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EDITORIAL

To open or not to open cultural venues: that seems to be the question in these troubled COVID-19 days. In Europe, there is a different answer for this question depending on the country we are talking about, and even in those countries that allow cinemas and theatres to open their doors to the public, the applicable rules diverge. With regard to those countries that have chosen to keep venues shut, courts of law have so far upheld this governmental strategy. In this newsletter we report on two instances of this: In Germany, the Bavarian Constitutional Court refused to suspend individual provisions of the Twelfth Bavarian Infection Protection Measures Ordinance by temporary injunction. In France, the Conseil d'Etat ruled that keeping all cinemas, theatres and performance venues closed to the public was necessary, appropriate and proportionate to the aim of protecting public health in a moment when the spread of the virus remained at a particularly high level in the population. For the European audiovisual sector, and for all cinemagoers, the old Latin legal maxim *dura lex, sed lex* (the law is hard, but it is the law) will become sadly understandable through these decisions...

While hoping that cinemas will open everywhere as soon as possible, we invite you to delve into the electronic pages of the present newsletter, which are as usual full of interesting articles.

Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

BULGARIA

European Court of Human Rights: Budinova and Chaprazov v. Bulgaria and Behar and Gutman v. Bulgaria

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

In the two judgments of 16 February 2021 the European Court of Human Rights (ECtHR) has highlighted the positive obligations of the member states to combat hate speech (see also *Beizaras and Levickas v. Lithuania,* IRIS 2020-3/21). The ECtHR found that incitement to hatred, violence and discrimination cannot rely on the protection of freedom of expression when the offensive expressions clearly harm the privacy rights of the victims of hate speech, *in casu* Roma and Jews. The member states have a duty under Article 8 in combination with Article 14 of the European Convention on Human Rights (ECHR) to take action against persons publicly inciting hatred, violence or discrimination.

The first case, *Budinova and Chaprazov v. Bulgaria,* primarily concerns a complaint, under Article 8 and Article 14 ECHR, about the dismissal of a claim brought by Bulgarian nationals of Roma ethnic origin. The applicants had sought a court order against Volen Siderov, a well-known journalist and politician compelling him to (a) apologise publicly for a number of public statements in which he had negatively stereotyped Roma in Bulgaria in a crude manner, and (b) refrain from making such statements in the future. The applicants asserted that a number of statements made by Siderov, as leader of the right-wing political party Ataka, in his television programme, interviews, speeches and a book, had amounted to harassment and incitement to discrimination against people of Roma ethnic origin. The Bulgarian courts however found that Siderov's statements had not subjected the applicants to treatment different to that accorded to the rest of the population, and that they neither constituted harassment nor incitement to discrimination.

The ECtHR is not in doubt that the applicants were personally and directly affected by the judicial decisions dismissing their claim against Siderov. Therefore, they had victim status and they could complain about an interference with their rights under Article 8 (right to privacy) and Article 14 (non-discrimination) ECHR. The Court finds that Siderov's statements about Roma were affecting the private life of individual Roma, triggering the application of Article 8 ECHR. The ECtHR refers to (a) the characteristics of the group (for instance its

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size, its degree of homogeneity, its particular vulnerability or history of stigmatisation, and its position *vis-à-vis* to society as a whole), (b) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype), and (c) the form and context in which the statements were made, their reach (which may depend on where and how they have been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity. The social and political climate prevalent at the time when the statements were made is another relevant factor. The ECtHR finds that Siderov's message, conveyed bluntly and repeated many times over, was, in essence, that Roma were immoral social parasites who abused their rights, lived off the back of the Bulgarian majority, subjected that majority to systematic violence and crime without hindrance, and aimed to take over the country. This amounted to extreme negative stereotyping meant to vilify Roma in Bulgaria and to stir up prejudice and hatred towards them. The Court also refers to the many channels of communication used by Siderov, including television and radio programmes, which meant that his statements reached a wide audience. It acknowledged the disadvantaged and vulnerable position of Roma, the need for their special protection and the need to combat their negative stereotyping.

The ECtHR reiterates that Article 8 ECHR gives rise to positive obligations, and that these obligations may require the adoption of measures designed to secure respect for private lives even in the sphere of the relations of individuals between themselves. In discharging this duty, the national authorities must, however, also have a regard to the rights of the author of the statements under Article 10 ECHR. Thus, in such cases the crucial question is whether the authorities have struck a proper balance between the aggrieved party's right to respect for his or her private life and the right of the author of the statements to freedom of expression. The Court recalls that expression on matters of public interest is in principle entitled to strong protection under Article 10 ECHR, whereas expression that promotes or justifies violence, hatred, xenophobia or any other form of intolerance cannot normally claim protection. It may be justified to impose even serious criminal-law sanctions on journalists or politicians in cases of hate speech or incitement to violence. Statements made by members of parliament deserve little, if any, protection if their content is at odds with the democratic values of the Convention system. Sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups deserve none or very limited protection under Article 10 ECHR. The ECtHR finds that the Bulgarian courts downplayed the capacity of Siderov's statements to stigmatise Roma as a group and arouse hatred and prejudice against them. They apparently saw Siderov's statements as no more than part of a legitimate debate on matters of public concern. For the ECtHR it is clear that Siderov's statements went beyond being a legitimate part of a public debate about ethnic relations and crime in Bulgaria, as they amounted to extreme negative stereotyping meant to vilify Roma. Hence the Bulgarian courts failed to strike a fair balance between the competing interests at stake. By refusing to grant the applicants redress in respect of Siderov's discriminatory statements, the Bulgarian authorities failed to comply with their positive

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obligation to respond adequately to discrimination on account of the applicants' ethnic origin and to secure respect for the applicants' private life. This brings the ECtHR, unanimously, to the conclusion that there has been a breach of Article 8 ECHR read in conjunction with Article 14 ECHR.

The second case, *Behar and Gutman v. Bulgaria,* is very similar to the first one, with the difference that the applicants are Bulgarian nationals of Jewish ethnic origin, complaining about the lack of action taken by the Bulgarian authorities against a series of anti-Semitic statements uttered by Siderov on several occasions. The ECtHR points to the fact that Siderov's statements were targeting Jews, a group that in view of the historical persecutions to which they have been subjected, in particular during the Second World War, can be seen as a vulnerable minority. The ECtHR refers to the virulent anti-Semitic narratives by Siderov, in particular his statements denying the reality of the Holocaust. The ECtHR considers these statements as attacks on the Jewish community and as incitement to racial hatred, anti-Semitism and xenophobia. This extreme negative stereotyping was meant to vilify Jews and to stir up prejudice and hatred towards them. With a similar reasoning as in *Budinova and Chaprazov v. Bulgaria*, the ECtHR, unanimously, reaches the conclusion that Article 8 and Article14 ECHR have been violated. The Bulgarian authorities have not adequately reacted against Siderov's discriminatory statements, as they failed to respond to discrimination on account of the applicants' ethnic origin and to comply with their positive obligation to secure respect for the applicants' private life.

Judgment by the European Court of Human Rights, Fourth Section, in the case of Budinova and Chaprazov v. Bulgaria, Application no. 12567/13, 16 February 2021

https://hudoc.echr.coe.int/eng?i=001-207928

Judgment by the European Court of Human Rights, Fourth Section, in the case of Behar and Gutman v. Bulgaria, Application no. 29335/13 , 16 February 2021

https://hudoc.echr.coe.int/eng?i=001-207929

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REPUBLIC OF TÜRKIYE

European Court of Human Rights: *Ramazan Demir v. Turkey*

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The European Court of Human Rights (ECtHR) delivered a judgment guaranteeing Internet access from prison to certain websites with legal information. In *Ramazan Demir v. Turkey*, the ECtHR found that the refusal by the Turkish authorities to allow a prisoner to consult Internet sites on legal matters, including the website of the European Court, violated the prisoner's right to receive information as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

The case concerns the prison authorities' refusal to grant a request for access to certain Internet sites, lodged by Ramazan Demir in the course of his pre-trial detention in Silivri Prison in 2016. Demir, a lawyer, requested to access the Internet sites of the European Court of Human Rights, the Constitutional Court and the Official Gazette, with a view to preparing his own defence and following his clients' cases. After the prison authorities' refusal, the first instance and appeal courts and the Constitutional Court also dismissed his request.

Referring to Article 10 ECHR, Demir complained before the ECtHR that the refusal to grant him access to the three Internet sites at issue, had violated his right to receive information and ideas. First in general terms the ECtHR reiterates that, in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information. It also refers to a number of instruments of the Council of Europe and other international instruments recognising the public service value of the Internet and its importance for the enjoyment of human rights. The ECtHR emphasises the important role played by the Internet in individuals' everyday lives, as an increasing amount of information and services are available only on the Internet. Next the ECtHR notes that imprisonment inevitably involves a number of restrictions on prisoners' communications with the outside world, including their ability to receive information. The ECtHR clarifies that Article 10 ECHR certainly does not impose a general obligation to provide prisoners with access to the Internet. But the ECtHR in earlier cases has found violations of Article 10 because prisoners were refused access to specific Internet sites, in particular Internet sites with legal information and educational content (see *Jankovskis v. Lithuania and Kalda v. Estonia*, IRIS 2016-4/2). In the present case, Turkish legislation provided that prisoners could be granted access to the Internet in the context of training and rehabilitation programmes. The ECtHR considers that it could not be excluded that Demir's request was aimed at training and rehabilitation, justifying Internet access for prisoners under the domestic legislation, especially in view of Demir's

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professional activity as a lawyer and the nature of the three Internet sites to which he requested access. The ECtHR took into account that a large number of its judgments and decisions, and also those of the Constitutional Court, were only available online and required navigation and research on the Internet sites in question.

The Court notes that the Turkish authorities have not provided sufficient explanations as to why Demir's access to the Internet sites could not be considered as pertaining to his training and rehabilitation. Nor were any other reasons given, for instance whether and why Demir ought to be considered as a prisoner posing a certain danger or belonging to an illegal organisation, in respect of which Internet access could be restricted. Although the security considerations raised by the Turkish authorities had to be regarded as pertinent, the ECtHR observes that the national courts had not carried out any detailed analysis of the security risks which would have arisen from Demir's access to these three Internet sites, especially given that the websites in question belonged to State authorities and to an international organisation. Furthermore, Demir would have accessed these websites only under the authorities' supervision and in the conditions laid down by them. Accordingly, no relevant and sufficient reasons were given by the Turkish authorities to justify the measure as necessary in a democratic society. Therefore the ECtHR finds, unanimously, that there has been a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Second Section, in the case of Ramazan Demir v. Turkey, Application no. 68550/17, 9 February 2021

https://hudoc.echr.coe.int/eng?i=001-207804

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EUROPEAN UNION

European Parliament: Resolution on closing the digital gender gap, including in media and audiovisual sectors

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On 21 January 2021, the European Parliament adopted an important "Resolution on closing the digital gender gap: women's participation in the digital economy", which includes notable provisions in relation to the European media and audiovisual sectors. This follows the European Commission's Action Plan to support the recovery and transformation of the media and audiovisual sector, which was adopted in December 2020. The Action Plan included a specific action point on launching a communication campaign to "foster diversity not only in front of but also behind the camera", in order to improve diversified representations and add new ideas, stories, and voices (see IRIS 2021-2/3).

The Resolution begins by reiterating under Article 8 of the Treaty on the Functioning of the European Union (TFEU), that, in all its activities, the EU shall aim to eliminate inequalities, and to promote equality between men and women. In this regard, the Resolution notes that to achieve gender equality, girls and young women need equal access to technology and a safe online environment. However, gender stereotypes constitute a serious obstacle to equality between women and men, contributing to gender segregation in education and employment. This has the effect of further widening the gender gap in the digital sector, preventing women's full participation as users, innovators and creators. As such, the Resolution makes a number of recommendations, including in relation to the role of the media and audiovisual sector, and the online environment.

First, in relation to the media and audiovisual sectors, the Resolution emphasises the impact of the cultural, media, advertising and audiovisual sectors in the development and intensification of gender stereotypes and promotion of normative and cultural barriers. This is also replicated through the language and images disseminated. Notably, the Resolution calls on audiovisual and media industries to "increasingly portray women" in science, technology, engineering and mathematics (STEM) and information and communications technology (ICT)-related professions, and to "introduce depictions of diversity and opportunity within STEM and ICT". Further, the Resolution calls on media industries to include women on discussion panels, in newspaper articles and in other spaces where public opinion and discourse on technological subjects is shaped.

Second, in relation to the online environment, the Resolution has notable provisions concerning digital and media literacy, and gender-based online

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violence. The Resolution notes with “great concern” the rise in digital crimes and acts of intimidation, bullying, doxing, harassment and violence against women in the digital world. It thusstresses the importance of digital and media literacy in combatting gender-based online violence. Importantly, the Parliament calls for further legally binding measures and for a directive to prevent and combat gender-based violence, including cyber violence, which is often directed at women such as public figures, politicians and activists, as well as online hate speech against women.

In particular, the Parliament calls on the Commission to ensure that the forthcoming proposal for a Digital Services Act (see IRIS 2021-2/13) and the new framework for cooperation between internet platforms address online platforms’ responsibilities regarding user-disseminated hate speech and other harmful, abusive and sexist content, to protect women’s safety online. Finally, the Parliament calls on the Commission to develop harmonised legal definitions of cyber violence and a new Code of Conduct for online platforms on combating online gender-based violence.

European Parliament Resolution of 21 January 2021 on closing the digital gender gap: women’s participation in the digital economy, P9_TA-PROV(2021)0026

https://www.europarl.europa.eu/doceo/document/TA-9-2021-0026_EN.html

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NATIONAL

GERMANY

[DE] Discussion draft on improving media accessibility and implementing the European Accessibility Act (EAA)

Christina Etteldorf
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Late last year, the German Länder published a discussion draft on strengthening media accessibility, which is designed to expand the related provisions of the *Medienstaatsvertrag* (state media treaty – MStV). The public consultation process ended on 8 January 2021.

Last year's MStV reforms included measures to improve media accessibility. However, when the MStV was adopted, the Länder stated in a joint declaration that they intended to develop these rules further in the near future. This is reflected in the new discussion draft which, by extending media accessibility, aims to enable all people to participate in media discourse and therefore to incorporate the provisions of the Directive on the accessibility requirements for products and services (European Accessibility Act (EU) 2019/882) in the MStV.

The draft begins by redefining an accessible service as one that can be found, accessed and used normally by people with disabilities, using the latest technological disability aids, without any particular difficulties and without the help of others.

In the general principles contained in Article 3 MStV, the draft adds the requirement for the broadcasters concerned (the ARD members, ZDF, Deutschlandradio and all providers of national private broadcasting services) to take measures to combat discrimination. Article 7, which sets out the rules on accessibility, is amended to ensure that the broadcasters, in their efforts to expand their accessible services, take into account the needs of people with different disabilities. Announcements broadcast in accordance with regional legislation on the right to make official announcements must also be accessible. For telemedia providers also, the provisions on accessibility enshrined in Article 21 are significantly expanded. Whereas these providers were previously only urged to support barrier-free access to television programmes and television-like telemedia within the scope of their technical and financial means, the discussion draft contains much more specific rules. Telemedia providers that offer access to television programmes or television-like telemedia should ensure, within the scope of their technical and financial means, that the system for selecting their services is accessible. In particular, barrier-free electronic programme guides should provide information on the availability of accessibility. Steps must be taken to ensure that accessibility components are fully transmitted with adequate quality, and synchronised with sound and video, while allowing for viewer control

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of their display and use. This also applies to the corresponding telemedia services of ARD, ZDF and Deutschlandradio.

Infringements by broadcasters are added to the list of offences contained in Article 115 MStV. Failure to provide or extend accessible services despite having the technical and financial means to do so, as well as breaches of the related reporting obligation, can therefore be sanctioned as offences.

Diskussionsentwurf zur Stärkung barrierefreier Medienangebote und zur Umsetzung des European Accessibility Acts (EAA)

https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/ENTWURF_Synopse_Barrierefreiheit_MStV_2020.pdf

Discussion draft on improving media accessibility and implementing the European Accessibility Act (EAA)

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[DE] Federal Cabinet adopts draft copyright reform act

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On 12 February 2021, the German *Bundestag* (lower house of parliament) adopted a draft act bringing German copyright law into line with the requirements of the Digital Single Market. The package, amending both the *Urheberrechtsgesetz* (Copyright Act – UrhG) and the *Verwertungsgesellschaftengesetz* (Collecting Societies Act – VGG), as well as introducing a new *Urheberrechts-Diensteanbieter-Gesetz* (Copyright Service Provider Act – UrhDaG), is primarily designed to implement the Directive (EU) 2019/790 (DSM Directive) and the Directive (EU) 2019/789 (Online SatCab Directive).

The most hotly debated provisions of the new legislation, which were also widely discussed in the run-up to recent EU copyright reforms, concern upload filters and the copyright liability of upload platforms. Enshrined in the draft Copyright Service Provider Act (UrhDaG-E), the relevant transposing provisions are closely based on the wording of the DSM Directive. They require service providers to make their best efforts to obtain the contractual rights to make copyright-protected works available to the public. If they fail to do so, they can be held liable for the (illegal) uploading of such works. The draft act also contains provisions on permitted uses (e.g. for quotations and pastiches), the remuneration of authors, and unauthorised uses that create the obligation for platforms to block content. In order to ensure that the use of automated processes does not result in content being unreasonably blocked, the uses covered by the draft that are presumed to be allowed, must not be blocked until a complaints procedure has been concluded. These include minor uses of works, which are defined in the act as film excerpts, motion pictures or audio tracks up to 15 seconds in duration, text containing up to 160 characters, and photographs and graphics up to 125kB in size. The UrhDaG-E also contains provisions on internal and external complaints procedures and out-of-court dispute resolution.

The legislative package also introduces a form of ancillary copyright for press publishers in order to protect the economic, organisational and technical performance of press publishers in creating press publications. The previous rules on this subject were declared inapplicable on technical grounds by the CJEU in 2019 (C-299/17, VG Media). Articles 87f to 87k of the draft Copyright Act (UrhG-E) contain new rules giving press publishers the exclusive right (and therefore also a licensing obligation) to make their press publications available to the public and reproduce them in whole or in part for online use by providers of information society services. However, these rules do not apply to private use by individual users, the insertion of hyperlinks to a press publication, and the use of individual words or very short excerpts from a press publication. Publishers' remuneration is also reorganised: publishers will once again be entitled to a share in remuneration for lawful uses, such as authorised private copying (Article 63a of the UrhG-E and Articles 27 to 27b of the draft Collecting Societies Act (VGG-E)).

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The existing provisions of copyright contract law (Articles 32 *et seq*. UrhG-E) are also amended and collective redress is strengthened (Article 36d UrhG-E and extended collective licences, Article 51 VGG-E). The draft also contains rules on permission to use text and data mining (Articles 44b and 60d UrhG-E), digital and cross-border education, preservation of and better access to cultural heritage (Articles 60e, 60f and 68 UrhG-E), and, finally, the online distribution of television and radio programmes, e.g. through live streaming and media libraries (Articles 20b to 20d and 87 UrhG-E).

The legal limits on authorised use are also extended in relation to caricature, parody and pastiche. The use of works for these purposes is permitted as long as it is justified by its specific purpose (Article 51a UrhG-E). This change was introduced partly in response to the CJEU's judgment in the Pelham case (C-476/17), in which the provision of Article 24 UrhG (free use) was declared incompatible with EU law.

Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes

http://dipbt.bundestag.de/dip21/brd/2021/0142-21.pdf

Draft act bringing German copyright law into line with the requirements of the Digital Single Market

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[DE] KEK approves Amazon streaming service

Mirjam Kaiser
Institute of European Media Law

The *Kommission zur Ermittlung der Konzentration im Medienbereich* (Commission on Concentration in the Media – KEK) has no objections to the licensing of a linear television channel that Amazon Digital Germany GmbH plans to launch in Germany under the working title 'Prime Video Live'. At its 256th meeting, it decided that diversity of opinion would not be harmed if the channel was granted a licence.

Amazon Digital Germany GmbH, which is affiliated to Amazon.com, Inc., applied to the *Bayerische Landeszentrale für neue Medien* (Bavarian new media authority – BLM) for a licence to broadcast a nationwide special-interest television channel under the working title 'Prime Video Live'. The channel will broadcast top UEFA Champions League matches live from the 2021/22 season onwards.

Amazon is a global online mail order company that sells its own products as well as those of third parties, and offers video and music streaming services.

The licence application was submitted to the BLM on the basis of Articles 52, 53(1) and 53(2)(1) of the *Medienstaatsvertrag* (state media treaty – MStV), which require private broadcasters to hold a licence. Article 53 lays down special conditions that must be met in order to operate a channel at national level. Since Amazon Digital Germany GmbH, which applied for the licence, is based in Munich, the BLM is the regional media authority responsible for carrying out the licensing procedure under Article 104(1)(1) MStV. Licence applications for national channels must also be examined by the KEK which, according to Articles 104(2)(3), 105(1)(1)(5), 105(3) and 107 MStV, is responsible for the final assessment of matters relating to the diversity of opinion on national television. The KEK's analysis suggested that diversity of opinion would be protected if a licence was granted to Prime Video Live because the new linear television channel did not cause any concern in relation to the media concentration law. In the KEK's view, the channel would not give Amazon Digital Germany GmbH, which was fully owned by Amazon.com, Inc. via Amazon Europe Core S.à.r.l. and Amazon.com Sales, Inc., a dominant influence on public opinion in the television market.

Pressemitteilung der KEK, 9. Februar 2021

https://www.kek-online.de/service/pressemitteilungen/meldung/ergebnisse-der-256-sitzung-der-kek

KEK press release, 9 February 2021

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[DE] Ratification of 2021 German state gambling treaty continues

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The *Staatsvertrag zur Neuregulierung des Glücksspielwesens in Deutschland* (state treaty on a new system of regulation for gambling in Germany, Glücksspielstaatsvertrag 2021 – GlüStV 2021), which was signed by the heads of government of the German Länder on 29 October 2020, should enter into force on 1 July 2021. However, this is dependent on the treaty being ratified by at least 13 Länder by 30 April 2021 and by Saxony-Anhalt, where the new joint gambling authority of the Länder will be based, from 30 June 2021.

The new state gambling treaty contains fundamental changes to the rules on advertising for gambling services on television. Under Article 5 of the current version, television advertising for public gambling is prohibited. However, the treaty makes provision for certain exceptions in order to achieve its objectives better. Alongside the need to protect children and gamblers, and to prevent gambling addiction, these objectives include the creation of a clearly defined, suitable alternative to illegal gambling that can steer people's natural urge to gamble in an orderly and monitored direction, as well as curb the development and spread of unauthorised black-market gambling. The treaty therefore allows the Länder to permit televised advertising for lotteries and betting on sport and horse-racing. However, televised advertising for sports betting directly before or during a live broadcast of the event concerned is prohibited. Advertising for illegal gambling services is also forbidden.

Under Article 5 of the new treaty, holders of a gambling permit issued pursuant to Article 4 are, unless otherwise stipulated in law, permitted to advertise authorised gambling services and enter into sponsorship agreements. The permit described in Article 4 should set out content-related and ancillary provisions on the format of advertising for public gambling services, especially on television and the Internet, including television-like telemedia and video-sharing services, and on mandatory notices. Advertising should not be excessive or aimed at minors or other similarly vulnerable groups. Misleading advertising for public gambling services is prohibited, especially if it contains inaccurate messages about the chances of winning or the type or size of the prizes. Advertising must not suggest that gamblers can influence the outcome of games of chance or that gambling can solve financial problems. Advertising that resembles editorial content is prohibited, while Internet, radio or television advertising for virtual slot machines, online casinos and online poker is only allowed between 9 p.m. and 6 a.m. Advertising for betting services on a sports event directly before or during a live broadcast of the event concerned is prohibited on the channel broadcasting the event. Advertising for sports betting featuring current athletes and officials is also forbidden, as are the advertisement and sponsorship of illegal gambling services.

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It appears likely that, despite intense debate on the subject, the required number of ratifications for the GlüStV 2021 will be reached and that gambling regulations will therefore be relaxed.

Staatsvertrag zur Neuregulierung des Glücksspielwesens in Deutschland

https://bravors.brandenburg.de/br2/sixcms/media.php/68/GVBl_I_06_2021-Anlage.pdf

State treaty on a new system of regulation for gambling in Germany

Übersicht über den Stand der Ratifikation

https://www.automatenwirtschaft.de/uebersicht-ratifizierung-gluecksspielstaatsvertrag-deutschland/

Overview of the status of ratification

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[DE] State media authorities issue first rules on new state media treaty

Mirjam Kaiser
Institute of European Media Law

The 14 German *Landesmedienanstalten* (state media authorities) have jointly drafted new rules to implement the provisions of the new *Medienstaatsvertrag* (state media treaty – MStV). The boards of the individual media regulators are now gradually approving these rules, clearing the way for them to enter into force. The new rules are designed, among other things, to express in practical terms the MStV's provisions on advertising.The principle being that minor broadcasting services (primarily Internet streams) do not require prior authorisation, and the MStV's new provisions on media platforms and user interfaces which came into force in November.

Under Germany's federal system, legislative competence in the broadcasting field lies with the Länder, including regard to content provided by other significant mass communication providers. It was on this basis that the Länder adopted the MStV, which came into force on 7 November 2020. This replaces the *Rundfunkstaatsvertrag* (state broadcasting treaty), and implements the EU Audiovisual Media Services Directive which was amended in 2018. It contains rules applicable at national level on modernising the media system in relation to media platforms, user interfaces and media intermediaries. Under the MStV, the state media authorities can adopt various sets of rules in order to give a practical form to the treaty's provisions and assist its implementation. These rules are incorporated into state law through corresponding acts of approval and publication. All 14 media authorities must agree before they can enter into force.

The rules contain provisions that more closely define and specify the regulatory scope of the MStV. Many of them contain definitions and procedural rules. The state media authorities adopted the rules on the implementation of the advertising regulations of the MStV in accordance with Articles 72(1) and 74 MStV. These rules contain, in particular, provisions on the labelling and optical marking of advertising, the admissibility of split-screen advertising, virtual advertising, addressable advertising, and public-interest advertising (e.g. charity appeals). The rules clarifying the exemption from prior authorisation, enshrined in Article 54(1) MStV, explain the criteria under which broadcasters do not require prior authorisation. These qualitative and quantitative criteria are used to determine the importance of a broadcast channel for the formation of individual and public opinion. The rules relating to the MStV's provisions on media platforms and user interfaces clarify, for example, the obligation to notify the operation of media platforms, the rules on signal integrity, unlawful overlaying and scaling (transposing Article 7a of the Audiovisual Media Services Directive into the MStV), transparency requirements and the allocation of channels on media platforms. The accessibility of media platforms in the context of the new rules on equal opportunities and discrimination is also more closely defined, as is content findability in user interfaces.

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Further rules drafted by the regulatory authorities are currently being approved by the media authorities' boards. These are in relation to the implementation of the competition-related provisions of the MStV, rules on arbitration bodies under Article 99 MStV in the context of the regulation of video-sharing services and rules on the levying of costs in connection with the supervision of nationwide services.

Rules are still being drawn up to clarify the MStV's provisions on transparency and discrimination in relation to media intermediaries, so-called public value services that must be given prominence in user interfaces, and quotas for European productions in the catalogues of television-like telemedia.

Satzung zur Durchführung der Werbevorschriften des Medienstaatsvertrags

https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Satzungsentwuerfe_MStV/Werbesatzung_Entwurf.pdf

Rules on the implementation of the advertising regulations of the state media treaty

Satzung zur Konkretisierung der Zulassungsfreiheit nach § 54 Abs. 1 des Medienstaatsvertrags

https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Satzungsentwuerfe_MStV/Zulassungsfreiheit_Entwurf.pdf

Rules clarifying the exemption from prior authorisation enshrined in Article 54(1) of the state media treaty

Satzung zur Konkretisierung der Bestimmungen des Medienstaatsvertrags über Medienplattformen und Benutzeroberflächen

https://www.blm.de/files/pdf2/mb_satzung_febr21_neu.pdf

Rules relating to the state media treaty's provisions on media platforms and user interfaces

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[DE] Cinemas to stay closed in Bavaria for now

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 22 March 2021, the Bavarian Constitutional Court refused to suspend individual provisions of the *Zwölfte Bayerische Infektionsschutzmaßnahmenverordnung* (Twelfth Bavarian Infection Protection Measures Ordinance - 12. BayIfSMV) of 5 March 2021 by interim injunction. The Ordinance issued by the Bavarian State Ministry of Health and Care contains protective measures for preventing the spread of COVID-19 disease. The petitioners had filed an application for a temporary injunction against regulations of the ordinance concerning, among other things, the closure of certain cultural institutions, as they considered them to be contrary to fundamental rights. The Bavarian Constitutional Court, however, rejected the granting of an temporary injunction, as the complaint did not show a likelihood of success based on the merits. According to the court, it could not be established that the legislature has obviously exceeded the leeway provided under federal law or that it could have carried it out in violation of fundamental rights or other provisions of the Bavarian Constitution. The ordinance was based on the guidelines previously agreed between the Federal Chancellor and the heads of government of the Länder, and the court stated that it did not observe any reason why the challenged regulations could be obviously unconstitutional. Given the current development of the pandemic in Germany, the legislator has the right to relax restrictions only in certain cases and under narrow conditions. The continued closure of cultural institutions such as theatres, opera houses and concert halls as well as cinemas also did not prove to be manifestly unconstitutional upon initial assessment. According to the court, attending cultural venues implies a significantly increased risk of infection compared to other social contacts. Furthermore, the fact that the artistic activities concerned are subject to more far-reaching restrictions than those that apply to the exercise of freedom of religion or freedom of assembly did not manifestly violate the principle of equality.

Entscheidung des Bayerischen Verfassungsgerichtshofs vom 22. März 2021, Aktenzeichen: Vf. 23-VII-21

https://www.bayern.verfassungsgerichtshof.de/media/images/bayverfgh/23-vii-21-entscheidung-e.pdf

Decision of the Bavarian Constitutional Court of 22 March 2021, Vf. 23-VII-21

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SPAIN

[ES] A bullfighter’s performance is not copyrightable

Maria J. Roman Gallardo
MRG Abogados

The world of bullfighting in Spain has been subject to controversy again. This time, not due to the opposition of animal’s defense groups, but due to the Supreme Court’s ruling No. 497/2021 of 16 February 2021, which denies a bullfighter’s performance in a bullfight being considered as an original work and artistic creation.

Spain is one of the 8 countries in which bullfighting is still protected under its Cultural Heritage Act 18/2013 of 12 November 2013 which, in its preamble, observes the artistic component of bullfighting, which is "an artistic manifestation in itself, decoupled from ideologies and in which profoundly human values are highlighted (…)”.

Facts referred to in the Supreme Court's ruling consisted in that, after the performance of a famous bullfighter in Spain, the said bullfighter sent a request to the Extremadura Intellectual Property Registry for the registration of a work titled "Faena de dos orejas con petición de rabo al toro "Curioso" nº 94, de peso 539 kgs, nacido en febrero de 2010 ganadería Garcigrande Feria de San Juan de Badajoz, día 22 de junio de 2014" (“The two-eared performance with request for the tail of the bull named "Curioso" number 94, weighing 539 kilograms, born on February 2010 on the Garcigrande Ranch, at the San Juan de Badajoz Festival on 22 June 2014”), providing audiovisual materials and a dossier for registration. Once the Intellectual Property Registry analyzed the provided documentation, the said Registry denied the registration of the work. The bullfighter challenged this decision, arguing that the bullfighter’s performance is an artistic manifestation and a piece of art, which should be subject to intellectual property protection. Said claim was dismissed by the Commercial Court number 1 of Badajoz and by the Extremadura Provincial Court, since they both considered that the bullfighter’s performance lacked the condition of artistic creation and therefore is not susceptible of protection as an intellectual property work; The Supreme Court subsequently reconfirmed both dismissals.

The Supreme Court reminds in its ruling the concept of “Work” and expressly cites the judgment of the Court of Justice of the EU (CJEU) of 12 September 2019 in the *Cofemel* case (C-683/17). “Work” constitutes an autonomous concept of EU law which must be interpreted and applied uniformly, requiring two cumulative conditions to be satisfied: (i) there exists original subject matter, in the sense of being the author’s own intellectual creation; (ii) classification as a "Work" is reserved to the elements that are the expression of such creation.

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The Supreme Court, on the basis of the second of these elements for the definition of “Work”, considers the following:

(i) The original formal expression of the bullfighter should “objectively and precisely” identify the bullfighter’s original artistic creation in order it to be considered as a “Work”;

(ii) This notwithstanding, the bullfighter’s performance in the arena, only causes subjective feelings and sensations to the public, due to the beauty of the forms generated in said dramatic context.

The Supreme Court, under this consideration and following various CJEU’s rulings such as the ruling of 13 November 2018 regarding the *Levola Hengelo* case (C-310/17), states that it is not possible to recognize the bullfighter’s performance as a “Work” subject to protection and registration for intellectual property , since it is impossible to “objectively and precisely” identify what the artistic creation of the bullfighter actually consists of.

Likewise, the Supreme Court concludes that it is not feasible to equate a bullfight to a choreography, the latter being subject matter to protection by applicable legislation. In choreography it is possible, through dance notation, to identify the original creation of its author, since it is possible to “objectively and precisely” identify the movements and forms of the dance. This may not be replicated in a bullfighter’s performance since, regardless of certain movements with the cape and certain challenges and stages of the bullfight (which may not be claimed to exclusively belong to a certain bullfighter since they are part of every bullfight), it is extremely difficult to objectively identify the bullfighter’s original artistic creation in order to recognize exclusivity rights corresponding to an intellectual property work.

Press release of the Spanish Supreme Court, 25 February 2021

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[ES] Supreme Court finds that the Catalan PSB failed to comply with principles of news neutrality and pluralism during elections

Sandra Torrillas & Mª Trinidad García Leiva
Audiovisual Diversity/ University Carlos III of Madrid

On 22 February 2021, the Spanish Supreme Court had to rule on whether the actions of *Corporació Catalana de Mitjans Audiovisuals* (the Catalan public-service broadcaster - CCMA) infringed the principles of news neutrality and political pluralism during the election period for the general elections called on 28 April 2019. The CCMA appealed to the Supreme Court against two resolutions issued by the *Junta Electoral Central* (Central Electoral Board - JEC), which found an infringement of these two principles in the coverage given by the CCMA to a demonstration and the broadcasting of a documentary, both of which took place during the election period in 2019. This ruling reiterates the position of the Supreme Court already expressed in previous case law (see also IRIS 2018-1/16, IRIS 2019-5/11, IRIS 2019-6/10, and IRIS 2020-4/3).

In its ruling, the Supreme Court placed particular emphasis on the public nature of the broadcaster, which is legally considered to be public administration. Thus, the CCMA "[...] although in the form of a private limited company, is a public entity belonging to the *Generalitat* of Catalonia. It is not, therefore, a private entity that operates freely in a space where the Constitution and the laws do not prohibit it from doing so. On the contrary, as a public entity [...], it must carry out the activity for which it is authorised by law with submission to it and full objectivity in the exclusive service of the general interests of all". This standard must always be maintained, given its public nature, and even more so in the context of an electoral process.

When analysing whether the CCMA's broadcasts infringed the principles of news neutrality and political pluralism or not, the Supreme Court stated that the analysis is based on an indeterminate legal concept: that of the electoral impact that certain information may have on the electorate. In order to approach this concept, it considered that it must be determined on a case-by-case basis, taking into account several factors: the aim of the broadcast, the subjects appearing in it, the time at which it is broadcast, its duration, as well as the format used. Considering the actual broadcasts, and having weighed up the fundamental rights to freedom of information and freedom of expression, on the one hand, and the principles of information neutrality and respect for political pluralism, on the other, the Supreme Court stated that "The freedom to communicate truthful information does not justify going beyond that and incurring the loss of the required neutrality. It is not an unlimited right, and even less so if it is a public body, which is particularly obliged to maintain its objectivity".

The Supreme Court rejected the appeal submitted by the CCMA, confirming the resolutions previously issued by the JEC which found that the broadcasting of the aforementioned content infringed the principles of news neutrality and political

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pluralism.

Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección Cuarta, Sentencia núm. 242/2021. Fecha de sentencia: 22/02/2021

https://www.poderjudicial.es/search/openDocument/ac80c41e59051c89

Judgment of the Spanish Supreme Court, Contentious-Administrative Chamber, Fourth Section, Ruling no. 242/2021. Date of judgement: 22/02/2021

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FRANCE

[FR] CSA orders C8 to obey sponsorship rules

Amélie Blocman
Légipresse

During the broadcast of the programmes “La Grande Darka“ and “Touche pas à mon Poste“ on the C8 television channel on 21 and 23 September 2019 respectively, the company Skyline Airways was mentioned several times and given visual prominence in relation to prize draws in which the prizes included flights organised by the airline.

On 20 April 2020, believing this to be a possible violation of the decree of 27 March 1992 defining broadcasters’ obligations in relation to advertising, sponsorship and teleshopping, the *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory body – CSA) notified the channel that it had decided to instigate sanction proceedings in accordance with Articles 42 *et seq*. of the law of 30 September 1986.

According to Article 9 of the decree of 27 March 1992, “Surreptitious advertising is not allowed. (...) Surreptitious advertising comprises the verbal or visual presentation of goods, services, the name, the brand name or the activities of a producer of goods or a provider of services during programmes where such presentation is made for advertising purposes.”

Furthermore, under the terms of section III of Article 18 of the same decree, “Sponsorship must be clearly identified as such at the start, the end or during the sponsored programme. It may be identified by the name, logo or other symbol of the sponsor, for example by a reference to its products or services, or a distinctive sign, subject to the following conditions: 1. Any mention of the sponsor during the broadcast of a programme, unless it takes place during a break in the programme, must remain occasional and discreet, be limited to a reminder of the contribution made by the sponsor and must not involve an advertising slogan or presentation of the product itself or its packaging; 2. When the sponsorship is designed to finance a game show or competition, the sponsor’s products or services must not be used as prizes for advertising purposes (...)”.

C8 claimed that the brand had been mentioned on the channel as part of a sponsorship arrangement identified by the message “Avec la participation de Skyline Airways” (“With the participation of Skyline Airways”) displayed in the credits at the end of the programmes concerned. However, the CSA’s investigation found that this reference in the credits had been barely visible and very short in duration. The sponsorship therefore could not be considered “clearly identified” in the sense of Article 18 of the decree of 27 March 1992.

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The CSA also noted that the company Skyline Airways had been mentioned and thanked repeatedly during the programmes and that its logo had appeared multiple times, in particular in close-up shots showing the presentation of prizes. The company, its brand, its aircraft and illustrations of the prizes had been visible on the studio screen on several occasions and for a significant overall period of time during the two programmes. The Skyline Airways website had also been frequently mentioned. The prizes had been awarded in the studio in the form of flight tickets bearing the airline's name that had appeared on the screen several times.

The CSA concluded that this practice constituted a commercial promotion and that the exposure given to Skyline Airways had breached Article 18 of the decree of 27 March 1992, which only permitted the use of a sponsor's products or services as prizes if it was not for advertising purposes.

The CSA therefore ordered the channel to adhere to these rules in the future by clearly identifying sponsorship arrangements and refraining from advertising sponsors in any way when giving away their products or services as prizes. However, it considered it unnecessary, in the circumstances, to impose a sanction against the company on the basis of Article 9 of the decree of 27 March 1992 prohibiting surreptitious advertising.

Décision n° 2021-81 du 20 janvier 2021 relative à la procédure de sanction engagée à l'encontre de la société C8 le 20 avril 2020

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043156645

Decision No. 2021-81 of 20 January 2021 concerning the sanction proceedings launched against the company C8 on 20 April 2020

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[FR] The closure of cinemas, theatres and performance venues is (still) not manifestly illegal

Amélie Blocman
Légipresse

Two months after their previous attempt, various personalities from the cultural sector once again asked the *Conseil d'Etat* (Council of State) judge responsible for urgent applications to suspend, as a matter of urgency, the closure of cinemas, theatres and performance venues ordered on account of the health crisis. In support of their request, the plaintiffs referred not only to the serious breach of freedom of expression and the freedom to communicate ideas, freedom of artistic creation, freedom of access to cultural works, freedom to do business and freedom of trade and industry, but also to the mental health of the population. They argued that the continued closure of all live performance venues was having a worryingly detrimental impact on the psychological well-being of a significant proportion of the French population which, in view of its long-term consequences, now posed the greatest risk to health. They therefore thought the closure of cinemas, theatres and performance venues was disproportionate in terms of its expected benefits for the protection of public health.

As it had previously stated in its ordinance of 23 December 2020, the *Conseil d'Etat* ruled that keeping all cinemas, theatres and performance venues closed to the public could only be considered necessary, appropriate and proportionate to the aim of protecting public health while the spread of the virus remained at a particularly high level in the population, likely to compromise the treatment, and in particular the hospital admission, of infected patients and those suffering from other illnesses in the short term.

It added that the impact on mental health of the measures taken to combat the epidemic should nevertheless be taken into account by the administrative authority in order to ensure they were proportionate to their sole objective of protecting public health. It noted that mental health in France had worsened during the health crisis (21% of the population had been suffering from anxiety and depression since the start of November) and that "it is quite possible that the measures taken to combat the epidemic – and not just the epidemic itself – have played their part in this".

However, epidemiological and hospitalisation data published on the date of the judge's decision showed that infection rates and pressure on hospitals remained very high in all regions, justifying more restrictive measures in some areas. Furthermore, the exponential spread of the so-called British variant, which was much more contagious, was expected to lead to a rapid increase in cases in the weeks to come.

Finally, the plaintiffs argued that the principle of equality was being ignored, since certain establishments remained open to the public. However, the judge did not

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think this, in itself, infringed a fundamental freedom.

In conclusion, it was deemed that, in view of the continuing rapid transmission of the virus and the high risk of an increase in infection levels over the next few weeks, and although the measures concerned were likely to have a negative impact on the psychological well-being of the population, the serious breach of fundamental freedoms caused by the closure of cinemas, theatres and performance venues to the public was not manifestly illegal.

Conseil d'État, ord. réf. 26 février 2021, N° 449692

https://www.conseil-etat.fr/Media/actualites/documents/2021/02-fevrier/449692.pdf

Conseil d'Etat, ordinance of 26 February 2021, No. 449692

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UNITED KINGDOM

[GB] The Daily Mail's defence against HRH Duchess of Sussex right to privacy claim summarily struck out by the High Court

Julian Wilkins
Wordley Partnership

The Honourable Mr Justice Warby of the High Court of Justice upheld a summary judgment application against Associated Newspapers Limited (ANL), according to which the publisher of the *Mail on Sunday* newspaper, had misused HRH The Duchess of Sussex (Meghan Markle) private information by publishing a private letter addressed to her father.

HRH applied to the court under rules 3.4(2)(a) and 24.2 of the Civil Procedure Rules to have ANL's defence struck out. Rule 3.4(2(a) allows the court to strike out a defence or part of it "if it appears to the court … that the statement of case discloses no reasonable grounds for.. defending the claim."

HRH had sued ANL for publishing a letter she had written to her father which he disclosed to the publisher after reading an article in a US magazine, *People*, bearing the headline "The Truth about Meghan. Her best friends break their silence." The article refers to the content of HRH's letter. Her father considered the *People* article had misrepresented his conduct and the content of letters between him and HRH.

On 9th February 2019 the *Mail on Sunday* published an article including one online. The headline said: "Revealed: the letter showing true tragedy of Meghan's rift with her father she says has 'broken her heart into a million pieces.'"

HRH claimed damages for breach of privacy, breach of copyright and data protection issues. ANL defence included HRH had no expectation of privacy given her prominent profile. Also, ANL's argued that her letter had been co-authored by a member of the royal household staff and HRH did not have sole authorship.

HRH sought a summary judgment arguing that the defence showed no realistic prospect of success at the final trial.

Regarding privacy the court had to consider a two part test. Did HRH enjoy a reasonable expectation of privacy in respect of the information in question? The court had to consider various factors, namely the attributes of the claimant; the nature of of the activity in which the claimant was engaged; the place at which it was happening; the nature and purpose of the intrusion; the absence of consent whether it was known or could be inferred; the effect on the claimant; and the circumstances in which and the purposes for which the information came into the hands of the publisher.

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The second criteria was whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression.

ANL's arguments included that the letter was already in the public domain by virtue of the references in the *People* article, albeit the letter's content was not published. ANL's article gave HRH's father opportunity to set the record straight and deal with any misconceptions arising from the *People* article. HRH's father asserted he would have kept the letter private but this changed when HRH's friends "attacked" him in the People*People* article.

The court considered that HRH had not lost her right to keep the letter private; she had written a very personal letter to her father who had originally intended to keep it private until changing his mind. Whilst the *People* article referred to the letter it included no actual extracts from the letter nor was there evidence of HRH contributing or encouraging the article. ANL had not contacted HRH before publication although the article made substantial references to the letter. ANL contended the letter helped vindicate HRH's father; the court considered at best only a fraction of the letter helped the father. Furthermore, because the father volunteered the letter to ANL that neither ".. defeats or overrides the claimant's presumptive right to keep the contents of her (HRH) Letter private."

Whilst the *People* article referred to the letter, it did not of itself create public domain in the letter. "The short point is that disclosure of information about the existence of the Letter and a description of its contents is not at all the same thing as disclosure of the detailed content. The distinction between fact and detail is an obvious and well-established feature of this branch of the law, vividly illustrated by this case."

In this case the court considered that the interference with freedom of expression was a necessary and proportionate means of protecting HRH's privacy.

Regarding breach of copyright, including fair dealing, a separate hearing would determine whether the letter was jointly owned copyright or whether the letter was an original literary work for the purposes of the Part 1 of the Copyright, Designs and Patents Act 1988.

The High Court refused ANL leave to appeal and they would need to seek permission of the Court of Appeal for any appeal.

HRH The Duchess of Sussex v Associated Newspapers Limited in the High Court of Justice, Chancery Division, Business and Property Courts-Intellectual Property List [2021]EWHC 273 (Ch). Date of Judgement 11th February 2021

https://www.judiciary.uk/wp-content/uploads/2021/02/Duchess-of-Sussex-v-Associated-2021-EWCH-273-Ch.pdf

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GREECE

[GR] New rules for the Greek Media Authority

Persa Lampropoulou
NCRTV

Part A of Law 4779/2021 reinforces the role of the Greek Media Authority (National Council for Radio and Television - NCRTV) as new powers have been given to it.

In particular, the NCRTV has, according to the law, the power and the overall responsibility:

- to map, license or register and supervise all media service providers established in Greece [Article 3 (6), 33 (1), 34];

- to represent the country, in procedures concerning issues of a) jurisdiction [Article 3 (7)] and b) violation of the provisions of the Directive by media service providers established in other member states targeting Greece, as well as to restrict the provision of such services, according to the provisions of the law [Article 4 and 5];

- to provide information and receive complaints regarding any accessibility issues, according to Article 7 (4) of the Directive;

- to collect, yearly, the necessary data concerning the accessibility of audiovisual media services to persons with disabilities [Article 10 (1)];

- to collect, every June, the necessary data concerning the promotion of EU works by (linear and nonlinear) media services providers [Article 17 (1), 20 (2), 21 (2)];

- to collect, yearly, the necessary data for the imposition of the financial contributions to on demand media service providers targeting Greece [Artcle 17 par. 2];

- to register and supervise VSPs established in Greece [Article 31 (5) and 32 (910)];

- to work along with the providers and other stakeholders for the drafting of national codes of conduct and to launch coregulatory schemes [Article 6]; and

- to initiate media literacy campaigns [Article 35].

The Authority also has the relevant enforcing powers [Article 33 (1)].

ΝΟΜΟΣ ΥΠ' ΑΡΙΘΜ. 4779 ΦΕΚ Α 27/20.2.2021

https://www.kodiko.gr/nomothesia/document/672722/nomos-4779-2021

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Law 4779/2021, 20 February 2021

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[GR] The transposition of the AVMSD in Greece

Persa Lampropoulou
NCRTV

Greece has transposed the Audiovisual Media Services Directive (AVMSD) in part A of Law 4779/2021.

In the interest of promoting European works, on-demand media service providers shall ensure at least a 30% share of European works in their catalogues (Article 13, paragraph 1). The law does not describe the concrete means of ensuring the prominence of European works in their catalogues. Financial obligations are imposed on all media service providers established in Greece (Article 8 of Law 3905/2010 (Official Gazette A 219)), but only on non-linear media service providers targeting Greece (Article 13, paragraph 2). On-demand media service providers targeting Greece are required to contribute 1.5% of their annual revenues earned in Greece. These providers may invest, according to the provisions of the law (Article 17 (2)), either in the production of audiovisual works that fall under the provisions of article 20 of law 4487/2017 (Official Gazette A 116) - that is, cinematographic works, TV-films or series, episodes of such series, parts of such episodes and in video games. Alternatively, they may invest in rights of such works that have not yet been presented to the public, or they may contribute to the fund of the National Centre for Audiovisual Media and Communication.

The law introduces more relaxed rules on commercial communications with the aim to supply media service providers with the flexibility to efficiently use their advertising time. Article 14 (article 9 of the Directive) contains only one stricter provision in paragraph 3c, restricting commercial communications regarding firearms, and including some further clarifications. In particular:

- paragraph 7 of the same article clarifies that commercial communications concerning gambling are allowed provided that: a) they are in accordance with the provisions of Law 4002/2011 (Official Gazette A 189) and the Ministerial Decision of the Minister of Finance, No. 79292 ΕΞ 2020 (Official Gazette B 3260); and b) the games concerned are lawful, according to the provisions of the same law;

- paragraph 8 also foresees that audiovisual commercial communications must not violate the provisions of Law 2251/1994 (Official Gazette A 191 – Law on Consumer Protection). In particular these must not mislead the public, especially as to the characteristics of products and services and their acquisition terms. Moreover, the same communications must not present products as having therapeutic properties when such properties are not scientifically substantiated and evidenced.

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Article 15 states that children's programmes cannot be sponsored by companies active in the production of alcoholic beverages (in paragraph 4) and that sponsorship logos may not be shown during anychildren's programmes (paragraph 7). Weather and sports news programmes following the news and current affairs programmes, on the other hand, can be sponsored (paragraph 6).

Article 16 provides that viewers should be clearly informed of product placement by an appropriate identification (visual or sound signal) at the beginning and at the end of the programme, as well as when the programme resumes after a break. At the end of a programme containing product placement, a list of all products that have been inserted in the programme must be displayed.

Stricter rules are also provided in paragraph 5 of article 24, which forbids the transmission of advertisements and teleshopping of erotic content from 6 a.m. to-01 a.m..

Paragraph 1 of article 32 provides that Video sharing platforms (VSPs) established in Greece should take the appropriate measures to protect:

- minors from programmes, User-generated video (UGV) and audiovisual commercial communication which may impair their physical, mental or moral development;

- the general public from programmes, UGV and audiovisual commercial communication which contain incitement to violence or hatred against a group of people or a member of such group based on race, colour, ethnic or national origin, genealogical ancestry, religion, disability, sexual orientation, identity or gender characteristics;

- the general public from programmes, UGV and audiovisual commercial communication whose content's dissemination constitutes a criminal offence under Union Law. The provision particularly targets child pornography as set out in articles 348A and 348D of the Penal Code, and offences concerning racism and xenophobia as set out in Law 927/1979 (Official Gazette A139), articles 82A and 184 (2-3) of the Greek Penal Code.

VSPs are required to take appropriate measures as provided for in paragraph 6 of article 32 which literally transposes paragraph 3 of article 28b of the directive. The assessment of these measures is entrusted to the NCRTV which also has the relevant enforcement powers (Article 32 (9)). NCRTV is also competent for registring and keeping a list (as foreseen in Article 28a,paragraph 6 of the Directive) of VSPs established in Greece (Article 31 (5)).

ΝΟΜΟΣ ΥΠ' ΑΡΙΘΜ. 4779 ΦΕΚ Α 27/20.2.2021

https://www.kodiko.gr/nomothesia/document/672722/nomos-4779-2021

Law 4779/2021, 20 February 2021

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ITALY

[IT] A new regulation on commercial communications on food products and beverages released by the Italian Advertising Self-Regulatory Body

Donata Cordone & Fabiana Bisceglia

On 9 February 2021, the *Istituto dell'Autodisciplina Pubblicitaria* (Italian Advertising Self-Regulatory Body - IAP) passed a new regulation to discipline commercial communications concerning food products and beverages. The approval of this act aims to strengthen the protection of children and ensure healthy eating.

The regulation at hand constitutes an attempt to implement some of the provisions of the revised AVMS Directive, that has not yet been transposed by Italy. It largely resorts to a self-regulatory and co-regulatory mechanism, for instance, by suggesting the adoption of codes of conduct to reduce the exposure of children to audiovisual commercial communications for food and beverages containing nutrients and substances with a nutritional or physiological effect. In particular, these include fat, trans-fatty acids, salt or sodium, and sugar, of which excessive intakes in the overall diet are not recommended. Among others, Article 5 of the Regulation specifies that audiovisual commercial communications targeting children “must not emphasize the positive nutritional qualities” of the latter types of foods and beverages.

Also, Article 11 of the Self-Regulatory Code on Commercial Communications, of which the new regulation will constitute a component, recommends paying particular attention to those messages targeting minors below the age of 12 and teenagers. This provision, among other things, prohibits the broadcast of messages which may encourage the adoption of imbalanced eating habits or disregard for the need to adopt a healthier lifestyle.

With a view to provide more detailed guidelines, the regulation largely reflects the provisions already set by the Ministry of Health along with the Italian Advertising Self-Regulatory Body in 2015 in the so-called “Guidelines for marketing communications regarding food products and beverages for the protection of children and their proper nutrition”.

The regulation generally bans those “statements or representations that could mislead children, including omissions, ambiguity, and exaggerations that are not obviously hyperbolic, particularly regarding the nutritional characteristics and effects of the product, prices, free offers, conditions of sale, distribution, the identity of persons depicted, prizes, or rewards”. It also mandates respect for the principles of fair representation and transparency.

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Regolamento per la Comunicazione Commerciale relativa ai prodotti alimentari e alle bevande, a tutela dei bambini e della loro corretta alimentazione

https://www.iap.it/codice-e-altre-fonti/regolamenti-autodisciplinari/regolamento-alimentari-bevande-bambini/

Regulation on commercial communications concerning food products and beverages for the protection of minors and ensure their healthy eating

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LITHUANIA

[LT] Radio and Television Commission of Lithuania establishes list of mandatory information about Radio and Television Commission and Public Information Ethics Commission

Indre Barauskiene
TGS Baltic

On 3 February 2021, implementing new changes in the Law on Provision of Information to the Public of the Republic of Lithuania, the Radio and Television Commission of Lithuania (LRTK) has adopted a decision "On the procedure for publishing information on the Radio and Television Commission of Lithuania and the Public Information Ethics Commission" (the Procedure).

The Procedure provides that radio and television broadcasters and on-demand audiovisual media service providers must publish information about:

the possibility to apply to the LRTK regarding violations of the Law; the possibility to apply to the Public Information Ethics Commission regarding violations of the Code of Ethics of Public Information.
The Procedure further details that television broadcasters must publish indicated information at the beginning and the end of each daily television programme. Moreover, the information must be published in easy-to-read text, on a monochrome background and displayed on the screen for at least 1 minute.

Radio broadcasters must communicate the indicated information during the broadcast of the radio programme.

However, if radio and television broadcasters publish this information on their website continuously and uninterruptedly in a section of the website easily accessible to the visitor, then the obligation to broadcast this information does not apply.

On-demand audiovisual media service providers must publish the information on a permanent and continuous basis, in a catalogue publication or in another section of the website easily accessible to the visitor.

The decision came into force on 5 February 2021.

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2021 m. vasario 3 d. Nr. Lietuvos radijo ir televizijos komisijos sprendimas Nr. KS-12 Dėl informacijos apie Lietuvos radijo ir televizijos komisiją ir visuomenės informavimo etikos komisiją skelbimo tvarkos

https://www.e-tar.lt/portal/lt/legalAct/1e3ed92066d311eb9dc7b575f08e8bea

Radio and Television Commission's of Lithuania Decision No KS-12, "On the Procedure for Publishing Information on the Lithuanian Radio and Television Commission and the Public Information Ethics Commission", dated 3 February 2021

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[LT] Radio and Television Commission of Lithuania further details requirements for broadcasting of advertising

Indre Barauskiene
TGS Baltic

The Radio and Television Commission of Lithuania (LRTK) has implemented new changes of the Law on Provision of Information to the Public of the Republic of Lithuania, which transposed Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services. The LRTK has supplemented and changed its former decision on the Requirements for audiovisual commercial communication, broadcasting of advertising and sponsorship of audiovisual media services, radio programs and individual radio and/or television programs (*Reikalavimų komerciniams audiovizualiniams pranešimams ir reklamos transliavimui, radijo programų ir atskirų programų rėmimo radijo ir (ar) televizijos programose įgyvendinimo tvarkos aprašas (*the Requirements)). This secondary law aims at setting detailed rules on the broadcast of advertising and sponsorship, its markings, terms and related requirements.

More detailed requirements for teleshopping

The Requirements have changed the regulation of *Televitrina* (teleshopping programs). Before the amendments *Televitrina* was defined as a program (show) for teleshopping spots, broadcast on television programs that were not exclusively for teleshopping. However, now Televitrina is considered to be a set of teleshopping spots that is broadcast as a separate program. Therefore, it must be marked during the broadcast.

The Requirements further detailed that the inclusion of teleshopping in programs for children is prohibited, as well as teleshopping for medicines and medical treatment services.

Additional requirements set for sponsorship

With regard to sponsorship, the new provisions state that only the following words defining sponsorship may be used in the sponsor's presentation: presents, sponsors, sponsor (*pristato, remia, rėmėjas*). The sponsor's presentation may be broadcast during the broadcast of the sponsored program, during the announcement of the sponsored program and / or during the broadcast of announcements of audiovisual media services and / or directly related ancillary products provided by the same broadcaster or other entities belonging to the same group of broadcasters.

Separation of advertising and general requirements of broadcasting time

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In respect to radio advertising the Requirements detail that other means of separating the advertising spot from other parts of the program, such as the call sign of the radio program, may be used at the end of the advertising spot.

Television advertising and teleshopping must be inserted into programs, grouped together with at least two television advertising or teleshopping spots within a single advertising or teleshopping window, except where television advertising or teleshopping windows are longer than 40 seconds. The means of separating television advertising from teleshopping may be used singly or in combination at the choice of the television broadcaster. The television broadcaster must choose such means of separation of television advertising and teleshopping as are specified in the Description, which would properly inform the viewers about the nature of the information provided. In addition, the total time devoted to television advertising and teleshopping spots shall not include neutral frames used between editorial content and television advertising or teleshopping spots and between individual spots.

It is noted that in the case of children's programs, where a children's program consists of more than one audiovisual work, television advertising for these audiovisual works may be inserted once for each period of at least 30 minutes and only if their duration exceeds 30 minutes.

The total time devoted to television advertising and teleshopping spots shall not exceed 20 percent of the time between 6 a.m. and 6 p.m. (i.e. not more than 2 hours 24 minutes in a 12-hour period) and shall not exceed 20 percent of the time between 6 p.m. and midnight (i.e. no more than 1 hour 12 minutes in a 6-hour period).

All these changes are valid since 5 February 2021.

Dėl Lietuvos radijo ir televizijos komisijos 2012 m. balandžio 11 d. sprendimo Nr. KS-58 „Dėl Reikalavimų komerciniams audiovizualiniams pranešimams ir reklamos transliavimui, radijo programų ir atskirų programų rėmimo radijo ir (ar) televizijos programose įgyvendinimo tvarkos aprašo patvirtinimo“ pakeitimo

https://www.e-tar.lt/portal/lt/legalAct/0a8da01066f011eb9dc7b575f08e8bea

Radio and Television Commission’s of Lithuania Decision No KS-11, replacing 11 April 2012 decision No KS-58 “On approval of the requirements for audiovisual commercial communication, broadcasting of advertising and sponsorship of audiovisual media services, radio programs and individual radio and/or television programs”, dated 3 February 2021

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[LT] Radio and Television Commission of Lithuania supplements rules on inspection of economic entities and changes definition of children’s programmes

Indre Barauskiene
TGS Baltic

Implementing new changes of the Law on Provision of Information to the Public of the Republic of Lithuania, the Radio and Television Commission of Lithuania (LRTK) supplemented and changed its former decision on the Approval of the rules of inspection of the activities of economic entities performed by the LRTK.

Amendments to the decision introduced two additional grounds allowing LRTK to carry out unscheduled inspections:

when it receives a request from other regulatory institutions; and when it receives an anonymous complaint concerning the acts or omissions of a particular economic operator, where the assessment of the available information raises suspicions that the activities of the economic operator may endanger the values protected by the law.
The decision also changed the definition of children’s programmes. Previously, programmes for children were not defined by the viewers' age, but by the programme's content and form. It was defined as a programme which aimed at developing a creative, thinking and curious personality, promoting family values and love of nature. These criteria are no longer in place. Children’s programmes are now determined only by the age of the targeted audience, which should be below 18 years old. It is also envisaged that programmes whose target audience includes people of all ages are not considered to be children's programmes.

Amendments came into force on 5 February 2021.

2021 m. vasario 3 d. Lietuvos radijo ir televizijos komisijos sprendimas Nr. KS-14 Dėl Lietuvos radijo ir televizijos komisijos 2019 m. spalio 30 d. sprendimo Nr. KS-72 „Dėl Lietuvos radijo ir televizijos komisijos atliekamų ūkio subjektų veiklos patikrinimų taisyklių patvirtinimo“ pakeitimo

https://www.e-tar.lt/portal/lt/legalAct/fc19c28066c111eb9dc7b575f08e8bea

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Radio and Television Commission's of Lithuania Decision No KS-14, replacing 3 October 2019 decision No KS-72 "On approval of the rules of inspections of the activities of economic entities performed by the Lithuanian Radio and Television Commission", dated 3 February 2021

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NETHERLANDS

[NL] Judgment on Minister's refusal to release documents to broadcaster on Flight MH17 disaster

Ronan Ó Fathaigh
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On 11 February 2021, the District Court of Midden-Nederland (*Rechtbank Midden-Nederland*) delivered a notable judgment on a government ministry's refusal to release documents to the media relating to the Flight MH17 disaster, following a freedom of information request under the Public Access to Government Information Act (*Wet openbaarheid van bestuur)* (WOB) (see also IRIS 2021-2/9). The Court held that the release of certain documents could be refused, due to the potential harm caused to "relations of the Netherlands with other states and with international organisations". Importantly, however, the Court ordered the Minister of Justice and Security (*Minister van Justitie en Veiligheid*) to reassess the refusal to release other documents, including correspondence from the Dutch National Coordinator for Counterterrorism and Security. This followed a recent judgment from the highest Dutch administrative court, Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), on other media requests for access to government information about the Flight MH17 disaster (see IRIS 2018-1/33).

The case arose in January 2018, when a journalist with the news programme *RTL Nieuws* submitted a freedom of information (FOI) request to the Minister of Justice and Security concerning the Flight MH17 disaster. The disaster occurred in 2014, when Malaysia Airlines Flight 17 (MH17) from Amsterdam to Kuala Lumpur was shot down over eastern Ukraine, resulting in the death of 298 persons. The FOI request concerned documents included in the so-called "MH17 Archives" held by the Ministry of Justice and Security, which includes documents and correspondence relating to MH17 from the National Coordinator for Counterterrorism and Security (*Nationaal Coördinator Terrorismebestrijding en Veiligheid*) (NCTV), the General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst*) (AIVD), the Military Intelligence and Security Service (*Militaire Inlichtingen- en Veiligheidsdienst*) (MIVD) and the international Organisation for Security and Co-operation in Europe (OSCE). In response to the FOI request, the Ministry released some documents, but crucially, refused to release, or redacted, certain documents from NCTV to the AIVD, MIVD and the Dutch police, and a threat analysis on the airports sector. These documents were refused on the basis of Article 10(1)(b) and Article 10(2)(a) of the WOB, which allow refusal to release information that "could harm the security of the State" or "the relations of the Netherlands with other states and international organisations".

RTL Nieuws appealed the Minister's decision to the District Court of Midden-Nederland, arguing that access to the documentation should be granted under the

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WOB. In order to determine whether the Ministry was right to redact or not to disclose the documents, the Court inspected the documents confidentiality, and then delivered its judgment. First, in relation to a document on the situation in Ukraine dating from 2014 that had been refused under Article 10(2)(a) of the WOB, the Court agreed with the Ministry on its refusal to release the information. Crucially, the Court held that document "was not intended to be made public", contained positions of certain international organisations that had not been approved by these parties, and the interest in its disclosure did not outweigh the interest in protecting the "relations of the Netherlands with international organisations". The Court rejected the broadcaster's argument that the passage of time should have changed that assessment. Importantly, however, in relation to other documents sought by *RTL Nieuws*, namely certain correspondence from the NCTV distributed to the AIVD, MIVD and the Dutch police in 2014; and from the MIVD on the threat analysis of the NCTV in 2014, the Court held that the Ministry had not provided "sufficient reasons" for redacting certain passages. Further, the Court rejected the Ministry's reason for refusal to release the MIVD report, holding that the "mere circumstance that the report dates from after the air disaster is insufficient" reason for refusal. In light of the Court's findings, the Court ordered the Minster to reassess the refusal to fully disclose those documents at issue. Finally, the Court rejected *RTL Nieuws'* submission that the Ministry's search of documents relating to the MH17 Archive had been "insufficient", holding that there was no evidence to doubt the Ministry's assertions as to the extent of the MH17 Archive covered by the FOI request.

District Court of Midden-Nederland, ECLI:NL:RBMNE:2021:500, 11 February 2021

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[NL] New Code of Conduct on transparency of online political advertising in the Netherlands

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On 9 February 2021, the Minister of the Interior and Kingdom Relations published the Dutch Code of Conduct on transparency of online political advertisements ("the Code"). According to the International Institute for Democracy and Electoral Assistance (International IDEA), the intergovernmental organisation that co-drafted the Code, it is the first national code of conduct on online political advertising in the European Union. The Code is a collaborative effort of various internet platforms (Facebook, Google, Snapchat, and TikTok) and 11 out of 13 political parties (VVD, CDA, D66, GroenLinks, SP, Partij van de Arbeid, ChristenUnie, Partij voor de Dieren, SGP, DENK and 50PLUS) to increase the transparency of political advertisements and to thereby regain citizen trust in the election process.

The background to the Code is that in the run-up to the parliamentary elections on 17 March 2021 in the Netherlands, the Minister requested the development of a new code of conduct on political advertising. An appeal for transparency of online political advertising was raised in the House of Representatives in October 2020. According to this appeal, the integral role of online advertising in political campaigning requires increased efforts of platforms and political parties in preserving the safety and fairness of Dutch elections. As a result, the Minister requested that International IDEA draft the Code.

Online political advertising can be targeted in ways that can undermine election fairness. Citizens can be categorised into certain groups and only receive advertisements on their (perceived) identities. The Code places obligations on political parties and platforms to provide citizens with more tools to carry out an effective right to vote. As the Minister argued, it is important to know why you are seeing certain political advertisements and not others, and who is responsible for these advertisements.

The signatories to the Code commit to taking a more proactive approach in advertising practices. By doing so, they can create a level playing field for political parties and combat disinformation, while simultaneously protecting the core values of privacy and freedom of expression. While the Code is predominately aimed at paid advertising, signatories are also recommended to treat unpaid advertisements in a similar way. The signatories jointly commit to “maintain the integrity of elections”, promote transparency of online political advertisements and to “avoid the dissemination of misleading content, hate speech and messages that incite violence.” In addition, political parties and platforms have separate obligations to meet these commitments.

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Political parties commit to fairness in advertising in ten ways. Most importantly, they commit to provide “faithful information for registration and verification processes”, maintain “ethical limits” to microtargeting, refrain from “psychological profiling”, attribute the source of their advertisements, to refuse foreign purchases or funding of advertisements, and to refuse to disseminate disinformation or misleading content, particularly regarding the voting process. Notably, microtargeting is not banned completely, allowing parties to target ads to individuals as long as they remain within the “ethical limits” of linking data sets.

Platforms commit to fairness in advertising in 12 ways. They primarily commit to providing transparency mechanisms that identify the source of, funding for, and reach of political advertisements. They have to provide such mechanisms for both the parties and the users. First, they have to establish clear advertising rules and verify that the information provided by the parties is in accordance with these rules. Second, they have to develop a “user-friendly response mechanism to answer questions or address issues related to the Dutch elections.” Platforms are required to respond quickly to the concerns of users and take a proactive approach in countering inaccurate information regarding the electoral process. Finally, in addition to the commitments leading up to and during the elections, platforms commit to conduct a “post-election review” that reflects upon the successes and incidents of the “Dutch elections and the correlated platform actions.”

Ministry of the Interior and Kingdom Relations, Dutch Code of Conduct Transparency Online Advertisements, 9 February 2021

https://www.idea.int/sites/default/files/news/news-pdfs/Dutch-Code-of-Conduct-transparency-online-political-advertisements-EN.pdf

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, ‘Minister Ollongren bevordert transparantie politieke advertenties met gedragscode’, 9 februari 2021

https://www.nieuwsbzk.nl/1885610.aspx?t=Minister-Ollongren-bevordert-transparantie-politieke-advertenties-met-gedragscode

Ministry of the Interior and Kingdom Relations, ‘Minister Ollongren promotes transparency in political advertisements with a code of conduct, 9 February 2021

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RUSSIAN FEDERATION

[RU] "Foreign agents" fines prescribed and imposed

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Following the recent entry into force of its decree that approved the standard text and procedure for publishing the imprint of a media outlet founded by a Russian legal entity and considered to be a "foreign agent" (see IRIS 2021-1/1), Roskomnadzor, the Russian governmental supervisory authority in media and communications (see IRIS 2012-8/36), started to monitor its implementation and filed protocols that allow judges to impose fines for violations. The fines were established by Article 19.34.1 of the Code of Administrative Offences, which entered into force in February 2020 (see IRIS Extra 2020-1).

In particular, Roskomnadzor successfully forwarded 260 protocols to start 142 administrative cases against the legal entity "Radio Free Europe / Radio Liberty LLC" established in the Russian Federation in 1991 for the production and distribution of news and other information material of Radio Free Europe/Radio Liberty (RFE/RL), as well as its Director-General, Andrei Sharyi. The grounds were the failure to ensure that all online material of various media projects by RFE/RL are properly self-marked as those produced by a "foreign agent" media outlet. As of 3 March 2021, the decisions, taken by the peace judges in Moscow, resulted in fines totalling RUB 39 Million (more than EUR 430 000). RFE/RL appealed the decisions and insists it is not an agent of any government and maintains an independent editorial policy.

Meanwhile, on 24 February 2021, the President signed into law several new additions to the Code of the Russian Federation on Administrative Offences, earlier adopted by the State Duma. They provide for fines, of up to RUB 2,500 for citizens, and up to RUB 50,000 for other entities, with or without confiscation of the material objects used, for violations of the provision that all references in the registered mass media to "foreign agent" entities must carry a specific statement on the fact that they are recognized as such. A violation of the demand, that all materials produced and/or disseminated online or through mass media by the "foreign agents" must include relevant statements, shall now result in fines of up to RUB 500,000 (EUR 5,500) for "foreign agent" entities and up to RUB 300,000 for "foreign agent" citizens.

The additions entered into force on 1 March 2021.

СМИ-иноагенты оштрафованы еще на 2,2 млн рублей

https://rkn.gov.ru/news/rsoc/news73376.htm

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Press release by Roskomnadzor of 2 February 2021

Press release by Roskomnadzor of 27 January 2021

В отношении СМИ-иноагентов составлены протоколы об административном правонарушении

https://rkn.gov.ru/news/rsoc/news73270.htm

Press release by Roskomnadzor of 12 January 2021

Представители средств массовой информации, выполняющих функции иностранного агента, вызваны на составление протоколов об административном правонарушении

https://rkn.gov.ru/news/rsoc/news73262.htm

Press release by Roskomnadzor of 29 December 2020

Радио Свободная Европа/Радио Свобода

https://www.svoboda.org/p/6741.html

Statement by RFE/RL

О внесении изменений в Кодекс Российской Федерации об административных правонарушениях

http://publication.pravo.gov.ru/Document/View/0001202102240001

Federal Statute “On additions to the Code of the Russian Federation on Administrative Offences", of 24 February 2021 N 14-FZ

Проекты "Радио Свобода" в РФ оштрафованы почти на 40 млн руб.

https://www.interfax.ru/russia/754351

News item by Interfax, 3 March 2021

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UKRAINE

[UA] Supreme court on Russian broadcasts

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At a written hearing on 29 September 2020, the Cassation Administrative Court, a chamber of the Supreme Court of Ukraine, upheld the decision taken in 2019 by the Sixth Appeals Administrative Court, which in turn annulled the decision by the Kyiv District Administrative Court on the merits of the case related to the permissibility of Russian TV rebroadcasts via cable systems in Ukraine (see IRIS 2019-4/31). This administrative case started in 2014.

On the eve of this judgment, the Supreme Court of Ukraine had decided that the parties' written submissions were to be reviewed through a summary proceedings in the Cassation Administrative Court, rather than by their personal attendance at the hearing. It also passed the case from the Grand Chamber to the Cassation Administrative Court.

The current appeal was for procedural and material law reasons and was brought by the national media regulator, the National Council on Television and Radio Broadcasting (see IRIS 1998-4/14) and the Kyiv City Prosecutor's Office. The respondents, the Ukrainian cable TV distributors "Vertikal-TV" and "Thorsat", provided their objections to the appeal.

In its decision, the Cassation Administrative Court confirmed that the original plaintiff, the National Council on Television and Radio Broadcasting, is a public authority with powers strictly determined by the Constitution of Ukraine and relevant national statutary law. None of these legal provisions either prescribed, or allowed the plaintiff to present those particular claims in the court of law. The decision of the Sixth Appeals Administrative Court is therefore confirmed and the latest appeal not upheld. This decision is final and may not be further appealed.

Верховний Суд, Постанова, справа №826/3456/14, 29.09.2020

https://reyestr.court.gov.ua/Review/91850891

Supreme Court, Resolution, case No. 826/3456/14, 29 September 2020

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Верховний Суд, Ухвала, справа №826/3456/14, 28.09.2020

https://reyestr.court.gov.ua/Review/91818373

Supreme Court, Decision, case No. 826/3456/14, 28.09.2020

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UNITED STATES OF AMERICA

[US] Jack Ryan: The hunt for copyright ownership

Kelsey Farish
Dac Beachcroft

In February 2021, a U.S. federal court in the state of Maryland handed down a decision regarding Jack Ryan, one of Hollywood's most prolific spies. However, after nearly 90 pages of legal analysis and a review of events reaching back to the 1980s, the Judge was unable to determine who owns rights to Jack Ryan as a fictional creation. In declining to dismiss the plaintiff's claim regarding ownership of the iconic character, the door is left wide open for a jury trial in due course.

In the United States, a fictional character described in a larger work, such as a novel or a movie, may in some circumstances enjoy copyright protection which stands independent of the work in which he or she appears. In practice, this means that no-one may capitalise upon a protected character's persona or development without permission, for example by publishing a sequel to the original. Of course, not all characters are automatically protected, and it is important to note that the protection is not set out in statute, but instead has evolved through case law.

Essentially, one of two tests may be applied in order to determine if a character is protected. Under the first test, a character may be copyright protected if they possess physical and conceptual attributes that are sufficiently delineated, and contain some unique elements of expression . The second test requires the character to "constitute the story being told", or otherwise be central to the plot. If a character described in written form or depicted visually can satisfy at least one of these two tests, it will likely receive copyright protection.

Since Tom Clancy's novel *The Hunt for Red October* was first published in 1984, millions have read about Ryan's adventures as a CIA analyst, and millions more have seen famous actors including Alec Baldwin, Harrison Ford, and John Krasinski portray Ryan in both film and television productions. Unfortunately for the litigants, the contractual framework underpinning the copyright ownership of Jack Ryan himself appears more convoluted than even the most dramatic spy thriller.

In the original agreement for the publication of *The Hunt for Red October*, Clancy granted the publisher "exclusive worldwide rights" and any "subsisting copyright" in the work. Subsequently, the publisher then licenced certain intellectual property rights to Paramount Pictures, whilst Clancy set to work on writing more material. Clancy then set up Jack Ryan Enterprises, Ltd. (JREL) and entered into new arrangements with Viacom for a television series, before establishing the Jack Ryan Limited Partnership (JRLP) with his then-wife Wanda King.

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When King and Clancy divorced some years later after 30 years of marriage, the separation agreement divided and transferred certain intellectual property assets between the former spouses, with King to receive 40% of profits. To complicate matters further, Clancy formed yet another company called Rubicon in the mid 1990s. After Clancy passed away in 2013, his estate granted permission to various authors to continue with the franchise in the same style of Clancy. It is his second wife and widow Alexandra Clancy who now seeks a share of the royalties earned by JREL and JRLP. Amongst other things, she argues that certain intellectual property rights were never properly transferred in the first instance. Elsewhere, she seeks to terminate earlier agreements so as to recapture rights to *The Hunt for Red October*.

In light of the above, it is no wonder that the commercial and legal position covering the scope of the fictional Ryan universe remains unclear as a matter of law. As noted in the judgment, “the cardinal rule of contract interpretation [in the United States] is to give effect to the parties' **intentions**” (emphasis added). For example, the judgment considered at length whether Tom Clancy was in effect an employee of his companies. This matters because under the U.S. doctrine of "work for hire", it is the employer or other person for whom the work for hire was actually prepared who is considered the “author” for copyright purposes, and not the individual creator.

Although this may appear at first glance to be an academic distinction, it is essential when attempting to determine the formalities – and validity – of a contract which seeks to sell or transfer intellectual property rights. Likewise, certain provisions of contracts seem to contradict others, especially as to whether Clancy sufficiently retained enough ownership of the Jack Ryan character so as to permit him to use the characters in derivative works.

As a general rule, and as noted by the judgment in question, “courts should be cautious in granting summary judgment where issues of intent relate to an ambiguous contract or document”. Finding some merit in each side’s argument, the judge was unable to say with certainty what “a reasonable jury” would decide. Accordingly, as neither argument was obviously compelling over that of the other, the court denied summary judgment and reserved for trial the question of Jack Ryan’s ownership.

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https://casetext.com/case/clancy-v-jack-ryan-enters

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