IRIS newsletter

IRIS 2023-9

A publication
of the European Audiovisual Observatory

European Audiovisual Observatory

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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Web Design:

Coordination: Cyril Chaboisseau, European Audiovisual Observatory
ISSN 2078-6158

EDITORIAL

Expressions of joy and relief swept through the US audiovisual industry (and beyond) when it was announced that the strike by the Writers Guild of America (WGA) had ended with a satisfactory agreement. The strike by the actors' union, SAG-AFTRA, however, continues and it is not yet clear when it will end.

Among other important points of concern (such as remuneration!), both strikes have raised an important issue: the use of artificial intelligence in the creation of audiovisual works. The WGA strike resulted in an agreement that AI is not a writer and that written material created by AI will not be considered literary, source or assigned material, while the SAG-AFTRA strike is still deadlocked on this issue. Turning to Europe, although the discussion is far from being as advanced, it is being followed with equal interest. To give you a few recent examples, the UK's data protection watchdog has issued a preliminary notice against the risks of Snapchat's AI chatbot, and France has taken some initiatives to regulate AI with regard to the audiovisual sector and to copyright matters. Unsurprisingly, AI will be a recurring theme in the Observatory's reporting. Stay tuned for our next major AI report in 2024!

Speaking of recurring themes, I mentioned in a previous editorial that the first critical reactions to the European Media Freedom Act (EMFA) have already emerged. The recently adopted position of the European Parliament has created both positive and negative waves: while European professional audiovisual and cultural organisations have welcomed the clarifications on Article 20 EMFA regarding the promotion of European audiovisual creation, journalists have expressed their dismay at the way spyware is regulated. Let's see what the trilogues will bring!

Enjoy the read!

Maja Cappello, Editor

European Audiovisual Observatory

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COUNCIL OF EUROPE

GREECE

European Court of Human Rights: *Amvrosios-Athanasios Lenis v. Greece*

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

The European Court of Human Rights (ECtHR) once again confirmed that in a democratic society there can be no tolerance for stirring up hatred, discrimination or violence against LGBTI people. Applying the abuse clause of Article 17 of the European Convention on Human Rights (ECHR), the ECtHR found that Amvrosios-Athanasios Lenis, as a senior officer of the Orthodox Church, could not claim the benefit of the right to freedom of expression as guaranteed by Article 10 ECHR: Lenis' expressions and statements, disseminated through his personal blog spot, amounted to the gravest form of hate speech and incitement to violence against homosexuals.

The case goes back to 2015 when Lenis, who was the Metropolitan of Kalavryta and Aigialeia, published an article on his personal blog vehemently criticising a law proposal debated in the Hellenic Parliament introducing civil unions for same-sex couples. His article referred to homosexual people as "the scum of society", it qualified homosexuality as a deviation from the laws of nature, as a social felony, and as a sin. Homosexuals were described as disgraced people and it continued: "Spit on them! Condemn them! Blacken them out! They are not human! They are perversions of nature! They are suffering mentally and spiritually! They are people with a mental disorder! [..] Therefore, do not hesitate! When you meet them, spit on them! Do not let them rear their heads! They are dangerous!". The text was reproduced by multiple websites, media outlets and social media. Charges were brought against Lenis, and after having been acquitted in first instance, the appellate court declared Lenis guilty of public incitement to violence or hatred against people because of their sexual orientation. The Court of Cassation confirmed this finding and agreed that Lenis' freedom of expression had not been violated as his article had been liable to cause discrimination and hatred against homosexual people. Lenis was convicted to a prison sentence of five months, suspended for three years. He complained before the ECtHR that his criminal conviction had violated his right to freedom of expression.

The ECtHR in its decision focussed on the relation between Article 17 and Article 10 ECHR. It reiterated that speech that is incompatible with the values proclaimed and guaranteed by the ECHR is not protected by Article 10 by virtue of Article 17 ECHR (also qualified as the "abuse-clause"). The purpose of Article 17, in so far as

it refers to groups or to individuals, is to make it impossible for them to derive from the ECHR a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the ECHR and therefore, no person may be able to take advantage of the provisions of the ECHR to perform acts aimed at destroying the aforesaid rights and freedoms. In earlier case law the ECtHR has found that the freedoms of religion, expression and association guaranteed by Articles 9, 10 and 11 ECHR are covered by Article 17. The decisive points when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17 are whether the statements are directed against the Convention's underlying values, for example by stirring up hatred or violence, and whether by making the statement, the author attempted to rely on the ECHR to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it. The ECtHR also reiterated however that Article 17 ECHR is only applicable on an exceptional basis and in extreme cases (see also *Perinçek v. Switzerland*, IRIS 2016-1/1 and *Roj TV A/S v. Denmark*, IRIS 2018-7:1/2). The ECtHR next referred to the finding by the appellate court and the Court of Cassation, that the article at issue amounted to hate speech against a group of individuals identified on the basis of their sexual orientation, and it agreed with their conclusion that Lenis' article was capable of stirring up violence against homosexual people. It reiterated that regard must be had to the words used and the context in which they were published, with a view to determining whether the texts taken as a whole can be regarded as incitement to violence. The ECtHR found that Lenis used harsh expressions which went so far as to deny homosexual people their human nature and that some of his statements clearly went beyond the expression of opinion, and were formulated in offending, hostile, or aggressive terms. Furthermore, the ECtHR took into account that the statements could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance, as they included multiple incitements to violence. The article had also caused feelings of fear amongst homosexual people. The ECtHR additionally referred to the fact that Lenis was a senior official of the Greek Orthodox Church, having the power to influence not only his congregation but also many other people who adhered to that religion, that is to say, the majority of the Greek population. Lenis had disseminated his remarks on the Internet, which made his message easily accessible to thousands of people. Clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated as never before, worldwide, in a matter of seconds, and will sometimes remain persistently available. Finally, Lenis' comments targeted homosexuals who may be seen as requiring enhanced protection. In particular, the ECtHR noted that it has already found that gender and sexual minorities require special protection from hateful and discriminatory speech because of the marginalisation and victimisation to which they have historically been, and continue to be, subjected. It also noted the low levels of acceptance of homosexuality and the situation of LGBTI people in the national context as identified in international reports. As a kind of disclaimer, the ECtHR stressed that criticism of certain lifestyles on moral or religious grounds is not in itself exempt from protection under Article 10 ECHR. However, when the impugned remarks go as far as denying LGBTI people their human nature, as in the present case, and are coupled with incitement to violence, then engagement of Article 17 ECHR

should be considered. Having regard to the nature and wording of the disputed statements, the context in which they were published, their potential to lead to harmful consequences and the reasons adduced by the Greek courts, the ECtHR considered that it was immediately clear that the statements sought to deflect Article 10 ECHR from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the ECHR. Also the fact that the impugned statements related directly to an issue which is of high importance in modern European society – protection of people's dignity and human value irrespective of their sexual orientation – brought the ECtHR to the finding that in the light of Article 17 ECHR Lenis' complaint did not attract the protection afforded by Article 10. As by reason of Article 17 ECHR, Lenis could not claim the benefit of the protection afforded by Article 10 ECHR, the ECtHR declared his application incompatible *ratione materiae* with the provisions of the ECHR and rejected it as inadmissible.

Decision by the European Court of Human Rights, Third Section, in the case of Amvrosios-Athanasios Lenis v. Greece, Application No. 47833/20, 27 June 2023 and notified in writing on 31 August 2023

https://hudoc.echr.coe.int/eng?i=001-226442

HUNGARY

European Court of Human Rights: *Index.hu Zrt v. Hungary*

Dirk Voorhoof
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The European Court of Human Rights (ECtHR) delivered a judgment in a case concerning the decision by Hungarian courts to order the Internet news portal Index.hu to pay compensation for having published a story recounted by a third person, which the domestic courts found to have been false and defamatory. The ECtHR considered the imposition of objective liability on Index.hu for the reproduction of the statements, irrespective of whether the author or publisher acted in good or bad faith and in compliance with journalistic duties and obligations, to be a violation of Index.hu's right of journalistic reporting as guaranteed by Article 10 of the European Convention on Human Rights (ECHR).

Index.hu had complained before the Strasbourg Court that the article in question concerned a public figure, more precisely the then President of Hungary, János Áder, and a matter of public interest. It argued that the order to pay compensation had violated its right to freedom of expression as an online news medium.

In its finding of a violation of Article 10 ECHR, the ECtHR reiterated that a politician inevitably and knowingly laid himself open to close scrutiny of his every word and deed by both journalists and the public at large, and that he should therefore have displayed a correspondingly greater degree of tolerance. János Áder was certainly entitled to have his reputation protected, but the requirements of such protection should have been weighed by the domestic courts against the public interest in the open discussion of political issues. However, in the present case the domestic courts did not perform any such balancing and they failed to include in their assessment any considerations as regards the contribution of the article to debate on a matter of public interest, or the scrutiny that János Áder should have anticipated regarding his actions. The ECtHR also reiterated that, as part of their role as "public watchdog", the media's reporting on "stories" or "rumours" – emanating from other persons – or "public opinion" is to be protected where these are not completely without foundation. The ECtHR found that the imposition of objective liability on Index.hu for the reproduction of defamatory statements made by third parties is difficult to reconcile with the existing case-law according to which the "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (see *Jersild v. Denmark*, IRIS 1995-1/2 and *Thoma v. Luxembourg*, IRIS 2001-9/1). Against this background, the ECtHR unanimously concluded that the national courts had failed to apply standards in conformity with the principles

embodied in Article 10 ECHR. The interference in issue was therefore not necessary in a democratic society, and hence breached Article 10 ECHR (see also *Magyar Jeti Zrt v. Hungary*, IRIS 2019-2:1/1).

Judgment by the European Court of Human Rights, First Section, in the case of Index.hu Zrt v. Hungary, Application no. 77940/17, 7 September 2023

https://hudoc.echr.coe.int/eng?i=001-226196

SERBIA

European Court of Human Rights: Radio Broadcasting Company B92 AD v. Serbia

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

According to the European Court of Human Rights (ECtHR), Serbia has violated the right to freedom of expression and information as protected under Article 10 of the European Convention on Human Rights (ECHR) by interfering with the broadcast of a TV news item and an online article published by the Radio Broadcasting Company B92 AD (B92). The ECtHR unanimously found that the disproportionate civil sanctioning of B92 for defaming a public official allegedly involved in corruptive practices could not be justified for relevant and sufficient reasons. The ECtHR in particular considered the measures imposed on B92 (damages, removal of article from internet portal and publication of judgment) capable of having a dissuasive effect on the exercise of B92's right to freedom of expression. It also emphasised that the TV news item and online article concerned a public person in relation to a matter of public interest, while the allegations were based on an official document. The reporting by B92 based on that document could be considered as a form of responsible journalism.

After being ordered in civil proceedings to pay compensation for defamation of a public official (Z.P.), B92 lodged an application with the ECtHR complaining that the interference with its right to impart information was not necessary in a democratic society, and hence in breach of Article 10 ECHR. The Serbian courts found that the allegations of corruption against the assistant minister for health Z.P. were not sufficiently substantiated. In essence the domestic courts found that before publishing the information in question, B92 had had a duty to verify the origin, accuracy and completeness of such serious allegations, which it had failed to do, relying only on an official note of the Ministry of the Interior, which was not considered a document of a relevant state body. Furthermore, Z.P. was not convicted, nor prosecuted for the alleged corruption.

The ECtHR confirmed once more that in this type of cases the main issue is whether the state, in the context of its positive obligations under Article 8 ECHR, has achieved a fair balance between an individual's right to protection of reputation and the other party's right to freedom of expression as guaranteed by Article 10 ECHR. Examining the TV broadcast and the content of the relevant article, the ECtHR considered that they were capable of tarnishing Z.P.'s reputation and of causing her prejudice in both her professional and social environment. Accordingly, the allegations attained the requisite level of seriousness which could cause prejudice to the personal enjoyment by Z.P. of her rights under Article 8 ECHR. The relevant criteria when it comes to the balancing exercise between the rights protected under Article 8 and Article 10 ECHR

include:

(a) the contribution made by the article or broadcast in question to a debate of public interest; (b) how well known the person concerned is and what the subject of the report is; (c) the conduct of the person concerned prior to the publication of the article; (d) the method of obtaining the information and its veracity; (e) the content, form and consequences of the information; and (f) the severity of the sanction imposed. While there was no discussion that the TV broadcast and the article reported on an issue of public interest and that it concerned Z.P. acting in her function of assistant minister for health, the ECtHR disagreed with the findings of the domestic courts on the method of reporting by B92: the ECtHR found that the reporting by B92 did not go beyond the limits of responsible journalism. It reiterated that even though internal official reports can be an important source for journalists, they cannot release them completely from their obligation to base their publications on sufficient research. But it found that by attempting to obtain Z.P.'s and the Ministry's version of events and by publishing the response of the Special Prosecutor's Office, B92 had sought to achieve a balance in its reporting, in compliance with its duty of diligence in verifying the authenticity and content of the police note. The ECtHR observed that the domestic courts appeared to have failed to take those aspects into account in assessing whether B92 had fulfilled the requirements of "responsible journalism". The ECtHR found that B92 had acted in good faith and with the diligence expected of a responsible journalist reporting on a matter of public interest, also emphasising the vital role of "public watchdog" which the press performs in a democratic society.

Finally the ECtHR referred to the set of measures taken against B92: the company was ordered to pay EUR 1 750 in respect of non-pecuniary damage, and EUR 990 for costs, and it was also ordered to remove the article from its Internet portal and to publish the domestic judgment in question. The ECtHR reiterated its view on the chilling effect that a fear of sanction may have on the exercise of freedom of expression and it found that the sanction and measures imposed were capable of having a dissuasive effect on the exercise of B92's right to freedom of expression. Where fines are concerned, the relatively moderate nature of a sanction does not suffice to negate the risk of a chilling effect on the exercise of the right to freedom of expression. Furthermore, given the high level of protection enjoyed by the press, there need to be exceptional circumstances for a newspaper to be legitimately required to publish, for example, a retraction, an apology or a judgment in a defamation case.

The ECtHR therefore came to the conclusion that the domestic courts had overstepped the narrow margin of appreciation afforded to them in restricting discussion on matters of public interest, by imposing a disproportionate interference that was not necessary in a democratic society within the meaning of Article 10 § 2 ECHR. There has accordingly been a violation of Article 10 ECHR.

European Court of Human Rights, Fourth Section, in the case of Radio Broadcasting Company B92 AD v. Serbia, Application No. 67369/16, 5 September 2023

https://hudoc.echr.coe.int/eng?i=001-226417

EUROPEAN UNION

EMFA: European Parliament adopts its position

Justine Radel-Cormann
European Audiovisual Observatory

Following CULT MEPs' adoption of their European Media Freedom Act (EMFA) report (see IRIS 2023-8:1/9), the EP adopted in plenary its position (negotiating mandate) on the European Commission's proposal for the EMFA on 3 October 2023, with 448 votes in favour, 102 against and 75 abstentions.

The EP's position suggests 295 amendments to the European Commission's proposal, covering the entire proposal.

The EP's position has made both positive and negative waves. Before the summer, a coalition of organisations from the audiovisual and cultural sectors (independent producers, directors, actors, composers, cinema exhibitors, distributors, trade unions and collecting societies) addressed the EU institutions on the content of the EMFA's proposal (see IRIS 2023-7:1/13). For instance, two proposed articles were concerning for the audiovisual sector:

The Article 20 of the proposal requires member states to ensure the measures they take affecting media service providers to be justified and proportionate. According to the coalition, the wording of this Article was too broad, undermining cultural policies and possibly allowing audiovisual media service providers to challenge national measures enforcing audiovisual policies if considered unjustified and non proportionate. In its position, the European Parliament modified the wording of this Article, ensuring that the targeted measures are related to media pluralism and editorial independence. The EP position now reads as "Any legislative, regulatory or administrative measure taken by a Member State that is liable to affect media pluralism and the editorial independence of media service providers regarding either the provision or the operation of their media services in the internal market shall be duly justified and proportionate. Such measures shall be reasoned, transparent, objective and non-discriminatory".

The proposed Article 4 could introduce an exception to the general ban on deploying spyware against journalists, when the national security of a member state is at stake. The EP's position wording implements a stricter framework under which the member states could use spywares when carried out "as last resort" measures (see AM. 114, Art.4(2b)), but does not completely ban the use of spywares, as reported by the European Federation of Journalists in its latest position on the EMFA.

Otherwise, MEPs decided to go further than the Commission regarding media services' editorial responsibility and independence. On editorial responsibility: MEPs' position reflects the need to make it clear for users who bear the editorial responsibility (especially for online content) (see proposed Art. 6(1)(ac) and related Amendment (AM) 129, and proposed Art. 19 and related AMs 235-237). Besides, MEPs' text ensures protection to recognised editors' responsibility for editorial content in the digital world by requiring providers of VLOPs to safeguard media freedom and pluralism when dealing with content moderation and taking any other actions (see proposed Art. 17 and related AMs. 208-228).

On the independence of media services, additional occurrences of the word "independence" have been spread throughout the text, starting with the future Regulation's objective in the proposed Art. 1(1) (AM. 69): the Regulation establishes "common basic principles to serve as minimum standards, while ensuring the independence of media services". Other amendments also corroborate this, for example, the proposed Art. 4(2) (AM 105) "The Union, Member State and private entities shall respect the effective editorial freedom and independence of media service providers", as in the proposed Art. 5(1) (AM 118) providing for Member States to ensure public service media providers a "full autonomy and editorial independence from governmental, political, economic or private vested interests".

The Council of the European Union adopted its negotiating position on 21 June 2023. Now that both the Council and the European Parliament have adopted their positions, the Council, the Commission and the Parliament will negotiate in the upcoming trilogue.

EC Proposal for a Regulation establishing a common framework for media services in the internal market (EMFA)

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A0457%3AFIN

Amendments adopted by the European Parliament on the proposal for a Regulation of the European Parliament and of the Council establishing the EMFA

https://www.europarl.europa.eu/doceo/document/TA-9-2023-0336_EN.html

Council of the EU's mandate for negotiations with the EP on the proposal for a Regulation of the European Parliament and of the Council establishing the EMFA

https://www.consilium.europa.eu/en/press/press-releases/2023/06/21/european-media-freedom-act-council-secures-mandate-for-negotiations/

EFJ's position following the EP's position on EMFA

https://europeanjournalists.org/blog/2023/10/04/emfa-efj-applauds-european-parliaments-vote-for-strengthened-regulation-deplores-conditional-use-of-spyware/

CJEU judgment dismisses Valve Corporation's action against the European Commission regarding the geo-blocking of certain video games on Steam

Eric Munch
European Audiovisual Observatory

On 27 September 2023, the Court of Justice of the European Union delivered its judgment in Case T-172/21, *Valve Corporation v. Commission*.

An action had been brought before the General Court of the European Union by Valve Corporation ("Valve"), seeking the annulment of a decision of the European Commission regarding the geo-blocking of certain PC video games on the platform Steam, a video game digital distribution service and storefront developed by Valve. Acting on the basis of information it had received, the European Commission found that Valve and five games publishers (Bandai, Capcom, Focus Home, Koch Media and ZeniMax) had infringed EU competition law by participating in a group of anti-competitive agreements or concerted practices which were intended to restrict cross-border sales of certain PC video games by putting in place territorial control functionalities between 2010 and 2015, in particular in the Baltic countries and certain countries in Central and Eastern Europe. To seek the annulment of the decision, Valve argued that the Commission had failed to take into consideration the economic argument of passive sales being harmful to the proper functioning of competition, reducing output and increasing prices, to the detriment of consumers. Valve also argued that the Commission had failed to take into account the digital nature of the goods and services affected, making them fundamentally different from tangible goods. Both arguments sought to demonstrate the existence of reasonable doubt as to the allegedly sufficient degree of harm to competition caused by the agreements or concerted practices and their anti-competitive object.

In its judgment, the General Court dismissed the action, finding that the Commission had established “to the requisite legal standard the existence of an agreement or concerted practice between Valve and each of the five publishers having as its object the restriction of parallel imports through geo-blocking of keys enabling activation and, in certain cases, use of the video games at issue on the Steam platform”, seeking to prevent the video games from being purchased at low prices by distributors or users located in countries where prices are higher. The geo-blocking was found not to pursue an objective of protecting the copyright of the publishers of the video games, but “to eliminate parallel imports of those video games and protect the high royalty amounts collected by the publishers, or the margins earned by Valve”.

Responding to additional arguments made by Valve, the General Court also ruled on the relationship between EU competition law and copyright, observing that copyright does not guarantee the opportunity to demand the highest possible

remuneration or to engage in conduct likely to lead to artificial price differences between the partitioned national markets.

Valve may bring an appeal before the Court of Justice against the decision of the General Court within the two months and ten days following the notification of the decision.

Judgment of the General Court in Case T-172/21

https://curia.europa.eu/juris/document/document.jsf;jsessionid=44FA0E239242F64957428E54AB77518C?text=&docid=277867&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1377281

DSA: Launch of the European Commission's Transparency Database of content moderation decisions

Eric Munch
European Audiovisual Observatory

Under Article 17 of the Digital Services Act (DSA), providers of hosting services are required to provide users with statements of reasons whenever they remove or restrict access to certain content. Those statements of reasons, containing clear and specific information, are collected in the European Commission's Transparency Database, the creation of which is foreseen by Article 24(5) of the DSA. This makes the Transparency Database the first regulatory repository of publicly accessible content moderation decisions taken by providers of online platforms active in the EU, allowing users to act in a more informed manner on the spread of illegal and harmful content online.

Between 20 June and 18 July 2023, various stakeholders, including online platforms, civil society organisations and researchers, were invited to participate in a public consultation regarding the transparency database, its implementation, level of granularity, and means of access and of submitting statements.

At this stage, only Very Large Online Platforms (VLOPs) must submit data to the database, as per their compliance with the DSA. They will be joined by all other providers of online platforms – with the exception of micro and small enterprises – starting 17 February 2024.

Users of the Transparency Database can view summary statistics (in beta version at the time of writing), search for specific statements of reasons and download data. The addition of new features such as new analytics and visualisation features are planned to be implemented in the coming months.

Digital Services Act: Commission launches Transparency Database

https://digital-strategy.ec.europa.eu/en/news/digital-services-act-commission-launches-transparency-database

Digital Services Act: Commission launches public consultation transparency database of ocntent moderation decisions

https://digital-strategy.ec.europa.eu/en/news/digital-services-act-commission-launches-public-consultation-transparency-database-content

EU ministers adopt the Cáceres Declaration aimed at promoting culture as an essential public good

Amélie Lacourt
European Audiovisual Observatory

In the framework of the Spanish Presidency of the Council of the EU, the 27 EU Ministers for Culture and the European Commissioner for Innovation, Research, Culture, Education and Youth met up on 25 and 26 September 2023 during the plenary session of the Informal Ministerial Meeting in Cáceres, Spain. The meeting was chaired by Miquel Iceta, the Spanish Minister for Culture and Sport, and focused on the Presidency's priorities in the field of culture.

All ministers endorsed the Cáceres Declaration, reaffirming their commitment to culture. In particular, they undertook to make culture "an essential public good, a global public good, at the highest policy level" and to strengthen the cultural policies of the EU and the member states. In the Declaration, ministers also reflected on the need to recognise culture as a new sustainable development goal, in the context of the revision of the 2030 Agenda.

The Presidency's programme also includes promoting digital cultural creation as a new way of producing and creating culture. At Spain's request, the Council of the EU included the video game industry among the priority creative sectors and on an equal footing with other audiovisual and cultural creations. During the meeting, Miquel Iceta also raised other issues, such as adopting a common European strategy for the video game sector and the status of the artist. These topics will be discussed in subsequent meetings at the Education, Youth, Culture and Sport Council on 23 and 24 November 2023 in Brussels.

Caceres Declaration

https://spanish-presidency.consilium.europa.eu/media/keantfog/c%C3%A1ceres-declaration.pdf

El Consejo de la UE incluye la industria del videojuego en los sectores creativos prioritarios, a petición de España

https://www.culturaydeporte.gob.es/en/actualidad/2022/04/220404-iceta-consejo-ue.html

The EU Council includes the video game industry in the priority creative sectors, at Spain's request

NATIONAL

CYPRUS

[CY] Radio and Television Amending Law allows one legal or natural person to own 100% of a licensee's capital share

Christophoros Christophorou
Council of Europe expert in Media and Elections

An amendment to the Law on Radio and Television Organisations has abolished the 25% ceiling of capital shareholding in a radio or television licensee, allowing a person, legal or natural, to own 100% of a licensee's capital share.

The amendment was introduced with a law proposal by a deputy of the Democratic Party – DIKO (Δημοκρατικό Κόμμα – ΔΗΚΟ) submitted in September 2021. The law proposal, reported in IRIS 2021-10:1/18, was modified and reformulated in May 2023 while the matter was discussed in the competent parliamentary committee and before it was presented to a plenary session of the House of Representatives. It was voted into law on 13 July 2023 and published in the official gazette on 28 July 2023.

The main changes brought by the amending law are as follows:

- The ceiling of capital shareholding, set to 25% in 1998, when the basic law was passed, is abolished. Any person, legal or natural, can now own or control 100% of the vote, directly or indirectly via a company.

- The ceiling of 25% of the capital share held by family members up to the second degree is also abolished and the provision is maintained with a maximum of 100%, which is redundant.

- A third-country citizen or company can own or control up to 10% of the capital share, subject to a decision by the Council of Ministers. The total share for third-country citizens can be up to 25% of the capital share.

- Provisions disallowing cross-media ownership, vertical ownership or shareholding are abolished.

- Instead of cross-media restrictions, the amendment disallows a person, legal or natural, *"to own or control a licence or any number of shares in a licensee which belongs to a media group if that person owns shares or owns or controls a licence or has shares in a licensee belonging to another media group"*.

- The above provision leaves room for cross-media ownership, provided a media licence is not linked to a media group.

- Provisions that set restrictions related to members of governing bodies of licensees, disallowing the presence of the same person or persons in more than one license, have been abolished.

- The change above leaves room for one person or more who does not own or control shares in licenses to be chairpersons or members of more than one media.

- New restrictions are introduced to prohibit granting an AVMS licence to persons that were convicted for specific offences. These include persons:

• linked to money laundering or having income from illegal activities,

• who have dues to the Social Insurance Fund,

• who have dues to the Tax Department (Income or VAT),

• convicted for sexual harassment or harassment.

- Finally, “reasonable suspicion” that the public interest or national security is at risk, leads to refusal of granting a licence. This is not about proof but “reasonable suspicion”.

This significant amendment of the law was brought without any previous study, without any consultation, public or ad hoc and without the participation of all stakeholders. The competent parliamentary committee selectively invited some stakeholders, but no representatives of the consumers, specialised NGOs or any expert.

Ο περί Ραδιοφωνικών και Τηλεοπτικών Οργανισμών (Τροποποιητικός) Νόμος 87(I)/2023, Επίσημη Εφημερίδα, Παράρτημα 1(1), αρ. 4957, 28 Ιουλίου 2023

http://www.cylaw.org/nomoi/arith/2023_1_087.pdf

Law on Radio and Television Organisations (amending), L. 87(I)/2023, Official Gazette, Appendix 1(1), n.4857, 28 July 2023

CZECHIA

[CZ] Recommendations for broadcasters to prepare Action Plans for making television programmes accessible for people with hearing impairments and people with visual impairments

Jan Fučík
Česká televize

The regulatory body, the Council for Radio and Television Broadcasting, has issued a Recommendation to broadcasters and operators of on-demand audiovisual services for the preparation of Action Plans for making television programmes accessible to persons with hearing impairments and persons with visual impairments (hereafter “Action Plans”) for the period from 1 July 2023 to 30 June 2025.

The draft Action Plans must be discussed with organisations associating persons with hearing impairments and persons with visual impairments. The result of negotiations between the operator and the representative organisations should optimally be a mutual agreement on the final form of the Action Plan. If such an agreement is not reached, the Action Plan should contain information on the fact that discussions with the representing organisations took place, but no mutual agreement was found in the context of the Action Plan. In such a case, the Action Plan should contain information on the diverging positions of the representing organisations and of the operator. It should contain the operator's justification as to why the requirements of the representative organisation are not feasible, and, at the same time, a specification of the operator's commitment to make it available.

The accessibility obligations will be formulated in the Action Plan by specifying a percentage of the programmes that will be made accessible. The share of programmes made available will always be calculated on the basis of the total broadcasting time of the programme over a period of one year. This will be the period from 1 July 2023 to 30 June 2024 and the period from 1 July 2024 to 30 June 2025 . The Action Plan should explicitly state details of the means by which these programmes will be made accessible to the hearing and visually impaired. Therefore, it should be explicitly stated that the programmes will be made accessible to people with visual impairments through audio descriptions. Other reasonable measures may also be stated and justified. In the case of accessibility for people with hearing impairments, the Action Plan should state what proportion of the accessible programmes will be accessible through closed captions, open captions, interpretation into Czech sign language or other, explicitly stated and justified, reasonable measures.

Recommendation to full-screen television broadcasters to draw up Action Plans on accessibility of television programmes for persons with hearing impairment and persons with visual impairment

GERMANY

[DE] Federal Film Board publishes updated film support levy report

Katharina Kollmann
Institute of European Media Law

The German *Filmförderungsanstalt* (Federal Film Board – FFA) has published an updated evaluation report on the revenue generated by the FFA film levy. The report describes the film levy system and the amount of revenue it generated between 2012 and 2022, examines the market sectors relevant to the film industry and looks ahead to how current payers of the levy and the market as a whole might develop between now and 2029. Following the decision to extend the German *Filmförderungsgesetz* (Film Support Act – FFG) until the end of 2024, the FFA has now updated the report that was originally published in mid-2022.

The FFA, an institution incorporated under public law, was founded in 1968 and operates on the basis of the FFG. As Germany's national film support agency, it is financed through a film levy paid by cinemas, the video industry and television companies. Article 171(1) FFG requires it to publish an evaluation report on the income generated by the levy in the context of the economic situation of the German film market.

According to the updated report, dated 30 June 2023 and published in August, the film levy generated more revenue in 2015 (EUR 57.2 million) than in any other year during the past decade. Although the figure remained generally stable between 2012 and 2019, averaging EUR 50.5 million, it fell sharply in the following two years and dropped to around EUR 40 million in 2022 as a result of the COVID-19 pandemic. While it was still higher than expected in 2019, in subsequent years it fell significantly short of the forecasts contained in the previous evaluation report.

It is worth noting that the cinema industry recovered well in 2022 following the decline caused by the COVID-19 pandemic. Referring to figures published by the largest German market research institute, GfK, the FFA reports that cinema market revenue increased to EUR 720 million, a 91% jump compared with 2021. This figure was around 30% lower than in 2019, the last year before the pandemic. According to GfK, around 74 million cinema tickets were sold in 2022, 85% more than in 2021 and around 65% of the 2019 figure. The cinema market is expected to continue its recovery from the pandemic-related collapse between 2023 and 2025. Nevertheless, revenue is still predicted to be around 14% lower in 2029 than its 2019 level.

GfK's figures also show that the home video market, which includes both physical image carriers and digital services, generated a record revenue of EUR 3.108 million in 2022. It therefore grew by 84% during the period covered by the report

(2012 to 2022). Closer inspection shows that the physical home video market began to shrink after 2013, a trend that continued in 2022. Meanwhile, the accelerating spread of new digital video formats means that the market as a whole is growing, with digital services in particular, especially Subscription-Video-on-Demand (SVoD), expected to become increasingly popular in the period until 2029. Physical video sales and rental, on the other hand, will account for less than 5% of home video revenue in 2029, with the rental market possibly disappearing altogether .

Last but not least, it is also notable that, in the context of the digital home video market, Ad-Supported Video-on-Demand (AVoD) is one of the fastest growing segments of the German advertising market. AVoD is mainly used by two groups of providers: German marketing companies and international platforms such as YouTube. In 2022, most net revenue within the German AVoD market – around 70% – was generated by international (social) video platforms, with YouTube alone accounting for around 40%.

Evaluierungsbericht zur Entwicklung des Abgabeaufkommens vor dem Hintergrund der wirtschaftlichen Situation des Filmmarktes in Deutschland

https://www.ffa.de/files/dokumentenverwaltung/studien%20mafo%20%28bearbeitet%20HS%29/2023/Evaluierungsbericht%20Abgabeaufkommen%20FFA_2023.pdf

Evaluation report on the development of revenue generated by the film levy in the context of the economic situation of the German film market

Aktualisierter Evaluierungsbericht zur Entwicklung des FFA-Abgabeaufkommens veröffentlicht, Pressemitteilung vom 17. August 2023

https://www.ffa.de/pressemitteilungen-detailseite/aktualisierter_evaluierungsbericht-zur-entwicklung-des-ffa-abgabeaufkommens-veroeffentlicht.html

Publication of updated evaluation report on the development of income generated by the FFA film levy, press release of 17 August 2023

[DE] Minden Administrative Court rules on YouTube blogger's right to press freedom

Katharina Kollmann
Institute of European Media Law

In a ruling issued in summary proceedings on 16 August 2023, the *Verwaltungsgericht Minden* (Minden Administrative Court – VG) decided that a YouTube blogger who wishes to report on a court case concerning himself is entitled to protection under the freedom of the press. The court also allowed him to take the equipment that he needed to produce reports into the court building.

The decision concerned a court procedure involving the YouTube blogger at the *Landgericht Bielefeld* (Bielefeld District Court – LG), which he wanted to report on via his YouTube channel. To do this, he intended to take two smartphones, two tripods and a laptop into the courtroom in order to make recordings before and after the hearing, as well as during breaks in the proceedings. However, the LG refused to grant him permission to take photographs and make video recordings inside the court building. The blogger assumed that this, along with a ban on cameras mentioned on the court's website, meant that he would not be allowed to take his equipment with him into the courtroom. He asked the VG to overturn this decision in summary proceedings.

The Minden VG ruled that the YouTube blogger's right to report on the case was directly derived from Article 5(1) sentence 2 of the *Grundgesetz* (Basic Law – GG), which guaranteed freedom of the press. Article 5(1) sentence 2 GG was worded in such a way that it applied to all media rather than just the press, broadcasts and films. The provision therefore covered not only media that had already been known about when the GG was drawn up, but also every new format that had emerged since that time, including digital mass communication. All new media that were neither broadcasts nor films enjoyed the same protection as the press. This applied not only to digital versions of traditional newspapers (online newspapers), but also to other web-based news offerings, such as blogs or video platforms including YouTube. The wording of the rule was therefore "open to development".

However, to be protected under press freedoms, information needed to be shared in a structured way. Comments posted in a chat room, for example, did not fall under freedom of the press, but under freedom of expression. The need for structure was nonetheless met by a YouTube blogger.

A YouTube blogger could be treated as a member of the press even if he/she did not hold a press pass. Protection under freedom of the press was not dependent on possession of a press pass.

Finally, the LG should not have prohibited the YouTube blogger from taking recording devices into the courtroom. Members of the press should be allowed to bring the equipment they need for their reporting into a court building. Under

freedom of the press, unimpeded research and other press-specific methods of obtaining information, including taking photographs and video recordings, were protected. Furthermore, a member of the press could not simply be told that he/she could only film outside a court building or produce written reports about a case.

The district court president's claim that the press were not allowed to report on their own cases was also refuted. A member of the press who intended to report on a court case in which he/she himself/herself was a party was not excluded from press freedoms. Rather, the press should be able to decide what to report on. This was part of the freedom of press publications enshrined in Article 5(1) sentence 2 GG, under which the press were free to determine what to report on and which articles to publish. The press code did not prohibit the press from reporting on their own court cases.

Last, but not least, the Bielefeld LG had argued that a press article should only be published if it was in the public interest, which it had claimed was not the case here. However, the VG ruled that the existence (or otherwise) of such public interest was legally irrelevant.

Verwaltungsgericht Minden, 1 L 729/23, 16. August 2023

http://www.justiz.nrw.de/nrwe/ovgs/vg_minden/j2023/1_L_729_23_Beschluss_20230816.html

Minden Administrative Court, 1 L 729/23, 16 August 2023

[DE] VAUNET market analysis reports continued growth of pay-TV and paid video content in Germany

Katharina Kollmann
Institute of European Media Law

On 31 August 2023, VAUNET, the umbrella organisation of private audio and audiovisual media companies in Germany, published its annual report, “Pay-TV and Paid-VoD in Germany” for 2022/2023.

The report states that overall revenues for pay-TV and paid video-on-demand (VOD) in Germany rose by around 5% to EUR 4.9 billion in 2022. VAUNET predicts that they will grow by a further 8% to EUR 5.3 billion in 2023, breaking the EUR 5 billion barrier for the first time. In the German-speaking region (Germany, Austria and German-speaking Switzerland), revenue increased by approximately 4% to EUR 5.8 billion in 2022 and is expected to exceed EUR 6 billion for the first time in 2023 (EUR 6.3 billion).

VAUNET puts this growth down to the diversity of programming in Germany and strong demand for pay-TV and Subscription-Video-on-Demand (SVoD). The number of pay-TV subscriptions in Germany rose slightly from 9.6 million in 2021 to 10.1 million in 2022. In 2023, VAUNET anticipates that it will increase again to approximately 10.3 million. Meanwhile, the number of SVoD subscribers rose from 19.2 million in 2021 to 19.8 million in 2022, with VAUNET predicting a further increase to around 20.8 million in 2023.

Pay-TV channels achieved a monthly average reach of 17.7 million viewers in 2022, slightly fewer than in 2021 (17.9 million). In the first half of 2023, they reached an average of 17 million viewers per month (17.8 million in the first half of 2022).

Pay-TV’s average audience share among viewers aged 3 and over was 3.3% in 2022, compared with 3.2% the year before. It reached 3.5% in the first half of 2023 (3.2% in the first half of 2022).

VAUNET predicts further market growth over the next few years, although this will largely depend on the regulatory landscape. It believes that additional burdens such as government-induced investment obligations are weakening market dynamics, while incentive models could provide positive momentum.

VAUNET-Publikation „Pay-TV und Paid-VoD in Deutschland“ für 2022/2023

https://vau.net/wp-content/uploads/2023/08/VAUNET-PUBLIKATION_Pay-TV-und-Paid-VOD-in-Deutschland-2023.pdf

VAUNET publication, "Pay-TV and Paid-VoD in Germany" for 2022/2023

VAUNET-Pressemitteilung vom 31. August 2023

https://vau.net/pressemeldungen/umsaetze-von-pay-tv-und-bezahlten-videoinhalten-in-deutschland-sind-2022-weitergewachsen/

VAUNET press release, 31 August 2023

SPAIN

[ES] The Spanish Government launches a consultation to promote the digital transformation of news media outlets

Azahara Cañedo & Marta Rodriguez Castro

The Spanish Ministry of Economic Affairs and Digital Transformation has launched a consultation targeted at media outlets with the objective of identifying their needs in addressing their digital transformation and advancing cybersecurity issues. This will be achieved primarily by fostering a more secure relationship with consumers through digital platforms.

The main topics media outlets are invited to comment on are the type of organisations that are part of the media sector (press and digital media, according to their activity, size and geographical distribution), the digital technologies they are implementing and those that they would like to introduce, their levels of cybersecurity, their investment in R&D aimed at the development of AI applications and the opportunities for public-private collaborations.

Despite the levels of digitisation achieved in the media sector, it has been identified that media organisations are not accessing the same levels of support as other strategic sectors. Thus, the government is designing specific lines of aid for the media sector, that would allow it to evolve and therefore enhance its contribution to a healthy democracy. The answers received through this public consultation will shape these lines of aid and will help establish the most suitable financial and collaboration instruments for the sector.

This initiative is part of the strategy "*Agenda España Digital* 2026", funded through the Recovery Plan for Europe, and is in line with the European Commission's "Annual Sustainable Growth Strategy 2021". It is also linked with the Spanish PERTE (Strategic Project for Economic Recovery and Transformation) on the New Language Economy , that aims at promoting Spanish and the co-official languages (Galician, Basque, and Catalan) as a factor of economic growth and competitiveness.

Expression of Interest for the Digitalization and Cybersecurity of the Media, Print and Digital Press Sector

FRANCE

[FR] Audiovisual production investment obligations: first cross-industry agreement with Netflix

Amélie Blocman
Légipresse

On 14 September, Netflix and the professional organisations representing the audiovisual creation sector (USPA, SPI, AnimFrance, SATEV, SEDPA, SACD and SCAM) announced that they had signed a partnership agreement as part of the investment obligations laid down in the so-called SMAD (On-demand Audiovisual Media Services) Decree of 20 June 2021. The decree, which brought the EU's Audiovisual Media Services Directive into French law, sets out in detail the obligations for foreign on-demand video platforms that target French audiences to help fund cinematographic and audiovisual production.

The parties agreed that Netflix should devote 100% of its compulsory contribution to audiovisual production to so-called patrimonial works (fiction, animation, documentaries, live entertainment, music videos) from 2023 onwards. The platform will also increase its level of investment in French-language works to 85%, and in independent works to 68%, by 2026. Finally, Netflix will double its diversity quota to 10% in audiovisual works, including 5% in documentaries and 5% in animation. This agreement has an initial four-year term until 31 December 2026 and is set to be included in the agreement between Netflix and the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM).

When the agreement between Netflix and ARCOM, along with those signed with Amazon for Amazon Prime Video and Disney for Disney+, was formalised in December 2021, the regulator had expressed a wish for these texts to be supplemented by cross-industry agreements. This has now been achieved for Amazon Prime Video and Netflix, which are thereby committing to invest even more in documentaries, animation and French-language productions. Meanwhile, ARCOM is confident that negotiations between the professional organisations and Disney+ will soon be concluded.

Arcom, Communiqué du 14 septembre 2023

https://www.arcom.fr/sites/default/files/2023-09/Communiqu%C3%A9%20de%20presse%20-%20%20L%E2%80%99Arcom%20salue%20la%20signature%20d%E2%80%99un%20accord%20entre%20Netflix%20et%20les%20organisations%20professionnelles%20du%20secteur%20de%20la%20cr%C3%A9ation%20audiovisuelle.pdf

ARCOM, press release of 14 September 2023

[FR] Initiatives to regulate AI in relation to audiovisual communication and copyright

Amélie Blocman
Légipresse

A few days after the French Prime Minister had announced, on 19 September, the creation of a committee on generative artificial intelligence (AI) comprising a group of experts who will analyse the impact of AI on culture, the *Autorité de régulation de la communication audiovisuelle et numérique* (the French audiovisual regulator – ARCOM) launched a fact-finding mission that will examine the role of AI in audiovisual and digital communication, while a bill designed to regulate artificial intelligence through copyright was tabled in the French Parliament.

AI technologies are central to the activities of stakeholders regulated by ARCOM, whether in terms of content recommendation algorithms or automatic social network moderation, for example. However, the unprecedented opportunities created by the growth of generative AI have given rise to a host of new questions relating to copyright, the preservation of cultural diversity and the reliability of information. In order to understand and anticipate the challenges posed by these technologies in greater detail, the regulator has decided to formalise its work in this area. It has therefore launched a fact-finding mission that will see all ARCOM board members and departments engage in dialogue with sector stakeholders and other public bodies with an interest in these matters. It will also take into account the ongoing discussions at European level, especially in relation to the AI Act.

Meanwhile, on 12 September, several MPs from the parliamentary majority (Renaissance party) tabled a bill designed to regulate artificial intelligence through copyright. Containing four articles, the bill proposes firstly to add the following paragraph to Article L. 131-3 of the French Intellectual Property Code (CPI): “The integration by artificial intelligence software of copyright-protected intellectual works and their subsequent exploitation are governed by the general provisions of this code and therefore subject to the authorisation of the authors or rightsholders.” The second article states that “when the work is created by artificial intelligence without direct human intervention, the only rightsholders are the authors or rightsholders who authorised the creation of the said AI-generated work”. The MPs also proposed that works generated by an artificial intelligence system should be labelled as “AI-generated works” and include the names of the authors whose works contributed to them (addition to Article L. 121-2 of the CPI).

Finally, the bill states that, in order to promote creativity, intellectual works created by an artificial intelligence system from works of uncertain origin should be subject to a taxation system benefiting the collective management organisation. The tax would be paid by the company that used the artificial intelligence system to generate the so-called “artificial work”.

Assemblée nationale, Proposition de loi n°1630 visant à encadrer l'intelligence artificielle par le droit d'auteur

https://www.assemblee-nationale.fr/dyn/16/textes/l16b1630_proposition-loi#:~:text=%C2%AB%20Lorsque%20l'%C5%93uvre%20est%20cr%C3%A9%C3%A9e,de%20concevoir%20ladite%20%C5%93uvre%20artificielle.

National Assembly, Bill No. 1630 regulating artificial intelligence through copyright

UNITED KINGDOM

[GB] Data protection regulator adopts a preliminary enforcement notice against Snap regarding the privacy risks posed by AI chatbot "My AI"

Eric Munch
European Audiovisual Observatory

On 6 October 2023, the Information Commissioner's Office (ICO), the UK's data protection regulator, issued a preliminary enforcement notice against Snap Inc. and Snap Group Limited over "a potential failure to assess the privacy risks posed by its generative AI chatbot 'My AI.'" The ICO's investigation provisionally found that Snap "failed to adequately identify and assess the risks to several million 'My AI' users in the UK," including children between the ages of 13 and 17.

This preliminary enforcement notice follows the publication on 15 June 2023 of a reminder to businesses to address the privacy risks posed by generative AI before adopting this technology. Prior to that, on 3 April 2023, the ICO had published a series of 8 questions organisations developing or using AI should consider with regards to the processing of personal data, ranging from the lawfulness of the data processing to transparency, security risk mitigation, individual requests for information and the intention to rely on AI to make automated decisions.

Initially launched in February 2023 for Snapchat+ subscribers in the UK, the chatbot feature was made available to all UK users in April 2023. Using OpenAI's GPT technology, 'My AI' is the first example of a generative AI being directly embedded into a major messaging platform in the UK.

The preliminary notice outlines the steps which the ICO may require depending on Snap's actions. In the event that a final enforcement notice were adopted, Snap may be required to stop processing data in connection with 'My AI.' Leading to the adoption of the preliminary notice was the ICO's finding that Snap "did not adequately assess the data protection risk posed by the generative AI technology, particularly to children." While John Edwards, the ICO's Information Commissioner, said that the investigation suggested "a worrying failure," it must be noted that the findings are provisional and that no breach of data protection law has been observed. The final decision by the ICO will be taken after careful consideration of Snap's response.

UK Information Commissioner issues preliminary enforcement notice against Snap

https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/10/uk-information-commissioner-issues-preliminary-enforcement-notice-against-snap/#:~:text=The%20Information%20Commissioner's%20Office%20(ICO,AI%20chatbot%20'My%20AI'.

Don't be blind to AI risks in rush to see opportunity - ICO reviewing key businesses' use of generative AI

https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/06/don-t-be-blind-to-ai-risks-in-rush-to-see-opportunity/

Generative AI: eight questions that developers and users need to ask

https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/04/generative-ai-eight-questions-that-developers-and-users-need-to-ask/

[GB] The UK's Online Safety Bill moves forward on path to becoming law

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University of Essex

On 19 September 2023, the UK's long-debated Online Safety Bill (OSB) received Parliamentary approval and will soon achieve Royal Assent, clearing the way for it to become law. This new legislation represents a seminal milestone in digital and technological policy formulation in the UK's post-Brexit era. It will introduce a new regulatory regime for online platforms and search engines which target the UK, imposing a set of obligations on in-scope services with consequences for non-compliance.

Main objectives

The Bill, which has become the subject of intense discussion and scrutiny, has five policy objectives: (a) to increase user safety online; (b) to preserve and enhance freedom of speech online; (c) to improve law enforcement's ability to tackle illegal content online; (d) to improve users' ability to keep themselves safe online; and (e) to improve society's understanding of the harm landscape.

Some key provisions

The OSB has had a long and contentious journey through Parliament since its initial publication in March 2022. Having cleared its final parliamentary hurdle on 19 September 2023, it is (at the time of writing) awaiting Royal Assent and will soon enter the statute books as the Online Safety Act 2023 (OSA).

The OSA introduces several provisions that will shape the online landscape in the UK. At its core, this landmark legislation puts an independent regulator (Ofcom, more below) in charge of overseeing a rigorous risk management framework for all social media platforms, with bigger or riskier companies having greater accountability. It requires companies to understand the risks inherent in the design and functionality of their service and mitigate the most serious.

The Act places duties on user-to-user services and search services, thus covering a wide range of services, including social media companies, search engines, forums, gaming services, chat services, dating apps, and messaging services. In addition, the new legislation includes new rules for pornography providers that apply beyond social media and search (i.e., to 'internet services' that publish or display "regulated provider pornographic content"), requiring that children in the UK must not normally be able to encounter such content online through measures like age verification.

Thus, businesses of different types and sizes will therefore be required to comply with the OSA. Any service that targets UK users will be caught, so international services with a relatively modest UK user base will still need to comply. However,

certain services are excluded from the Act's scope. This includes e-mail services, texts, internal business services, and services whose only user-to-user interaction is via "below-the-line" content (e.g., comment sections). Broadcast and print media, already regulated or self-regulated, also enjoy a carve-out.

More specifically, the OSA requires in-scope service providers to take proportionate measures to prevent users from encountering "priority" illegal content (such as terrorism and child sexual abuse), minimise the length of time such content is present and promptly remove any illegal content when alerted to it.

To safeguard children online, the OSA imposes stricter obligations on certain services to prevent minors from seeing the 'highest risk' forms of content, such as content that encourages, promotes, or provides instructions for suicide, self-harm and eating disorders. Age verification and age estimation measures must be highly effective in preventing children from accessing pornographic content. The new law also grants greater powers for coroners to access children's data on behalf of bereaved parents, should a tragedy occur.

Moreover, regulated service providers are required to prevent users from encountering fraudulent adverts. Stricter user empowerment provisions have been added to enable adult users of the largest or riskiest platforms to avoid content they do not want to see (including from anonymous accounts, abusive or misogynistic content, etc). The Act also introduces greater protections for women and girls disproportionately affected by online harms, through dedicated Ofcom guidance to services.

Additionally, the OSA requires service providers to allow users to report illegal content easily and maintain transparent complaint procedures. This ensures that users can voice their concerns, including issues related to content takedowns.

The OSA also explicitly emphasises the importance of freedom of expression and privacy laws when implementing online safety measures, aiming to strike a balance between safety and individual rights.

Finally, the Act creates new criminal offences, including the offences of false communications, threatening communications, sending or showing flashing images electronically ("epilepsy trolling"), sending images of genitals ("cyber-flashing"), and sharing intimate images online, including DeepFake pornography.

Ofcom, the online safety regulator

The UK's communications regulator, Ofcom, is appointed as the regulator responsible for online safety under the OSA. Ofcom will play a pivotal role in ensuring the success of the legislation and has been tasked with developing Codes of Practice that will flesh out detail on how regulated services can comply with their duties once the Act is in force. Of note, although alternative approaches can be taken by in-scope services, the Codes are expected to offer the clearest approach to compliance. Ofcom has clarified that requirements will vary for

different types of service, and the duties imposed on service providers will be limited to what is proportionate and technically feasible.

Non-compliance with the OSA carries significant consequences. In-scope services that fail to meet their duties could face fines of up to £18 million or 10% of their global annual revenue, whichever is higher. Additionally, senior executives and managers could be held personally criminally liable for specified offences (e.g., failure to comply with children's safety duties, where it is attributable to any neglect on the part of an officer of the regulated entity).

Continuing controversies

Two aspects of the OSA have raised concerns: age verification and end-to-end encryption. The OSA mandates certain businesses to verify the age of online visitors using age verification or estimation software. Critics argue that such systems are unreliable and pose privacy threats. In addition, the OSA's requirements for scanning proactively private messages for illegal content have raised some concerns (particularly by tech companies like WhatsApp and Signal) about the potential erosion of end-to-end encryption. The government has sought to clarify that:

"There is no intention by the Government to weaken the encryption technology used by platforms. As a last resort, on a case-by-case basis, and only when stringent privacy safeguards have been met, Ofcom will have the power to direct companies to make the best efforts to develop or source technology to identify and remove illegal child sexual abuse content. We know that this technology can be developed. Before it can be required by Ofcom, such technology must meet minimum standards of accuracy. If appropriate technology does not exist that meets these requirements, Ofcom cannot require its use. That is why the powers include the ability for Ofcom to require companies to make best endeavours to develop or source a new solution."

The road ahead and the current VSP framework

The OSA represents a significant shift in regulating online safety in the UK. It marks a move from an era of self-regulation, where service providers decide what amounts to safe design and whether to enforce their terms of service, to regulation under which services are accountable for their choices.

The road ahead is likely to involve consultations, feedback collection, and potential adjustments to ensure that the OSA effectively fulfils its intended purpose. Ofcom will adopt a phased approach to the Act's implementation, with phase one (shortly after the Act's commencement) focusing on illegal content duties, phase two on child safety duties and pornography, and phase three on transparency, user empowerment and other duties on categorised services.

Finally, it should be noted that the existing Video-Sharing Platforms (VSP) regime will remain in force for a transitional period, meaning that all pre-existing, UK-established VSPs will remain subject to the obligations in Part 4B of the Communications Act 2003 until it is repealed through future secondary legislation

(see further IRIS 2023-6:1/25). Given the two regimes' shared objective to improve user safety by requiring services to protect users through the adoption of appropriate systems and processes, Ofcom considers that compliance with the VSP regime will assist services in preparing for compliance with the forthcoming online safety regime set out in the OSB.

How Ofcom is preparing to regulate online safety (Ofcom, 15 June 2023)

https://www.ofcom.org.uk/online-safety/information-for-industry/roadmap-to-regulation/0623-update

House of Commons, Online Safety Bill (Hansard, Vol 737, Col 804, 12 September 2023)

https://hansard.parliament.uk/commons/2023-09-12/debates/81853BB7-375E-45C0-8C9D-4169AC36DD12/OnlineSafetyBill#contribution-1BDC6830-E3DB-45BD-B048-393063DB4D32

It's (nearly) here: a short guide to the Online Safety Act (CUKT, 19 September 2023)

https://carnegieuktrust.org.uk/blog-posts/its-nearly-here-a-short-guide-to-the-online-safety-act/

ITALY

[IT] AGCOM appointed as Italian Digital Services Coordinator

Francesco Di Giorgi
Autorità per le garanzie nelle comunicazioni (AGCOM)

In accordance with Article 49, paragraph 2, of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on digital services (DSA), the Italian legislator has designed the Italian Communications Regulatory (Agcom) as Digital Services Coordinator (Article 15 of the law decree of 15 September 2023, n. 123 entitled "*Urgent measures to combat youth hardship, educational poverty and juvenile crime, as well as for the safety of minors in the digital environment*").

Agcom has to guarantee the effectiveness of the rights and the obligations established by the DSA by supervising the achievement of the expected objectives. Especially regarding the protection of minors from pornographic content available online, as well as other illegal or otherwise prohibited content, conveyed by online platforms or other intermediary service providers, and contribute to achieving a safe digital environment.

It is also provided that the Competition and Market Authority, the Personal Data Protection Authority and any other national authority, within the scope of their respective competencies, ensure all necessary collaboration with the Digital Services Coordinator. To guarantee the aforementioned objectives, these Authorities can regulate the application and procedural aspects of mutual collaboration with memoranda of understanding.

AGCOM has to detail conditions, procedures and operating methods for exercising the powers and functions it holds as Coordinator of Digital Services, pursuant to the DSA. And carry out related tasks in an impartial, transparent and timely manner.

To achieve the new tasks effectively, it is provided that, in case of violation of the obligations set out in articles 9, 14, 15, 23, 24, 26, 27, 28, 30, 45, 46, 47 and 48 of the DSA - Agcom, in the exercise of the powers referred in the combined provisions of articles 51 and 52 of the DSA, imposes, based on principles of proportionality, adequacy and respect for adversarial proceedings. According to the procedures established with its monetary regulation, administrative sanctions up to a maximum of 6% of the annual worldwide turnover in the financial year, prior to the infringement notice, to the provider of an intermediary service falling within its sphere of competence, as Digital Services Coordinator, pursuant to national and European law applicable to the offence.

In case of inaccurate, incomplete or misleading information, failure to respond or rectification of inaccurate, incomplete or misleading information and failure to comply with the obligation to undergo an inspection, AGCOM imposes a pecuniary administrative sanction up to a maximum of 1% of the worldwide turnover achieved in the previous financial year.

The maximum daily amount of late payment penalties that AGCOM can apply is equal to 5% of the average global daily turnover of the supplier of an intermediary service achieved in the previous financial year, calculated starting from the date specified in the decision.

To apply the fine, the Authority considers the seriousness of the fact and the consequences resulting from it, as well as the duration and possible recurrence of the violations.

Lastly, the expansion of AGCOM's organic structure and the corresponding costs are expected. They represent a contribution equal to 0.135 per thousand of the turnover resulting from the latest balance sheet approved by the providers of intermediary services established in Italy, as defined by the DSA Regulation. AGCOM will have to identify, with the collaboration of ISTAT and the Revenue Agency, the list of parties required to pay the tax contribution.

DECREE-LAW No. 123 of 15 September 2023 'Urgent measures to combat youth discomfort, educational poverty and juvenile crime, as well as for the safety of minors in the digital environment'.

[IT] New provisions to increase the safety of minors in the digital sector

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Autorità per le garanzie nelle comunicazioni (AGCOM)

New measures to protect minors in the digital sphere have been introduced by Italian legislative decree No. 123 of 15 September 2023, entitled "Urgent measures to combat youth hardship, educational poverty and juvenile crime, as well as for the safety of minors in the digital sphere".

In particular, in order to guarantee a safer digital environment for minors, Article 13 provides for new measures aimed at the manufacturers of electronic communication devices (smartphones, computers, tablets and, where compatible, video game consoles, and other possible connected objects such as televisions, watches, voice assistants, home automation and the Internet of Things).

The measures at hand, to be fully implemented within one year from the entry into force of the decree, impose on all operating systems of the devices concerned the obligation to make available parental control applications (i.e. elements external to electronic communication devices, networks, applications or software for electronic communication devices, easily understandable and accessible to users, and allowing parental controls).

Furthermore, it is envisaged that suppliers of electronic communication services must ensure, free of charge, the availability of parental control applications within the scope of supply contracts in electronic communications services governed by the electronic communications code.

Likewise, device manufacturers, also through distributors operating in Italy, have the obligation to inform users about the possibility and importance of installing parental control applications. The supervisory power over these obligations is attributed to the Communications Authority, AGCOM, which must prepare, by 31 January each year, a report on the impact of the implementation of the measures described above with particular reference to the use of the parental control applications.

The other crucial innovation is the new provisions relating to digital and media literacy for the protection of minors and information campaigns. In this context, four actions are envisaged:

- The first action provides that the Department for Family Policies at the Presidency of the Council of Ministers must promote studies and develop guidelines for users of electronic communication devices and parental control applications, with particular attention to educators, families and the minors themselves.

- Furthermore, it is established that Family Centres have the obligation to offer advice and services regarding the media and digital literacy of minors, by paying specific attention to their protection from exposure to pornographic and violent content.

- The third action concerns the launch of annual training campaigns on the conscious use of the Internet and the associated risks, in particular on the means of preventing access to potentially harmful content for the harmonious development of minors by the Presidency of the Council of Ministers and the Ministry for Business and Made in Italy (MIMIT).

- The last action concerns the obligation on the part of the political authority with responsibility for family policies to report to the parliament by 31 May of each year on the status of the implementation of this law.

DECRETO-LEGGE 15 settembre 2023, n. 123 "Misure urgenti di contrasto al disagio giovanile, alla poverta' educativa e alla criminalita' minorile, nonche' per la sicurezza dei minori in ambito digitale."

https://www.gazzettaufficiale.it/eli/id/2023/09/15/23G00135/sg

DECREE-LAW No. 123 of 15 September 2023 "Urgent measures to combat youth hardship, educational poverty and juvenile crime, as well as for the safety of minors in the digital environment"

MOLDOVA

[MD] Audiovisual Code amended again

Andrei Richter
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On 31 July 2023, the Moldovan Parliament adopted a new set of amendments to the Audiovisual Media Services Code (the Code) designed to counter Russian propaganda. The amendments, at least in part, were put forward in response to the criticism by the Venice Commission that the sanctions for violations of the provisions foreseen by the 2022 amendments to the Code (see IRIS 2022-7:1/3) were problematic, as the formula on the "gradual application" of sanctions was found to be "too vague" and did not "provide sufficient guarantees against the risk of misuse or extensive interpretation of the provision".

The Code was amended to clarify that the national media regulator, the Audiovisual Council (CA), may first "suspend the broadcast license for a period of up to seven days, or, as applicable, [...] deprive the broadcaster of the right to use the national coverage multiplex – for media service providers who, after being penalized, repeatedly broadcast content qualified as disinformation" (Article 11 amending Article 84 of the Code).

It also revoked the right of the public broadcaster of the Gagauz special region in Moldova, the *Gagauziya Radio Televizionu* (GRT) Company, to use a slot in the free multiplex with national coverage. This involves a retroactive application of the law, as in 2023, the CA granted GRT this right for a period of nine years.

The amendments also redefined disinformation from "intentional dissemination of false information, created with the aim of inflicting harm on a person, a social group, an organisation or the security of the state" to "intentional dissemination, by any means, in the public space, of information whose false or misleading nature can be verified and which is likely to harm national security" (the Code includes a total ban on "disinformation and propaganda about the military aggression").

P entru modificarea Codului serviciilor media audiovizuale al Republicii Moldova nr. 174/2018, publicat în Monitorul Oficial Nr. 306-309 art. 555

https://www.legis.md/cautare/getResults?doc_id=138540&lang=ro

Statute No. 248 of 31 July 2023 on the amendments to the Audiovisual Media Services Code of the Republic of Moldova No. 174/2018, published in Monitorul Oficial No. 306-309 Article 555

Opinion on Amendments to the Audiovisual Media Services Code and to Some Normative Acts Including the Ban on Symbols Associated with and

Used in Military Aggression Actions, Adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022), paragraphs 82, 103

https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)026-e

[MD] Statute on StratCom enforced

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Following the recent introduction by the President of Moldova, Maia Sandu, of a draft statute to establish an institution that would counter propaganda harmful to the Republic of Moldova and defend its citizens from information threats (see IRIS 2023-7:1/18), the statute on the proposed institution – the Centre for Strategic Communication and Combating Disinformation – was adopted by the parliament on 31 July and came into force on 18 August 2023.

The national StratCom, still to be established, is to be named the Centre for Strategic Communication and Combating Disinformation. It will be empowered by the statute to do the following:

a) elaborate and develop a cooperation and coordination model between public authorities and institutions for the achievement of strategic communication, as well as managing and supporting the implementation of that model;

b) elaborate, develop and coordinate mechanisms for the dissemination of national narratives and communication guidelines, including for the purpose of strengthening the security of the information space;

c) recommend and coordinate the development and implementation of communication strategies and campaigns;

d) elaborate and develop a centralised capacity for monitoring and analysing the information space, including regarding “information manipulation actions and foreign interference” (hereafter referred to as “alien actions”);

e) elaborate and develop inter-institutional cooperation mechanisms to identify, prevent and counter alien actions and to strengthen the resilience of state institutions and society;

f) recommend to national and international public authorities and institutions, media institutions, social network companies and platforms that they take steps to eliminate the causes and conditions that contribute to disinformation and alien actions that threaten national security;

g) establish and develop cooperation on this with social network companies and content-sharing platforms;

h) provide training and develop other measures to strengthen the state's capabilities for strategic communication and countering alien actions;

i) provide support in the process of strategic communication in crisis situations;

j) elaborate and develop cooperation mechanisms between the authorities and public institutions, civil society and media institutions in order to strengthen their capacities and counter alien actions;

k) develop international cooperation and represent Moldova in bilateral and multilateral formats in the field;

l) elaborate, implement and adjust instructions, guidelines, methodologies and procedures in order to coordinate and plan strategic communication processes and to prevent, identify and counter alien actions.

The Centre's functions are quite vague and fail to focus on analytical and consultative work for the authorities. The statute also fails to identify the aims of possible or actual "information manipulation actions and foreign interference" or the source of such activity – i.e. the aggressor state.

Even though the statute is designed to follow EU policies, the new Centre does not seem to fit well into the existing system of StratComs and/or focus on European cooperation and integration in this regard, nor does it note the relevant activities of the European institutions. It has failed to follow the definitions provided by European law and uses terms that have been found problematic by the European institutions, such as "impeccable reputation" in defining the qualities of the candidates to lead the Centre. Still, at least partially, the Centre's activity is to be financed by foreign "cooperation and development partners, including through external financial assistance programmes".

Privind Centrul pentru Comunicare Strategică și Combatere a Dezinformării și privind modificarea unor acte normative; publicat în Monitorul Oficial Nr. 318-321 art. 566

https://www.legis.md/cautare/getResults?doc_id=138661&lang=ro

Statute No. 242 of 31 July 2023 regarding the Center for Strategic Communication and Combating Disinformation and regarding the modification of some normative acts; published in in Monitorul Oficial No. 318-321 art. 566

NETHERLANDS

[NL] Competition Authority investigation into KPN acquisition of telecom provider Youfone

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On 14 September 2023, the *Autoriteit Consument en Markt* (the Netherlands Authority for Consumer and Markets) (ACM) issued a notable decision that the Dutch telecom provider KPN is not yet permitted to acquire rival telecom provider Youfone Nederland, as the acquisition needs "further investigation". KPN's services consist of offering electronic communications services via its fixed and mobile networks, including telephony, data, internet, and television services; while Youfone Nederland is a mobile network operator that uses KPN's network, and offers mobile telecommunications services, internet, television, and telephony services. Notably, the ACM stated that the acquisition "could result in a loss of significant competitive pressure" in the budget segment of the market for mobile telecommunication services, and "could lead to higher prices or a reduced selection for consumers".

The ACM's investigation follows KPN's notification in June 2023, asking the ACM for permission for the takeover of Youfone Nederland. As noted by the ACM, an acquisition or merger may not proceed if the merger of the companies has negative consequences for competition and therefore for price, quality, or innovation. With every takeover, the question is whether sufficient competition remains immediately after the transaction and in the subsequent years.

In its 14 September 2023 decision, the ACM explained that Youfone is a rapidly growing and highly competitive provider of mobile telecom services in particular, and focuses on a broad target group. It does this with a limited number of competitively priced subscriptions. These are so-called no-frills subscriptions, and this positioning ensures that Youfone "puts pressure on the prices of other telecom service providers". Youfone does not have its own network and uses KPN's mobile network. Youfone could also use other networks, which "may strengthen Youfone's position in negotiations with KPN about the use of the network and contribute to Youfone's ability to compete competitively on price". Crucially, the ACM noted that the acquisition may "worsen competition in the no-frills segment of the mobile telecommunications services market", and that it will "investigate this further in a follow-up study", and look at whether "other providers can take over Youfone's role as a driver of competition".

Autoriteit Consument en Markt "Nader onderzoek nodig naar overname Youfone door KPN", 14 september 2023

https://www.acm.nl/nl/publicaties/nader-onderzoek-nodig-naar-overname-youfone-door-kpn

Netherlands Authority for Consumer and Markets, Further investigation needed into takeover of Youfone by KPN, 14 September 2023

[NL] Senate adopts bill criminalising sharing of personal data for purpose of intimidation

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On 11 July 2023, the Dutch Senate (*Eerste Kamer*) adopted a bill on the criminalisation of obtaining, distributing or otherwise making available personal data for the purpose of intimidation (*strafbaarstelling gebruik persoonsgegevens voor intimiderende doeleinden*), an activity known as "doxing". This is where personal data, such as addresses and phone numbers, as well as private information about family members, is distributed online so that it can be used to intimidate someone, and journalists are often victims. Notably, recent Dutch government measures introduced to protect the safety of journalists online included a commitment to introduce a law to combat doxing (see IRIS 2022-8/15).

Under the bill, to "obtain, distribute or otherwise make available identifying personal data of another person or a third party with the intention of causing fear to that other person, causing serious inconvenience, or causing serious hindrance in the exercise of his/her office or profession", carries a maximum prison sentence of two years or a fine of up to EUR 22 500 euros. The new law gives the police and the Public Prosecution Service more authority to take action against doxing; and a victim can also initiate civil proceedings if it is known who posted the offending content online. Compensation for damages and the removal of the unlawful content offline can then be ordered. If the perpetrator is not known, a notice can be made to the online intermediary hosting the content. The bill will amend the Criminal Code and the Code of Criminal Procedure, and will come into effect on 1 January 2024, having been adopted by the House of Representatives (*Tweede Kamer*) in February 2023.

The Ministry of Justice and Security released a statement, noting that the phenomenon of doxing is "common", and has a "major impact on the people who are targeted in this way". It is often "police officers, journalists and politicians" who become victims of doxing. Those targeted "fear for their safety and that of their loved ones", can no longer "express their opinions without fear", and are no longer "able to fulfil their duties"; it also affects "fundamental freedoms and the functioning of our democratic constitutional state".

Amendment to the Criminal Code and the Code of Criminal Procedure in connection with the criminalization of obtaining, distributing or otherwise making personal data available for intimidating purposes, 11 July 2023

Ministry of Justice and Security, "The use of personal data for the purpose of intimidation will become a punishable offense", 12 July 2023

UNITED STATES OF AMERICA

[US] Hollywood strike: writers reach agreement

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In the United States of America (USA), a federal statute from Congress governs copyright law: the Copyright Act. There are also state laws which deal with issues not covered by federal law. According to Section 201, the ownership lies in the author of the work.

However, this general principle knows derogations, among which the “work for hire” principle, as provided by Section 201 (b)

Ultimately, in this scenario, employers become authors and owners of copyright in works created by their employees. Many works produced in this sector fall under the definition of works-made-for-hire. The protection of the rights of creators and performers is ensured by audiovisual collective management organisations, who negotiate collective agreements with studios. For example, the Writers Guild of America (WGA) negotiates on behalf of its members with the Alliance of Motion Picture and Television Producers regarding rights to screen credits.

A massive strike started in May 2023 in Hollywood, bringing together writers and actors asking for better working conditions (especially remuneration conditions for writers). While the actors' strike is still ongoing*, a tentative agreement to amend the 2020 Minimum Basic Agreement (MBA) between the Writers Guild of America and the Alliance of Motion Picture and Television Producers was reached on 24 September 2023. The agreement was ratified on 9 October 2023 by 99% of WGA members, with a term from 25 September 2023 to 1 May 2026. It includes significant gains for remuneration and protections to regulate the use of artificial intelligence (AI).

The 2023 MBA amends parts of the 2020 MBA, such as :

- MBA minimum increases: 5% on ratification of the contract, 4% on 5 February 2024, and 3.5% on 5 February 2025.

- A new viewership-based streaming bonus for “high budget subscription video on demand” series and films: a bonus of 50% of the fixed domestic and foreign residual to be paid to writers when the content is viewed by a minimum 20% of the VOD’s audience in the first 90 days of release (or in the first 90 days in any subsequent exhibition year).

- VOD services will provide the WGA with streaming data, subject to a confidentiality agreement.

- For series employment, writers will see their weekly pay increase by the agreed rate under the MBA (5%, 4%, and 3.5%).

- On AI, its use for projects covered by the MBA is now regulated: AI is not a writer, and AI-generated written material is not considered literary material, source material or assigned material under the MBA. While companies cannot require writers to use AI software, a writer may ask the company to use AI when writing as long as the writer follows the company policies. Besides, companies using writers' services shall disclose to writers if materials they received were generated by AI. Finally, on AI, the WGA reserves the right to assert that the exploitation of writers' productions to train AI is prohibited by the MBA or other law.

This last part on AI echoes the current trilogues taking place between the EU institutions, aiming to adopt an AI Act regulating its uses in the internal market. Concerns were voiced by the creative industry, fearing the use of copyrighted data to train AI. For the moment, the interinstitutional negotiations are still ongoing (next trilogue on 24 October 2023).

* At the time of writing (16 October 2023), actors and studios have not yet reached an agreement. See SAG-AFTRA's website: https://www.sagaftrastrike.org/why-we-strike and: https://www.hollywoodreporter.com/business/business-news/sag-aftra-talks-suspended-studios-say-1235616218/ as well as: https://www.theguardian.com/culture/2023/oct/12/actors-union-talks-suspended-sag-aftra-hollywood-strike

WGA's 2023 MBA ratified

https://www.wgacontract2023.org/announcements/2023-mba-ratified

WGA summary of the 2023 MBA

https://www.wgacontract2023.org/the-campaign/what-we-won

USA Copyright Act

https://www.copyright.gov/title17/

A publication
of the European Audiovisual Observatory

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