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EDITORIAL

The work of the European Audiovisual Observatory resembles the cultivation of a field: it takes time and effort, but then comes the rewarding harvest. In the present case, we have recently reaped the fruits of months of incessant toil in the following form:

- a Mapping report on the rules applicable to video-sharing platforms with regard to illegal and harmful content, which covers the different approaches of the EU27 countries plus the UK and Norway.

- an in-depth publication titled Unravelling the Digital Services Act Package which aims at complementing and expanding the discussions in our series of webinars dealing with topics directly affected by this new proposed legislation and its interplay with existing regulation (content moderation, copyright protection, gatekeeping VOD services, fight against disinformation).

- a new version of our AVMSDatabase, which allows interactive searches across the national transpositions of the revised Audiovisual Media Services Directive in the EU member states. A first set of nine countries is available today (AT, BG, FI, HU, LT, LV, MT, PT and SE), the national rules of the remaining EU member states will be gradually fed into the AVMSDatabase as soon as they are available.

- Our AVMSD Tracker shows the progress in the transposition process for all the EU27 countries and is integrated with complete correspondence tables and easy reading info-sheets with the highlights for the first set of nine countries.

Needless to say, we are not the only ones labouring in the audiovisual field: by way of example, the European Parliament has adopted a resolution on the European Media and Audiovisual Plan, Spain has transposed two Copyright directives, France has created a new regulatory authority, Italy's AGCOM has taken action concerning the webcasting of the Serie A Championship, and the UK's Ofcom has published its research on offensive language on TV and radio.

We are rounding off this year but already preparing for new challenges in 2022 by expanding our team: maybe you know a young professional interested in media law who would like to join the Department for Legal Information at the Observatory? Or maybe you are the one? Take a look at our vacancy! The deadline for applications is 30 November

You can read about these and many other interesting developments in our electronic pages. As usual the Newsletter will take a break until the end of the year, so I take the opportunity to wish you all a very good Festive Season ahead!

Stay safe and enjoy your read!

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Maja Cappello, editor European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

RUSSIAN FEDERATION

European Court of Human Rights: V*olodina v. Russia (No. 2)*

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

In a case about domestic violence in Russia, the European Court of Human Rights (ECtHR) emphasised the State's obligation to protect people from acts of cyberviolence — including the publication of intimate photographs without consent, stalking and impersonation — and to carry out an effective investigation into these acts. The case concerns Ms. Valeriya Volodina's allegation that the Russian authorities had failed to protect her against repeated cyberviolence by her partner who had created fake profiles in her name, published intimate photos of her, tracked her movements and sent her death threats via social media. The ECtHR found, in particular, that despite having the legal tools available to prosecute Ms. Volodina's partner, the authorities had not carried out an effective investigation and had not considered at any point in time what could and should have been done to protect her from recurrent online harassment. The authorities had therefore failed to comply with their obligations under Article 8 of the European Convention on Human Rights (ECHR) by insufficiently protecting Ms. Volodina from severe abuse (see also ECtHR 9 July 2019, *Volodina v. Russia*, App. no. 41261/17, finding violations of Article 3 and 14 ECHR).

In response to the Government's argument of non-exhaustion of domestic remedies, the ECtHR found that Ms. Volodina had made use of a remedy available to her under domestic law which was apparently effective and offered reasonable prospects of success, as complaining to the police about these matters could be an effective remedy. As to the Government's argument that Ms. Volodina should have also instituted civil proceedings, the ECtHR was of the opinion that, even assuming that a civil-law remedy could have been an effective one, an applicant who had pursued an apparently effective remedy could not be required to have also tried others that were available but probably no more likely to be successful.

On the merits of the case, the ECtHR clarified that the concept of private life included a person's physical and psychological integrity which States had a duty to protect, even if the danger came from private individuals. The particular vulnerability of victims of domestic violence and the need for active State involvement in their protection had been emphasised both in international instruments and in the Court's well-established case-law. The acts of cyberviolence, cyberharassment and malicious impersonation had been categorised as forms of violence against women and children capable of

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undermining their physical and psychological integrity in view of their vulnerability. The ECtHR refers to its earlier judgment in the case of *Buturugă v. Romania* (ECtHR 11 February 2020) in which it had pointed out that "cyberharassment is currently recognised as an aspect of violence against women and girls and can take a variety of forms, such as cyber-violations of private life ... and the taking, sharing and handling of information and images, including intimate ones". According to the ECtHR, online violence, or cyberviolence, was closely linked with offline, or "real-life", violence and fell to be considered as another facet of the complex phenomenon of domestic violence. The ECtHR also observed that intimate partners were frequently the likely perpetrators of acts of cyber-stalking or surveillance. States have a positive obligation to establish and apply effectively a system punishing all forms of domestic violence, whether occurring offline or online, and to provide sufficient safeguards for the victims.

It was not in dispute that the non-consensual publication of Ms. Volodina's intimate photographs, the creation of fake social-media profiles impersonating her, and her tracking with the use of a GPS device, interfered with her enjoyment of her private life, amounting to humiliation and disrespect, and causing her to feel anxiety, distress and insecurity, while also undermining her dignity.

First, the ECtHR found that the existing Russian legal framework was deficient in several important respects and failed to meet the requirements inherent in the State's positive obligation to establish and apply effectively a system punishing all forms of domestic violence.

Second, the ECtHR considered that the acts of cyberviolence in the instant case had been sufficiently serious to require a criminal-law response on the part of the domestic authorities and reiterated that both the public interest and the interests of the protection of vulnerable victims from offences infringing on their physical or psychological integrity required the availability of a remedy enabling the perpetrator to be identified and brought to justice. Civil proceedings which might have been an appropriate remedy in situations of lesser gravity would not have been able to achieve these objectives in the present case. As to the possibility of issuing orders prohibiting certain conduct or forms of cyberviolence, the ECtHR was unable to find that they offered sufficient protection to victims of domestic violence in Ms. Volodina's situation. It found that the response of the Russian authorities to the known risk of recurrent violence on the part of Ms. Volodina's former partner had been manifestly inadequate and that, through their inaction and failure to take measures of deterrence, they had allowed him to continue threatening, harassing and assaulting Ms. Volodina without hindrance and with impunity.

Third, the ECtHR reiterated that, to be effective, an investigation had to be prompt and thorough. The authorities had to take all reasonable steps to secure evidence concerning the incident, and special diligence was required in dealing with domestic violence cases. According to the ECtHR, the investigation which had been conducted from 2018 onwards could not be said to have been expeditious or sufficiently thorough. It had taken the authorities nearly a year to

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obtain information about the Internet addresses of the fake accounts from the Russian company operating the social media platform *VKontakte* and the authorities had not sent any requests to Instagram to identify the owner of the fake accounts. The questioning of Ms. Volodina and the inspection of the fake pages on Instagram had taken place in May 2020, two years since she had made her complaint in 2018. As a consequence of the slow-paced investigation into the fake social media profiles, the prosecution eventually became time-barred. The criminal case against Ms. Volodina's former partner was discontinued, even though his involvement in the creation of the fake profiles appeared to have been established. By failing to conduct the proceedings with the requisite diligence, the Russian authorities bore responsibility for their failure to ensure that the perpetrator of acts of cyberviolence be brought to justice. The impunity which ensued was enough to shed doubt on the ability of the State machinery to produce a sufficiently effective deterrent to protect women from cyberviolence.

The ECtHR came to the conclusion that even though the existing framework equipped the Russian authorities with legal tools to prosecute the acts of cyberviolence of which Ms. Volodina had been a victim, the manner in which they had actually handled the matter – notably a reluctance to open a criminal case and the slow pace of the investigation resulting in the perpetrator's impunity – disclosed a failure to discharge their positive obligations to protect Ms. Volodina's private life. Therefore, the ECtHR found, unanimously, a violation of Article 8 ECHR.

Judgment by the European Court of Human Rights, Third Section, in the case of Volodina v. Russa (No. 2), Application no 40419/19,14 September 2021

https://hudoc.echr.coe.int/eng?i=001-211794

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EUROPEAN UNION

Commission sends reasoned opinion to nine EU member states over lack of implementation of the revised AVMS Directive 2018

Ronan Ó Fathaigh
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On 23 September 2021, the European Commission announced that it had sent a "reasoned opinion" to nine EU member states (Czechia, Estonia, Ireland, Spain, Croatia, Italy, Cyprus, Slovenia and Slovakia) for failing to provide information about the implementation of the revised Audiovisual Media Services Directive 2018 (AVMS Directive) (see IRIS 2019-1/3) into their national law. Notably, the revised AVMS Directive had been enacted in November 2018, and under Article 2, EU member states were required to incorporate the Directive into national law by 21 September 2020, and to notify the Commission of the text of the main provisions of national law which were adopted.

Under the EU treaties, the Commission may take legal action – an infringement procedure – against an EU member state that fails to implement EU law. This legal action involves a number of stages, including: first, sending a letter of formal notice requesting further information to the member state concerned, who must send a detailed reply; second, sending a reasoned opinion: a formal request to comply with EU law; and third, the Commission deciding to refer the matter to the EU Court of Justice.

In November 2020, the European Commission announced that it had launched infringement procedures against 23 EU member states for failing to transpose the AVMS Directive (see IRIS 2021-1/25). However, numerous EU member states have enacted national legislation implementing the AVMS Directive. The revised AVMS Directive contains a range of new rules, including more flexibility in television advertising; a strengthened country-of-origin principle; increased obligations to promote European works for on-demand services (such as Netflix), including at least a 30% share of European content in their catalogues and the requirement to ensure the prominence of this content; certain audiovisual rules being extended to what are termed video-sharing platforms (such as YouTube); extending the obligation to protect minors to video-sharing platforms, which must put in place appropriate protective measures; reinforced protection on television and video-on-demand against incitement to violence or hatred and public provocation to commit terrorist offences; and video-sharing platforms also being required to take appropriate measures to protect people from incitement to violence or hatred and content constituting criminal offences.

Finally, the Commission noted that the nine EU member states that had received the reasoned opinion had two months to reply to the Commission, "or the

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Commission may decide to refer their cases to the Court of Justice of the European Union".

European Commission, "Commission calls on Member States to fully transpose EU rules on audiovisual content", 23 September 2021

https://digital-strategy.ec.europa.eu/en/news/audiovisual-media-commission-calls-member-states-fully-transpose-eu-rules-audiovisual-content

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European Parliament: Resolution on European Media and Audiovisual Plan

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European Audiovisual Observatory

On 20 October 2021, the European Parliament adopted a resolution on Europe's Media in the Digital Decade: an Action Plan to Support Recovery and Transformation. The Action Plan (see IRIS 2021-2/3) focuses on three areas of activity and 10 concrete actions, with the overall aim of helping the media sector recover from the crisis. This will be achieved by facilitating and broadening access to financial support, transforming by stimulating investments to embrace the twin digital and green transitions, while ensuring the sector's future resilience, and empowering European citizens and companies.

In its Resolution, the European Parliament pushes for substantial support for the media sector from the EU and member states in order to help the sector recover from the pandemic and transform itself to keep pace with the changing business models of the digital age. It also calls for legislative and non-legislative tools to protect media organisations. Moreover, Parliament wants a permanent EU news media fund in order to safeguard the financial and political independence of European journalists and journalism, and stresses that EU recovery funds earmarked for the media must support media organisations in those EU countries where media face particular financial and political pressure or rule-of-law concerns. MEPs also point to the dangers of the "disproportionate economic impact" and "predatory behaviour" of global online platforms that dominate data and advertising markets and which have the power to remove legal content provided by media services. Additionally, they demand the urgent adoption of the Digital Services Act package, which can provide a level playing field for the EU media and ensure equal access to data and rules on online political advertising.

In order to support the EU's audiovisual industry, MEPs demand the EU to develop special tax policies as well as fiscal and financial incentives to boost production and investments, the setting up of EU insurance guarantees for audiovisual co-productions and rules to ensure catalogues of on-demand services contain a share of European works of at least 30%.

European Parliament resolution of 20 October 2021 on Europe's Media in the Digital Decade: an Action Plan to Support Recovery and Transformation

https://www.europarl.europa.eu/doceo/document/TA-9-2021-0428_EN.html

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NATIONAL

CYPRUS

[CY] A legal proposal for abolishing media ownership restrictions

Christophoros Christophorou
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A proposal for amending Article 19 of the Law on Radio and Television Organisations N.7(I)1998, regulating ownership, has been made by a deputy of the *Δημοκρατικό Κόμμα* (Democratic Party – DIKO]. The proposal would bring drastic changes to the system of restrictions on ownership, and the Parliamentary Committee on Internal Affairs of the House of Representatives is expected to discuss it soon.

Legal restrictions currently in force provide for a system of "share-holding ceilings" for legal or natural persons in combination with other factors, such as the management composition of a company, the presence of those legal or natural persons in the management of a company, or in more than one company, and their share-holding in them. It also sets restrictions for cross-media ownership based on the above factors. Limitations also exist regarding the shareholdings of natural or legal persons from third-countries. A familial relationship of up to second degree is also a limiting factor

The proposal removes the 25% shareholding ceiling for a natural or legal person in a licenced company. It would also remove the restriction, based on a combination of the make-up of the shareholders and the composition of the board of directors, on the participation of one company in another. Various ceilings, such as the maximum total share-holding (74%) a company can hold in another company is also removed

The ceiling of 25% of shares that natural or legal persons from third-countries can hold, in total, in the share-holding structure of a company would be changed by the proposal to a maximum of 50%. The threshold of 5% that one third-country person can hold in a company would be abolished, as would be the requirement that the Council of Ministers must decidewhether a person from a third-country can acquire shares.The proposal also removes the requirement that when calculating the various percentage ceilings for shares held between members that are relatives (up to second degree).

Finally, new restrictions are proposed, which would exclude natural persons from participating in a media company if their criminal record is not clear or if they have been convicted for debts to the State or for disseminating fake news. Natural or legal persons that have been convicted for plagiarism or theft of

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intellectual property would also be prohibited from obtaining a licence.

Some of the expected effects of the proposal are as follows :

Abolishing the ceiling of share-holding in a company (or in a company that is a shareholder of another company) may result in one natural person fully controlling a licenced company.

Similarly, not taking into account the composition of the management board of a company as a factor for restricting ownership may result in a situation where a person controls more than one, or a high number, of AVMS companies.

In addition, the removal of the parental factor in the calculation of the total percentage of shares held could leave the door open for a family to own more than one media company leading to a monopoly by a family.

With regard to share-holding by a natural or legal person from a third-country, the ownership ceiling of 50% would make it possible for equal sharing between Cypriots/citizens of other EU countries and third-countries citizens. A question remains open as to what would happen in the case both parties insisted on eventual divergent options.

Finally, generic prohibitions on fake news, plagiarism and other torts might result in disproportionate measures being taken.

Επίσημη Εφημερίδα, 8 Οκτωβρίου 2021, Παράρτημα Έκτο, Νομοσχέδια και Προτάσεις Νόμου, σσ. 1822-5

https://www.mof.gov.cy/mof/gpo/gpo.nsf/All/0B08464B411457F9C2258768001DEBB8/$file/4281%208%2010%202021%20PARARTIMA%20EKTO.pdf

Official Gazette, 8 October 2021, Appendix SIX, Draft laws and Law Proposals, pp. 1822-5

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GERMANY

[DE] Several public service broadcasters introduce three-step test for telemedia services under Article 32(5) MStV

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Alongside their traditional offer of radio and television channels, German public service broadcasters are increasingly providing telemedia offers in accordance with Article 27 of the *Medienstaatsvertrag* (state media treaty – MStV). According to Article 30(2) MStV, such offers particularly include “broadcasting of their programmes on demand before and after their scheduled broadcasting”, sometimes with time limitations, e.g. for sports events, “as well as independent audiovisual content”, and “historical/cultural archives with informative, formative and cultural telemedia”. They should be provided “through electronic portals with access unobstructed to the greatest possible extent” (Article 30(4) MStV) and, in order that they do not compete directly with press publishers, they may not be of a press-type nature (Article 30(7) MStV). Services provided over the Internet in particular fall within the telemedia category.

In accordance with Article 32(3) to (7) MStV, the compatibility of a new telemedia offer, orof significant changes made to an existing telemedia offer with legislative provisions, must be verified before they can be approved. The definition of a new telemedia offer, or of a significant change to an existing telemedia offer, is determined by the state broadcasting authorities in accordance with standard criteria in their statutes or guidelines. When the overall content-related orientation of an existing telemedia offer or the intended target audience changes, a significant change is considered to exist.

The verification process is carried out by the respective broadcasting council or television council of the state broadcasting authorities in accordance with a three-step procedure described in Article 32(4) MStV.

The first step is to verify the extent to which the new telemedia offer, or the significant change, complies with the democratic, social, and cultural needs of society, and whether the offer falls within the public service remit and is therefore, in principle, allowed. The second step involves checking the extent to which the telemedia offer concerned contributes to media competition from a qualitative point of view. This quality check is a central part of the procedure. The extent to which the offer fits in with and affects other existing freely accessible telemedia offers of public service broadcasters, in all relevant markets, is analysed. The opinion-forming function of the offer is especially relevant in this verification process. Finally, in the third step, the proportionality of the financial means required for the offer is examined. This is determined with reference to the public benefit of the telemedia service, i.e. the journalistic value that it adds.

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In order to ensure that a balanced outcome is reached, Article 32(5) MStV states that members of the public should be given the opportunity to comment, especially via the Internet, within a minimum period of six weeks. Such public consultation processes were opened in September by the SWR Broadcasting Council regarding changes to SWR telemedia, ARD.de and planet-schule.de, and by the NDR Broadcasting Council for NDR Online. The changes, which concern a total of 17 ARD telemedia concepts, relate to online audiovisual content separate from broadcasting ("online only"/"online first"), the role and the importance of third-party platforms such as YouTube, and the retention period concept.

After the deadline for the submission of public comments has passed, the relevant broadcasting council must analyse the comments received. The opinions of independent experts, whose names must be published, may also be commissioned. The NDR plans to seek such opinions on the effects of fundamental changes to its offers on all relevant markets.

Under Article 32(6) MStV, the competent broadcasting council or television council must decide whether the legislative provisions are met with a majority of two thirds of the members present, which must at the same time represent at least the majority of all its members. The reasons for the decision must be given, taking into account the comments and any expert opinions received, and the result should be published along with any such opinions. The approval process is not complete until the result of the assessment has been submitted to and confirmed by the authority responsible for legal supervision, in the aforementioned cases the state chancelleries of the *Länder*. The description of the new or significantly changed offer must then be published on the website of the relevant state broadcasting authority. It must also be mentioned in the official gazettes of the *Länder* concerned. This procedure should ensure conformity with EU law. New or significantly changed telemedia offers may not be provided until the procedure is complete and the required information has been published.

Pressemitteilung des SWR

https://www.swr.de/unternehmen/organisation/gremien/rundfunkrat/pressemitteilung-dreistufentest-100.html

SWR press release

Pressemitteilung des NDR

https://www.presseportal.de/pm/6561/5029500

NDR press release

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[DE] Cable operator's compensation claim for anti-competitive non-payment of fees upheld

Christina Etteldorf
Institute of European Media Law

In a ruling of 6 July 2021 (case no. KZR 11/18), the *Kartellsenat* (Cartel Division) of the *Bundesgerichtshof* (Federal Supreme Court – BGH) decided that a public service broadcaster's failure to pay feed-in fees to a cable network operator breached the anti-discrimination rules of the *Gesetz gegen Wettbewerbsbeschränkungen* (Act Against Restraints of Competition – GWB) and therefore created a compensation liability if (and because) payments were made to other cable network operators.

In a previous case, the BGH followed an action brought by a cable network operator to the *Landgericht Hamburg* (Hamburg regional court, case no. 315 O 625/11), demanding compensation totalling EUR 218 294.56 from the operator of Zweites Deutsches Fernsehen (ZDF) for unpaid feed-in fees covering the period between 2008 and 2012. ZDF's main channel, which was the main focus of the decision, is among the channels that must be carried free of charge under the so-called 'must-carry' obligation that German media law imposes on cable network operators that serve more than a certain percentage of connected households and therefore hold a dominant market position. Until the end of 2012, ZDF voluntarily paid a fee to four large cable network operators, which covered most of the cable network in Germany, for carrying its programmes. Since 2013, German public service broadcasters have no longer voluntarily paid feed-in fees to cable network operators. Although the defendant's programmes were carried in the Hamburg region via the plaintiff's network between 2008 and 2012 in accordance with the must-carry rules contained in the *Medienstaatsvertrag Hamburg-Schleswig-Holstein* (Hamburg-Schleswig-Holstein state media treaty) (in the version of the *Rundfunkstaatsvertrag* (state broadcasting treaty) valid at the time), it did not pay any fee for this service. The plaintiff therefore demanded payment of the unpaid fees plus interest, on the grounds that it had suffered a competitive disadvantage compared with the four major cable network operators that had received payments. Both the Hamburg regional court and the *Oberlandesgericht Hamburg* (Hamburg regional appeal court – OLG) (ruling of 29 March 2018, case no. 3 U 132/14) had rejected the plaintiff's request. The BGH, following a further appeal, then examined the case and found in favour of the cable network operator.

The compensation claim is based on Article 20(1)(2) in conjunction with Article 33(1)(3) GWB, on the grounds that, for no objective reason, the plaintiff had been treated unfairly compared with the large cable network operators. According to the BGH, these cable network operators and the plaintiff all operated in the same market, i.e. the market for the distribution of programme signals via broadband cables. The BGH considered that the existence of objective justification should be determined through a comprehensive weighing-up of the competitive situation. On this basis, it concluded that, contrary to the OLG's view, the plaintiff had been

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unlawfully discriminated against. The BGH explained that the non-payment of the feed-in fee had been highly detrimental to the plaintiff because it had not been remunerated for the feed-in service that it had provided. This in turn had a negative impact on its position vis-à-vis its competitors. On the one hand, it should be noted that its universal service remit, in principle, obliged the defendant to make use of the feed-in services of all cable network operators and entitled it to do so without paying a fee under the must-carry obligation. On the other hand, it should be borne in mind that, although the plaintiff held a dominant market position in the distribution area concerned and was therefore obliged to carry the defendant's programmes, it held very little market power compared with ZDF and its direct competitor in the relevant distribution area (Kabel Deutschland). On account of the need to build a broadband cable network, the plaintiff was also seriously hindered from entering the market for the provision of cable television to end customers. On the basis of this weighing-up process, the BGH concluded that the considerable disadvantage caused to the plaintiff by the defendant's failure to pay feed-in fees could not be justified under competition law. In particular, in view of the objectives of the GWB (protection of competition and open market access), such unequal treatment could not be justified by the argument that market-leading providers should, as the public service broadcasters had suggested, be given preferential treatment for a limited period on account of their longstanding (albeit voluntary) payment of feed-in fees.

The BGH concluded that the OLG's legal assumptions had been incorrect, annulled the ruling and referred the case back to the OLG for a new trial and a new decision.

Urteil des BGH (Az. KZR 11/18)

https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=b0b0ab06373750b09ddd962568bc5253&nr=122215&pos=0&anz=1

Federal Supreme Court judgment (case no. KZR 11/18)

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[DE] German court rules that YouTube's deletion of COVID-19 videos was unlawful

Mirjam Kaiser
Institute of European Media Law

In a press release of 12 October 2021, the *Landgericht Köln* (Cologne regional court – LG Köln) announced that it had decided in summary proceedings (case nos. 28 O 351/21 and 28 O 350/21) that YouTube had unfairly deleted two user-generated videos, featuring reports and interviews concerning COVID-19, on the basis of its general terms and conditions.

As part of the "#allesaufdentisch" campaign, which went viral at the end of September this year, various German artists uploaded onto the YouTube video-sharing platform video clips of interviews with comments by so-called scientists and experts concerning measures taken to combat COVID-19 and associated media coverage. The campaign was a continuation of the "#allesdichtmachen" campaign, in which a number of actors, authors and other German film and television personalities had, in late April, satirically discussed the COVID-19 measures taken in Germany. However, both campaigns, which met their initiators' objective to open up a public debate on how the COVID-19 crisis was being handled, were heavily and widely criticised, partly because they promoted conspiracy ideology.

The Cologne regional court's decision in the summary proceedings concerned two videos from the second campaign, which YouTube had deleted on the grounds that their content infringed its guidelines (in particular the guideline on medical misinformation on COVID-19). The YouTube channel operator had then applied to the LG Köln for a preliminary injunction against YouTube and demanded that the videos be reinstated.

The court upheld the applications and ruled that the deletion of the videos, with a penal notice attached, should be prohibited, at least pending a decision in the main proceedings. However, it also warned the applicant about the content of the uploaded videos. Explaining its decision, the court held that, since the applicant had a contractual entitlement to use the services provided by YouTube, they could assert those rights against YouTube. YouTube had deleted the videos unlawfully because it had failed to adequately explain which parts had allegedly infringed its guidelines. Long videos should not be deleted without providing a detailed list of the parts that supposedly contained medical misinformation. The situation for short clips was different, although this was not the case here, since the videos in question were 26 and 28 minutes long. YouTube should therefore have informed the channel operator which parts had breached its guidelines. Deleting the videos without providing this information was unlawful because the videos had also contained permissible statements. YouTube can appeal against both decisions. The regional court will then need to consider whether to confirm or lift the preliminary injunction. If it confirms it, YouTube will be able to appeal to the *Oberlandesgericht Köln* (Cologne regional appeal court). A final decision, on the point of law itself, would only be taken in the main proceedings.

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Pressemitteilung des LG Köln

https://www.lg-koeln.nrw.de/behoerde/040_presse/zt_presse/pressemitteilungen/PM2021-08-YouTube-Video.pdf

Cologne regional court press release

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[DE] October entry into force for NetzDG appeal procedure

Christina Etteldorf
Institute of European Media Law

On 1 October 2021, new rules establishing an appeal procedure for social networks and video-sharing platform services entered into force in Germany. The rules were introduced as part of the latest reform of the *Netzwerkdurchsetzungsgesetz* (Network Enforcement Act – NetzDG) under the *Gesetz zur Änderung des Netzwerkdurchsetzungsgesetzes* (Act to Amend the Network Enforcement Act) of 3 June 2021. For video-sharing platform services, the appeal procedure has been applicable to user-generated videos and programmes since 28 June 2021. Since 1 October 2021, as well as social networks, video-sharing platform services have also been obliged to provide a corresponding procedure for other types of content.

Under the newly introduced Article 3b NetzDG, providers are obliged to provide an effective and transparent procedure for reviewing decisions on the removal or blocking of access to content. Both the complainant (i.e. the person who flags the third-party content) and the user, on whose behalf the flagged content was stored (content creator), can request a review if a service provider decides to remove or block access to content following a complaint alleging that it is illegal. For the review process to be triggered, an appeal must be submitted, with grounds of complaint, within two weeks of the provider's decision being taken. With this in mind, providers must make available an easily recognisable process that enables users to contact them electronically in a simple, direct way.

The act also contains provisions designed to promote transparency. For example, if a provider wishes to rectify its decision, it must immediately inform the respondent, i.e the person who initially flagged the allegedly illegal content, about the content of the appeal and give them the opportunity to reply within a reasonable deadline. The parties must be informed of this possibility in advance. However, the provider must ensure that the identities of the parties to the procedure are not disclosed. Furthermore, the provider's decision on the appeal, which must not be taken by a person who was involved in taking the initial decision, must be notified with grounds to the parties immediately.

Under the exemption referred to in Article 3b(3)(4) NetzDG, a provider does not need to review its decision if the appeal concerns commercial communications that are clearly unsolicited, or are in breach of the provider's general terms of business and are either shared by the user with many other users or are made accessible to the public, or if the appeal clearly has no prospect of being upheld. This exemption is designed to ensure the appeal procedure is not abused in clear cases of advertising.

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The reform of the NetzDG that resulted from the amending act served in part to implement Articles 28a and 28b of the EU Audiovisual Media Services Directive. Video-sharing platform services could previously be subject to the NetzDG insofar as they could also be defined as social networks. However, these did not include platforms that only distributed specific, e.g. thematically limited, content (such as so-called video-game “Let’s Plays”) in user postings, independent of their social network functions. Now the law has been extended to cover all video-sharing platform services, this limitation no longer applies and the obligations of social networks and video-sharing platform services with regard to unlawful content have been harmonised.

Gesetz zur Änderung des Netzwerkdurchsetzungsgesetzes vom 3. Juni 2021 (BGBl. 2021 I/29)

https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl_NetzDG.pdf;jsessionid=8D70A0B85DA81EF4DF4E2C1BC090D7A0.1_cid334?__blob=publicationFile&v=2

Act to Amend the Network Enforcement Act of 3 June 2021 (Official Gazette 2021 I/29)

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SPAIN

[ES] CNMC analyses proposals to market football broadcasting rights

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 19 October 2021, the Spanish regulator *Comisión Nacional de los Mercados y la Competencia* (CNMC) approved three reports in which it analysed the conditions proposed by the *National Professional Football League* (LNFP) for marketing the broadcasting rights of the Liga championship for the coming seasons in national territory and in international markets. These reports are issued pursuant to Article 4 of the Royal Decree-Law 5/2015 which regulates the conditions for joint marketing of rights to exploit audiovisual content of professional football competitions.

In its report on the exploitation of content of the national league championship in Spain, the CNMC made the following considerations and recommendations:

- The CNMC welcomed the structure presented for marketing the rights in different lots and options, as this may encourage more operators to participate and may encourage competition between them.

- It noted that the possibility of submitting bids for a period of four and/or five seasons should be eliminated.

- The LNFP should ensure the principles of publicity, transparency and non-discrimination in the process of awarding the rights. In particular, by eliminating discretionality in the evaluation of bids, such as, for example, the possibility of increasing the evaluation of a financial bid by up to 15% for technical-formal aspects not based on objective criteria or formulas.

- In addition, it should modify all those issues that could lead to discriminatory treatment between operators, such as the use of reserve prices for each lot or the sale of rights together with the in-house produced Canal LaLiga Primera channel.

- The Commission also recommends reviewing the limitation whereby only pay-TV operators can exploit these lots.

- Finally, it is recommended to remove the reference to the ownership of rights and powers that the LNFP does not own.

Concerning its reports on the exploitation of national league championship content in territories outside the European Economic Area and in the United Kingdom, the Republic of Ireland and Iceland, the CNMC made the following considerations and recommendations:

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- Clarify the content of the lots and the criteria for assessing the requirements for their award, to ensure a transparent and competitive procedure.

- Consider a contract duration that is in line with the principles and rules of competition.

- Eliminate the mention of the ownership of rights and powers that the LNFP does not own.

Informe sobre la propuesta de la Liga Nacional de Fútbol Profesional para la comercialización de los derechos de explotación de contenidos del Campeonato Nacional de Liga en España (primera división) a partir de la temporada 2022/2023 por una duración de tres, cuatro o cinco temporadas, según las ofertas

https://www.cnmc.es/sites/default/files/3752669_4.pdf

Report on the proposal of the National Professional Football League for the marketing of exploitation rights of the National League championship in Spain (First Division) as from the 2022/2023 season for a duration of three, four or five seasons, depending on the bids

Informe sobre la propuesta de la Liga Nacional de Fútbol Profesional para la comercialización internacional de los derechos de explotación de contenidos del Campeonato Nacional de Liga en ciertos territorios fuera del Espacio Económico Europeo

https://www.cnmc.es/sites/default/files/3752705_3.pdf

Report on the National Professional Football League's proposal for the international marketing of the rights to exploit National League Championship content in certain territories outside the European Economic Area.

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[ES] Transposition of Copyright Directives

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European Audiovisual Observatory

On 2 November 2021, the Council of Ministers adopted a Royal Decree-Law transposing into Spanish law Directive (EU) 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (DSM Directive).

The Royal Decree-Law recognises a new related right for press publishers and authors. This is a right in its own right, held by publishers of press publications and news agencies with regard to online uses of their press publications, vis-à-vis information society service providers. It regulates the reproduction of a fragment of a publication (a snippet) by content/news aggregators for subsequent availability on their own pages or platforms, but it is silent on how this right is to be managed, thus giving each publisher and rights holder the option and freedom to manage it either individually, through direct negotiation with digital content aggregators, or through a collective management organisation on a voluntary, not compulsory, basis. The negotiation of authorisations to content aggregators for the use of these materials shall be carried out in accordance with the principles of contractual good faith, due diligence, transparency and respect for the rules of free competition, excluding the abuse of a dominant position in the negotiation.

Online content-sharing service providers will need authorisation from the rightsholder. In this regard, the Royal Decree-Law determines that if these providers do not obtain this authorisation, they will be subject to the specific liability regime introduced by Article 17 of the DSM Directive.

In addition, the Royal Decree-Law establishes a series of mandatory rules intended to ensure that authors and performers obtain adequate and proportionate remuneration for the transfer of their rights. It incorporates, within the margins of the DSM Directive, the following new limits or exceptions:

a) An exception is envisaged for the benefit of research organisations and institutions responsible for cultural heritage, so that they can carry out, for scientific research purposes, text and data mining of works or other benefits to which they have lawful access. In cases where the organisation that intends to carry out text and data mining is not a research organisation or institution responsible for cultural heritage or the purpose of the mining activity is unrelated to scientific research, it is foreseen that the rightsholder of the work concerned may establish a reservation of rights. In this case, a licence is required. Neither of the above two limits entail any remuneration in favour of the rightsholders.

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b) It allows the digital use of works and other subject-matter for the purpose of illustration for educational purposes, in educational establishments recognised by a Member State, irrespective of the level of education, in so far as the uses are justified by the non-commercial purpose of the educational activity.

c) It enables cultural heritage institutions to reproduce for conservation purposes works permanently in their collections.

d) Other measures: non-commercial use of works by cultural heritage institutions. It is foreseen that collecting societies may grant non-exclusive copyright licences, for non-commercial purposes, for reproduction, distribution, public communication, when they are permanently in the collection of a cultural heritage institution.

Real Decreto-ley 24/2021, de 2 de noviembre, de transposición de directivas de la Unión Europea en las materias de bonos garantizados, distribución transfronteriza de organismos de inversión colectiva, datos abiertos y reutilización de la información del sector público, ejercicio de derechos de autor y derechos afines aplicables a determinadas transmisiones en línea y a las retransmisiones de programas de radio y televisión, exenciones temporales a determinadas importaciones y suministros, de personas consumidoras y para la promoción de vehículos de transporte por carretera limpios y energéticamente eficientes

https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-17910

Royal Decree-Law 24/2021 of 2 November 2021 on the transposition of European Union directives on covered bonds, cross-border distribution of collective investment undertakings, open data and re-use of public sector information, the exercise of copyright and related rights applicable to certain online transmissions and to broadcasts of radio and television programmes, temporary exemptions for certain imports and supplies, for consumers and for the promotion of clean and energy-efficient road transport vehicles

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FRANCE

[FR] Access for minors to pornographic websites: ARCOM’s powers stipulated by decree

Amélie Blocman
Légipresse

Decree no. 2021-1306 of 7 October 2021 sets out the conditions for the application of the intervention measure devolved to the French audiovisual regulator (CSA, now known as ARCOM) under Article 23 of the Law of 30 July 2020 with regard to providers of online public communication services that allow minors to access pornographic content in violation of Article 227-24 of the Penal Code.

Incorporated in the Law on Domestic Violence, this provision aims to protect minors from exposure to pornographic content. Therefore, if a provider of an online public communication service is found to be allowing minors to access pornographic content in violation of Article 227-24 of the Penal Code, the ARCOM president will send it a formal notice ordering it to take all possible steps to prevent minors accessing the content concerned. The recipient of the injunction then has 15 days in which to present its observations. The decree of 7 October 2021 explains the content of the formal notice, how it should be served and how the evidence should be assessed. In this regard, it states that: “the president [of ARCOM] takes into account the level of reliability of the technical procedure established by the [service provider] to ensure that users wishing to access the service are adults”. Furthermore, ARCOM “may adopt guidelines concerning the reliability” of these technical procedures.

If the injunction addressed to the service provider by ARCOM is breached and the content remains accessible to minors, the ARCOM president may refer the matter to the president of the Paris judicial court with the request that, ruling on the merits under the accelerated procedure, it should order Internet access providers to block access to the service. It can also demand that the service be removed from search engines or online directories. The French public prosecutor is informed of the court president’s decision. The decree states that, if a court has ordered that access to the disputed service should be blocked in this way, Internet access providers should take “any steps necessary […] including using Domain Name System (DNS) blocking”. Users of online public communication services to which access is blocked are “directed to an [ARCOM] information page stating the reasons for the blocking measure”.

Finally, in response to a legitimate concern to combat mirror sites, the law also permits the ARCOM president to “refer the matter, on request, to the president of the Paris judicial court for the same purpose if the online public communication service is made accessible from a different address”.

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The aw of 25 October 2021 states that the ARCOM president may act “ex officio or at the request of the public prosecutor or any legal or natural person with an interest in bringing proceedings”.

Décret n° 2021-1306 du 7 octobre 2021 relatif aux modalités de mise œuvre des mesures visant à protéger les mineurs contre l'accès à des sites diffusant un contenu pornographique

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044173388

Decree no. 2021-1306 of 7 October 2021 on methods for implementing measures to prevent minors accessing sites with pornographic content

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[FR] Agreement signed between authors and producers on model clauses for cinema contracts

Amélie Blocman
Légipresse

On 11 October, following the signature of a similar agreement with audiovisual producers at the Festival de la Rochelle in September, professional authors' organisations including the SACD, ARP, FAMS and ACID, along with representatives of the cinematographic production industry (API, SPI, UPC), signed, in the presence of the French Minister of Culture, a professional agreement establishing model clauses designed to protect copyright in cinema contracts. This collective agreement provides film authors with the assurance that principles relating to the fixing of their remuneration (proportional share of revenue, in accordance with Articles L. 131-4 and L. 135-25 of the French Intellectual Property Code – CPI) and their moral rights (Articles L. 121-1 and L. 121-5 of the CPI: right to respect for the author's name and authorship; establishment of the final version of the work; right to respect for the work) will be upheld.

The agreement, which is valid for five years, is based on a provision of the ordinance of 21 December 2020 transposing the Audiovisual Media Services Directive (AVMSD). Introduced under Article L. 311-5 of the Cinema and Animated Images Code, it states that producers will only be able to access funding from the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC) if these clauses are included in each contract they sign with authors concerning the production of a work, as required by the ordinance, which imposes new financing obligations on platforms such as Netflix. The ordinance transposing the directive also states that works that infringe copyright law and do not contain such clauses cannot be taken into account in the investment obligations of online platforms or television channels. By way of derogation, the CNC may award funding if the applicant can prove that the author with whom the contract is concluded is a foreign national living outside France who is bound by rules that are incompatible with the inclusion of the model clauses designed to safeguard respect for authors' property and moral rights.

Alongside the implementation of these clauses in both audiovisual and cinema contracts, and their monitoring by the CNC and the French audiovisual regulator (*Conseil supérieur de l'audiovisuel* – CSA), the ongoing negotiations between authors and producers of cinematographic, fictional and animated works will also need to be stepped up.

Communiqué de la SACD, 12 octobre 2021

https://www.sacd.fr/nouvel-accord-auteurs-producteurs-sur-les-clauses-types-dans-les-contrats-cinema

SACD press release, 12 October 2021

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[FR] Collecting society for press neighbouring rights established

Amélie Blocman
Légipresse

Two years after the Lsaw of 24 July 2019 (no. 2019-775) was adopted, Europe's first collective management body dedicated to the management of neighbouring rights of press publishers and agencies was established in France on 26 October. Chaired by Jean-Marie Cavada, a former MEP who was heavily involved in the adoption of the EU Directive on copyright and related rights in the Digital Single Market, the *société des Droits Voisins de la Presse* (Press Neighbouring Rights Collecting Society – DVP), which was launched on the initiative of the FNPS, SEPM and SPIIL press unions, is designed to provide all press publishers with a collective tool for the negotiation, collection and distribution of neighbouring rights, as well as a clear and transparent framework for both publishers and users of content protected by these new rights. The DVP, which will be managed by *Sacem* (the Society of Authors, Composers and Publishers of Music), is expected to deal directly with Google, Facebook, Microsoft and all other companies that are liable for neighbouring rights. It will also benefit online platforms by simplifying negotiations and providing a clear and transparent framework for the use of content protected by these new neighbouring rights. "The creation of this collective management body is a decisive step towards the effective recognition of the need for fair distribution of value between publishers and press agencies on the one hand, and these new digital stakeholders, who until now have been profiting unduly from content produced by the press, on the other", said the DVP chairman. It should be remembered that, on 13 July, the French competition authority fined Google EUR 500 million for failing to negotiate "in good faith" with publishers. An appeal is pending.

Members of the audiovisual industry (France Télévisions, M6, Altice Media) and the press (L'Équipe, Le Canard enchaîné, Prisma Media, CMI, Le Point, etc.), as well as the AFP, Dioranews and MaxPPP press agencies, have already joined the DVP, which aims to represent all holders of neighbouring rights that opt for collective management.

Meanwhile, Facebook has announced an agreement with the *Alliance de la presse d'information générale* (General Press Alliance – APIG), which represents French national, regional and local daily newspapers and regional weekly press publishers, containing general principles governing remuneration for content that is published and shared on the American platform. The agreement, which concerns around 300 publishing companies and provides each with a minimum level of remuneration, lays the foundation for renewable three-year licensing contracts. Pierre Louette, the APIG president, commented: "Hopefully, the conclusion of this agreement will help to accelerate the negotiations currently under way with Google".

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Communiqué de presse, 26 octobre 2021

http://extranet.fnps.fr/telechargements/CP_Creation_OGC_Droit_Voisin_20211026.pdf

Press release, 26 October 2021

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[FR] Refusal of request for Internet access providers to block pornographic websites accessible to minors

Amélie Blocman
Légipresse

Two child protection organisations filed a motion for a summary hearing in the hope that the courts would order France's largest Internet access providers to take appropriate measures to block access to nine pornographic websites. Their claims were based, firstly, on the provisions of Article 6-I-8 of the Law on Confidence in the Digital Economy (LCEN) of 21 June 2004, and secondly on the provisions of Article 835(1) of the Code of Civil Procedure. They were not, however, based on Article 23 of Law no. 2020-936 of 30 July 2020, which assigns jurisdiction in the dispute to the president of the judicial court, ruling on the merits under the accelerated procedure. Similarly, the document instituting proceedings that was submitted to the urgent applications judge had been notified to the defendants between 2 and 4 August 2021, i.e. before the entry into force of Law no. 2021-1109 of 24 August 2021, under which the president of the judicial court, ruling on the merits under the accelerated procedure, has jurisdiction to deal with applications concerning the prevention or termination of damage caused by the content of an online public communication service pursuant to Article 6-I-8 LCEN.

The Paris judicial court, in a summary judgment, ruled that the organisations' requests based on Article 6-I-8 LCEN were inadmissible. It pointed out that, under the subsidiarity principle enshrined in the article, measures to block illegal sites should primarily be taken against the hosts of the sites concerned, while access providers could only be asked to intervene if the hosts failed to act. In the present case, the companies responsible for each website were identifiable and expressly identified, while postal addresses within the European Union or e-mail addresses via which they could be contacted directly were mentioned in the sites' general conditions and confidentiality policies. The applicants had failed to show that they had attempted to contact them and therefore to prove that they had been unable to take quick, effective action against the host or publisher of the nine sites concerned.

The court accepted that allowing minors to access the sites in question was 'manifestly unlawful', since it infringed Article 227-24 of the Penal Code.

Nevertheless, there was no justification for blaming the alleged infringement on the defendants, who had been sued in their role as Internet access providers. They neither published nor monitored pornographic content and did not need to justify the absence of measures taken to prevent minors accessing it. Since the companies that published the content had been neither sued in nor even informed of the proceedings, they had not been given the chance to comment on the measures demanded, which would have infringed their interests or rights, and if appropriate, propose alternative solutions. As a result, the court could not make a judgment on the proportionality of the requested measures in accordance with

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the adversarial principle. The requests based on Article 835(1) of the Code of Civil Procedure were therefore rejected.

TJ Paris, jugement réf., 8 octobre 2021 n° 21-56149 – Association La Voix de l'enfant et a. c/ Sté Orange et a.

Paris judicial court, summary ruling, 8 October 2021, no. 21-56149 - Association La Voix de l'enfant et al v Sté Orange et al.

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[FR] Regulatory Authority for Audiovisual and Digital Communication (ARCOM) officially established

Amélie Blocman
Légipresse

The hotly anticipated law on the regulation and protection of access to cultural works in the digital age has been promulgated, six months after it was presented to the Council of Ministers. The text incorporates some of the provisions of the bill on audiovisual communication and cultural sovereignty in the digital age that was tabled by the government in late 2019, examination of which was interrupted by the health crisis.

The law has two main objectives. Firstly, in Chapters 1 and 2, it provides for the creation of the *Autorité de régulation de la communication audiovisuelle et numérique* (Regulatory Authority for Audiovisual and Digital Communication – ARCOM) on 1 January 2022 through the merger of the *Conseil supérieur de l'audiovisuel* (National Audiovisual Regulatory Authority – CSA) with the *Hadopi* (High Authority for the Dissemination of Works and the Protection of Rights on the Internet). The idea is to create a regulator with broader powers, especially in the creative chain, from fixing obligations to protecting copyright and combating piracy. The new authority will also deal with digital media, the fight against fake news and online hatred, and the regulation of subscription-based video platforms and the obligations imposed on them. ARCOM will therefore "embody the new model of audiovisual and digital regulation". Its nine members are appointed by decree on the basis of economic, legal or technical expertise or professional experience in the field of communication, in particular the audiovisual sector, or electronic communications. Its president is appointed by the president of the Republic.

Secondly, the law also contains a significant section devoted to the safeguarding of cultural creativity, strengthening measures to combat Internet piracy on streaming, direct download and referencing websites that make money by providing online access to works in breach of copyright, in particular by creating a 'blacklisting' mechanism and a system for combating mirror sites. It also makes provision, in the Sports Code, for an emergency ad hoc mechanism for stopping the illegal retransmission of sports events and competitions.

Finally, the law adds a new section to the Cinema and Animated Images Code in order to protect public access to cinematographic and audiovisual works (Chapter 3). Under existing legal provisions, it was not possible, within the context of free movement of capital as defined by European law, to guarantee public access to French works from audiovisual or film catalogues that were the subject of "predatory" acquisitions by foreign companies or investment funds. The new law extends the continued exploitation obligation set out in Article L.132-27 of the Intellectual Property Code, which currently only applies to producers, to anyone who acquires French works, whatever their status or nationality, requiring them to (i) preserve the technical media on which the work is stored, (ii) endeavour to

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exploit the work as fully as possible, and (iii) provide annual information to the authors or rightsholders on the measures taken for this purpose. An obligation to give notice six months prior to the transfer of rights will enable the Minister of Culture, if necessary, to impose obligations guaranteeing the continued exploitation of French works in these catalogues.

Loi n° 2021-1382 du 25 octobre 2021 relative à la régulation et à la protection de l'accès aux œuvres culturelles à l'ère numérique

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044245615

Law no. 2021-1382 of 25 October 2021 on the regulation and protection of access to cultural works in the digital age

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UNITED KINGDOM

[GB] Ofcom publishes its research on offensive language on TV and radio

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On 22 September 2021, Ofcom, the UK's communications regulator, published its latest research into people's attitudes towards offensive language on scheduled TV and radio. The findings provide an insight into how audiences feel about language they might encounter in programmes they watch or listen to.

A mixed-methods approach was adopted for this research. A quantitative strand captured spontaneous responses on the acceptability of 186 words, whereas the qualitative survey comprised 37 online discussion groups and 25 depth interviews involving participants from a variety of locations and backgrounds. The research engaged, in particular, with a larger and more diverse selection of people than ever before (including Black African and Caribbean people, Indian, Pakistani and Bangladeshi people, disabled people, as well as the LGBTQ+ and Gypsy and Traveller communities), and sought specific views towards offensive language of members of the Jewish and Chinese communities for the first time. The research also examined attitudes to other types of potentially offensive content such as blackface, mimicking of accents, misgendering and deadnaming.

Respondents indicated that they still want broadcasters to give careful consideration to how and when offensive language is used but many acknowledged the important role such language can play in programming depending on the given context (e.g., offensive language used for dramatic effect, for humour, to reflect real life or even to inform). Swift apologies were also deemed important where offensive language was accidentally broadcast.

Attitudes towards the use of swear words appeared to be somewhat more tolerant, so long as the strongest language was broadcast after the watershed and parents were given adequate warnings. However, some more serious concerns were expressed about discriminatory language on TV and radio, especially in relation to race. Participants stated that they expected broadcasters to take the utmost care to justify and carefully contextualise the strongest forms of such language so that audiences would be adequately protected.

Interestingly, mixed views were evident with respect to older programmes containing outdated views which could cause unnecessary offence and reinforce stereotypes. Participants pointed out that they did not wish to see older programmes containing potentially problematic content disappear completely. Some concerns were expressed, in particular, about sanitising history or censoring older programmes. Nevertheless, participants highlighted that suitable

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warnings should be clear and specific, indicating the type of language or content that might cause offence.

It is anticipated that the research findings will support broadcasters, when planning their content, in better understanding audience expectations about problematic language. They will also assist the regulator in making decisions about potentially offensive language in programmes, while having regard to freedom of expression. Readers should be warned that the report contains highly offensive language, terminology and discussion of content that may cause offence.

Public attitudes towards offensive language on TV and Radio, Ipsos Mori Research for Ofcom

https://www.ofcom.org.uk/__data/assets/pdf_file/0021/225336/offensive-language-summary-report.pdf

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ITALY

[IT] AGCOM intervenes in the broadcasting of the Italian Serie A Championship on the DAZN platform

Ernesto Apa & Eugenio Foco
Portolano Cavallo

This year, the OTT platform DAZN, operating under German authorisation, has acquired the audiovisual rights to the Italian Serie A Championship, obtaining the possibility of broadcasting all Serie A football matches (380 in total) for three years (2021-2024), of which 70% would be broadcast on an exclusive basis.

The Autorità per le Garanzie nelle Comunicazioni (Authority for Communications Guarantees — AGCOM) welcomed the web-broadcasting of such a major sporting event in Italy as an important step towards the digitalisation of the country. It also pointed out that this represented a convenient time for the regulation of digital platforms.

For this reason, over the last few weeks, AGCOM has paid keen attention to several related issues, including the quality of streaming services, consumer protection and audience rating systems.

Notably, through Resolution No. 206/21/CONS, AGCOM has provided guidance inviting DAZN and all telco operators to cooperate in order to avoid an overload of the network during the broadcast of football matches with the aim of: (i) protecting the quality of streaming services provided to DAZN users; and (ii) avoiding harm to the users of other electronic communications networks caused by the uncontrolled increase in the Internet traffic. It is of note that AGCOM reserved the right to adopt precautionary measures if necessary to avoid any possible network inefficiencies and, as a consequence, the degradation of the Internet service quality for all end-users.

In response to the above, DAZN developed the DAZN Edge, a content delivery network, and published the DAZN Service Charter on its website.

However, according to AGCOM, the DAZN Service Charter does not fully comply with Italian law on transparency obligations, indemnities, complaints and customer assistance. In this regard, AGCOM clarified that DAZN, as the provider of the DAZN Edge network, has to comply with the Italian Code of Electronic Communications.

Lastly, on 7 October 2021, AGCOM issued a press release stating that it had issued an order against DAZN requiring the latter to adopt any behaviour necessary to guarantee users' rights. In particular, AGCOM pointed out that DAZN had to adopt measures aimed at preventing malfunctioning related to the television signal broadcast in live streaming and implement an efficient help

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center that included the possibility for users to directly contact a physical person.

Furthermore, through Resolution No. 268/21/CONS, AGCOM also initiated an investigation into DAZN to assess the reliability of its audience rating systems in light of AGCOM's Resolution No. 194/21/CONS. Indeed, as underlined by AGCOM, audience ratings not only have a strong impact on planning advertising and future investments but, in particular, under Section 26 of Law Decree No. 9/2008, they were also relevant for the distribution of revenues deriving from the commercialisation of the audiovisual rights on the Serie A Championship.

Audizione del presidente dell'Autorità per le garanzie nelle comunicazioni Giacomo Lasorella sulle questioni regolatorie relative alla trasmissione del campionato di calcio sulla piattaforma Dazn

https://www.agcom.it/documents/10179/24308804/Documento+generico+15-09-2021/ec7f7a7f-58e2-4f00-987d-15b2bb8f7cfc?version=1.0

Hearing of the president of the Italian Commnications Authority, Giacomo Lasorella, on the regulatory issues pertaining to the broadcasting of the soccer championship on the DAZN platform

DELIBERA N. 206/21/CONS. ATTO DI INDIRIZZO PER IL CORRETTO DIMENSIONAMENTO E LA DISLOCAZIONE GEOGRAFICA DELLA RETE DI DISTRIBUZIONE (CDN) DELLE PARTITE DI CALCIO DI SERIE A PER LE STAGIONI 2021-2024 IN LIVE STREAMING

https://www.agcom.it/documents/10179/23165504/Delibera+206-21-CONS/d53a7e75-2566-44f8-98a3-99bd2a5bce4b?version=1.0

Resolution No. 206/21/CONS. GUIDANCE ACT FOR THE CORRECT SIZING AND GEOGRAPHICAL DISLOCATION OF THE DISTRIBUTION NETWORK (CDN) OF THE SERIE A FOOTBALL MATCHES FOR THE SEASONS 2021-2024 IN LIVE STREAMING

DELIBERA N. 268/21/CONS. AVVIO DI UNA ISTRUTTORIA NEI CONFRONTI DELLA SOCIETÀ DAZN AVENTE AD OGGETTO LA VERIFICA DELLA METODOLOGIA DI RILEVAZIONE DEGLI ASCOLTI

https://www.agcom.it/documents/10179/24159700/Delibera+268-21-CONS/af399d06-4c77-4c9a-935f-85a617e5ac1e?version=1.0

RESOLUTION NO. 268/21/CONS. INITIATION OF A PRELIMINARY INVESTIGATION INTO DAZN CONCERNING VERIFICATION OF THE METHOD USED TO MONITOR AUDIENCE RATINGS

COMUNICATO STAMPA. AGCOM: PROCEDIMENTO D'URGENZA A DAZN

https://www.agcom.it/documents/10179/24540622/Comunicato+stampa+07-10-2021/33a17876-1dda-4f49-8fd9-a3dadb304f44?version=1.0

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PRESS RELEASE. AGCOM: URGENT PROCEEDING AGAINST DAZN

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LITHUANIA

[LT] The Supreme Administrative Court sets guidelines for publishing personal information on popular top richest listings

Indre Barauskiene
TGS Baltic

This case relates to a popular article published annually about the richest people in Lithuania. The article discusses the people included in the list, identifies their possible wealth, and analyses their dynamic through the years.

The article in this case identified the richest woman in Lithuania – Ms. A – who had complained to the *Žurnalistų etikos inspektoriaus tarnyba* (Office of the Inspector of Journalist Ethics — the Defendant) about a breach of the *Visuomenės informavimo įstatymas* (Law on the Provision of Information to the Public — the Law) and the General Data Protection Regulation (GDPR). The Defendant admitted the complaint but the publisher, UAB Naujienų centras (the Publisher), appealed the decision. The case reached the highest court – the *Lietuvos vyriausiasis administracinis teismas* (Supreme Administrative Court of Lithuania — the SACL) – which, on 15 September 2021, adopted a final ruling, forming a new set of guidelines for publishing information about the wealthiest part of the population.

Regarding the concept of a "public person", the SACL noted that the wealthiest people in the country occupied a position in society that made their activities related to the management of their assets relevant to public affairs. They were, therefore, public persons within the meaning of Article 8 of the European Convention on Human Rights (the Convention) and of the Law. However, such people did not hold any official duties in the public sector, thus their right to maintain their private life was, in principle, broader than that of those holding such positions. The fact that their business operated in important social sectors was not relevant in the context of the present dispute and did not affect the qualification of a public person.

In respect to the public's interest in such lists, the SACL noted that the publication about the wealthiest people in the country, the discussion of the value of the assets they managed, and the areas in which their business operated, could indeed contribute to the public interest debate. The SACL noted that such top listings in essence raised issues that affected society to such an extent that they could reasonably attract interest and concern.

However, the case was remitted for a new investigation in respect of the accuracy and completeness of the data that had been published. It had to be noted that Ms. A was a private person and therefore there was no public and reliable source that accurately and correctly reflected the value of her assets. Therefore, the

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calculation method chosen by the Publishers was not capable of reflecting their real value. In the light of the above, it was found that the publication of an inaccurate value of the assets of Ms. A had infringed the requirement that public information had to be published in a fair, accurate and impartial manner (Article 3(3) of the Law).

The SACL concluded that the publication had contained an approximate value of the assets of Ms. A (a result of the assessment of the data relating to the assets) and was therefore classified as an opinion, and not a fact or real (correct) data (knowledge). Consequently, on the basis of the above considerations, the Defendant's initial Decision was referred back for re-examination.

Lietuvos vyriausiojo administracinio teismo 2021 m. rugsėjo 15 d. nutartis administracinėje byloje Nr eA-2066-624/2021

https://www.infolex.lt/tp/2024252

Ruling of the Supreme Administrative Court of Lithuania in administrative case No. eA-2066-624/2021, dated 15 September 2021.

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NETHERLANDS

[NL] Broadcaster's news and opinion website is not subject to objectivity rules

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On 1 October 2021, the *Rechtbank Midden-Nederland* (District Court of Midden-Nederland — the Court) delivered a notable judgment on the media standards applicable to news and opinion websites operated by broadcasters. Notably, the Court laid down important principles on the freedom of broadcasters to criticise public figures, including in online news articles, and refused to order a rectification against a broadcaster sought by a public figure over various online articles.

The case involved a well-known activist who campaigns against Covid-19 measures implemented by the Dutch government, and is director of a high-profile campaign group ("Stichting Viruswaarheid", Virus Truth Foundation) which sued the government over its Covid-19 measures. In 2021, the activist initiated legal proceedings against the broadcaster BNN-VARA over its news and opinion website (Joop.nl), in particular over various online publications describing the activist as a "Corona denier" ("*corona-ontkenner*"), "virus madman" ("*viruswaanzinnige*"), and "cult leader" ("*sekteleider*"). The activist claimed these descriptions contained in news items on the broadcaster's website were unlawful, and sought removal of these terms from items already published, a ban on the use of the terms in future news items, and also sought a rectification. Notably, the activist had no issue with these terms being used in "opinion pieces" or cartoons, but specifically objected to their use in "news" items.

At the outset, the Court noted that the case concerned a clash between fundamental rights, namely the broadcaster's freedom of expression under Article 10 of the European Convention of Human Rights (ECHR), and the claimant's right to protection of reputation under Article 8 ECHR. Notably, the Court rejected the broadcaster's argument that the claimant could not invoke Article 8 ECHR as the statements at issue did not affect his private life, but only concerned his role as director of the campaign group. Instead, the Court held the descriptions at issue concern the "private sphere" of the claimant in the form of his reputation, and as such, Article 8 ECHR was at issue. It followed, according to the Court, that in balancing Article 8 and 10 ECHR, a number of criteria must be taken into account.

First, the Court examined the medium on which the statements were made, and noted that the website is an online opinion website. Crucially, contrary to the claimant's argument, the Court emphasised that the media is generally "not under an obligation to present news exclusively in an objective manner", and an opinion website such as that operated by the broadcaster, does not have an objectivity "obligation". The fact that the website made a distinction between the

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categories “news” and “opinion” did not change this, as items in the “news” category on the website were also “regularly permeated with opinion and value judgements”. Second, the Court examined the specific terms used, and held that “Corona denier”, “virus madman”, and “cult leader”, were value judgments, and would only be unlawful if lacking a “sufficient factual basis”. However, the Court held there was a sufficient factual basis, noting that “Corona denier” was similar to “climate denier”, in that it indicated someone who had a different view to the prevailing views on Covid-19 or climate change; the term “virus madman” was a “pun” on the name of the campaign group’s previous name (*Stichting Viruswaanzin)* (Virusmadness Foundation); while “cult leader” was also a value judgment, having regard to the claimant describing himself in the past as an “icon” and “hero” for a large group of people opposed to Covid-19 measures. Finally, the Court had regard to the claimant’s own tone in public debate, and held that he must accept viewpoints and criticism in response to this, including his description of a government minister as, “[H]e not only looks like a Nazi, he also behaves like that ”, and comparing the obligation to wear a face mask with wearing a “Star of David”.

In conclusion, the Court dismissed the claimant’s application, holding that the broadcaster had no obligation to publish news items objectively or without value judgments, and that the statements at issue were not unlawful.

Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2021:4702, 1 oktober 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2021:4702

District Court of Midden-Nederland, ECLI:NL:RBMNE:2021:4702, 1 October 2021

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[NL] LinkedIn ordered to restore Dutch politician's account closed over COVID-19 disinformation

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On 6 October 2021, the *Rechtbank Noord-Holland* (District Court of Noord-Holland - the Court) delivered a significant judgment on the issue of politicians' social media accounts and ordered the online platform LinkedIn to restore the account of a Member of Parliament (MP) that had been closed under its COVID-19 disinformation policy. However, the Court refused to order that LinkedIn reinstate specific posts concerning COVID-19 published by the politician which had been removed.

The case involved Mr. Wybren van Haga, a Dutch politician and member of the *Tweede Kamer* (House of Representatives), who was critical of the Dutch government's Covid-19 measures. Mr. van Haga had maintained a LinkedIn account for over a decade, and had posted many messages via his account, including messages critical of COVID-19 measures. On 7 June 2021, LinkedIn informed the MP that his account had been permanently restricted due to a series of posts concerning COVID-19 which had been deleted for violating LinkedIn's rules on disinformation. The posts included: "The IFR (Infection Fatality Rate) of Corona is slightly higher, but comparable to the #IFR of flu", "Kids don't get sick from #COVID19 and asymptomatic contamination is close to zero", and "It remains strange that #Ivermectin does work in other countries, but this drug may not be used in the Netherlands".

Following the closing of his account, the MP initiated legal proceedings against LinkedIn, seeking to have his account restored and his posts re-uploaded. The Court first dealt with the issue of the closing of the MP's account. At the outset, the Court made a significant finding, holding that while LinkedIn was a private party, its parent company (Microsoft) had "responded" to the European Commission's call for online platforms to "prevent disinformation about COVID-19". As such, the Court held that the case concerned a restriction on freedom of expression at the "instigation of the government, of a type of information considered undesirable by the government (harmful disinformation about COVID-19), via a certain type of channel (social media platforms)"; and that had to be taken into account when determining the "freedom to be left to the platform" in that regard. Further, the Court noted that the user agreement between LinkedIn and the MP was a "continuing performance agreement", and, under the Dutch Civil Code, such agreements had to include requirements of "reasonableness and fairness", including in relation to termination of the agreement. Crucially, the Court strongly criticised LinkedIn's communication with the MP about the closing of his account based on his COVID-19 posts, holding that its communication had been "substantively inadequate", "insufficiently informative" and had contained "no motivation" apart from a "single reference" to the user agreement on disinformation. Therefore, the Court held that the termination of the user

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agreement had occurred “without due care”, and ordered LinkedIn to reinstate the MP’s account. However, the Court did emphasise that the MP “must comply” with the conditions that LinkedIn imposed on the use of its platform.

Second, the Court considered the content of the MP’s deleted posts and referred to the case-law of the European Court of Human Rights; in particular, that where damage might be caused by statements of facts, there had to be a “sufficient factual basis”. Crucially, the Court held that LinkedIn had had “good grounds” to find that the MP’s posts had contained “harmful disinformation”, including that dissemination of that information could “diminish the willingness of readers to follow well-founded advice and adhere to prescribed measures”. As such, the Court refused to order that LinkedIn reinstate the MP’s deleted posts concerning COVID-19 measures.

Finally, the Court ordered LinkedIn to restore the MP’s account within three days of the judgment’s publication.

Rechtbank Noord-Holland, ECLI:NL:RBNHO:2021:8539, 6 oktober 2021

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNHO:2021:8539

District Court of Noord-Holland, ECLI:NL:RBNHO:2021:8539, 6 October 2021

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RUSSIAN FEDERATION

[RU] Fines amass as social networks violate law

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On 8 November 2021, Justice of the Peace T.Vakhrameev in Moscow issued two resolutions in relation to violations by social networks of Article 13.41 (paragraph 2) of the Code of Administrative Offences of the Russian Federation. Under the provisions of the Code, a failure to comply with the requirement of Roskomnadzor (the Federal Service for Supervision of Communications, Information Technology and Mass Media) to block access to information banned in Russia or to remove information recognised as illegal in Russia under the Federal Statute "On Information, Information Technologies and on the Protection of Information", and to continue to host providers or website owners (including foreign ones) providing such information, shall lead to significant monetary fines.

The fines for legal entities amount to between RUB 800 000 and RUB 4 million. The unlawful information in this case included; "information with calls to extremist activities"; child pornography; drug use; and "unfaithful information and untruthful socially significant information" (see IRIS Extra 2021).

The Justice of the Peace imposed a fine of RUB 4 million (around EUR 48 400) on Telegram Messenger Inc., and RUB 2 million on Google LLC. These rulings open the way for imposing – in case that the violations persist – further fines on these companies that would amount to 10 percent of their annual profit (in Russia).

It would appear that between January and October 2021 the Russian courts have fined Facebook, Twitter, Telegram, Google and TikTok a total of RUB 180 million.

Постановление о назначении административного наказания

https://mos-sud.ru/422/cases/admin/details/75454bed-cf79-44ba-9d5c-a0c46c16382d?formType=shortForm&caseNumber=&participant=%D0%A2%D0%B5%D0%BB%D0%B5%D0%B3%D1%80%D0%B0%D0%BC&uid=&year=&caseDateFrom=&caseDateTo=&caseFinalDateFrom=&caseFinalDateTo=&judge=&codex=&publishingState=&hearingRangeDateFrom=&hearingRangeDateTo=&sessionRoom=&sessionRangeTimeFrom=&sessionRangeTimeTo=&sessionType=&docsDateFrom=&docsDateTo=&documentStatus=&documentType=

Judge of Peace of circuit 1422 of the Tagansky district of the City of Moscow. Resolution on the imposition of an administrative penalty

РКН рассказал о штрафах Facebook, Twitter, Telegram, Google и Tiktok, AIF

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https://aif.ru/society/web/rkn_rasskazal_o_shtrafah_facebook_twitter_telegram_google_i_tiktok

Roskomnadzor spoke about fines on Facebook, Twitter, Telegram, Google and Tiktok, AIF

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