptions, the radio stations had to communicate the amount of such advertising by not later than 23 February 2019. If the scheme works well, with everyone's cooperation, then the regulator would consider renewing it for the coming months.

Direttiva. Elezzjoni Parlament Ewropew. Xandir ta' Reklamar bi Ħlas fuq l-Istazzjonijiet tar-Radju Nazzjonali

http://www.ba-malta.org/file.aspx?f=387

Directive. European parliamentary elections. Broadcast of Paid Advertisements on Nationwide Radio Stations

http://www.ba-malta.org/file.aspx?f=387

NETHERLANDS

[NL] Provisional relief judge of the District Court: Facebook can't invoke safe harbour protection under Article 14 of the eCommerce Directive

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On 21 December 2018, the provisional relief judge of the District Court of Amsterdam ("the District Court") ruled on a dispute between PVH B.V. ("PVH") and two of its subsidiaries on one side, and Facebook Ireland Limited and Facebook Netherlands B.V. ("Facebook") on the other side. Most notably, the District Court ruled that Facebook did not fall within the scope of the safe harbour provided by Article 14 eCommerce Directive, as implemented by Article 6:196c(4) of the Dutch Civil Code (Burgerlijk Wetboek - "the DCC").

The dispute arose after numerous advertisements were shown on Facebook's platforms, Facebook and Instagram, which infringed PVH's trademarks. After being notified by PVH of those infringements, Facebook deleted the advertisements in question. Moreover, upon request of PVH, Facebook provided PVH with information regarding the advertisers concerned - namely "identifiers". Nonetheless, PVH requested additional information, such as the advertisers' addresses and payment details. Facebook did not respond to this request. PVH asked the District Court to order, inter alia, that Facebook cease all infringements without delay, provide PVH with all information regarding the advertisers, and take effective measures to prohibit the advertisers in question from using its platforms.

Most notably, the substantive assessment of the dispute concerned the question of whether the ineffectiveness of the measures taken on Facebook and Instagram established that Facebook had infringed PVH's trademarks. PVH argued that the constant reoccurrence of the litigious advertisements demonstrated the ineffectiveness of the measures taken by Facebook. In connection to this, the scope of the safe harbour (as provided by Article 14 of the eCommerce Directive and Article 6:196c(4) of the DCC) was debated. This safe harbour exempts hosting service providers from liability for information that they store for their users. Hosting service providers only fall within the scope of this safe harbour if they have taken on a passive role - that is to say, they have no knowledge of the illegality of the information in question, and, moreover, act expeditiously to remove or disable access to such information after becoming aware of its illegality.

The Court agreed with PVH in its reasoning: Facebook had taken on an active role in publishing the infringing advertisements and did thus not fall within the scope of the safe harbour. The Court cited Facebook's advertising policies as an indication of this active role. According to those advertising policies, advertisements are subject to prior verification and possibly to rejection.

Moreover, advertisements cannot, inter alia, infringe third parties' intellectual property rights. According to the Court, Facebook consequently co-determines the content of advertisements. Given its active role, Facebook must take appropriate measures to stop the systematic infringement of third parties' intellectual property rights. This obligation also encompasses measures to prevent future, sufficiently concrete, infringements on platforms. However, the Court did not hold that Facebook infringed PVH's trademarks, because its platforms are not to be used for illegal advertising; on the contrary - its advertising policies illustrate the fact that it attempts to prevent such advertising. Nonetheless, the Court held that Facebook could be held liable on the basis of tort law because it had failed to take appropriate measures. Ultimately, the Court ruled, inter alia, that Facebook should cease all infringements and provide PVH with identifying information regarding the malicious advertisers. The latter also applies to future illegal advertisements.

Rechtbank Amsterdam 21 December 2018, ECLI:NL:RBAMS:2018:9362

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2018:9362

Provisional relief judge of District Court 21 December 2018, ECLI:NL:RBAMS:2018:9362

[NL] Recording and sharing by a journalist of a confidential phone call with a council member was not unlawful

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In a judgment of 11 December 2018, the Court of Appeal of Arnhem-Leeuwarden ("the Appeal Court") ruled that a journalist had not acted unlawfully by taping and sharing a recording or the contents of a phone call in which a municipal council member ("the council member") provided him with confidential information.

As a party chairman, the council member was a member of a committee responsible for the appointment of an acting mayor. While the appointment procedure was underway, and days before the official announcement of the nominee, the council member spoke over the phone about, inter alia, that procedure with a journalist from a Dutch national newspaper. Unbeknown to the council member, a second journalist, who worked for a regional door-to-door newspaper, accompanied the national journalist and secretly taped the phone call which the first journalist had conducted with his phone on speaker function. After being asked about the candidate by the journalist from the national newspaper, the council member did not provide a name. He did, however, provide a profile from which the identity of the candidate was subsequently quite easily be identified by the regional journalist. Eventually, the chairman of the nomination committee found out that someone from the committee had leaked information about the procedure. The regional journalist, when asked, confirmed that it had indeed been the council member who had provided her with this information, after which she also shared the recording with the municipality council. After several complaints were received from a number of other council members, an investigation was started into the council member's wrongdoings. The council member, however, filed a complaint with the police regarding the regional journalist having taped the phone call illegally. In the subsequent criminal proceedings, the journalist was found guilty of this crime, but not punished. In a subsequent civil lawsuit, a District Court rejected the council member's submission that the journalist had acted unlawfully by recording the phone call without the council member knowing, and by making this recording or its contents available to others. The council member appealed.

In the appeal decision, the Appeal Court weighed the council member's right to the protection of his private life (which includes the right to protection of privacy and reputation) against the journalist's right to freedom of expression (which also encompasses the right to journalistic freedom). The Appeal Court reiterated that in balancing these rights all relevant factors and circumstances had to be taken into account. The first factor that the Court deemed of importance was the fact that the council member was a public figure and that the actions of which he accused the regional journalist concerned a matter of public interest. The council member therefore had to tolerate more severe criticism and public scrutiny than

would normally be the case. Additionally, the Appeal Court considered that the fact that the council member had not known that the phone call was being recorded did not detract from the fact that he had provided confidential information in a manner incompatible with his role as member of a confidential committee and as an administrator. The Appeal Court rejected the council member's argument that he had been provoked by the journalist, deeming that asking questions was simply what journalists do. In view of the fact that the phone conversation between the journalist and the council member had concerned an important matter of public interest, the Court ruled that the regional journalist had had a broad margin of appreciation in deciding how to disclose the information and had not acted negligently by sharing the recording. The council member also argued that he had agreed to - and on multiple occasions had insisted on - confidentiality with the national journalist; however, the Appeal Court ruled that the council member, as a public figure, should have been aware of the risk that the phone conversation might be made public.

In the light of these findings, the Court of Appeal ruled that the journalist's right to freedom of expression should prevail and that the council member's appeal should be rejected. The Court upheld the judgment of the District Court.

Gerechtshof Arnhem-Leeuwarden 11 December 2018, ECLI:NL:GHARL:2018:10765, 11 December 2018, ECLI:NL:RBAMS:2018:1555

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2018:10765

Court of Appeal Arnhem-Leeuwarden, 11 December 2018, ECLI:NL:RBAMS:2018:1555.

ROMANIA

[RO] Modification of the Decision on retransmission notification

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On 29 January 2019, the audiovisual watchdog Consiliul Naţional al Audiovizualului (National Audiovisual Council, CNA), adopted Decision No. 155/2019 on the modification and completion of CNA Decision No. 72/2012 with regard to the conditions for issuing and amending the retransmission notification (see, inter alia, IRIS 2014-3/39, IRIS 2015-8/29).

The new Decision simplifies and clarifies Chapter II of CNA Decision No. 72/2012 ”Procedure and conditions for issuing, modifying and withdrawing the retransmission notification”, with a focus on the documents required for issuing and amending the retransmission notification. The modifications applied to Article 2 (2) b), concerning the standard certificate issued by the telecom watchdog (ANCOM) to certify that the applicant provides electronic communications networks or services; Article 2 (2) d), concerning the distributor's declaration regarding the ownership of the legal retransmission rights for the programmes, which specifies the number of programmes for which they have retransmission rights, as listed in Annex 2 of the Decision; Article 2 (5), concerning the copies of required documents, and Article 5 (2) c), concerning the distributor's declaration regarding the ownership of the legal retransmission rights for the programmes, which specifies the number of programmes for which they have retransmission rights, only for programme services subject to change, as listed in Annex 2 of the Decision.

A new paragraph (3) was added to Article 3: At the request of the CNA, the distributor of retransmitted programmes has to submit the agreement or contract attesting to the retransmission right, while maintaining the confidentiality of the data entered.

The new CNA Decision also clarifies the procedure for implementing the must-carry system, according to Article 82 (2) of the Audiovisual Act.

A new paragraph (4) was added to Article 10: At least three months before the date referred to in Article 11 (1) - meaning 15 January of each year - broadcasters wishing to leave the must-carry list will notify their intention to the CNA, which will publish it on its website, to the attention of all distributors of programmes.

Article 13^1 (3) was modified in the sense that the maximum term of 60 days was reduced to a maximum of 30 days from the deadline provided in paragraph (2) - 1 February of each year - within which time the programme service distributors have the obligation to introduce in their offer the regional/local

programme services that meet the conditions of the must-carry system. Article 13^1 (4) was modified in the sense that if in the regional/local offer there are not at least two retransmitted regional/local programmes, the application file for amending the retransmission notification will also contain a statement on the distributor's own responsibility, stating all the requests received and why the distributor had not accepted them.

Article 15 was modified as follows: If during the year a broadcaster no longer fulfils the legal requirements for the must-carry regime for a particular programme service, the CNA will make this public on its website.

Article 17 of Decision No. 72/2012, which provided for specific deadlines for the year 2012, was repealed.

Annexes Nos. 2 and 3 of the Decision were modified and have been renumbered as Annexes 1 and 2.

Decizia nr. 155 din 29 ianuarie 2019 pentru modificarea Deciziei Consiliului Național al Audiovizualului nr. 72/2012 privind condițiile de eliberare și modificare a avizului de retransmisie

http://cna.ro/IMG/pdf/Dec._155_2019.pdf

Decision no. 155 of 29 January 2019 amending the Decision of the National Audiovisual Council no. 72/2012 on the conditions for issuing and amending the retransmission notification

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