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EDITORIAL

Almost twenty-five years ago, the European Audiovisual Observatory proudly presented the first issue of a new legal publication: IRIS - Legal Observations of the European Audiovisual Observatory. At the time, IRIS was marketed as a print-only publication and had a successful career until the end of 2009 when, modern times oblige, we decided to transform it into an electronic newsletter. Now, almost ten years on, we believe the time has come to give IRIS a facelift in order to make it conform to the new graphic identity of the Observatory. We hope that this graphic revamp, which also includes our legal database IRIS Merlin (http://merlin.obs.coe.int/), is to your liking.

Despite the newsletter looking quite different now, its mission remains the same as the one which inspired its creation almost 25 years ago: keeping you up-to-date and well informed about all legal developments relevant to the European audiovisual sector, providing the accurate, fact-oriented, neutral reporting that you may already have come to know and appreciate thus far.

Enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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COUNCIL OF EUROPE

CROATIA

European Court of Human Rights: *Vučina v. Croatia*

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

In *Vučina v. Croatia,* the European Court of Human Rights (ECtHR) has held that the level of seriousness associated with the erroneous labelling of a photograph in a lifestyle magazine and the inconvenience the named person may have suffered did not give rise to an issue under Article 8 of the European Convention on Human Rights (ECHR), neither in the context of the protection of the applicant's image nor of her honour and reputation. The ECtHR dismissed the complaint that the domestic courts had failed to protect the applicant's image and honour, also observing that the Croatian judicial authorities had provided effective protection by awarding the applicant damages and ordering a correction of the erroneously published information by an Internet portal.

The applicant in this case was Diana Vučina who brought a civil action against the publisher of the lifestyle magazine Gloria, seeking damages in respect of the erroneous labelling of her photograph. The magazine had published a photograph of Mrs. Vučina that had been taken during a popular music concert in Split. The photograph was small in size and depicted her clapping. The caption to the photograph gave the name of A.K. – the wife of Ž.K., the then Mayor of Split. The same page contained several other photographs of various celebrities who had attended the concert, and the captions to those photographs indicated their names. Following the publication of her photograph and the accompanying erroneous indication of her name, Mrs. Vučina asked Gloria to print a correction. However, she received no reply from the magazine, nor was the published information rectified. In court, Mrs. Vučina submitted that she, as a doctor of medicine and a university lecturer, and her real husband, as a university professor, were very active in the social life of Split, and that following the publication of her photograph in Gloria, people had started approaching her, addressing her by the Mayor's wife's name, and taking photographs of her. She argued that it was difficult to express all the unpleasantness that she and her family had suffered and that her personality rights, honour and reputation had been infringed by the publication of the erroneously labelled photograph.

After the Municipal Court found that there had been a breach of Mrs. Vučina's personality rights, in appeal, Split County Court dismissed her civil action, holding in particular that, irrespective of the controversies surrounding the Mayor, there

were no negative connotations in Mrs. Vučina being identified as his wife in the photograph published in Gloria, and that the published information was incapable of giving rise to public denigration. Shortly afterwards, the Constitutional Court dismissed Mrs. Vučina's constitutional complaint as unfounded, endorsing the reasoning of Split County Court. Meanwhile, an Internet portal used the photograph from Gloria, again erroneously identifying Mrs. Vučina as the Mayor's wife. The picture accompanied an article that discussed the details of an extra-marital affair in which the Mayor had allegedly engaged, as well as certain alleged irregularities concerning his business dealings, with which his wife was also associated. The Internet portal was obliged by court order to publish a correction and pay damages to Mrs. Vučina. Mrs. Vučina complained under Article 8 ECHR of a breach of her right to respect for her private life by virtue of the failure of the domestic courts to protect her image from being erroneously attributed to another person in a lifestyle magazine. She stressed that the reporters of the magazine Gloria had acted contrary to the relevant professional standards and had not verified the information concerning her identity before publication of the impugned photograph. Moreover, the magazine had not acted in good faith, as it had failed to correct the erroneous labelling of her photograph and to provide her with an apology.

The ECtHR first reiterates that, in order for an issue to arise under Article 8 ECHR, as regards the effects of the publication of a photograph on a person's private life, honour or reputation, the impugned situation affecting that person's private life must reach a certain threshold of severity or seriousness. In its preliminary determination as to whether the impugned situation affecting Mrs. Vučina's private life had attained the requisite level of seriousness under Article 8 ECHR, the ECtHR takes into consideration the following criteria: the manner in which the photograph had been obtained; the nature of the publication; the purpose for which the photograph was used and how it could be used subsequently; and the consequences of the publication of the photograph for the applicant. The ECtHR observes in particular that the taking of Mrs. Vučina's photograph in a public place at a public event and its subsequent publication in itself raises no particular issue under Article 8 ECHR. However, the key issue in the present case is not the fact that the photograph was taken and published but the fact that the magazine had made an error in the designation of the applicant's name by confusing her name with that of the Mayor's wife. The ECtHR is of the opinion however that the photograph and the article it illustrated (amongst other pictures of celebrities) was not denigrating towards Mrs. Vučina. In so far as the impugned photograph was later used by an Internet portal in a manner that could have been damaging to Mrs. Vučina's right to respect for her private life, the ECtHR finds it important that the domestic courts provided effective protection to Mrs. Vučina by awarding her damages and ordering a correction of the erroneously published information. Mrs. Vučina was therefore able to forestall any sufficiently serious adverse consequences for her private life arising in connection with the published information. Although the ECtHR does not lose sight of the fact that obviously the publisher of Gloria unjustifiably refused to provide an apology and a correction of the erroneous information, it observes that Mrs. Vučina had the possibility of asking the domestic courts to issue an order for a correction and apology, which

could have served as an appropriate and justified avenue for her grievances. Mrs. Vučina, however, failed to do so, and instead only sought an award of damages from the publisher, which the County Court found to be unjustified. The ECtHR sees no grounds for calling the County Court's findings into question. Having regard to the context in which the publication of the article in question and Mrs. Vučina's photograph was made the ECtHR cannot find that the very fact that the Mayor's wife's name was placed next to Mrs. Vučina's photograph amounted to a sufficiently serious intrusion into her private life. As the ECtHR is unable to find that the false impression created by the impugned photograph was objectively capable of creating any negative public perception of Mrs. Vučina and hence did not raise an issue under Article 8 ECHR, it dismissed Mrs. Vučina's complaint as incompatible *ratione materiae* with the ECHR.

ECtHR First Section, Vučina v. Croatia, Application no. 58955/13, decision of 24 September 2019, notified in writing on 31 October 2019

https://hudoc.echr.coe.int/eng?i=001-198384

HUNGARY

European Court of Human Rights: *Herbai v. Hungary*

Dirk Voorhoof
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In *Herbai v. Hungary*, the European Court of Human Rights (ECtHR) has held that the dismissal of an employee for publishing articles on a website that could tarnish the reputation of his employer violated the employee's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ECtHR found that there was an absence of fair balance between the employee's right to freedom of expression and the employer's right to protect his legitimate business interests, especially as there was no evidence of damage to the business interests of the employer.

The applicant, Mr Csaba Herbai, worked as a human resources management expert at Bank O. since 2006. His tasks included the analysis and calculation of salaries and staffing management. According to the code of ethics of the bank, employees were under an obligation not to publish, formally or informally, any information relating to the functioning and activities of the bank. In 2011, Mr. Herbai, together with Ms. A.N., had started a knowledge-sharing website for human resources management-related publications and events. Shortly after the publication of two articles on the website, one by Ms. A.N. and one by Mr. Herbai himself, the bank terminated Mr. Herbai's employment for breaching his employer's confidentiality standards. The bank argued that Mr. Herbai's conduct in providing educational services in the field of human resources management had infringed its economic interests. Moreover, given the nature of his position, he was in possession of information whose publication interfered with the bank's business interests. Mr. Herbai instituted proceedings before the Budapest Labour Court challenging the termination of his employment contract, but the Labour Court dismissed his action, finding that the website and the content of the articles constituted a breach of the duty of mutual trust and had jeopardised Bank O.'s business interests. The Budapest High Court, however, came to the opposite conclusion: Mr. Herbai's conduct had not jeopardised his employer's business interests and his dismissal for breach of trust had therefore not been lawful. But the Kúria (Supreme Court) subsequently upheld a request for review made by the bank, and it endorsed the findings of the first-instance court, observing that Mr. Herbai's conduct had endangered his employer's business interests and that he had acted in breach of his employer's code of ethics. This finding was confirmed by the Constitutional Court, who found that Mr. Herbai's conduct in managing the website and the content of the articles at issue were not protected by the right to freedom of expression enshrined in Article IX (1) of the Hungarian Fundamental Law.

Mr. Herbai lodged an application with the ECtHR in which he complained that the termination of his employment on account of articles published on a website had infringed his right to freedom of expression as protected by Article 10 ECHR. In general terms, the ECtHR reiterates that Article 10 ECHR also applies when the relations between employer and employee are governed, as in the case at hand, by private law, and that the state has a positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals (see also *Fuentes Bobo v. Spain*, Iris 2000/4-1, *Wojtas-Kaleta v. Poland*, Iris 2009/9-1 and *Nenkova-Lalova v. Bulgaria*, Iris 2013/4-1). The ECtHR observes that in order to be fruitful, labour relations must be based on mutual trust. Even if the requirement to act in good faith in the context of an employment contract does not imply an absolute duty of loyalty towards the employer or a duty of discretion to the point of subjecting the worker to the employer's interests, certain manifestations of the right to freedom of expression that may be legitimate in other contexts are not legitimate in that of labour relations. The ECtHR considers the following elements to be relevant when examining the permissible scope of a restriction on the right to freedom of expression in the employment relationship: the nature of the speech in question, the motives of the author, the damage, if any, caused to the employer by the speech, and the severity of the sanction imposed. It observes that the articles at issue dealt with human resources policies providing information and opinion on recent developments in the field, and inviting discussion on business practices and tax issues. The ECtHR explicitly disagrees with the Hungarian Constitutional Court's finding that comments made by an employee do not fall within the scope of protection of the right to freedom of expression on the grounds that they are of a professional nature, without a "public link" which would enable them to clearly characterise as part of a discussion on matters of public interest. Furthermore the ECtHR is of the opinion that Mr. Herbai has not acted in pursuit of purely private interests or aired a personal grievance through his website as his intention was to share knowledge with and among the audience. Although the information shared by Mr. Herbai was closely related to his employment tasks, and even though the ECtHR accepts that, under Hungarian law, employers are entitled to a degree of deference in deciding which conduct could lead to the disruption of working relations even without such disruption being manifest, it observes that neither Mr. Herbai's employer nor the Hungarian courts made any attempt to demonstrate in what way the speech in question could have adversely affected Bank O.'s business interests. Finally the ECtHR also notes that a rather severe sanction was imposed on Mr. Herbai, namely the termination of his employment without any assessment of the availability of a less severe measure.

The ECtHR concludes that the enjoyment of the right to freedom of expression should be secured even in the relations between employer and employee. It finds that in the case at hand, which concerns the establishment of a professional website and the publication of articles on that website, there is a lack of meaningful balancing of the interests at issue by the domestic courts. The substantive outcome of the labour dispute was dictated purely by contractual considerations between the applicant and Bank O. and voided the applicant's reliance on freedom of expression of any effect. The ECtHR finds that the

Hungarian authorities have not fulfilled their positive obligations under Article 10 ECHR as they have failed to demonstrate convincingly that the rejection of Mr. Herbai's challenge against his dismissal was based on a fair balance between his right to freedom of expression, on the one hand, and his employer's right to protect its legitimate business interests, on the other hand. Therefore the ECtHR unanimously finds that Article 10 ECHR has been violated.

ECtHR Fourth Section, Herbai v. Hungary, Application no. 11608/15, 5 November 2019

https://hudoc.echr.coe.int/eng?i=001-197216

EUROPEAN UNION

“Stakeholder dialogue” meetings on Article 17 of the DSM Directive

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In October and November 2019, the European Commission organised three “stakeholder dialogue” meetings, as required under Article 17(10) of the recently-enacted Directive on Copyright in the Digital Single Market (“DSM Directive” – see IRIS 2019-4/5). As explained below, these meetings were aimed at discussing best practices for cooperation between online content-sharing service providers and rightsholders.

Article 17 of the DSM Directive is entitled ‘Use of protected content by online content-sharing service providers’. This provision, in general terms, establishes the responsibilities of online content-sharing service providers (OCSSP) that give access to user-uploaded protected works. It provides that where an OCSSP enables access to copyright-protected works uploaded by its users, this act shall be considered as an act of communication to the public.

Importantly, under Article 17(4), OCSSPs are liable for any unauthorised dissemination of copyright-protected works to the public , unless they can demonstrate that they have: “(a) made best efforts to obtain an authorisation, and (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event, (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)”.

Crucially, under Article 17(10), the European Commission is required to organise stakeholder dialogue meetings to discuss best practices for cooperation between online content-sharing service providers and rightsholders. The Commission shall take into account the results of the stakeholder dialogues, in order to issue guidance on the application of Article 17 – in particular regarding the “cooperation” referred to in Article 17(4).

In this context, the stakeholder dialogue meetings held pursuant to Article 17(10) aimed to hear stakeholders’ views and to discuss possible practical solutions for the application of Article 17 – including actions to be taken by online content-sharing service providers with regard to unauthorised content. The objective is to submit input in order to guide the Commission on the proper application of Article

17, which will assist the uniform application of the obligations of the OCSSPs and the rightsholders, as well as the establishment of industry-wide standards of professional diligence.

More specifically, the first stakeholder dialogue meeting held on 15 October 2019 aimed to map out existing practices relating to the use of copyright-protected content by online content-sharing service providers in cooperation with rightsholders, as well as to gather user experiences. Furthermore, at the second and third meetings on 5 and 25 November 2019, the Commission invited stakeholders to make technical presentations as regards licensing and the application of content identification tools and technologies. The Commission also invited presentations by users' organisations that would focus on concrete examples of problems that end-users may face in uploading their content to content-sharing services, and their experiences with available redress mechanisms when seeking to challenge the blocking or removal of their content.

Further meetings will be organised in early 2020, and the final dates for the meetings will be confirmed in due time.

European Commission, First meeting of the Stakeholder Dialogue on Art 17 of the Directive on Copyright in the Digital Single Market, 15 October 2019

https://ec.europa.eu/digital-single-market/en/news/first-meeting-stakeholder-dialogue-art-17-directive-copyright-digital-single-market

European Commission, Second meeting of the Stakeholder Dialogue on Art 17 of the Directive on Copyright in the Digital Single Market, 5 November 2019

https://ec.europa.eu/digital-single-market/en/news/second-meeting-stakeholder-dialogue-art-17-directive-copyright-digital-single-market

European Commission, Third meeting of the Stakeholder Dialogue on Art 17 of the Directive on Copyright in the Digital Single Market, 25 November 2019

https://ec.europa.eu/digital-single-market/en/news/third-meeting-stakeholder-dialogue-art-17-directive-copyright-digital-single-market

EU Internet Forum adopts “Crisis Protocol” to prevent viral spread of certain kind of content online

Melinda Rucz
Institute for Information Law (IViR)

At its fifth annual meeting on 7 October 2019, the EU Internet Forum was devoted to the EU Crisis Protocol. The aim of the Protocol is to facilitate a rapid response mechanism to tackle the viral spread of terrorist and other violent extremist content online.

The European Commission set up the Internet Forum in 2015 in response to the alarming increase in the use of the Internet by terrorists to spread extremist propaganda. Acknowledging the crucial role that the Internet can play in the fight against incitement to violence, the Internet Forum pledged to bring together representatives of the technology industry, national governments and Europol to coordinate efforts against the online spread of terrorist content. Following the terrorist attack in New Zealand in March 2019, leaders of numerous national governments and the technology industry adopted the “Christchurch Call”, committing to eliminate terrorist and violent extremist content online (see IRIS 2019-7/2). The then president of the European Commission, Jean-Claude Juncker, declared at the time that an EU Crisis Protocol would be adopted by the Internet Forum by way of contributing to the global efforts prompted by the Christchurch Call.

The primary function of the Crisis Protocol is the facilitation of a rapid and coordinated cross-border response mechanism to contain the spread of terrorist content online. The European Commission, member states and various online service providers – including Facebook, Twitter, Google, Microsoft, Dropbox, JustPaste.it and Snap – have signed up to coordinate crisis management within the framework of the Protocol. The response mechanism is comprised of four steps. Firstly, on the basis of geographical reach and the speed of the spread of online content, an incident is identified as a crisis. After this, the relevant stakeholders, such as the affected member states and online service providers, are notified of the existence of the crisis. At this stage, Europol may coordinate notifications if multiple member states are affected. Subsequently, the relevant national law enforcement authorities and online service providers share (on a voluntary basis) real-time information about the online content concerned. On the basis of that information exchange, the law enforcement authorities and online service providers will coordinate efforts by drawing up operational plans, sharing hashtags and URLs, and maintaining a crisis log. At the last stage, a post-crisis report is prepared in which all the actors that were involved in the management of the crisis assess the response and identify elements that can be improved upon in the future.

Furthermore, the Crisis Protocol emphasises the subsidiary nature of the response mechanism. The Protocol only applies in exceptional situations, when national crisis management procedures prove insufficient. Additionally, the Crisis Protocol highlights the need for an effective crisis communication method and lays down certain principles for this purpose. Specifically, under the Protocol procedure, the public, the media and other relevant stakeholders are kept informed about steps to alleviate the crisis throughout in order to ensure that the public is reassured that the appropriate steps are being taken, to mitigate any tensions and to pre-empt the spread of disinformation.

European Commission, Fighting Terrorism Online: EU Internet Forum committed to an EU-wide Crisis Protocol, 7 October 2019

https://ec.europa.eu/commission/presscorner/detail/en/IP_19_6009

First annual self-assessment reports by signatories to Code of Practice on Disinformation

Gionata Bouchè

On 29 October 2019, the European Commission released the self-assessment reports submitted by Facebook, Google, Microsoft, Mozilla and Twitter and other trade association signatories to the Code of Practice on Disinformation (the Code) as part of its broader Action Plan against Disinformation (see IRIS 2019-1/7). The Commission is currently drafting an evaluation of the overall effectiveness of the Code during its first year of implementation which will take into account both the reports of independent bodies assisting the Commission in its analysis, as well as the relevant efforts of the signatories to adapt the transparency standards of their policies against disinformation to the Code's self-regulatory criteria (see IRIS 2019-10/6). The assessments had to be conducted in light of the objectives set out across the Code's five pillars: (1) scrutiny of ad placements, (2) political and issue-based advertising, (3) integrity of services, (4) empowering consumers and (5) researchers.

First, the signatories had to illustrate the course of action they had taken to disrupt advertising and monetisation incentives that facilitate the spreading of disinformation, including the imposition of restrictions to advertising services not complying with the platforms' policies. The Commission pointed out that certain efforts had been made to secure a safe environment for ad traders, but stated, "there has been a lack thus far of joined-up efforts by platforms and other stakeholders - including fact checkers, researchers and media - to identify persistent or egregious purveyors of disinformation and to develop indicators for the trustworthiness of media sources, for the development and the deployment of ad scrutiny and brand safety measures".

Secondly, it observed that "[a]ll platform signatories deployed policies and systems to ensure transparency around political advertising, including a requirement that all political ads be clearly labelled as sponsored content and include a 'paid for by' disclaimer." However, "[a]lthough the platforms' respective definitions of political advertising are in line with the Code, there are notable differences in scope." While some of the platforms have gone to the extent of banning political ads, the transparency of issue-based advertising is still significantly neglected.

Thirdly, all platforms have shown that they have adopted measures to combat manipulative and inauthentic behaviour, including the suppression of millions of fake accounts and the implementation of safeguards against malicious automated activities. However, the Commission acknowledged the importance of further commitment to counteract such activities for the purpose of preserving service integrity, and stated that "more granular information is needed to better assess

malicious behaviour specifically targeting the EU and the progress achieved by the platforms to counter such behaviour."

In relation to the last two pillars, several tools have been developed to help consumers evaluate the reliability of information sources, and to open up access to platform data for researchers. For example, users of all platforms are now better able to understand and customise their exposure to personalised ads, and researchers may access political ads through Google, Twitter and Facebook's repositories. Nevertheless, the Commission notes that "platforms have not demonstrated much progress in developing and implementing trustworthiness indicators in collaboration with the news ecosystem", and "some consumer empowerment tools are still not available in most EU Member States." Finally, the "provision of data and search tools to the research community is still episodic and arbitrary and does not respond to the full range of research needs."

The Commission is now awaiting the reports by the Third Party Organisation chosen by the signatories and by an independent consultant in order to complete its process of evaluation. The final results will be presented before the European Parliament, specifically addressing emerging dynamics during the last EU general elections.

European Commission, Code of Practice on Disinformation: First Annual Reports - October 2019, 29 October 2019

https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=62698

Facebook, Facebook report on the implementation of the Code of Practice for Disinformation, September 2019

https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=62681

Google, EC EU Code of Practice on Disinformation: Google Annual Report, September 2019

https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=62680

NATIONAL

AUSTRIA

Public service streaming portal Filmmit passes public value test

Gianna Iacino
Legal expert

On 13 November 2019, the Austrian media regulator, KommAustria, approved an application from the public service broadcaster ORF to provide an on-demand service offering mainly fictional content (films and box sets).

ORF currently operates the commercial online film library Filmmit through several subsidiaries. In order to make Filmmit into a public-service, ad-free, on-demand service, ORF asked KommAustria to carry out a so-called public value test in accordance with Article 6a of the ORF Act. In its application, ORF stated that the on-demand service would mainly provide content that had already been or would in future be broadcast on an ORF television channel and that had been available to download from ORF's 'TVthek' for no more than seven days. Third-party productions that would only be available on-demand and that would not be broadcast on ORF's linear channels would make up no more than 5% of the on-demand service's content and would only be used to 'contextualise' other content. The on-demand service would be funded partly through broadcasting licence fees and partly through a user subscription charge, with the provision of the platform itself funded through the licence fee and the additional costs of acquiring and using content financed through the user subscription fee.

According to the European Commission's 2009 Communication, a public value test should always be carried out if a public service broadcaster wants to introduce a significant new service or make significant changes to an existing one. Under the ORF-G, the test involves deciding whether the proposed service meets the social, democratic and cultural needs of the Austrian population, and fits in with the core remit of a public service broadcaster. Its potential impact on service diversity, market conditions and competition should also be evaluated. The benefits to society and potential market effects must then be weighed against each other.

In its decision, KommAustria noted, first of all, that the conditions for a public value test had been met. Although ORF was already operating the Filmmit on-demand service as a commercial online service, it would now form part of its public service remit, so it would be treated as a new service.

KommAustria thought the on-demand service would make an effective contribution to ORF's fulfilment of cultural requirements and its public service remit, and would not be disproportionately detrimental to competition or service

diversity. The Filmmit on-demand service was an online service in keeping with the organisation of broadcasting. The same applied to the content that would only be available on-demand and that would not be shown on ORF's linear channels, since it would make the on-demand service more attractive. This was also an economically viable service and the fact that it was subscription-based did not make it incompatible with ORF's public service remit. Contrary to the objections raised by the Verband Österreichischer Privatsender (Austrian Private Broadcasters' Association – VÖP), there was no reason to prohibit the service under the ORF-G. In particular, the provision of online services was not covered by the ban on e-commerce since, logically speaking, this only applied to e-commerce within its narrow sense. In concrete terms, the service would help to meet cultural requirements and the related public service remit because it would mean some of the content broadcast on ORF's television channels could remain available permanently or for a much longer period than the seven days currently provided by the 'TVthek'. This particularly included Austrian films and TV series (co-)produced as part of ORF's public service remit using the licence fee or commissioned by ORF, which would reach a wider audience if they were available online for longer. This was especially appropriate in view of the anticipated continuation of the drop in linear television consumption. The proposed service was not expected to harm any other companies operating in Austria.

Bescheid der KommAustria

https://www.rtr.at/de/m/KOA1128019011/38742_KOA%2011.280_19-011.pdf

KommAustria decision

Fashion TV: Bone of Contention in Russia

Alla Naglis, Xenia Melkova
King & Spalding LLC

With two judgments delivered days apart in November 2019, the Moscow Arbitrazh Court (first instance for commercial disputes) sided with the former distributor of a Fashion TV channel in Russia in the dispute with the owner of the global brand and its local representative over the distribution rights of a worldwide television channel. This is a new chapter in the longstanding dispute, but the matter appears still far from being resolved.

Austrian Fashion TV Programmgesellschaft mbH and Russian Fashion TV LLC, its former official distributor, have been in active conflict since the brandowner terminated the channel distribution contract. As of late 2015, the two companies, along with the Austrian rightsholder's local representative Intermoda LLC, have been filing claims against each other with respect to the use of similar designations in locally registered mass media, the distributor's company name, the Russian and international trademarks and the channel's brand. The global owner and its representative have, in a number of instances, been denied protection for their designations, while the former distributor's claims have been upheld, including its 2016 claim to hold the Fashion TV WIPO-registered trademark invalid in Russia on the grounds that the owner had failed to use it (in that case, however, the court only partly satisfied the claim, ruling that the trademark remained valid for television transmission in Russia).

During the years of dispute, the channel was simultaneously distributed by both Fashion TV LLC and Intermoda LLC (under the title 'F'), causing a lot of confusion and uncertainty among Russian platforms as to the channel's ownership.

Fashion TV LLC even at some point registered in its name a trademark representing the channel's diamond-shaped logo, but in April 2018, the Russian Patent and Trademark Office cancelled Fashion TV LLC's trademark. Still, in the recent 8 November 2019 judgment, the Moscow Arbitrazh Court again rejected the claim brought by FASHION TV Programmgesellschaft mbH against Fashion TV LLC to cease violation of the claimant's rights to trademark and trade name. Only the brief resolution has been published, with no reasoned judgment available thus far. While by law, the full reasoned judgment must be published within five days of the delivery of the brief resolution, delays are not uncommon.

Another decision issued by the same court on November 14, 2019 (and available in full) was also made in favour of Fashion TV LLC, acting, in that case, as the plaintiff against Intermoda LLC and requesting an injunction for Intermoda LLC to use the wording "Fashion TV Russia" in the TV channel name and in the mass media registration on the ground of the similarity between the channel's name and the plaintiff's company and trade name, which has been in use since 2007. The court, in its judgment, relied on the provisions of the Russian Civil Code

regulating intellectual property and held that the company name, in that case, had come into use first and, as a result, the use of the wording by Intermoda LLC did infringe the previously registered company name. The court ordered Intermoda LLC to change the name of the registered mass media and to cease using the designation 'FashionTV' in the title of a television channel.

In practical terms, both November judgments can be appealed, so the dispute may have further rounds to go. Moreover, while Fashion TV LLC considers the two decisions mentioned above as a confirmation of its rights to the channel in Russia, Intermoda LLC points out that the channel it distributes comes up with the diamond-shaped "F" logo, and thus does not really depend on the disputed wording or registration.

This long-running dispute is a perfect example of the issues that may arise in connection with the protection and distribution of a global TV channel in Russia. Russian legislation does not allow the distribution of foreign TV channels without a local mass media registration, and at the same time, limits foreign ownership in Russian mass media to 20%. This induces foreign rightsholders to engage local companies as licensees/distributors of their channels and the holders of the Russian mass media registration and broadcasting licences. The relationship would then involve a number of critical elements (such as the company/trade name, the channel's designation and mass media registration, channel content) which are all subject to different sets of rules regarding their use and protection, potentially resulting in different interpretations, and making the foreign rightsholder's position less secure. There are no rules or established practices consistently addressing the issue of international TV channels and their correlation with mass media registrations in Russia, and while registrable rights to these designations give their owners the most certain protection against illegal distribution, the above case shows that it is difficult to completely avoid the risks.

Арбитражный суд города Москвы, Дело № А40-105820/19-27-975

http://kad.arbitr.ru/Card/344c7fc5-d887-4efd-845e-34cef6a7ac5d

Case file No. A40-105820/19-27-975 of November 8, 2019

Арбитражный суд города Москвы, Дело № А40-232193/19-12-1820

http://kad.arbitr.ru/Card/802245af-1b8b-44dc-ab7c-fd55671bc204

Case file No. A40-232193/19-12-1820 of November 14, 2019.

BELGIUM

New Belgian theatrical rating system

Eva Lievens
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Just a few months before its 100th anniversary, the Belgian Law prohibiting minors under the age of 16 from accessing the cinema will be abolished. This law, which was adopted on 1 September 1920, had been the subject of criticism for quite some time. A long revision procedure was hampered by questions related to the division of competences between the federal State and the communities. This issue was solved in 2014, through the sixth state reform, which transferred the competence for film classification to the communities (the Flemish, French-speaking and German-speaking Communities, and the Common Community Commission of the Brussels-Capital Region).

On 15 February 2019, these communities concluded a cooperation agreement that stipulates that the classification of films that are screened for the first time in a Belgian cinema will be carried out according to the *Kijkwijzer* (Watch Smarter) methodology. This is the classification method which has been applied in the Netherlands since 2002.

The framework that is put in place is a co-regulatory system, which entails that the Communities decide on the methodology and the application thereof, and film distributors and/or producers carry out the actual classification themselves, based on an online scientific questionnaire. An important difference with the previous system is the shift from a prohibition/approval-based system to an information-based recommendation system. Completing the questionnaire (or 'coding form') results in a content classification – information about the nature of content which might be inappropriate for minors, such as violence, fear, sex(uality), drugs and alcohol abuse, foul language, or discrimination – and an age classification – an age category which indicates the age from which it is appropriate to watch a film. The age classification is a recommendation. All classifications will be made public on a website. Complaints regarding classifications can be submitted to the secretariat for the classification of films. Such complaints will usually be addressed through mediation by the secretariat, and, in certain circumstances, by a complaint commission, which will be composed of experts in youth protection or child and youth psychology, lawyers, judges or representatives of civil society organisations.

The new classification system will become applicable from 8 January 2020 onwards. Whereas the cooperation agreement so far only covers films which are screened in movie theatres, there is a reference to a possible extension to other media in article 16. So far, however, this possibility has not been taken up by the Communities.

Samenwerkingsakkoord van 15 februari 2019 tussen de Vlaamse, Franse en Duitstalige Gemeenschap en de Gemeenschappelijke Gemeenschapscommissie (GGC) betreffende de classificatie van films, vertoond in Belgische bioscoopzalen

https://cjsm.be/cultuur/sites/cjsm.cultuur/files/public/20190215_nl_samenwerkingsakkoord-classificatie-films.pdf

Cooperation agreement of 15 February 2019 between the Flemish, French-speaking and German-speaking Community and the Common Community Commission (GGC) concerning the classification of films, screened in Belgian cinemas

Kijkwijzer

http://www.kijkwijzer.nl/

Kijkwijzer

https://www.kijkwijzer.nl/english

GERMANY

Package of measures to combat right-wing extremism and hate on the Internet

Jan Henrich
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On 30 October 2019, the German Bundesregierung (Federal Government) adopted a package of measures to combat right-wing extremism and hate crime, designed in part to extend law enforcement authorities' powers to deal with online platforms. This follows an attack in Halle in early October, when a heavily armed right-wing extremist, who had been radicalised on the Internet, tried to enter a synagogue and shot two people dead. The attack was one of several recent acts of violence and threats targeting politicians and journalists in particular.

The new measures are designed to make it easier to identify hate crime on the Internet. In future, platforms such as Facebook, Twitter and YouTube will not only be able to delete posts that incite hatred or contain death threats, but also report them to the authorities, along with the user's IP address. A new central contact point will be created at the Bundeskriminalamt (Federal Criminal Police Office) for this specific purpose.

The possibility of extending the scope of the Netzwerkdurchsetzungsgesetz (Network Enforcement Act), which entered into force in 2017, will also be examined. This law obliges social network providers with 2 million or more users to block illegal content within 24 hours and to publish regular reports on such content. Law enforcement authorities will also be given greater powers to obtain information from online platform operators.

In another measure, new rules on hate crime will be added to the German Strafgesetzbuch (Criminal Code), while the definition of existing offences will be amended to take into account the specific characteristics of the Internet.

However, the new measures also include changes to provisions on the fight against right-wing violence away from the Internet. For example, local politicians will be better protected against defamation and the law on arms and explosives will be strengthened. The civil register will also be adapted through legislative amendments in order to guarantee the protection of people threatened with violence.

The Federal Government is also planning to step up its efforts to prevent right-wing extremism, anti-Semitism and racism, as well as improve advice services and information for victims of hate crime.

The German Bundestag (parliament) is yet to approve the package of measures.

Pressemitteilung des Bundesministeriums der Justiz und für Verbraucherschutz vom 30. Oktober 2019

https://www.bmjv.de/SharedDocs/Artikel/DE/2019/103019_Ma%C3%9Fnahmenpaket_Kabinett.html

Press release of the Federal Ministry of Justice and Consumer Protection, 30 October 2019

Ad blocker could contravene German cartel law

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In a ruling of 8 October 2019, the German Bundesgerichtshof (Federal Supreme Court – BGH) overturned a decision by the Oberlandesgericht München (Munich Appeal Court – OLG) to declare a well-known ad blocker lawful. Although the judges of the highest German civil court confirmed the appeal court's findings with regard to competition law, they thought a number of questions remained unanswered where cartel law was concerned.

A legal dispute over the functioning of 'AdBlock Plus', which was sold by Eyeo GmbH, has been rumbling on for almost five years. The software, which can block advertisements on websites, is configured in such a way that individual, 'non-disruptive' ads can sometimes appear on websites if they are included on a so-called 'white list'. Small and medium-sized companies can unblock their ads free of charge, while larger website operators have to pay a fee to be added to the white list. Several media companies had complained, accusing the software provider of exploiting their services through unfair commercial practices, and had applied for an injunction. However, the Landgericht München (Munich District Court) had rejected their claim in the first instance. It ruled that the ad blocker's business model should not be classified as an aggressive commercial practice, which was prohibited. The Munich Appeal Court had confirmed this decision. The way in which ad blockers worked had also been approved in other court cases. The German Bundesverfassungsgericht (Federal Constitutional Court), for example, had recently dismissed a constitutional complaint brought by a large German online newspaper against a previous BGH ruling, which had declared the business model behind ad blockers lawful.

In its recent judgment, the cartels chamber of the BGH agreed that the ad blocker did not breach German competition law. Under the Gesetz gegen unlauteren Wettbewerb (Unfair Competition Act), for example, aggressive commercial practices were those that were likely to significantly impair the freedom of choice of the consumer or other market participant. The judges did not think this was the case here.

However, the BGH ruled that the appeal court had been wrong to dismiss claims put forward under cartel law, since the ad blocker could be unlawfully used to create a dominant market position.

According to the BGH, a company that made software available to Internet users free of charge, enabling them to block adverts when they visited websites funded by advertising, and that offered the operators of the websites concerned the chance to pay to join a white list that enabled them to unblock their adverts, held a dominant position in the market for the provision of access to users who had installed its ad blocker if the operators of the websites concerned had no other commercially viable means of accessing these users.

Under the ruling, the case was referred back to the appeal court for a new decision. The BGH also pointed out that, if the ad blocker provider was found to hold a dominant market position, there would need to be a comprehensive balancing of interests that could also lead to the ad blocker being declared unlawful.

Urteil des Bundesgerichtshofs vom 8. Oktober 2019 - KZR 73/17 -

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=100748&pos=0&anz=1

Judgment of the Federal Supreme Court of 8 October 2019, KZR 73/17

Federal Administrative Court rules on youth protection authorities' discretionary powers

Jan Henrich
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In a ruling of 30 October 2019, the German Bundesverwaltungsgericht (Federal Administrative Court) confirmed the rating of Bushido's rap album 'Sonny Black' as harmful to minors. The Berlin rapper's album glorified violence and contained highly discriminatory lyrics, according to the court. The decision examined the discretionary powers of the German Bundesprüfstelle für jugendgefährdende Medien (Federal Examination Office for Media Harmful to Minors – BPjM), the regulatory body responsible for classifying data media and telemedia with content harmful to minors on the basis of the Jugendschutzgesetz (Youth Protection Act – JuSchG).

In 2015, the BPjM had decided that the album should no longer be sold to children and teenagers because it glorified a criminal lifestyle and defamed women and homosexuals. The rapper's appeal against this decision was granted in the second instance by the Oberverwaltungsgericht Münster (Münster Higher Administrative Court), which referred to formal errors in the hearing that formed part of the classification procedure.

The BPjM successfully appealed this decision before the Bundesverwaltungsgericht, which ruled that the original classification had been lawful. The Federal Examination Office's findings had shown that the album was harmful to minors. Media were harmful to minors if they were likely to harm the development of children and teenagers or their upbringing as independent, socially capable members of society. The court therefore confirmed the BPjM's view that the interests of youth protection in the current case outweighed those of artistic freedom because, although the album had entertainment value, it lacked enhanced artistic importance.

The decision is significant because, in its judgment, the court set out new principles for the classification of media that are harmful to minors. Previously, authorities such as the BPjM, whose decision-making organs comprise representatives of art, culture, education and youth work, had their own discretionary powers, which were only subject to limited judicial review. However, the court distanced itself from this principle and ruled that, under the guarantee of legal protection enshrined in the Constitution, classification decisions should be subject to judicial review. The BPjM's decision, applying youth protection criteria set out in legislation, was therefore open to such a review.

Pressemitteilung des Bundesverwaltungsgerichts zum Urteil vom 30. Oktober 2019 - BVerwG 6 C 18.18

https://www.bverwg.de/pm/2019/77

Press release of the Federal Administrative Court on the judgment of 30 October 2019, BVerwG 6 C 18.18

ZAK finds Channel21 guilty of infringing advertising and programming guidelines and Medicinal Product Advertising Act

Arvid Peix
Institute of European Media Law

At its meeting on 19 November 2019, the Kommission für Zulassung und Aufsicht (Commission on Licensing and Supervision – ZAK), the central organ of the German media authorities with responsibility for monitoring advertising on national television channels, decided that Sport1's teleshopping window, Channel21, had infringed current advertising laws enshrined in Article 7(1)(3) and (4) of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement – RStV) and Article 41(1)(4) in conjunction with Article 3 of the Heilmittelwerbegesetz (Medicinal Product Advertising Act – HWG).

The case concerned advertising for a so-called 'pain relief pen' known as 'Paingone' in a programme on 11 December 2018. According to the manufacturer, this product, which resembles a pen, offers an alternative to traditional pain relief and has no side effects at all. When applied to the skin, it is said to deliver electronic frequency through the skin into the nervous system in order to relieve pain. The product was advertised as such on the teleshopping window Channel21, with the claim that it had multiple uses, including the relief of muscle pain and headaches, period pain and even rheumatic pain. The pen was also described as a good alternative to traditional pain relief tablets that often had dangerous side effects.

In the ZAK's opinion, channel21 had crossed the boundary of lawful advertising. The claims made in the teleshopping programme about the product's health benefits had created the impression that it could replace the medicinal treatment of painful conditions and, in some cases, was more effective. It had been suggested that the product could relieve headaches and even remove the need for an operation – without medication and its side effects.

Since even the manufacturer itself significantly played down the effectiveness of its product on its website ("For temporary relief of pain as part of current pain medication Paingone will not totally eliminate pain"), the ZAK thought the claims made in the advertisement were misleading and harmful to consumers. Misleading consumers was prohibited under the relevant provisions of both the RStV and the HWG, especially if it promoted behaviour that significantly endangered their health or safety.

The organiser of the teleshopping programme issued a statement rejecting the allegation, but confirmed that it would no longer advertise the product in the future. Nevertheless, 'Paingone' continues to be offered for sale on channel21's website.

Pressemitteilung der ZAK vom 20.11.2019

https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/news/auf-klick-schmerzfrei-no-pains-gone-mit-paingone/

ZAK press release of 20 November 2019

Extreme-right NPD wins dispute over Facebook page classified as ‘harmful to minors’

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On 27 August 2019, the German Bundesverfassungsgericht (Federal Constitutional Court) decided that, before classifying a comment as ‘harmful to minors’ on the basis of the Jugendmedienschutz-Staatsvertrag (Inter-State Agreement on the Protection of Minors in the Media), the author’s fundamental right to freedom of expression must be taken into account. The second chamber of the first senate of the Bundesverfassungsgericht therefore upheld a constitutional complaint lodged by a regional association of the extreme right-wing NPD party.

The case concerned the association’s Facebook page, which is freely accessible and contains articles on political topics and links to third-party content. Between 2014 and 2016, the regional association had published several articles on refugee policy, which had included grossly disparaging comments about refugees by users and the association itself. The responsible media regulator had fined the website operator on the grounds that it should have appointed a youth protection officer because it made content harmful to minors commercially available via telemedia. A local court had rejected a complaint about the fine and a subsequent legal challenge had been dismissed as unfounded by the appeal court, which had ruled that the NPD regional association’s comments were harmful to minors because they promoted indiscriminate rejection of entire ethnic groups and aggressive animosity towards religious and ethnic minorities. The site operator had then appealed to the Constitutional Court, alleging that its fundamental right to freedom of expression enshrined in Article 5(1) of the German Grundgesetz (Basic Law – GG) had been infringed.

The judges in Karlsruhe decided that the disputed comments did not fall outside the protection offered by the freedom of expression simply because they were directed at minorities, incited hatred or were potentially racist. They ruled that, when classifying comments as harmful to minors and imposing the related legal consequences, the importance of the freedom of expression should be taken into account. In the decisions taken here, this had not been the case, since the comments had all been treated as one and classified as harmful. The court should have examined the meaning of each comment individually and taken into account the full implications of the sanction imposed, that is, the obligation to appoint a youth protection officer.

Pressemitteilung des Bundesverfassungsgerichts vom Nr. 66/2019 vom 11. Oktober 2019

https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2019/bvg19-066.html;jsessionid=31AF33C6AF1F475DB0C3E1019F620750.1_cid392

Federal Constitutional Court press release no. 66/2019, 11 October 2019

SPAIN

CNMC fines Atresmedia and Mediaset for anti-competitive practices

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Media groups Atresmedia and Mediaset, the largest commercial state broadcasters in Spain, were fined by the national regulator (*Comision Nacional de los Mercados y la Competencia* – CNMC), for a breach of the anti-trust rules governing TV advertising. The illegal conduct infringes Article 1 of Law 15/2007 and Article 101 of the Treaty on the Functioning of the EU. Mediaset has been fined EUR 38.9 million, while Atresmedia was fined EUR 38.2 million. They have been instructed to modify their commercial strategies within the next three months.

Atresmedia and Mediaset have developed commercial policies in respect of the sale of TV advertising that has resulted in high concentration: their channels account for over 85% of the overall market. As a consequence, the capacity of other operators to secure revenue has been endangered and the risk of those operators being expelled from the market has increased.

Anti-competitive practices have included, on the one hand, imposing high minimum investment thresholds on advertisers (with failure to comply resulting in possible penalties), and, on the other hand, paying incentives to media agencies when a certain volume of investment is achieved. A combination of such tactics has influenced advertisers and agencies to invest most of their budgets in Mediaset and Atresmedia.

Additionally, both companies have “commercialised” their advertising slots in fixed packages – that is to say, advertisers are forced to purchase advertising slots placed on the companies’ respective larger and smaller channels as a set package and not slot-by-slot. Moreover, all the networks’ channels broadcast the same commercials simultaneously, according to a schedule determined by their leading channels.

These actions are considered to constitute vertical single-branding agreements that impose minimum purchase requirements, as defined in the European guidelines on vertical agreements.

Resolución Expte. S/DC/0617/17 ATRESMEDIA/MEDIASET

https://www.cnmc.es/sites/default/files/2746591_3.pdf

Resolution S/DC/0617/17 ATRESMEDIA/MEDIASET

Spanish Government may shut down websites without a court warrant

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CMS Albiñana & Suárez de Lezo

For public security reasons, the government has reserved the right to suspend, exceptionally and as a precautionary measure, the transmission of data and the connection to the Internet, as provided in the Royal Decree-Law 14/2019 of 31 October (hereinafter, the “Royal Decree-Law”).

This Royal Decree-Law amends Law 9/2014 of 9 May on Telecommunications to acknowledge the government's right to take over any types of infrastructure, network, service or digital resource that may affect public security within the framework of national defence. It means that the Ministry of Economy and Business has the power, in exceptional cases, to immediately and temporarily shut down websites and other services and to control all networks without a prior court warrant in order to guarantee public order and public and national security.

The government adopted this provision to prevent anyone from trying to use the Internet, a website or apps for the aforementioned reasons. In particular, this regulation was the government's reaction to the so-called *digital Catalan Republic* , an initiative of the regional Catalan Government to create a *digital republic* that involves, among other things, the processing of personal data such as census records, voter rolls, tax information and other records on Internet servers that are located outside the European Union with the intention of creating an online *digital Catalan Republic*.

The Royal Decree-Law might be contrary to the Spanish Constitution, as constitutional guarantees must be observed when adopting such measures which might limit, for example, the right to freedom of expression.

Real Decreto-ley 14/2019, de 31 de octubre, por el que se adoptan medidas urgentes por razones de seguridad pública en materia de administración digital, contratación del sector público y telecomunicaciones.

https://boe.es/boe/dias/2019/11/05/pdfs/BOE-A-2019-15790.pdf

Royal Decree-Law 14/2019, of October 31, whereby urgent measures are taken for reasons of public security in matters of digital administration, public sector contracting and telecommunications.

FINLAND

The Council for Mass Media publishes dictum on the use of algorithms in journalism

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On 30 October 2019, the Finnish self-regulatory body for the media sector, Council for Mass Media (CMM), agreed on a historical dictum regarding algorithmic journalism. The dictum concerns news automation and personalisation, that is, newsbots, voting aid applications, and targeted recommendations, among others. The utilisation of algorithms as such is seen as a dispensable means to produce (more) quality content in an increasingly efficient manner. However, the news rooms should know the logic behind the algorithms they use. The dictum also aims to ensure transparency and accountability in the utilisation of algorithms in journalism.

The dictum refers to sections 2, 7, and 9 of the Guidelines for Journalists. Respectively, these concern the duty to make content-related decisions according to journalistic principles and the accompanying ban to outsource editorial decision-making outside the editorial office as well as the duties to obtain information openly and indicate sources. The dictum sets out that news automation and personalisation always involve journalistic decisions, such as what is published and to whom. These decisions must be made journalistically, without transferring decision-making power to outside programmers, among others. The editorial office must sufficiently understand the logic behind the algorithms it uses and make sure that developers of digital media services follow the guidelines for journalists in their independent decision-making. The editor-in-chief is ultimately responsible for the activity.

The CMM gave two recommendations: news media must inform their public of the use of automation and relevant data sources when publishing essentially machine generated content, and their public must also be informed of the personalisation and data collecting related thereto. The information must be provided transparently and in an intelligible manner. The dictum was prepared by a working group which included, among others, the chairman and several members of the CMM, the editors-in-chief of the major Finnish newspapers, as well as the director of Yle News Lab. Moreover, the CMM had conducted a survey among news media in order to map both the use of algorithms in the media sector and the need for a dictum.

Lausuma uutisautomatiikan ja personoinnin merkitsemisestä 2019. Hyväksytty 30.10.2019.

http://www.jsn.fi/lausumat/lausuma-uutisautomatiikan-ja-personoinnin-merkitsemisesta-2019/

Dictum on designating news automation and personalisation.

JSN hyväksyi historiansa ensimmäisen algoritmien journalistista käyttöä käsittelevän lausuman

http://www.jsn.fi/uutiset/jsn-hyvaksyi-historiansa-ensimmaisen-algoritmien-journalistista-kayttoa-kasittelevan-lausuman/

CMM accepted its first dictum regarding journalistic use of algorithms

FRANCE

CSA’s RT France warning confirmed

Amélie Blocman
Légipresse

Having received an official warning from the French national audiovisual regulatory authority (*Conseil supérieur de l’audiovisuel* – CSA) in June 2018 after broadcasting a news report, RT France, the French-language outlet of the Russian international news channel RT, requested the retraction of the warning – which demanded that it respect its agreement with the CSA – on the grounds that the CSA had abused its powers. Article 2-3-6 of the channel’s agreement with the CSA (in the version applicable at the time) states: “The honesty requirement applies to all programmes. The broadcaster […] must verify the validity and sources of all news stories. As far as possible, the source should be indicated. Information that is unconfirmed should be reported in the conditional tense. It [the broadcaster] must demonstrate rigour in the presentation and processing of information. / It must ensure that the context in which images were captured is appropriate to the subject they are used to illustrate. […] In news programmes, the broadcaster may not use technological processes to alter the meaning or content of images. […]”. Article 4-2-1 stipulates that the CSA may issue an official warning to the broadcaster, demanding that it meet its obligations.

The disputed sequence – approximately 18 minutes in duration – was broadcast during a television news bulletin on 13 April 2018 that was mainly devoted to the situation in Syria following chemical attacks carried out a week earlier against the civilian population of the city of Douma. As well as various reactions from the international community, the sequence included two interviews accompanied by written text (such as “Some locals are thought to have been forced to simulate chemical attacks” or “simulated attacks”), street interviews in which Parisian passers-by were asked whether they thought western air strikes in Syria would be appropriate, and a studio interview with an individual described as an “international strategic advisor”.

The CSA found, firstly, that the interview excerpts broadcast by RT France during the disputed programme, in which people had described in Syrian Arabic the famine that was ravaging the Douma region, had been dubbed with a translation that had borne no resemblance to what had actually been said but had instead indicated that a chemical attack had been merely faked. It had transpired that this translated dialogue had concerned a different excerpt, which had not been broadcast. Secondly, the CSA found that the French translation of some of the comments in Syrian Arabic had accused the Jaysh al-Islam armed group for the faking of chemical attacks, whereas in point of fact this had not been said by the people interviewed in the original language.

The *Conseil d'État* ruled that the CSA had correctly applied the provisions of the channel's agreement, since the interviews had failed to demonstrate the required level of rigour and in the second case) honesty in the presentation and processing of information.

Article 2-3-1 of the channel's agreement with the CSA also requires journalists to "ensure that controversial issues are presented honestly and that different points of view are expressed". The *Conseil d'État* explained that although these stipulations did not prevent the broadcaster from defining an editorial approach, they did require it to ensure that, where controversial issues were concerned, a distinction was made between the presentation of facts, commentary on those facts and the expression of different points of view.

The CSA, when issuing the warning in question, noted that the sequence had shown a marked imbalance in its analysis of the subject in question and an unequivocal approach to the issue of chemical weapons, whereas the subject was so sensitive and controversial that, under its agreement with the CSA, the broadcaster should have laid out different points of view. On account of the confusion between the presentation of the facts, commentary on those facts and the use of written text such as "simulated attacks", the disputed sequence had given the impression that the simulation of the chemical attacks on the city of Douma on 7 April 2018 was an established fact, whereas it was actually shrouded in uncertainty and controversy. Furthermore, the studio interview with a so-called "international strategic advisor" – who had claimed that the Syrian army did not use chemical weapons, that the Jihadists had laboratories in which they made such weapons and that public opinion in western countries had been manipulated – with nothing to counterbalance his remarks had constituted a one-sided presentation of an issue that was highly controversial.

Lastly, contrary to the broadcaster's claims, the *Conseil d'État* ruled that the disputed CSA decision could not be regarded as constituting a disproportionate attack on the freedom of expression. The request for the CSA's warning to be retracted was therefore rejected.

Conseil d'État, 22 novembre 2019, n° 422790

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjU84WMhvTmAhWaA2MBHb0oAHEQFjAAegQIBBAB&url=https%3A%2F%2Fwww.legifrance.gouv.fr%2FaffichJuriAdmin.do%3FoldAction%3DrechJuriAdmin%26idTexte%3DCETATEXT000039417378%26fastReqId%3D91637690%26fastPos%3D20&usg=AOvVaw2S3iciDqx3OLxsKwGw1ZCP

Conseil d'Etat, 22 November 2019, no. 422790

All tablet computers to be taxed at same rate for private copying

Amélie Blocman
Légipresse

Private copying constitutes a well-known exception to copyright under Article L 122-5-2 of the Intellectual Property Code (which regulates authors' rights) and Article L 211-3-2 (which regulates neighbouring rights). Authors of works that are copied in a non-commercial and non-professional context are entitled to compensatory remuneration, which is paid at source and collected directly from manufacturers and importers of digital media and recording devices used for copying. These companies add the tax to the purchase price paid by consumers. The Private Copying Committee, created under Article L 311-5 of the Intellectual Property Code, is responsible for deciding which types of medium are subject to private copying remuneration, the rates of remuneration for each type of medium, and the conditions regarding the payment of such remuneration.

In the case at hand, a digital tablet manufacturer had asked the *Conseil d'État* to annul, on the grounds of abuse of power, Article 2 of the Private Copying Committee's decision of 5 September 2018, by which the committee had extended the remuneration for private copying that already applied to "built-in memories and hard disks in multimedia tablet computers with a media player function, with or without a detachable keyboard (but not attached)" to all such tablets – including those equipped with Windows 8.1 operating systems and later versions (which had previously been exempt). It had also requested the annulment, on the grounds of abuse of power, of Article 6 of the said decision, which had created a single rate of remuneration for all such tablets.

Previously, the committee had distinguished between tablets with an operating system for mobile devices or with their own operating system (known as "media tablets"), which were subject to private copying remuneration, and those with Windows 8.1 operating systems or later versions (known as "PC tablets"), which were exempt. In its disputed decision, the committee considered that this distinction had become obsolete because of technical advances in the respective types of operating systems. Furthermore, a user survey had shown that the number of private copies made on these devices was high and virtually the same for both types of tablet. Finally, the *Conseil d'État* ruled that the committee had been right, when evaluating the number of copies made, to hold that the practice of copying, for private use, content that was being streamed live did not, in itself, constitute a form of piracy that would justify omitting it from the calculation of remuneration due. The application was therefore rejected.

Conseil d'État, 27 novembre 2019, n°425595, Société Archos

https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000039426793

Conseil d'Etat, 27 November 2019, no. 425595, Société Archos

UNITED KINGDOM

Channel 5: Ofcom’s change of control review

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The Communications Act makes provision for Ofcom to carry out reviews when there is a change in ownership of any Channel 3 or Channel 5 licensee. There have been three previous reviews in relation to a change in control of Channel 5.

Section 353 requires Channel 5 to give Ofcom notification of a “relevant change of control”, backed up by an obligation to provide Ofcom with such information as it requires to carry out a review of the change. The “relevant change of control” is not limited to the direct holding of shares in the licence holder but also includes any body connected with the licensee.

Ofcom was notified of the merger of CBS Corporation and Viacom Inc, both US corporations owned by the same entities. Prior to the merger, Viacom had held shares in a company which, through various intermediaries, eventually held shares in Channel 5 Broadcasting Limited, the licensee. After the merger, CBS would survive (renamed ViacomCBS Inc) but all Viacom’s assets and liabilities would be transferred to CBS. While ultimate ownership would not change, CBS would become a body corporate in the chain of companies holding Channel 5, and this is a relevant change of control for the purposes of section 353 of the Communications Act.

Ofcom is obliged to carry out a review of the effects or likely effects of such a change. Subsections 353(4) and (5) list matters to be taken into account. These relate to programming matter, specifically the amount of time allocated to original programmes, news and current affairs, and the range of programmes made at different centres of programme production in the United Kingdom outside the M25. Ofcom took the view that ownership and executive leadership were relevant, given their potential impact on investment strategy and future commissioning decisions, and thus ultimately on programming. Should Ofcom be of the view that the relevant change of control would be prejudicial to any of the matters specified in subsections 353 (4) and (5), it would vary the licence to make sure the change of control is not prejudicial.

In its 2005 review, when CLT acquired the Channel 5 licensee, Ofcom stated that its approach to the review was “first to establish what changes have taken place or are planned in the areas covered by subsections (4) and (5), and whether the level of provision has remained and is likely to remain at or above the level preceding the change of control”. It broke the programming down into the specific categories identified in section 353, assessing them individually. It took a similar approach in 2010 and 2014. In the current review, the factors that Ofcom took into account in its review were:

Whether the ultimate owners would remain unchanged; Whether the immediate owner of the Channel 5 licensee would also remain unchanged; Whether the key executives of Viacom would remain in place in the combined entity and would have committed to continued control over programming and investment strategy; Whether the new President of ViacomCBS was the person who was in charge of Viacom's international networks at the time Channel 5 was originally acquired by Viacom.

Ofcom took the view that "the transaction has a strategic and commercial rationale which is not to do with Channel 5 and therefore would be unlikely to affect its strategic direction directly."

Ofcom concluded that the change of control would not be prejudicial to programming and therefore did not propose to amend Channel 5's licence.

Channel 5: change of control review Review under section 353 of the Communications Act 2003

https://www.ofcom.org.uk/__data/assets/pdf_file/0023/181391/change-of-control-review-channel-5.pdf

Directors UK introduces its Directing Nudity and Simulated Sex Guidelines

Julian Wilkins
Wordley Partnership and Q Chambers

Directors UK, the professional association for screen directors, has launched its Directing Nudity and Simulated Sex Guidelines (the Guidelines), purportedly the first of their kind in the UK. However, arguably, they act as a complement to the terms contained in the agreement between the Producers Alliance for Cinema and Television (PACT) and the actor's union, Equity, dated 1 August 2004 as revised on 13 October 2005 (The Agreement).

The Guidelines provide shared professional expectations that apply to everyone involved in making sensitive content, with the aim of becoming standard working practice within the TV and film industry.

The Guidelines provide best practice for directors working with producers, writers, performers, casting directors, wardrobe and make-up, agents and intimacy co-ordinators. An intimacy co-ordinator helps deliver the director's vision in a safe, protective and collaborative way whilst acting as advocate for cast and crew to guard against the risk of exploitation or vulnerability. The Guidelines include rehearsal techniques, scenes of sexual violence, planning shots to adhere to individual contract clauses, and addressing issues that occur on set.

The Guidelines were produced in consultation with Directors UK member directors, industry bodies and professionals from across the disciplines, and are supported by BAFTA, BFI, the Casting Directors' Guild, Equity and the Writers' Guild of Great Britain as well as industry advocacy groups ERA 5050 and TIME'S UP UK.

Susanna White, Directors UK Film Committee Chair said: "The director, as the creative lead on a production, should set the tone for a professional and respectful on-set environment [...] and no member of a cast or crew should ever be put in a position where they feel unsafe, exploited or mismanaged — especially when making sensitive material."

The Guidelines reflect the Agreement's Clause 13(3) which states that "the artist shall be notified before any audition takes place that the actual engagement will involve nudity or simulated sex acts or both." Similarly, Clause 13(4) of the Agreement refers to no artist being required to disrobe entirely or in part after being interviewed for the part, whatever its nature, and no artist being required to perform any simulated sex acts. The artist can request an observer at audiences, with other attendees limited to those absolutely necessary, a rule that applies to filming too.

Likewise, before filming, an artist should be notified in writing about the requirement for nudity and its extent, including any simulated sex. Even where an

artist agrees to performing a sex scene, they can change their mind and a body double can be used. Regarding any unused material containing nudity, semi-nudity and/or simulated sex, a producer will use his or her best endeavours to ensure it is destroyed.

The UK Directors Guidelines reflect the Agreement but are more prescriptive and encourage co-operation, for instance in the script writing: “Nudity and simulated sex should only be in the script if they are essential to the story.”

The Guidelines consider the dialogue between the director and the artist’s agent, including which part of the body the performer is comfortable about having filmed; the impact of social media; and whether the artist has suffered any trauma in earlier life which may be exacerbated by performing nude/simulated sex scenes.

Another example of the Guidelines' prescriptive approach is: "Plan movement, touch and kisses in advance. When kissing, there should be no ‘tongues’, unless the performers and director agree. Agree on sucking, nibbling, duration, pressure etc.” Each performer is to be given a word to use indicating if, during a scene, they no longer feel safe or comfortable.

After filming a scene, the director should ensure everyone is okay and take the performers' minds back to their real selves by discussing something light, such as their next project. It also recommends that cast and crew be signposted to any aftercare available.

The Guidelines refer to Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, which states that it is a criminal offence to make or distribute child pornography (a child is defined as someone under 18 years of age). Directors are reminded that if they are working on a project that involves some non-explicit or implied sexual content with teenagers or young people, there remains significant regulation around their contribution.

Directors UK Guidelines on Directing Nudity and Simulated Sex

https://www.directors.uk.com/news/directing-nudity-and-simulated-sex-guidance

GREECE

New Greek classification system of TV programmes

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The Ministry of Digital Policy, Telecomunications and Information has issued a new classification system for TV programmes with its Decision No. 106/12.6.2019. This decision was the result of the National Council for Radio and Television's (NCRTV) relevant draft proposal, which was submitted to the Ministry, and a public consultation which ended on 30 April.

The new system for the classification of TV programmes is based on their content as well as on the age of viewers. In particular, the classification of programmes depends on how likely they are to impair the moral, physical, psychological or mental development of minors. The classification of a programme is based, in particular, on qualitative and quantitative criteria, such as the editorial justification, the context and the genre, the frequency, the repeatability, the intensity and the duration of the broadcasting of unsuitable scenes.

Programmes are classified by the broadcaster and, in particular, by a special committee consisting of experts such as psychologists, teachers, lawyers and media experts in specific categories. These categories are linked to the timeframes during which a programme can be broadcast.

The age classification of programmes is set out in the following 5 categories:

- K: represents programmes suitable for everyone

- 8: represents programmes suitable for minors over eight years old

- 12: represents programmes suitable for minors over twelve years old

- 16: represents programmes suitable for minors over sixteen years old

- 18: represents programmes suitable for viewers over eighteen years old.

These visual symbols (K, 8, 12, 16, 18) appear throughout the duration of the programme and throughout the duration of its trailer.

A verbal explanation of the symbols appears at the beginning of the programme and after an advertisement break of 30 seconds for the “8” and “12” categories and of one minute for the “16” and “18” categories. For the “K” category, it is the broadcaster that decides how long the showing of the verbal explanation should last.

Programmes classified in the “K” category can be broadcast at any time. Programmes classified in the “8” category cannot be broadcast during the children’s programme zone and 30 minutes before or after such a zone. Programmes classified in the “12” category can be broadcast between 9 p.m. and 6 a.m., and after 10 p.m. on Fridays and Saturdays, and on the eve of or during school holidays. Programmes classified in the “16” category can be broadcast between 10 p.m. and 6 a.m. Programmes classified in the “18” category can be broadcast between midnight and 6 a.m.

The content classification of programmes is set out in the following 4 categories:

- Violence: meaning that the programme includes violent scenes

- Sex: meaning that the programme includes sexual scenes

- Use of substances: meaning that the programme includes scenes of use of drugs and other addictive substances

- Improper speech: meaning that the programme includes improper use of language

These verbal symbols and their explanation appear at the beginning of the programme and after an advertisement break of 30 seconds.

Απόφαση αριθμ. 16/12.6.2019, Κατάταξη και σήμανση των τηλεοπτικών προγραμμάτων, Εφημερίς της Κυβερνήσεως

http://www.et.gr/idocs-nph/search/pdfViewerForm.html?args=5C7QrtC22wFqnM3eAbJzrXdtvSoClrL8zS83ZvoDVVTNZ8op6Z_wSuJInJ48_97uHrMts-zFzeyCiBSQOpYnT00MHhcXFRTs3uGr7wXIbG8m0XS8UQeMpx4CDEw-c8YDM8SHBjG7w8I.

Decision n. 106/12.6.2019, Classification and marking of TV programmes, Government Gazette

IRELAND

Minister for Justice and Equality launches public consultation on hate speech

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On 24 October 2019, the Minister for Justice and Equality, Charles Flanagan, launched a public consultation process on hate speech. The consultation forms a crucial part of the review of the relevant law in this area – namely, the Prohibition of Incitement to Hatred Act 1989 – and aims to ensure that Ireland's legislation on hate speech is fit for purpose and is effective in meeting the real needs of communities and individuals who experience the impact of hate speech.

The Prohibition of Incitement to Hatred Act 1989 prohibits certain forms of threatening, abusive or insulting conduct that are intended or likely to stir up hatred against a group of persons on account of certain characteristics. These characteristics are "race, colour, nationality, religion, ethnic or national origins, membership of the travelling community and sexual orientation." Threatening, abusive or insulting conduct can take the form of "Actions likely to stir up hatred", under Section 2, and includes: the publication or distribution of written material; the use of words or behaviour or the display of written material outside of a private residence; and the distribution, showing or playing of a recording of sounds or visual images. The Act also contains a provision governing "Broadcasts likely to stir up hatred", and this covers broadcasts to the general public of images or sounds under Section 3. In addition, the Act contains a provision on the "Preparation and possession of material likely to stir up hatred", which includes "the preparation and possession, or the making or possession, of written material or recordings of sounds or visual images." The Act contains some exceptions and defences; however, the conduct or material concerned – whether it involves words, written material, images or sounds – must be: "threatening, abusive or insulting" and "intended or likely to stir up hated against a group of persons" (not an individual) on account of their characteristics.

There are four preliminary issues identified for discussion in the consultation. The first issue is whether the list of protected characteristics covered by the Act should be extended to include other groups in society with shared identity characteristics – for instance, "disability or gender identity" – who are vulnerable to having hatred stirred up against them. The second issue is whether the use of the term "hatred" should be changed? Under the existing Act, in order to be an offence, the words or material must be intended or likely to stir up "hatred" against one of the protected groups that the consultation paper identifies as being at "high threshold" risk. The consultation paper states that "the Act is designed to deal with hateful behaviour that is sufficiently severe to reach the threshold for criminal prosecution" and notes that the term "hatred" is not defined under the Act, which uses the term according to its usual meaning. Moreover, "given that

prosecutions under the current Act have been relatively rare," the consultation is seeking views as to "whether the requirement to stir up hatred should be replaced by another term (hostility or prejudice, for example)" and if so, what the implications would be for freedom of expression?

The third issue in the consultation deals with the application of the Act to online speech and notes that "while the wording of the current Act is broad enough to cover incitement via modern technologies and online behaviour [such as] online broadcasting, publication and social media discourse", views are being sought to consider whether a more explicit wording that cited these forms of communication might result in more successful prosecutions under the legislation. The current Act, for instance, refers to distributing written material to the public or a section of the public, and the consultation organisers are seeking views as to "whether this is sufficient to capture modern day communications where posts on social media sites can be general posts or theoretically limited to followers or 'friends' and could therefore be argued not to be public".

The fourth issue relates to the requirement under the current Act "to prove that the action was intended or likely to stir up hatred". The Consultation paper notes that "in some cases prosecutions may not succeed, as this intent or likelihood cannot be proven, regardless of the actual effect of the action"; therefore, the consultation is seeking views as to "whether the need to prove intent or likelihood within the Act should be changed – for example to include circumstances where the person was reckless as to whether their action would stir up hatred."

There are three ways in which the public and relevant stakeholders can contribute to the consultation on hate speech: through an online questionnaire posted on the Department of Justice and Equality website; a structured set of workshops designed to hear specifically from minority communities; and a public call for written detailed submissions, aimed at those with expert knowledge of the subject or the operation of the current legislation. The public consultation on hate speech runs until 13 December 2019, and a second phase dealing with hate crime (which is separate, but closely related to hate speech) will be published by the Department of Justice and Equality in 2020.

Department of Justice and Equality, 'Hate Speech Public Consultation'

http://www.justice.ie/en/JELR/Pages/Hate_Speech_Public_Consultation

Review of the Prohibition of Incitement to Hatred Act 1989, Pubic Consultation, October 2019, Consultation Document

http://www.justice.ie/en/JELR/A_Review_of_the_Prohibition_of_Incitement_to_Hatred_Act_1989.pdf/Files/A_Review_of_the_Prohibition_of_Incitement_to_Hatred_Act_1989.pdf

Broadcasting Authority publishes research report on political social media advertising

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On 17 September 2019, the Broadcasting Authority of Ireland (BAI) published a research report on political social media advertisements. The ElectCheck 2019 research report was commissioned by the BAI and undertaken by the Institute for Future Media and Journalism (FuJo) at Dublin City University. The research examined the political advertising activity on Facebook, Twitter and Google during the European elections in May 2019, in the context of the platforms' commitments in the self-regulatory Code of Practice on Disinformation to address the spread of online disinformation and fake news. The research forms part of a wider EU project established in April 2019 by the European Regulators Group for Audiovisual Media Services (ERGA), designed to assist the European Commission in monitoring the implementation of the commitments made by Google, Facebook and Twitter in the Code.

The ElectCheck 2019 research report examined more than 1 500 political advertisements included in ad libraries and datasets provided by Facebook, Twitter and Google using a set of questions identified by ERGA to assess the extent to which each platform disclosed relevant information about political advertising, including: (i) whether the advert was paid for; (ii) who paid for it; (iii) if it carried a disclaimer stating that it was a political or issues-based advert; (iv) information on micro-targeting options; and (v) the amount spent on the advert.

The report identified several specific issues, including a lack of clarity regarding who had paid for advertisements and how much was spent on them. Overall, the report found that "while some information relative to the research questions could be found from the supplied datasets," it was not possible to achieve a clear, fully comprehensive picture of the nature and scale of political advertising on Facebook, Twitter and Google, "due to inconsistencies in the datasets." In relation to the disclosure of payer information, for instance, the report noted that, "both Facebook and Google made this clear in the majority of cases while Twitter required the researcher to click through various links to subsections of the advert details pages in order to obtain this information." The report observed that in the majority of cases examined, "both Facebook and Twitter provided a disclaimer on the immediate image of the advert that advised it was related to social issues or politics, Google, however, although hosting the adverts on a webpage entitled 'political adverts in the European Union' did not provide any individual disclaimers on the immediate images of the adverts." Overall, the report found "only Facebook labelled any adverts as issue-based", namely those concerned with campaigning issues, such as immigration and the environment, rather than election candidates or parties. The report further identified that while micro-targeting information was available in all cases, it was limited to geography, gender and age.

According to the BAI's chief executive Michael O'Keeffe, "positively, this report indicates that Facebook, Google and Twitter proactively engaged with commitments under the Code in relation to the transparency of political advertising during the 2019 European Elections in Ireland," however, "it is equally clear that the overall objectives underpinning these commitments were not achieved in Ireland" and as the report indicates, the "inconsistency across the three companies results in a systematic lack of transparency and comprehensive understanding of political and issue-based advertising online".

BAI, 'Elect Check 2019: a report on political advertising online during the 2019 European elections'' 17th September 2019

http://www.bai.ie/en/download/134399/

BAI, 'New report on political social media ads identifies inconsistencies in datasets and definitions'

https://www.bai.ie/en/new-report-on-political-social-media-ads-identifies-inconsistencies-in-datasets-and-definitions/

ITALY

First Italian case on advertising of electronic cigarettes

Ernesto Apa, Elisa Stefanini

On 5 November 2019, the Court of Rome, by adopting a restrictive interpretation of Italian legislation, ordered two companies to block the delivery of some commercial communications relating to electronic cigarettes (e-cigs) and liquid refills, as an urgent measure.

Article 21, paragraph 10, of Legislative Decree No. 6/2016 (which implemented the EU Directive 2014/40/EU on tobacco products) provides for a ban on the advertising of e-cigs and refill liquids. Specifically, it prohibits the following activities which have the aim or the direct or indirect effect of promoting electronic cigarettes and refill containers:

Commercial communications in information society services, in the press and other printed publications, except for publications that are intended exclusively for professionals in the trade of e-cigs or refill containers and for publications which are printed and published in third countries, where those publications are not principally intended for the European Union market; Commercial communications on the radio; Any form of public or private contribution to any event, activity or individual person which may have transnational effects; and Audiovisual commercial communications to which Directive 2010/13/EU (Audiovisual Media Services Directive - AVMSD) of the European Parliament and of the Council applies.
In the case at hand, an association of consumers sued two companies, alleging that the advertising activities they were carrying out were in contrast with Article 21, paragraph 10, and therefore illegal. The court ordered the following advertising activities to be immediately blocked: (i) Publication of e-cigs pictures on the Internet, specifically on the companies' websites and in their social media (that is, Facebook, Instagram), including the re-post by the companies on their social channels (also through the use of links) of messages autonomously posted by third parties (for example, influencers) with hashtags that recall a brand or model of e-cigs; and (ii) Posting of posters and advertising billboards in public places or places open to the public or on public transports (as was the case in Rome).

First of all, the court recalled that the only texts allowed are those containing information, descriptions and instructions on the use of e-cigs without promotional contents (that is, information on prices and the technical characteristics of the product, such as ingredients, taste and nicotine content). Consequently, the company may only provide such information on its official website and social channels. For the same reason, only images of e-cigs and liquid refills used to help in the choice of the product to be purchased or to describe the products' technical characteristics are allowed. Therefore, any information or image provided without this intent falls within the ban provided for by Article 21 of

Legislative Decree No. 6/2016, due to the nature of commercial/advertising communication.

Secondly, the court clarified that the “commercial communication” prohibited by Legislative Decree No. 6/2016 includes any form of communication intended, directly or indirectly, to promote the sale of goods and services to consumers, pursuant to Legislative Decree No. 70/2003, by using a wide interpretation of this wording.

Thirdly, the court specified that the prohibition of commercial communications in the “press and other printed publications” covers commercial communication carried out not only in the press, but also on "any type of typographical or photographic reproduction intended for publication on media other than printed paper" such as posters and advertising billboards placed in public places or open to the public and on public transport.

The decision of the Court also includes some guidelines, most notably:

Texts containing information, descriptions and instructions on the use of e-cigs without promotional contents are allowed; Images of the products can be published on the homepage of the company’s website in order to immediately inform the consumer of the fact that they have accessed the official site of a company that produces and/or markets that particular type of e-cigs; The company may have an official website as well as social media channels where the information above can be published; and Posts published by third independent users without any kind of compensation (that is, user-generated contents), with hashtags that recall a certain model or brand of e-cigs, are out of the companies’ responsibility.

Tribunale di Roma, sezione XVII civile specializzata in materia di Impresa, ordinanza 5 novembre 2019, n. 57714

Court of Rome, civil secction XVII specialized on commercial affairs, ordinance no 57714 of 5th November 2019

Rome Commercial Court enjoins Facebook to reactivate CasaPound Italia’s account

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On 11 December 2019, Judge Stefania Garrisi issued an interim order on behalf of the Rome Commercial Court enjoining the social media company Facebook Ireland Ltd to reactivate the account of the extreme right-wing movement “CasaPound Italia” and that of its administrator, Davide Di Stefano.

On 9 September 2019, Facebook had closed CasaPound Italia’s account, with some 240 000 followers, as well as the accounts of some of its members and sympathisers, due to an alleged infringement of Facebook’s policy prohibiting the incitement to hatred and violence. The next day, CasaPound Italia asked Facebook to reactivate its account, but received no reply. CasaPound Italia thus lodged an application for interim relief with the Rome Commercial Court under Section 700 of the Italian Code of Civil Procedure.

In its order of 11 December 2019, the Rome Commercial Court, at the outset, recalled that the contractual relationship between Facebook and its users is governed by Facebook’s Terms of Use and Community Standards. However, the Rome Commercial Court added that, since Facebook plays a pivotal role in the implementation of the principle of political pluralism as laid down in Article 49 of the Italian Constitution, it must comply not only with the above contractual obligations, but also with the basic principles of the Italian legal order, ‘at least until a court establishes – in the context of ordinary judicial proceedings – that a given user has infringed those very principles.'

The Rome Commercial Court thus found that the deactivation of CasaPound Italia’s Facebook account was at variance with the principle of political pluralism, in that it precluded a political actor that had been ‘lawfully active on the Italian political scene since 2009’ from participating in the Italian political debate.

The Rome Commercial Court then turned to Facebook’s arguments for closing CasaPound Italia’s account, notably the infringement of the ban on incitement to hatred and violence as set out in Facebook’s Terms of Use and Community Standards.

The Rome Commercial Court observed that the promotion of CasaPound Italia’s values and goals through its Facebook account could not be regarded, *per se*, as a violation of the above ban. The court also found that episodes of violence or hatred against minorities involving CasaPound Italia’s members, which had not been discussed on CasaPound Italia’s Facebook page, could not be attributed to CasaPound Italia so as to justify the deactivation of its Facebook account, as that would amount to a form of strict liability, a principle that must be interpreted narrowly under Italian law. Moreover, the court ruled that posts displaying the

Celtic cross or other symbols did not amount, in themselves, to a violation of the above ban and did not warrant the deactivation of CasaPound Italia's account, only the removal of the individual posts concerned.

The Rome Commercial Court also found that foreign court rulings on Facebook's hate speech policy were not relevant to the case at hand, as they concerned parties pursuing goals incompatible with the Constitution, an 'assessment on the merits' that Facebook had no authority to carry out and that, in any case, was not possible in the course of interim relief proceedings.

Finally, the Rome Commercial Court considered that, given Facebook's role in the implementation of the principle of political pluralism, the exclusion of a political actor was liable to give rise to irreparable harm, thus warranting an interim measure.

Therefore, the Rome Commercial Court enjoined Facebook to immediately reactivate CasaPound Italia's account as well as that of its administrator Davide Di Stefano, under penalty of the payment of EUR 800 for each day of delay, and to bear legal expenses for a sum of EUR 15 000. The interim order may be appealed within 15 days before a panel of judges of the Rome Commercial Court, as per Section 669-terdecies of the Italian Code of Civil Procedure.

Associazione di promozione sociale Casapound Italia and Davide Di Stefano v Facebook Ireland Ltd (59265/2019)

http://www.lacostituzione.info/wp-content/uploads/2019/12/Casa-Pound-v-Facebook.pdf

Social Promotion Association Casapound Italia and Davide Di Stefano v Facebook Ireland Ltd, Case no. 59265/2019

NETHERLANDS

Journalist released from detention by Rotterdam Court over protection of sources

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On 25 October 2019, the district court of Rotterdam ordered the release from detention of a journalist working for the Dutch public broadcaster NOS who had been detained for over 30 hours for the protection of journalistic sources in a criminal case. His detention was met with significant public debate and protest, with the editor-in-chief of NOS stating that, “the right to the protection of journalistic sources is crucial for the journalist’s role as the watchdog of a democratic society.” Hundreds of journalists had also protested outside the court.

In 2014, a man was shot in his home after the shooter had mistakenly identified him as a target in a drugs conflict. During the resultant investigation, a wiretapped conversation between a source and the journalist became of particular interest. The questions asked by the journalist implied awareness of important details unknown to the prosecutor. With the goal of obtaining more information with regard to those details, the journalist was asked to act as a witness in the case. He invoked his right as a witness to refuse to answer questions on the grounds of Article 218a, paragraph 1 of the Dutch Code of Criminal Procedure (DCCP), as it would be detrimental to the protection of journalistic sources and the freedom of information. The examining magistrate considered that this right was limited in the case at hand, as the questions concerned information submitted as evidence, and not that originating from other sources. Nevertheless, the journalist refused to comply, and the magistrate ordered his detention on 24 October 2019.

Detention, or ‘gijzeling’ in Dutch, is the strongest means of coercion available in Dutch law. According to Article 221, paragraph 1, DCCP, the examining magistrate may order the witness to be detained in the interest of the investigation when they refuse to answer questions without legal grounds. However, this must be considered in light of a balance of interests and most notably Article 218a, paragraph 1, DCCP, and case law concerning Article 10 of the European Convention on Human Rights.

On 25 October 2019, the district court of Rotterdam reconsidered the balance of rights to assess whether the detention should continue. The Court agreed with the earlier considerations in that the right is not absolute, but limited to protecting sources in the interest of the freedom of information. However, the court extended the scope of protection, in light of ECtHR case law, to include the journalist’s means of obtaining information, the unpublished contents of this information, and the protection of sources that are not, or no longer, anonymous. The court highlighted the need to identify such a broad scope in order to prevent a chilling effect on the freedom of information.

The court then considered whether the public interest could outweigh the protection of witnesses granted by Article 218a, paragraph 1, DCCP. Paragraph 2 of the same article allows a restriction on the right when the unanswered question causes unreasonable harm to the public interest. Considering the fundamental importance of the freedom of information as protected by the ECtHR, the court found no public interest basis for the detention.

The court concluded that there were insufficient grounds to rule that the public interest outweighed the right to freedom of expression, and ordered that the journalist be released immediately.

Rechtbank Rotterdam, 25 oktober 2019, ECLI:NL:RBROT:2019:8376

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2019:8376

Court of Rotterdam, 25 October 2019, ECLI:NL:RBROT:2019:8376

Wil Thijssen and Jan Tourkov, "Rechtbank laat gegijzelde NOS-journalist Robert Bas vrij", de Volkskrant, 25 oktober 2019

https://www.volkskrant.nl/nieuws-achtergrond/rechtbank-laat-gegijzelde-nos-journalist-robert-bas-vrij~b37d73b8/

"*Court releases hostage NOS journalist Robert Bas*", *Wil Thijssen and Jan Tourkov, de Volkskrant, 25 October 2019*

Ziggo not required to disclose customer data associated with IP address for potential copyright infringement

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On 5 November 2019, the Court of Appeal of Arnhem-Leeuwarden upheld a lower court judgment, finding that an Internet service provider (ISP) was not required to provide customer data associated with certain IP addresses that were identified as being used for potential copyright infringement.

The case involved Dutch Film Works (DFW), which is the largest independent film distributor in the Netherlands in the field of cinema, home entertainment, video-on-demand and television. It is also a co-distributor of the US film *The Hitman's Bodyguard* (the "film"), and is entitled to take action on behalf of the film's rightsholders for infringement of intellectual property rights. Ziggo is one of the largest telecommunications providers in the Netherlands and is an ISP.

In 2017, DFW commissioned a German company to monitor the unauthorised sharing of the film via BitTorrent networks, which allows peer-to-peer file sharing. Following the monitoring, in 2018, DFW requested that Ziggo provide the names and addresses of Ziggo customers associated with 174 IP addresses. These IP addresses had been recorded by the German company during its monitoring activities. Ziggo refused to release the data to DFW, and DFW initiated legal proceedings against Ziggo. On 8 February 2019, the Rechtbank Midden-Nederland (District Court of Midden-Nederland) rejected DFW's claim to order Ziggo to disclose the customer data. DFW appealed the lower court judgment, and on 5 November 2019, the Court of Appeal of Arnhem-Leeuwarden rejected the appeal, and upheld the district court's judgment.

The court of appeal began by stating that the question of whether there was a legal obligation on Ziggo to provide the customer data involved a balancing between the interest of DFW in protecting its intellectual property rights, and the interest of Ziggo in protecting the personal data of its customers. This balancing involved Ziggo customers' right to personal data under Article 8 of the EU Charter of Fundamental Rights (the Charter), and the right to respect for privacy under Article 8 of the European Convention on Human Rights (ECHR). It also involved DFW's right to property under Article 17 of the Charter and Article 1 of Protocol 1 ECHR. Next, the court recognised that DFW had a legitimate interest in the provision of certain personal data from Ziggo. In this regard, the court took into account that individuals who had downloaded the film via BitTorrent had thereby intentionally infringed the intellectual property rights of DFW. As such, DFW had a legitimate interest in identifying the potential infringers, and to recover damages, by making requests to ISPs to provide the name and address details of the potential infringers.

However, after balancing these interests, the court concluded that it would not issue an order for Ziggo to disclose the customer data. First, the court held that

DFW had not made it sufficiently clear when it would use a certain action in relation to a Ziggo customer, which could range from sending a warning letter, to recovering costs and damages by issuing a summons. The court considered that Ziggo would be unable to adequately inform its customers in advance of the consequences of the provision of personal data to DFW. Secondly, the court considered that DFW was also not sufficiently transparent as to the amounts it would claim from these Ziggo customers, and the costs it would claim to have incurred to track down these Ziggo customers. As such, the consequences of the transfer of the Ziggo customers' personal data could not be properly estimated. Finally, the Court held that DFW had not made clear how the rights of the Ziggo customers involved would be effectively guaranteed. In light of these considerations, the court refused the relief sought by DFW.

Gerechtshof Arnhem-Leeuwarden, 5 november 2019, ECLI:NL:RBMNE:2019:423

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2019:9352

Court of Appeal of Arnhem-Leeuwarden, 5 November 2019, ECLI:NL:RBMNE:2019:423

ROMANIA

National Radio Day established by Romanian Parliament

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On 27 November 2019 Romania's Chamber of Deputies (*Camera Deputaţilor* – the lower chamber of the Romanian Parliament) adopted the draft of a law establishing 1 November as "National Radio Day".

The draft Law was tabled by 55 Social Democrat and non-affiliated senators. The document was tacitly adopted by the Senate (the upper chamber of the Parliament) on 6 March 2019. The law contains the following provisions:

Art. 1. – 1 November is established as National Radio Day. Art. 2. – The national and local administrative authorities may organise cultural/scientific events dedicated to the celebration of National Radio Day or may provide logistical and/or financial support to non-governmental organisations or other institutions that organise such events. Art. 3. – The Romanian Radio Broadcasting Society and the Romanian Television Broadcasting Society, as public services, may include in their schedules programmes and/or excerpts from events dedicated to celebrating National Radio Day.

The sponsors of the law asset that their aim was, in establishing National Radio Day, to ensure the recognition of radio's crucial role in the history of Romania and to pay tribute to the journalists, technicians and artists who have spread certain values among the public via the airwaves. The first official radio programme in Romania was broadcast on 1 November 1928 at 5 p.m. local time.

Proiect de Lege pentru instituirea zilei de 1 noiembrie ca Ziua Naţională a Radioului – expunerea de motive

http://www.cdep.ro/proiecte/2019/100/10/3/em140.pdf

Draft Law to establish the day of November 1 as National Radio Day – the reasoning of the initators

Proiect de Lege pentru instituirea zilei de 1 noiembrie ca Ziua Naţională a Radioului – forma pentru promulgare

http://www.cdep.ro/pls/proiecte/docs/2019/pr113_19.pdf

Draft Law to establish the day of November 1 as National Radio Day – form for promulgation

RUSSIAN FEDERATION

Law on Mass Media Foreign Agents adopted in Russia

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On 21 November, 2019, at the third and final reading, the State Duma of the Russian Federation adopted the draft law providing the possibility of applying the status of mass media foreign agent to individuals. On 25 November, the law was signed by the President of the Russian Federation.

The amendments suggest that the individuals can be recognised as "performing the functions of a foreign agent" on a par with legal entities if they create or distribute (including online) the information of the mass media foreign agent and at the same time receive money or material assets of foreign origins.

According to the amendments, all media that already have the status of "foreign agents" will have to establish a Russian legal entity before February 1, 2020 to be able to work in the Russian Federation. In addition, all their publications must bear the indication that they were created by a "foreign agent". Henceforth, foreign media recognised as foreign agents will be obliged to establish the appropriate legal entities within one month after inclusion in the register of the Ministry of Justice.

The Chairman of the Information Policy Committee of the State Duma, Leonid Levin, assured the public that the law would not be used against bloggers and publicists.

He stated, "This legislation is in no way directed against freedom of speech and freedom of dissemination of information in our country, but is a response to a number of unfriendly actions of the United States against the Russian TV channel RT (previously Russia Today), Sputnik and the journalists who work with them. It will complete the formation of a system of reciprocal measures against foreign media working with the Russian audience. It is important that the bill establishes a possibility, but not an obligation. Each case will be assessed by the Ministry of Justice and the Ministry of foreign Affairs of the Russian Federation, which will guarantee against making unreasonable decisions."

In July 2012, the State Duma adopted the amendments to a number of Russian laws that regulate the activities of non-profit organisations (NGOs). The law obliges NGOs that engage in political activities and receive foreign funding to register as " foreign agents." NGOs should indicate their status, for example on their websites, and report regularly on their financial situation. To date, more than 70 organisations have been included in the "foreign agents" register.

Later, in 2017, the "foreign media agents" legislation was adopted, shortly after the US Justice Department required RT America (part of the RT network) to

register as a foreign agent in the United States.

On 5 December, 2017, the Ministry of justice officially recognised nine media outlets as foreign agents: Voice of America; Radio Free Europe/Radio Liberty (RFE/RL); the TV channel "Present time"; the Tatar-Bashkir service "Radio Liberty" (Azatliq Radiosi); Siberia. Realities; Idel. Realities; Factograph; Caucasus. Realities; and Crimea. Realities. The list has not changed since then.

Пресс-релиз Комитета по культуре Госдумы РФ

http://komitet5.km.duma.gov.ru/Novosti-Komiteta/item/20517363/

Culture Committee of the Russian State Duma's press release

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