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LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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EDITORIAL

# 1998 : A year for the new technologies

After a brief Winter break, IRIS is back to offer its readers, with the same rigor as in previous years, an exhaustive and discerning panorama of legal developments in the audio-visual sector in Europe. It is in this sector that the development of Information technologies is tending to use up more and more political and legislative energy, both at national and European level. IRIS is both an observer and a repository for these developments and the section dealing with legal measures that follow the development of new technologies and their growing interaction with the media and telecommunications sector will certainly see itself broadened this year.

Then, in this first issue of 1998, you will see that the Europe's Ministers responsible for national media policies have adopted two resolutions relating to new technologies. The European Union is also becoming increasingly active in the sector, with the various instruments such as the Green Paper on Convergence and two draft directives concerning the Information Society, one dealing with copyright and related rights and the other with mechanisms of transparency. On a more classical note, the revised Television without Frontiers directive is already making waves in The Netherlands, while the previous version is still causing a stir in Italy. The Green Paper on the protection of minors and human dignity is continuing to make progress and should soon be included within a recommendation of the Council of the European Union.

Despite the fast pace being set by these technological developments, some States have not forgotten to reorganise their regulatory system. Belgium, for example, has completed its reform of its regulatory bodies, while Rumania has set up a new authority, the National Film Board, for regulating and organising its film sector.

As promised in November 1997, IRIS is welcoming in a new partner, Medialex, a new national magazine that will be reporting any significant audio-visual-related development in Switzerland.

The members of the editorial board would like to wish all IRIS subscribers a happy and successful 1998.

Frédéric Pinard
IRIS Coordinator
*ad interim*





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## The Global Information Society

### European Commission: Action plan on promoting safe use of the Internet

As the Internet is used as the medium for a certain number of potentially illegal and detrimental sites and can also be used to distribute activities of a criminal nature, the European Commission adopted, on 26 November 1997, a proposal for an action plan on promoting safe use of the Internet. The proposal came in the form of a communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions.
The plan covers both illegal and detrimental content, which it examines both with regard to their approach and to the ways and means of controlling and penalising them.
Illegal content of certain net sites comes under various headings, such as national security (e.g. terrorist activities, protection of minors (e.g. pornography), protection of human dignity (e.g. racial discrimination), economic security (e.g. credit card fraud), the protection of privacy, intellectual property rights, etc. Illegal content has to be attacked at the source by the police and the judiciary authorities, with the backing of industry, through efficient self-regulation (codes of conduct, setting-up of hot-lines for users to report site contents they consider to be illegal).
The notion of detrimental content refers to site content which is authorised but the distribution of which is restricted (to adults, for example) or which could be offensive to certain users. Technological solutions (filtering and classification systems, self-regulation) systems can be used to control these sites, alongside a campaign to increase user awareness, especially among parents and teachers.
The Commission envisages four main lines of action :
- Creating a safe environment (hot-lines, self-regulation)
- Developing filtering and classification systems
- Encouraging awareness campaings
- Monitoring and support for legal developments in the sector.

The action plan, as set out in the communication, should soon be included in a proposed decision of the Council of the European Union.

Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, 26 November 1997,"Action Plan on promoting safe use of the Internet". Available in English, German and French via the Document Delivery Service of the Observatory.

(Frédéric Pinard,
European Audiovisual Observatory)

### European Union: Agreement on a draft Directive on transparency mechanisms concerning services in the information society

On 27 November 1997 the Internal Market Council (DGXV) reached a political agreement by a qualified majority on a draft Directive aimed at guaranteeing the transparency of national legislative measures to be adopted in respect of services in the information society (*see* IRIS 1996-10: 3 and 1996-8: 3). Its main purpose is to ensure that the internal market is not fragmented and that new national regulatory provisions do not hamper the free circulation of services created by the information society. The proposed Community instrument would therefore require that before being finally adopted, national legislative or regulatory measures affecting such services be notified to the Commission which would then pass them on to the other member States to ensure they were compatible with the principles of free circulation of services and their control by the country of origin. If the procedure were not respected, the measure could not be upheld against the economic forces concerned. Once the draft national text was notified, the authorities of the other Member States would have three months in which to state their position. Should any doubt persist at the end of this period as regards the compatibility of the draft national measure with the above principles, a one-month extension could be envisaged. As the procedure would not be confidential, the economic forces concerned could also make their position known.
The services in the information society as defined in the draft Directive comprise those services, already existing or yet to be devised, supplied at a distance by electronic means and at the individual request of a user. This includes, for example, professional on-line services (insurance, health, etc), on-line information, video on demand, virtual visits to museums, distance teaching, etc. However, television or radio broadcasting services are excluded from the scope of the draft Directive, as they are not supplied in response to an individual request.

(Frédéric Pinard,
European Audiovisual Observatory)

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## Council of Europe

### Council of Europe: Adoption of two resolutions on the new technologies

The 5th European Ministerial Conference on Mass Media Policy held in Thessaloniki on 11 and 12 December last year, attended by the Ministers from Council of Europe member States which are responsible for national media policies, adopted two resolutions concerning the field of the new technologies.
The first Resolution covers "the impact of new communications technologies on human rights and democratic values". It introduces the principle of "universal community service", according to which the States undertake to create a framework for access by the public to networks and new communications services on a universal basis, that is regardless of place of residence, at an affordable price, comprising a basic service (especially in the field of information, education and culture) to which all individuals should have access. Fair and non-discriminatory access should also be ensured by all providers and operators involved in these new networks and services. The Ministers reiterated their attachment to the freedom of expression and information and the exercise of journalistic freedoms and cultural pluralism which, while remaining closely protected, should find greater significance in the development of the new technologies. Lastly, the States undertake to guarantee the respect for human rights and democratic values as set out in the various texts of the Council of Europe, while combating the use of the new communications and information services for spreading any ideology, or carrying out any activity, which is contrary to such rights, by preventing the creation, processing or manipulation of images and sounds compromising the fair presentation of facts and events in news reporting, ensuring that the use of the new technologies does not prejudice the right to a fair trial nor the authority and impartiality of the judiciary, while guaranteeing the right to privacy of correspondence and the transmission of personal data, etc.
The second Resolution adopted by the Ministers at Thessaloniki covers the need to rethink overall the regulatory framework for the media with a view to adapting it to the current development of the new technologies, referring in this respect to the three Recommendations adopted on 30 September 1997 by the Committee of Ministers of the Council of Europe (*see* IRIS 1997-10: 4).
Lastly, the Ministers (except the russian representative) adopted a Statement on freedom of expression and the Media in the Republic of Belarus.

Resolution No.1: The impact of new communications technologies on human rights and democratic values.
Resolution No.2: Rethinking the regulatory framework for the media.
Statement on Freedom of Expression and the Media in the Republic of Belarus.
Texts available in English and French via the Document Delivery Service of the Observatory.

(Frédéric Pinard,
European Audiovisual Observatory)

## European Union

### European Commission: Proposal for a Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society

The European Commission, following up its plan to present legislative measures in the area of intellectual property, as announced in its 1997 Work Programme and in the Information Society's "Rolling Action Plan" (*see* IRIS 1997-1: 4), presented a Proposal for a Directive aiming at the harmonisation of copyright and related rights in the Information Society.
The proposal focuses on some key-issues in copyright and related rights in order to cope with the challenges represented by the spread of digital technologies, the fast converging evolution of the audio-visual, telecommunications and information technology sector and the advent of new cable, satellite and digital transmission methods. These key-issues comprise the right of reproduction, which manifests a whole variety of approaches in the Member States, the communication to the public right, which shows its particular importance with respect to the exploitation of intellectual property on-line and the distribution right. The latter has already undergone some kind of harmonisation-process in relation to certain categories of works (eg. databases, computer rights) as well as in relation to a group of specific rightholders (*see* Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property), nevertheless Member States appear to apply different regimes and different limitations to distribution rights in respect of (other) works. Member States also apply different concepts to classify the restricted act of distribution of works and, in the view of the Commission, they carry out somewhat conflicting policies in the field of exceptions to this right (i.e. with regard to exhaustion).
The proposal of the Commission does not aim at a general harmonisation of laws on copyright and related rights in the Member States; it rather aims at harmonisation in some sectors which are specific and crucial for the functioning of the Internal Market.
According to the Commission its Proposal will benefit the free circulation of works and related subject matter in the Community and help eliminate distorsions of competition among the Member States.

Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society. Presented by the Commission. Brussels, 10.12.1997, COM(97) 628 final. Available in English via the Document Delivery Service of the Observatory.

(Marina Benassi,
Institute for Information Law
University of Amsterdam)

## European Commission: Adoption of the Convergence Green Paper

On 3 December 1997 the European Commission adopted a Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the implications for Regulations.
The Green Paper primarily aims at launching a Europe-wide debate on how the new generation of electronic media should be regulated. There is a wide range of views with respect to this debate on future regulation falling between the maximalist and the minimalist opinion. According to the maximalists, the current regulation is designed based on the situation of clear distinction between sectors and therefore not appropriate any more since the distinction between services has blurred. The minimalist point view, however, argues that convergence will have a more limited impact and will not alter the specific nature of different services. Media policy therefore should promote social, cultural and ethnical values whatever technology is used for delivering. They favour two sets of rules, one for economic aspects and another for service content, in order to guarantee efficiency and quality.
Against this background the Green Paper raises a number of other questions concerning for example the possible adaptation of other definitions in telecommunications and media, possible new approaches (or adaptation of existing approaches) to be applied to issues of market entry and licensing, the promotion of completing the switch from analogue to digital services, the objectives of standardisation in the light of convergence and the future role of the existing different regulatory authorities. The public consultation period concerning these questions will end on 3 April 1998.

Green Paper on the convergence of the Telecommunications, Media and Information Technology sectors, and the implications for regulations. European Commission COM(97) 623. Brussels, 3 December 1997. Available in English, German and French via the Document Delivery Service of the Observatory.

(Patrick Burger,
Institute for Information Law,
University of Amsterdam)

# National

## CASE LAW

## Italy: Decision of the Court of Cassation on the application of the "Television without Frontiers" Directive to teleshopping channels

On 15 April 1997, the Court of Cassation decided on the application of the "Television without Frontiers" Directive in regard to broadcasters which transmit wholly or mainly teleshopping programmes.
A national broadcaster, *Telemarket*, the holder of a national licence to broadcast via terrestrial frequencies, was condemned by the *Garante per l'editoria e la radiodiffusione* to the payment of a fine. The broadcaster had transmitted fifteen hours of teleshopping programmes on one and the same day, therefore violating Article 18, paragraph 9 of Italian law n° 223 of 1990, enacted to transpose the "Television without Frontiers" Directive into Italian law. The broadcaster took legal action against this decision, arguing that the Directive did not intend to cover the activities of broadcasters which limit their transmissions to teleshopping programmes. After a negative ruling by a lower court, the matter was referred to the Court of Cassation, which did not accept the argument. Having held that Article 18 of the Directive is so clear in its wording that no preliminary ruling on its interpretation was neccessary from the European Court of Justice (so applying the *acte clair* doctrine), the Court of Cassation considered that the Directive is of general application, so to cover all the channels which are under the jurisdiction of a Member State of the European Community. Monothematic channels, wholly devoted to teleshopping, do not fall outside the scope of the Directive, but they are not permitted. It should be noted that the revised "Television without Frontiers" Directive now permits channels exclusively devoted to teleshopping. Member States are requested to transpose the revised Directive into their national laws not later than eighteen months after its adoption (30 December 1998).
The Court of Cassation also held that the norms which limit the amount of time to be devoted to advertising and teleshopping are consistent with constitutionnal values such as freedom of private initiative, since they are devoted to create a pluralistic system necessary to ensure the preminent value of freedom of information.

Court of Cassation, ruling of 15 April 1997, *SIT Teleservice contro Garante per l'editoria e la radiodiffusione.* Available in Italian via the Document Delivery Service of the Observatory.

(Roberto Mastroianni,
University of Florence,
Legal Secretary at the Court of Justice of the European Communities)

## Ireland: Ban on religious advertising upheld

Ireland is a dualist country in the sense that the European Convention on Human Rights has not been incorporated into domestic law. However, in a judgment which is indicative of the increasing willingness of the Irish courts to take account of the Convention, the High Court in April 1997 ([1997] 2 ILRM 467) considered a ban on broadcast advertising in the light of Article 10 and the jurisprudence of the European Court of Human Rights.

The advertisement in question asked "What think ye of Christ?" and went on to announce the forthcoming Easter Week showing, and satellite transmission, of a video about the resurrection. The Independent Radio and Television Commission (IRTC), which governs the commercial broadcasting sector, had banned the advertisement on the grounds that the relevant legislation, the Radio and Television Act 1988, stated that: "No advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute." The High Court judge took the view that the advertisement in question was more than a mere notification of an event and therefore infringed the provision of the Act. However, a wider issue arose as to whether the provision itself was constitutional or whether it amounted to an unreasonable restriction on freedom of expression , freedom of conscience or the free profession or practice of religion.

The court rejected arguments based on religion. Since any such advertisement would have been prohibited regardless of what religion was involved, there was no question of religious discrimination, the court said. Moreover, having regard to the provisions of the Irish Constitution on the right to communicate and freedom of expression, the prohibition on religious advertisements was not unconstitutional.

"Although the European Convention on Human Rights is not part of Irish municipal law", the judge said, "regard can and should be had to its provisions when considering the nature of a fundamental right and perhaps more particularly the reasonable limitations which can be placed on the exercise of that right." He therefore went on to consider Article 10, and, in particular, the decision of the European Court of Human Rights in *Informationsverein Lentia v Austria* (ECHR, 24 November 93, Series A, vol 276). He concluded that the prohibition on religious advertisements in Irish legislation was part of the licensing system as contemplated by Article 10 and that it was reasonable for the Irish legislature to take the view that in Irish society religious advertising by commercial radio might be undesirable in the public interest, especially given the fact that religion has been a divisive factor in Northern Ireland. On the issue of proportionality, the court concluded that the legislation imposed very few limitations on the right to advertise and, at any rate, that it was not possible to subdivide religious advertising so as to allow certain categories of what might be described as innocuous religious advertising.

High Court, Roy Murphy v. Independent Radio and Television Commission and the Attorney General, 25 April 1997. Available in English via the Document Delivery Service of the Observatory.

(Marie McGonagle,
Law Faculty, National University of Ireland, Galway)

## Switzerland: Animal welfare advertising - not a right

In January 1994, the Association against Animal Factories (*Verein gegen Tierfabriken* - VgT) asked The Television Advertising Co. (*AG für das Werbefernsehen* - AGW), a subsidiary of the Swiss Radio and Television Corporation (SRG) to show a television spot highlighting the cruel conditions in which working animals were kept and urging viewers to eat less meat. But the AGW refused, because of the spot's "political content", and also because the association was not prepared to rework it to bring it into line with the requirements of the Radio and Television Act (*Radio- und Fernsehgesetz* - RTVG). The association brought an unsuccessful action in the Federal Court (*Bundesgericht*), protesting at the AGW's refusal to show the spot. The acquisition of advertising material by the SRG in connection with the programme activities entrusted to it is governed not by public, but essentially by private law. To this extent, there is no "right to air-time" under the RTVG. In the Federal Court's opinion, neither the refusal to broadcast the spot nor the general prohibition on political advertising in Section 18 (5) of the RTVG violates Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is true that advertising is generally covered by freedom of opinion, but Article 10 of the Convention does not guarantee the right to use a specific broadcasting station, and the prohibition serves the process of democratic opinion-forming, since it helps, among other things, to forestall undesirable concentrations in the printed media sector by protecting its advertising market. According to press reports, the association means to contest the Federal Court's decision before the European Court of Human Rights.

Federal Court Judgment of 20 August 1997; 2A.330/1996. Available in German via the Document Delivery Service of the Observatory.

(Oliver Sidler
*Medialex)*

## Switzerland: On-screen violence - how far can it go?

On 22 August 1996, Swiss television (DRS) showed the Belgian film, *Man beisst Hund* ("Man bites Dog") on the programme, *Delikatessen*. In the film, a three-man camera crew follows a professional killer, who brutally murders over 25 people on impulse and also commits a rape. His savage and cold-blooded acts are unflinchingly portrayed in scenes of graphic violence. Article 55bis, para. 2 of the Swiss Constitution regulates the reponsibilities of radio and television, and specifically assigns a cultural role to programme organisers, who are required to protect cultural values. However, the Independent Complaints Authority has consistently ruled that it is not necessary for every programme to contribute positively to the enhancement of cultural values - although programmes which flagrantly do the opposite are not permissible. In this case, it found that the brutally violent killings in the film bordered on the intolerable. They could not, however, be viewed in isolation, but needed to be seen and judged in the context of the film's particular style. The violent scenes did not show violence for its own sake, and their impact and meaning were qualified and altered in various ways. Detailed commentary, the interplay of documentary and fiction-film elements and occasional grotesquely exaggerated scenes were among the means employed for this purpose. The use made of these stylistic devices and the absurdity of the action served to distance viewers firmly from the scenes of violence. They could clearly see that the film as a whole was not intended to glorify violence or play down its effects. This being so, it did not violate the programme regulations.

Decision of the Independent Complaints Authority for Radio and Television *(Entscheid der Unabhängigen Beschwerdeinstanz für Radio und Fernsehen)* of 7 February 1997, VPB/JAAC 1997, 655 ff. Available in German via the Document Delivery Service of the Observatory.

(Oliver Sidler,
*Medialex)*

## Germany: Centralised marketing of football broadcasting rights prohibited

In a judgment given at last instance on 11 December 1997 - KVR 7/96 - the Monopolies Division of the Federal Court (*Kartellsenat des Bundesgerichtshofs* - BGH) upheld the Federal Cartel Office's (*Bundeskartellamt*) decision forbidding the German Football Association (*Deutscher Fußball Bund* – DFB) to centralise the marketing of television rights to the home matches of German teams competing for the European Cup and the European Cup-Winners' Cup. The association's application for permission to establish a cartel for rationalisation purposes, in accordance with Section 5, para. 2 and 3, in conjunction with Section 11, para. 1 of the Act against Restrictions on Competition (*Gesetz gegen Wettbewerbbeschränkungen* - GWB) was also finally rejected. The Federal Court ruled that the Federal Cartel Office's prohibition was legal, since centralised marketing, in accordance with Article 3 (2) and (6) of the Professional Players' Statute adopted by the DFB's Advisory Council, tended to restrict competition, within the meaning of Section 1, para. 1, sentence 1 of the GWB. Although the aim of centralised marketing was to help maintain the athletic and economic viability of teams, these sports policy objectives did not warrant exemption from the ban on cartels. After this judgment, the DFB is also unable to claim a right to centralised marketing under Article 14 (1) of the UEFA Statutes, since this provision does not regulate the ownership of marketing rights to individual matches. Permission to establish a cartel for rationalisation purposes was refused on the ground that centralised marketing does not improve the cost-benefit ratio, but simply serves to boost revenue from TV transmission.

Federal Court judgment of 11.12.1997 - KVR 7/96. Available in German via the Document Delivery Service of the Observatory.

(Wolfram Schnur,
Institut of European Media Law - EMR
Saarbrücken/Brussels)

## Germany: Action to prevent re-use on CD-ROM fails

On 29.08.1997, the Hamburg Regional Court (*Landgericht Hamburg*) rejected an action brought by 70 members of *FreeLens*, a press photographers' association, against the news magazine *Der Spiegel*.
The applicants complained at the re-publication on CD-ROM, without their specific permission, of photographs originally published in *Der Spiegel* between 1989 and 1993. Under the transfer of purpose principle (Section 31 (5) of the Copyright Act), the spatial and temporal scope of globally assigned rights is determined by the purpose specified in the contract. Provided that the use in question was known at the time when the contract was concluded and was thus included in it (Section 31 (4) of the Copyright Act), the global assignment of rights covers it as well. In its judgment 1 ZR 63/93 Re-use on Video III, the Federal Court ruled that knowledge of a use was not simply knowledge of its technical feasibility, but also knowledge of its economic significance and utility. In this case, the Hamburg Regional Court compared use on CD-ROM with the usual practice of making the whole year's issues available again, both in printed form and on microfilm, and accordingly decided that an unknown use within the meaning of Section 31 (4) of the Copyright Act was not involved. Since this meant that the photographers' further permission was not required, it rejected their application. Contrary to the judgment given by the Amsterdam District Court on 24 September 1997 (*see* IRIS 1997-10: 6), re-use on CD-ROM is thus permissible in these circumstances even without the author's express permission.

Judgment of the Hamburg Regional Court of 29.08.1997, Az. 308 O 284/96, Judgment of the Federal Court of 26.01.1995, Az. 1 ZR 63/93. Available in German via the Document Delivery Service of the Observatory.

(Wolfram Schnur,
Institut of European Media Law - EMR
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## Spain: The granting of Private TV Licences by the Government in 1989 considered lawful by Supreme Court

After the adoption of the Private TV Law in 1988, the Spanish Government, then the Socialist party (*PSOE*), opened a procedure to grant the three licences provided for. Article 19, par 3. of the Act stipulates that no natural or legal person can own, directly or indirectly more than 25% of the capital of a licensee company, so several joint ventures were created to bid for the licences. Finally, four media ventures competed for the three licences: *Antena Tres TV* (*Godó Group*, *Prensa Española*); *Gestevisión-Tele Cinco* (Berlusconi, *ONCE*); *Canal Plus* (*Canal Plus France*, *PRISA Group*), and *Univisión* (*Zeta Group*, News International). The Council of Ministers took its decision in 1989, and the latter was finally the one left without a licence. Consequently, *Univisión* decided to challenge the Government´s decision before the Supreme Court, which recently, more than eight years later, has taken a decision, stating that the Government's decision at the time had been lawful.

In its judgement, the Supreme Court rejected *Univisión´*s claims, although the judgement has some controversial aspects. *Univisión* challenged the Government´s decision to grant licences to *Gestevisión-Tele Cinco* and to *Canal Plus.*

In regard to *Gestevisión-TeleCinco*, *Univisión* alleged that one of its members, the *ONCE* group (a non-profit organisation of Spanish blind people, dependent on the Ministry of Social Affairs, which gets its revenues from a public lottery) controlled *de facto* 40% of the shares, which is more than the legal limit of 25%, which means that the licence would have been unduly granted. The Supreme Court decided that this statement had not been proved. Another judicial investigation opened in July 97 by the *Audiencia Nacional* against *Gestevisión* for an alleged fiscal fraud, is currently studying the share that was really held by the *ONCE*. This new investigation also covers *Berlusconi´*s participation in the society, because he allegedly got to control later up to 80% of the society. *Gestevisión* strongly denies all these charges, and as for the alleged breach of the capital share limit, it says that all the share transfers had been expressely notified and approved by the Telecoms Ministry. Furthermore *Gestevisión* says that, according to the Private TV Act, if the capital share limit is surpassed, *Gestevisión* should be officially warned of this fact, after which it would then have a period of one month to make the necessary changes in order to come back in line with the legal provisions.

In relation with *Canal Plus*, *Univisión* complained that *Canal Plus* was granted a licence although the prior official reports stated that *Univisión´*s proposal was better, and although *Canal Plus* is a pay-TV broadcaster. It must be explained here, that terrestrial broadcasting in Spain is regarded as a public service and that therefore, the licences were meant to be granted to broadcasters who could be expected to offer a public service. Therefore, according to *Univisión* (that proposed a free-to-air TV programme), a licence given to a pay-TV was contrary to the public service naturem aimed at, and was forbidden by the tender conditions and by Spanish law. This problem does no longer exist today, at least not in relation with satellite pay-TV, since in Spain, satellite TV is no longer regarded as a public service, or with cable pay-TV, whose regulation expressely allows the licencees to ask for remuneration.

The Supreme Court decided it was possible to grant a licence to a pay-TV broadcaster. It based itself on a broad interpretation of Article 32 of the 1980 Television Act (Law 4/1980). This article stipulated that public service TV may get its revenues from the State, from advertising, from the sale of its products and from licence fees due for the ownership of TV sets. The Supreme Court considers, in an analogical interpretation, that it was possible that *Canal Plus* could ask for a fee. *Univisión* had contested this possibility arguing that Article 32 only applied to public TV, as private TV is regulated in a different law; that the fee mentioned in Article 32 had never existed in practice in Spain; and furthermore, that *Canal Plus* fee was not related with the ownership of the TV sets, but with the provision of TV services, and that the imposition of this fee was in any case against Spanish tax law regulating licence fees. The Supreme Court rejected this line of reasoning; it affirmed that the Government's decision was right, as several ministerial reports had stated, and also considers that asking for a fee was an economically sound option too, as it left more room for the other TV´s to compete for the advertising market, thus ensuring the viablity of them all. The Supreme Court also said that the official reports adopted before the decision stated that both options got very similar qualifications, although they represented very different models, and that the Government had a right to choose the one that it thought better to accomplish the public service duties involved.

*Sentencia del Tribunal Supremo, Sala 3ª (Contencioso-Administrativo),* Judgement of the Supreme Court, Third Chamber (Administrative Law), 22 September 1997. Available in Spanish via the Document Delivery Service of the Observatory.

(Alberto Pérez Gómez,
*Departemento de Derecho Público,*
*Universidad de Alcalá de Henares)*

## Russian Federation: Judicial Chamber rules on presumption of innocence

The Judicial Chamber on Informational Disputes under the President of Russian Federation adopted a Recommendation "On the application of the principle of "presumption of innocence" for the journalists' activity". The Recommendation is a reply to the inquiry of the Moscow Media Law and Policy Center. The immediate reason for the inquiry was the draft law "On Television and Radio Broadcasting" that passed its first reading in the State Duma (lower house of the Parliament) in September 1997, Article 18 of which prohibits broadcasters from disseminating information that violates the "presumption of innocence".
The Judicial Chamber has concluded that the principle of presumption of innocence as laid down in Article 49 of the Constitution of the Russian Federation can be applied only to the governmental bodies and their staff that have power to restrict rights and freedoms of a person. Journalists are not among them. Only courts can decide that someone is guilty of a crime with all legal repercussions. As to the journalists, they do investigative reporting or cover criminal investigation as part of their constitutional right to freedom of information, on the other hand they do their professional duty by informing the public on circumstances of public interest. Therefore, opinion of a journalist that was expressed in the mass media shall not influence the right of a person to be considered innocent in the legal sense. Thus the draft law is an ungrounded attempt to narrow the limits of the freedom of mass information as set by the Constitution of the Russian Federation. The Judicial Chamber concludes that the existing legislation on the responsibilities of the journalists is sufficient to protect the rights and legal interests of persons from abuse of the freedom of mass information. Therefore the Chamber appealed to the State Duma with a Recommendation to review the rule of Article 18 of the Broadcasting Bill.
The Judicial Chamber on Informational Disputes was created by the Decree of the President of the Russian Federation on 31December 1993 (No 228). It is a State body that assists the President in the realisation of his constitutional powers to guarantee the rights, freedoms and lawful interests in the sphere of mass information.

*O primenenii printsipa presumptsii nevinovnosti v deyatelnosti zhurnalistov* (*po zaprosu Tsentra "Pravo i sredstva massovoi informatsii*"). Recommendation "On application of the principle of presumption of innocence for the journalists' activity" (On inquiry of the Media Law and Policy Center). Adopted on 24 December 1997 (No 3 (10)). Published in Russian in *Zakonodatelstvo i praktika sredstv massovoi informatsii*, No 12, 1997. Available in Russian via the Document Delivery Service of the Observatory.

(Andrei Richter,
Moscow Media Law and Policy Center)

## France: Radio audience measurement before the courts

The Commercial Court (*tribunal de* commerce) and the Court of Appeal (*cour d'appel)* in Paris have just delivered the first decisions in a case being brought between the radio station *Voltage FM* and *Médiamétrie*, the company which is under contract to supply it with information on audience figures. In September 1997 the company *RTV Multicom* which operates the music station questioned the results of a survey carried out by *Médiamétrie*, according to which *Voltage*'s audience had fallen by more than half, although the station had carried out considerable promotional operations in the previous month.
On 14 October 1997 the Commercial Court in Paris, which heard the case as an urgent matter, ordered an expert's report on the methodology used by *Médiamétrie*.
*Médiamétrie* appealed against the decision and asked the Court to acknowledge that there was no need for the case to be heard as an urgent matter and that Article 145 of the new Code of Civil Proceedings (*code de procédure* civile) was not intended for such application. In its order setting aside the judgment, the Court considered that the company *RTV Multicom*, which provided proof of the promotional efforts undertaken and parameters which appear at first sight favourable to the maintenance - even approximately - of its listening audience, was justified in questioning the exact cause of the drop in its audience figures by more than half, and the conditions in which the method has been applied to it in this specific case.
The *Voltage* radio station was therefore justified in requesting an investigation to establish whether the audience was measured in accordance with the provisions governing its relations with *Médiamétrie*. As a result the Court decided that the *Centre d'études des supports de publicité* should examine the conditions under which the *Voltage* audience measurements were carried out.
What happens next should be followed up. The stakes are important, as *Médiamétrie* is the only reference in France for advertisers and central advertising purchasing offices; its surveys have direct results on the resources of radio stations - they should be able to trust reliable measurements.

Commercial Court of Paris, sitting in urgent matters on 14 October 1997; Court of Appeal in Paris, 5 December 1997. Available in French via the Document Delivery Service of the Observatory.

(Charlotte Vier,
*Légipresse)*

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

## LEGISLATION

### Rumania: New laws relating to the film sector

The Rumanian Government's emergency Decree No. 67/1997 relating to the setting up, organisation and operation of the National Film Board and the constitution of the National Film Fund provides the general framework for the regulation and organisation of the financing and development of Rumanian film.
The National Film Board (NFB) is a specialist, government-run body that replaces the old National Film Centre. The NFB organises film in Rumania and manages the financial resources granted to it by the Government.
The responsibilities of the NFB, as provided for in Article 6, are mainly as follows :
- to draw up draft orders, edicts and laws concerning organisational, technical, financial and legal measures needed to ensure that the national film industry is properly run;
- to lay down standards and give instructions for those institutions that come under its authority;
- to set up the Film Register so as to have a unitary system for registering, listing and authorising activities within the sector and for classifying cinematographic works.
- to draw up cinematographic statistics for the National Statistical Committee.

The NFB is run by the NFB Council, which is made up of a Chairman, assisted by a Deputy Chairman and eleven members. The Chairman is appointed by the Prime Minister. Nine members are appointed by the Chairman, from names put forward by cinematography creator associations and unions, commercial production or distribution companies from within the sector, the Rumanian Television Corporation, private television companies and specialist publications. The two other members are appointed by the Minister of Culture and the Minister of Finance. Each member has a two-year mandate which can only be renewed once.
According to article 12, State funding as well as other extra-budgetary sources are channelled through the National Film Fund, to be used by the NFB to carry out its mission. The extra-budgetary sources are, in accordance with article 13, made up of tax levied on operations relating to the Film Register, on the sale or rental of video cassettes, on advertising on state or private television and on receipts for films screened in cinemas or other public places.
The money the NFB receives through the National Film Fund is given out mainly to producers and distributors of films of all categories. This financial backing can be obtained as of right or selectively (through a competition) and can be given as an interest-free loan that is repaid in instalments as and when receipts start coming in. These receipts, according to the aforementioned Decree, are the money received by the film's producer and come from the sale of the rights, from the exhibition of the film and from various other rights, such as the distinct use of the music of the film and its sale on audio cassette, CD, etc.
Article 28 lays down the criteria for awarding or refusing applications for financial backing. Films that portray violence in a favourable or indiscriminate light, those that promote racism or ethnic, religious or sexual discrimination, those that constitute an affront to individual dignity and X-certificate films will be refused financial backing.
Article 32 makes it compulsory for any Rumanian or foreign economic agent who sells or distributes films in classic or magnetic form or who develops any other kind of cinematographic activity, to register with the Film Register and also to obtain operating permission. Failure to do so results in fines and the person being banned from working in the sector. Article 34 makes it obligatory for 5 % of total screen time to be given over to films made by Rumanian citizens or Rumanian nationals (at least two of them).
90 days after the emergency edict comes into force, the National Film Archive (NFA) will come under the responsibility of the Ministry of Culture. A prior Government order will set out the re-organisation of the NFA and the way it operates. Economic agents producing films and receiving funding either as of right or selectively, must send a copy of the film to the NFA. In order to strengthen Rumania's ties with the European Union and within 30 days of the edict coming into force, the NFB will make the necessary applications to bring Rumania into the Union's specialised programmes.

*Ordonanta de urgenta privind infiintarea, organizarea si functionarea Oficiuli National al Cinematografiei si constituirea Fondului cinematografic national* of 24 October 1997. Available in Rumanian via the Document Delivery Service of the Observatory.

(Constanța Moisescu,
Rumanian Office for Authors' Rights)

## Germany: Television Signal Transmission Act passed

The act on the use of standards for the transmission of television signals - the Television Signal Transmission Act (*Gesetz über die Anwendung von Normen für die Übertragung von Fernsehsignalen – Fernsehsignal-übertragungs-Gesetz - FÜG*) - came into force on 25.11.1997, incorporating Directive 95/47/EC of the European Parliament and the Council of the European Union of 24.10.1995 on the use of standards for the transmission of television signals (the TV Standards Directive - *see* IRIS 1996-2: 5) into national law. The rules embodied in the new Act largely coincide with those laid down in the Directive.
The Act accordingly makes 16:9 the standard format for wide-screen TV services and lays down technical requirements for the corresponding digital transmission systems, which must comply with European standards. Fully digitalised television services must use a transmission system approved by a recognised European standards body.
The Act also contains important regulations on digital television services and the right of access to services. Pay-TV service providers must give all programme providers equal, non-discriminatory access to their systems. The Act lays down technical standards for connection to other elements in a digital television service, particularly additional decoders and digital receivers. Wherever manufactured, so-called set-top boxes must be capable of decoding coded signals in a manner consistent with the current state of technology on the common European market. They must also be capable of reproducing uncoded signals.
The Act covers legal aspects of competition too, containing regulations on equal access to the new technologies, with particular reference to the reception of digital television services accessible via decoder, and to licensing of the access technologies.
A conciliation body will be set up to resolve disputes.

Act on the application of standards for the transmission of television signals (Television Signal Transmission Act - *Gesetz über die Anwendung von Normen für die Übertragung von Fernsehsignalen – Fernsehsignalübertragungs-Gesetz* - FÜG) of 14.11.1997 - Federal Official Journal (*Bundesgesetzblatt*), Part 1 1997, No. 77, 24.11.97, p. 2710, in force since 25.11.1997. Available in German via the Document Delivery Service of the Observatory.

(Wolfgang Cloß,
Institut of European Media Law - EMR)
Saarbrücken/Brussels)

## Austria: New rules on compensation in media law

In the fight against organised crime, two new methods of investigation have been incorporated into the Code of Criminal Procedure: "optical and acoustic surveillance of persons with the help of technical devices" (popularly known as the bugging offensive) and "computerised data-scanning".
Alongside the reform of criminal procedure, a new Section 7c ("Protection against prohibited publication") has been inserted in the Media Act. Under the new compensation rule, persons whose legitimate interests have been harmed are in principle entitled to claim compensation from media operators or publishers who disclose information concerning recordings, photographs or written records obtained when telephone calls are monitored or optical and acoustic devices are used for surveillance of persons, provided that such recordings, pictures or written records have not been used already in public court proceedings. Compensation may not exceed ATS 1,000,000, and certain factors must be taken into account when deciding the amount. In certain cases (for example, when personal information has been published at the authorities' instigation), there is no entitlement to compensation.

Section III of the Federal Act incorporating specific investigative methods aimed at combating organised crime in the Code of Criminal Procedure and amending the Criminal Code, the Media Act, the Prosecution Service Act and the Police Act (Federal Gazette 1997 I 105 of 19 August 1997); the German text of the new regulations can be accessed on Internet under URL http://www.netlaw.at/MedG.htlm and is also available via the Document Delivery Service of the Observatory.

(Albrecht Haller,
IFPI, Austria)

## Kazakhstan: New Governmental Body to Monitor Mass Media

On 31 October 1997 the Government of the Republic of Kazakhstan adopted a decree concerning the creation of the Ministry of Information and Public Accord, as well as the Statute of this Ministry. The Ministry replaced the National Agency on the Press and Mass Media Issues.
The new Ministry consists of five departments: Mass Media, Domestic Policy, Development of Languages, State Publishing Programmes and Domestic Administration. In the *oblasts* (regions) of Kazakhstan administrative agencies of Information and Public Accord are created, its directors will be appointed by the Minister with the agreement of the regional Governor (*akim*).
According to the decree of the Government, the Ministry is the "central executive body that is responsible for the formation of the united informational space in Kazakhstan and conducts State policy in the sphere of mass information and the press, national, youth, confessional, and language policies in accordance with the law".
The Ministry and its regional administrative agencies become founders (in the sense of the Kazakh law "On the Press and Other Mass Media" of 28 June 1991, similar to the 1990 USSR law of the same name) of newspapers, magazines, television and radio companies, news agencies, and other mass media that are financed from the national budget.
The top priorities of the Ministry are the strengthening of internal stability; the formation of Kazakhstan patriotism and identity; provision of the informational security of the State; formation of publishing programmes intended to provide psychological and moral support to the economic and political reforms; increase of the quality and professionalism of the mass media; and analysis of compliance to the media-related laws.
The Ministry will do that, among other means, by registering mass media organisations, assisting in copyright protection, taking part in the drafting of Bills related to the mass media, placing governmental production orders with the publishers and media organisations.
The Ministry will probably take part in fulfilling the decree of the President of the Republic of Kazakhstan "On Formation of the United Informational Space in the Republic of Kazakhstan" adopted on 9 December 1997.

Decree of the Government of the Republic of Kazakhstan of 31 October 1997 (#1474) "On adopting the Statute and structure of the Ministry of Information and Public Accord of the Republic of Kazakhstan" (*Ob utverzhdenii Polozheniya i struktury Ministerstva informatsii i obshchestvennogo soglasiya Respubliki Kazakhstan*) and the Statute itself, as well as the Decree of the President of the Republic of Kazakhstan "On Formation of the United Informational Space in the Republic of Kazakhstan" (full texts) were published in Russian in "*Zakonodatelstvo i praktika sredstv massovoi informatsii. Kazakhstan*" (issue 4, December, 1997. Pp. 2-4). The texts of the documents are available in Russian via the Document Delivery Service of the Observatory.

(Andrei Richter,
Moscow Media Law and Policy Center)

## Belgium: The reform of regulatory bodies within the Flemish Community approved by the Flemish Parliament.

On 3 December, the Flemish Parliament voted in the new decree aimed at reorganising the Flemish Media Council and which also allows for the setting up of a Flemish Media Commission. The Flemish Government's Bill (see IRIS 1997-10 : 12) was approved by Parliament with just a few amendments.
Setting aside the regulatory power, which is not related to the audiovisual regulatory process and which remains the province of Parliament and the Government, everything else within the audio-visual sphere will come under the Media Council in its role as independent authority. The Council will be made up of 3 members, including a judge, who will act as Chairman. Civil servants from the Ministry of the Flemish Community will make up the Council staff. There will, therefore, as from now be a single body to handle authorisations, supervision, approvals and sanctions within the audiovisual sector. The sole exception will be the Flemish Council for Disputes for radio and television. The Council for Disputes will rule on all individual disputes that crop up following the application of provisions concerning either non-discrimination in Flemish radio and television programmes , or journalistic ethics and the impartiality of new programmes. The other bodies, such as the Council for Local Radios and the Flemish Council for Advertising and Sponsoring will be axed, while the role of the Flemish Media Council will be reduced to an advisory capacity either with regard to media policy or for the preparation of draft Bills.
Before the Media Commission is up and running, the Flemish Government still has to set out the procedures to be implemented with regard to approvals and sanctions. The decree stipulates that in any case, the principles of appeal, of a full hearing, of reasoned decisions and advertising will be upheld. A lot will depend on how the Government will be organising the Commission and what kind of staff and logistics means the Commission will be given. During the parliamentary debates, the Minister for Media Affairs, Mr. Eric van Rompuy, stressed the fact that the current reform represented a revolution in media policy within the Flemish community.

*Decreet betreffende het Vlaams Commissariaat voor de Media en de Vlaamse Mediaraad,* St., Vl. Parl, 1996-97, nr. 742). Available in Dutch via the document Delivery Service of the Observatory.

(Prof. Dirk Voorhoof,
Media Law Section of the Communication Sciences Department,
Ghent University, Belgium)

## LAW RELATED POLICY DEVELOPMENTS

### The Netherlands: First implementation of the revised "Television without Frontiers" Directive by the Media Authority

On 24 November 1997, the Media Authority of The Netherlands (Commissariaat voor de Media) wrote a letter to the Holland Media Groep (HMG) that it will extend its monitoring activities for compliance with the Dutch Media Act, to the broadcasters of HMG (esp. RTL4 and RTL5). A similar letter was sent to radio broadcasters Sky Radio and Classic FM.
This decision is based on the revised 'Television without Frontiers' Directive which stipulates that a broadcaster is deemed to be established in a Member State when it has its Head Office in this Member State and takes its editorial decisions in this Member State. This provision of the revised Directive has already been transposed into Dutch national law by means of Article 4, par. 1 jo. Article 1 under hh. and p. of the amended Media Act, which entered into force on 1 September 1997.
SBS6 and Veronica are already considered as 'Dutch' broadcasters. RTL4 and 5 claim to be established in Luxembourg. According to the *'Commissariaat voor de Media'* - pursuant to the revised Directive - they are established in Hilversum, the Netherlands, since the decisions on programming are being taken here.
The Media Authority gave the HMG until 6 January 1998 to ask for a private commercial broadcasting licence under Dutch media law. Without such a licence, cable operators will no longer be allowed to distribute the programmes of HMG. The HMG has also been instructed to bring the contents of its programmes in line with the Dutch rules on advertising and sponsoring, before 1 March 1998.

Letter of 20 November 1997, ref. MBe/6773/mvd, *Staatscourant* of 24 November 1997, 226. Available in Dutch via the Document Delivery Service of the Observatory.

*(Mediaforum)*

## News

### European Comission calls for separation of telecom and cable activities

With a view to revising the 1995 "Cable" Directive (Commission Directive 95/51/EC of 18 October 1995 amending Directive 90/338/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalised telecommunications services ), the Commission, on the threshold of the development of the multimedia sector and the liberalisation of the telecommunications sector, is envisaging tabling a Directive to separate telecommunications and cable activities where these are carried out by the same operator. The Commission holds the opinion that in certain Member States supply by a single operator of telecommunications networks and teledistribution networks, inherited from previous monopolies, could enable former monopolies to delay the emergence of effective competition and therefore hold back the development of telecom and multimedia applications. The requirement to separate accounting in the case of a single telecommunications operator in a dominant position supplying competitive networks, as provided for in Directive 95/51/EC, is apparently thought to be insufficient. Fearing the appearance of "super monopolies", the Commission is therefore envisaging effective separation involving the exploitation of the two activities in the form of clearly separated legal entities.
IRIS will report on any significant evolution in respect of this draft Directive.

IP/97/1139, Brussels, 17 December 1997. Available in English and French via the Document Delivery Service of the Observatory.

(Frédéric Pinard,
European Audiovisual Observatory)

### European Commission considering infringement proceedings against Italy

The Commission has announced that it is considering starting proceedings against Italy before the European Court of Justice of the European Communities because of its failure to respect certain provisions of the Television without Frontiers Directive. The Commission referred mainly to the measures applicable to advertising slots and the broadcasting of European productions. The broadcasting quotas provided for in Italian legislation apply only to cinematographic works and do not cover all the types of programme intended by the Directive. Moreover, no national measures have been adopted to support the creation and broadcasting of independent productions. Lastly, the legislative text transposing the Directive does not respect the obligations contained in the Community text as regards the interruption of programmes by advertising.

IP/97/1154, Brussels, 18 December 1997. Available in English, French and Italian via the Document Delivery Service of the Observatory.

(Frédéric Pinard,
European Audiovisual Observatory)

## Germany: Digital television comes to Germany; media giants *Bertelsmann* and *Kirch* notify Brussels Commission of intended digital Pay-TV merger

Having agreed in June 1996 to merge the German Pay-TV channels *Premiere* and DF1, *Bertelsmann AG* (CTL/UFA) and the *Kirch Group* have now notified the European Commission, as the authority responsible for supervising mergers under the Concentrations Control Regulation (Regulation (EEC) No. 4064/89 of 21.12.1989 on the control of concentrations between undertakings). The Commission will shortly be considering whether the merger, which is of Community significance, is compatible with Article 2 of the Regulation.

At the same time, the Investigating Committee on Media Concentrations (*Kommission zur Ermittlung der Konzentration im Medienbereich* - KEK - *see* IRIS 1997-6:13) - is considering the merger at national level.

In October 1997, the two concerns, in consultation with *Deutsche Telekom*, had agreed with the media authorities in several *Länder* that digital TV programmes could be experimentally licensed and operated jointly on cable, using the D-box decoder system. Assuming that the merger is compatible with the law on monopolies, final approval can be granted only on the basis of a new regulation, which will be introduced when the Agreement on Broadcasting between the Federal States in United Germany is amended for the fourth time in the course of 1998. The experimental licensing of digital TV is controversial; the representatives of some *Land* media authorities feel that the activities which have been started cannot be reversed if the merger is forbidden or conditions are imposed.

In the meantime, at the instigation of EC Commissioner Karel Van Miert, the European Commission's Directorate General for Competition has written to *Bertelsmann AG* and the *Kirch Group,* threatening to institute formal proceedings unless they immediately cease using and marketing the D-box decoder for *Premiere digital*, and take active measures to counter the impression, given in advertising, that they have actually agreed on a common decoder for digital television. The European Commission fears that use of the D-box before it approves the merger is creating a *de facto* situation, i.e. constitutes anticipated implementation of the collective agreements on opening-up of the digital television market in Germany. This violates the prohibition on mergers prior to approval by the European authorities.

In a statement, the Commission stressed that this measure in no way anticipated the decision which would be taken on the intended merger during the monitoring process.

The two concerns see the European Commission's demand as a competitive handicap, since it leaves *Premiere* as the only European Pay-TV channel forbidden to use a decoder. None the less, *Premiere* has agreed to stop marketing *Premiere-digital* via D-box. This means that no further contracts are being concluded, in addition to those signed with digital subscribers before 15 December 1997.

(Wolfgang Cloß,
Institut of European Media Law - EMR
Saarbrücken/Brussels)

## United Kingdom: Broadcasting closed-circuit footage may have privacy implications

The High Court decided on 25 November that it was neither unlawful nor irrational for the owner of a closed-circuit television system (in this case a local authority) to release footage to the media for the purpose of showing how succesful the system was in the prevention and detection of crime. However, the judge recognised that there might be "undesirable invasions of a person's privacy." In this case, a man's face was identified by family and friends as it was inadequately masked. The judge proposed that, until the Europena Convention on Human Rights had been fully incorpoarted into law, reliance should be had on guideance being issued in codes of practice. Such a Code has been published by the Local Government Information Unit.

The Times, 26 November 1997; "A watching brief: A code of practice for CCTV" Available in English from LGIU, 1-5 Bath Street, London EC1V 9QQ.

(David Goldberg,
School of Law,
University of Glasgow)

## United Kingdom: BBC gets licence for 24 hour cable news

Chris Smith, the Secretary of State for Culture, Media And Sport has issued a licence to the BBC to broadcast its round-the-clock news channel BBC News 24. Although a licence was already granted to the BBC in July, the BBC withdrew its original application to broadcast a 24-hour news service, to protect itself from the threat of judicial review by BskyB. BSkyB had accused the BBC of predatory pricing because the corporation is to offer the service free to cable networks, in comparison with BskyB who sells its own 24-hour news service to the cable companies for about 50p per subscriber. The BBC's 24-hour news will also be broadcast overnight on BBC1 in the hours between the end of the night schedule, and the start of breakfast television. Financed from the licence fee, it is the first of several channels and services the BBC intends to offer on digital television networks next year. The corporation has also entered partnerships with private companies.

(Stefaan Verhulst,
PCMLP - University of Oxford)

## Germany: Bavarian cable - ORF wants out

The Austrian Broadcasting Corporation (*Österreichischer Rundfunk* - ORF) has stepped up its efforts to put an end to the relaying of its first programme, ORF1, on *Deutsche Telekom AG*'s cable networks in Bavaria. So far, ORF's programme has been fed onto the Bavarian networks under a "general cable agreement", concluded in 1991 between *Deutsche Telekom*, on the one hand, and ORF, Swiss television and other foreign broadcasters on the other. This gives *Deutsche Telekom* the right to relay foreign programmes on cable in areas where antenna reception is also possible.
ORF's action is motivated by the fact that it found itself competing with German private channels, since it, like them, was showing mass-audience material - successful Hollywood productions, for example. Viewers tended to prefer the Austrian programme, which was not interrupted by commercials. While ORF was obliged to accept this situation on its home television market as the natural outcome of competition, the private channels concerned claimed that it broke the law on the German market. They argued that the licensing agreements gave ORF the right to broadcast in Austria only, even though land-based transmission made some degree of transfrontier overspill inevitable. The rights acquired did not, however, cover transmission on German cable networks.
Because of the dispute, ORF set out in December to revoke *Deutsche Telekom*'s relay rights, either by terminating the above agreement (the legality of which was contested, however, by *Deutsche Telekom*) or by negotiation.

(Alexander Scheuer,
Institut of European Media Law - EMR
Saarbrücken/Brussels)

## Austria: Music on private cable TV - fees agreed

On 29 September 1997, the Austrian performing rights societies, *Staatliche Genossenschaft der Autoren, Komponisten und Musikverleger, registrierte Genossenschaft mbH* (AKM) and *Wahrnehmung von Leistungsschutzrechten Gesellschaft mbh* (LSG) concluded general agreements on fees for the use of recorded music in private cable TV programmes with the professional bodies representing cable broadcasters and network (in the USA: "system") operators. The agreement came into force on 15.10.1997 for an unlimited period. A general agreement on the retransmission of foreign programmes has already been in force since 1984.
The agreement concluded with AKM covers permission to broadcast musical and associated verbal works in (active) cable television programmes on the cable systems specified by the programme organisers. It does not cover the broadcasting of "musical/dramatic works", within the meaning of Section 1, Sub-section 2 (2) of the Performing Rights Societies Act - the so-called major rights - and particularly the recording or re-recording of musical works; these "mechanical" music rights are managed by *Austro-Mechana* and must be acquired from them.
The parallel agreement with LSG is solely concerned with protecting performance rights in the case of material recorded for commercial purposes. It accordingly covers the rights of performers (Sections 66ff. Of the Copyright Act) and of record and cassette producers (Section 76 of the Copyright Act) - but not of composers and authors of texts. On behalf of the performers and producers it represents, LSG gives cable programme organisers the right to reproduce recordings (CDs, music tapes, records) for use in their own programmes and also to broadcast the repertoire it manages.
Both agreements use the programme organiser's gross revenues from commercials, sponsorship, placements and other advertising revenue to calculate the gross fees due. A 20% lump sum is deducted from these gross earnings to cover commissions, rebates, discounts, etc., and the fees, which are graded in accordance with music's share of the programme, are worked out on this basis (for example, if music constitutes less than 15% of the programme, then 1,5% of the base sum is due under the AKM agreement, and 1,0% under the LSG agreement). Both agreements provide for a minimum fee - ATS 0,24 per month/cable subscriber for the AKM repertoire, and ATS 0.16 for the LSG repertoire. In both cases, there are graded introductory rebates for the first three years.
Cable network (USA: "system") operators are jointly liable under both agreements. Programme organisers may not broadcast until they have secured a declaration of acceptance and liability from the network operators who carry their programmes, and have sent it to the AKM or LSG.
Permission to use works in private cable programmes is acquired by separate contract, concluded - on the basis of a model contract - between the programme organiser and the AKM or LSG. Permission must be separately obtained for every cable channel. The cable broadcaster also undertakes to supply both performing rights societies with a detailed schedule of all the works used, within one month of their being broadcast.

(Heinz Wittmann,
*Medien und Recht* - Vienna)

## France: Foreign channels on the French cable network

A judgement handed down on 10 September 1996 by the Court of Justice of the European Communities (European Commission vs. Kingdom of Belgium - *see* IRIS 1996-10: 5-6) condemned the principle of prior agreement between the National Media Authority (CSA) and broadcasters from EU Member States before they can be distribued on cable networks (in the USA referred to as "cable systems"). It is now up to France to draw the consequences of this decision. Article 34-1 of the law of 30 September 1986 states that the cable operator, the body that makes up the programme package, has to obtain authorisation from the Audiovisual Supervisory Board (*Conseil Supérieur de l'Audiovisuel* - CSA) and that each channel seeking to be distributed has to sign a convention with the CSA setting out the production and broadcasting quota of French and European-produced programmes. The aforementioned judgement of 10 September 1986 means the convention system has to be discarded. The CSA, even before the change in the law, scheduled for Spring 1998, decided to set up a temporary scheme whereby a simple declaration has to be made when foreign channels are being carried on the French cable network.

(Bertrand Delcros, *Légipresse*)

## France: Re-allocation of radio frequencies

There are over 1500 private radios in France using terrestrial frequencies, in compliance with the law. However, it has needed some 17 years to bring calm to the wavelengths. Back in the early 80's, the so-called "free" radios hijacked the FM waveband and successive regulatory bodies experienced great difficulty in bringing them to book, in other words making sure that a frequency could only be used with the authorisation of what is now the Audiovisual Supervisory Board (*Conseil Supérieur de l'Audiovisuel - CSA*) . The CSA has recently found itself up against the problem of private radios (often national networks), secretly buying radio frequencies from local radios. This illegal situation could not continue and, after long negotiations, the CSA persuaded the radios to give back the illegally-acquired frequencies, 472 in all. The frequencies were then re-distributed by the CSA to the most suitable applicants.
The procedure as described above does not, however, involve Radio France, the state-run radio which, with its seven national and thirty-eight local radios, benefits from a special status with regard to the allocation of radio frequencies.

(Bertrand Delcros, *Légipresse*)

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## AGENDA

**Hands on Internet Security**
2-4 February 1998
Organiser: IIR Technology
Venue: London
Information & Registration:
Tel: +44 171 344 3900
Fax: +44 171 344 3920

**On-Line Delivery '98**
11-12 February 1998
Organiser: Write Image
Venue: London
Information & Registration:
Tel: +44 171 493 5400
E-mail: nicky@write-image.co.uk

**The 1998 GSM World Congress**
17-19 February 1998
Organisation: IBC UK Conferences
Venue: Palais des Festivals, Cannes, France
Information & Registrations:
Tel: +44 171 453 2198
Fax: +44 171 636 1976
E-mail: sarah.ellis@ibcuk.co.uk
www.gsmworldcongress.com

**Copyright, Media & Digital Technology**
20 February 1998
Organiser: IBC
Venue: Strand Palace Hotel, London, WC2
Information & Registration:
Tel: +44 171 453 5492
Fax: +44 171 636 6858
E-mail: cust.serv@ibcuk.co.uk

**Broadcast@Internet 98**
23, 24, 25 & 26 February 1998
Organiser: IBC
Venue: The Cumberland Hotel, London, W1
Information & Registration:
Tel: +44 171 453 2000
Fax: +44 171 636 1976
E-mail: suzi.morris@ibcuk.co.uk

**Intellectual Property in Central and Eastern Europe**
26 & 27 February 1998
Organiser: IBC
Venue: Hotel Don Giovanni, Prague
Information & Registration:
Tel: +44 171 453 2702
Fax: +44 171 631 3214
E-mail: georgina.grant@ibcuk.co.uk

**GMPCS Asia '98**
Conference on global mobile personal communications in Asia
3 & 4 March 1998
Organiser: IQPC
Venue: Singapore
Information & Registration:
Tel:+65 325 6330
E-mail:
gmpcsasia@iqpcworldwide.com

**Effective IT for Business**
3, 4 & 5 March 1998
Organiser: Richmond Business Events
Venue: Birmingham, England
Information & Registration:
Tel: +44 171 602 9177
E-mail: akwatts@netcomuk.co.uk

**Contrats informatiques**
4 & 5 March 1998
Organiser: Institute for International Research
Venue: Paris
Information & Registration:
Tel: + 33 1 46 99 50 10
Fax: + 33 1 46 99 50 45