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EDITORIAL

Last month we reported on the European Commission's decision to accept the commitments of film studios on licensing contracts for cross-border pay-TV services. We recalled thereby the possible important implications of this decision for the future of the debate on the territoriality of copyright law. This month it is the turn of the new Directive on copyright and online transmissions of broadcasting organisations and retransmissions of television and radio programmes (formerly so-called "SatCab regulation") to make the headlines for our newsletter. Some will see in its adoption a further step towards the European Commission's alleged aim to eliminate the territoriality principle from copyright law in the EU. Others may argue that the final directive is miles away from Commission's original intentions on this matter. Whether a watered-down attempt at opening walled gardens or a torpedo under the floating line of the European audiovisual industry, time will tell how things develop from here, and we will certainly come back to this subject in the future.

And talking about Europe, I am sure you are aware that we have European Parliament elections coming up in May! Of course, elections mean debates and controversies, and our pages bear witness to this. We report how in France courts were asked to issue urgent decisions by three politicians who wanted to participate in a televised debate involving nine other candidates heading party lists in the European elections, which was broadcast on public-service TV. We also present the rules governing the audiovisual electoral campaign for the election of the members from Romania to the European Parliament and two Spanish decisions the legislation concerning media and elections.

Otherwise, in the wonderful month of May flowers bloom, birds sing, and the Festival de Cannes opens its doors to the whole fauna and flora of international cinema. As usual we will be present at the Croisette with a conference on " Film financing – European strategies to boost cultural diversity ". The conference will look at how today's European films are financed: Who are the new financial players? How does public policy channel money into film funds and financing mechanisms? How is the structure of film financing in Europe changing? This free entry conference will take place on Saturday 18 May from 9.30 – 11.30 at the Olympia cinema in Cannes as part of the Marché du film (doors open at 9.10). The conference is open to all Cannes 2019 Film Market, Festival and Press accreditations, but you need to register here: https://forms.gle/gTt1yd4JoJTb15d16 .

Enjoy your read!

Maja Cappello, editor
European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

NORWAY

European Court of Human Rights: Høiness v. Norway

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

The European Court of Human Rights (ECtHR) has delivered a new judgment with regard to the liability of an Internet portal for offensive content allegedly tarnishing one's reputation (see also Delfi v. Estonia (Grand Chamber), IRIS 2015-7/1; Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, Iris 2016-3/2 and Pihl v. Sweden, Iris 2017-5/3). The ECtHR agreed with the findings by the Norwegian courts that although some anonymous comments were inappropriate and tasteless, the expeditious removal of the offensive comments upon actual knowledge by the media company and the editor exempted the Internet portal from liability. Therefore, the dismissal by the Norwegian courts of the applicant's complaint against the Internet portal for alleged violation of her right to privacy and reputation was not in breach of Article 8 of the European Convention on Human Rights (ECHR).

The applicant in this case, Ms Mona Høiness, is a well-known lawyer in Norway who was formerly a talk show host and active participant in public debate. The Internet portal Hegnar Online published articles concerning her role and relationship with a wealthy, elderly widow from whom she had inherited. The inheritance case was covered extensively by some media, and the Hegnar Online website featured a forum - at a separate web address, but to which access was given via the online newspaper - where readers could start debates and submit comments. There was no editorial content in the forum: all content was user-generated, and it was possible for users to comment anonymously, without the requirement to register. After a few readers had posted some vulgar and sleazy comments about Ms Høiness, she initiated civil proceedings against the Hegnar Media AS company and Mr H., an editor working for Hegnar Online. Ms Høiness complained that her honour had been infringed, particularly because of sexual harassment in three comments on the Hegnar Online's forum. The defendants argued that they had not been aware of the comments and that the offensive comments had been removed as soon as they had become aware of them. It was recognised by the Norwegian High Court that each of the three comments were 'inappropriate, unserious and tasteless', but that was, in itself, not sufficient. Ms Høiness' claim for compensation could only succeed if 'sufficient culpability'

could be demonstrated by Hegnar Online and Mr H. for not having done enough to discover and thereafter remove the impugned comments. As two comments had been rapidly removed after the notification by Ms Høiness, and one comment had been deleted on the portal staff's own motion, there was no reason to consider Hegnar Online liable in this case. Furthermore, the Norwegian courts awarded the defendants for their litigation costs, to be paid by Ms Høiness for a total of approximately EUR 45 000.

Before the ECtHR, Ms Høiness complained that the Norwegian authorities, by not sufficiently protecting her right to respect for her private life and requiring her to pay the defendants' litigation costs, had acted contrary to Article 8 of the European Convention on Human Rights (ECHR). The ECtHR observed that what was at issue in the present case was not an act by the state, but the alleged inadequacy of the protection afforded by the domestic courts to Ms Høiness' private life. While the essential object of Article 8 ECHR was to protect the individual against arbitrary interference by public authorities, it did not merely compel the state to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may also involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The ECtHR reiterated that in order for Article 8 ECHR to come into play, however, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life, while the rights guaranteed under Articles 8 and 10 ECHR deserved equal respect. Thus, the question was whether the state had struck a fair balance between Ms Høiness' right to respect for her private life under Article 8 ECHR and the online news agency and forum host's right to freedom of expression guaranteed by Article 10 ECHR. In this regard, the ECtHR first and foremost emphasised that the impugned comments had not amounted to hate speech or incitement to violence. In balancing the conflicting rights at issue, the ECtHR referred to the specific aspects of freedom of expression as being relevant for the concrete assessment of the interference in question: the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the company.

The ECtHR agreed that Ms Høiness would have faced considerable obstacles in attempting to pursue claims against the individuals behind the anonymous comments, while it also took account of the fact that Hegnar Online was a large, commercially run news portal and that the debate forums were popular. It did not appear, however, that the debate forum was particularly integrated in the presentation of news and thus could be taken to be a continuation of the editorial articles. Most importantly, the ECtHR referred to the measures adopted by Hegnar Online: it had an established system of moderators who monitored content, and readers could click on 'warning' buttons in order to notify their

reaction to comments. In the present case, the news portal company and its editor had acted appropriately by rapidly removing the offensive comments upon notification. The ECtHR saw no reason to substitute a different view for that of the domestic courts, and it found that the Norwegian courts had acted within their margin of appreciation when seeking to establish a balance between Ms Høiness' rights under Article 8 ECHR and the news portal and host of the debate forum's opposing right to freedom of expression under Article 10 ECHR.

The ECtHR finally noted that a considerable amount of litigation costs had been imposed on Ms Høiness, but it agreed with the Norwegian courts that there had been no reason to deviate from the starting point which had established that the winning party be awarded compensation for their fees and expenses. Taking account of the nature of the claim lodged before the national courts, the subject matter and the 'welfare and relative strength' of the applicant, the ECtHR did not consider that it could call into question the domestic courts' assessment as to the imposition of costs. Unanimously, the ECtHR held that there had been no violation of Article 8 ECHR.

Judgment by the European Court of Human Rights, Second Section, case of Høiness v. Norway, Application no. 43624/14, 17 March 2019

http://hudoc.echr.coe.int/eng?i=001-191740

EUROPEAN UNION

European Parliament: Directive on copyright and online transmissions of broadcasting organisations and retransmissions of television and radio programmes

Ronan Ó Fathaigh
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On 28 March 2019, the European Parliament voted to adopt a Directive on the exercise of copyright and related rights applicable to certain online transmissions by broadcasting organisations and retransmissions of television and radio programmes. The Directive was first proposed as a Regulation by the European Commission in 2016 (see IRIS 2016-9/4 and IRIS 2018-1/10). However, in December 2018, the Council and European Parliament announced that an agreement had been reached and that the "originally proposed Regulation will have to be redrafted so that it takes the form of a Directive" (see IRIS 2019-2/4).

The stated purpose of the Directive under the new Article 1 is to lay down rules to enhance cross-border access to a greater number of television and radio programmes by facilitating the clearance of rights for the provision of online services that are ancillary to the broadcast of certain types of television and radio programmes and for the retransmission of television and radio programmes. The Directive also lays down rules for the transmission of television and radio programmes through "direct injection" (Article 8), which is a process increasingly used by broadcasters to transmit their programmes to the public. Instead of transmitting their programmes directly to the public over the air or by wire, broadcasters send their programmes to distributors, which transmit them to the public.

One of the main provisions aimed at addressing the difficulties associated with copyright clearance is Article 3, which sets out the country-of-origin principle. It provides that rights required to make certain programmes available on broadcasters' online services (for instance, their simulcasting or catch-up services) are to be cleared only for the broadcaster's country of principal establishment (instead of all Member States in which the broadcaster wishes to make its programmes available). Notably, Article 3 applies to all radio programmes, but only to television programmes that are: (i) news and current affairs programmes, or (ii) fully financed own productions of the broadcasting organisation. Article 3 also explicitly states that it "shall not apply to the broadcasts of sports events and works and other protected subject matter included in them". Furthermore, Article 3(3) provides that the country-of-origin

principle shall pertain without prejudice to the contractual freedom of the rightsholders and broadcasting organisations to agree, in compliance with Union law, to limit the exploitation of such rights.

Moreover, Article 4 and 5 concern the retransmission of television and radio programmes and extend the system of mandatory collective management, which is currently applicable to cable retransmissions only, to retransmission services provided through other means (such as Internet Protocol television (IPTV), and satellite, digital terrestrial or online technologies. The Commission states that this system allows retransmission operators to clear the necessary rights in a simpler manner - they need to clear the relevant rights with broadcasters whose channels they retransmit and with collective management organisations - i.e. organisations that represent a multitude of rightsholders, and not with several individual right holders on a one-to-one basis (e.g. a music composer or an audiovisual performer).

Finally, Article 8 concerns the transmission of programmes through direct injection, and clarifies that when broadcasters transmit their programme-carrying signals by direct injection exclusively to distributors, and the latter transmit these to the public, there is an “act of communication to the public”, in which both the broadcaster and the distributors participate, and for which they need to obtain authorisation from rightsholders. According to the Commission, this new provision will help to ensure that rightsholders are adequately remunerated when their works are used in programmes transmitted through direct injection.

The Parliament’s text will now have to be formally endorsed by the Council of the European Union. Following publication in the Official Journal of the EU, member states will have two years to transpose the Directive into national legislation.

Position of the European Parliament adopted at first reading on 28 March 2019 with a view to the adoption of Directive (EU) 2019/... of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC, 28 March 2019

http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2019-0322

European Commission, “Commission welcomes European Parliament's vote on new rules facilitating access to online TV and radio content across borders”, 28 March 2019

http://europa.eu/rapid/press-release_STATEMENT-19-1888_en.htm

Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of

television and radio programmes, COM(2016) 594 final, 14 September 2016

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0594

NATIONAL

GERMANY

[DE] Ban on TV, radio and Internet advertising for online casinos confirmed

Jörg Ukrow
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The advertising landscape for German private TV broadcasters has, for many years, included advertisements for gambling services that are illegal under the *Glücksspielstaatsvertrag* (Inter-State Gambling Agreement - GlüStV) of the German Länder. It has long been disputed whether these advertising campaigns can be based on the online gambling licences that were awarded in Schleswig-Holstein at a time when the Land followed its own path by relaxing the rules on gambling.

The online gambling licences awarded in Schleswig-Holstein expired at the start of February 2019. As a result, television, radio and Internet advertising for these gambling services, which are now banned throughout the country, is no longer permitted under German gambling and broadcasting laws. For regulatory bodies such as the German Landesmedienanstalten (state media authorities), the considerable risk of joint action being taken against this form of advertising in accordance with the 2014 *Gemeinsame Leitlinien der obersten Glücksspielaufsichtsbehörden der Länder und der Landesmedienanstalten zur Zusammenarbeit bei der Aufsicht über Glücksspielwerbung im privaten Rundfunk und Telemedien privater Anbieter* (Common Guidelines of the supreme gambling supervisory authorities of the Länder and state media authorities on collaboration in relation to the monitoring of advertising for gambling in private broadcasting and telemedia) has been mitigated.

At their conference on 21 February 2019, the heads of the state and senate chancelleries of the Länder noted that, in order to continue to safeguard monitored services under its jurisdiction, Schleswig-Holstein wanted to grant new licences, valid until 30 June 2021, to providers that had been granted licences to run online casinos on the basis of its previous state law, even though such casinos were banned under Article 4(4) of the GlüStV. They also noted that this meant that the ban on organising or providing public gambling services on the Internet, enshrined in Article 4(4) GlüStV, would temporarily be lifted in a closely defined geographical area (Schleswig-Holstein) until 30 June 2021. However, this plan has not yet been legally implemented and the emphasis on geographical limitation suggests that nationwide advertising for such services would not be permitted.

In this context, in an official press release, the Medienanstalt Hamburg/Schleswig-Holstein (Hamburg/Schleswig-Holstein media authority - MA HSH) stated that the ban on broadcast advertising for online casinos would remain in place in Schleswig-Holstein and throughout the country. It expressly advised all state-wide and national broadcasters licensed by it to avoid sanctions by refraining from broadcasting advertising spots for online gambling services and, if in doubt, to seek the advice of the MA HSH before doing so.

Pressemitteilung der MA HSH

https://www.ma-hsh.de/infothek/pressemitteilung/werbeverbot-fuer-online-casinos-in-hoerfunk-und-fernsehen-gilt-weiter.html

Press release of the Hamburg/Schleswig-Holstein media authority

[DE] Bundestag votes for draft Trade Secrets Act

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On 21 March 2019, despite criticism from media associations and the opposition, the German Bundestag adopted a draft act tabled by the federal government to implement Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, as contained in a recommended resolution drawn up by the Bundestag Law and Consumer Protection Committee. Directive 2016/943 obliges member states to protect trade secrets through civil law provisions.

According to the act's explanatory memorandum, trade secrets have considerable economic value, but until now have not received any special legal protection under an instrument such as the Patent Act or Copyright Act. In the federal government's view, the current protection of trade secrets in German law, provided under the criminal law provisions of Articles 17 to 19 of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG) and Articles 823 and 826 of the Bürgerliche Gesetzbuch (Civil Code - BGB), if necessary in conjunction with Article 1004 BGB, is not sufficient to meet the directive's requirements. Under the government's proposal, the directive will be transposed through a new Gesetz zum Schutz von Geschäftsgeheimnissen (Act on the protection of trade secrets - GeschGhG), which will provide consistent protection against unlawful acquisition, use and disclosure of trade secrets. The draft act contains extensive civil law remedies and, in some circumstances, criminal law provisions to deal with such offences.

In this context, the Bundestag also welcomed the fact that the federal government, during the negotiations on the European Commission's proposal for a directive on the protection of persons reporting on breaches of Union law (COM (2018) 218 final - Whistleblower Protection Directive), advocated rules on the protection of whistleblowers that are coherent and protect the interests of all. At the same time, however, it asked the government, during the ongoing trilogue negotiations, to keep in mind possible interactions between the Whistleblower Protection Directive and Directive (EU) 2016/943, and to seek a reasonable balance between the need to protect whistleblowers, the need for private and commercial confidentiality and the public's right to information.

The draft has been criticised partly because it could significantly hamper freedom of reporting, especially investigative journalism. In a statement of 20 February 2019, for example, the public service broadcasters and journalists' associations complained that insufficient account had been taken of the fact that the media often needed access to information and documents relating to internal business processes in order to expose wrong-doing in companies, institutions or authorities. A clear exemption was needed for the media, including the right not to disclose sources in order to be able to continue guaranteeing informant confidentiality. A narrower definition of trade secrets was also required.

Under the current draft act, the disclosure of trade secrets can be justified on the

basis of the freedom of expression and freedom of information enshrined in the Charter of Fundamental Rights of the European Union, which includes respect for media freedom and plurality. However, without a clear exemption, journalists' associations claimed that civil and criminal law proceedings could still be instigated. In their view, the draft was stricter than it needed to be under EU law and would therefore harm investigative journalism.

Pressemitteilung zur Abstimmung im Deutschen Bundestag

https://www.bundestag.de/dokumente/textarchiv/2019/kw12-de-schutz-geschaeftsgeheimnisse-628876

Press release on the vote at the German Bundestag

[DE] Court prohibits arbitrary changes to pay-TV programme package

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In a recently published judgment of 17 January 2019 (Case no. 12 O 1982/2018), the Landgericht München (Munich district court) decided that customers were unreasonably disadvantaged by a unilateral, groundless change to programme packages sold by pay-TV provider Sky Deutschland.

In its terms of business, the pay-TV provider had reserved the right to change or limit programme packages and services as long as their 'overall character' was not affected. The terms of business also stated that the programme content of sports channels was seasonal and could vary depending on the availability of broadcasting rights. Sky therefore referred to its terms of business in order to prevent customers cancelling their subscriptions on the grounds of a change to their programme package.

The Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. (Federation of German Consumer Organisations -VZBV), had complained about this practice. It had claimed, for example, that customers who had subscribed to a Sky sports package because of a previously advertised broadcast of Formula 1 racing had been prevented from cancelling their subscription when the event had been removed from their package in 2018. The vzbv criticised the fact that customers could be unreasonably disadvantaged if Sky Deutschland was allowed to change its services unilaterally. For most of its customers, minimum contracts are either 12 or 24 months long and are automatically renewed.

The court largely upheld the vzbv's complaint and declared the relevant clauses invalid under Article 308(4) of the Civil Code (BGB). It held that the clause enabled Sky to change its programme package for no reason in a way that could not be foreseen or predicted by customers, in particular since there were no limits to the scope of such restrictions and changes. The rule was therefore unreasonable. Under German law, terms of business that unreasonably disadvantage consumers are invalid.

However, another clause in the broadcaster's terms of business, entitling Sky to change its programme packages for licensing or technical reasons, was deemed admissible. The vzbv's request that customers be allowed to object to such changes was rejected. The court held that the broadcaster had a justified interest in maintaining this rule because continuing a contract in such circumstances would be impossible. Furthermore, Sky had already given its customers a special right to cancel their subscriptions in such cases. The vzbv has already lodged an appeal against this part of the decision with the Oberlandesgericht München (Munich district appeal court).

Urteil des LG München vom 17. Januar 2019 (Az. 12 O 1982/2018)

https://www.vzbv.de/sites/default/files/downloads/2019/03/06/sky_deutschland_fernsehen_lg_muenchen_i_a_8608-22.pdf

Decision of Munich district court, 17 January 2019 (case no. 12 O 1982/2018)

[DE] Federal Administrative Court submits questions to CJEU about broadcasting contribution payment methods

Christina Etteldorf

On 27 March 2019, following applications from two people who are required to pay the German broadcasting contribution (cases BVerwG 6 C 5.18 and 6 C 6.18), the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) decided that the Court of Justice of the European Union (CJEU) should rule on whether the broadcasting contribution can and should be payable in cash. The decision primarily concerns the interpretation of the concept of legal tender and the scope of the European Union's exclusive jurisdiction over monetary policy.

In Germany, the obligation for private individuals to pay the broadcasting contribution, through which public broadcasting is largely financed and which currently stands at EUR 17.50 per month, is based on the ownership of a residence. Whereas the level of the financial contribution is fixed by the broadcasting authorities, it is collected by the ARD ZDF Deutschlandradio Beitragsservice and, according to the Rundfunkbeitragssatzung (broadcasting contribution regulations), can only be paid by standing order or direct debit, either through regular or one-off payments. In the main proceedings, two people who were required to pay the contribution complained about this situation, among other things, and asked the court to declare that they were entitled to pay it in cash. They had argued that since, under German and European law, euro banknotes were the only unrestricted legal tender, it should be possible to pay the broadcasting contribution in this way. However, their complaints and subsequent appeals had all been rejected, primarily on the grounds that, as far as mass tax collection procedures were concerned, there was no unconditional obligation to accept cash payments because, for reasons of simplicity and practicality, it was appropriate to authorise a fully cashless payment system. Moreover, people paying the contribution had the possibility of making a cash payment to the ARD/ZDF/Deutschlandradio account at a bank.

However, the BVerwG suspended the latest appeal proceedings launched by the complainants because it thought the decision depended largely on the interpretation of EU law. It therefore submitted the following questions to the CJEU:

1) Is the exclusive competence in the field of monetary policy for the member states whose currency is the euro, held by the Union under Article 2(1) in conjunction with Article 3(1)(c) of the Treaty on the Functioning of the European Union (TFEU), compatible with a legal act adopted in a member state obliging public authorities of that member state to accept legally required payments in euro banknotes?

2) Does the status of euro banknotes as legal tender, enshrined in the third sentence of Article 128(1) TFEU, the third sentence of Article 16(1) of Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank and in the second sentence of Article 10 of Council Regulation (EC) No. 974/98 of 3 May 1998 on the introduction of the euro,

prevent public authorities of a member state from refusing to accept such banknotes as payment for legally imposed charges, or does EU law provide scope for regulations prohibiting the use of euro banknotes for the payment of certain legally imposed charges?

3) If the answer to question 1 is yes and the answer to question 2 is no: can a legal act in the field of monetary policy, for which the Union has exclusive competence, adopted in a member state whose currency is the euro, be applied if the Union has not exercised its competence?

Pressemitteilung Nr. 23/2019 des BVerwG vom 28. März 2019

https://www.bverwg.de/de/pm/2019/23

Federal Administrative Court press release no. 23/2019, 28 March 2019

[DE] Higher Administrative Court rules on the significance of spectrum scarcity for allocation decisions

Christina Etteldorf

In a recently published decision of 18 December 2018 (Case no. 5 B 229/18), the Sächsische Oberverwaltungsgericht Bautzen (Saxony Higher Administrative Court Bautzen - OVG) ruled that, if a competitor's complaint about the allocation of broadcast transmission capacity appears unlikely to succeed, the public interest in the provisional allocation of transmission capacity takes precedence over the competitor's interest in suspending the implementation of the allocation decision. Although the decision concerns radio transmission capacity, it contains important general principles for the allocation of broadcasting spectrum by means of selection processes in national broadcasting as a whole.

In the summer of 2017, the Gremienvorsitzendenkonferenz (Conference of Chairpersons of the Decision-Taking Councils - GVK) of the German Landesmedienanstalten (state media authorities) had decided, as part of a tender process, that Antenne Deutschland GmbH & Co. KG (ADG), a joint venture of Media Broadcast Digital Radio GmbH and Absolut Digital GmbH, should be assigned the digital terrestrial transmission capacity to set up a second German DAB+ multiplex platform. The Sächsische Landesanstalt für privaten Rundfunk und neue Medien (Saxony state authority for private broadcasting and new media - SLM), on whose behalf the GVK had been acting, had therefore allocated the spectrum to ADG. However, its decision was contested by Digital Audio Broadcasting Platform DABP GmbH, which had been unsuccessful in the tender process and had requested a temporary injunction, primarily on the grounds that the procedure on which the decision had been based had been flawed. The Verwaltungsgericht Leipzig (Leipzig administrative court) granted the injunction, but only weighed up the application's chances of success in the main proceedings rather than conducting a detailed legal assessment because it deemed the allocation decision to be clearly unlawful and therefore considered that the applicant's interest in its provisional deferment should take precedence.

However, the OVG Bautzen overturned the administrative court's decision, which meant that the allocation decision remained immediately enforceable. Although, in the OVG Bautzen's opinion, the allocation decision was unlawful on account of the alleged procedural failings (but not clearly unlawful, as the administrative court had claimed) and would probably also be classified as unlawful in the main proceedings, there was a predominant interest in declaring it immediately enforceable.

The OVG Bautzen stressed that a tender process in which information sent to bidders by the authorities was not put on record failed to meet the requirement

(also laid down in EU law) for a fair, transparent process. Deadlines in such a process needed to be consistent, clear and unambiguous. Individual changes could not be made to spectrum bid documents before the mutual agreement procedure provided under the Inter-State Broadcasting Agreement had been instigated.

The OVG Bautzen stated that the enforceability of the decision took precedence mainly on account of the freedom to broadcast enshrined in the Basic Law. The importance to the general public of the effective use of broadcast frequencies, which were socially and economically significant and relevant to the Basic Law, but in short supply, demanded that the allocation decision be implemented, as long as it was not clearly unlawful. The frequencies available to broadcasters constitute a scarce, constitutionally significant commodity and should therefore be used effectively and promptly rather than be left unused during legal proceedings that might last several years. This was particularly true in the context of broadcasting freedom, which was guaranteed under the Basic Law. Plurality of reporting, which was connected to frequency use, was considered especially important for the formation of individual and public opinion. On the other hand, the disadvantages caused to the unsuccessful bidder by the temporary use of the transmission capacity were not a determining factor.

Beschluss des OVG Bautzen vom 19. Dezember 2018

https://www.justiz.sachsen.de/ovgentschweb/document.phtml?id=5337

Decision of the Saxony Higher Administrative Court Bautzen, 19 December 2018

SPAIN

[ES] Amendment to the Spanish Intellectual Property Law

Enric Enrich
Enrich Advocats, Barcelona

The Spanish BOE (Official Gazette) published Law 2/2019 of March 1, amending the Intellectual Property Law and implementing the following EU directives into Spanish law: EU Directive 2014/26/ on the collective management of copyright and related rights, and the granting of multi-territorial licences of rights in musical works, and EU Directive 2017/1564 on certain permitted uses of certain works protected by copyright and related rights and other benefits in favour of blind people, people with visual impairment or people with other difficulties in accessing printed texts.

The criteria followed in the transposition have been based, primarily, on conformity with the text of the directives and, as far as possible, on the principle of a minimum reform of the current regulations.

The main novelty introduced by this regulation affects the collective management organisations (CMOs), with the introduction of a series of measures to strengthen their transparency (the obligation to prepare an annual transparency report is established, in parallel with the annual accounts), governance and management of intellectual property (IP) rights in order to improve the control (an internal control body is introduced) and accountability of the governing and representation bodies of the said entities. The law sets measures (including the setting of distribution ceilings) in order to prevent certain works or services from receiving disproportionate amounts in relation to the commercial or audience returns of their exploitation, which was a corrupt practice by a certain Spanish CMO in the recent past.

New developments in the collection of rights have also been introduced; the sanctioning regime has been modified to clarify the division of powers, specify the maximum delays to resolve administrative sanctioning procedures for the commission of infractions, and the mechanism of exchange of information between European authorities.

The new law incorporates specific rules applicable to the management entities of other states that operate within Spain; to entities dependent on a management entity; and it also regulates the new “independent management operators”, which are entities that are already active in Spain, breaking the traditional monopoly and managing IP rights, but who, prior to this reform, were operating

outside the legal framework and the supervisory powers of public administrations.

In addition, multi-territorial online music licences are to be regulated for the first time.

The management entities are obliged to establish general, simple and clear rates that determine the remuneration required for the use of their repertoire.

The new text also includes measures to combat piracy, including the possibility of closing websites that violate IP rights in a serious and repeated manner without the need for judicial authorisation.

Likewise, the regulation of the use of works and services without the authorisation of the rightsowner in favour of people with visual disabilities or with other difficulties accessing the printed texts, includes audio and digital formats, in order to improve the availability and exchange within the internal market of certain works and protected features in an accessible format.

Finally, the new law includes a precise regulation of the resale right (or “droit de suite”), which will be made effective through the management entities and, as a novelty, will be generated from a resale price of EUR 800. The protection of this right has been proposed to Spanish authors, national authors from other EU member states, as well as third-country nationals with habitual residence in Spain.

Ley 2/2019, de 1 de 1 de marzo, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por el Real Decreto Legislativo 1/1996, de 12 de abril, y por el que se incorporan al ordenamiento jurídico español la Directiva 2014/26/UE del Parlamento Europeo y del Consejo, de 26 de febrero de 2014, y la Directiva (UE) 2017/1564 del Parlamento Europeo y del Consejo, de 13 de septiembre de 2017

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2019-2974

Law 2/2019, of March 1, amending the Intellectual Property Law approved by Royal Legislative Decree 1/1996, of April 12, and transposing into Spanish law Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 and Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017

[ES] Constitutional Court of Spain rules out the use of hidden cameras for journalistic purposes

Miguel Recio
CMS Albiñana & Suárez de Lezo

On 25 February 2019, the Constitutional Court of Spain ruled out, in a judgement, the use of hidden cameras for journalistic purposes. The Constitutional Court ruled that “the Constitution does not permit the use of hidden cameras for journalistic purposes as it constitutes a serious illegitimate interference with the fundamental rights to privacy and to one’s own image”.

The judgement of the First Chamber partially upheld the appeal for constitutional protection brought by an individual who considered that journalists of a television channel had violated his rights to privacy, own image and honour by broadcasting a report recorded with a hidden camera. The images captured by the hidden camera were used by various programmes broadcast by a television channel to denounce suspicious illegal activities undertaken by the plaintiff that could have serious risks for public health.

In its judgement the Constitutional Court addressed the conflict between media organisation’s freedom to communicate truthful information and the fundamental right to honour, privacy and one’s own image. This raised the correct balance of such rights, given that none of the rights recognised in Article 18.1 of the Spanish Constitution (honour, personal privacy and own image) is absolute.

The Constitutional Court, on the basis of the jurisprudence of the European Court of Human Rights (ECtHR), ruled that the hidden-camera reporting technique, as a general rule, must “be limited in its use, [and] only as a last resort, in accordance with ethical rules”. However, it “may exceptionally be considered legitimate when there are no less intrusive means of obtaining information”.

With regard to conflict between the freedom to communicate truthful information and the fundamental rights to honour, privacy and one’s own image, in this case the Constitutional Court considered that “the method used to obtain the intrusive content (by means of hidden cameras) had not been necessary and proportionate for the purpose of ascertaining the activity carried out by the plaintiff during his professional consultation and for the constitutional exercise of the freedom of information”. The Constitutional Court added that in order to achieve their goal, the journalists could have conducted interviews with plaintiff´s clients.

Furthermore, the Constitutional Court considered that “the broadcasting - on several television programmes and on the channel´s website - of the appellant´s image and voice without applying any distortion method constituted an unnecessarily invasive activity with regard to privacy and the right to one’s own image”.

Therefore, the Constitutional Court ruled that the fundamental rights to honour, privacy and one’s own image had to prevail in this case over the use of the hidden-camera reporting technique, given that there had been less intrusive

possible means of obtaining the information in question, such as conducting interviews with the plaintiff´s clients, and given the fact that the broadcast programmes had included content that had not been essential for information purposes.

Press release No. 24/2019, "The Constitutional Court rules out, in general terms, the use of hidden cameras for journalistic purposes, considering that it constitutes an illegitimate interference with the rights to privacy and to one's own image."

https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2019_024/Press%20Release%20No.%2024.2019.pdf

Sentencia del Tribunal Constitucional, de 25 de Febrero de 2019, de la Sala Primera

https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2019_024/2018-169STC.pdf

Judgement of the Constitutional Court, of 25 February 2019, of the First Chamber)

[ES] Decisions concerning information neutrality during election campaigns

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On 27 March 2019, two separate decisions from the Junta Electoral Central (Central Electoral Commission - JEC) and from the Junta Electoral Provincial de Barcelona (Barcelona Electoral Commission - JEPB) ruled that the public service Corporació Catalana de Mitjans Audiovisuals (Catalan Audiovisual Media Corporation - CCMA) had infringed the legislation concerning media and elections.

According to the Ley Orgánica del régimen electoral general (Representation of the People Institutional Act - LOREG), which regulates the use of mass media for electoral campaigning, the Electoral Administration has a duty to preserve equality in the course of electoral processes and requires public service media to respect that principle, maintaining information neutrality and observing the principle of proportionality.

The case before the JEC concerned an action brought by the political party Ciutadans-Partido de la Ciudadanía against a decision of the JEPB of 21 March 2019, rejecting its complaint against the CCMA for coverage of a demonstration which took place in Madrid on 16 March 2019, that is, during the electoral period leading up to the national election of 28 April 2019. The JEC upheld the appeal and revoked the Agreement of the JEPB. The JEC noted the electoral incidence of the informative coverage carried out by the CCMA and considered that the retransmission violated the principles of political pluralism and informative neutrality guaranteed by Article 66.1 LOREG, not only for the live and full retransmission of this act for more than two hours, but also for the deployment of means, not only in the retransmission of the demonstration but in multiple interviews in relation to it, not only of demonstrators, but also of political leaders belonging to certain parties, and by the television format used, which concentrated in it all the political information provided that day. In this way, the CCMA coverage was made in favour of the partisan interests defended by the organisers of the demonstrations, in violation of the principles of political pluralism and information neutrality.

The case before the JEPB also concerns an action brought by the political party Ciutadans-Partido de la Ciudadanía concerning the use by media belonging to the Corporació Catalana de Mitjans Audiovisuals of expressions such as "exile", “political prisoner" or "trial of repression". The JEPB decided that the use of such expressions by public service media managed by the Corporació Catalana de Mitjans Audiovisuals was contrary to Article 66 of the LOREG and Instruction 4/2011 of 24 March of the JEC, and especially to the principle of political and social pluralism, as well as to the principles of equality, proportionality and information neutrality that must govern the actions of the public media in electoral periods. It also urged the media owned by the CCMA to refrain from referring to the trial, which is currently ongoing before the Second Chamber of the Supreme Court, as a “repressive trial”, as it is a trial conducted according to

the Rule of Law. However, the JEPB did not see any reason to urge the aforementioned media of the CCMA to retract themselves as requested by the party that brought the action (for a similar case see IRIS 2018-1/16).

Acuerdo de la Junta Electoral Central número 101/2019, 27 de marzo de 2019

http://www.juntaelectoralcentral.es/cs/jec/doctrina/acuerdos?packedargs=anyosesion=2019&idacuerdoinstruccion=66987&idsesion=929&template=Doctrina%252FJEC_Detalle

Agreement of the Central Election Board No. 101/2019, 27 March 2019

Acuerdo de la Junta Electoral Provincial de Barcelona, 27 de marzo de 2019

https://www.ara.cat/2019/03/28/2019-27-03_recursononeutralidad_-2.pdf?hash=fe85be3e6e7d6c15a9729ee8744ae1101cff2a37

Agreement of the Provincial Electoral Board of Barcelona, 27 March 2019

[ES] Spanish Court shuts down “stream-ripping” websites

Miguel Recio
CMS Albiñana & Suárez de Lezo

A recent judicial order issued by the Juzgado de lo Mercantil (Commercial Court) nº 11 of Barcelona has ordered that seven “stream-ripping” websites be shut down. The judicial order was requested by the Asociación de Gestión de Derechos de Propiedad Intelectual (AGEDI).

The judicial order was issued three months after the lawsuit was filed by AGEDI.

The Commercial Court ordered precautionary measures preventing access from Spain to seven “stream-ripping” websites. The websites in question are flvto.biz, flvto.com, flvto.co/es, flvv2mp3.org, flv2mp3.com, flv2mp3.by, and 2conv.com.

Under the order, Internet service providers (ISPs) must continue to block access to these websites until the administrators of the infringing websites - including their domains, subdomains, IP addresses, URLs, and proxies or any other technical mean of conversion to MP3 - now or in the future, either (i) request the producers of the phonograms for the appropriate licence or (ii) cease their infringing activity.

This judicial order means that traffic in respect of millions of visits from users in Spain will stop. In this instance, users had been obtaining audio content from legal platforms such as YouTube and converting it into permanent copies of songs, without obtaining the necessary copyright licence and other rights from the owners and without remunerating them. The songs downloaded had been converted to MP3 files, allowing users to listen to them at any time free of charge. This technique is known as “stream-ripping”.

The two main blocked pages reached the 215th (flvto.biz) and 895the (2conv.com) positions in the ranking of national websites.

This is the third such court order that AGEDI has obtained within the last two years. The previous orders were delivered against piracy websites as well, such as search engines with links to cyberlockers or P2P protocols. Under the orders several websites, such as Exvagos.com, Masquetorrent.com, Isohunt.to, 1337x.to, Limetorrents.cc, Torlock.com. Torrentfunk.com y Extratorrent.cd, were shut down.

According to the 2018 Music Consumer Insight Report, published by the International Federation of the Phonographic Industry (IFPI), 40% of users in Spain practice “stream-ripping”, the main illegal download technique. This is

higher than the global average of 32%.

El nuevo golpe a la piratería musical acaba con los convertidores a MP3

https://www.abc.es/cultura/musica/abci-nuevo-golpe-pirateria-musical-acaba-convertidores-201902181106_noticia.html

The new blow to music piracy ends with converters to MP3

FRANCE

[FR] Conseil d'État confirms "12" rating for film "Sausage Party"

Amélie Blocman
Légipresse

In 2016, the Minister of Culture awarded a "12" rating without a separate warning for the original subtitled version of the animated film "Sausage Party". The "Juristes pour l'enfance" association asked the Paris Administrative Court to suspend this decision on the grounds of misuse of power, arguing that the film should have carried a "16" rating. The court refused this request, as did the relevant administrative appeal court. The association then appealed to the Conseil d'État (Council of State).

In a judgment of 4 March 2019, the Conseil d'État stated that, under the terms of Article L. 211-1 of the French Film and Animated Images Code, the granting of a film classification licence may be subject to conditions related to the protection of children and young people or respect for human dignity. Furthermore, in cases involving the alleged misuse of power, it is up to the judge concerned to decide whether a measure taken is proportionate in view of the objectives pursued by the law. In particular, taking into account the age of the children, he must weigh up whether the film, taken as a whole, is likely to corrupt young viewers and therefore undermine the objectives of protecting children and young people and respect for human dignity.

Firstly, the Conseil d'État upheld the appeal court's decision which, when considering whether the film in question could be regarded as likely to corrupt viewers aged over 12, had noted the absence of non-simulated sex scenes and extreme violence. The court had also taken into account the fact that, since the characters in the animation were not fully human, the scenes complained about by "Juristes pour l'enfance" were unrealistic and did not incite inappropriate behaviour.

The Conseil d'État also concluded that the court had correctly noted that, although the animated film in question depicted characters using coarse and sometimes vulgar language and contained several scenes in which foodstuffs represented in human form consumed alcohol and drugs and engaged in sexual activity, these scenes were not meant to be realistic, but humorous. They fitted coherently into the overall tone of the film, which was designed to subversively criticise consumerism and to promote hedonism. In view of these considerations, the administrative appeal court had correctly upheld the Minister of Culture's decision to grant a "12" rating for the original subtitled version of the film in

question.

Since “Juristes pour l’enfance” was not entitled to contest the appeal decision, the “12” rating was confirmed.

Conseil d'État (10e et 9e ch. réunies), 4 mars 2019, Association Juristes pour l’enfance

https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=A1801A627781CEA34531BE5BBCB5EE99.tplgfr29s_3?oldAction=rechJuriAdmin&idTexte=CETATEXT000038196992&fastReqId=1301933009&fastPos=8

Council of State (9th and 10th chambers combined), 4 March 2019, ‘Juristes pour l’enfance’

[FR] CNC presents the first section of its “Series Plan”

Amélie Blocman
Légipresse

At the international “Series Mania” festival held in Lille from 22 until 30 March 2019, Frédérique Bredin, President of France’s National Centre of Cinematography and the Moving Image (Centre National du Cinéma et de l’Image Animée - CNC), announced the first measures in the “Series Plan” initiated last year by the then Minister for Culture. “We have to help our TV series acquire an industrial logic, making it easier to pass from one season to the next. It’s what audiences expect,” she said.

The first section of the plan includes three key measures, which would only apply to original TV series.

The aim of the first measure is to promote the development of new formats in order to satisfy international demand and meet the expectations of young audiences. Thus, the CNC will be extending its bonus (25%) - originally intended for the first seasons of series with 52-minute episodes - to shorter formats (episodes lasting between 20 and 52 minutes). This support will encourage in particular the development of programmes aimed at young audiences. The aim of the second measure is to reduce the waiting time between the first and second seasons of series originally made in France. The CNC will be extending its 25% bonus from the first to the second season of series with episodes lasting between 20 and 52 minutes. The aim is to encourage producers to embark on a second season of a series even before the first season has been broadcast, the aim being to produce one season per year and meet international standards. The budget for these three measures is EUR 3 million per year. Lastly, the CNC will be supporting series with strong international ambitions by granting a bonus to works receiving substantial foreign pre-funding.

A second section of this “Series Plan” will be developed once the current consultation with professionals in the audiovisual sector is complete. It will be devoted to writing and development and will also make it easier to produce original series with special effects in France.

Communiqué de presse du gouvernement français, « Culture : un plan d'aide aux séries françaises », 28 mars 2019

https://www.gouvernement.fr/culture-un-plan-d-aide-aux-series-francaises

French Government press release, “Culture: a plan to aid French series”, 28 March 2019

[FR] Political pluralism on television, European elections and editorial freedom

Amélie Blocman
Légipresse

The Paris Administrative Court, followed by the Conseil d'État (Council of State), was recently asked to issue urgent decisions by three politicians who wanted to participate in a televised debate involving nine other candidates heading party lists in the European elections, which was broadcast on France 2 at 9 p.m. on 4 April 2019. They were Benoît Hamon, François Asselineau and Florian Philippot, who headed the lists for Génération.s, the UPR and Les Patriotes respectively.

On 1 April 2019, the urgent applications judge of the Paris Administrative Court allowed the politicians' requests. He pointed out that respect for pluralism was part of the conditions of operation of France Télévisions and was enshrined in a recommendation issued by the national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) on 22 November 2017, which laid down the general principle of the fair allocation of speaking time between political parties and groups. The decisions not to invite these three candidates to take part in the debate were therefore deemed likely to cause "a serious and clearly illegal violation of the fundamental freedom represented by respect for the principle of pluralist expression of schools of thought and opinion".

France Télévisions appealed against the three interim orders. In a decision issued on the morning of the debate in question, the urgent applications judge of the Conseil d'État stated, firstly, that the specific rules governing audiovisual communication in pre-election periods, which were applicable during the six weeks leading up to election day on 26 May, did not yet apply on the date of the television debate concerned. Neither the law of 30 September 1986 nor the CSA recommendation of 22 November 2017 required France Télévisions to treat all politicians equally outside election periods. Furthermore, the Conseil d'État stated that the public audiovisual group's editorial policy was free and independent. Under the CSA's supervision, the broadcaster was responsible for devising and organising programmes that contributed to the democratic debate and supported the pluralistic expression of schools of thought and opinion. Therefore, the urgent applications judge could not question decisions taken in this regard unless they seriously and clearly violated a fundamental freedom.

In the case at hand, France Télévisions invited to participate in the debate on 4 April 2019 nine politicians who represented movements that expressed the main political viewpoints across the whole French political spectrum. They were chosen on the basis of past French and European Parliament election results, opinion polls and their contribution to political debate. These are the criteria mentioned in the CSA recommendation. The Conseil d'État did not consider that France Télévisions had seriously and clearly violated the pluralistic expression of schools of thought and opinion. In particular, the three applicants could, in various ways, express their views to a political audience and, as election candidates, take part in other political debates or programmes. Moreover, the disputed decisions could

not be regarded, in themselves, as violating the freedom to vote or freedom of opinion. The ruling of the urgent applications judge of the Paris Administrative Court was quashed and the applications of the three politicians rejected.

France Télévisions welcomed the decision of the Conseil d'État, which it said "confirms and protects its editorial freedom". However, it decided to "maintain the 12-guest format of the programme" by including the three applicants in the debate.

Tribunal administratif de Paris, (ord. réf.), 1er avril 2019, Génération.s, Union populaire républicaine, Les Patriotes (3 décisions) Conseil d'État (ord. réf.), 4 avril 2019 - France Télévisions

http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/Conseil-d-Etat-ordonnance-du-4-avril-2019-France-Televisions

Paris Administrative Court (urgent decision), 1 April 2019, Génération.s, Union populaire républicaine, Les Patriotes (3 decisions) Council of State (urgent decision), 4 April 2019 - France Télévisions

[FR] Proposed legislation on on-line hate to be debated in parliament soon

Amélie Blocman
Légipresse

Laetitia Avia (MP for Paris, REM party) has tabled a bill to “combat online hate” which should be examined within the coming weeks. The wording is in line with the desire that Emmanuel Macron has expressed to oblige all the parties concerned (platforms, Internet users, and Internet access providers) to face up to their responsibilities in the fight against hate on the Internet.

As noted in the explanatory statement to the bill, the current legal provisions governing online hatred are mainly those contained in the Law on confidence in the digital economy (Loi pour la confiance dans l’économie numérique - LCEN); this was adopted on 21 June 2004, at a time when platforms and social media were not yet accessible in France. The bill therefore defines the obligations incumbent on the major platforms and the resulting hierarchy of responsibility. The new rules would be applied to all platforms directing services towards France, regardless of their physical location. Article 1 defines a new hierarchy of administrative responsibility that would apply to platforms with heavy traffic, according to a monthly connection threshold that could be laid down by decree. This provision would require such operators to withdraw or render inaccessible, within no more than 24 hours of their being notified, any content manifestly containing incitement to hatred or discriminatory insults based on race, religion, gender, sexual orientation, or handicap. Failure to comply with this obligation could attract a penalty determined and imposed by the French national audiovisual regulatory authority (Conseil Supérieur de l’Audiovisuel - CSA), amounting to up to 4% of the operator’s annual global turnover.

The aim of Article 2 is to simplify the notification of disputed content to operators and to ensure seamless use for users. To achieve this, the text proposes adapting mechanisms for notification and processing. Introducing a single notification button for all major operators of communication platforms ought to help optimise the notification process. Article 3 would require platform operators to provide clear information on the means of redress (including judicial means) available to users. Article 4 lays down the obligations regarding transparency incumbent on platform operators with regard to combating hateful content - including, for example, communicating the number of notifications received, the breakdown of the offences covered, the number of abusive notifications, and the human and financial resources devoted to the task. It would be for the regulator to decide on the list of items of information that ought to be made public and the respective timeframe. Article 4 also inserts a new Article 17-3 into the Audiovisual Act of 30 September 1986, which would give the CSA the necessary authority to carry out supervision missions. The Article includes a provision enabling the CSA to issue

recommendations aimed at assisting platform operators in identifying unlawful content. Article 5 requires platform operators to have a legal representative in France in order that any judicial proceedings may be carried out more efficiently. It also triples the level of criminal penalties that may be imposed on any platform refusing to cooperate promptly, increasing the corresponding fine from EUR 75 000 to EUR 250 000.

Article 6 is aimed firstly at simplifying the procedure for obtaining an initial decision to block and dereference unlawful websites, and secondly empowering an administrative authority to order the blocking (on the basis of the initial court decision) of any mirror sites that are identified .

For Roch-Olivier Maistre, the new President of the CSA, the text marks a first step towards regulating the Internet.

Proposition de loi visant à lutter contre la haine sur internet, enregistrée à la Présidence de l'Assemblée nationale le 20 mars 2019

http://www.assemblee-nationale.fr/15/propositions/pion1785.asp

Bill to combat hate on the Internet, tabled at the National Assembly on 20 March 2019

UNITED KINGDOM

[GB] Government responds to its Call for Evidence on the impact of social media on the administration of justice

Alexandros K. Antoniou
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On 5 March 2019, the Attorney General's Office published the Government's response to its call for evidence examining the impact of social media on the administration of justice. The response revealed that although the risk to the legal process has increased with the proliferation of social media in recent years, it nevertheless remains relatively minor and it is still at a level whereby it does not pose a serious threat to the criminal justice system.

The call for evidence was launched in September 2017 by the then Attorney General, Jeremy Wright, and closed on 8 December 2017. It asked for examples of trials affected by commentary on social media, placing particular attention on the issues of active proceedings, as well as violations of reporting restrictions and anonymity orders. Submissions were made by media organisations, judges, legal practitioners, academics and members of the public. Interestingly, no submissions were received from social media companies.

The call for evidence was prompted by the collapse of the 2015 Angela Wrightson murder trial following an "avalanche of public outrage on social media" in reaction to legitimate news coverage and the prohibition of further reporting of the case until the conclusion of the retrial at a different venue. The following year, nine media organisations appealed against the imposition of these reporting restrictions. The Court of Appeal substituted an order under section 45(4) of the Senior Courts Act 1981 requiring the media not to place any report of the criminal proceedings on their Facebook profiles and to disable users' comments on their respective online articles. This, however, was "an unusual and exceptionally high-profile case, rather than illustrative of a wider problem." Members of the judiciary indicated that they had the necessary tools to mitigate the risk of prejudicial social media posts (e.g. requiring editors to remove a newspaper story from social media, or directing juries to avoid or disregard social media comments). However, concern was expressed over such tools potentially causing unnecessary delays to the trial process and an additional drain on resources.

A key area of concern that emerged from the evidence was that some social media users might be unaware of what constitutes a breach of an anonymity

order or might not be conscious of the extent to which their posts could prejudice criminal proceedings. This is particularly the case in relation to young individuals, who are the most active social media users. In response, the Attorney General's Office will promote the safe use of social media as part of a public legal education campaign. A dedicated contempt of court webpage has been launched on the public sector information website gov.uk to explain in an accessible manner the potentially serious consequences of using social media to undermine the administration of justice. In addition to these efforts to support public understanding, the Judicial Office will develop user-friendly and comprehensive guidance for jurors on the use and abuse of social media.

Another area of concern involved the issue of legal liability for social media posts. This is linked to the wider debate about the responsibilities of media organisations, individual users who post on social media, and social media companies themselves. To address this concern, the Attorney General's Office has agreed a new working relationship with Facebook, Google and Twitter so that unlawful posts or material which risk contempt of court can be flagged and promptly removed, if necessary.

The malicious disregard of legal prohibitions by social media users who clearly intend to disrupt the trial process emerged as another relevant cause for concern. The evidence, however, showed that such behaviour can be managed by relying on existing powers. In several cases, deliberate offending was targeted by the police and led to prosecutions. The Attorney General's Office will continue working with cross-government partners to improve the enforcement of the law on anonymity online and inform the development of the forthcoming Online Harms White Paper, which will include activities taking place on social media.

Overall, the response to the call notes that the use of social media gave rise to new challenges, but that these are "not unmanageable." Given this position, no new legislation was proposed.

Policy Paper: Response to Call for Evidence on the Impact of Social Media on the Administration of Justice (5 March 2019)

https://www.gov.uk/government/publications/response-to-call-for-evidence-on-the-impact-of-social-media-on-the-administration-of-justice

BBC and Eight Other Media Organisations, R (on the application of) v F and D [2016] EWCA Crim 12 (11 February 2016)

https://www.bailii.org/ew/cases/EWCA/Crim/2016/12.html

[GB] Local TV twice breached Ofcom’s Rule 9.5 by giving undue prominence to commercial businesses without editorial justifcation

Julian Wilkins
Wordley Partnership and Q Chambers

That’s Manchester is a local television service serving the city of Manchester and its surrounding area, however, it was held to have breached Ofcom’s Rule 9.5 by giving undue prominence to a product, service or trademark during two news reports.

The first report concerned an initiative by the Greater Manchester Chamber of Commerce to encourage small businesses in the area to adopt their own website. The Greater Manchester Chamber of Commerce was working in conjunction with a digital marketing service called UENI. The That’s Manchester newsreader, in their introduction, referred to the pairing between UENI and the Chamber of Commerce; this was reiterated in the main report, including UENI’s logo being shown. There was an interview with a representative of UENI who spoke about the virtues of businesses being online, as well as mentioning their offer to build websites free of charge before 31 August 2018 and giving their website address.

The second news report concerned the first British Muslim woman to reach the North Pole as part of an all-female expedition. During the report, it was mentioned that the expedition had been sponsored by a local food company, Summit to Eat, and the company’s logo and headquarters were shown. The reporter said: “Summit to Eat is a range of freeze-dried meals that are made here in Preston...they are high in calories, so it’s great for an expedition such as the Euro-Arabian expedition....”

There were shots including close-ups of the products as well as an explanation of why Summit to Eat had been chosen as the sponsor.

Rule 9.5 of the Ofcom’s Code of Conduct rules states: “ No undue prominence may be given in programming to a product, service or trade mark. Undue prominence may result from:

- the presence of, or reference to, a product, service or trademark in programming where there is no editorial justification;

- the manner in which a product, service, or trade mark appears or is referred to in programming.”

That’s Manchester argued that in the case of each report there was no prior agreement, third party influence or payment to mention or describe the companies. The references were made in the context of each story and resulted from decisions taken by the journalists. The news provider said that they had since reminded their journalistic staff: “about the importance of minimising the risk of (inadvertent) undue prominence.”

The Ofcom rules were established to help create a distinction between editorial content and advertising. Rule 9.5 does not prevent references to products or services in programmes but they must not be given undue prominence. Factors such as audience expectation and the suitability of the commercial reference were amongst the factors to be taken into account when considering any potential breach. The context of the references in relation to the story would also be considered. Audiences expected broadcasters to maintain the highest standards of editorial independence and to be free of any commercial influence.

Regarding the first story, Ofcom considered that there was reasonable editorial justification for mentioning UENI, given their collaboration with the Greater Manchester Chamber of Commerce to make Manchester “a world-leading digital city region.” However, the interview with UENI’s spokesperson occupied half the report; the newscaster’s opening remarks portrayed the company favourably by describing them as “small business champions”; whilst throughout the report UENI led the narrative about small businesses needing to develop their online presence. Furthermore, the data used was solely UENI’s and no other person was interviewed.

Ofcom decided that the level of prominence afforded to UENI in the report was not justified by the editorial context and, therefore, there had been a breach of Rule 9.5.

Regarding the second report, whilst Ofcom appreciated that the expedition team had been sponsored by a local business, giving regional interest, the amount of focus given to the company in the report detracted from the main focus of the report, namely the endeavour of a local woman to reach the North Pole. The sponsor’s details were a secondary or incidental criteria to the main story. The Summit to Eat company occupied a quarter of the story, including a prominent display of their logo. The variety of products were clearly shown and some of the comments from the company’s spokesperson were akin to being promotional.

Ofcom considered that the level of prominence given to Summit to Eat was not justified by the editorial context of the news. Even though no money had been paid to the broadcaster, it was important that news programmes avoided giving the impression that they were under any kind of commercial influence, so that audiences are reassured of the programme’s editorial independence. As such, there had been a breach of Rule 9.5.

Issue 374 of Ofcom's Broad and on Demand Bulletin 11th March 2019

https://www.ofcom.org.uk/__data/assets/pdf_file/0020/140555/Issue-374-of-Ofcoms-Broadcast-and-On-Demand-Bulletin.pdf

ITALY

[IT] Court of Cassation rules on ISPs' liability in RTI v. Yahoo! case

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On 19 March 2019, the Italian Supreme Court of Cassation issued its judgment in the appeal filed by RTI (Reti Televisive Italiane S.p.A., one of the main Italian broadcasters) against the landmark Milan Court of Appeals' decision issued in January 2015 in the RTI v. Yahoo! case.

The case arose in 2009 when RTI filed a suit against Yahoo!, provider of the Yahoo! Video service, to have the latter condemned for copyright infringement against RTI, based on the fact that several of RTI's videos were hosted on the Yahoo! Video platform, uploaded by users without RTI's consent.

The first instance Court of Milan upheld RTI's demands, declaring that Yahoo! had infringed the plaintiff's copyrights by hosting those pieces of content.

In 2015, the Milan Court of Appeals reversed the decision, confirming that Yahoo! could not be held liable given its role as a mere intermediary that does not control or manage the content uploaded by third users. Yahoo!, therefore, had acted as a hosting provider - thus protected by the "safe harbour" defence in light of Article 16 of the E-Commerce Decree (Legislative Decree No. 70 of 2003) and Article 14 of the E-Commerce Directive (2000/31/EC). Most importantly, the Milan Court of Appeals did not recognise any distinction between active and passive hosting providers, proposed by some rulings, especially those of the Court of Rome. The Milan appellate panel had identified the category of "advanced" hosting provider, which does not fall outside the boundaries of the "safe harbour" defence provided by the e-commerce legislation. RTI filed an appeal against this decision with the Court of Cassation. The Court of Cassation reversed the appellate decision, establishing important principles of law, and remanded to the Court of Appeals on the requirements of the communication to lawfully put the provider "on notice."

In light of the prevailing interpretation by the Court of Justice of the European Union (CJEU) and of new legislative developments at European Union level, the Court of Cassation recognised the existence of a distinction between active and passive hosting providers. The court established the following principle of law: "The active hosting provider is the provider of information society services that carries out an activity beyond a mere technical, automatic and passive service

and, on the contrary, carries out an active conduct, cooperating with others in the commission of the illicit activity; thus, the active hosting provider cannot benefit from the safe harbor liability regime enshrined in Article 16 of the Decree and its liability shall be ascertained on the basis of the general rules on liability".

To this end, the court enlisted some indexes that suggest that the hosting provider is carrying out an active role (not all of them must be present): (i) filtering, (ii) selection, (iii) indexing, (iv) organisation, (v) cataloguing, (vi) aggregation, (vii) evaluation, (viii) use, (ix) modification, (x) extraction, or (xi) promotion of content, if made in the context of a business-oriented management of the service, as well as techniques to profile users in order to increase their loyalty. The ultimate effect of these activities is "[…] to complete and enrich in a non-passive way the fruition of the contents by indeterminate users".

The court then dealt with the issue of liability, focusing its analysis on Article 16 of the E-Commerce Decree and laying down the following principle of law: "in the context of the information society services, the hosting provider's liability pursuant to Article 16 of the E-Commerce Decree exists upon the provider that failed to immediately remove the unlawful pieces of content as well as when it kept hosting them, when all the following conditions are met: (i) the provider is aware of the illicit activity committed by the recipient of the service, because it received notice from the rightsholder or from third sources; (ii) the unlawfulness of the recipient's conduct is reasonably verifiable with the same degree of diligence that it is reasonable to expect from a professional Internet operator in a certain historical moment, insomuch as the provider is grossly negligent if it fails to ascertain the unlawfulness of the content; (iii) the provider has the possibility to usefully act, because it was made aware in a sufficiently specific way of the unlawful pieces of content that shall be removed".

In this respect, the Court of Cassation underlined that the liability of a hosting provider is based on two specific elements, namely (i) the unlawfulness of the content hosted, which in turn derives from the infringement of others' rights, by means of a civil or criminal offence, for example, a copyright infringement; and (ii) the knowledge of this unlawfulness, meaning that the hosting provider's liability can exist only if the latter culpably omits to take down the unlawful information or disable access to its service, thus failing to stop the infringement of third parties' rights.

The Court of Cassation remanded to the Milan Court of Appeals the decision as to whether the notice shall mandatorily include the URLs of the at-issue content or whether other details suffice for the purpose of putting the provider on notice.

Finally, the Court of Cassation clarified that the purpose of Article 17 of the E-Commerce Decree is to enhance cooperation between hosting providers and national judicial/administrative authorities in identifying and preventing unlawful activities. Article 17 being a general principle, hosting providers, either active or passive, cannot be deemed liable for failure to preventatively monitor their services. However, they shall promptly inform the authorities when they are aware of potentially unlawful activities on their services.

Corte di Cassazione, I sezione civile, sentenza n. 7708/2019 pubblicata il 19 marzo 2019

http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/7708_03_2019_no-index.pdf

Court of Cassation, First civil division, ruling no. 7708/2019, published on 19 March 2019

NETHERLANDS

[NL] Cookie walls: Dutch Privacy Authority declares that websites must remain accessible if tracking cookies are refused

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In a press release of 7 March 2019, the Dutch Data Protection Authority (DPA) declared that websites must remain accessible for Internet users who refuse to give consent to the placement of tracking cookies. Websites that only grant access to their site after visitors have given consent do not comply with the free consent standard set by the General Data Protection Regulation (GDPR).

In the Netherlands, cookie placement is regulated under the Dutch Telecommunications Act (Telecommunicatiewet). Under article 11.7a of this Act, consent is required to store or to receive access to information on the devices of end-users that is deemed to have a significant impact on the privacy of the end-user. This provision also covers the placement of tracking cookies. Such cookies track the online behaviour of users and enable websites to create digital profiles that can be used for targeted advertisement. Since the analysis of the online behaviour of Internet users equals the analysis of personal data, consent is always required for the placement of tracking cookies (see IRIS 2015-5/29).

Under the GDPR, consent constitutes one of the six legal grounds for the lawful processing of personal data. However, one of the conditions for this legal ground to be valid is that consent needs to be freely given. Consent is not freely given if the data subject does not have a real or free choice or if the data subject cannot refuse consent without adverse consequences. In the press release, the DPA announced how this condition should be explained with regard to cookie walls. A cookie wall is a pop-up that is displayed to inform Internet users about the use of tracking cookies on a website and to ask consent for placement of these cookies. This pop-up does not have a decline option. The Internet user can only accept the placement of tracking cookies and proceed in order to view the content of the website. According to the DPA, Internet users who encounter a cookie wall do not have a real or free choice regarding whether or not to give consent. Although Internet users can refuse to accept the placement of tracking cookies, they cannot make this decision without adverse effects. If they refuse, they will not gain access to the website. Consequently, the DPA states that under these circumstances Internet users are being put under pressure to share their personal data. The DPA therefore concludes that the condition of free consent cannot be fulfilled when a website is using a cookie wall.

In view of this analysis, cookie walls are not allowed under the GDPR. The DPA stated in its press release that it requires websites to adjust their practice by keeping content and services accessible when tracking cookies are refused. The press release concluded with the announcement that in - response to the complaints received by the DPA - several organisations have been directly informed of the reasoning for this legal standard. The DPA furthermore announced that it would intensify its auditing in the upcoming period in order to check whether the standard has been correctly interpreted.

Autoriteit Persoonsgegevens, Nieuwsbericht, 7 maart 2019

https://www.autoriteitpersoonsgegevens.nl/nl/nieuws/websites-moeten-toegankelijk-blijven-bij-weigeren-tracking-cookies

Dutch Data Protection Authority, Press Release, 7 March 2019

[NL] Statements by a political party about “wrong real estate bosses” on a website and Facebook page were not unlawful

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In a judgement of 22 December 2018, the District Court of Limburg ruled that a Dutch political party, the Socialist Party (SP), had not acted unlawfully by posting on a website called foutevastgoedbazen.nl (wrongrealestatebosses.nl)) and on a Facebook page statements about a real estate company, Metroprop, which owns a large number of properties in Heerlen, a city in the South of the Netherlands, and about its managing director.

The website was an initiative of citizens of Heerlen and the political party aimed at protesting against what they call “wrong real estate bosses”, such as the managing director of Metroprop. The website refers to articles in the local newspaper in which the abandoned properties owned by Metropop are mentioned and carries several photographs of its vacant properties. The website also has an online hotline that citizens can use to report other “wrongful” real estate bosses. The Facebook page refers to this website and also alleges that the managing director appears to be a “wrong” real estate boss.

In response, the managing director of Metroprop (the plaintiff) filed a lawsuit against the political party (the defendant). He argued that the defendant was acting unlawfully by posting statements about the plaintiff linked to “wrong” real estate bosses on their website and Facebook page. Accordingly, he demanded that the defendant remove these statements and publish a rectification in which the defendant should acknowledge that the statements were unlawful. The plaintiff also demanded that the defendant should refrain from publishing other statements about the plaintiff linked to “wrong” real estate bosses.

The District Court noted that this case concerned the question of whether the right to freedom of expression (enshrined in article 10 of the European Convention on Human Rights - “the ECHR”) of the defendant or the reputation and honour (as protected by article 8 of the ECHR) of the plaintiff should prevail. In its assessment, which took account of article 6:162 of the Dutch Civil Code, the Court considered all the relevant circumstances of the case. Firstly, the Court stated that the plaintiff plays an important role in the real estate market in Heerlen. Therefore, the plaintiff should be considered to be a public figure and had to show greater tolerance of criticism than a private person. Furthermore, it found that the statements made on the website and Facebook page had to be seen in the context of a wide and political debate in Heerlen, and that it therefore served the public interest. The Court stressed that in such a political and public

debate regarding the development of real estate in Heerlen, both parties had the right to hold different views. The Court, therefore, did not agree with the plaintiff that the statements of the defendant were incorrect, because the plaintiff had not sufficiently demonstrated this.

Considering all these circumstances, the Court found that the statements on the website and Facebook page of the political party identifying the managing director as a “wrong” real estate boss had not been unlawful. Accordingly, the Court ruled that the defendant’s right to freedom of expression should prevail and it dismissed the plaintiff’s claims.

Rechtbank Limburg 22 januari 2019, ECLI:NL:RBLIM:2019:515

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2019:515

District Court of Limburg, 22 January 2019, ECLI:NL:RBLIM:2019:515

ROMANIA

[RO] Audiovisual rules for the 2019 European Parliament elections in Romania

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On 26 March 2019, the Consiliul Naţional al Audiovizualului (National Audiovisual Council - CNA) adopted Decision No. 308/2019 with regard to the rules governing the audiovisual electoral campaign for the election of the members from Romania to the European Parliament (see IRIS 2009-6/28, IRIS 2011-3/29, IRIS 2014-5/27).

The elections will be held on Sunday 26 May 2019. The audiovisual electoral campaign will start on 27 April at midnight and will end on 25 May at 7 a.m. local time, 24 hours before the opening of the voting sections, according to Article 1(1).

The television and radio broadcasters have to observe the principles of fairness, balance and impartiality in relation to the electoral competitors (Article 3). The access of electoral competitors to public radio and television services, as well as to electoral debates broadcast by private radio and television stations, is free of charge (Article 7 (2)). The commercial broadcasters who decide to offer airtime for the campaign will charge single rates per unit of time and/or programme for the rest of the electoral programme types allowed by this Decision (Article 5 (2)).

The audiovisual electoral campaign airtime will be divided as follows: 4/5 will be equally shared among electoral competitors who now have MEPs (with the exception of independent candidates) and 1/5 of the airtime will be equally shared among electoral competitors who do not have MEPs, as well as among independent candidates, according to Article 38 (4) of Law No. 33/2007 on the organization and conduct of elections to the European Parliament, republished, and of Article 5 (4) of Decision No. 308/2019.

According to Article 7 (1), public broadcasters and commercial broadcasters will allow electoral competitors access only to a) electoral promotion programmes, b) electoral debates and c) electoral advertisements. Under the provisions of Article 7 (2), the access of electoral competitors to public radio and television services, as well as to electoral debates broadcast by private radio and television stations, is free of charge.

In the news broadcasts, news about the campaign activities of electoral competitors as well as statements made live can be disseminated, respecting the

principles of fairness, equilibrium, impartiality and correct information of the public, according to Article 8 (1) and (2). The informative broadcasts cannot be sponsored (Article 8 (3)).

Article 9 (1) stipulates that audiovisual material, other than electoral spots, made available to broadcasters by electoral competitors may be broadcast only in electoral promotion programmes. The live or registered broadcasting of rallies or election meetings, press conferences or other campaign activities of electoral competitors without the editorial intervention of broadcasters is considered an electoral promotion programme (Article 9 (2)). Under the provisions of Article 10, private broadcasters may air for a fee only those audiovisual productions of electoral promotion that are made by the electoral competitors and to which the broadcasters have made no editorial contribution.

The electoral promotion programmes will be clearly marked by broadcasters (Article 11). During the election campaign, the candidates and the representatives of electoral competitors cannot be producers, presenters or moderators of public or private broadcasters' programmes (Article 12 (1)). Candidates who hold public office may appear in programmes other than electoral ones, however their involvement must be restricted to issues related to the exercise of their functions. In these situations, broadcasters are required to ensure the equidistance and pluralism of opinions (Article 12 (2)).

With regard to electoral programmes, broadcasters are also required to ensure observance of the following rules: that the programmes do not incite hatred on grounds of race, religion, nationality, sex or sexual orientation; that they do not contain statements that undermine human dignity, the right to one's image, or that are contrary to morality; the programmes must not contain criminal or moral accusations against other candidates or electoral competitors without being accompanied by relevant evidence presented explicitly (Article 13).

According to Article 14, the producers, presenters and moderators of electoral debates have to be impartial; ensure that the show is well-balanced, giving each guest the chance to express their opinions; ensure that the debate sticks to electoral themes; intervene when guests breach, by conduct or expressions, the rules provisioned in Article 13; if the guest does not comply with the requests, the moderator may take the decision to turn off the microphone or interrupt the show, as appropriate.

Article 15 further provides that: public and private broadcasters may broadcast electoral spots only in electoral programmes (Article 15 (1)); electoral spots shall not constitute commercial advertising (Article 15 (2)); and electoral spots may not last more than 60 seconds and must be explicitly assumed by the electoral competitors (Article 15 (3)). The total duration of the broadcasting of the

electoral spots may not exceed six minutes within one hour (Article 15 (4)). When broadcasting electoral spots, private broadcasters are obliged to ensure equal conditions of access and rates for the electoral competitors per unit of time (Article 15 (5)). Electoral spots cannot be included in the electoral programmes, in the intervals allocated to other electoral competitors (Article 15 (6)). During electoral debates, broadcasters may insert electoral spots only in separate and appropriately marked blocks (Article 15 (7)). During the electoral campaign, with the exception of electoral spots, it is forbidden to broadcast any forms of advertising containing references to electoral competitors (Article 15 (8)).

Furthermore, it is forbidden to present opinion polls, telecasts or street surveys beginning 48 hours before the ballot and until the ballot boxes are closed (Article 16 (3)), as well as to broadcast electoral programmes and spots 24 hours before the start of voting and until the closing of the ballot boxes (Article 17). Finally, Article 18 includes provisions on the right to replica and to rectification, which follow the general regime of these rights.

The Decizia nr. 308 din 26 martie 2019 privind regulile de desfăşurare în audiovizual a campaniei electorale pentru alegerea membrilor din România în Parlamentul European

http://www.cna.ro/IMG/pdf/DECIZIE_nr._308_din_26_martie_2019_Alegeri_PE_2019.pdf

Decision no. 308/2019 with regard to the rules of the audiovisual electoral campaign for the election of the members from Romania in the European Parliament

[RO] The Audiovisual Law modification promulgated

Eugen Cojocariu
Radio Romania International

On 20 March 2019, the President of Romania, Klaus Iohannis, promulgated the Law on the modification and completion of Audiovisual Law No. 504/2002 (see latest IRIS 2018-6/30, IRIS 2018-8/36, IRIS 2018-10/22, IRIS 2019-1/3, IRIS 2019-2/21 and IRIS 2019-4/29).

The new Law No. 52/2019 had been adopted by the Senate (upper chamber of the Romanian Parliament) on 18 February 2019 and by the Chamber of Deputies on 21 November 2018.

The law establishes the obligation to provide information on the telephone number "Telverde for Victims of Domestic Violence" in television and radio programmes addressing the issue of domestic violence.

Informing victims of domestic violence about the existence of the Telverde telephone number for victims of domestic violence is, in the case of radio broadcasters, done by reading the text 'In case of emergency, call the Telverde number for victims of domestic violence' accompanied by a note with the Telverde telephone number. In the case of television services, a text about the Telverde service is displayed statically and legibly throughout the programme.

The law was adopted to increase the level of awareness among victims of domestic violence of the existence of this Telverde for Victims of Domestic Violence. Although Romania has had this dedicated telephone line since November 2015, the use rate has been extremely low. The phone line is not only for those who have been abused, but also for people who want information and who wish to speak to someone. The call centre is made up of specialists and experts on preventing and combating domestic violence.

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

http://www.cdep.ro/pls/proiecte/docs/2018/cd413_18.pdf

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

RUSSIAN FEDERATION

[RU] Disrespectful information banned

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On 18 March 2018, Russian President Vladimir Putin signed into law a set of amendments to the Federal Statute on information, information technologies and protection of information (or the IT Law, see IRIS 2018-1/39, IRIS 2017-8/34, IRIS 2014-6/31 and IRIS 2014-3/40) that aim to stop online dissemination of certain categories of offensive information.

A new Article 15-1-1 bans spreading information that “exhibits blatant disrespect for the society, State, official state symbols of the Russian Federation, Constitution of the Russian Federation or governmental bodies of the Russian Federation.”

The new law provides additional powers to Roskomnadzor, the governmental supervisory authority in media, communications and personal data traffic (see IRIS 2012-8/36), on content control of the websites without a court decision. Upon an appeal of the Prosecutor-General or one of his (currently) 18 deputies, Roskomnadzor is now empowered to “immediately” notify the hosting providers (in Russian and in English) that they shall notify the owner of the online resource (website) to remove such offensive information. The owner shall follow the notice within 24 hours. In the case of failure to abide it, the hosting provider shall block access to the resource. If the hosting provider fails to do so, Roskomnadzor instructs ISPs to “immediately” block access to the websites with offensive information. Such blocking lasts until the illegal information is removed.

Another bill amends the Code on Administrative Offenses and establishes fines for online dissemination of such illegal information of 30 000 to 50 000 roubles, and if the offence is repeated - of 100 000 to 200 000 roubles (and even 300 000 roubles, or EUR 4 100, for a third offence) or administrative arrest of 15 days.

The amendments were adopted by the lower house of the Parliament on 7 March and approved by the upper chamber on 13 March. They became effective on 19 March 2019.

The OSCE Representative on Freedom of the Media previously expressed his concern about the draft laws in a statement.

О внесении изменения в Федеральный закон "Об информации, информационных технологиях и о защите информации"

http://pravo.gov.ru/

Federal Statute "On amendments to Article 15-3 of the Federal Statute on information, information technologies and protection of information." 18 March 2019, No. 31-FZ. Officially published on 19 March 2019

О внесении изменений в Кодекс Российской Федерации об административных правонарушениях

http://pravo.gov.ru/

Federal Statute "On amendments to Code of the Russian Federation on Administrative Offenses." 18 March 2019, No. 27-FZ. Officially published on 19 March 2019

Law further restricting speech in Russia might negatively affect freedoms of media and of information on Internet, says OSCE Representative. 14 December 2018

https://www.osce.org/representative-on-freedom-of-media/406775

[RU] False information amendments made

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On 18 March 2018, Russian President Vladimir Putin signed into law a set of amendments to the Federal Statute on information, information technologies and the protection of information (or the IT Law, see IRIS 2018-1/39, IRIS 2017-8/34, IRIS 2014-6/31 and IRIS 2014-3/40) that aim to stop online dissemination of certain categories of false information under the guise of truthful information.

The amendments are to the existing Article 15-3 (“Procedures for restricting access to information disseminated illegally”) of the IT Law. They prohibit the dissemination in “network publications” (or registered online media, see IRIS 2012-8/36) of “untruthful socially significant information”, which would constitute a “threat to the life and/or health of citizens, to property, the threat of massive violations of public order and/or public security, or threat of establishing obstacles to the functioning of every-day supply objects, transport of social infrastructure, credit entities, objects of power-supply, industry or communications”.

The new law provides additional powers to Roskomnadzor, the governmental supervisory authority in media, communications and personal data traffic (see IRIS 2012-8/36), on content control of the websites without a court decision. Upon an appeal of the Prosecutor-General or one of his (currently) 18 deputies, Roskomnadzor is now empowered to “immediately” notify the editors of the network publication and instruct them to remove such information. The editors shall “immediately” follow the notice of Roskomnadzor. Should they fail to abide it, Roskomnadzor instructs ISPs to “immediately” block access to the websites of the “network publications”. Such blocking will last until the illegal information has been removed.

Another bill amends the Code on Administrative Offenses and establishes fines for all media outlets and online authors that spread “untruthful socially significant information” of up to 1 million rubles, if no harm was made, and of 1.5 million rubles (EUR 20 500), in cases when the harm was indeed made.

The amendments were adopted by the lower house of the Parliament on 7 March and approved by the upper chamber on 13 March. They became effective on 19 March 2019.

The OSCE Representative on Freedom of the Media previously expressed his concern about the draft laws in a statement.

О внесении изменений в статью 15-3 Федерального закона "Об информации, информационных технологиях и о защите информации"

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Federal Statute "On amendments to Article 15-3 of the Federal Statute on information, information technologies and protection of information." 18 March 2019, No. 31-FZ. Officially published on 19 March 2019

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https://www.osce.org/representative-on-freedom-of-media/406775

OSCE

OSCE: Tallinn Guidelines on National Minorities and the Media in the Digital Age

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The Organization for Security and Co-operation in Europe's High Commissioner on National Minorities (OSCE HCNM) has issued the Tallinn Guidelines on National Minorities and the Media in the Digital Age in February 2019. The Office of the OSCE HCNM was established in 1992 as a mechanism to provide early warnings of, and prevent, conflicts involving national minorities within the OSCE region.

The Tallinn Guidelines provide the 57 participating OSCE States with detailed guidance on how to create and safeguard an inclusive space for public debate in diverse societies. The Guidelines pay particular attention to how persons belonging to national minorities and other groups interact in a fast-changing media environment, and how digital technologies can be used to counter hate speech and (online) disinformation. Pluralism and diversity and security-related issues also feature centrally.

There are 37 Guidelines in total, spread across four sections. Section I, Enabling Environment for freedom of expression and media freedom, sets out the conditions that need to be realized by States as part of their positive obligation to create an environment in which free speech and pluralistic, independent media can thrive. In such an environment, persons belonging to minority and majority groups in society should be able to participate in public debate, in full safety and without fear, including through the media, and in the languages of their choice. Such an environment is typically characterized by law and policy frameworks securing equality and non-discrimination, minority rights, freedom of information, media pluralism and a culture of independence in the media sector, including in respect of national regulatory bodies and the operation of public service, commercial, community and other media.

Section II, Media environment, addresses some of the regulatory and policy challenges posed by ongoing transformative changes in the media environment. Despite unprecedented communicative opportunities and the informational abundance online, challenges for national minorities to have effective access to content in their own languages persist. This section emphasizes the importance of universal service obligations, media and information literacy (including in the languages of national minorities) and the need for internet intermediaries to show human rights due diligence in their operations and be pro-active in offering

their services in the languages of national minorities.

Section III, Pluralism and diversity, is the most extensive section. It explores an array of possible ways to promote pluralistic media and diversity of content, including content tailored to, and in the languages of, national minorities, in a multi-media environment where information flows are local, national and transnational. Media ownership and control, licensing, support measures and incentives for the production, dissemination and promotion of national minority content, the role of independent national media regulatory authorities and the roles of different types of media and intermediaries all feature centrally.

In Section IV, Media, information technologies and conflict prevention, the focus is on the parameters of international human rights law for countering hate speech, disinformation, propaganda or inflammatory discourse. The limited nature of permissible restrictions on the right to freedom of expression is spelt out, as well as the importance of measures such as counter-speech, intercultural dialogue - including via the media and social media, and education and awareness-raising activities. Different roles are identified for States, the media and internet intermediaries.

The Guidelines “are based on concrete provisions in, and contemporary and forward-looking interpretations of, international and European human rights, media and communications law and policy standards” (Introduction, p. 12). An extensive Explanatory Note clarifies the provenance of each of the Guidelines, the thinking behind them and how they have been informed by the experiences of the Office of the HCNM over the years.

The Guidelines are the latest addition to a series of thematic Recommendations and Guidelines issued by the HCNM. The series’ focuses to date have been on national minorities and education rights (1996), linguistic rights (1998), participation in public life (1999), the use of minority languages in the broadcast media (2003) (IRIS 2004-1/2), policing in multi-ethnic societies (2006), inter-State relations (2008), the integration of diverse societies (2012) (IRIS 2013-2/7) and access to justice (2016).

OSCE High Commissioner on National Minorities, Tallinn Guidelines on National Minorities and the Media in the Digital Age, 1 February 2019

https://www.osce.org/hcnm/tallinn-guidelines

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