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EDITORIAL

These past weeks have been particularly productive in Brussels. In chronological order: in a speech delivered to the European Parliament's Committee on Culture and Education on 19 April 2021, Commissioner Thierry Breton expressed his belief that the EU should “prepare a European Media Freedom Act to complement our legislative arsenal in order to ensure that media freedom and pluralism are the pillars of our democracies”; on 21 April 2021, the European Commission published its landmark and much-anticipated Proposal for a Regulation laying down harmonised rules on Artificial Intelligence; on 18 May 2021, the Council of the European Union approved conclusions to support the recovery and transformation of the European media sector; on 19 May 2021, the European Parliament adopted ‘Creative Europe’, the EU’s support programme for culture and the audiovisual sector; the same day, the European Parliament adopted a Resolution on Artificial Intelligence in education, culture and the audiovisual sector and a report with recommendations to the European Commission on challenges of sports events organisers in the digital environment; in another resolution adopted on 20 May 2021, Parliament reiterated the need for common EU rules on accessible and human-centric technology; and, last but not least, on 26 May 2021, the European Commission adopted its Guidance on Strengthening the Code of Practice on Disinformation.

This state of “busyness” reflects the convoluted times we live in. The COVID pandemic requires extraordinary budgetary measures, while groundbreaking technological developments and threats to media freedom elicit urgent regulatory responses. But this is not the exclusive territory of the EU: there is also lots happening on national levels. This includes among many other issues the transposition of the key provisions of the Directive on copyright in the Digital Single Market in French law, and the adoption in Italy of the 2019-2020 European Delegation Law which provides, *inter alia* the criteria and principles for the implementation of the AVMSD. On the other side of the Atlantic, the US Supreme Court handed down a decision in Google LLC v. Oracle America, Inc. with important implications for copyright law.

But enough with the spoilers. Stay safe and enjoy your read!

Maja Cappello, editor

European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

REPUBLIC OF TÜRKIYE

European Court of Human Rights: *Akdeniz and others v. Turkey*

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

The European Court of Human Rights (ECtHR) has delivered another judgment finding Turkey in breach with the right to freedom of expression and information as guaranteed by Article 10 of European Convention on Human Rights (ECHR). The case concerns an interim injunction ordered by the domestic courts banning the dissemination and publication in the press, television and radio and on the Internet of any information on a parliamentary inquiry into allegations of corruption against four former ministers.

The applicants in this case are Banu Güven who is a well-known TV-journalist in Turkey, and Yaman Akdeniz and Kerem Altıparmak, two law professors and experts on online freedom of expression who are also popular bloggers and users of social media platforms. They requested the lifting of the ban in question, relying on their right to freedom to impart information and ideas, as well as their right to receive information. The Constitutional Court dismissed their request on the grounds of their lack of victim status, since they were not concerned by the criminal investigation, nor directly or personally affected by the injunction.

Before the ECtHR Güven, Akdeniz and Altıparmak complained of a violation of their rights under Article 10 ECHR. The Turkish government argued that the subject matter of the present case was the confidential conduct of a criminal investigation. The government submitted that the principle of the secrecy of judicial investigations was set out in international law and that the impugned measure aimed to ensure the observance of that principle. And furthermore, according to the government, the case did not involve any issue regarding freedom of expression or freedom of the press. The ECtHR observes that the need to protect the secrecy of investigations is not ignored in its case-law, but it disagrees with the government's argument. Indeed, it considers that in itself, a measure consisting in prohibiting the possible publication and dissemination of information via any medium raised an issue under the freedom of expression. It notes that the impugned injunction, which had a very broad scope, covering not only printed and visual material but also any type of information published on the Internet, had amounted to a preventive measure adopted in the framework of a parliamentary inquiry intended to prevent the possible publication and dissemination of information. It observes that that measure had covered virtually all the aspects of the ongoing parliamentary inquiry. The ECtHR refers to Article

285 of the Turkish Penal Code punishing ex post facto violations of the secrecy of investigations, albeit without imposing any general ban on publishing the content of the measures adopted during an individual investigation. Thus that provision guaranteed the right to publish information on a pending criminal investigation, respecting the boundaries on the right to impart information.

The ECtHR unanimously declares Banu Güven's application admissible, as she as a journalist, political commentator and TV news presenter, could legitimately claim that the impugned prohibition had infringed her right to freedom of expression. She could therefore claim victim status. In that connection, the Court said that it should not be overlooked that the gathering of information, which is inherent in the freedom of the press, is also considered as a vital precondition for operating as a journalist. In the context of the debate on a matter of public interest the impugned preventive measure was liable to deter journalists from contributing to public discussions of issues important to community life. The ECtHR accepts that her freedom to impart information and ideas had been affected inasmuch as she had been unable, even for a fairly short period, to publish or disseminate information or to share her ideas on a topical issue which would have attracted considerable public attention.

The ECtHR holds that there has been a violation of Article 10 ECtHR in respect of Banu Güven. It finds that the impugned injunction, which had amounted to a preventive measure aimed at prohibiting any future dissemination or publication of information, had had major repercussions on Güven's exercise of her right to freedom of expression as a journalist on a topical issue. Such interference however had lacked a "legal basis" for the purposes of Article 10 ECHR, and has therefore prevented Güven from enjoying a sufficient level of protection as required by the rule of law in a democratic society.

With regard to the two other applicants, Akdeniz and Altıparmak (see also IRIS 2016-2/1), the ECtHR is of the opinion that they have not demonstrated how the impugned prohibition had affected them directly. The Court considers that the mere fact that the two academics – like all other Turkish citizens – have sustained the indirect effects of the impugned measure is insufficient to claim victim status within the meaning of Article 34 ECHR. Clearly, in view of the fact that the decision to issue an interim injunction had been aimed not only at traditional media professionals but also at Internet users, such as bloggers and popular social media users, Akdeniz and Altıparmak could legitimately claim to have sustained the indirect effects of the impugned measure. Nevertheless, the ECtHR reiterates that "purely hypothetical risks" of an applicant suffering a deterrent effect are insufficient to amount to an interference within the meaning of Article 10 ECHR. As regards the right of access to information, the ECtHR repeats that university researchers and the authors of works on matters of public interest also benefit from a high level of protection. Moreover, academic freedom is not confined to university or scientific research, but extends to the right of academics to freely express their viewpoints and opinions, even controversial or unpopular ones, in their fields of research, professional expertise and competence. However, the ECtHR finds that in the present case the two law professors did not complain of having been refused access to any specific information they might have

required. Furthermore, there was nothing to suggest that the impugned measure had targeted or infringed their academic freedom. The ECtHR is of the opinion that Alkeniz and Altıparmak lacked victim status in the instant case, and therefore it declares their application inadmissible by majority. In his dissenting opinion Judge Egidijus Kūris sharply disagrees with the majority's finding that Alkeniz and Altıparmak lacked victim status. He argues that apart from journalists, academics who are popular bloggers and are active in the field of human rights also have an interest to be able to impart and receive information about a parliamentary inquiry of major public interest. This, within the limitations imposed by law in order to protect the confidentiality of the criminal investigations and the rights of others. Kūris considers both journalists and academics as Alkeniz and Altıparmak as 'public watchdogs' that are hindered in their rights guaranteed by Article 10 ECHR due to the preventive measure *contra mundum* imposed by the Turkish courts. According to the dissenting opinion it is ironic that in this case the complaint of human right defenders is dismissed by the ECtHR, while the complaint of a journalist has been accepted with regard to the same facts in relation to a human rights' violation: "It is a sad irony that the Chamber, which is the judicial arm of a human rights court, has rejected applications by human rights defenders for incompatibility *ratione personae* with the provisions of the Convention in a case in which it agreed to consider the merits of a factually identical application by a journalist."

Arrêt de la Cour européenne des droits de l'homme, (deuxième section), rendu le 4 mai 2021 dans l'affaire Akdeniz et autres c. Turquie, requêtes nos 41139/15 et 41146/15

https://hudoc.echr.coe.int/eng?i=001-209674

European Court of Human Rights, Second Section, Akdeniz and others v. Turkey, Applications nos. 41139/15 et 41146/15, 4 May 2021

EUROPEAN UNION

Council of the EU: Conclusions to support the recovery and transformation of the European media, cultural and creative sectors

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 18 May 2021, the Council of the European Union approved conclusions to support the recovery and transformation of the European media sector. The conclusions respond to the Action Plan presented by the Commission on 3 December 2020 (see IRIS 2021-2/3).

The audiovisual industry and the news media sector have suffered during the COVID-19 crisis and face enormous challenges such as changes to people's viewing habits and the loss of advertising revenue. Member states are invited to take advantage of the Recovery and Resilience Facility, (the EU's post-crisis financial instrument), and to invest in the acceleration of the digital transformation and green transition of the news media and audiovisual sectors. Ministers also call for efforts to make sure that the audiovisual industry can more easily reach European and international markets and audiences. In order to boost the circulation of European content within Europe and internationally, cooperation on production and distribution needs to be facilitated. Supporting cross-border collaboration between audiovisual market actors is also key. The Action Plan puts forward a number of initiatives to support the audiovisual and news media sectors. A planned MEDIA INVEST initiative will provide EUR 400 million to support investment in the audiovisual industry. News media will benefit from the loans and investments of the NEWS initiative. An interactive digital tool will help media companies identify the most suitable financial support scheme.

On the same date, the Council also adopted conclusions on the recovery, resilience and sustainability of the cultural and creative sectors. They restate that the cultural and creative sectors are among the hardest hit by the COVID-19 pandemic and that there is a need to take decisive policy actions in their support, both as an immediate response and as a more ambitious and far-sighted approach, as the current crisis has exposed some structural challenges and pre-existing vulnerabilities of the cultural and creative sectors. In order to promote the recovery, resilience and sustainability of the cultural and creative sectors, the conclusions identify six priorities:

- improving access to available funding;

- enhancing the resilience of professionals in the cultural and creative sectors;

- further strengthening mobility and cooperation;

- expediting the digital and green transitions;

- improving knowledge and preparedness for future challenges;

- taking cultural scenes and local communities into account.

The Council conclusions also aim to promote fairness and equality for all, giving special attention to the situation of female artists and cultural professionals. The Council calls on member states and the Commission to exchange views on best practices and to take stock of these conclusions in 2023.

Council conclusions on 'Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation'

https://data.consilium.europa.eu/doc/document/ST-8727-2021-INIT/en/pdf

Council conclusions on the recovery, resilience and sustainability of the cultural and creative sectors

https://www.consilium.europa.eu/media/49703/st08768-en21.pdf

European Commission: Guidance on Strengthening the Code of Practice on Disinformation

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 26 May 2021, the European Commission adopted its Guidance on Strengthening the Code of Practice on Disinformation (see IRIS 2019-1/7).

The Guidance calls for the reinforcement of the Code by strengthening it in the following areas:

- The Commission encourages platforms active in the EU, relevant stakeholders in the online advertising ecosystem, private messaging services, as well as stakeholders that can contribute with resources or expertise to the Code's effective functioning, to join the Code. The Code should include new tailored commitments corresponding to the size and nature of services provided by signatories.

- Platforms and players in the online advertising ecosystem must take responsibility and work better together to defund disinformation, notably by exchanging information on disinformation ads refused by one of the signatories, improving transparency and accountability around ad placements and barring participation by actors that systematically post debunked content.

- The Code should provide comprehensive coverage of the current and emerging forms of manipulative behaviour used to spread disinformation, and include tailored commitments to ensure transparency and accountability of measures taken to reduce its impact.

- The signatories must make their recommender systems transparent and take measures to mitigate the risks that these fuel such as the viral spread of disinformation. They should also provide their users with accessible, effective tools and procedures to flag disinformation with the potential to cause public or individual harm. Users who have been subject to measures taken in response to such flagging should have access to an appropriate and transparent mechanism to appeal and seek redress. The Code should also enhance the visibility of reliable information of public interest, and warn users who interact with content marked as false by fact-checkers.

- The Code should include better cooperation with fact-checkers and increase coverage across EU countries and languages. The Code should also include a robust framework for access to data for researchers.

- The Code should include an improved monitoring framework based on clear key performance indicators (KPIs) measuring the results and impact of actions taken by the platforms as well as the overall impact of the Code on disinformation in the

EU. Platforms should regularly report on the measures taken and their relevant KPIs to the Commission. Information and data should be provided by the platforms in standardised formats, with Member State breakdowns.

Signatories should also develop a Transparency Centre where they indicate which policies they have adopted to implement the Code's commitments, how they have been enforced, and display all the data and metrics relevant to the KPIs. The Guidance also proposes the establishment of a permanent task force chaired by the Commission. It would be composed of signatories, representatives from the European External Action Service, the European Regulators Group for Audiovisual Media Services (ERGA) and from the European Digital Media Observatory (EDMO). The task force, which will also rely on the support of experts, will help review and adapt the Code in view of technological, societal, market and legislative developments.

The Commission will call upon the signatories of the Code of Practice to convene and strengthen the Code in line with the Guidance. It also encourages new signatories to join the Code. To this end, the Commission will reach potential new signatories and interested parties. The signatories should proceed swiftly with revision of the Code and provide a first draft of the revised Code in the autumn. This year the Commission will also propose a legislation to improve the transparency of political advertising. The Guidance also calls for reinforced commitments in this area to pave the way towards the upcoming strengthened legislative framework and to devise industry-led solutions in its support.

European Commission Guidance on Strengthening the Code of Practice on Disinformation (COM(2021) 262 final)

https://ec.europa.eu/newsroom/dae/redirection/document/76495

European Commission: Proposal for an Artificial Intelligence Act

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On 21 April 2021, the European Commission published its landmark and much-anticipated Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act). This follows the publication of the European Strategy on Artificial Intelligence in 2018, and the publication of the Guidelines for Trustworthy AI in 2019 by the High-Level Expert Group on Artificial Intelligence, established by the European Commission (see IRIS 2019-7/3). The 108-page Proposal for an Artificial Intelligence Act runs to 85 Articles and, as the Commission states, is based upon a risk-based approach, by prohibiting certain AI systems with unacceptable risks, while subjecting high-risk AI systems to strict obligations.

At the outset, Article 3 of the Artificial Intelligence Act defines an AI system as software that is developed with one or more of certain techniques and approaches (listed in Annex I), such as "machine learning", and can, for a given set of human-defined objectives, "generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with". Importantly, Title II of the Act then sets out a number of AI practices that are prohibited. For example, AI systems that "materially distort a person's behaviour" in a manner that causes or is likely to cause that person or another person physical or psychological harm are prohibited under Articles 5(a) and 5(b). Further, AI systems that allow "social scoring" by governments (i.e., classification of the trustworthiness of individuals over a certain period of time based on their social behaviour) are also prohibited under Article 5(c). Notably, Article 5(d) prohibits the use of real-time remote biometric identification systems in publicly accessible spaces for the purpose of law enforcement, except in certain circumstances. These include the detection, localisation, identification or prosecution of a perpetrator or suspect of certain criminal offences, and the prevention of a specific, substantial and imminent threat to the life or physical safety of natural persons, or a terrorist attack.

The Artificial Intelligence Act then addresses AI systems that are "high-risk" in Title III. These types of AI systems are contained in Annex 3 to the Act, and include AI systems for (a) education training; (b) employment, workers management and access to self-employment; (c) access to and enjoyment of essential private services and public services and benefit; (d) law enforcement; (e) assisting judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts; (f) migration, asylum and border control management. Crucially, the Artificial Intelligence Act sets out a number of rules which apply to these high-risk AI systems, including rules on data and data governance, documentation and recording keeping, transparency and

provision of information to users, and human oversight.

Of particular note, Article 52 lays down rules on deep fake technology, and provides that AI systems that generate or manipulate image, audio or video content that appreciably resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful ("deep fake"), must disclose that the content "has been artificially generated or manipulated". However, this rule does not apply where use of the AI system is necessary for the exercise of the right to freedom of expression and the right to freedom of the arts and sciences, guaranteed in the EU Charter of Fundamental Rights, and "subject to appropriate safeguards for the rights and freedoms of third parties".

Finally, Title VI sets up a governance system at EU and member state level. First, Article 56 establishes a European Artificial Intelligence Board, which will provide advice and assistance to the European Commission on the application of Artificial Intelligence. Further, under Article 59, member states will be required to designate national competent authorities for the purpose of ensuring the application and implementation of the Artificial Intelligence Act.

The European Parliament and the Member States will now consider the Commission's proposal in the ordinary legislative procedure. If adopted, the Regulation will be directly applicable across the EU.

European Commission, Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final, 21 April 2021

https://ec.europa.eu/transparency/regdoc/rep/1/2021/EN/COM-2021-206-F1-EN-MAIN-PART-1.PDF

European Commission, Europe fit for the Digital Age: Commission proposes new rules and actions for excellence and trust in Artificial Intelligence, 21 April 2021

https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1682

European Commission: Towards a European Media Freedom Act

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On a speech delivered to the European Parliament's Committee on Culture and Education on 19 April 2021, Commissioner Thierry Breton expressed his belief that the EU should “prepare a European Media Freedom Act to complement our legislative arsenal in order to ensure that media freedom and pluralism are the pillars of our democracies.”

While the pandemic has accentuated the vulnerabilities and structural challenges of this sector which is facing increased competition with large platforms in a fragmented market, Mr Breton also sees a multitude of opportunities, particularly with digital transformation. After describing EU support measures for the sector and the state of the art with regard to the adoption process of the Digital Services Act package, he addressed “the central issue” of media freedom and pluralism in Europe and the Commission’s "Democracy" and "Media" action plans adopted last December. He declared himself “very vigilant” about respecting EU rules on the independence of media regulators, and expressed the need for a complementary tool to intervene in the area of media freedom, as the Commission’s current toolbox is limited.

Mr Breton’s proposal for a European Media Freedom Act aims at complementing the EU’s legislative arsenal “in order to ensure that media freedom and pluralism are the pillars of our democracies”. In his view, the EU would need a mechanism to increase transparency, independence and accountability around actions affecting control and freedom of the press. This would also be an opportunity to look at the resilience of small actors, and their innovative funding models. Furthermore, he proposed to reflect on how best to strengthen the governance of public media, around a common framework to better prevent the risks of politicisation and to better ensure diversity and pluralism. And finally, he suggested reflecting on the funding supporting pluralism and media freedom, and on the structures that carry this funding.

"For a « European Media Freedom Act »", speech delivered to the European Parliament's Committee on Culture and Education on 19 April 2021 by Commissioner Thierry Breton

https://ec.europa.eu/commission/commissioners/2019-2024/breton/announcements/european-media-freedom-act_en

European Parliament: Creative Europe 2021-2027 adopted

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 19 May 2021, the European Parliament adopted 'Creative Europe', the EU's programme for culture and the audiovisual sector. The new programme will invest EUR 2.5 billion in the EU's cultural and creative sectors. This is almost double the budget when compared to 2014-2020 (up from EUR 1.4 billion).

Creative Europe is divided into three different strands:

- Culture focuses on networking, transnational and multi-disciplinary collaboration in cultural and creative sectors and fostering a stronger European identity and values with special attention for the music sector, as negotiated by MEPs.

- Media is dedicated to stimulating cross-border cooperation, mobility and innovation; increasing the visibility of European audiovisual works in the new environment; and making it attractive to different audiences, especially young people.

- Cross-sectoral aims to encourage innovation, support cross-sectoral projects, the exchange of the best practices and address common challenges. Support, for the first time, will also go to the news media sector, promoting media literacy, pluralism, press freedom and quality journalism, and helping the media to better address the challenges of digitalisation.

Alongside the increase in funding, the new programme has a greater focus on inclusion, on support for contemporary and live music sectors that are among those hit hardest by the pandemic, and higher co-financing rates for small-scale projects. It furthermore includes an obligation for the programme to promote female talent and support women's artistic and professional careers.

As the programme had been already approved by the Council of the EU, it entered into force immediately after being published in the official journal. In order to ensure a smooth transition from the previous programme period, retroactivity provisions in the regulation ensure that the new Creative Europe enters into effect from 1 January 2021.

European Parliament legislative resolution of 19 May 2021 on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council establishing the Creative Europe Programme (2021 to 2027) and repealing Regulation (EU) No 1295/2013 (14146/1/2020 – C9-0134/2021 – 2018/0190(COD))

https://www.europarl.europa.eu/doceo/document/TA-9-2021-0239_EN.html

European Parliament: Report on illegal broadcasting of live sporting events

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 19 May 2021, the European Parliament adopted a report with recommendations to the European Commission on the challenges of sports event organisers in the digital environment.

According to the Report, enforcement procedures concerning live broadcasts of sports events need to be as swift as possible, but the current legal framework for injunctions and for notice and takedown mechanisms does not always sufficiently guarantee an effective and timely enforcement of rights. Therefore, concrete measures should be adopted to adapt the current legal framework to these specific challenges. In particular, the Report calls for the removal of, or the disabling of access to, infringing live sport broadcasts by online intermediaries to be immediate or as fast as possible, and in any event no later than within 30 minutes of the receipt of the notification from rightsholders or from a certified trusted flagger regarding the existence of such illegal broadcast. While real-time takedown should be the objective pursued in cases of infringing live sports event broadcasts, any such measures must respect the general legal principle of not imposing a general obligation to monitor.

With regard to the cross-border enforcement of rights, the Report underlines that the general framework provided for by Union law is not applied uniformly at national level and that civil procedure and notice and takedown mechanisms differ from one Member State to another. Enforcement tools in the cross-border context lack efficiency, so further harmonisation of the procedures and remedies in the Union is needed to address, in the context of the Digital Services Act package and other potential legislative proposals the specific nature of live sports event broadcasts. The Report also stresses the challenges met by national enforcement agencies and authorities and underlines the importance of close collaboration and exchange of best practices between relevant authorities at Union level, national authorities and relevant actors.

Notice and action procedures should form the basis for measures addressing illegal content in the Union, but the current notice and takedown procedure does not allow for swift enforcement for “live” sports events. Therefore, a mechanism involving certified trusted flaggers should be set up. Moreover, providers of streaming servers and streaming platforms should implement specific takedown tools or measures, in order to remove or disable access to illegal live sports event broadcasts available on their service.

The Report also points to the existence of practices developed at national level, such as live injunctions and dynamic injunctions, that have proved to be a means

of tackling piracy of sports event broadcasts more efficiently, and calls on the Commission to assess the impact and appropriateness of introducing injunction procedures aimed at allowing real-time disabling of access to, or removal of, illegal online live sports event content. Such procedures must not, however, lead to the arbitrary and excessive blocking of legal content. Safeguards are needed to ensure that the legal framework strikes the right balance between the need for efficiency of enforcement measures and the need to protect third party rights. The Report also calls on the Commission to take measures that make it easier for consumers to find legal means of accessing sports content online and stresses that liability for the illegal broadcasting of sports events rests with the providers of streams and platforms and does not lie with fans or consumers, who often unintentionally come across illegal online content and should be further informed on the legal options available.

Finally, the Report considers that the creation in Union law of a new right for sports event organisers will not provide a solution as regards the challenges they face that arise from a lack of effective and timely enforcement of their existing rights.

European Parliament resolution of 19 May 2021 with recommendations to the Commission on challenges of sports events organisers in the digital environment (2020/2073(INL))

https://www.europarl.europa.eu/doceo/document/TA-9-2021-0236_EN.html

European Parliament: Resolutions on Artificial intelligence adopted

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 19 May 2021, the European Parliament adopted a Resolution on Artificial intelligence in education, culture and the audiovisual sector. The resolution calls to ensure that AI technologies are trained in a way that prevents gender, social or cultural bias and protects diversity. Addressing the different aspects of AI technology use in education, the resolution stresses that teachers must always be able to correct decisions taken by the AI's, especially regarding student selection and evaluation. At the same time, it highlights the need to enhance digital skills across Europe and train teachers to prepare for AI technology use in education.

To prevent algorithm-based content recommendations from negatively affecting the EU's cultural and linguistic diversity, MEPs ask for specific indicators to be developed to measure diversity and ensure that European works are being promoted. The Commission must establish a clear ethical framework for how AI technologies are used in EU media to ensure people have access to culturally and linguistically diverse content. Such a framework should also address the misuse of AI to disseminate fake news and disinformation. The use of biased data that reflect already existing gender inequality or discrimination should be prevented when training AI. Instead, inclusive and ethical data sets must be developed, with the help of stakeholders and civil society, to be used during the "deep learning" process.

In a separate resolution adopted on 20 May 2021, Parliament reiterated the need for common EU rules on accessible and human-centric technology. In it, Parliament underlined the need for strong support for digital innovation. EU lawmakers must guarantee any accompanying common legislation endorses trustworthy, fair, accessible and human-centric technology, for example, with an adequate degree of human control over algorithmic decision-making. European SMEs need the right amount of support to benefit from new technologies, be it through testing facilities, better access to data, easier regulatory requirements or funding.

The resolution argues that AI solutions could diminish existing barriers and reduce the fragmentation of the internal market, support European digital economy and its competitiveness, contributing also to safety, security, education, healthcare, transport and the environment. At the same time, MEPs add that a clear legal framework for AI is a prerequisite for establishing trust in the technology, to avoid discrimination and to make sure the fundamental rights of Europeans are sufficiently protected.

European Parliament resolution of 19 May 2021 on artificial intelligence in education, culture and the audiovisual sector (2020/2017(INI))

https://www.europarl.europa.eu/doceo/document/TA-9-2021-0238_EN.html

European Parliament resolution of 20 May 2021 on shaping the digital future of Europe: removing barriers to the functioning of the digital single market and improving the use of AI for European consumers (2020/2216(INI))

https://www.europarl.europa.eu/doceo/document/TA-9-2021-0261_EN.html

NATIONAL

BULGARIA

[BG] Amendment to the Film Industry Act

Irina Kanusheva
Bulgarian National Film Center

The Bulgarian Film Industry Act was amended in March 2021 after a two and a half years into making.

The main changes are that two new schemes are introduced for a first time in the film industry in Bulgaria – for support of TV series in the minimum amount of BGN 3 Million per year (EUR 1.5 M) and a new scheme for cash rebate with a total minimum amount per year of BGN 15 Million (EUR 7,5 M).

The Law also provides the unprecedented raise of the state support for national cinema, which is the highest ever – BGN 25 Million per year as a minimum (EUR 12,5 M).

The amendments to the Film Industry Act entered into force on 6 March 2021 and will start operating after the adoption of the new Rules of Procedure, which the National Film Center expects to be approved not later than July 2021.

Закон за филмовата индустрия (ЗФИ)

https://www.lex.bg/laws/ldoc/2135474936

Film Industry Act (consolidated version of 2 March 2021)

[BG] Mandatory requirements for video-sharing platform providers already in force in Bulgaria

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

On 22 December 2020 the Act for amendment and supplement to *Закон за радиото и телевизията* (the Radio and Television Act - RTA) was promulgated in *Държавен вестник* (State Gazette) and Directive (EU) 2018/1808 (AVMSD) was transposed in Bulgarian national law (see IRIS 2021-2/22).

One of the main novelties concerns the regulation of video-sharing platform services and providers within the meaning of the AVMSD. The *Съвет за електронни медии* (the Council for Electronic Media - CEM) is now empowered to regulate all video-sharing platform providers (platform providers) which are operating under the jurisdiction of Bulgaria.

According to the law, platform providers must register and shall be entered in a separate section of the public register of the CEM. The registration occurs after the platform providers submit a notification which shall include basic information on the platform provider and the platform. As entitled by the additional provisions of the law, the CEM has approved a sample of the notification letter which was published on its website on 20 January 2021.

In compliance with the amended RTA, a draft of the general terms and conditions of platform providers shall also be attached to the notification and they will be subject to an *ex-ante* approval by CEM. Future amendments of the general terms and conditions shall be subject to the same approval procedure. In addition, the CEM will have the right to take sole initiative to amend them to ensure the interests of the audience.

The statutory deadline for submitting notification by the providers was two months as of the entry into force of the amendments, i.e. 22 February 2021. Approximately 3 months after the deadline only one platform has been registered. This is the largest local video-sharing platform – Vbox7.

The lack of many registered platform providers may be due to the ambiguity of the definition concerning which platforms for sharing videos are operating under Bulgarian jurisdiction. It could also be due to the lack of sufficient campaign concerning the new regulations, but this remains to be seen. It is also possible that there are no video-sharing platform providers operating under the Bulgarian jurisdiction within the meaning of the AVMSD.

Irrespective of the reason, it is a fact that a couple of months after the statutory deadline there is still no clarity of all the video-sharing platforms under Bulgarian jurisdiction. This shows that even if the AVMSD is already transposed, in practice it will take time for the sector to adapt to the new requirements and obligations.

Регистър на Съвета на електронните медии

https://www.cem.bg/platforms_reg.php?&lang=bg

Register of the Electronic Media Council

[BG] The consolidation of local telecommunications and media market continues

Nikola Stoychev
Dimitrov, Petrov & Co., Law Firm

The Dutch-based holding United Group continues the consolidation of the local market by closing a couple of new deals for the acquisition of some of the major regional telecom operators. This comes shortly after the January transaction approved by the competition watchdog for the acquisition of one of the leading media service providers *Нова Броудкастинг Груп* (Nova Broadcasting Group) (see IRIS 2021-3/19).

By Decision № АКТ-402-15.04.2021 of *Комисия за защита на конкуренцията* (the Commission for Protection of Competition – CPC), the competition regulator approved the acquisition of the internet and service providers *Нет 1* (Net 1) and its subsidiaries *КомНет София* (KomNet Sofia) and *И Ти Ви* (ITV) by *Българска телекомуникационна компания* (the Bulgarian Telecommunications Company - BTC) which is owned by the United Group. Net 1 is among the top five largest telecoms per income and number of subscribers, providing: 1) fixed retail internet access, and 2) retail pay TV in the country and in the capital, Sofia. Net 1 is the second largest cable TV provider in Sofia (a market where BTC is not present). Net 1 also provides fixed telephone services. This acquisition alone adds approximately 50 000 TV subscribers and 30 000 Internet subscribers to BTC's subscribers.

The relevant stakeholders expressed opinions on the acquisition and some expressed concerns that the transaction may distort the competition in all affected markets. Based on its data, the telecom regulator *Комисия за регулиране на съобщенията* (the Communications Regulation Commission – CRC) concluded that after the transaction BTC will become the second largest cable TV operator and will strengthen its position in terms of the supply of pay TV especially for the territory of Sofia. The CRC also stated that following the acquisition of Net 1 the first three companies in the pay TV sector will cover almost 99% of the subscribers, and the competitive pressure on BTC will be limited to its main competitors A1 and *Булсатком* (Bulsatcom). The CRC also mentioned that after the transaction BTC will continue to be the largest provider of fixed Internet access in the country, but it will be increasing its relative share. It adds that BTC will become the second national undertaking providing TV via all possible platforms – cable, satellite and IPTV.

In its final decision the CPC has found that there will be no distortion of any of the relevant markets. It argued that BTC will acquire companies which provide Internet access through technologies that are not new for the acquisitors' groups. It goes on to say that the concentration is not a prerequisite for creating a significant advantage over competitors, because there is no change in the already existing market shares. The CPC has finally concluded that the notified

transaction could not significantly impede effective competition in the relevant markets and no creation or strengthening of a dominant position will occur.

In addition, by Decision № АКТ-403-15.04.2021, the CPC also approved unconditionally another BTC deal for the acquisition of the Plovdiv cable operator N3, which according to CRC data for 2019 had approximately 26 000 TV subscribers and 4 200 Internet subscribers. N3 is among the top five largest pay TV providers in the country and in the city of Plovdiv (and in second place for cable TV). Also, the company is among the top 10 internet service providers in the country and in the city of Plovdiv. The arguments of the competition regulator for approval are rather similar to those in the decision above.

Finally, on 10 May 2021 news outlets announced that BTC has acquired the largest fixed internet and pay TV provider in the northeast of Bulgaria *Нетуоркс – България* (Networx Bulgaria) and its subsidiary operating in Sofia – *Онлайн Директ* (Online Direct). Official data shows that these companies have approximately 68 000 fixed internet subscribers. No data is available for pay TV subscribers. Clearance from the competition watchdog is a pre-condition for closing of the transaction and decision should be expected in the following months.

These acquisitions are probably not the final in the sector and the consolidation of the market will continue. One of the assets worth noting in the market is the IPTV and satellite provider Bulsatcom which is the second largest pay TV provider in Bulgaria (satellite and IPTV). The latter has faced financial troubles in the past years and is up for grabs according to various news reports. The competition for Bulsatcom, however, will be strong because the company is the last operator of such magnitude in the country and will be an excellent asset that can be added to the portfolio of companies interested in the sector.

Решение № АКТ-402-15.04.2021 на КЗК

http://reg.cpc.bg/Decision.aspx?DecID=300059888

CPC, Decision № АКТ-402-15.04.2021

Решение № АКТ-403-15.04.2021 на КЗК

http://reg.cpc.bg/Decision.aspx?DecID=300059889

CPC, Decision № АСТ-403-15.04.2021

CZECHIA

[CZ] Decision of the Supreme Adminstative Court on defective advertising

Jan Fučík
Česká televize

On 31 March 2021, the Czech Supreme Administrative Court upheld the judgement of the Regional Court of Brno in the case INDEX ČECHY s.r.o. against the Ministry of Industry and Trade concerning unlawful advertising.

In 29 June 2016, the Regional Office of the South Moravian Region imposed a fine of CZK 50,000 on the plaintiff for committing an administrative offence pursuant to Section 8a (3) d) of Act No. 40/1995 Coll., on the regulation of advertising. It produced an advertisement in the form of a double-sided leaflet, which was publicly distributed in a quantity of 213,689, and which contained a nearly naked female body unrelated to the activity being promoted, which is generally contrary to good morals, and in particular discriminatory against the female sex and degrading to human dignity.

The plaintiff appealed against the decision of the regional authority to the Ministry of Industry and Trade, which confirmed the decision of the Regional Office.

The plaintiff challenged the defendant's decision in an action before the Regional Court in Brno, objecting that the requirements for the content of advertising set out in § 2 paragraph 3 of the Act on the Regulation of Advertising do not require that the advertisement be linked to the promoted activity.

The Regional Court dismissed the action and upheld the defendant's decision. In the judgment of 4 June 2019, the Regional Court concluded that the depiction of a woman in the advertisement in question was contrary to the requirement of respect for human dignity, since the use of a woman's almost naked body merely as an accessory or decoration serves to attract attention. Such a depiction reduces the woman to a mere object and creates the idea that it is acceptable to perceive and treat persons in that way. Such an advertisement is also discriminatory because it portrays women in a role that puts them at a disadvantage precisely because of their gender. This approach leads to the reinforcement of stereotypical images of women and places them in a degrading position as sexual objects. The depiction of the woman in question fulfils the elements of sexism as one of the manifestations of sex discrimination, consisting in unequal treatment on the basis of sex. The Regional Court also noted that not every depiction of a naked body leads to the conclusion that the advertisement is prohibited. The examples cited by the applicant (e.g. advertisements for cosmetic products, perfumes, massages, lingerie) do not generally suffer from a lack of connection between the form of the advertising message used and the type of activity advertised. The fact that the person depicted in the advertisement acts

voluntarily does not alter the matter, since the right to protection of human dignity cannot be waived.

The plaintiff filed a cassation appeal against the judgment of the Regional Court with the Supreme Administrative Court, which concluded that the appeal was not well-founded and therefore dismissed it pursuant to the second sentence of Article 110(1) of the Code of Civil Procedure.

Rozsudek Nejvyššího správního soudu č.j. 8 As 202/2019-43 ze dne 31.3.2021

http://kraken.slv.cz/8As202/2019

Judgement of the Supreme Adminstrative Court, 8 As 202/2019-43, 31 March 2021

[CZ] Decision of the Supreme Court on television and radio fees

Jan Fučík
Česká televize

On 15 December 2020, the Czech Supreme Court decided that television and radio fees are a mandatory payment similar to tax, within the meaning of Section 240 of the Penal Code. The decision granted the appeal of the Supreme Public Prosecutor in the case of two entrepreneurs who had not paid a total of over CZK 300 thousand in television fees.

The criminal offene of evading tax, fees and similar mandatory payments, pursuant to Section 240 of the Penal Code, is committed by a person who evades tax, customs, social security premiums, contributions to the state employment policy, accident insurance premiums, health insurance premiums, fees or other similar mandatory payments to a great extent (ie by at least CZK 100 000).

On 12 August 2019, the defendants were first acquitted by a judge of the District Court in Prachatice, according to which their actions did not amount to a criminal offence and there was no reason to refer to the case.

On 22 July 2020, the Regional Court in České Budějovice also dismissed the prosecutor's complaint (which challenged the above-mentioned resolution in its entirety, to the detriment of the defendants) as unfounded.

However, the Supreme Public Prosecutor filed an appeal against both entrepreneurs. According to the Supreme Public Prosecutor, the television fee in favor of Czech Television (ČT) is not a private law relationship, but a mandatory payment by law. This legal relationship cannot be established or terminated by its participants by agreement, and a natural or legal person is obliged to pay a fee regardless of whether he / she receives a public service of the Czech Television in the field of television broadcasting. The amount of the fee is set at a flat rate and does not depend on whether and, if so, to what extent the service is actually accepted. It cannot therefore be regarded as a payment where the fee corresponds to the service provided, as would be the case in a contractual relationship between equal participants.

The Supreme Court came to the conclusion that television fees pursuant to Act No. 348/2005 Coll., on radio and television fees, are "another similar mandatory payment" within the meaning of Section 240, Paragraph 1 of the Penal Code. This conclusion can also be applied to radio fees according to the same law.

Rozhodnutí Nejvyššího soudu č.j. 7 Tdo 1229/2020 z 15.12.2020

https://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/BD84A97FFCA00450

C12586A1001B8651?openDocument&Highlight=0

Decision of the Supreme Court No., 7 Tdo 1229/2020 from 15.12.2020

GERMANY

[DE] Advertising industry adopts new code of conduct and strengthens youth protection

Dr. Jörg Ukrow
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On 12 April 2021, the *Zentralverband der deutschen Werbewirtschaft* (German Advertising Federation – ZAW) presented a revised version of the code of conduct on commercial communication for foods and beverages, which will enter into force on 1 June 2021. These self-regulatory rules apply to commercial communication such as advertising on TV, radio, posters and in magazines, as well as Internet and social media advertising, cooperation with influencers, and advertising on social networks and video platforms.

Under the revised version of the *Verhaltensregeln des Deutschen Werberats über sämtliche Formen der kommerziellen Kommunikation für Lebensmittel* (German Advertising Standards Council Code of Conduct on all forms of commercial communication for foods and beverages), which was first adopted in 2009, the rules prohibiting direct demands for the purchase or consumption of an advertised product aimed at children below a certain age, as well as demands that they induce their parents to purchase such a product, have been updated. The previous age limit of 12 has been increased to 14. The rules therefore apply to advertising directly aimed at children under 14, regardless of the medium or environment used. This change applies to all rules that were previously only applicable to under-12s.

The restrictions on advertising for foods and beverages have also been tightened in other ways. For example, in future, in audiovisual commercial communications aimed at children under 14, it will no longer be permitted to emphasise the positive nutritional qualities of foods of which an excessive intake is not recommended as part of an overall balanced diet. In practical terms, this concerns messages such as ‘with added vitamins and minerals’ or ‘high in wholemeal for physical performance’. The new advertising code therefore supports society’s efforts to promote a balanced diet. It also forms a part of the measures to strengthen the protection of children’s health from potentially damaging audiovisual commercial communication, as advocated by the Audiovisual Media Services Directive, which was amended by Directive (EU) 2018/1808.

Verhaltensregeln des Deutschen Werberats über sämtliche Formen der kommerziellen Kommunikation für Lebensmittel

https://www.werberat.de/lebensmittel

German Advertising Standards Council Code of Conduct on all forms of commercial communication for foods and beverages

[DE] New MDR state treaty can enter into force following ratification by state parliaments

Mirjam Kaiser
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Following the decision of the Thüringen state parliament on 21 May 2021, all state parliaments of the *Länder* of Saxony, Saxony-Anhalt and Thüringen have now approved the amended *Staatsvertrag über den Mitteldeutschen Rundfunk* (state treaty on Mitteldeutscher Rundfunk – MDR-StV). The amended treaty can therefore enter into force on 1 June 2021.

The broadcasting corporation Mitteldeutscher Rundfunk (MDR) is a member of the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (German Association of Public Service Broadcasters - ARD) and broadcasts to viewers in Saxony, Saxony-Anhalt and Thüringen. Under Germany's federal system, with the *Länder* holding legislative competence in the media field, state treaties are required in order for the *Länder* to cooperate across their borders. State treaties require the approval of the respective state parliaments (see Article 65(2) of the constitution of the Free State of Saxony, Article 77(2) of the constitution of the Free State of Thüringen and Article 69(2) of the constitution of Saxony-Anhalt).

The first MDR-StV was adopted by Saxony, Saxony-Anhalt and Thüringen on 30 May 1991. The recently approved amendment, following adaptation to data protection rules in 2018, marks its first proper overhaul. The need to amend the treaty was triggered, in particular, by the ruling of the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG) of 25 March 2014 (case No. 1 BvF 1/11) on the *Staatsvertrag über das Zweite Deutsche Fernsehen* (state treaty on Zweites Deutches Fernsehen – ZDF-StV), in which the court decided that no more than one third of the members of the supervisory bodies of public service broadcasters could be part of state authority or a political party. This constitutional requirement has been implemented through the new amendment, which increases the size and diversity of MDR's *Rundfunkrat* (Broadcasting Council), which must include a representative of disabled people's associations, for example (see Article 16(1)(19) MDR-StV). Meanwhile, the *Verwaltungsrat* (Administrative Council) is also enlarged from seven to ten members (see Article 22(1) MDR-StV). The themes of the environment and climate protection are also added to the programme mandate under Article 8 MDR-StV.

The decision to expand the supervisory bodies has been heavily criticised in some quarters. It was only taken in order to enable the existing state authority and political party representatives to remain in their posts without breaching the 1/3 rule laid down by the BVerfG. MDR itself has also expressed concern about provisions that, in its opinion, threaten its independence from state authorities. This fear is based on the wording of the protocol declaration, which states that the three *Länder* should "benefit from their share of MDR income in the medium term".

With the BVerfG due to issue a ruling on the broadcasting licence fee, the members of the state parliaments are already expecting the MDR-StV to be back on their agenda again during the next legislative period.

Staatsvertrag über den Mitteldeutschen Rundfunk (MDR)

https://www.revosax.sachsen.de/vorschrift/19075-StV-MDR

State treaty on Mitteldeutscher Rundfunk (MDR)

[DE] New media company code to improve protection of journalists from violence and threats

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A new code of conduct for media companies was unveiled on 22 April 2021. Drafted at the initiative of a number of organisations and associations, including Reporters Without Borders and the *Deutsche Journalisten-Verband* (German Journalists' Association – DJV), the code is designed to improve the protection of journalists from violence and other threats. It contains a list of measures, including essential mechanisms that media companies should put in place in order to deal with threats aimed at their employed or freelance journalists. All media companies involved in journalistic activities are invited to adopt the code.

The code was developed partly as a result of the latest surveys conducted by Reporters Without Borders and the European Centre for Press and Media Freedom, which reflect a worrying increase in both physical attacks and verbal threats against journalists in Germany. The code proposes a series of measures that media companies are urged to take in order to create a safe environment for journalists.

The first such measure is the appointment of a contact person within the company for journalists who are targeted. This person's role is to provide information about available support, such as psychological or legal assistance, and to act as a mediator (e.g. by cooperating with the public prosecution office or other authorities). If a journalist is threatened, targeted with hate messages or attacked in relation to a report, the media company should, in particular, provide external psychological and legal support – including for the journalist's family members – and pay for any personal protection or house move that proves necessary. Training and workshops on how to deal with hate messages and threats should also be regularly offered, while employees and freelance journalists should be kept informed of the support available.

Companies should also create their own in-house contact point to which journalists can forward the hate mail that they receive, without having to deal with the legal or psychological consequences it creates. Messages sent to this central e-mail address should be regularly checked by the in-house legal team and, if necessary, reported to the criminal prosecution authorities. Media professionals should also be accompanied by security staff while filming in potentially dangerous situations. Finally, efforts should be made to quickly block social media accounts from which hate messages are disseminated.

The code has already been adopted by large media companies including dpa, taz, Die Zeit and Zeit Online, Der Spiegel and Frankfurter Rundschau.

Kodex für Medienhäuser

https://www.djv.de/fileadmin/user_upload/INFOS/20210415_Schutz_Kodex_Massnahmenkatalog.pdf

Media company code of conduct

[DE] State media authorities issue further rules on state media treaty

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The 14 German *Landesmedienanstalten* (state media authorities) have jointly drafted further 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. Following the entry into force of an initial series of rules designed to implement the MStV's provisions on exemption from prior authorisation, advertising and competition (see IRIS 2021-4/12), the latest rules concern, among other things, European productions (Article 77 MStV), the MStV's provisions on media platforms and user interfaces, and the arbitration body (Article 99 MStV).

Under Germany's federal system, legislative competence in the broadcasting field lies with the *Länder*, with 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. Through provisions such as Articles 77 and 99, which form the basis for two of the sets of rules discussed here, the MStV implements the EU Audiovisual Media Services Directive (AVMSD), which was amended in 2018. However, it also contains provisions applicable at national level aimed at modernising the media system in relation to new stakeholders that are significant for media diversity, including media platforms, which are the subject of the third set of rules.

According to the *Telemediengesetz* (Telemedia Act), providers of so-called video-sharing services are obliged to set up a complaints procedure so users can report illegal content. As part of this procedure, the *Landesmedienanstalten* will create an arbitration body to which users can refer disputes over the outcome of the complaints process. Such disputes could arise if, for example, a user disagreed with a service provider's decision to delete a video they had shared, or if a service provider failed to remove potentially illegal content despite receiving complaints about it. The rules on the arbitration body to be set up pursuant to Article 99 of the MStV define both its membership and the principles of the arbitration procedure itself. They came into force on 15 April 2021.

Meanwhile, the rules implementing the MStV's provisions on media platforms and user interfaces cover not only media platforms such as traditional cable networks or so-called OTT services, but also user interfaces such as smart TVs. They reflect how media usage has changed and are designed to safeguard media pluralism (diversity of both content and providers) in the digital age. These rules clarify, for example, the MStV's provisions on notification and transparency requirements relating to a future or current media platform or user interface, protection against overlaying of advertising, the allocation of channels on media platforms, the accessibility of media platforms, and the findability of programmes and content in

user interfaces. Once they enter into force on 1 June 2021, the rules, which also contain procedural regulations, will therefore provide broadcasters with equal, non-discriminatory access to media platforms and user interfaces.

According to the MStV, European works must constitute at least 30% of the content made available by television-like telemedia, in particular video-on-demand services. This obligation, based on the AVMSD and extending a rule that has existed for television channels for many years, is designed to protect the diversity of audiovisual media in German-speaking and European countries, as well as strengthen European film and television production. The rules on European productions specify, for example, what constitutes a European work, how the quota is calculated and how appropriate prominence should be given to European works in VoD catalogues. Quota exemptions for providers with low turnovers or viewer figures, as well as for certain categories of television-like telemedia, are also explained. The rules, which also clarify procedural matters, will enter into force on 1 July 2021.

Satzung über die Schlichtungsstelle gemäß § 99 Medienstaatsvertrag

https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/20201120_VSD-Satzung_final.pdf

Rules on the arbitration body pursuant to Article 99 of the state media treaty

Satzung zur Konkretisierung der Bestimmungen des Medienstaatsvertrags über Medienplattformen und Benutzeroberflächen

https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Satzungsentwuerfe_MStV/20210317_MB-Satzung_final.pdf

Rules implementing the provisions of the state media treaty on media platforms and user interfaces

Satzung zu europäischen Produktionen gemäß § 77 Medienstaatsvertrag

https://www.die-medienanstalten.de/fileadmin/user_upload/Rechtsgrundlagen/Satzungen_Geschaefts_Verfahrensordnungen/Satzungsentwuerfe_MStV/20210315_EU-Quoten_final.pdf

Rules on European productions pursuant to Article 77 of the state media treaty

SPAIN

[ES] Audiovisual media service providers meet European film and series funding ratios for 2019

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Law 7/2010 of 31 March 2010 on General Audiovisual Communication obliges audiovisual media services providers to earmark part of their revenue for the financing of European films and series in order to promote cultural and linguistic diversity. This provision stems from the Audiovisual Media Services Directive.

The financing may take the form of a direct participation in the production or works or the acquisition of exploitation rights. The extent to which service providers must contribute varies depending on their type: public service broadcasters must invest 6% of their profits from the previous year whilst commercial players contribute 5%. Obligations are further specified according to different factors, such as the type of audiovisual work (film, television series or miniseries), the language used (Spain's co-official languages), and the independent nature of the production. The law establishes, for example, a minimum percentage of funding depending on the nature of the audiovisual production: 60% of such an investment must be assigned to pre-financing films, 60% of which has to be allocated to films shot in any of Spain's official languages. These percentages are 75% and 60% respectively, for public service broadcasters.

The Spanish regulatory body, the *Comisión Nacional de los Mercados y la Competencia* (CNMC) / National Commission of Markets and Competition, by virtue of Law 3/2013, monitors compliance with these obligations annually, and on an individual basis, for each service provider. Thus, in relation to the 2019 financial year, the CNMC has issued a report comprising the performance of 21 service providers. It has been concluded that 19 have complied with the said financing whereas two have failed to do so (Cineclick y Lomatena Investments). Moreover, some have exceeded their investment obligations (Multicanal, Mediaset, Telefónica, Atresmedia, Euskaltel/R-Cable/Telecable, Orange, Vodafone, History Channel, Filmin, 13TV, Rakuten, NBC Universal, Veo TV, Net TV, Cosmopolitan, Sony, FOX y Viacom). The public service broadcaster CRTVE has also exceeded expected contributions with the exception of pre-financing dedicated to film and miniseries.

Nota de prensa de la CNMC, "La CNMC audita el cumplimiento de la obligación de financiar películas y series europeas durante 2019", 3 de mayo de 2021

https://www.cnmc.es/prensa/foe-control-anual-2019-20210503

Presse release of the CNMC, "The CNMC monitors the compliance of financing European films and series during 2019", 3 May 2021

[ES] RTVE interview violated the principles of informative neutrality and equality

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European Audiovisual Observatory

On 13 May 2021, the *Junta Electoral Central* (Central Electoral Board - JEC) partially upheld the appeal filed by the political party Vox against Decision no. 92 of the Provincial Electoral Board of Madrid of 1 May 2021, in relation to its complaint against the Corporación Radio y Televisión Española for the interview with the Vox candidate, in the programme "La Hora de la 1", broadcast on 26 April 2021. The decision rules that, in the terms in which the interview was carried out, there was a violation by RTVE of the principles of informative neutrality and equality set forth in Article 66.1 of the Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General (Organic Law on the General Electoral System - LOREG).

Article 66.1 of the LOREG states that "respect for political and social pluralism, as well as equality, proportionality and news neutrality in the programming of publicly-owned media during election periods, shall be guaranteed by the organisation of these media and their control provided for by law". The appealed decision had rejected the complaint based on the fact that "although the television interview may be somewhat incisive, and its forms debatable, [...] the freedom of information and opinion of the television medium must prevail, and the interview, as a whole, does not constitute an infringement of the principle of informative neutrality". In its decision, the JEC ruled that the two main topics chosen by the interviewer were of informative interest. However, taking into account the time devoted to them and the fact that, in her treatment of them, the interviewer maintained a tone of reproach and reprobation, taking a position, at times, against the interviewee, the JEC considered that the interview was not carried out in accordance with the principles of equanimity and neutrality required of the public medium in which it took place. According to the JEC, this critical tone was accompanied by a position, apparently at least, contrary to the candidate being interviewed, giving rise to a series of replies and counter-replies by the journalist, repeatedly questioning the candidate's reply and entering into a debate with her on the two controversial issues in terms that lacked the neutrality and balance with which public media professionals should act in this type of interview. In fact, it was a change of format, as what should have been an interview focused on the party's electoral programme became a debate between the journalist and the candidate, thus consuming the time allotted for this interview. While not disputing the presenter’s right to cross-examine the interviewee's answers, the JEC found reprehensible the way in which the media professional placed herself in a position of direct confrontation with the candidate. An examination by the JEC of the other election interviews conducted on the same programme, and by the same interviewer, showed that the journalist did not maintain this recriminatory tone with other candidates, nor did the interview focus on particularly polemical

aspects, as in this case.

The JEC considered that it was not appropriate to open a sanctioning procedure, given that neither in this electoral process nor in recent previous processes had the JEC declared non-compliance by RTVE with the provisions of Article 66.1 of the LOREG. Therefore, the appeal was upheld in as much as it required RTVE to ensure that actions such as this one are not repeated in the future, and the professionals of said media outlet should respect the principles of news neutrality and equality with respect to all candidates competing in the elections.

A dissenting minority vote was subscribed by 5 members of the JEC, in which they considered that the decision of the JEC should have dismissed the appeal.

Acuerdo 300/2021 de la Junta Electoral Central, Núm. Expediente: 293/1235, 13 de mayo de 2021

http://www.juntaelectoralcentral.es/cs/jec/doctrina/buscadorresult?esinstruccion=false&idacuerdoinstruccion=76693&materias=0&objeto=Vox&operadoracuerdo=-1&operadorobjeto=-1&sPag=1&template=Doctrina/JEC_Detalle&tiposautor=0&total=67

Resolution 300/2021 of the Central Electoral Board, File No.: 293/1235, 13 May 2021.

FRANCE

[FR] Key provisions of Directive 2019/790 on copyright and related rights transposed into French law

Amélie Blocman
Légipresse

The key provisions, namely Articles 17 to 23, of Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market, were transposed into French law by Ordinance No. 2021-580 of 12 May 2021. Article 15 of the Directive had previously been transposed by the Law of 24 July 2019 creating a neighbouring right for press publishers and agencies.

Under Article 1 of the Ordinance, a new Article L. 137-1 of the Intellectual Property Code (IPC) defines the scope of the services concerned by the transposition of Article 17. It refers to online content-sharing service providers, which are understood to be providers of online public communication services. The main objective, or one of the main objectives, of these service providers is to store and provide the public with access to a large quantity of protected works and other protected items uploaded by their users, which they organise and promote with a view to making a profit, either directly or indirectly. The text states that a *Conseil d'Etat* (Council of State) decree will lay down how a large quantity of protected works and items will be defined. It explains that online public communication services that deliberately infringe copyright and related rights cannot benefit from the exemption from liability that applies to providers who make their best efforts according to Article 17 of the Directive.

Article L. 137-2 of the IPC states that, by offering access to works uploaded by its users, an online content-sharing service provider performs acts of representation for which it must obtain authorisation from the rightholders. Part II of Article L. 137-2 therefore rules out any possible application of the provisions of paragraphs 2 and 3 of part I of Article 6 of Law No. 2004-575 of 21 June 2004, which sets out certain exemptions from liability, to such a provider for such acts. While holding online content-sharing service providers liable for piracy in the case of unauthorised usage, part III of Article L. 137-2 takes into account their best efforts to obtain the authorisation of rightholders and to combat the uploading of unauthorised protected content. The new Article L. 137-4 of the IPC states that the new provisions do not prevent users from benefiting from exemptions and, in this respect, obliges service providers to create a mechanism for users to dispute the blocking or removal of a work they have uploaded that prevents lawful use of that work (with the possibility of subsequently appealing to the *Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet* (High Authority for the Dissemination of Works and the Protection of Rights on the Internet – Hadopi)).

The transposition of Article 17 is designed to give authors and performers the chance either to be paid by content-sharing platforms that distribute their works on a massive scale, or to ensure that effective preventive measures are taken to ensure the unavailability of unauthorised works, while at the same time providing users with greater legal certainty and new rights.

The Ordinance also transposes Articles 18, 19, 20 and 22 of the Directive, which set out the principle of appropriate and proportionate remuneration and strengthen transparency obligations for the benefit of authors and performers. Finally, they give authors and performers new rights in their relationship with parties that exploit their works, through a mechanism for adjusting the remuneration agreed in a contract and the right of revocation if a work is not exploited. These provisions also take into account existing sector-specific provisions and, as is permitted under the Directive, suggest that conditions for their implementation should be determined through professional negotiations.

Article L. 132-18 of the IPC, amended by Article 6 of the Ordinance, for example, clarifies the scope of the transparency obligation in general representation agreements signed with on-demand audiovisual media services. This transparency covers the number of times a work is downloaded, visited or watched over a period dependent on how the rights are distributed.

The new Article L. 132-28-1, created under Article 10 of the Ordinance, aims, through the producer and the contract authorising communication of a work to the public, to include this transparency obligation for the benefit of authors in the audiovisual production contract.

Articles 8 and 9 of the Ordinance support the implementation of the right to proportionate remuneration in the audiovisual sector. According to Article 9, if no collective agreement on the remuneration of authors is in place for each form of exploitation of audiovisual works within 12 months of the Ordinance's entry into force, the regulatory authority can lay down all or some of the conditions and mechanisms for such remuneration until an agreement on the relevant points comes into force.

The Ordinance should soon be supplemented with the adoption of two further ordinances transposing the final provisions of Directives 2019/790 and 2019/789.

Ordonnance n° 2021-580 du 12 mai 2021 portant transposition du 6 de l'article 2 et des articles 17 à 23 de la Directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les Directives 96/9/CE et 2001/29/CE, JORF du 13 mai 2021

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043496429

Ordinance no. 2021-580 of 12 May 2021 transposing Articles 2(6) and 17 to 23 of Directive 2019/790 of the European Parliament and of the Council of 17 April 2019

on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Official Gazette of 13 May 2021

[FR] Satirical song did not cross the boundary of freedom of expression

Amélie Blocman
Légipresse

During the France Inter programme “Par Jupiter!”, in response to a Brazilian court’s decision to ban a film portraying Jesus Christ as a homosexual, a singer performed a satirical song entitled “La chanson de Frédéric F...” in which Jesus Christ was described as a homosexual in obscene and vulgar terms.

The political think tank *Fondation de service politique* asked the *Conseil d'Etat* (Council of State) to annul the decision of the *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory body – CSA) of 26 February 2020 in which the CSA refused to open sanction proceedings against Radio France pursuant to Articles 48-1 *et seq*. of the Law of 30 September 1986.

The *Conseil d’Etat* held that the CSA is responsible for ensuring that, in accordance with Articles 3-1 and 43-11 of the Law of 30 September 1986, the programmes made available to the public by Radio France contribute in particular to social cohesion and the fight against discrimination. It is also responsible for guaranteeing respect for the principle of freedom of communication of thoughts and opinions, which is enshrined and protected in the constitutional provisions of the 1789 Declaration of the Rights of Man and of the Citizen and referred to in Article 1 of the Law of 30 September 1986.

In the *Conseil d’Etat’s* view, the evidence suggested that the song in question, which was designed to criticise discriminatory attitudes towards homosexuals and did not promote discrimination against a specific group of people on religious grounds, had been clearly satirical in nature. It thought that, despite the outrageous tone of certain parts of the song, for which the singer and Radio France had later apologised, the broadcast could not be regarded as having exceeded the boundaries of freedom of expression or infringed the national broadcaster’s legal obligation to contribute to social cohesion and the fight against discrimination in a way that could justify use of the CSA’s powers to issue a formal notice or sanction pursuant to Articles 48-1 *et seq*. of the Law of 30 September 1986.

Council of State decision of 6 May 2021, no. 440091, Fondation de service publique

[FR] Application for stay of CSA sanction against CNews rejected

Amélie Blocman
Légipresse

On 17 March 2021, the *Conseil Supérieur de l'Audiovisuel* (French audiovisual regulatory body – CSA), pursuant to Article 42-1 of the Law of 30 September 1986, imposed a fine of EUR 200,000 against the CNews television channel following remarks made by political commentator Eric Zemmour during the programme "Face à l'info" broadcast on 29 September 2020 (see IRIS 2021-5:1/26). Zemmour then asked the urgent applications judge of the *Conseil d'Etat* (Council of State) to stay the execution of the decision. He argued that execution of the decision would infringe the right to be presumed innocent as well as freedom of expression since, firstly, the disputed decision stated that he had committed the offence of incitement to racial hatred even though a criminal investigation was still under way and, secondly, the decision had the purpose or effect of denying him access to certain media.

The urgent applications judge of the *Conseil d'Etat* pointed out that, according to Article L. 521-1 of the Code of Administrative Justice, the execution of an administrative decision could be stayed on the grounds of urgency if the decision harmed a public interest, the applicant's situation, or the interests defended by the applicant in a sufficiently serious and immediate way. Taking into account the applicant's arguments, the judge therefore needed to assess whether the effects of the disputed decision created sufficient urgency for the execution of the decision to be stayed until the application had been judged on its merits. The urgency should be measured objectively, taking all the circumstances of the case into account.

In this case, the *Conseil d'Etat* ruled that the applicant had failed to put forward any relevant circumstance that could justify a stay of execution of the decision, i.e. payment by the CNews television channel of a fine imposed for failing to meet its obligations, since its execution would not, in itself, cause any harm to the applicant.

In the absence of urgency within the meaning of Article L. 521-1 of the Code of Administrative Justice, the application was rejected.

CE, 28 avril 2021, N° 451898, E. Zemmour

http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-04-28/451898

Council of State decision of 28 April 2021, no. 451898, E. Zemmour

UNITED KINGDOM

[GB] Channel 5 makes public apology for “Can’t Pay? We’ll Take It Away!” broadcast

Alexandros K. Antoniou
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On 19 April 2021, Channel 5 publicly apologised and agreed to pay damages to a couple who were shown in the television programme *Can’t Pay? We’ll Take it Away!*

Channel 5 Broadcasting Ltd is a national broadcaster which broadcasts Channel 5, and also 5HD, 5 + 1, Spike, 5Star and 5USA. It also operates My5, a free video on-demand internet service. *Can’t Pay? We’ll Take It Away!* is a British factual documentary series which follows the work of High Court Enforcement Officers (HCEAs) as they go about their business of collecting alleged debts and repossessing homes. The show has been entered for multiple awards including BAFTA, the National Television Awards and was shortlisted for a Grierson.

On 11 May 2017, two HCEAs attended the home of Mr Andrew Wain and Ms Julie Kelly to enforce a debt incurred in respect of money borrowed from a private individual who had agreed not to pursue the sum owed. A film crew was also in attendance, but withdrew their curious gazes following Mr Wain’s refusal to permit them entry to the couple’s home.

However, the HCEAs, who did enter, wore bodycams (as well as radio microphones) and recorded video and audio footage of what was happening in the claimants’ property. The recordings made in this way were subsequently edited and incorporated in an episode of the programme *Can’t Pay? We’ll Take it Away!* by Channel 5. The episode was broadcast several times from 2017 until late 2020 to over 6.7 million viewers in total.

In September 2020, Mr Wain and Ms Kelly (the claimants) issued proceedings against Channel 5 (the defendant) for the misuse of their private information in respect of the filming, making and multiple broadcasts of the episode in question, which showed the couple in a state of “considerable distress” and caused them “immense upset”. The claimants’ case was that the programme wrongly revealed private matters which took place in their home.

In a joint statement read in open court before The Honourable Mrs Justice Collins Rice, the claimants accepted an offer of settlement in relation to their claim and received a “substantial damages” payment in recognition of the nature of the intrusion suffered and serious breach of their Article 8 ECHR rights. “They are both very private individuals and they live in a small community and word soon spread about the programme amongst people they know through work and socially”, the court heard.

Channel 5 also agreed to pay the couple's reasonable legal costs and undertook not to broadcast the programme complained of again, or make it available online. The broadcaster accepted that it got the balancing exercise between matters of public interest and the right to privacy "wrong" on this occasion and publicly apologised to the claimants for the "considerable distress" caused to them by the programme.

The matter is now considered concluded.

Wain and Kelly v Channel 5 Broadcasting Ltd (Statement in Open Court, 19 April 2021)

https://hamlins.com/wp-content/uploads/2021/04/Wain-Kelly-v-Channel-5-final-SIOC-25.02.21.pdf

[GB] High Court determine publication of Notice by the Daily Mail recording summary judgment awarded to HRH Duchess of Sussex

Julian Wilkins
Wordley Partnership and Q Chambers

The Honourable Mr Justice Warby of the High Court of Justice gave summary judgment on 11 February 2021 (February judgment) for HRH The Duchess of Sussex (HRH) which declared that Associated Newspapers Limited (ANL) in a series of Daily Mail and MailonLine articles had breached HRH's copyright and privacy by publishing a private letter that she had sent to her estranged father a few months after marrying Prince Harry. On 5 March 2021 Mr Justice Warby determined the extent and nature of the public apology notice from ASL (March judgment).

In May 2021 the court received further evidence that undermined ANL's remaining defence due for trial in Autumn 2021 that HRH had co authored the letter with a member of the Royal Household staff and as a consequence the copyright belonged to the Crown. ANL had argued that that HRH did not solely own the copyright and could not thwart its publication.

Subsequent to the February judgment the offending articles continued to be published by ANL on their MailOnLine site despite the court having held them to be a misuse of private information and infringement of HRH's copyright.

ANL contended special reasons to continue publication although they had not identified any form of harm or detriment to them or to the public interest caused by not publishing. The court found no good reason for continuing publication and whilst the letter had become public domain information it did not prevent HRH seeking to protect its content.

Applying Directive 2004/48/EC (the Enforcement Directive) enacted in Part 63 Practice Direction (PD63) of the English Civil Procedure Rules. Article 15 of the Enforcement Directive provides: "Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authority may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision and publishing it in full or in part. Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising."

Paragraph 26.2 of PD63 states: "Where the court finds that an intellectual property right has been infringed, the court may, at the request of the applicant, order appropriate measures for the dissemination and publication of the judgement to be taken at the expense of the infringer."

The court had a discretion by applying various factors including the deterrence of the infringing defendant and acting as a deterrent to other infringers. Factors

against granting the relief included the strength of policy grounds relating to the case's facts plus procedural or practical obstacles preventing an effective and proportionate order. HRH had to present a precise form of order, and a workable solution. identifying appropriate platforms or publications for the notice, including possibly a hyperlink to the main judgment so the public could see its reasoning and context. ANL had been criticised as to how it had reported the outcome of the February judgment.

Any notice was not to punish or humiliate the defendant whilst a disproportionate financial burden upon a publisher would be impermissible. Although a published notice interfered with freedom of expression it was a justified measure, necessary and proportionate to pursue a legitimate aim; HRH's rights required protection and vindication having been infringed by ANL's publication thus justifying interfering with their freedom of expression. Such interference was neither an objectionable or disproportionate interference with free speech by publishing a supplementary statement to correct a wrongful publication and referring to a court judgement.

Mr Justice Warby ordered a notice to be published once on the front page of the Mail on Sunday and to include: "*The court found that Associated Newspapers infringed her copyright by publishing extracts of her handwritten letter to her father in the Mail on Sunday and in Mail Online.*" The same notice would appear for a week in the MailOnLine with a hyperlink to the February judgment and summary.

Since the March judgment, evidence has been produced that Mr Jason Knauf of the Royal Household staff had not co-authored the letter so copyright did not belong to the Crown. HRH lawyers contend that summary judgment for all outstanding issues is granted in her favour obviating the need for the autumn trial; ANL do not oppose summary judgment.

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 510 (Ch), 5 March 2021

https://www.judiciary.uk/wp-content/uploads/2021/03/Duchess-of-Sussex-v-Associated-judgment-1.pdf

[GB] TV network sanctioned by Ofcom for the third time over harmful coronavirus-related content

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On 19 April 2021, Ofcom, the UK's communications regulator, found that two episodes of the Loveworld TV Network's programme *Full Disclosure* featured potentially harmful statements about the Coronavirus pandemic and vaccine rollout, without providing adequate protection for viewers.

Full Disclosure is a current affairs programme which features two presenters discussing a range of news stories. It is broadcast by the religious channel Loveworld Television Network, the licence for which is held by Loveworld Limited.

Ofcom found that during two *Full Disclosure* episodes (broadcast on 11 and 12 February 2021) "a substantial amount of materially misleading and potentially harmful" statements were made about how Coronavirus vaccinations work, their safety and their ability to protect people. These were made without any scientific or other credible basis and went without sufficient context or challenge. Ofcom stated in its ruling: "We were particularly concerned about the repeated assertions that having a vaccine is equivalent to being infected with the Coronavirus, and that catching Coronavirus was as safe, and could even potentially be safer, than receiving a vaccine." This was evident in comments by the presenters such as "you might as well catch COVID-19" and "maybe [...] catching the virus itself is better than having a vaccine?"

The programme also contained several comments about the serious side effects or the medical complications of coronavirus vaccines and other statements which were considered to have the potential to distort viewers' perception of the risks and benefits of receiving a vaccination. Other statements, which could lead people to underestimate the potential risk posed to them by COVID-19 and the effectiveness of measures they could take to protect themselves against contracting the virus, were also included in the episodes at issue.

The topics described above were deemed particularly sensitive given the broader contextual factors present. At the time of the broadcast, the number of confirmed COVID-19 cases had reached 108 million globally. A third government-imposed national lockdown was in force and the rollout of UK approved Coronavirus vaccines had been underway for over two months. The measures implemented to deal with the public health crisis had resulted in restrictions on public freedoms in the UK, leading to considerable debates, not only about the adopted strategies in response to the pandemic, but also about vaccine efficacy and their approval processes.

Reflecting on the importance of freedom of expression in a democratic society, Ofcom acknowledged that it was in the public interest for a broadcaster to

scrutinise established thinking and official authorities' responses to the coronavirus pandemic, including the potential side effects of vaccinations. But, in doing so, compliance with the Broadcasting Code was required. The Code does not prevent broadcasters from including contentious viewpoints in programmes, including robustly questioning public health authorities, but this must be done in compliance with Rule 2.2, which states that "factual programmes or items or portrayals of factual matters must not materially mislead the audience".

Moreover, broadcasters must ensure they provide "adequate protection" for the audience from the inclusion of potentially harmful material, in line with Rule 2.1 of the Code. Loveworld's presentation of "highly misleading" claims without a sufficient degree of challenge risked potential serious harm to viewers, particularly at a time when people (especially elderly and other vulnerable groups) were likely to be seeking reliable information about vaccines against coronavirus and making important decisions about whether to accept an offer of vaccination. "We considered that the claims made in both of these programmes went far beyond reasonable scrutiny and debate", the regulator stated and added: "Our concern was heightened by the fact the presenters appeared to use a number of discredited sources and already disproved theories to provide materially misleading and harmful information to a potentially vulnerable audience".

Ofcom concluded that Loveworld Ltd had committed serious breaches of Rules 2.1 and 2.2 of its Code and directed the network to broadcast a summary of its ruling. The regulator has yet to make a final decision on a suitable sanction, but noted that this was the third breach decision recorded against Loveworld Ltd in relation to harmful content about the ongoing Coronavirus pandemic. This was despite assurances it had previously offered as to how it would improve its compliance procedures following a previous statutory sanction for similar breaches. On 30 March 2021, Ofcom imposed a GBP 125,000 fine on the channel for a second breach which also related to "inaccurate and potentially harmful claims" about the coronavirus pandemic. Considering its serious and persistent breaches of the Code, the licensee Loveworld Ltd could now be exposed to even more severe sanctions.

Ofcom Broadcast and On Demand Bulletin, 9 April 2021

https://www.ofcom.org.uk/__data/assets/pdf_file/0032/217589/sanction-decision-loveworld-full-disclosure.pdf

Ofcom, Sanction 140 (21), 30 March 2021

https://www.ofcom.org.uk/__data/assets/pdf_file/0026/216890/Sanction-Decision-Loveworld-Limited-Global-Day-of-Prayer.pdf

ITALY

[IT] Agcom intervenes to avoid forms of spectacularization of events that can harm the personal sphere

Francesco Di Giorgi & Luca Baccaro

On 29 April 2021, the Italian Authority for Communications (Agcom) adopted a decision against the company "La7 S.p.A." to ensure strict compliance with the principles enshrined in the Consolidated Law on Audiovisual Media Services (TUSMAR) and in the Authority's provisions to protect impartial information and correct the way of representing legal proceedings and the image of women.

The issue concerns the way in which a case of alleged sexual violence committed by a well-known successful entrepreneur operating in the fintech sector (Genovese case) was dealt with by the very popular program called "Non è l'Arena".

According to the proceedings, in terms of consistency, the handling of the case was disproportionate to current events (12 episodes of the program in recent months with spaces lasting between fifty and eighty minutes), going beyond the limits of the legitimate exercise of the right to press. According to Agcom, similar and continuous attention does not seem to have been reserved for other news stories of equal interest to public opinion.

With reference to the methods of conducting and dealing with the case, Agcom notes that the handling of the case has not always ensured the necessary balance between information and respect for the confidentiality of the investigation and the rights to dignity, honour and reputation of the people for the benefit of the sensationalism of the news in which the tone, the words, the choice of guests and the narrative sequence are qualifying elements. Beyond the legitimate right to report and the social relevance of the issue, for the Authority, dealing with this matter so many times has led to the extreme publicity of the personal drama, emphasizing and spectacularizing events that has ultimately amplified the suffering of the young women involved.

Furthermore, the confrontation between the different theories "does not seem to have been adequately guaranteed, as the long 'serialisation' of the affair has inevitably generated, even in the most attentive viewer, the risk of confusion between the roles of the parties involved, leading both to a sort of secondary victimisation and, ultimately, the loss of the informative and social effectiveness of the investigation".

Agcom has therefore imposed on the program’s publisher, the generalist national television broadcaster "La 7", to take care to create a balanced reconciliation between the right to report and the fundamental rights of the person in the information programs dedicated to current affairs subject to legal proceedings in

progress, avoiding forms of representation of events that can harm the personal sphere of the subjects involved.

Delibera n. 147/21/CONS "Richiamo alla società la7 S.p.A. al rispetto dei principi a tutela della completezza dell'informazione e della corretta rappresentazione dei procedimenti giudiziari e dell'immagine della donna nei programmi (Programma Non è l'arena)".

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=22808547&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution n. 147/21/CONS

[IT] European Delegation Law setting criteria and principles for AVMSD implementation

Ernesto Apa& Marco Bassini
Portolano Cavallo

On 21 April 2021 the Italian Parliament passed the 2019-2020 European Delegation Law (Law No. 53/2021). The European Delegation Law vests in the Executive the power to adopt, by a legislative decree, a set of provisions implementing in the Italian legal system the directives that Italy is bound to transpose according to the EU Treaties. When providing for such delegation of powers the law also establishes the criteria and principles that the national norms, to be adopted by the Executive branch, shall comply with.

Article 3 of the 2019-2020 European Delegation Law provides the criteria and principles for the implementation of Directive (EU) 2018/1808, which significantly revisited the Audiovisual Media Services Directive (Directive 2010/13/EU). Among others, Article 3 ensuress that the implementing norms shall:

result in the approval of a new AVMS Code (i.e. Legislative Decree No. 177 of 31 July 2005) containing provisions and definitions (including those on online video-sharing services) consistent with the market and technological evolution; include measures that provides adequate protection for human dignity and minors with respect to audiovisual content, including user generated content, and commercial communications broadcast by video sharing service providers; the relevant measures may vest in the Italian Communications Authority the power to promote self-regulatory and co-regulatory procedures; include measures for the protection of consumers' rights, including out-of-court redress mechanisms or amicable dispute settlement procedures, in case audiovisual media service providers fail to comply with their obligations under the AVMS Directive; promote European works, including in the context of on-demand audiovisual media services, by simplifying and reordering the existing measures and establishing transparency requirements applicable to audiovisual media service providers; provide measures ensuring compliance with the provisions on commercial communications applicable also to video-sharing service providers and revisiting the duration limits on advertising according to criteria such as flexibility, proportionality and competitiveness; provide measures for limiting the sound level of commercial communications and messages delivered by public and private broadcasters in accordance with the relevant resolutions of the Italian Communications Authority; provide measures ensuring that audiovisual media service providers, including social networks, shall provide users with sufficient information with respect to the content, including advertising, which may likely harm the physical, mental, and moral development of minors, including gambling advertising; in addition to that, they shall provide specific measures to counter the use of false accounts, whether belonging to non-existing individuals or to other individuals, to alter the exchange of opinions, to raise public alarm or to take advantage of the dissemination of fake news; provide measures ensuring that audiovisual media service providers provide adequate information on the content that may harm the physical, mental, or moral development of minors,

associating to them a sound alert when they are delivered on mobile devices; safeguard the protection of minors from non-appropriate content, including advertising, delivered during programs targeting children, related to food or beverages, including alcoholic beverages, which contain nutrients and substances with a nutritional or physiological effect, of which excessive intakes in the overall diet are not recommended; and provide adequate measures for promoting self-regulatory and co-regulatory mechanisms aimed to reduce the risks for minors deriving from audiovisual commercial communications; encourage digital literacy by audiovisual media service providers and video-sharing content providers; update the tasks of the Italian Communication Authority, further strengthening its independence; update the provisions on the administrative sanctions provided by the AVMS Code in light of the new obligations set by Directive (EU) 2018/1808, in accordance with the principles of reasonableness, proportionality and effectiveness.

Legge 22 aprile 2021, n. 53 - Delega al Governo per il recepimento delle direttive europee e l'attuazione di altri atti dell'Unione europea - Legge di delegazione europea 2019-2020

http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021-04-22;53!vig=2021-05-08

2019-2020 European Delegation Law (Law no. 53/2021) of 22 April 2021

[IT] New regulation governing works of Italian original expression

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On 29 January 2021, the Ministry of Culture and the Ministry of Economic Development issued a new regulation providing the definition of audiovisual works of Italian original expression, produced anywhere, in accordance with Article 44-sexies of the AVMS Code (Legislative Decree No. 177 of 31 July 2005). The regulation entered into force on 23 April 2021, although applications for obtaining the recognition as works of Italian original expression will be accepted only from 7 June 2021.

According to Article 2 of the regulation, audiovisual works of Italian original expression include the following works:

European works whose direct sound recording is entirely or at least for 50% of the overall duration in Italian or Italian dialects; in case of works set, although partially, in Italian regions where language minorities exist or where some of the characters come from those regions, the relevant languages are equalized to the Italian language, provided that the use of that language is strictly necessary for the relevant storytelling; cinematographic, television or web works consisting of original fiction or animated films and documentaries having Italian nationality pursuant to Italian law; cinematographic, television or web works consisting of original fiction or animated films and documentaries, where the contribution of the Italian company is of a merely financial nature, which have obtained the status of co-production and meet one of the following requirements: are produced on the basis of an agreement between an Italian company and a non-Italian company that provides the subsequent production of another work as international co-production or international production, in which the contribution of the Italian company is higher than that of the non-Italian one, and which has technical, artistic and economic characteristics comparable to the former work; have content of Italian original expression, with respect to elements such as culture, history, national identity, creativity and locations, corresponding to a minimum score to be calculated according to the scoring tables attached to the regulation; European works, other than cinematographic, television or web works consisting of original fiction or animated films and documentaries, which have content of Italian original expression, with respect to elements such as culture, history, national identity, creativity and locations, corresponding to a minimum score to be calculated according to the scoring tables attached to the regulation.
In addition to the above, Article 3 of the regulation also establishes the procedure for the acquisition of the status as work of Italian original expression. Article 4 provides that the General Directorate Cinema and Audiovisual will be in charge of keeping the records of the works of Italian original expression, that will be published on the institutional website.

Decreto interministeriale 29 gennaio 2021 n. 47 recante "Regolamento in materia di definizione delle opere audiovisive, ovunque prodotte, di espressione originale italiana di cui all'articolo 44-sexies del TUSMAR".

https://confindustriaradiotv.it/wp-content/uploads/2021/04/regolamento-opere-espressione-originale-italiana-di-cui-all-articolo-44-sexies-del-tusmar_29-gennaio-2021_compressed.pdf

Ministry of Culture and Ministry of Economic Development, regulation providing the definition of audiovisual works of Italian original expression, anywhere produced, in accordance with Article 44-sexies of the AVMS Code, 29 January 2021

NETHERLANDS

[NL] Dutch Press Council introduces criteria for anonymization requests

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On 1 May 2021, the *Raad voor de Journalistiek* (Dutch Press Council) incorporated in its *Leidraad* (Guidelines) new criteria for assessing complaints from individuals who have unsuccessfully requested media to erase or anonymise their personal data in online publications. The Dutch Press Council also dealt with such requests prior to the introduction of these criteria in the Guidelines, pursuant to the general right to be forgotten (see, for example, IRIS 2018-6/7 and IRIS 2019-10/4), stressing the need for the creation of specific criteria.

The Dutch Press Council is an organisation maintaining a system of voluntary self-regulation of the press in the Netherlands. It considers complaints about media. In addressing complaints, the Dutch Press Council applies its Guidelines, which also allow journalists and the public to readily become familiar with the general views that guide the Dutch Press Council in evaluating complaints.

The Dutch Press Council notes that there is an urgent need to protect personal data. More and more people voice concern about their (digital) reputation and request media outlets to remove online publications. It further notes how the privacy rights of individuals can conflict with the right of information of the public. It states that the public interest of complete and reliable news archives in those instances should only be set aside in exceptional cases.

The Guidelines contain, in brief, the following 11 criteria for this assessment: the degree to which the individual has a direct interest; how easily the individual can be identified based on the publication; the implications of the publication for the individual; whether the individual is a minor; whether the individual cooperated with the publication and whether the individual knew or was aware of the consequences of the publication and their cooperation; the public interest in keeping the information available; the relevance of the personal information for the publication; the factual accuracy of the publication; whether the information is publicly available elsewhere and to what extent the individual contributed to the public availability; whether the publication deals with an opinion or a statement of facts; and prior opinions of the Dutch Press Council about the publication.

Finally, when confronted with a request to remove personal information, a journalist can also apply these criteria to quickly assess the validity of that request, i.e. whether the request for removal should be granted.

Dutch Press Council, Council establishes criteria for requests for anonymisation, 30 April 2021

Dutch Press Council, Guidelines

[NL] Facebook joins Dutch Advertising Code Foundation

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On 29 April 2021, the *Stichting Reclame Code* (Dutch Advertising Code Foundation) announced that Facebook had joined, and officially endorsed the principles and objectives of the Advertising Code Foundation. The Foundation is the self-regulatory body for advertising in the Netherlands (see IRIS 2018-2/27 and IRIS 2013-7/21). Importantly, the Foundation maintains the *Nederlandse Reclame Code* (Dutch Advertising Code), and consumers, commercial companies and other organisations that have a complaint about an advertisement can submit it to the independent *Reclame Code Commissie* (Advertising Code Committee) for a decision. Importantly, the *Mediawet* (Media Act), which was recently amended pursuant to the revised EU Audiovisual Media Service Directive 2018 (see IRIS 2021-1/24), now provides under Article 3.4a, that providers of video platforms which market, sell or organise audiovisual commercial communication must be affiliated with the Dutch Advertising Code, and subject to the supervision of the Advertising Code Foundation.

The Dutch Advertising Code has a variety of rules on advertising, such as misleading advertising, aggressive advertising, and that advertising must be recognisable. Further, there are specific rules on alcohol, health products, cosmetic products, and advertising directed at children. Notably, in 2019, the Advertising Code Foundation adopted the Advertising Code on Social Media & Influencer Marketing, which contains specific rules for advertising on social media and so-called influencer marketing, which is prevalent on social media platforms such as Instagram (which is owned by Facebook).

In terms of procedure, when a complaint is submitted on a possible violation of the advertising Code, the (Chair of the) Advertising Code Committee determines whether the advertisement in question complies with the rules in the Dutch Advertising Code. When a violation of the Code has been established, the Compliance department will monitor whether the advertiser concerned complies with the decision of the (Chair of the) Advertising Code Committee. A decision of the Committee may be appealed to the Board of Appeal.

Finally, in relation to the Facebook agreement, the Director of the Advertising Code Foundation stated that “with this support for self-regulation, Facebook has opted to actively engage with the advertising industry to discuss consumer protection and promote the open and transparent enforcement of our advertising codes. An important step forward and we are very happy with that”.

Dutch Advertising Code Foundation, Facebook joins the Advertising Code Foundation, 29 April 2021

POLAND

[PL] Appeal court decides on obligation for ZDF and UFA Fiction to issue public apology

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Following an appeal by Zweites Deutsches Fernsehen (ZDF) and UFA Fiction GmbH, the Kraków appeal court has amended a first-instance decision requiring them to issue a public apology for breaching the personality rights of members of the Polish Home Army (AK) and to pay compensation in relation to the broadcast and production of the film series *Unsere Mütter, unsere Väter* (Our mothers, our fathers). While the compensation order was quashed, the obligation to issue a public apology on Polish television and the German channels ZDF, ZDFneo and 3sat was upheld. The written grounds for the decision have not yet been published. However, in a press release of 24 March 2021 (case No. I ACa 808/19), the appeal court reacted to criticism of the decision within Poland by stressing the importance of free speech and highlighting the essential lines of argument contained in the oral reasons for the decision.

The legal dispute followed actions brought by a Polish war veteran and the World Union of Soldiers of the National Army against ZDF and the production company UFA Fiction GmbH. The plaintiff had himself served in the Polish Home Army (AK), an armed underground movement that resisted the German occupation of Poland during the Second World War. He claimed that the portrayal of the AK in the three-part mini-series *Unsere Mütter, unsere Väter*, which was first broadcast in Germany in 2013, had violated his personality rights by containing scenes that, in his view, suggested that the AK was partly responsible for crimes against the Jewish people.

The Kraków appeal court fully rejected the war veteran’s complaint on the grounds that an individual could not make a claim for protection of the rights of a national community. The court also held that it was not entitled to make a judgement about historical and scientific truths that, by their very nature, should be the subject of free public debate. The plaintiffs therefore had no claim to protection on the grounds that the nation’s reputation should be protected if that protection extended beyond that which resulted from their individual position and legal situation.

The court examined whether the depiction of the Polish AK in the mini-series was covered by the artistic and narrative freedom of the film producers and explained the need to weigh the plaintiff’s personality rights against the producers’ artistic freedom. Regarding the storyline of the series *Unsere Mütter, unsere Väter*, the court concluded that the creators had not, as a rule, overstepped the boundaries of creative freedom. Elements of the plot suggesting anti-Semitic attitudes among

Polish people were justified by the need to depict the fate of one of the film's main characters (a German Jew in hiding in Poland). Historical knowledge suggested that the authors were entitled to deal with these themes in this way. Under these circumstances, the film-makers' freedom of expression therefore took precedence over the war veteran's individual rights, especially since the latter could not be directly identified as one of the characters in the film.

As a result, the court ruled that the boundaries of creative freedom had not been crossed because, in accordance with historical knowledge, the producers had been entitled to write the scenes to fit the logic of the film and portray the fate of its main characters in this way. The Poles' anti-Semitic tendencies in the film were therefore covered by artistic freedom. The court also referred to the fact that the plaintiff's general personality rights had only been breached in a minor way because he could not be directly identified in any of the scenes.

The action brought by the World Union of Soldiers of the National Army, on the other hand, was partially upheld. The court specifically referred to the film's depiction of a group of soldiers wearing white and red armbands and the abbreviation 'AK'. These soldiers had therefore been identified as members of a certain military organisation. The court held that this had been unreasonable on the film-makers' part because it was unnecessary for the storyline. It ruled that, in order to portray the heroes' fate, it would have been sufficient to show scenes including Polish soldiers without associating them with a particular military organisation. To have done so was especially reprehensible given that there was no historical evidence that the AK was an anti-Semitic organisation.

ZDF and UFA Fiction GmbH will decide whether to appeal against this ruling when the written grounds are issued. In particular, they do not think their artistic freedom was sufficiently taken into account.

Sąd Apelacyjny w Krakowie, Komunikat w sprawie I ACa 808/19 dot. filmu „Nasze matki, nasi ojcowie", 24/03/2021

https://krakow.sa.gov.pl/komunikat-w-sprawie-i-aca-80819-dot-filmu-nasze-matki-nasi-ojcowie,new,mg,1,279.html,637

Press release of the Kraków appeal court, 24 March 2021

ROMANIA

[RO] Draft modification of the PSB Law

Eugen Cojocariu
Radio Romania International

Romanian MPs from the center-right ruling coalition have initiated a legislative proposal for the modification of Law No. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Company and the Romanian Television Company, with subsequent amendments and completions (see inter alia IRIS 2014-7/30,IRIS 2015-6/33, IRIS 2015-8/26, IRIS 2016-5/28, IRIS 2017-3/26, IRIS 2017-8/31, IRIS 2017-10/31, IRIS 2018-1/35, IRIS 2018-2/30, IRIS 2018-6/29, IRIS 2018-7/27).

The main modification consists of splitting the function of President of the Board of Administration and Director General (CEO) into two separate functions, President of the Board and, separately, Director General (CEO), in order to better define the roles and competencies and to have different persons for the strategic and, respectively, the executive top management. The Director General would be appointed by the Parliament from the 13 members of the Board of Administration, for each public broadcaster, radio and television. The two broadcasters have been repeatedly accused of political bias and the draft law intends to better define the roles and competences of top managers.

Another provision is that the members of the Board of Administration of the Romanian public radio and TV are not allowed to be employees of those companies (they and their relatives, up to and including the second degree) and they are not allowed to be on the Boards of commercial companies, nor to work in commercial companies which have business relations or opposite interests with Radio Romania and the Romanian Television.

The two Presidents of the Boards of Administration and the two Director Generals will receive a salary equal to the salary of a Minister, the rest of the members of the Boards of Adminstration 40% of the brut salary of the above mentioned top managers. In the present form of the law, the President and Director General receives a salary equivalent to the salary of a Minister, and the members of the Boards receive 25% of this brut amount.

A new Article 27^1 was introduced in the draft document, which provisions for the competencies of the President of the Board of Administration: leads the meetings of the Board of Administration; coordinates the control and supervision activities of the Council and submits regular reports to it; periodically presents economic situations submitted by the Director General; based on the express mandate of the Council, it represents Radio Romania or the Romanian Television in their relations with international bodies; presents in the specialized parliamentary commissions of the Romanian Parliament, in the presence of the members of the

Council, the annual activity report; ensures the proper functioning of the own working apparatus of the Board of Administration; ensures the transparency of the decisions and the activity of the Board of Administration.

Propunere legislativă pentru modificarea Legii nr.41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune, cu modificările şi completările ulterioare – forma iniţiatorului

http://www.cdep.ro/proiecte/2021/100/70/3/pl225.pdf

Legislative proposal for the modification of Law no. 41/1994 on the organization and functioning of the Romanian Radio Broadcasting Company and the Romanian Television Company, with subsequent amendments and completions - form of initiator

Expunerea de motive a iniţiatorilor

http://www.cdep.ro/proiecte/2021/100/70/3/em225.pdf

Explanatory memorandum

RUSSIAN FEDERATION

[RU] New fines for media and "false journalists"

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On 30 April 2021, President Vladimir Putin signed into law amendments to the Code on Administrative Offences. Under the new paragraph 2.4 of Article 13.15 of the Code, dissemination in the mass media and in online messages and materials of the mass media of messages and/or materials of foreign mass media performing the functions of a foreign agent and/or a Russian legal entity included in the Register of foreign mass media, performing the functions of a foreign agent, without indicating that these messages and/or materials were created and/or disseminated by foreign mass media performing the functions of a foreign agent and/or a Russian legal entity included in the Register of foreign mass media, performing the functions of a foreign agent, - shall be a punishable offence, in the case of media entities with a monetary fine of up to RUB 50 000 (around EUR 550). Individual journalists can face fines of up to RUB 2 500 (around EUR 28) and officials up to RUB 5 000 (around EUR 56) for the same violations.

The same amendments also make an administrative offence of the use of the “PRESS” sign by a person who has no such right. A new paragraph 6.2 of Article 20.2 of the Code introduces relevant fines of up to RUB 30,000 (around EUR 335).

О внесении изменений в Кодекс Российской Федерации об административных правонарушениях

http://www.consultant.ru/document/cons_doc_LAW_383342/#dst100010

Federal Statute “On amendments to the Code of the Russian Federation on Administrative Offences” of 30.04.2021 N 102-FZ

UNITED STATES OF AMERICA

[US] Google v Oracle - when is it "fair use" to copy content?

Kelsey Farish
Dac Beachcroft

On 5 April 2021, the United States Supreme Court handed down its decision in *Google LLC v. Oracle America, Inc*. 593 U.S. ___ (2021), thereby concluding over ten years of protracted and intensely followed litigation. Google ultimately won what has been called the "copyright case of the century", with a 6-2 majority (the Court's newest justice, Amy Coney Barrett, did not participate). Much has been written about the case, which focused on the copyrightability of approximately 11,500 lines of software source code, first published by Oracle. This code was used by Google as the basis for its popular mobile phone operating system, Android.

On its face, *Google v Oracle* may not seem like a case that film studios, production companies, and copyright holders in creative content would be concerned about. However, this case was the first time in nearly 30 years that the United States' highest court considered the doctrine of "fair use", an exception under U.S. copyright law which frees a would-be infringer from copyright liability. In *Google v Oracle*, the Court's key consideration was whether Google's copying of Oracle's code constituted a permissible "fair use" of that material.

Accordingly, and as one of the relatively rare copyright matters to come before the Supreme Court, this case serves as a helpful insight as to how fair use defences can succeed. This will be of importance to creators and proprietors of audiovisual intellectual property, who are increasingly confronted with derivatives of their copyrighted material. Under 17 USC § 107, to determine if a new work makes fair use of the original, a court will consider multiple factors, including:

> (1) the **purpose** and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (2) the **nature** of the copyrighted work;
>
> (3) the **amount and substantiality** of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the **effect of the use** upon the potential market for or value of the copyrighted work.

When analysing the "purpose and character of the use" as set out in the first element, the court will consider the extent to which the new work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." In other words, the first element

considers to what extent the new work is “transformative”. Case law makes clear that although transformative use is not always absolutely necessary for a fair use finding, transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright law.”

Interestingly for our purposes, all but one industry member of the Motion Picture Association of America (MPAA) filed legal arguments in support of Oracle in 2020. Universal Pictures, Paramount Pictures, Walt Disney Studios, Warner Bros. and Sony Pictures urged the Court to resist Google’s arguments that its use of Oracle’s code was transformative. Netflix did not join the MPAA’s brief, which stated:

“Unlike purely expressive works, software, by definition, has a functional component that makes it inherently different. Applying the concept of transformation to partially non-expressive works like software is like trying to put the proverbial square peg into a round hole. Transformation, with its focus on new expression, meaning, or message, assumes an effect on human thought or emotion; in contrast, software, in significant part, operates independently of such human thought and emotion.”

In the end, however, the Court’s majority disagreed. The opinion stated that “Google’s copying of the Java SE API, which included only those lines of code that were needed to allow programmers to put their accrued talents to work in a new and transformative program, was a fair use of that material as a matter of law” (emphasis added).

Two justices however dissented from this opinion. Worth noting in particular is Justice Thomas’s dissent, which argued that the majority’s interpretation “eviscerates copyright”. He went on to explain: “A movie studio that converts a book into a film without permission not only creates a new product (the film) but enables others to ‘create products’— film reviews, merchandise, YouTube highlight reels, late night television interviews, and the like. Nearly every computer program, once copied, can be used to create new products. Surely the majority would not say that an author can pirate the next version of Microsoft Word simply because they can use it to create new manuscripts.”

When copyright holders look at material which makes use of their content, they may consider, “to what extent do these derivative works constitute copyright violations?” Clearly, the principles and arguments set out in *Oracle v Google* are likely to be applied (or at least, referenced) in copyright lawsuits for years to come.

Google LLC v. Oracle America, Inc. 593 U.S. ___ (2021)

https://www.supremecourt.gov/opinions/20pdf/18-956_d18f.pdf

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