IRIS newsletter

IRIS 2019-8

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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Web Design:

Coordination: Cyril Chaboisseau, European Audiovisual Observatory • Development and Integration: www.logidee.com • Layout: www.acom-europe.com and www.logidee.com
ISSN 2078-6158

EDITORIAL

September is the month of wine harvesting in many regions of Europe. After one year of patient cultivation, grapes are carefully picked from the grapevines to be selected, fermented and bottled as Bacchus' divine nectar. Red, white or rosé, still or sparkling, there is one for every palate.

Our september newsletter also provides a rich harvest with articles catering for every interest. For example: are you interested in the transposition of the Audiovisual Media Services Directive? We report on legislative amendments in Cyprus aimed at harmonising the Law on Radio and Television Organisations with the AVMS Directive.

Do you care about the development of case law in the field of the media? We report, among other things, on four decisions of the Court of Justice of the European Union: 1) on the use of protected works in the reporting of current events; 2) on the importance of freedom of information and freedom of the press in relation to the Copyright Directive; 3) on how imposing pay-to-view restrictions on foreign TV channels owing to “incitement to hatred” is permissible under the AVMS Directive; 4) on the legality of sampling.

And if you want more, we have on our menu a decision of the German Federal Constitutional Court on the difference between expressing an opinion and making defamatory statements, plus a judgment of the European Court of Human Rights on Brzeziński v. Poland.

You can also read about media literacy in the United Kingdom, about the European Commission’s clearing of the Vodafone/Liberty Global cable deal, about Facebook being fined EUR 2 million in Germany, about the Turkish Regulation on Radio, Television, and Optional Broadcasting Services Provided on the Internet, and many, many other interesting issues – it's all there in the current pages of our newsletter.

Enjoy your read!

Maja Cappello, editor
European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

POLAND

European Court of Human Rights: Brzeziński v. Poland

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

In its committee judgment in the case of *Brzeziński v. Poland,* the European Court of Human Rights (ECtHR) unanimously held that there has been a violation of Article 10 of the European Convention on Human Rights (ECHR) with regard to the applicant's right to freedom of expression as a politician at election time. The case concerns in particular a provision in Poland's election law which allows a court, within 24 hours, to consider whether 'untrue information' has been published, and to issue an order prohibiting its further distribution.

In October 2006, during a political campaign for election to municipal and district councils and regional assemblies, Mr Zenon Brzeziński was standing for the post of municipal councillor. In a brochure in which the public was called to vote for the members of his electoral group, Brzeziński criticised the way in which the municipality was run. These criticisms mainly concerned the mayor and the members of the municipal council. Brzeziński implied that the members of the local council had concluded a form of agreement, with the sole aim of taking advantage of the posts that they held. The mayor and a local politician who were targeted in the brochure sued Brzeziński, applying for an injunction to prevent the dissemination of the brochure and obliging its author to rectify the incorrect information and offer a public apology. On the morning of 27 October 2006, Mr Brzeziński was summoned by telephone to a hearing scheduled for 1.30 p.m. on the same date at the Częstochowa Regional Court. Brzeziński did not attend the hearing. By a decision of the same date, the court barred Brzeziński from continuing to distribute his brochure and ordered him to apologise and to correct the inexact information contained therein. It also ordered him to pay 5000 Polish zlotys (PLN) to a charitable organisation and PLN 360 to the complainants for costs incurred. The court noted that Brzeziński had implied that fraud had been committed in the allocation of public grants, although, in the findings of the court, these facts had not been established. It found that the allegations in the brochure were 'untrue', 'malicious' and 'exceeded the permissible forms of electoral propaganda'. The regional court's judgment was later upheld by the court of appeal.

Brzeziński lodged an application before the ECtHR in 2007, claiming a violation of his right to freedom of expression. Twelve years later, in its judgment of 25 July 2019, the ECtHR holds that there has been a violation of Brzeziński's freedom of

expression. The ECtHR considers that the election law provision was 'prescribed by law' pursued the legitimate aim of the 'protection of the reputation or rights of others', while the main question was whether the interference with the right to freedom of expression had been 'necessary in a democratic society'. First, the Court reiterates that under Article 10 ECHR there is little room for restrictions on political and public interest expression, which makes the domestic authorities' margin of appreciation for restricting such expression very limited. The ECtHR does not consider the summary proceedings problematic as it finds Brzeziński had been lawfully summoned to the first-instance hearing, and that his absence from the first-instance hearing and the resultant impossibility of presenting his arguments to the domestic court were not imputable to the national authorities alone. It notes that Brzeziński was expressing himself as a candidate for the post of municipal councillor and as a representative of an electoral group which was distinct from that of the outgoing mayor. However, it did not appear from the reasoning of the domestic courts that they had examined whether the impugned remarks had a credible factual basis, or whether Brzeziński had acted with requisite diligence. The contested remarks had been immediately classified as lies and regarded as damaging the good reputation and standing of the complainants as candidates in the local elections. The ECtHR disagrees with the domestic courts' finding that Brzeziński was required in the present case to prove the truth of his statements, and it holds that the language used in the brochure had remained within the limits of admissible exaggeration or provocation, having regard to the ordinary tone and register of the political debate at local level. The ECtHR finds that no fair balance has been struck between the need to protect Brzeziński's rights to freedom of expression and the need to protect the complainants' rights and reputation, and that the reasons provided by the domestic courts to justify Brzeziński's conviction cannot be considered relevant and sufficient, and did not correspond to any pressing need. Furthermore, in addition to the ban on continuing to publish the brochure, Brzeziński had been ordered to apologise and to rectify the comments that were held to be inexact by having a statement published on the front page of two local newspapers. He had also been ordered to pay a sum of money to a charitable organisation. The ECtHR is of the opinion that the cumulative application of these sanctions would likely have an inhibiting effect on individuals engaged in local political debate and it concludes that there had been a disproportionate interference with Brzeziński's right to freedom of expression, in violation of Article 10 ECHR. The ECtHR held that Poland was to pay the applicant EUR 9 700 in respect of non-pecuniary damage and EUR 100 in respect of costs and expenses.

ECtHR First Section, Appl. no 47542/07, 25 July 2019

https://hudoc.echr.coe.int/eng?i=001-194958

EUROPEAN UNION

GERMANY

Court of Justice of the European Union: ECJ on use of works in the reporting of current events

Christina Etteldorf

In a judgment of 29 July 2019 (Case no. C-516/17 – Spiegel Online v Volker Beck), the European Court of Justice (ECJ) decided that, in principle, the use of a protected work in the reporting of current events does not require the author's prior consent under the Copyright Directive (2001/29/EC). The quotation of a work by means of a hyperlink is also permitted as long as the quoted work, in its specific form, has previously been made available to the public with the rightsholder's authorisation or in accordance with a non-contractual licence or statutory authorisation.

The dispute concerned politician Volker Beck who, in 1988, had published an article that he claimed had been amended by the publisher. In the article, the politician had expressed sensitive and controversial views from which he had subsequently distanced himself. During the 2013 German parliamentary election campaign, he provided various newspaper editors with the manuscript of the disputed article to prove that it had been amended. However, he did not give consent for the texts to be published in the media. Instead, he published both versions of the article on his own website, along with a statement dissociating himself from the article and claiming that the published article had been distorted by the publisher. Spiegel Online subsequently published an article in which it contended that the politician had misled the public because, contrary to Beck's claim, the central statement contained in the manuscript had not been altered. In addition to the article, the original versions of the manuscript and published article were available for download by means of hyperlinks. The politician believed that his copyright had been infringed and challenged the making available of the complete texts. The Bundesgerichtshof (Federal Court of Justice) referred the case to the ECJ with questions concerning the interpretation of the provisions of Directive 2001/29/EC, in particular in relation to freedom of expression and freedom of the media.

The ECJ stressed that the directive did not fully harmonise the scope of the exceptions and limitations to authors' exclusive rights of reproduction and communication to the public and gave the member states significant, albeit highly regulated, discretion.

Freedom of information and freedom of the press, enshrined in the Charter of Fundamental Rights of the European Union, were not capable of justifying, beyond the exceptions and limitations provided for in the Directive, a derogation from the author's exclusive rights of reproduction and communication to the public.

Regarding the possibility for member states to allow exceptions to an author's exclusive rights for the purposes of reporting current events, this should not be made dependent on a prior request for the author's consent. It was for the national courts to ascertain whether the publication of the original versions of the manuscript (without the author's statements of dissociation) was necessary to achieve the informatory purpose. In doing so, they should particularly bear in mind that the protection of intellectual property rights is not an absolute right and evaluate whether the nature of the information at issue is of particular importance in political discourse or discourse concerning matters of public interest.

As regards the exception for quotations, the ECJ ruled that it was not necessary for the quoted work to be inextricably integrated, by way of insertions or reproductions in footnotes, for example, into the subject matter citing it. A quotation could therefore be made by including a hyperlink to the quoted work. In such cases, however, the use must be made "in accordance with fair practice, and the extent required by the specific purpose", that is, only within the confines of what is necessary to achieve the purpose of the quotation (namely reporting). This only applied to works that had already been lawfully made available to the public – either with the authorisation of the copyright holder or in accordance with a non-contractual licence or a statutory authorisation. The German courts will therefore now need to ascertain whether the publisher who originally published the manuscript acted lawfully. In the ECJ's view, the fact that Beck published the texts on his own website was not sufficient to justify a corresponding quotation right. For, in this case, the documents were lawfully made available to the public only in so far as they were accompanied by Beck's statements of dissociation.

Judgment of the CJEU (Grand Chamber), Case C-516/17, 29 July 2019

http://curia.europa.eu/juris/document/document.jsf?text=&docid=216543&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=10106

Court of Justice of the European Union: Freedom of information and freedom of the press in relation to the Copyright Directive

Christina Etteldorf

In a judgment of 29 July 2019 (Case no. C-469/17, Funke Medien NRW GmbH v Bundesrepublik Deutschland), the European Court of Justice (ECJ) explained that freedom of information and the freedom of the press cannot justify derogations from the rights of authors beyond the exceptions or limitations provided for in the Copyright Directive (Directive 2001/29/EC). The court's decision was surprisingly clear, given that, both at national level and in the Opinion of the Advocate General, the right to protection of the disputed 'Afghanistan papers' had been seriously questioned.

The decision follows a legal dispute in Germany over the publication of military status reports on the foreign deployments of the Bundeswehr (federal armed forces) by the Westdeutsche Allgemeine Zeitung (WAZ) in 2012. These reports, prepared every week by the Bundesregierung (Federal Government), referred to as 'Unterrichtung des Parlaments' (parliament briefings – UdPs) and labelled 'Classified documents – for official use only', are sent to selected members of the German Bundestag (Federal Parliament), sections of the Bundesministerium der Verteidigung (Federal Ministry of Defence) and other federal ministries, and to certain bodies subordinate to the Federal Ministry of Defence. It remains unclear how the WAZ obtained a large proportion of the UdPs – its previous application for access to them had been rejected on the grounds that disclosure of the information could have adverse effects on the security-sensitive interests of the federal armed forces. The Federal Republic of Germany (FRG) brought an action for an injunction against the WAZ, which it accused of infringing its copyright by publishing the status reports without its consent. The WAZ appealed on the grounds of freedom of the press. Although the lower-instance courts upheld the FRG's action on the grounds that copyright over a literary work had been infringed, the Bundesgerichtshof (Federal Court of Justice – BGH) referred the matter to the ECJ, asking, *inter alia*, whether, on the basis of a general weighing-up of interests, the fundamental rights of freedom of information and freedom of the press justified limitations to copyright beyond the limitations provided for by law.

In its judgment, the ECJ began by addressing the national courts in detailed preliminary observations concerning the protection of works: it stated that it was for the national court to determine whether military status reports were protected under copyright, and, in particular, whether they constituted an 'intellectual creation' that reflected the author's personality and were expressed by free and creative choices. If the documents were protected, the ECJ continued, freedom of information and the freedom of the press could not justify a copyright exemption beyond the exceptions and limitations provided for in the Copyright Directive. The harmonisation effected by the Copyright Directive should, in particular in the context of electronic media, safeguard a fair balance between intellectual

property rights and the interests of the users of protected subject matter (in particular their freedom of expression and information). Therefore, the list of exceptions provided for, which already took users' interests into account in terms of freedom of information and freedom of the press, was exhaustive. Only when interpreting national provisions to implement exceptions and limitations was it necessary to ensure that the interpretation, whilst consistent with their wording and safeguarding their effectiveness, fully adhered to fundamental rights.

However, the ECJ did not expressly exclude the possibility that the publication of the reports by the WAZ might be covered by the derogation relating to the reporting of current events contained in the Copyright Directive.

Judgment of the CJEU (Grand Chamber), Case C-469/17, 29 July 2019

http://curia.europa.eu/juris/document/document.jsf?text=&docid=216545&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9424

Court of Justice of the European Union: Sampling allowed, subject to restrictions

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

In a ruling of 29 July 2019, the Court of Justice of the European Union strengthened the rights of artists with regard to so-called sampling and decided that the use of sound samples taken from a phonogram may, under certain circumstances, be used in a new piece of music without the consent of the phonogram producer. At the same time, however, a special rule on 'free use' in German copyright law was classified as incompatible with EU law.

The procedure concerned a legal dispute in Germany that has gone unresolved for more than 20 years. In 1997, the composers Moses Pelham and Martin Haas had copied a two-second rhythm sequence from the song 'Metall auf Metall' by the group Kraftwerk and had used it as a continuous loop in their own song 'Nur mir'. Two members of the Kraftwerk group claimed that, as producers of the phonogram concerned, their copyright-related rights had been infringed. They therefore sought a prohibitory injunction, damages and the surrender of the phonograms featuring the song 'Nur mir' for the purposes of their destruction.

The Bundesgerichtshof (Federal Court of Justice – BGH), before which the latest appeal had been brought, submitted a number of questions to the CJEU on the interpretation of EU law in this respect,includingquestions onthe technique of sampling itself and the scope of various exceptions and limitations tocopyright and related rights.

Regarding sampling itself, the CJEU stated that phonogram producers have the exclusive right to authorise or prohibit reproduction in whole or in part of their phonograms – a right that is fully harmonised at EU level and is therefore not open to any national discretion. However, if a user, in exercising the freedom of the arts, takes a sound sample from a phonogram in order to embody it, in a modified form unrecognisable to the ear, in another phonogram, that is not a 'reproduction'. It is therefore necessary to strike a fair balance between the interests of the holders of copyright and related rights and those of the users of protected subject matter, whoare covered by the freedom of the arts.

The CJEU also considered that the exceptions and limitations to the rights of rightsholders provided for in EU law were determined exhaustively and that a fair balance had been struck between the conflicting interests. Therefore, an additional copyright limitation linked to 'free use', contained in Article 24 of the German Urheberrechtsgesetz (Copyright Act), was incompatible with EU law.

Judgment of the CJEU (Grand Chamber), Case C-476/17, 29 July 2019

http://curia.europa.eu/juris/document/document.jsf;jsessionid=B4B4D7E69DF74C6C20B5A56D9EE8D809?text=&docid=216552&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7848

EU: EUROPEAN COMMISSION

European Commission: Vodafone/Liberty Global cable deal cleared, subject to certain conditions

Léa Chochon
European Audiovisual Observatory

The Commission has approved the proposed acquisition by Vodafone of Liberty Global's cable business in the Czech Republic, Germany, Hungary and Romania, subject to full compliance with a series of commitments proposed by Vodafone. These commitments reflect the Commission's competition concerns, in particular as regards the position of broadcasters and consumers on the German market. The proposed transaction as such would, for example, strengthen the market power of the merged entity, thereby hindering the position of broadcasters in the wholesale provision of signals for the transmission of television channels, as well as their ability to provide additional and innovative services.

In order to avoid such competition concerns and to ensure that "customers will continue enjoying fair prices, high-quality services and innovative products", as stated by Margrethe Vestager, Commmissioner for Competition Policy, the deal was authorised on condition that Vodafone fully complies with five commitments, namely:

- the Cable Broadband Access Commitment: to enter into an agreement with a "remedy taker" (already identified as Telefónica), which will be granted access to the merged cable network in Germany, allowing it to replicate the competitive pressure exerted by Vodafone (which would otherwise be lost as a result of the merger) and to compete more effectively in the provision of fixed broadband services in Germany.

- the OTT Commitment: not to contractually restrict the possibility for broadcasters that are carried on the merged entity's TV platform to also distribute their content via an OTT service in Germany.

- the Interconnection Capacity Commitment: to ensure that it maintains at least three uncongested routes into the merged entity’s IP network in Germany, in order to ensure that it has an incentive to provide sufficient interconnection capacity to allow the merged entity’s broadband customers to access any OTT service in Germany either via the interconnection points or otherwise.

- the Feed-in Fee Commitment: not to increase the carriage fees paid by free-to-air broadcasters for the transmission of their linear television channels via Vodafone’s cable network in Germany by extending existing agreements or, if necessary, by concluding new ones.

- the HbbTV Commitment: to continue carrying the HbbTV signal of free-to-air broadcasters over its merged cable network, thus allowing viewers to access the broadcasters' interactive services.

Vodafone has now completed the transaction for a total enterprise value of EUR 18.4 billion, becoming the leading converged operator in Europe.

Commission clears Vodafone's acquisition of Liberty Global's cable business in Czechia, Germany, Hungary and Romania, subject to conditions - European Commission - Press release

https://europa.eu/rapid/press-release_IP-19-4349_en.htm

Case M.8864 — Vodafone/Certain Liberty Global Assets - Non-confidential version of commitments - interim text

https://ec.europa.eu/competition/mergers/cases/additional_data/m8864_7150_3.pdf

UNITED KINGDOM

Court of Justice of the European Union: Pay-to-view restriction on foreign TV channel now permissible

Ronan Ó Fathaigh
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On 4 July 2019, the Court of Justice of the European Union (CJEU) delivered a judgment on whether Lithuania's media authority could impose an obligation on all broadcasters requiring that a UK-based channel could be broadcast in Lithuania only in pay-to-view packages, as it had found that one of its programmes "contained information that incited hatred". The CJEU held that such a measure did not infringe Article 3(1) of the Audiovisual Media Services Directive (AVMSD), which provides that member states "shall not restrict retransmissions" of broadcasts from another member state.

The case concerned the Baltic Media Alliance (BMA), which is a UK-based company, and holds a licence from the UK Office of Communications (Ofcom) to broadcast the television channel NTV Mir Lithuania. The channel is broadcast in Lithuania, and the case arose in 2016, when the Lithuanian Radio and Television Commission (LRTK) delivered a decision concerning a programme broadcast on NTV Mir Lithuania. The programme concerned "collaboration of Lithuanians and Latvians in connection with the Holocaust and the allegedly nationalistic and neo-Nazi internal policies of the Baltic countries"; and the LRTK found that the programme "incited hatred on the basis of nationality". In its decision, the LRTK required broadcasters in Lithuania and "other persons providing Lithuanian consumers with services relating to the distribution of television channels via the internet", for 12 months, to broadcast or retransmit the channel NTV Mir Lithuania only in pay-to-view packages.

The BMA initiated legal proceedings seeking to quash the LRTK decision, arguing that it breached Article 3(1) of the AVMSD, as it "restricted the retransmission of a television channel from a [member state]". In this regard, the Vilnius Regional Administrative Court decided to refer a question to the CJEU for a preliminary ruling on whether imposing the obligation was consistent with Article 3 of the AVMSD.

Article 3(1) of the AVMSD provides that member states "shall ensure freedom of reception" and "shall not restrict retransmissions" of audiovisual media services from other member states for "reasons which fall within the fields coordinated by this Directive". This includes incitement to hatred, which is covered under Article 6 AVMSD. However, a member state may "provisionally derogate" from Article 3(1)where: (a) the television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 6, (b) during the previous 12 months, the broadcaster has infringed the provision "on at least two prior

occasions", and (c) the broadcaster has notified the European Commission of the measures that it intends to take. The Commission must deliver a decision on whether the measure is compatible with EU law.

The CJEU first recognised that it was "common ground that the LRTK did not follow that procedure [under Article 3(2)] for the adoption of the decision of 18 May 2016" and that as such, the main question was whether the pay-to-view requirement imposed by the LRTK constituted a "restriction" of retransmissions, prohibited under Article 3(1).

The CJEU stated that the "wording" of Article 3(1) did not "in itself allow the nature of the measures covered by the provision to be determined", and that instead the CJEU would examine its "objectives", "context" and "EU law as a whole". Applying this method of interpretation, the CJEU held that a national measure does not constitute a "restriction" of retransmission where it (i) "regulates the methods of distribution of a television channel" and (ii) does not "prevent the retransmission". The CJEU noted that "consumers can still view it if they subscribe to a pay-to-view package" and that in its opinion, such a measure "does not restrict the retransmission". The CJEU concluded that Article 3 AVMSD must be interpreted as meaning that imposing an obligation on broadcasters, and on distributors of TV channels or programmes via the Internet, to retransmit in that member state, for a period of 12 months, a television channel from another member state only in pay-to-view packages, is "not covered" by Article 3(1) AVMSD.

Judgment of the CJEU (Second Chamber), Case C-622/17, 4 July 2019

http://curia.europa.eu/juris/document/document.jsf?text=&docid=215786&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=8688

OSCE

ALBANIA

OSCE: Legal analysis on draft proposals to regulate electronic publications in Albania

Joan Barata Mir

On 23 July 2019, the OSCE Representative on Freedom of the Media (RFoM) sent the Prime Minister of Albania, Edi Rama, a legal analysis that examines a series of proposed amendments to Law No. 97/2013 on Audiovisual Media in the Republic of Albania and to Law No. 9918 of 19 May 2008 on Electronic Communications in the Republic of Albania. This communication is part of a long process of consultation between the Office of the Representative and the government during the long – and still ongoing – drafting process of the legislation. Despite the fact that there have been important improvements compared to the drafts prepared earlier in the year, the analysis points at several problematic issues still present in the proposals which appear not to be in line with international standards on freedom of expression.

The independent audiovisual media regulatory agency (Audiovisual Media Authority - AMA) has been given the power to oblige providers of electronic publications services to publish an apology, remove content or insert a pop-up notice in cases of violations of a series of general obligations established in previous provisions of the law, including the obligation to “respect the privacy and dignity of citizens”. According to the analysis, this attribution is too broad and poorly defined, and therefore could lead to the adoption of very restrictive decisions in an almost discretionary manner.

The latest proposal also refers to the possibility of “blocking access to the Internet” in cases where electronic media services “may abet” the criminal offences of child pornography, incitement of terrorist acts or breach of national security. Such resolutions are apparently to be taken by AMA “subsequent to written opinions from NAECES [National Authority for Electronic Certification and Cyber Security] and the Electronic and Postal Communications Authority [AKEP]”. The analysis criticises the fact that the draft is not clear on what the area of competence or the iresponsibility of AMA is in such cases: if the aim of the legal reform was to speed up the process of taking down illegal content online, the introduction of a new intermediary between NAECES and AKEP would seem an inefficient solution that would only prolong the execution of the decision and introduce further legal uncertainty. The analysis particularly points at the fact that the draft does not make it clear whether AMA has the power to review or reconsider NAECES’s decisions in this area.

From a broader perspective, the RFoM also questions the fact that provisions included in the draft would not incorporate sufficient safeguards with respect to administrative measures to be adopted vis-a-vis providers of electronic publications services in cases of possible excessive temporary and quantitative restrictions to the right to freedom of expression (particularly when it comes to pieces of fully legitimate content also available on websites which host illegal content), as well as access to effective appeal and judicial review mechanisms.

Regarding sanctions, the RFoM welcomes the references introduced regarding sub-legal acts to determine the specificities of the regime of infractions and sanctions. However, the analysis also notes that there is no provision establishing that such sub-legal rules need to particularly follow the principle of proportionality and take into account the size and economic capacity of the media outlets in question. Moreover, the proposed rules refer to very high economic fines to be imposed in cases of contraventions that may not be necessarily serious.

Last but not least, the powers granted to AKEP in the proposal to amend the legislation on electronic communications, notably the power to adopt measures to protect a wide range of interests, including national interests, public security or fundamental rights, are also considered to be inconsistent with international standards of legal certainty, proportionality and necessity.

Legal Analysis on the Draft Laws on Changes and Amendments to the Law on Audiovisual Media and the Law of Electronic Communications in the Republic of Albania and Other Relevant Provisions Regarding the Regulation of Certain Types Content Provided Through the Internet

https://www.osce.org/representative-on-freedom-of-media/426152?download=true

NATIONAL

AUSTRIA

[AT] FPÖ video on "E-Card abuse" is discriminatory

Gianna Iacino
Legal expert

In a decision of 23 July 2019 (KOA 1.960/19-197), the Austrian communication regulator KommAustria ruled that a video produced by the Freiheitliche Partei Österreichs (Freedom Party of Austria – FPÖ) on the theme of "E-Card fraud" was discriminatory and therefore violated Article 31(3)(2) of the Audiovisuelles Mediendienste-Gesetz (Audiovisual Media Services Law - AMD-G).

The FPÖ operates the on-demand audiovisual service 'FPÖ-TV' and has registered its own YouTube and Facebook channels with KommAustria. Via its on-demand service, it posted a video about measures taken by the government at the time to combat social security fraud, in particular the fact that the so-called 'E-Card' would include a photo of the card-holder. This would ensure that the card could not be used by unauthorised persons. The 'E-Card', a smart card containing personal social insurance information (health insurance, unemployment insurance, etc.), must be shown when visiting the doctor, for example, to ensure that the costs are charged to the correct health insurance provider.

The video is an animated film showing a man with a moustache and wearing a fez visiting the dentist. A voice-over calls the man 'Ali'. In the next scene, a deep laugh can be heard as the man hands an E-Card to the receptionist. The voice-over says: "But stop!". A buzzer is then heard and the voice-over continues: "Ali has Mustafa's E-Card because, unlike his cousin, Ali is not insured." The camera zooms in on the E-Card so the name "Mustafa" is visible on the card, which does not include a photo. In the next image, Mustafa appears in a thought bubble above Ali's head. He looks virtually identical to Ali, with a moustache and a fez, although he also has a beard. A buzzer is heard again. The receptionist does not accept the E-Card and the voice-over says: "The surgery does not accept the E-Card because in future, thanks to the FPÖ, each E-Card will need a photo." The receptionist asks Ali for an E-Card with a photo. Since he does not have one, he leaves the surgery with his head bowed and a tear in his eye while the voice-over says: "Bad luck, Ali. Goodbye, social security fraud."

KommAustria categorised the YouTube version of the video as a form of advertising that seriously infringed the ban on discrimination enshrined in Article 31(3)(2) in conjunction with Article 30(2) AMD-G. The video discriminated against a certain group of people because it contained and promoted negative stereotypes of them.

The appearance of the fez, an item of typical Middle Eastern Islamic headwear, and the first names Ali and Mustafa, which are both very popular in Islamic countries, clearly suggested to the average viewer that both characters were from a Middle Eastern Islamic background. Ali and Mustafa also looked very similar, which demonstrated a clear intention to portray this group of people as typical abusers of the social security system. The average viewer would conclude that the video was designed to place the debate on E-Card fraud in the context of migration. The video also used degrading or ridiculous forms of expression and images, such as Ali's bowed head as he left the surgery with a tear in his eye, having scornfully laughed as he tried to get dental treatment by showing his cousin Mustafa's E-Card. The reference to adult characters by using only their first names was also significant.

In a separate decision of 23 July 2019 (KOA 1.960/19-181), KommAustria rejected a complaint about the video's publication on Facebook on the grounds that no audiovisual media service had been presented. At the time of the allegation, the video had no longer been available at the Internet address cited by the complainant. Nor had any other audiovisual content been available at the time. Since no audiovisual content had been provided, there was no on-demand audiovisual media service under Article 2(4) AMD-G. Facebook had been registered by the FPÖ as a means of distributing the 'FPÖ-TV' on-demand service and appeared in the KommAustria register. However, its registration under Article 9 AMD-G did not prove the existence of an on-demand audiovisual media service, but rather the activity carried out by the provider. The mention of the media service in the authority's public register pursuant to Article 9(4) AMD-G had no constitutive effect, only a declaratory one.

Entscheidung der KommAustria vom 23. Juli 2019 – KOA 1.960/19-181

https://www.rtr.at/de/m/KOA196019181/38255_KOA%201.960-19-181%20anonymisiert.pdf

Decision of the KommAustria of 23 July 2019 – KOA 1.960/19-181

BELGIUM

[BE] Major step forward in the development of DAB+ digital radio services

Olivier Hermanns
Conseil Supérieur de l'Audiovisuel Belge

On 11 July 2019, the *Conseil supérieur de l'audiovisuel belge* (Higher Audiovisual Council of the French-speaking community of Belgium – CSA) adopted a series of decisions allocating radio frequencies for the broadcastingof radio services(including digital services). The implementation of these decisions will help to increase the number of digital (DAB+) radio stations in Belgium.

This is the final stage of a tender procedure lasting several months. Initially, on 21 December 2018, the government of the French-speaking Community of Belgium had adopted a decree setting out the tender procedureunder which the CSA would decide on applications for frequencies and issue licences by granting the right to use a radio frequency or radio frequency network. The applicants also had the right to request the allocation of a radio frequency or radio frequency network for analogue broadcasting. They had to be independent of any government, political party or organisation representing employers or workers.

The CSA then examined the admissibility of the applications that were received, before assessing the eligible applications against the criteria laid down in the decree of 21 December 2018. These criteria mainly concerned the "own-production quota", cultural promotion and the broadcastingof musical works in the French language or works by authors, composers, artists or music producers linked to French-speaking Belgium. Applicants also had to demonstrate the suitability of their three-year financial plan, describe their experience in the radio industry and explain why their project was original and unique.

For digital broadcasting, the CSA granted 75 local multiplex licences for a nine-year period to independent radio stations and four networks covering the entire French-speaking part of Belgium. The CSA welcomes the fact that its decisions are helping to create "one of the richest, most varied digital radio landscapes in Europe."

Not all available frequencies were allocated during this procedure. A new tender process is therefore expected to be held to allocate the remaining frequencies.

Communiqué de presse du Collège d'autorisation et de contrôle du Conseil supérieur de l'audiovisuel de la Communauté française de Belgique

http://csa.be/breves/1359

Press release of the Conseil supérieur de l'audiovisuel of the French Community of Belgium

CYPRUS

[CY] Extension of Television Temporary Licences for one Year to June 2020

Christophoros Christophorou
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Eight years after the television digital switch-over in July 2011, Cyprus audiovisual media service providers continue operating with temporary digital licences. The latest extension of licences will be until the end of June 2020. Law 92(I)/2019 amending the basic Law on Radio and Television Organisations L. 7(I)/1998 authorises the Radio Television Authority to extend the validity of TV licences for all operating service providers for one more year. The law was published in the Official Gazette on 28 June 2019. The temporality of licences is justified by the pending amendments to the basic Law 7(I)/1998 that would respond to the conditions of the new environment and make possible the issuance of permanent licences. However, amendments to the law in spring 2019 were of very limited scope and did not address the issues that would enable the issuing of permanent (normal) licences. Thus, temporality has now been extended until 30 June 2020. When permanent AVMS licences are issued, they will be valid for ten years, as provided by the basic law.

By virtue of the same amending law, temporary licences to legal entities of public law have also been extended for one year, even in cases where they do not fulfil all the requirements set by law; this is applicable to Αρχή Τηλεπικοινωνιών Κύπρου (Cyprus Telecommunications Authority, CYTA), a semi-governmental organisation that also operates IPTV. Its capital share and structure as a legal entity of public law deviated from the model set in the basic law, which requires, among other things, capital share dispersion and a ceiling of 25% per share holder. After having operated in an analogue environment unregulated for online providers, CYTA benefited from a special provision voted in 2011 and has continued operating in the digital environment.

The amending law authorises the Radio Television Authority to also issue temporary licences to new applicants, also valid until the aforementioned date.

With the exception of a recent amendment of limited scope (see the article on this topic in this issue), the basic law has remained unchanged since 2010-11, when provisions of the AVMS Directive of 2010 were incorporated into Cyprus national law. The competent parliamentary committee expressed its concern about the problem of temporality to the plenary of the House of Representatives. On behalf of the government, it was said that an overhawl of the law is under study in order to address all the issues relevant to the operation of AVMS providers in today's environment. No details were provided in the parliamentary committee's report to the plenary of the House of Representatives about the timing of the expected amendments.

Νόμος 92(I)2019 που τροποποιεί τους περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών Νόμους του 1998 έως 2019, Ε.Ε. Παρ. I(I), 28.06.2019, σ. 538

http://cylaw.org/nomoi/arith/2019_1_092.pdf

Act 92(I)2019

[CY] Amendments for harmonising the Law on Public Service Media and the Cyprus Broadcasting Corporation

Christophoros Christophorou
Council of Europe expert in Media and Elections

The House of Representatives amended the law on public service media (PSM) - the Cyprus Broadcasting Corporation (RIK) Law, so that, among other things, it is better harmonised with the *acquis communautaire*. Amendments were made on the basis, among other considerations, of observations in the framework of the EU Pilot project. They relate to a variety of issues, such as the spectrum of services offered, membership of the corporation's governing council, commercial messages, the protection of minors and the powers of the Cyprus Radio Television Authority over the PSM.

The main provisions of the amending law are as follows:

The number of members of the corporation's governing council is set to no more than nine, instead of seven, with the quorum requiring the presence of four members plus the chairperson.

The spectrum of services offered has been extended to include Internet and digital services and "any other services and programmes of interest to the public".

The provision that exempted isolated advertising or teleshopping messages from the general rule of being "readily recognisable and distinguishable from editorial content" has been corrected; the screening of isolated messages must be the exception, not exempted from the general rule.

Bulletins related to the environment are included in programmes (weather forecasts, stock exchange bulletins, etc.) that may receive sponsorship.

The prohibition of the advertising of and teleshopping messages related to medicinal products has been extended to medical treatment.

RIK has been granted the right to make a request to receive material on major events for which other AVMS providers have the exclusive rights.

The prohibition of audiovisual commercial communications likely to harm human dignity, promote discrimination on the basis of racist and other criteria or promote anti-social behaviour has been extended in order to protect minors; the relevant provision of the AVMS Directive of 2010 in Article 9.1.(g) has been incorporated into the law.

More provisions aim at protecting children participating in any kind of broadcasts by requiring their parents' or tutors' consent. Also, the employment of children in activities or programmes, in whatever capacity, requires the child's free participation, in compliance with employment and other relevant laws. The child's

refusal to continue should lead to the interruption of his/her participation.

The powers of the Radio Television Authority over RIK have been further specified so that the regulator monitors the compliance of the PSM with all the provisions of the AVMS Directive that are incorporated in the law governing how the corporation functions.

A new special provision allows the corporation to have deposits of up to 10% of its budget specific to the provision of public service in order to compensate for fluctuating income or expenses or emerging needs and extraordinary activities. The use of these funds should be duly justified and in compliance with the laws on state aid.

This is the first time the PSM law has been amended since the incorporation of the provisions of the AVMS Directive into this law in December 2010.

Νόμος 52(I)2019 που τροποποιεί τον περί Ραδιοφωνικού Ιδρύματος Νόμο Κεφ. 300Α, Ε.Ε. Παρ. I(I), 12.04.2019, σσ. 341-5

http://www.cylaw.org/nomoi/arith/2019_1_052.pdf

Act 52(I)2019

[CY] Amendments for harmonising the Law on Radio and Television Organisations with the AVMS Directive

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The House of Representatives has adopted a number of amendments to the basic law on Radio and Television Organisations 7(I)/1998 in order to fully harmonise its provisions with the AVMS European Directive. According to the explanatory report attached to the draft of the amended law, the amended sections of the law relate to a variety of issues, with some deemed necessary on the basis of observations made within the framework of "EU Pilot" (an ongoing informal dialogue between the Commission and the EU member states about issues related to potential non-compliance with EU law). The main amendments are as follows:

AVMS providers that use a satellite up-link situated on the territory of the Republic of Cyprus or use satellite capacity appertaining to the Republic come under the jurisdiction of the Republic. The previously-worded relevant section of the law referred to an up-link or satellite capacity that "belonged" to the Republic.

The provision that exempted isolated advertising or teleshopping messages from the general rule of being “readily recognisable and distinguishable from editorial content” has been corrected; under the amended law, the screening of isolated messages must now be the exception to the general rule (not exempted from it entirely).

Bulletins related to the environment may now receive sponsorship, as it was the case with weather forecasts, sports and stock exchange bulletins.

The prohibition of advertising and teleshopping messages relating to medicinal products has been extended to encompass medical treatment.

The obligation of each AVMS provider to make available to other providers material from major events for which it has exclusive rights has been extended, so that the Cyprus Broadcasting Corporation (RIK) now also receives such material.

Various other sections of the law have been amended by simply reformulating their content without making any changes to their substance.

This is the first amendment of the law since the transition to digital television in Cyprus in July 2011. A draft law aimed at implementing an extensive update of the law in order, as announced officially, to respond to the needs connected to the digital environment in which audiovisual media services operate was sent to the House of Representatives in 2013. It was subsequently withdrawn by the Government for further study, since when there has been no further such initiative. The present amendment is limited in scope and substance.

Νόμος 53(I)2019 που τροποποιεί τους περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών νόμους του 1998 έως 2018, Ε.Ε. Παρ. I(I), 12.04.2019, σσ. 346-8

http://cylaw.org/nomoi/arith/2019_1_053.pdf

Act 53(I)2019

GERMANY

[DE] Federal Constitutional Court on the difference between expression of an opinion and defamatory criticism

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In a decision of 14 June 2019, the Bundesverfassungsgericht (Federal Constitutional Court) issued a decision explaining the conditions under whichthe expression of an opinion should be categorised as defamatory criticism, meaning it was not protected under the freedom of expression enshrined in Article 5(1)(1) of the Grundgesetz (Basic Law). Thedecidingfactor was whether the remarks had a factual basis. Whether they represented an insult under criminal law depended on the balance between freedom of expression and the personality rights of the individual concerned.

In the case at hand, the plaintiff in a civil court procedure had been fined for insulting the judge. He had criticised the judge's handling of the case, saying that: "The way the judge influenced the witnesses and conducted the proceedings, and her attempt to exclude the plaintiff from the proceedings" was highly reminiscent of "the court procedures of Nazi special courts." He also compared the judge's handling of the case to a "medieval witch trial." Two appeals against the sentence had already been rejected.

The Bundesverfassungsgericht cancelled the fine and referred the case back to the Landgericht Bremen (Bremen District Court). It decided that the complainant's fundamental right to freedom of expression had been violated by the lower-court judgments because his remarks had wrongly been categorised as defamatory criticism. Comments could only be classified as defamatory criticism if they were not – as was usually the case – part of a factual discussion but were, in substance, aimed solely at defaming a person, such as in the context of a private feud; the reason for and context of the remarks should therefore be determined.

In principle, deciding whether comments should be punished as an insult under Article 185 of the Strafgesetzbuch (Criminal Code) or whether they were protected by freedom of expression involved a weighing-up process. This process can only be dispensed with if the comments are categorised as '*Schmähkritik*' (critical defamation) or '*Formalbeleidigung*'(an insult resulting from the form of the comment) because freedom of expression often takes second place to the need to protect a person's honour. However, for this reason, strict, independent benchmarks must be applied when categorising a comment as defamatory criticism.

In this case, the Bundesverfassungsgericht did not consider these conditions to be met. The comments had not constituted pure defamation of the judge, but criticism of her handling of a civil court procedure. Historical comparisons with

National Socialism or allegations of a ‘medieval’ attitude could carry particular weight in the weighing-up process, but did not, in themselves, constitute defamatory criticism. The right to heavily criticise measures taken by public authorities without the fear of state sanctions was a central component of the freedom of expression.

Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom 14. Juni 2019- 1 BvR 2433/17 -, Rn. (1-23)

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/06/rk20190614_1bvr243317.html;jsessionid=9028565B37092757CB94B142C7D6510E.2_cid394

Federal Constitutional Court, Order of the Second Chamber of the First Senate of 14 June 2019 - 1 BvR 2433/17 -, margin (1-23)

[DE] ‘StreamOn’ injunction confirmed

Marius Drabiniok
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In a decision of 12 July 2019, the Oberverwaltungsgericht Nordrhein-Westfalen (North Rhine-Westphalia Higher Administrative Court) confirmed the decision of the Bundesnetzagentur (Federal Networks Agency) to ban Deutsche Telekom’s ‘StreamOn’ service in its current form and rejected an appeal against a first-instance summary judgment of the Verwaltungsgericht Köln (Cologne Administrative Court).

‘StreamOn’ is a so-called zero-rating service, which means that the data used to stream audio and video services from certain content providers is not deducted from mobile customers’ monthly data allowances. Telekom customers can add the service free of charge as part of their mobile contracts. However, for customers on certain tariffs, Telekom had limited broadband speeds for video streaming to a maximum of 1.7 Mbits/s. Moreover, ‘StreamOn’ could only be used in Germany, so audio and video streaming outside Germany was deducted from customers’ data allowance.

As the German telecommunications regulator, the Bundesnetzagentur had decided that ‘StreamOn’ violated the principle of net neutrality, as well as European roaming regulations. It had banned the mobile provider from offering the service in its current form in December 2017. Although the zero-rating service could, in principle, continue to be offered, the ‘roam like at home’ principle would need to be adhered to and unthrottled bandwidth made available. This was the only way of ensuring compliance with the equal treatment requirement, a cornerstone of European net neutrality rules. The Verwaltungsgericht Köln and now the Oberverwaltungsgericht Nordrhein-Westfalen both rejected urgent actions brought by the mobile provider contesting the ban.

The judges explained that net neutrality protected a fundamental functional principle of the Internet for the benefit of all users. It was violated if video streaming speeds were deliberately throttled compared to other services or applications. Furthermore, under European roaming rules, it was prohibited to charge an additional fee for roaming services in other European countries compared with the domestic price. The current system would result in less favourable pricing structures in other European countries.

Following the Higher Administrative Court’s decision, which cannot be appealed, the Bundesnetzagentur’s decision is temporarily effective, pending a decision in the main proceedings.

Beschluss des Oberverwaltungsgericht NRW, 13 B 1734/18

https://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2019/13_B_1734_18_Beschluss_20190712.html

Decision of the Higher Administrative Court NRW, 13 B 1734/18

[DE] Federal Office for Justice fines Facebook

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On 3 July 2019, the Bundesamt für Justiz (Federal Office for Justice – BfJ) fined Facebook Ireland Limited EUR 2 million for infringing the Netzwerkdurchsetzungsgesetz (Network Enforcement Act – NetzDG) in its transparency report for the first half of 2018.

Since 1 January 2018, as a social network provider, Facebook has been obliged under Article 2(1) NetzDG to submit a report in German twice a year explaining how it has dealt with complaints about illegal content, and to publish these reports in the Federal Gazette as well ason its own website. According to Article 1(3) NetzDG, unless it is justified, content is unlawful in the sense of paragraph 1 if it meets the criteria laid down in Articles 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in connection with 184d, 185 to 187, 201a, 241 or 269 of the Strafgesetzbuch (Criminal Code).

The reports published on a provider's own website must be easily recognisable, directly accessible and permanently available. For the purposes of transparency, they must cover the points listed in Article 2(2) NetzDG, including general observations outlining the efforts undertaken by the provider of the social network to prevent criminally punishable activity on its platforms;a description of the mechanisms for submitting complaints about unlawful content and the criteria applied in deciding whether to delete or block unlawful content;the number of incoming complaints about unlawful content during the reporting period;and the number of complaints that resulted in the deletion or blocking of the content at issue during the reporting period, broken down according to criteria such as the reason for the complaint. Under Article 4(1) and (2) NetzDG, the BfJ, as the relevant regulatory body, can issue fines of up to EUR 5 million if a transparency report is inaccurate or incomplete.

In particular, the BfJ accuses Facebook of listing only a fraction of the complaints filed about unlawful content in the published report, which it blames on an inconsistent system for platform users to submit complaints. For example, Facebook has created a special reporting form for complaints under the NetzDG, while a separate flagging mechanism is used to report infringements of Facebook's community standards. Problems arose because users wishing to report unlawful content in the sense of the NetzDG often did so via the standard flagging mechanism. The specially created NetzDG form was difficult to find on the provider's website. In view of discrepancies with the Community Standard Enforcement Report, the BfJ concluded that the transparency report published by Facebook was incomplete, and that, in particular,the obligation to provide information on the number of complaints that had resulted in content being deleted or blocked,asenshrined in Article 2(2)(7) NetzDG, had not been met. Facebook's own Community Standard Enforcement Report, a separate

report fromthe NetzDG transparency report, is designed to demonstrate its progress incombating content that is unlawful or in breach of its community standards. The purpose of the transparency report, namelyto provide as accurate an account as possible of the effectiveness of the complaints mechanism, had therefore been ignored.

The report had also failed to meet Facebook's obligations under Article 2(2)(4) NetzDG to provide information about the organisationand the procedures for handling complaints. The information published by Facebook failed to provide a rigorous and transparent account of how its internal systems were organised.

Facebook was also accused of reporting inaccurately on measures to report back to complainants (Article 2(2)(9) NetzDG). In the BfJ's view, the disclosures made did not show whether complainants were informed of the grounds for decisions taken on reported content.

Pressemitteilung des BfJ

https://www.bundesjustizamt.de/DE/Presse/Archiv/2019/20190702.html

Press release of the BfJ

NetzDG-Transparenzbericht von Facebook

https://fbnewsroomus.files.wordpress.com/2018/07/facebook_netzdg_juli_2018_deutsch-1.pdf

NetzDG-Transparenzbericht von Facebook

SPAIN

[ES] Acquittal of the four persons responsible for the largest pirated website in Spain

Miguel Recio
CMS Albiñana & Suárez de Lezo

The Criminal Court nº 4 of Murcia acquitted the administrators of the websites "filmsyonkis.es", "seriesyonkis.es" and "videosyonkis.es" from 2008 to 2014of a crime against intellectual property.

The judgement considered proven that the aforementioned pages contained links or hyperlinks, classified according to different criteria, preceded or not by a synopsis of the work and its cover, with a discussion forum, and limited themselves to redirecting visitors to external mega servers (mainly Megavideo and Megaupload) which host audiovisual works protected by intellectual property rights uploaded by unidentified third parties, with the works not too visible when searching directly on the mega server.

With regard to the facts, the judgement related that these websites did not contain any audiovisual content, but were limited to the publication of links that led to other servers where the works were hosted.Furthermore, no evidence was obtained that any of the defendants had accessed the mega server to upload the content of a movie whose link appeared later on its website. Furthermore, there is no record of any of the four defendants obtaining direct economic income derived from the number of downloads of the protected audiovisual material (benefits that were obtained by the uploader). Any income received was the indirect benefits derived from the advertising which appeared on the web pages in the form of a pop-up window or banners.

After an exhaustive analysis of the existing doctrine and jurisprudence on this matter, including even the most recent jurisprudence of the European Court of Justice, the court concluded that the proven facts did not fit the definition of a crime against intellectual property as contained in Article 270 of the Criminal Code before the reform operated in July 2015.

Sentencia nº 222/2019, de 21 de Junio de 2019, del Juzgado de lo Penal nº 4 de Murcia

http://www.poderjudicial.es/search/contenidos.action?action=accessToPDF&databasematch=AN&reference=7b38d7bf1b8a2d69&publicinterface=true&encode=true

Judgment nº 222/2019, of 21 June 2019, of the Criminal Court nº 4 of Murcia

[ES] Intellectual Property Commission orders the blocking of infringing websites

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European Audiovisual Observatory

In recent weeks, Spanish courts have authorised the implementation of different measures proposed by the *Sección Segunda de la Comisión para la Propiedad Intelectual* (the Second Section of the Intellectual Property Commission) – also known as the "Anti-Piracy Commission" – ordering operators to block access to websites that have illegally made available for download copyrighted content without the rights holders' authorisation. One case concerned the websites www.grantorrent.com and www.grantorrent.net, which illegally offered download links to hundreds of content material without authorisation. In another case, more than 60 websites linked to ThePirateBay were blocked at the request of the Intellectual Property Commission.

The Intellectual Property Commission is an administrative body attached to the Ministry for Culture and Sports, although it does not form part of the Ministry's organisational structure. Its main tasks are mediation, arbitration, tariff determination, tariff control and the safeguarding of intellectual property rights. The Commission also provides advice on any matters within its competence to the Ministry. The Second Section of the Commission on Intellectual Property aims at safeguarding intellectual property rights against infringement by those responsible for information society services, in the event that the latter (either directly or indirectly) act for profit or their activity has caused or is likely to cause pecuniary damage to rightsholders. Section Two acts exclusively at the request of a party, subject to the principles of legality, objectivity, proportionality and contradiction.

Tanto para la lucha contra la piratería: Se revalida el cierre de la web grantorrent.com

https://www.cineytele.com/2019/07/25/victoria-para-la-lucha-contra-la-pirateria-se-revalida-el-cierre-de-la-web-grantorrent-com/

Goal for the fight against piracy: The closure of the web grantorrent.com is revalidated

Más de 60 webs vinculadas a ThePirateBay serán bloqueadas a instancias de la 'Comisión Antipiratería'

http://www.culturaydeporte.gob.es/actualidad/2019/06/190624-60-webs.html

*More than 60 websites linked to ThePirateBay will be blocked at the request of the '*Anti-Piracy Commission*'*

[ES] Using a domain name for the purpose of selling it to the owner of a trademark is forbidden

Miguel Recio
CMS Albiñana & Suárez de Lezo

Several years ago, a person registered a domain name that included the name of a law firm, without using it. The law firm, incorporated as a company in 2015, was using the .eu country code Top Level Domain (ccTLD), but also wanted to register the .es ccTLD that was registered by that person.

The law firm contacted the domain owner in order to try to reach an agreement, but the domain owner instead asked for a high amount of money. The law firm filed a lawsuit against the domain owner.

The Commercial Court (*Juzgado de lo Mercantil*) nº 1 of Valencia ruled that the law firm was entitled to register and use a domain name that included its trademark. The court, in its judgement Nº 185/2019 of 22 May 2019, concluded that the owner of a trademark must be the rightful owner of the domain name that includes it and ordered its subrogation in the ownership of this domain name.

In 2003, the Spanish Supreme Court ruled that there is a subjective right of exclusive use of the trademark, which presents both a positive and a negative aspect. The positive aspect is that the owner of the trademark may use it for selling the trademark or for advertising purposes; the negative aspect is that the trademark owner may prohibit other people from using it.

Therefore, the law firm was able to use the .es ccTLD as it was the owner of the trademark included in the domain name.

Sentencia nº 185/2019, de 22 de Mayo de 2019, del Juzgado de lo Mercantil nº 1 de Valencia

http://diariolaley.laley.es/content/Documento.aspx?params=H4sIAAAAAAAEAMtMSbH1CjUwMDAzMTQzMrNUK0stKs7Mz7Mty0xPzStJBfEz0ypd8pNDKgtSbdMSc4pT1RKTivNzSktSQ4sybUOKSlMBAh9L2UUAAAA=WKE

Judgment no. 185/2019 of 22 May 2019 of the Commercial Court no. 1 of Valencia

FRANCE

[FR] Publication of controversial legislation creating a "GAFA tax"

Amélie Blocman
Légipresse

Act No. 2019-759 of 24 July 2019 “creating a tax on digital services and changing the trajectory of corporate tax cuts” was gazetted on 25 July 2019. The "GAFA tax", which was promoted by Minister of the Economy and Finance Bruno Le Maire, is based on European draft legislation that was not passed because of reticence on the part of several European Union member States. That leaves France as a pioneer.

The newly-created tax amounts to 3% of the turnover generated by certain digital activitiesin France. It covers revenue from targeted on-line advertising, connecting Internet users on platforms, and the sale of users’ data for advertising purposes. The tax is aimed at "digital giants"–companies with global turnover in respect of such services of EUR 750 million, corresponding to EUR 25 millionin France. The tax should therefore apply to about thirty corporate groups, including not only Google, Amazon, Facebook and Apple, but also Meetic and Airbnb. The tax is to be introduced provisionally, pending the conclusion of an international agreement within the OECD,which is expected before the end of 2020.

As soon as the legislation was adopted in France, there was lively reaction from the United States, with the announcement that the effects of the new French tax would be investigated. President Donald Trump threatened to retaliate by taxing French businesses. Despite the dissension between Washington and Paris, the Ministers of Finance of the G7 countries, meeting at the G7 summit in Biarriz end of August, eventually reached agreement on the need to set up a minimum global tax on companies in 2020, even if they are not physically present in any particular country. France undertook to abolish its "GAFA" tax and to reimburse the companies concerned for the difference between it and the future tax currently under discussion at international level at the Organisation for Economic Cooperation and Development (OECD).

Loi n° 2019-759 du 24 juillet 2019 portant création d'une taxe sur les services numériques et modification de la trajectoire de baisse de l'impôt sur les sociétés

https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038811588&dateTexte=&categorieLien=id

Act No. 2019-759 of 24 July 2019 “creating a tax on digital services and changing the trajectory of corporate tax cuts”

[FR] National Assembly adopts online hate speech bill

Amélie Blocman
Légipresse

On 9 July 2019, French MPs adopted a bill to combat online hate speech by 434 votes to 33, with 69 abstentions. The bill, called for by the President of the Republic and tabled by majority party MP Laetitia Avia, requires Internet platforms and search engines – if they meet various thresholds that will be set by decree – to remove or block content that is "obviously"illegal within 24 hours of it being reported, or risk a fine of up to EUR 1.25 million.

The content concerned is that which “obviously infringes the provisions of Article 6(I)(7)(3) of the Law ontrust in the digital economy (LCEN) and Article 33(3) and (4) of the Law of 29 July 1881 on the freedom of the press”. This includes content that infringes human dignity, condones crimes, or constitutes the provocation of and incitement to hatred, violence or insults on grounds of origin, race, religion, sexual orientation or gender identity. It also includes sexual harassment, child pornography and content related to the procuring or trafficking of human beings. However, racial, religious, homophobic or sexist discrimination, and the denial of crimes against humanity are not covered by the text at this stage. Anti-discrimination organisations, as mentioned in the 1881 press law, are entitled to exercise the rights granted to the plaintiff in cases involving the new offence of refusal to take down obviously hateful content.

The new law also increases platforms’ cooperation obligations(especially in terms of legal cooperation), requiring them to appoint a legal representative in France. It also makes provision for a standard mechanism by which to flagabuse, which should be directly accessible for Internet users. Platforms will be obliged to take all possible steps to prevent the redistribution of content defined as "online hate speech"and replace removed content with a message indicating that it has been taken down. Removed data will be kept for one year for the purposes of a criminal investigationaimed atestablishingwhether it is illegal or not.

In line with the Law against the manipulation of information of December 2018, the powers of the CSA (the French audiovisual regulator) have also been strengthened. The CSA is now responsible for regulating platforms in relation to the fight against hateful content and can fine them up to 4% of their global revenue if they breach their obligations. The law also steps up measures to combat the "mirroring"of hateful content that has been the subject of a final court decision.

The law also provides for the creation of a public prosecution authority and court specialising in the fight against online hatred, along with the development of the online complaint platform mentioned in the Law on 2018-2022 programming and judicial reforms that was adopted in March this year (new Article 15-3-1 of the Code of Criminal Procedure). MPs also voted for the creation of an "online hate observatory"which, in partnership with the operators, associations and

researchers concerned, will monitor and analyse the development of the kind of hateful content targeted by the law.

The Secretary of State for the Digital Economy, Cédric O, welcomed the vote, saying that it struck the right balance between freedom of expression and "effectiveness". Away from the Parliament, the text has been heavily criticised. In an open letter, the *Ligue des Droits de l'Homme*(Human Rights League), the *Conseil national du numérique (*National Digital Council) and the president of the *Conseil national des barreaux*(National Council of Bars) insisted that "the courts should be at the heart of the process for classifying content and deciding what should be taken down or blocked". Meanwhile, the *Commission nationale consultative des droits de l'homme*(National Consultative Commission on Human Rights – CNCDH) expressed concern about the new law's impact on fundamental freedoms. Although it supported the law's objective, it called for a full review of the bill, which it considered "inadequate'and "unsuitable".

Because the government has applied the expedited procedure to the bill, there will only be one reading in each chamber, with the Senate set to examine it after the summer break.

Proposition de loi visant à lutter contre les contenus haineux sur internet, adoptée par l'Assemblée nationale en première lecture.

http://www.assemblee-nationale.fr/15/ta/ta0310.asp

Proposal for a law to combat hate content on the Internet, adopted by the National Assembly at first reading

[FR] Neighbouring rights: France is the first country to transpose the European Copyright Directive

Amélie Blocman
Légipresse

The French Minister of Culture, Franck Riester, has welcomed the adoption of the law of 24 July 2019 creating a neighbouring right for news agencies and news publishers, noting that “France is the first country to transpose the EU directive on neighbouring rights [Directive 2019/790 on copyright and related rights in the Digital Single Market] into national law.”

In accordance with Article 15 of the directive, the law provides news publishers and news agencies with the right to remuneration for any reproduction and communication to the public of news content in digital form. The rights provided for expire two years after 1 January of the year following the date on which a press publication is first published.

The law’s scope includes photographs and videos, as well as any use (even partial) of publications that may give rise to remuneration. In accordance with the directive, the rights do not extend to hyperlinking and the use of “individual words or very short extracts” of press publications. It is up to the courts to define these terms in practice. Periodical publications published for scientific or academic purposes, such as scientific journals, are also excluded.

The remuneration due in relation to these neighbouring rights is “based on income from exploitation of any kind, direct or indirect or, failing that, a lump sum”. It should in particular take into account “the human, material and financial investments made by news publishers and news agencies, the contribution of press publications to political and general news, and the extent to which press publications are used by online services that communicate to the public”. Professional journalists and other authors of works contained in press publications are entitled to an “appropriate and fair” proportion of such remuneration. This proportion, and the way it is distributed among the authors concerned, must be fixed through a company-level agreement or, failing that, a collective bargaining agreement.

As regards other authors, a specific agreement negotiated between professional organisations of press companies and representative agencies on the one hand and professional authors’ or collective management organisations on the other will determine the “appropriate and fair” proportion of the remuneration due to them under neighbouring rights. Under the law, this additional remuneration does not have the nature of a salary.

If no agreement is reached in the six months following the publication of the law, one of the stakeholders will be able to refer the matter to a committee (established under the law) composed of an equal number of representatives of publishers and agencies on the one hand and journalists and authors on the other,

and chaired by a state representative. This committee will be responsible for seeking a compromise with the parties in order to conclude an agreement. If no agreement can be reached, it will fix the appropriate level of remuneration due under these neighbouring rights, and the means of distributing it among the authors concerned. Rightsholders will need to be sent, at least once a year, "up-to-date, relevant and full information on the method to be used to calculate the appropriate and fair proportion of remuneration due to them".

Stakeholders are therefore now being urged to study the new law. "What happens next will depend on the unity of the press. The publishers hold the balance of power under the law. The second round is now under way," explained the law's author, Senator David Assouline. With this in mind, before the law was published, the board of directors of the General Press Alliance on11 July set up an *ad hoc* working group to implement neighbouring rights. When it begins work in September, among its tasks will be: determining the remuneration base and methods, appointing a management company, negotiating with platforms, and establishing rules for distribution among publishers.

Loi n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse, JORF, 26 juillet 2019

https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038821358&dateTexte=&categorieLien=id

Law No. 2019-775 of 24 July 2019 creating a neighbouring right for the benefit of news agencies and press publishers, JORF, 26 July 2019

[FR] Next steps towards transposing Copyright Directive into French law through the Audiovisual Reform Bill

Amélie Blocman
Légipresse

The Law creating a neighbouring right for news agencies and news publishers will not be the last piece of copyright legislation in France. At the start of July, the Minister of Culture, Franck Riester, announced the “next stages” of work to transpose the EU Copyright Directive. “The government is continuing to work on all the other topics in an effort to quickly transpose the essential provisions,” he said. Referring to Articles 17 and 18 of the new law, which aims to oblige online platforms to pay fair remuneration to creators for the content that they redistributeand fair and proportional remuneration to authors, the minister said that draft texts were currently being discussed with the industry.

Franck Riester also listed the other copyright-related topics that he considered "essential": “Safeguarding the ReLIRE project [...] on the digitisation of out-of-print books, which we need to bring into line with European law for it to continue; adapting the provisions of the law on freedom of creation concerning image referencing services so that they also comply with European law and can be used effectively; and the ‘direct injection’ principle of the so-called ‘Cabsat directive’.” During the debates, the minister also mentioned the transposition into national legislation of the exception for text-mining for the purposes of scientific research.

The Prime Minister added that all these provisions should be included in the audiovisual bill to be presented to the Council of Ministers at the end of October and examined by the National Assembly in January 2020.

At the same time, the*Conseil supérieur de la propriété littéraire et artistique* (Higher Council for Literary and Artistic Property – CSPLA), which advises the Ministry of Culture on these issues, set up a study group to assess the conditions in which a compulsory collective management system could be created “in order to ensure fair remuneration of photographers and artists whose works are reproduced and communicated to the public, without their prior consent, by automated image referencing services.” Although such a scheme was brought in under the law of 7 July 2016 on freedom of creation (Art. L. 136-4 of the Intellectual Property Code), the implementing decree was never adopted. Since then, Directive 2019/790 of 17 April 2019 has supported "the objective pursued by the legislature through various measures designed to increase the possibility for creators to be remunerated by the digital platforms that exploit their works.” The Ministry of Culture therefore wishes to amend the measure that was adopted in 2016 “in order to ensure its effective implementation”. As well as the proposed compulsory collective management system, the study group was invited to examine "alternative systems". The results are expected by 31 October.

Discours de Franck Riester, ministre de la Culture, prononcé à l'occasion de l'examen au Sénat de la proposition de loi tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse

https://www.culture.gouv.fr/Presse/Discours/Discours-de-Franck-Riester-ministre-de-la-Culture-prononce-a-l-occasion-de-l-examen-au-Senat-de-la-proposition-de-loi-tendant-a-creer-un-droit-vo

Speech by Franck Riester, Minister of Culture, on the occasion of the Senate's consideration of the bill to create a neighbouring right for news agencies and press publishers

UNITED KINGDOM

[GB] Advertising Standards Authority enforces new ad rule

David Goldberg
deeJgee Research/Consultancy

Generally, under Section Four of the Broadcast Code of Advertising Practice, advertisements must not be harmful or offensive. Advertisements must take account of generally accepted standards in order to minimise the risk of causing harm or serious or widespread offence. The context in which an advertisement is likely to be broadcast must be taken into account in order to avoid unsuitable scheduling.

The newly-added rule states that “Advertisements must not include gender stereotypes that are likely to cause harm, or serious or widespread offence”.

During August, the Advertising Standards Authority issued three adjudications concerning this rule.

One concerned a television ad and video-on-demand ad for the soft cheese, Philadelphia; another involved atelevision ad for the Volkswagen eGolf car. A third involved five complainants, who believed that an ad for Buxton Water perpetuated harmful gender stereotypes by contrasting the men and the woman undertaking activities that they considered were stereotypically associated with each gender; this complaint was not upheld.

The first two cases ended in the finding of a breach of the rule, and the companies in question were ordered as follows:

Mondalez
The ad must not appear again in its current form. The manufacturers of Philadelphia, Mondelez Ltd, were instructed to ensure that their advertising did not perpetuate harmful gender stereotypes. (Such stereotyping included suggesting that stereotypical roles or characteristics are always uniquely associated with one gender.)

Volkswagen Group UK
The ad must not appear again in the form complained about. The Volkswagen Group UK Ltd was told to ensure that their advertising did not present gender stereotypes in a way that was likely to cause harm, including by directly contrasting male and female roles and characteristics in a manner that implied they were uniquely associated with one gender.

ASA BCAP Rule 4.14

https://www.asa.org.uk/type/broadcast/code_section/04.html

What do the recent ASA rulings on gender stereotyping mean for your ads?

https://www.clearcast.co.uk/blog/what-do-the-recent-asa-rulings-on-gender-stereotyping-mean-for-your-ads/

ASA Ruling on Volkswagen Group UK Ltd

https://www.asa.org.uk/rulings/volkswagen-group-uk-ltd-g19-1023922.html

[GB] Ofcom publishes two reports concerning public service broadcasters

Julian Wilkins
Wordley Partnership and Q Chambers

Ofcom has published two reports concerning public service broadcasters (PSBs) in fulfilment of its obligation under the Digital Economy Act 2017 to review the prominence of PSBs. The first report, entitled "Review of Prominence for Public Sector Broadcasting", explains the regulator's recommendations to government to ensure that PSBs remain easy for TV viewers to find and watch on connected services and devices. The second report, "The Future of Public Service Media", gives Ofcom’s view as to the future of public service media.

In the first report, Ofcom proposes legislation to guarantee public service broadcasters a protected prominence on TV sets and to help the PSBs compete against online competitors such as Netflix, Amazon and YouTube. PSBs such as the BBC, ITV, Channel 4 and Channel 5 must already be displayed prominently in the electronic channel guides of cable and satellite television services such as Sky and Virgin because of their public remit to provide news, weather and other services. Viewers should be able to find PSB content easily on the homepage of connected TVs, for example, set-top boxes and streaming sticks; other TV platforms may be subject to these prominence rules in due course as technology and viewing habits change, for instance ITV’s and the BBC’s recently introduced BritBox.

However, a declining interest in traditional television, particularly by younger audiences, has encouraged the PSBs to seek greater surety about maintaining their prominent position on Internet-connected TV sets which are free to display streaming applications such as Amazon Prime.

Ofcom indicated that some PSBs might have to improve their on-demand apps in order to qualify under new prominence rules to deliver an appropriate range of high-quality PSB content around particular genres, such as children’s content (an area in which Ofcom wishes PSB’s to invest more resources), current affairs and factual content, and programmes made specifically for UK viewers in order to fulfil their obligations under the Communications Act 2003.

Ofcom’s report says flexibility is required to adapt legislation as new technology emerges and viewing habits change. The regulator wishes to ensure that PSB channels remain easy to find on TV guides.

As part of the report, Ofcom will review the future of PSBs in an online world and publish its conclusions by the end of the year. The regulator will engage with government and industry to discuss Ofcom’s recommendations and next steps. Ofcom proposes that the government introduce new rules on prominence for modern viewing platforms in order to support traditional broadcasters.

The second published report, "The Future of Public Service Media", outlines Ofcom's plans to provide a forum on the future of public service media, appraise the PSBs' performance over the last five years and summarise the work Ofcom is undertaking to support PSBs. The report complements current activities such as the House of Lords Communications Committee enquiry into the future of public service broadcasting in the context of Video on Demand (VOD) and other pay-per-view content.

PSBs remain notable for producing a broad range of distinctive high-quality TV programmes that appeal to and reflect diverse communities and regions. Ofcom observed, "they help to cohere our society, providing shared experiences of drama, entertainment and learning." According to Ofcom's report, traditional TV and radio remain the most popular form of viewing and listening. However, there is a gradual shift towards well-funded, on-demand broadcasters with global reach such as that of Netflix as compared to PSBs who are increasingly subject to costs and revenue pressures, making content harder to finance. Furthermore, UK adults now watch on average more than half an hour of YouTube videos per day. Ofcom considers that PSBs need to meet these challenges, including encouraging younger audiences, and to be able to compete generally against the global digital programme providers; Ofcom wishes to ensure PSB is maintained and strengthened.

Ofcom's The Future of Public Service Media

https://www.ofcom.org.uk/__data/assets/pdf_file/0022/155155/future-public-service-media.pdf

Ofcom's recommendations - Review of Prominence for Public Service Broadcasting

https://www.ofcom.org.uk/__data/assets/pdf_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf

[GB] RT fined GBP 200 000 for breach of due impartiality rules but broadcaster challenges decision

Julian Wilkins
Wordley Partnership and Q Chambers

RT has been fined GBP 200 000 by Ofcom following its previous decision (see Iris 2019-3/17) that the broadcaster had breached the regulator's due impartiality Code of Conduct rules concerning seven programmes broadcast by the channel over a period of approximately seven weeks between 17 March 2018 and 4 May 2018, primarily concerning the poisoning of Sergei Skripal and his daughter, Yulia, in Salisbury on 4 March 2018. One of the seven programmes concerned coverage of the Syrian conflict and adopting a pro Russian stance without acquiring alternative or opposing opinions. The Ofcom licence for the RT service is held by the autonomous non-profit organisation TV-Novosti.

In total, Ofcom investigated ten RT programmes broadcast between March and May 2018, concluding that seven breached due impartiality rules regarding matters of political controversy. The programmes found in breach were Sputnik, RT, 17 March 2018, 7.30 p.m.; News RT, 18 March 2018, 8 a.m.; Sputnik, RT, 7 April 2018, 7.30 p.m.; Crosstalk, RT, 13 April 2018, 8.30 p.m.; Crosstalk, RT 16 April 2018, 8.30 p.m.; Crosstalk, RT, 20 April 2018, 8.30 a.m.; News RT, 26 April 2018, 8 a.m.

Two of the breaches were related to programmes hosted by the former politician George Galloway, a regular presenter on the channel, who cast doubt on the link between the Salisbury poisonings and Russia.

The fine follows Ofcom's decision earlier this year that RT had breached Rule 5.1 of the Ofcom Code of Conduct which states: "News, in whatever form must be reported with due accuracy and presented with due impartiality."

Furthermore, Rule 5.12 states: "...due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service...in each programme or in clearly linked and timely programmes."

The serious breaches of the Code meant Ofcom had a number of ways of punishing RT, including revoking its licence to broadcast in the United Kingdom. Instead, the regulator concluded it was more just to impose a substantial fine and require RT to broadcast a summary of the findings, in a form and on dates to be determined by Ofcom.

Ofcom said, "Taken together, these breaches represented serious and repeated failures of compliance with our rules. We were particularly concerned by the frequency of RT's rule-breaking over a relatively short period of time."

Ofcom decided not to revoke the licence as there had been no further allegations of breaches of impartiality against RT to date. Also, Ofcom took into account the

additional steps RT had taken to ensure its compliance since the launch of the regulator's investigations.

However, RT will not have to pay the fine and broadcast Ofcom's ruling immediately, since it is challenging the initial ruling through a judicial review for which permission was granted by the English High Court in June 2019. The judicial review trial is expected to occur before the end of the year.

When opposing the complaints of breaching Ofcom's due impartiality rules, RT has previously argued that its viewers expect to see a pro-Russian viewpoint when they watch the channel.

Ofcom recognised balancing the broadcaster's and audience's right to freedom of expression under Article 10 of the European Convention of Human Rights with compliance with impartiality rules.

Issue 369 of Ofcom's Broadcast and On Demand Bulletin

https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2019/ofcom-fines-rt

Ofcom fines RT GBP 200 000

https://www.ofcom.org.uk/about-ofcom/latest/media/media-releases/2019/ofcom-fines-rt

[GB] UK Regulator Expands Media Literacy Activities

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On 18 July 2019, Ofcom, the UK's communications regulator, announced the launch of a media literacy network and the creation of a media literacy advisory panel as part of its "Making Sense of Media" programme.

As Ofcom points out, "in an online environment, where the possibility for direct content regulation diminishes, the need for a media-literate public increases." The regulator's "Making Sense of Media" programme aims to help adults and children in the UK acquire the necessary skills, knowledge and understanding to make use of traditional and new communication services. The programme builds on a significant body of research into media use and media reception, and relies on a strong stakeholder network for sharing information and ideas.

The newly launched programme will bring together expert individuals and organisations in order to develop effective online media literacy interventions. It is anticipated that the network will be involved in a variety of related activities such as informing people of the benefits and risks of online activities, sharing findings regarding individuals' understanding, and use of electronic media, and identifying priority areas for robust research.

The Ofcom programme will also be supported by the Making Sense of Media Advisory Panel, which will meet quarterly to debate and inform the development of Ofcom's media literacy policy. Although the panel is still taking shape, it is currently composed of 11 expert representatives from the industry, academia and the third sector. Its members are expected to identify new research areas, share best practice from across the UK and internationally, and consider the best ways to evaluate the impact of media literacy activities on people's skills and critical thinking.

The establishment of the advisory panel and network are welcome steps forward in promoting citizens' and consumers' media literacy. With these new initiatives, Ofcom joins other national regulatory authorities that have previously led or supported the development of media literacy networks, such as the Broadcasting Authority of Ireland, Croatia's Agency for Electronic Media and the Norwegian Media Authority.

Ofcom - Making Sense of Media

https://www.ofcom.org.uk/research-and-data/media-literacy-research

IRELAND

[IE] Broadcasting Authority publishes submission to public consultation

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On 24 June 2019, the Broadcasting Authority of Ireland (BAI), the country's independent regulator for radio and television broadcasters, published its submission to the Irish Government's "Public Consultation on the Regulation of Harmful Online Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive" (AVMSD (EU) 2018/1808). The public consultation was initiated by the Communications Minister, Richard Bruton, in March 2019, in response to the European Council's adoption of the revised AVMSD, which all EU member states are required to transpose into law by September 2020. The purpose of the consultation was to gather the views of all relevant stakeholders on key issues as part of the development of an Online Safety Act. The consultation sought views under "Four Strands", representing the different services and regulatory systems to be established or updated, comprising: "National online safety laws to apply to Irish residents; the Regulation of Video Sharing Platforms (VSPs); the Regulation of On-Demand Services; and Minor Changes to the Regulation of Traditional Television.' The BAI, in its extensive submission to the consultation, sets out its proposed regulatory approach in respect of the four key strands outlined in the consultation document.

The BAI submits that the statutory regulation of online videos and harmful online content for Irish residents can be "most effectively accomplished through the introduction of a single, comprehensive regulatory scheme and regulator" and that this would provide "an opportunity to develop a vision for the further regulation of media content across all platforms and services which at its heart seeks to serve and protect audiences and users in the new media environment." According to the BAI, the regulator should have regard to the wider objectives of content and services that serve citizens, such as "ensuring Diversity and Plurality, the promotion of Freedom of Expression, sustaining and enhancing democratic discourse and facilitating linguistic and cultural diversity." In addition, the BAI proposes that "a single regulator would provide consistency in the regulation at a time when the same content can be disseminated by multiple means." Furthermore, the regulator could act as a single point of contact for all other European regulators and various stakeholders thereby improving efficiency. The BAI is of the view that "given its extensive regulatory experience in the area of audio-visual regulation and its application of content principles across the sector," it would be able to play a "leading role" in this scheme. Moreover, the BAI proposes that the new regulator "should have the power to rectify online harms by issuing harmful online content removal notices on behalf of Irish residents that

have been directly affected by harmful content." The BAI, in its submission, also proposes "the development and enforcement of an online safety code, which would be applicable to key Irish online service providers in order to minimise harms generally."

On the issue of video-sharing platforms, the BAI notes that most of Europe's largest providers of video-sharing platform services, such as Facebook, Google and Twitter, are based in Ireland and submits that these platforms should be "directly regulated by a statutory regulator" and that the AVSMD rules should be implemented through legislation and statutory codes. The Broadcasting Authority is of the view that the "media regulator should be responsible for the development of high-level rules and regulation" and also for the assessment of the measures put in place by VSPs to implement those rules. Furthermore, the BAI considers that "a robust and transparent complaint system and independent appeals mechanism" would form part of that regulatory framework.

On the issue of the regulation of on-demand services, the BAI, in its submission, notes that the revised AVMSD "envisions a more level playing field in regulation between television broadcasting services and on-demand services like the RTE player or YouTube channels". The Broadcasting Authority proposes that the most appropriate means of introducing the revised Directive's new rules for on-demand services is through statutory regulation and codes, with the statutory regulator being assigned to the role of overseeing on-demand services.

On the issue of minor changes to the regulation of linear television broadcasting, the BAI states that "viewers and listeners in Ireland are served by a wide range of linear broadcasters all of whom play a valuable role in providing choice and diversity for Irish audiences." The Broadcasting Authority observes that 'the revised AVMSD requires member states to ensure a more level playing field in the audiovisual marketplace by increasing standards of protection rather than weakening them." Accordingly, the BAI proposes that "linear broadcasting should continue to be regulated as before, except to the extent that changes may be made pursuant to the revised Directive."

***BAI - Submission to the Department of Communications, Climate Action & Environment Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Service Directive*'**

http://www.bai.ie/en/download/134036/

[IE] Communications minister publishes Broadcasting Amendment Bill and announces reform of TV licence fee system

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On 2 August 2019, the Minister for Communications, Climate Action and Environment, Richard Bruton TD, published the Broadcasting (Amendment) Bill 2019 (hereinafter 'the Bill'). The purpose of the Bill is to make amendments to certain provisions of the Broadcasting Act 2009. The Bill comprises eleven sections and contains several key provisions.

The Bill makes three main amendments to section 33 of the Broadcasting Act 2009, which is the section that authorises the Broadcasting Authority of Ireland (BAI), the independent regulator for radio and television broadcasters, to impose a levy on broadcasters to meet its expenses. Under the current provisions, the levy imposed by the BAI can only be raised to meet 'expenses properly incurred', which in operational terms, leaves the BAI without adequate working capital at certain points of the levy cycle. Section 3 of the Bill aims to allow the BAI to impose the levy not only to meet expenses properly incurred, but to facilitate adequate working capital so that it can meet its day-to day operational requirements.

Section 5 of the Bill amends section 123 of the Broadcasting Act 2009, and makes provision enabling the BAI to be allocated public funding from television licence receipts, to be used towards meeting the expenses incurred by the BAI in conducting its regulatory functions. Section 5 of the Bill also seeks to cap this contribution by 50 per cent in order to ensure that industry continues to pay a contribution towards the BAI's expenses. Furthermore, taking into account the United Kingdom Referendum result to leave the European Union and the potential for broadcasters currently based in the UK to locate in Ireland, section 33 of the Broadcasting Act 2009 is being amended in section 3 of the Bill so as to apply to 'content provision contract holders', so that they can be included under the scope of the BAI levy where necessary. Further amendments to section 33 of the Broadcasting Act 2009 also provide for criteria on which levy exemptions or deferrals can be granted by the BAI to ensure that section 71 of the Broadcasting Act 2009, which establishes the right of new entrants seeking to establish and engage in television broadcasting in Ireland, continues to accommodate the type of audiovisual services for which it was originally designed (namely, new forms of audiovisual media that might have a smaller audience appeal).

Section 7 of the Bill also contains a new section to provide for the establishment of a new scheme under the 'Broadcasting Funding Scheme' administered by the BAI, which would allow for the provision of grants to journalists in local or community radio stations as a means of promoting the development of good journalistic practices and standards in local radio.

The Broadcasting (Amendment) Bill 2019, which has been approved by the Irish Government, will be presented before Dail Eireann, the lower house and principal chamber of the *Oireachtas* (Irish legislature), in the Autumn.

On 2 August 2019, the Minister for Communications, Richard Bruton, also made an announcement regarding proposed changes to the manner in which the television licence fee is to be collected in Ireland in the future. The minister noted that 'due to the nature of technological change and the movement towards digital devices' the design of the television licence fee must change. The minister stated that the Irish Government would accept the recommendations of the Working Group on the Future of Public Service Broadcasting, a cross-departmental working group established by the government in 2018, to examine options for the collection of the TV licence fee or its replacement. In April 2019, the Working Group, reporting to the minister, recommended that the collection of the TV licence fee be put out to public tender later in 2019. According to the Working Group, a five year contract for the service is required in order to make it feasible for the successful tender to invest in database and collection improvements.

Minister Bruton stated that the Irish Government also agreed that following the end of the five year contract period, the licence fee should be replaced by 'a device independent broadcasting charge which takes account of technological change and will enable the sustainable funding of public service content in the longer term.'

Finally, Minister Bruton also announced a review of the Broadcasting Act 2009 in order to evaluate the proportion of the television licence revenue which is allocated to the Sound and Vision Scheme which supports the independent sector and native Irish content and which is administered by the BAI. Under section 156 of the Broadcasting Act 2009, seven per cent of the net television licence receipts (approximately EUR 14.5 million) are allocated to the Broadcasting Fund, from which the Sound and Vision Scheme is funded. Increasing the seven per cent of licence fee funding would increase support to the independent broadcasting sector and incentivise the production of desirable public service content across the sector.

The review of the Broadcasting Act 2009 will also consider the minimum amount of funding that public service broadcaster RTÉ is obliged to spend on commissioning external content. In 2018, this amounted to EUR 39.7 million. Accordingly, increasing this amount would provide an important stimulus to the independent production sector.

Broadcasting (Amendment) Bill 2019 [No. 64 of 2019] 31 July 2019

https://data.oireachtas.ie/ie/oireachtas/bill/2019/64/eng/initiated/b6419d.pdf

Broadcasting (Amendment) Bill 2019 [No. 64 of 2019] 31 July 2019 - Explanatory Memorandum

https://data.oireachtas.ie/ie/oireachtas/bill/2019/64/eng/memo/b6419d-memo.pdf

ICELAND

[IS] The national lottery draw on the Icelandic National Broadcasting Service: Advertisement but not sponsored content

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The Media Commission (Fjölmiðlanefnd), Iceland

In a decision of 17 May 2019 the Icelandic Media Commission came to the conclusion that the national lottery draw in Iceland should be regarded as advertising and thus should count towards the total amount of advertising minutes permitted within an hour. The case is considered to be a landmark case since the national lottery draw has been allowed for decades without the event being categorised as a "commercial communication".

In 2018 the Media Commission received a complaint from a commercial media company concerning a possible breach of advertising rules in connection with the national lottery draw, which is available on the public service broadcaster RÚV's main television channel. According to the complaint, the national lottery draw should be regarded as advertising and thus count towards the total amount of advertising minutes permitted within an hour.

Under law, RÚV may broadcast eight minutes of advertising every hour (compared to the 12 minutes rule that applies to commercial broadcasters). Furthermore, RÚV also has to abide by stricter provisions on sponsorship compared to those that apply to commercial broadcasters. Thus, RÚV is only allowed to sponsor major international or national events and national sports events.

The national lottery draw, Lottó, is broadcast on RÚV every Saturday, and RÚV receives payments from the owner of the Lottó trademark in exchange for the broadcasting time on the basis of a contract between the two parties. In its decision, the Media Commission considered whether the national lottery draw should be categorised as advertising, sponsored content or something else. It came to the conclusion that the lottery draw should be categorised as advertising, owing to the presentation of information regarding ticket prices, expected prizes in other related lottery games (Vikinglotto, Eurojackpot and Joker) and information on where to buy tickets for the national lottery draw and other related lottery games. According to the Media Commission's decision, this part of the presentation did not have any general information value for the public. Its purpose was first and foremost to draw attention to the registered trademarks of Lotto, Vikinglotto, Eurojackpot and Joker, and to encourage viewers to purchase tickets in the lottery games.

The decision had an impact on both the public service broadcaster and one of the commercial broadcasters, since the national lottery draw is also shown on the

biggest commercial channel, Channel 2.

Álit fjölmiðlanefndar vegna Lottó-útdráttar Íslenskrar getspár á RÚV

http://fjolmidlanefnd.is/2019/05/17/alit-fjolmidlanefndar-vegna-lotto-utdrattar-islenskrar-getspar-a-ruv/

Press release of 17 May 2019

ITALY

[IT] Dailymotion not protected by the E-Commerce Directive

Ernesto Apa & Filippo Frigerio
Portolano Cavallo

With a landmark decision published on 12 July 2019, the Court of Rome found Dailymotion SA (Dailymotion) liable for copyright infringement against Reti Televisive Italiane S.p.A. (RTI) and condemned it to pay EUR 5.5 million in compensation for damages.

The judges also ordered Dailymotion to (i) remove from its services all RTI's audiovisual content examined during the proceedings; (ii) abstain from further exploiting for commercial purposes the same audiovisual content; (iii) pay EUR 5 000 for any future infringements; and (iv) pay the legal fees and expenses. In addition, RTI has been authorised to publish the decisive part of the judgment (so-called PQM) in the paper and online editions of three major Italian newspapers (*Il Corriere della Sera*, *Il Sole 24 Ore*, and *Il Giornale*) and on Dailymotion's homepage, at Dailymotion's expense.

The case arose when RTI filed a law suit against Dailymotion,requesting that the latter be condemned for copyright infringement in connection with 995 pieces of content, hosted on its platform, depicting audiovisual content for which RTI claimed copyright. Dailymotion first objected on jurisdiction grounds, moving to dismiss the case on the ground that the Italian courts lacked jurisdiction. On the merits, Dailymotion claimed it was a hosting provider, protected by the 2000/31/EC directive's safe harbor (the E-Commerce Directive), and cited French case precedents confirming its qualification. Dailymotion also requested that the court refer the case to the Court of Justice of the European Union, as a matter of interpretation of the directive.

Consistently with its numerous case precedents on this specific issue, the Court of Rome dismissed the lack of jurisdiction objection in light of Article 5(3) of Regulation No. 2001/44/EC (Brussels I regulation) and Sections 78-*ter*and 79 of the Italian Copyright Law (Law No. 633/1941).

On the merits, the court analysed the European and national framework concerning Internet service providers. In particular, the court took into account the E-Commerce Directive and its national implementing instrument (that is, Legislative Decree No. 70 of 2003), as interpreted by the European Court of Justice, as well as the recent Italian Court of Cassation Decision No. 7708/2019 in the *RTI v. Yahoo!*case.

The main points that led to the final decision can be summarised as follows:

Article 14 of the E-Commerce Directive applies only to passive hosting providers. Passive hosting providers are those services of a "mere technical, automatic and passive nature" (recital 42 of the E-Commerce Directive). Active hosting providers cannot benefit from the safe harbor defence and fall outside the boundaries of the E-Commerce Directive.

The respondent, namely Dailymotion in this case, was the best candidate to submit evidence capable of demonstrating whether its activities could qualify it as an active or passive hosting provider, for the purposes of Article 14 of the E-Commerce Directive. Thus, the question of whether the exemption from liability applied was to be ascertained on the basis of the evidence submitted by the respondent, pursuant to the proximity of evidence principle.

That being said, the court was open to the possibility of one service qualifying as both an active and passive hosting provider, in connection with different activities carried out. On the basis of both the evidence submitted by the parties and the court-appointed expert's report, the panel of judges considered more likely than not that Dailymotion carried out an active role in connection with RTI's audiovisual content.

The copyrighted material was reported to Dailymotion by RTI with an *ex parte* communication and the latter failed to act. Consistently with its previous case law, the court did not consider decisive the circumstance that RTI's reports did not include the content's URLs. Thus, Dailymotion was declared liable for copyright infringement and the court condemned it to pay EUR 5.5 million.

This amount was calculated using the hypothetical licence fee criterion, which the Court of Rome had already applied in many other similar cases. Interestingly enough, the court determined the amount not from the moment the audiovisual content was reported, but from the instant it was uploaded to the platform.

Tribunale di Roma, sentenza n. 14757/2019 pubblicata il 12 luglio 2019 (R.G. 24711/2012)

Tribunale di Roma, judgment no. 14757/2019 published on 12 July 2019 (R.G. 24711/2012)

[IT] Italian DPA issues EUR 1 million fines against Facebook over Cambridge Analytica scandal

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On 14 June 2019 the *Garante per la protezione dei dati personali* (Italian Data Protection Authority – *Garante*) issued a EUR 1 million fine against Facebook Italy S.r.l. and Facebook Ireland (together "Facebook") in relation to the Cambridge Analytica case.

Specifically, the *Garante* took action following the news that Facebook had communicated its users' personal data to Cambridge Analytica, a third company providing analytics services. The *Garante* found that the personal data of 57 Italian users (who downloaded the app "Thisisyourdigitallife") had been unlawfully communicated to Cambridge Analytica. For this reason, the Garante had already banned Facebook from processing the data of Italian users and sanctioned Facebook with a fine amounting to EUR 52,000 (by decisions issued on 10 January 2019 and on 28 March 2019).

In the decision of June 2019, the *Garante* found that Cambridge Analytics had the possibility to access the personal data of the Facebook contacts ("friends") of the abovementioned users through the tool "Facebook login". In fact, following the use of this tool by those 57 Italian users, Cambridge Analytica had received personal data (including sensitive data) regarding 214,077 users. The Garante found that such communication was unlawful, since: (i) the data subjects had not been properly informed of the possibility that, by adding a contact on Facebook, their data could be communicated to third parties following the use of the "Facebook login" function by their contact, and (ii) they had not had the possibility to express consent to such communication of data in the form of an "opt-in".

To calculate the amount of the sanction, the Garante considered that the conduct had amounted to a serious infringement, as it concerned a database of "particular significance" (since the database contained a considerable amount of up-to-date data constituting a representative part of the overall Italian population). The Garante also took into consideration Facebook's economic size and the fact that Facebook had complied with the prescriptions provided by the *Garante* on January.

The *Garante* based its decision solely on the Italian Data Protection Code (Legislative Decree no 196/2003). Indeed, the facts underlying the fines took place before the enactment of the European General Data Protection Regulation n. 679/2916 (GDPR) and the entry into force of the implementation of Legislative Decree no. 101/2018, which accordingly are not applicable to the facts at hand.

The *Garante* affirmed its jurisdiction over the Cambridge Analytica case on the basis of the following arguments: (a) the activity of Facebook Ireland was directed

at Italian users and was carried out through an Italian subsidiary (i.e. Facebook Italy); and (b) Facebook Italy S.r.l. is the controller of the data communicated to Cambridge Analytica, as it is a company that markets advertising space, and the collection of personal data of users is included in the marketing activities of third parties developing external apps.

Ordinanza ingiunzione nei confronti di Facebook Ireland Ltd e Facebook Italy s.r.l. - 14 giugno 2019

https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9121352

Order injunction against Facebook Ireland Ltd and Facebook Italy s.r.l. - 14 June 2019

NETHERLANDS

[NL] Online news platform entitled to Copyright Act exception on portraits

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On 12 June 2019, the Amsterdam District Court delivered a ruling on copyright and the use of portrait photographs in online news articles. In 2013 the claimant, a photographer, was asked by a third party to photograph an economist/journalist for an interview. Separately, the portrait was used several times on the website of Dutch News, a small online news outlet. The economist had sent his portrait photograph to Dutch News to accompany online news articles. The news platform used the portrait photograph at least 20 times on its website. The photographer who created the photograph, however, considered this use to constitute an infringement of his copyright. He wrote a letter to Dutch News asserting his copyright, pointing out that he had not given permission for the use of the portrait photograph on the website. In response, it was removed from the website.

The photographer requested the District Court of Amsterdam to award him damages in respect of the infringement of his copyright and the alleged infringement of his moral right, as his name was not mentioned in conjunction with the publication of the photographs. Dutch News claimed it was allowed to use the picture, citing Article 19 of the Dutch Copyright Act (*Auteurswet*). This provision contains a special rule regarding copyright in respect of portraits. There is no copyright infringement when a photographic portrait is used in a newspaper or journal with the permission of the person photographed. This rule applies as long as the photographer is credited, provided that their name is mentioned on or with the work. This provision only applies to portraits created as a result of an assignment, by or on behalf of the persons portrayed, or given to the maker on their behalf. Article 19 of the Dutch Copyright Act refers to the use of portrait photographs in newspapers and journals. However, the Court held that this provision applies equally to television news bulletins and websites.

The name of the photographer was not given next to the portrait together with the publication of the portrait. The Court agreed with Dutch News that this was not required as the name of the photographer was not provided with or on the work itself. The photographer furthermore claimed that the photograph was not made by or on behalf of the person portrayed. Here too, the Court sided with Dutch News and found that even though the assignment was given by a third party, the portrayed person had a strong interest in the creation of the photograph, and as such can be understood to have been made on his behalf.

The Amsterdam District Court held that there had been no copyright infringement, as the use of the picture on the website of Dutch News falls fully within the scope of Article 19 of the Dutch Copyright Act.

Rechtbank Amsterdam, 17 juli 2019, ECLI:NL:RBAMS:2019:4919

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2019:4919

Amsterdam District Court, 17 July 2019, ECLI:NL:RBAMS:2019:4919

[NL] Targeted television advertising by KPN is permissible under the Media Act

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On 11 June 2019, the *Commissariaat voor de Media* (the Dutch Media Authority - CvdM) delivered a decision ruling that the planned introduction of targeted television advertising by the telecommunications company KPN and media company Talpa was permissible under the Media Act (*Mediawet*). KPN offers various TV packages via set-top box and the KPN iTV app, while Talpa owns the Dutch commercial television channels SBS6, SBS9 and Net5, which are distributed as part of KPN packages. Advertising spots are broadcast between programmes on these channels, and in order to increase revenue from television advertising, KPN and Talpa decided to begin collaborating on introducing targeted advertising at viewers with a pre-defined profile. In 2018, KPN informed the CvdM of the planned introduction of targeted advertising, and submitted a request for a decision on whether it was permissible under the Media Act. In particular, under Article 6.13(2) of the Media Act, KPN - as a package provider - may only distribute Talpa's programme chanels "unchanged".

KPN is able to map viewing behaviour from its KPN set-top box with data from its iTV app, and in combination with the subscriber data, KPN can create advertising profiles in respect of consumers who have given explicit permission (that is to say, who have "opted in"). KPN has also developed the technology to provide customised advertising based on viewer profiles. KPN is then able to create group profiles (e.g. "interested in sport)", which can be targeted with certain advertisements. Under the collaboration, KPN provides profile information to Talpa, and Talpa is able to sell advertising spots on the basis of these profiles. Talpa then informs KPN which advertising spots should be displayed during a period to viewers from a target group.

The CvdM noted that under Article 6.13(2) of the Media Act, KPN must distribute Talpa's programme channels "unchanged". In this regard, it referred to the ministerial explanation of the provision, which stated that the provision "mainly concerns not being allowed to [make cuts or changes] in the editorial content", and that a "package provider may also not place additional advertising". The CvdM held that while KPN does not change the programme channels, it does include advertising spots; this is done on the basis of an agreement with Talpa. Therefore, KPN does not cut or edit the programme channels, and there is no infringement on the integrity of the programme channels. The CvdM concluded that KPN complies with the requirement that Talpa programme channels be distributed unchanged and that under Article 6.13, it does not matter whether Talpa includes the advertising itself in the programme channels or instructs KPN to pass on the targeted advertisements.

Lastly, the CvdM added that its decision was in line with Recital 26 of the 2018 Audiovisual Media Services Directive (IRIS 2019-1/3), which provides that "[i]n

order to protect the editorial responsibility of media service providers and the audiovisual value chain, it is essential to be able to guarantee the integrity of programmes and audiovisual media services supplied by media service providers. Programmes and audiovisual media services should not be transmitted in shortened form, altered or interrupted, or overlaid for commercial purposes, without the explicit consent of the media service provider".

Commissariaat voor de Media, Bestuurlijk rechtsoordeel KPN, 11 juni 2019

CvdM, Management opinion of KPN, June 11, 2019

ROMANIA

[RO] Modification of the Audiovisual Code

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The *Consiliul Naţional al Audiovizualului* (National Audiovisual Council, CNA) adopted Decision No. 614 of June 11, 2019, for amending and completing Decision No. 220/2011 of the National Audiovisual Council with regard to the Code of Regulation of the Audiovisual Content. The decision was published in the Official Journal of Romania No. 517 of June 24, 2019, Part I (see, *inter alia*, IRIS 2014-5/28 and IRIS 2017-4/31).

After Article 41 (1) c), a new paragpraph (d) was introduced which stipulates that audiovisual media service providers cannot broadcast: "images from funerals, except for news and/or reports from news programmes, shows or documentary films. The exception being state funerals."

After Article 46, a new Article 46 (1) was introduced: "Reports in any form about the improvement and/or cure of diseases, regardless of the methods used, can only be made by presenting the opinion of a specialist doctor regarding the initial and final medical diagnoses."

A new paragraph (2) was introduced in Article 70. Paragraph (1) stipulates that within the news and debate programmes that address issues of public interest regarding ethnic, religious or sexual minorities, the point of view of the abovementioned minorities will be presented. The new paragraph (2) provisions that only the religious promotion of religious cults recognised by the state is allowed.

Paragraph (3) of Article 89 was modified as follows: "With the exception of advertising spots related to bets that can be broadcast also during live sports broadcasts, audiovisual programmes containing gambling, as well as advertising spots promoting such games, are subject to the conditions of the protection of minors provided in chapter II ‘Classification of programs for the protection of minors’ of title II ‘Protection of minors’".

Paragraph 5 of Article 120, with regard to food advertising, was modified as follows:

"Within the advertising blocks promoting food, broadcasters must alternatively broadcast one of the following warning messages:

a) «For a healthy life, eat fruits and vegetables daily.»;

b) «For a healthy life, exercise at least 30 minutes every day.»;

c) "For a healthy life, drink at least 2 litres of water daily.";

d) «For a healthy life, observe the main meals of the day.»;

e) «For your health, avoid excess salt, sugar and fat.»;

f) «The exclusive breastfeeding of a baby during the first 6 months is essential for a healthy life.»;

g) «For the emotional health of your child, spend as much time as possible with him/her.»;

h) "For good oral health, brush your teeth twice a day.»;

i) «Alcohol consumption up to the age of 18 seriously damages brain development.»;

j) «To promote equal opportunities, children with disabilities have the right to learn in any school.»"

Decizie nr. 614 din 11 iunie 2019 pentru modificarea şi completarea Deciziei Consiliului Național al Audiovizualului nr. 220/2011 privind Codul de reglementare a conţinutului audiovizual

http://cna.ro/IMG/pdf/Decizia_nr._614_din_11_iunie_2019__M._Of._nr._517_din_25_iunie_2019.pdf

CNA-Decision no. 614 of 11 June 2019

[RO] National Audiovisual Council - focus on very sensitive cases

Eugen Cojocariu
Radio Romania International

The *Consiliul Naţional al Audiovizualului* (National Audiovisual Council, CNA) focused on very sensitive cases which have been covered intensively by the mass media over the last few months. The CNA issues sanctions or warnings (see IRIS 2010-8/42, IRIS 2011-1/44, IRIS 2012-1/39, IRIS 2012-4/36, ans IRIS 2017-6/27).

On 29 July 2019, the National Audiovisual Council called onbroadcasters to act in a decent and responsible manner in the case of crimes in Caracal, southern Romania, and to respect fundamental human rights and freedoms, the protection of human dignity and the right to one's own image, as well as to ensure that the correct information is given - provisioned by the audiovisual legislation. The CNA clearly warned that it would conduct monitoring activities to evaluate how broadcasters cover this topic.

The case of Caracal, where two teenage girls aged 15 and 18 were allegedly kidnapped, raped, murdered and incinerated by a 65-year-old serial killer has provoked a huge wave of emotion in Romania since 25 July, when the case first came under the spotlight. The case is underway and has triggered the resignation of the Internal Affairs Minister as well as the dismissal of high-level police officers and will also trigger the tightening of penalties for criminals, rapists and pedophiles.

The tabloid media leaked some private conversations between one of the victims and the emergency number 112 operators, and even quality media covered the subject in a sensational tabloid fashion, with accents of hysteria and sometimes cynicism, which prompted the National Audiovisual Council to issue a warning recalling the provisions of the Audiovisual Code in the field:

Article 45 (1) Everyone has the right to have his/her privacy respected in difficult times such as those of irreparable loss or misfortune. (2) In the case of human suffering, natural disasters, accidents or acts of violence, the audiovisual media service providers have the obligation to respect the image and dignity of the persons in such situations.

Article 64 (1) By virtue of the public's fundamental right to information, the audiovisual media service providers must respect the following principles: a) ensure a clear distinction between facts and opinions; b) make sure that the information provided on a subject, fact or event is correct, verified and presented impartially and in good faith.

In another development, on 13 August 2019, the National Audiovisual Council issued sanctions against more commercial TV stations for breaches of the legal provisions with regard to the coverage of the case of a young Romanian Roma girl

adopted by a family of Romanians living in the USA. The debate generated by the case of the small girl who was brutally taken from a maternal assistant by a prosecutor to be entrusted to the family who adopted her sparked a great public outpouring of emotion and launched considerable debates about the behaviour of a state official with a child in a difficult situation and about the need to modify adoption legislation in Romania. Years ago, the country was harshly criticised for its legislation on adoption and for the way orphans and children in placement centres were cared for by the state.

The CNA issued a LEI 15 000 fine (around EUR 3 170) for România TV station, a fine of LEI 10 000 (around EUR 2 110) for B1 TV, and a public warning for Realitatea TV for breaches of the Audiovisual Law and of the Audiovisual Code. The breaches were related to the following legal provisions: Article 3 (2) of the Audiovisual Law, and Article 18 (1), Article 40 (2), (4) and (5), and Article 64 (1) (see reference above for Article 64 (1)) of the Audiovisual Code.

According to Article 3 (2) of the Audiovisual Law, all audiovisual media service providers have the obligation to ensure that the public is provided with objective information by presenting the facts and events correctly and to favour the free formation of opinions.

Article 18 (1) of the Audiovisual Code stipulates that between 6 p.m. and 11 p.m., productions presenting: (...) b) scenes of sex, bad language or trivial, vulgar or obscene behaviour may not be broadcast.

Article 40, regarding the right to one's own image and the obligation to present evidence to prove the accusations launched against a person, provisions as follows:

(2) If the accusations stipulated in paragraph 1 are provided by the audiovisual media service provider, it must comply with the principle *audiatur et altera pars*; the observance of this principle implies non-discriminatory conditions of expression until the end of the same programme in which the accusations were made. If the data subject refuses to present a point of view, this fact must be stated.

(4) The programme moderators have the obligation to insist on the interlocutors proving the accusatory statements in order to allow the public to evaluate how justified they are.

(5) Moderators, presenters and programme makers have the obligation not to use and not to allow their guests to use abusive language or to instigate violence.

Comunicat de presă 29.07.2019

http://cna.ro/Comunicat-de-pres,9814.html

Press release of 29 July 2019

Comunicat de presă. Ședința publică a CNA din 13.08.2019

http://cna.ro/Comunicat-de-pres,9814.html

Press release - CNA public meeting of 13 Augsut 2019

REPUBLIC OF TÜRKIYE

[TR] Regulation on Radio, Television, and Optional Broadcasting Services provided on the Internet entered into force

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As previously reported in the IRIS Newsletter (IRIS 2018-10/25), the Regulation on Radio, Television, and Optional Broadcasting Services Provided on the Internet (Radyo, Televizyon ve İsteğe Bağlı Yayınların İnternet Ortamından Sunumu Hakkında Yönetmelik) entered into forced on 1 August 2019. The regulation is applicable to national and foreign broadcasters offering radio, television, and on-demand broadcasting services via the Internet. Such broadcasters could be either media service providers or platform operators, and the regulation leaves out of scope the individual communication services (excluding the news, films, and TV series) and platforms that are not specifically designed for providing Internet-based media services.

The regulation establishes several financial duties for broadcasters; media service providers must obtain a licence in order to broadcast on the Internet, while platform operators should obtain broadcasting transmission authorisation. Besides licence fees and broadcasting transmission authorisations (see IRIS 2018-10/25), th media service providers and platforms offering on-demand services have to pay a fee of 5 ‰ of their annual net sales to the Radio and Television Supreme Council (*Radyo Televizyon Üst Kurulu'nun* - RTUK). Media service providers who already have a licene for non-Internet based broadcasting services (for example, cable, satellite, terrestrial, etc.) could launch an Internet broadcasting service without obtaining a separate licence if they transfer the URL information and/or the necessary platform operator’s information to RTUK. Foreign companies providing broadcasting services in Turkey must establish a headquarters office in Turkey in order to obtain a licence.

From 1 September 2019, media service providers and platform operators offering broadcasting services without a licence will be notified by RTUK on the necessity of obtaining one. If broadcasting still continues without the application procedure having been initiated, and the licence fee is not paid, RTUK could request the magistrate's criminal judge to order the provider concerned to remove or block the content. RTUK has recently published several guidelines and application forms specific to each type of licence.

Besides financial obligations, the regulation assigns several other obligations to media service providers and platform operators, some of which are mutually identified for both categories of broadcasters. These are related to keeping the documents used to apply for a licence, and the information contained in them, updated, and complying with the relevant law and international treaties that

Turkey is a party to.

Media service providers are given editorial responsibility which is, as defined in the regulation, the power to regulate and have control over the choice of programmes and their content and provide a streaming service (in the case of radio and television programmes) and a catalogue (in the case of on-demand services). Media service providers are responsible for removing or excluding from their services those programmes which violate the related legislation (for instance, Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services). They are also entitled to encrypt the sound of the programme together with the image, in cases where the programme is encrypted. Moreover, they shall provide several pieces of information, such as the number of subscriptions and users they have, as well as their corporate structure, programmes, programme catalogues, platform operators and commercial income.

Platform operators' duties mostly consist in providing notifications to RTUK on media service providers, such as their name, contact information, web address and the language in which they broadcast. In addition, they must not transmit broadcasts by media providers who do not have a licence, or whose licence is either invalid or has been terminated. Upon request of RTUK, they shall provide remote access to the audio and visual files that are being used for broadcasting as well as the possibility of monitoring them.

Radyo, Televizyon ve İsteğe Bağlı Yayınların İnternet Ortamından Sunumu Hakkında Yönetmelik, Resmi Gazete yayın tarihi: 1 Ağustos 2019, Sayı: 30849

Regulation on Radio, Television, and Optional Broadcasting Services Provided on the Internet , Official Gazette publication date: 1 August 2019, No: 30849

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

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