IRIS
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY
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IRIS LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

http://services.obs.coe.int/en/index.htm

EDITORIAL

Questions for our readers

IRIS will now be taking its winter break – this is the last issue for 1998. In December we will be working on the concept of IRIS' content, so we would like to know the reactions of our readers to a number of basic questions.

1. Up to now, we have only touched on telecommunications, usually under the heading of the global information society. Because of the size of IRIS, it could only report on telecommunications in greater depth at the expense of other thematic topics. Would you like to see more on telecommunications, and if so which areas would you like to see dealt with in less detail?
2. Which other themes would you like to see covered in greater detail?
3. IRIS endeavours to cover all the member States of the Council of Europe in its reports. Are there any geographical areas of particular interest to you, and which you would like to read more about? Are there any areas for which you do not consider IRIS to be the main source of information anyway, and which could therefore be dealt with in less detail?
4. One of IRIS' aims is to be as up to date as possible in its reporting, while ensuring that its sources of information are reliable. Are you satisfied with the result?
5. IRIS concentrates above all on passing on first-hand information and information material, without making any comment on its content. Would you prefer IRIS to offer analysis and commentary as well as its reports?
6. In what form would you prefer to read IRIS – as a printed booklet or on-line by computer?

I look forward to receiving as many replies as possible from you (including by e-mail to IRIS@obs.coe.int) on these points. IRIS will be back at the end of January 1999; until then, I wish you all the best.

Susanne Nikoltchev
IRIS co-ordinator

Documents, which are bolded and marked by  , are available via our document delivery service in the indicated (iso-code) language. Please let us know, possibly in writing, what you would like to order and we will send you an order form immediately.

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The Global Information Society

France: Journalists' Copyright and Internet (continued)

The Court of Appeal in Colmar has overturned the order in an urgent matter delivered on 3 February 1998 by the Regional Court (*Tribunal de Grande Instance – TGI*) of Strasbourg, under which the journalists of the daily newspaper *"Dernières Nouvelles d'Alsace"* (*DNA*) and the television channel *France 3* had obtained the closure, on pain of a fine, of a web-site offering extracts from the *DNA* and the television channel's news programme which infringed the journalists' copyright (see IRIS 1998-2: 5). Meanwhile, an agreement defining the conditions for using the *DNA* on-line had been reached between the company which publishes the newspaper and the main unions of journalists, as a result of which the journalists' unions have withdrawn from the court proceedings.
The dispute nevertheless still remained ongoing in full in respect of the journalists at *France 3*, who considered that neither their employment contracts nor the collective agreement covering the audiovisual sector included any transfer of their rights of use to the channel.
It was therefore for the Court in Colmar, under the urgent procedure and by virtue of Article 807 of the new Code of Civil Proceedings, to determine whether the reproduction on Internet of television broadcasts produced by *France 3* constituted a manifestly unlawful nuisance or imminent prejudice to the channel's journalists. The Court adopted the argument developed by the presiding judge in the initial urgent proceedings. An audiovisual work is a collaborative work protected by Article L 113-7 of the intellectual property code (*Code de propriété intellectuelle - CPI*), with ownership being in the hands of the co-originators. In the case at hand, concerning the methods of transferring rights, as the employment contracts between *France 3* and the journalists contained no relevant provisions, only the provisions of the 1983 collective agreement for journalists were applicable. However, at the time broadcasting or reproduction on Internet could not have been forseen, and there was therefore no specific agreement, as required by Article L 131-6 of the *CPI*, covering the transfer of the journalists' rights to use the work on Internet. As a result, *France 3* was not able, as it had in the agreement protocol signed with the Internet operator, to declare itself the holder of the intellectual property rights for its broadcasts.
The Court nevertheless overturned the original order, as it was not apparent that the Internet operator had committed a manifestly unlawful nuisance or imminent prejudice. The Court therefore found that the company editing the web-site should not be forbidden to reproduce the disputed items, particularly as the contract with *France 3* had expired at the end of May and as the channel had since ended the experiment.
It was therefore up to the petitioners to continue the legal debate on the merits of the case before the appropriate court.

Court of Appeal of Colmar (1st chamber A), 15 September 1998; S.A. *SDV Plurimédia* v. *USJF, SNJ et al.*

FR

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Austria: Internet and Copyright – Supreme Court Decides

A decision given in mid-August by the Supreme Court on an application for an interim injunction dealt for the first time with copyright law aspects of the use of works on the World-Wide Web (WWW). The proceedings originated in a contract concluded in 1984 between the widow of the writer, Konrad Bayer (1932-1964), and a publisher. In this contract, Mrs Bayer assigned "sole and exclusive publication rights in all impressions and editions" of her late husband's entire literary output to the publisher in question. The nature of the rights assigned was clarified by a list of the uses covered.
An injunction was sought against the Commissioner for the 1997 Venice Biennale, appointed by the Federal Chancellor's Office, who edited the official exhibition catalogue, "The Vienna Group [Ö]", and is named in it as being responsible for its content. The catalogue reproduces texts by Konrad Bayer without the publisher's permission; moreover, the defendant made these texts available on the Web at http://wienergruppe.at and announced that a bookshop edition, accompanied by a CD-Rom, would follow.
Since the plaintiff publisher's application is justified only to the extent that it itself holds rights of use , the Supreme Court was obliged to interpret the original contract and, in particular, to clarify the extent of the rights assigned by it. It took the view that the subject of the contract and the uses listed implied that the plaintiff held only the rights required for use in printed form; this view was supported by the fact that the "new media", Internet and CD-Rom, were still largely unknown at the time when the contract was concluded, or at least that their economic significance for the author was completely unforeseeable in 1984. (The appeal court had argued that WWW and CD-Rom uses were already known at the time when the contract was concluded.) While the German Copyright Act, for example, declares that no rights may be assigned, or obligations stipulated, in respect of uses still unknown, Austrian copyright law contains no express provision to this effect – and indeed no detailed rules on copyright contracts. While finding interpretation of the contract sufficient to decide this case, the Supreme Court referred to the legal situation in Germany and expressly said that the question as to whether the assignment of rights in respect of uses still unknown was also invalid in Austrian law could remain open.

Judgment of the Supreme Court *(Oberster Gerichtshof)* of 12 August 1998, File No. 4 Ob 193/98f.

DE

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Council of Europe

European Court of Human Rights: Three Recent Judgments on the Freedom of Expression and Information

1. Hertel vs. Switzerland, 25 August 1998: the freedom of expression also extends to the criticising of certain economic goods, in casu microwave ovens.
In 1992 in an article in the quarterly Journal Franz Weber referred a research paper of Mr. Hertel on the effects on human beings of the consumption of food prepared in microwave ovens. According to the journal the research findings of Mr. Hertel scientifically proved the (carcinogenic) danger of microwave ovens. In an editorial by Mr. Weber it was argued that microwave ovens should be banned. Some extracts of the research paper were also published. The Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances started up proceedings against the editor of the journal and against Mr. Hertel under application of the Federal Unfair Competition Act (Section 3). While the application against the editor of the Journal was dismissed, in the case against Mr. Hertel the Berne Commercial Court allowed the application because the defendant had used unnecessarily wounding statements. Mr. Hertel was prohibited by the Court from stating that food prepared in microwave ovens was a danger to health and from using in publications and public speeches on microwave ovens the image of death. The imposed injunction was later confirmed by the Federal Court.
Mr. Hertel applied to the European Commission for Human Rights, complaining especially of a violation of Article 10 of the European Convention of Human Rights. Just like the Commission in its report of 9 April 1997, the European Court comes to the conclusion that Mr. Hertel's freedom of expression was violated by this ban imposed on him by the Swiss Courts. Although the interference in the applicant's freedom of expression was prescribed by law and had a legitimate aim ("the protection of the rights of others"), the Court is of the opinion that the impugned measure was not necessary in a democratic society. The Court notes that there is a disparity between the measure and the behaviour it was intended to rectify. According to the Court "the effect of the injunction was partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied". And the Court emphasised : "It matters little that this opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas" (par. 50). By six votes to three the Court reached the conclusion that Article 10 of the European Convention was violated.

2. Lehideux and Isorni vs. France, 23 September 1998: a conviction because of an advertisement presenting in a positive light certain acts of Marshal Pétain is considered a violation of the right of freedom of expression.
On 13 July 1984 the newspaper *Le Monde* published a one-page advertisement bearing the title "People of France, you have short memories". The text presented Philippe Pétain, first as a soldier and later as French head of State under the Vichy Government, in a positive light. After a complaint by the National Association of Former Members of the Resistance a criminal procedure was started against Mr. Lehideux as the president of the Association for the Defence of the Memory of Marshal Pétain and against Mr. Isorni as the author of the text. The advertisement finally was estimated a public defence of the crimes of collaboration with the enemy, under application of section 23-24 of the Freedom of the Press Act of 29 July 1881 (Paris Court of Appeal 26 January 1990). The civil parties were awarded damages of one franc and publication of excerpts from the judgment in *Le Monde* was ordered. The Court of Cassation in its judgment of 16 November 1993 was of the opinion that this conviction did not infringe the right to freedom of expression protected by Article 10 of the European Convention.

The European Court in Strasbourg, sitting in Grand Chamber (21 judges), has now reached a different conclusion. Although the interference in the applicants' right to freedom of expression was prescribed by law and pursued the protection of the reputation or rights of others and the prevention of disorder or crime, the criminal conviction of Lehideux and Isorni was not estimated as "necessary in a democratic society". Although the Court recognises that the litigious advertisement presented Pétain in an entirely favourable light and did not mention any of the offences for which he was sentenced to death by the High Court of Justice in 1945, the Court also underlines that the text explicitly contains a disapproval of "Nazi atrocities and persecutions" and of "German omnipotence and barbarism". Although the Court estimates the omissions in the advertisement of any reference to the responsibility of Pétain for the persecution and deportation to the death camps of tens of thousands of Jews "morally reprehensible", it evaluates the advertisement as a whole in the light of a number of circumstances of the case. Referring to the different decisions and judgments during the domestic proceedings, to the fact that the events in issue occurred more than forty years ago and to the circumstance that the publication in issue corresponds directly to the object of the associations which produced it without any other proceedings have ever been brought against them for pursuing their object, the Court reaches the conclusion that the impugned interference in the applicants' rights violates Article 10. The Court also refers to the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. Taking all this into consideration, the Court reaches the conclusion that the criminal conviction of the applicants was disproportionate and as such unnecessary in a democratic society. Therefore, the conviction of Lehideux and Isorni has been a breach of Article 10 (fifteen votes to six). Having reached this conclusion, the Court does not consider it appropriate to rule on the application of Article 17of the Convention (prohibition of abuse of rights).

3. Steel and others vs. United Kingdom, 23 September 1998: the arrest and detention of protesters for breach of the peace and the freedom of expression.
The judgment of the European Court in the case Steel and others concerns 3 different cases with an analogue issue: the interference by the British authorities against protest and demonstrations by ecological or peace movement activists. In all 3 cases the applicants were arrested and kept in custody some time for reason of "breach of peace". The first applicant, Ms. Steel, took part in a protest against a grouse shoot. She walked in front of a hunter's shotgun, preventing him from firing. The second applicant, Ms. Lush, took part in a protest against the building of an extension to a motorway. Three other applicants had taken part in a protest against the sale of military helicopters : their protest took the form of the distribution of leaflets and holding up banners in front of a conference centre. The Court recognises that although the protest by the first and second applicant took the form of physically impeding the activities of which the applicants disapproved, this behaviour could be considered as the expression of an opinion within the meaning of Article 10. With regard to both cases the Court is of the opinion however that the detention and the imprisonment was to be considered as "necessary in democratic society" for the interest in maintaining public order, the rule of law and the authority of the judiciary. With regard to the detention of the protesters against the military helicopters, the Court is of the opinion that this interference was not "prescribed by law", since the peaceful distribution of leaflets could not be considered as a breach of the peace. The Court does not find any indication that the applicants significantly obstructed or attempted to obstruct the conference taking place or that they took any other action likely to provoke others to violence. Additionally, the Court considered the interference in the applicants' right of freedom of expression as disproportionate to the aims of preventing disorder or protecting the rights of others. Unanimously the Court reached the conclusion that in this case there has been a violation of Article 10, just as there was a violation of Article 5, par. 1 of the Convention (right to liberty and security).

Available in English and French on the website of the ECHR at http://www.dhcour.coe.fr/eng/judgments.htm.

EN FR

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European Union

European Union: Data Protection Directive Takes Effect

The Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data came into force on 25 October 1998. This obliges member states to take the legal, technical and organisational measures needed to provide a uniform level of protection throughout the Community concerning automated processing and storage of personal data in data banks.
The Directive states that personal data may, in principle, be processed only with the consent of the person concerned, or for one of the special reasons which it lists. The processing of certain sensitive data may be totally prohibited in some circumstances. The processing of personal data is closely bound up with the purpose for which they were collected. Exceptions to the rules laid down in the Directive are permissible, with a view to freedom of opinion and information, for journalistic, literary or artistic purposes – particularly in the audiovisual field.
The Directive gives the persons concerned a broad range of rights, from information rights, through access and deletion rights, to the right to object to processing and the right to compensation. The processor must also notify a national supervisory authority which is to be set up, and which will have comprehensive powers of investigation and intervention and a right of access to data.
Personal data may be transferred to non-EU states only if these states provide an adequate level of protection. The obligation on member states of ensuring that data are not transferred to outside states where the level of protection is regarded as unsatisfactory, has already led to negotiations between the EU and the USA and to provisional postponement of a possible data embargo.
So far, only Greece, Portugal, Sweden, the United Kingdom and Italy have implemented the Directive, or at least its main provisions. In the other member states – apart from Germany, France and Luxembourg – the necessary legislation is on the way.

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L281, 23 November 1995, 0031-0050). URL: http://www.europa.eu.int/comm/dg15/en/index/htm.

EN FR DE

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Council of the European Union: Adoption of a Recommendation on the Protection of Minors and Human Dignity

On 24 September the Council of the European Union formally adopted a Recommendation on the protection of minors and human dignity in audiovisual and information services. This marks the end of a long institutional process which began with the adoption of a Green Paper in 1996 (*see* IRIS 1998-10: 4). The field of

application of this new Community instrument is relatively extensive as it covers audiovisual and information services available to the public in any form. Broadcasting services are nevertheless excluded (these are already covered by the Directive on "Television without Frontiers"), as are radio broadcasting services.
The text specifically quotes parental control measures as a means of combating illegal and harmful content, and opts for auto-regulation, which offers companies the advantage of being able to adapt more readily to rapid technological change. The Council nevertheless takes care to point out that any restriction or attack on the principle of freedom of expression must be "non-discriminatory, necessary to achieve the desired objective and strictly proportional with regard to the limitations it imposes", and proposes a different approach depending on whether content is deemed to be unlawful or harmful. In keeping also with national and local sensitivities as well as cultural diversity in determining content, it stressed that "particular attention must be paid to the application of the subsidiarity principle", as the transnational nature of the problem could then be resolved by means of very close international coordination.
The Council addresses both the Member States and the industry, recommending that they set up national frameworks for auto-regulation and the implementation of codes of conduct by collaboration between all the parties concerned (users, consumers, companies and public authorities). As regards broadcasters, it advocates experimentation – on a voluntary basis – of new ways of protecting minors and viewers' information and, for on-line services, the creation of structures for dealing with complaints with a view to combating illegal content; such structures must be suited to cooperation at both national (with the relevant legal and police authorities) and international level. The Council then presents the guidelines embodying these recommendations. Thus the codes of conduct , in their provisions aimed at combating harmful content, should make provision for measures such as a warning page, a sound or visual signal, a descriptive label and/or a classification of content, or a system for checking the age of the user. Parental control should become easier with the supply of filter software, installed and activated either by the user or by the services operators. Lastly, and although established on a voluntary basis, it must ensure that the codes of conduct are adhered to by means of dissuasive sanctions which would involve penalising any violations.

Council Recommendation of 24 September 1998 on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity. OJEC No. L 270, 7 October 1998: 48-55.

EN FR DE

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European Parliament: Directive on the Legal Protection of Conditional Access Services Passed Second Reading

In the second reading on 8 October 1998, the European Parliament approved the Council's common position, as amended by another recital. The new Recital 12 a stipulates "that Member States provide appropriate legal protection against the placing on the market, for direct or indirect financial gain of an illicit device which enables or facilitates without authority the circumvention of any technological measures designed to protect the remuneration of a legally provided service." In addition the Parliament shortened the delay for the Commission's reporting on the implementation of this Directive to three years for the first report and two years for the period thereafter (*see* IRIS 1998-8: 4, IRIS 1998-5: 4, IRIS 1997-8: 8).

Decision on the common position adopted by the Council with a view to the adoption of a European parliament and Council Directive on the legal protection of services based on, or consisting of, conditional access (C4-0421/98-97/0198 (COD)).

EN

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European Commission: Preventing Imitations and Pirating of Products and Services in the Internal Market – Green Paper Published

The European Commission recently published a green paper on combating imitations and the pirating of products and services in the Internal Market. In addition to standardising concepts in this area, it sets out to explore the need for comprehensive measures to prevent the pirating of products and services protected by the laws on trade, copyright, services and data banks. It mentions radio and information society services as being particularly affected by piracy.
Four lines of action, comprising different measures, are envisaged. One covers technical measures against piracy. The Green Paper refers to measures taken so far in various economic sectors, and particularly mentions the field of copyright law and Article 6 of the proposal for a Directive to harmonise specific areas of copyright law and related rights in the information society. It raises the question of a general prohibition on certain practices involving the use of inadmissible technical facilities, and also the possibility of covering technical preventive measures in the Commission's research and development programme, and particularly Area 2 of the fifth framework programme "A user-friendly information society".
In addition to calling for monitoring of the private economic sector, the Green Paper focuses on sanctions which may be required and on ways of enforcing intellectual property rights. If necessary, legislative measures

could be taken to supplement the TRIPS agreement on enforcement of those rights. The possibility of going beyond the very general provisions on sanctions and remedies contained in the proposal for a copyright directive, and protecting intellectual property more effectively with the help of (horizontal) Community initiatives is also considered.
The last line of action refers to administrative co-operation. The proposals made here concern, not just the exchange of information and the setting-up of a data bank, but also transfrontier monitoring of suspect movements of goods, and mutual recognition of evidence obtained in other member states.
The Commission calls on all interested parties to participate in the consultation process and in helping to answer the questions raised in the Green Paper.

Commission of the European Communities. Green Paper on combating imitations and the pirating of products and services in the Internal Market, COM(98). URL: http://www.europa.eu.int/comm/dg15/en/index.htm.

EN FR DE

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European Commission: Future of the Audiovisual Media – DG X Report

Marcelino Oreja (DG X), Commissioner responsible for media policy and chairman of the High Level Group, presented its report, "The Digital Age: European Audiovisual Policy", at the end of October. This contains the experts' opinions and recommendations on the Community's future role in this area.
One major point of emphasis is support for the audiovisual industry, not least through extension of Community financial aid. Because of their significance for the digital media, special attention is to be paid to marketing and the management of rights.
In view of the present debate on the funding of public service broadcasting in the member states (*see* the report on DG IV's discussion paper), the points made on this issue are also of some interest. Two criteria are put forward as a basis for assessment of the systems applied in member states. The first is proportionality of the resources deployed to the functions of a public service. The second is transparency: i.e. in the case of purely commercial activities which are over and above the public service function, separate accounts should be kept, insofar as funding comes from sources other than licence fees.
The report emphasises the special importance of the role which public service broadcasting plays in the balance between protection of the public's interest in the social function of the audiovisual media on the one hand, and free market forces on the other. The member states are urged, however, to come up with a joint definition of public service broadcasting.
After previous publications on the Community's activity in the audiovisual media field – such as the conclusions of the Luxembourg conference on digital broadcasting and the Birmingham conference on the challenges and opportunities of the digital age, the Commission's July communication on future activity, and particularly the Green Paper on convergence – the report provides another document to serve as a basis for discussion of support measures and legal contexts for action in this field.

URL: http://europa.eu.int/comm/dg10/avpolicy/index_en.html.

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European Commission: DG IV Discusses Funding of Public Television

On 20 October, the possible structuring of state aid for public television was the subject of a consultation by DG IV with Member State aid experts. The discussion focused on the compatibility of funding public television with EC competition law. In a statement published by DG IV after the meeting, Commissionar Van Miert emphasizes that obviously a majority of Member States would prefer a case by case approach to the adoption of guidelines and that an even bigger majority sees the need for more transparency in the area of funding public television.
The discussion came after several private television channels had launched a series of complaints (five cases are still pending and one case is on appeal) to the Commission alleging that public broadcasters abused public funding. In addition, in the recent *Telecinco* case the European Court of First Instance has confirmed the Commission's (exclusive) jurisdiction to assess the compatibility of State aid with the common market and urged the Commission to conduct a diligent and impartial examination of the complaint in question (s*ee* IRIS 1998-9: 5).
Commissioner Van Miert has announced that he will call a meeting with private broadcasters to discuss the issue of "public aid" further.

Statement by Commissioner Van Miert made on 20 October 1998 (DN: IP/98/916 of 21 October 1998).

EN FR

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European Audiovisual Observatory

National

CASE LAW

Hungary: Case Brought by Journalists Against Journalists on Violation of Personal Reputation

On 11 October 1998 the Court of Appeal in Budapest (Metropolitan Court) delivered a decision in a dispute between journalists about the truthfulness of the TV reporting by two of them which had been publicly called into question by two of their journalist colleagues (joined by two other defendants).
One of the most popular Hungarian weekly TV programs on domestic politics is called "Week" and is broadcast in national public service TV1. On 20 June 1993 a report was broadcast by the plaintiffs on the 23 October 1992's national celebration of the anniversary of Hungary's fight for independence against the Soviet troops which had invaded Hungary on 23 October 1956. For example, the report showed that extremist radical right wing groups attempted to prevent the Hungarian President of the State to deliver his public speech at the Hungarian Parliament.
According to the defendants, the report on the appearance and demonstration of extremist radical right wing groups at the Hungarian Parliament had neither been made on the real site of the events nor at the actual time of the gathering.
The plaintiffs claimed that these allegations which have been made by their colleagues working also at TV1 - who were eventually known for their right wing political affiliations - were violating the plaintiffs' reputation.
In considering all evidences, the Court of Appeal decided in favour of the plaintiffs by ruling that the allegations of the defendants were not proved to be true and therefore harmful to the plaintiffs' reputations. The court also held, that the plaintiffs have the right to announce the court's decision related to the report in question in the same television program.
This was amongst the first Hungarian court cases decided at the final instance by independent courts, in which journalists were sued by other journalists in connection with professional ethical issues.

Metropolitan Court (Court of Apppeal in Budapest) 47.Pf 25 598/1994/47, decision of 11 October 1998.

HU

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Belgium: Private Copying and Computer Equipment

In Belgium, *Auvibel* is responsible for collecting and redistributing payments due for making private copies of sound and audiovisual works.
The company Hewlett Packard sells CD Recorders or CD Writers in Belgium; these make it possible to store information on a blank CD (CD-recordable).
Auvibel considered that this recording equipment and the blank CDs was subject to payment for private copying as provided for in Article 55 of the Copyright and Neighbouring Rights Act of 30 June 1994 ("the Act"). According to *Auvibel*, by refusing to make the due payment, Hewlett Packard was infringing the copyright protection of the originators, artistes or performers and producers of phonograms and audiovisual works. *Auvibel* therefore applied to the Presiding Judge of the Regional Court (*Tribunal de Première Instance*) for an order to put an immediate stop to making the equipment and blank CDs available, on pain of a fine.
The Presiding Judge declared the application unfounded, for the following reasons:
The Presiding Judge considered that Hewlett Packard was right in referring to the Minister for Justice's report to the King prior to the Royal Decree of 28 March 1996 concerning remuneration for private copying. The report sets out the reasons which led the King, after consulting representatives of the sectors concerned, to set the remuneration applicable to computer media and equipment which could be used in particular for the private copying of sound and audiovisual works at specifically 0% of the sale price. According to the report, this type of equipment was not being used for this purpose to a significant extent. Although this equipment also made it possible to copy sound and audiovisual works, it was mainly used professionally for data storage.
The Presiding Judge did not uphold *Auvibel*'s argument that the rate provided for in the Royal Decree could not be applied by the Court as the King had overstepped the powers vested in him by law by in fact exempting this type of computer equipment and media from payment. The Court decided that zero rating in no way infringed the principle of entitlement to payment.
The Presiding Judge also recalled the existence of a consultative committee for this sector, which had been set up specifically to enable it to adapt regulations to technical and market developments without delay. According to the Presiding Judge, it was up to *Auvibel* to apply to this committee and request that the rate of payment for this type of equipment and media be changed in line with the present situation.
According to the present state of legislation, therefore, the Presiding Judge found that *Auvibel*'s submission was unfounded.
An appeal has been lodged against the decision.

Judgment by the Presiding Judge of the Regional Court *(Tribunal de Première Instance)* in Brussels (97/6126/A), 6 November 1997, in the case of Auvibel S.C.R.L. v. Hewlett Packard Belgium S.A.

FR

Peter Marx
Marx, Van Ranst, Vermeersch & Partners

Ireland: "Power CDs"

In a recent case the Irish High Court decided that a "Power CD" is a record for the purposes of copyright. A "Power CD" is a compact disc which in addition to sound tracks (as in the usual type of compact disc), also contains text, graphics and visual images for playing on a multi-media computer.
Although a new Copyright Bill is due to be published at the end of October 1998, this area of law is still largely governed by the Copyright Act 1963. Section 2 of the Act essentially defines a "record" as any device in which sounds are embodied so as to be capable of being automatically reproduced from such a device. Section 13 (1) of the Act allows a person to make a record of a musical work without infringing the copyright in that work, provided certain conditions are fulfilled (*inter alia* the person must notify the copyright owner of his intention to make such a record and must pay him a fair royalty). Section 13(4) of the Act provides that where a record comprises sung or spoken words together with music, any copyright in such words is not infringed by the making of the record, again provided the same conditions regarding notice and the payment of a fair royalty are fulfilled.
The plaintiffs manufacture "Power CDs" in Ireland for the Spanish market. They sought a declaration from the court that "Power CDs" are records for the purpose of the Act. The defendants, who are a copyright collection society acting for music publishers in Ireland, argued that since a "Power CD" contains extra information, it could not be a record for the purposes of the Act. However, the judge decided that the definition of "record" in the Act did not exclude the extra visual dimension contained in the "Power CD" and that this broad interpretation was in accordance with the wording of Section 13. The decision thus grants record manufacturers a much greater degree of protection against actions for breach of copyright in respect of both music and words.
The judge also pointed out that the outcome of the case was important because legal proceedings are at present being taken in Spain against the Irish manufacturers by the relevant copyright collection society in that jurisdiction.

Mandarim Records Limited v Mechanical Copyright Production Society (Ireland) Limited. High Court, 5 October 1998.

EN

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Spain: Agreements signed in 1993 for the televising of the Spanish Football League were unlawful

The *Audiencia Nacional* (*AN)* confirmed the 1993 decision of the Spanish anti-trust authority (*Tribunal de Defensa de la Competencia - TDC*) that the agreements for the televising of Spanish Football League matches between the Spanish Professional Football League (*Liga Nacional de Fútbol Profesional - LNFP*) and some Spanish broadcasters (*TVE, Canal* Plus and the *Federación de Organismos de RadioTelevisión Autonómica -FORTA-*, the Association of Regional Broadcasters) were unlawful.
The *TDC* had taken this decision because the scope of the exclusivity rights was too wide: they had been signed for a very long term (eight years), and they included world-wide broadcasting rights for all competitions organised by the *LNFP*, commercial exploitation of videos, highlights programmes, etc. The *TDC* also had found unlawful the *LFNP's* agreed obligation not to sell any rights to any other broadcasters, and, in addition, to extend the agreement for another term of five years if *FORTA, TVE* and *Canal Plus* would match any other broadcaster's bid. The *TDC* had imposed a fine of 147 million pesetas on the *LNFP* for abusing its dominant position.
The Resolution adopted by the *TDC* was appealed before the administrative section of the *AN*. The Spanish broadcasters *Antena Tres TV* and *Telecinco*, which had lodged the original complaint before the *TDC*, asked the *AN* to enforce, on a provisional basis, the Resolution adopted by the *TDC*, and to suspend the application of the agreements. Both the *Audiencia Nacional* and the *Tribunal Supremo* decided not to grant the provisional order, and so, the plaintiffs had to wait for the judgement of the *AN*. More than five years later, the *AN* has finally decided to uphold the view of the *TDC.* In the meantime, the unlawful agreements were applied until their expiry in 1998. Nevertheless, the judgement of the *AN* confirms the fine imposed on the *LNFP*, and allows *Antena Tres TV* and *Telecinco* to seek damages in civil proceedings. However, that will not happen in the immediate future, as the *FORTA* has appealed the judgement of the *AN* to the *Tribunal Supremo*.

Sentencia de la Audiencia Nacional, Sala de lo Contencioso-Administrativo, Sección 6ª, LNFP y televisiones autonómicas (TVG, Canal Sur, Televisió de Catalunya, ETB, RTVV y Telemadrid)/ TDC, y Antena Tres TV y Gestevisión Telecinco, of 17 July 1998.

ES

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LEGISLATION

United States: Congress Passes Internet Bills

In the past month, Congress has passed several measures to promote electronic commerce and protect children using the Internet. Three such bills were attached to the Federal budget, which President Clinton is expected to sign shortly.
The Internet Tax Freedom Act will prohibit state and local governments from imposing Internet access or bit taxes, as well as other "multiple or discriminatory taxes" on electronic transactions during a temporary

moratorium. However, the bill will not prohibit taxation on gross or net income derived over the Internet or other non-transactional taxes.
The Internet Tax Freedom Act will also establish a temporary Advisory Committee on Electronic Commerce to recommend rules for the income and excise taxation of transactions using the Internet. Legislative recommendations are to be submitted within 18 months of enactment. The Committee will consist of representatives of Federal, State and local governments as well as the electronic industry and consumer representatives.
The Children's Online Protection Act restricts material considered harmful to minors from being sold or transferred of over the Internet to persons under 17 years of age. Violations carry penalties up to $50,000 and six months in prison. However, the bill does provide an affirmative defense to defendants that attempt to restrict access to minors through a verified credit card, debit account, adult access code, or adult personal identification number (or any other procedure that the Federal Communications Commission deems to be adequate).
Congress passed a separate bill, the Children's Online Privacy Protection Act of 1998, to protect children under the age of 16 from having personal information – such as addresses, telephone numbers, or social security numbers – solicited over the Internet. The bill requires that websites targeted to children, such as some pen pal services and chat rooms, must first attain verifiable parental consent before asking for personal information from children. The Federal Communications Commission is directed to prescribe specific regulations within one year of enactment.
Finally, the President has already signed into law the WIPO Copyright Treaties Implementation Act. The Act implements the 1996 treaties signed at the World Intellectual Property Organization Conference in Geneva. Among other provisions, the Act makes it illegal to manufacture, import, or sell products that allow users to circumvent technological protection of intellectual property on the Internet. The complaining party may elect to receive either actual damages or statutory damages. In addition, violators may receive fines and prison terms.

Internet Tax Freedom Act [ftp://ftp.loc.gov/pub/thomas/cp105/sr276.txt]
Children's Online Protection Act [ftp://ftp.loc.gov/pub/thomas/cp105/h3783.ih.txt]
Children's Online Privacy Protection Act of 1998 [ftp://ftp.loc.gov/pub/thomas/cp105/s2326.is.txt]
WIPO Copyright Treaties Implementation Act [ftp://ftp.loc.gov/pub/thomas/cp105/h2281.ih.txt]

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Ireland: Child Trafficking and Pornography Act 1998

The purpose of the Child Trafficking and Pornography Act, passed a few months ago, is to prohibit trafficking in, or the use of, children for the purposes of their sexual exploitation, and to prohibit the production, dissemination, handling or possession of child pornography.
The Act, which is aimed particularly at the Internet, covers film, video, tapes, computer disks, and other forms of audio and visual representation, through any medium, or produced by or from computer graphics or any other electronic or mechanical means. The Internet is not specifically mentioned but the scope of the Act is kept sufficiently broad to ensure that it will not become quickly outdated by advances in computer technology. The terms "child pornography" and both "audio representation" and "visual representation" are defined in the Act in broad terms. A child is defined as a person under the age of 17 years.
A number of offences are created. It is an offence to organise or knowingly facilitate child trafficking for purposes of sexual exploitation (maximum penalty is life imprisonment) or to allow a child to be used for child pornography (maximum penalty is a fine of £25,000 and/or 14 years' imprisonment). It is also an offence *inter alia* to produce, distribute, publish, import, export, or sell child pornography (maximum penalty is a fine - amount not specified -and/or14years' imprisonment). Possession of child pornography is itself an offence (maximum penalty is a fine of £5,000 and/or 5 years' imprisonment).
However, despite concerns about the placing of pornography on websites which children regularly access, the Act does not deal specifically with access by children to pornography. Proposals to include such measures in this or in subsequent legislation relating to children were rejected. For parents who are concerned about this problem, "Net Nanny" is available and can be loaded onto any personal computer to control access. Also, a report is awaited from a working group set up to examine the illegal and harmful use of the Internet.
Meanwhile, the Irish Society for the Prevention of Cruelty to Children (ISPCC) has urged Ministers of the EU Member States to ensure that other Member States, that have not done so already, enact similar legislation, so that through the harmonisation of laws on child abuse, it may be stamped out more effectively. Ireland was due to raise the issue at a meeting of Foreign Ministers in Luxembourg in early October. The ISPCC has also said that nasty and violent computer games should be regulated in the same way as literature and film. At present, they do not come within the control mechanisms of the Censorship of Films or Video Recordings Acts.

Child Trafficking and Pornography Act 1998.

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Russia: New Licensing Act Is Adopted

Russian Parliament adopted a new licensing Act ("On Licensing of Certain Types of Activities"). From the moment of its entering into force, all regulation concerning licensing of any type of activity to be adopted by the Parliament or by the Government shall correspond to this act.
The Act enumerates activities on Russian territory, for which the licence is needed. These activities include: television and radio broadcasting; broadcasting of additional information (teletext); provision of services in the

field of informational encoding; manufacture and distribution (except retail trade) of any phonograms and audiovisual products; public demonstration in cinema of any audiovisual products (exhibition of films).
The main provisions of the Act are as follows:
The maximum amount of licence fee cannot be more than the equivalent of 10 minimum monthly wages (approximately USD 55 as at the end of October). The term of licence cannot be less than 3 years, unless the licence seeker asks for a shorter term. The request for a licence shall be reviewed within 30 days (or less) from the moment of the official presenting of the request. The licensing bodies shall keep registers of issued licences, and those registers shall be open to the public. The licensing bodies can suspend the implementation of a licence, if there is a violation of the conditions (clauses) of the licence, which damages health, public morals or interests and state security. The licence can be annulled by the court upon a petition by the controlling governmental body. The reasons for annulment are: (a) presenting false information in the claim for issuing the licence; (b) the repeated or rough violation of clauses of the licence; (c) illegal decision of the state body on issuing the licence.
According to Russian experts, this Act is indispensable for allowing effective business in Russia, because many current governmental decisions on licensing of certain types of activities are in contradiction with federal statutes and with each other. The Act strictly limits any kind of arbitrariness of government bodies and its officials responsible for licensing procedure. This Act will stand in for the still pending Broadcasting Act, which would regulate the procedure of licensing in the broadcasting sphere in Russia.

Federalny Zakon Rossiyskoy Federatsii "O litsenzirovanii otdelnykh vidov deyatelnosty" adopted on 16 September 1998. Published in "Rossiyskaya gazeta" on 3 October 1998.

RU

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Ukraine: Quotas for National Films

Based on Article 22 of the Statute "On Cinematography" (*See* IRIS 1998-4: 9) the Cabinet of Ministers of Ukraine adopted a decree (No 1436) that introduces quotas for national (Ukrainian) films on television and cinema. The act operates with the term "national screen time" which is described as total time of public showing of films in cinemas, as well as on over-the-air, cable, and satellite television of Ukraine. The quota for Ukrainian products, as established in the Statute "On Cinematography" shall be at least 30 per cent.
All entities of all forms of property that deal in exhibition (public showing) of films should provide on a monthly basis relevant statistics to the Ministry of Culture and Arts. The Ministry of Culture, the National Council on Television and Radio Broadcasting Issues, the Ministry of Economics, and the State Committee on Statistics are the bodies that will have control over the accuracy of the statistics and timely provision of the reports of the exhibitors. In case of violations of the quota limit, the exhibitors at fault may have their licences to show films (which are obligatory to deal with the business) revoked.

*Polozhennya pro natsionalny ekranny chas ta yoho vykorystannya subyektamy kinematografii ta telebachenny*a (ruling on the national content of cinema and television). Adopted by the Cabinet of Ministers of Ukraine on September 14, 1998. Published in Ukrainian in Teleradiokurier journal, 6, 1998.

UK

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Spain: Approval of a Decree on Digital Terrestrial Television

A Decree on the National Technical Plan on Digital Terrestrial Television (DTTV) has been approved in order to establish DTTV services in Spain. The legal basis of the Decree is the forty-fourth Additional Provision of Law 66/1997, of 30. December 1997, which refers to the possible introduction of these new services.
According to this Decree, there will be several transmission networks called "multiplexes", each of which will be able to carry at least four different programme services. The Decree reserves programme services in some of the multiplexes for existing national and regional public service broadcasters, in order to allow them to simulcast their analogue and digital programmes. For these purposes, the Plan reserves two programme services in a digital multiplex for *TVE* (national public service broadcaster), two programme services for the regional public service broadcasters, and a programme service for each of the three private broadcasters, *Antena 3 TV*, *Telecinco* and *Canal Plus*. If the existing private broadcasters obtain their concessions, which are to be renewed in 1999, they must start providing DTTV services no later than two years after the renewal of the concessions.
The remaining DTTV programme services available will be operated by one or more private broadcasters, which will be awarded a concession following a public tender. Once the new concessionaires have commenced to provide DTTV services and the existing national and regional broadcasters no longer have to provide analogue services, the existing broadcasters may be allowed to operate its own multiplex.
A Ministerial Order, approved with the Decree, establishes that the public broadcasters offering DTTV services are responsible for ensuring that their output complies with the Statute of Radio and TV of 1980 and the Law of the Third Channel of 1983, while private broadcasters must respect the Law on Private TV of 1988 (particularly parts II, III and IV of this Law). The Ministerial Order also states that the new concessionaire or concessionaires of DTTV services must broadcast non-encrypted programmes for at least four hours per day and thirty-two hours per week. For the rest of the week, they may broadcast free-to-air TV services or pay-TV

services, depending on the conditions set out in their licences. In the event that the concessionaires provide digital pay-TV services, they must use open decoders that comply with the Spanish provisions in this regard (*i.e.*, Law 17/97, implementing EC Directive 95/47; (*see* IRIS 1997-5: 12)).

Disposición adicional cuadragésimo cuarta de la Ley 66/1997, de 30 de diciembre, de medidas fiscales, administrativas y del orden social, (Forty-Fourth Additional Provision of the Law on certain taxation and administrative provisions and social affairs), *BOE* nº 313 of 31.12.1997.
Real Decreto 2169/1998, de 9 de octubre, por el que se aprueba el Plan Técnico Nacional de la Televisión Digital Terrenal, (Decree on the approval of the National Technical Plan on Digital Terrestrial TV), *BOE* nº 248 of 16.10.1998, pp. 34244-34248.
Orden de 9 de octubre de 1998 por la que se aprueba el Reglamento Técnico y de Prestación del Servicio de Televisión Digital Terrenal, (Ministerial Order on the approval of the technical aspects and clarifying the conditions upon which Digital Terrestrial TV Services must be offered), *BOE* nº 248 of 16.10.1998, pp. 34248-34249.

ES

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LAW RELATED POLICY DEVELOPMENTS

Italy: New National Frequency Plan

On 30 October 1998 the *Autorità per le Garanzie nelle Communicazioni* (the Independent Regulatory Authority for Telecommunications and Media) issued the new national frequency plan. The plan identifies 17 national networks, 11 of which are reserved for national television and 6 for local television. These 17 networks cover 80 % of the national territory and 92 % of the population, transmitting from a total of 487 sites across the country (fewer compared to the actual 600). The inspiring principle is to rationalise the location of the sites: the plan calls for the building of a number of new sites, which will be shared by all broadcasters serving the same area, and for the dismantling of a number of existing sites in order to reduce the electromagnetic pollution. Four channels have been reserved to digital terrestrial broadcasting and one to digital radio broadcasting.
The implementation of the plan will require a period of some months - between 18 and 30 - which will be agreed upon by the *Autorità* under the terms of the regulation concerning license application procedures which will be released by the end of November 1998. The Italian Ministry of Communication is due to assign the new licenses by the end of January 1999. Considering that 11 channels are reserved to national broadcasting and that, according to Law 249/97 regulating the TV and T1c sectors, each operator can control no more than "20 % of available resources", this implies that a single operator will not be allowed to own more than two national channels. As a consequence Mediaset, which currently controls three national networks, may be forced to transfer one of them to satellite.

Piano nazionale di assegnazione delle frequenze per la radiodiffusione televisiva. Relazione illustrativa, Autorità per le Garanzie nelle Comunicazioni, 30 Octobre 1998.

IT

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Autorità per le Garanzie nelle Comunicazioni

Germany: Copyright Act – Fifth Amended Version on the Way

On 7 July 1998, the Federal Minister of Justice issued the preliminary draft of a fifth amending act on the Copyright Act, the aim being to bring the latter into line with developments in the field of information and communication technology. The primary purpose of the draft is to implement two treaties adopted by the World Intellectual Property Organisation (WIPO) – the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty – as rapidly as possible (*see* IRIS 1997-1:5).
One important innovation in the draft is a new transmission right – the "right to make available". This covers the right to make protected material available to individual users on digital networks ("on-demand services"). The concept of "public" also requires adjusting here. So far, the term "public" has been taken to mean that use by all users must be simultaneous – which leaves the copyright status of use in the case of on-demand services uncertain. The draft accordingly makes it clear that a work is also made public when it "is made available to, or perceptible by, various members of the public, or is made available to one of their number via a service aimed at the public". This new right to transmit also needs to be distinguished from the right to broadcast, which is not the same. The criterion used to make this distinction is that of a "structured programme": to broadcast a work is to make it available to the public within a structured programme; to transmit it is to make it available outside a structured programme. The draft also gives performing artists a new right to recognition, which strengthens their strictly personal rights and also brings their legal status closer to that of authors. The draft sets out to ensure that technical measures to protect rights-holders are not evaded, by comprehensively prohibiting action to evade, eliminate, destroy or render unusable. It also protects rights-holders against manipulation of certain data used to identify a work or the conditions attaching to its use. On the other hand, the provision on compulsory licences for the manufacture of phonograms has disappeared completely. This was originally intended to guard against the danger of individual manufacturers'

acquiring a monopoly - which no longer exists, since the corresponding rights are now universally exercised by performing rights societies. It is worth noting – particularly in view of the current negotiations concerning the proposed EU directive – that the draft makes no general change in the regulations on restrictions contained in copyright law. Nor are the regulations on payment for the lawful(mainly private) making of copies amended. The draft restricts itself to systematic adjustments already rendered necessary by recognition of the new on-line right. To this extent, it is merely a first step, and a second will probably have to be taken during the next legislative period.

Preliminary draft of a fifth act amending the Copyright Act, published by the Federal Ministry of Justice on 7 July 1998, with a bill on the WIPO treaties on copyright, and on performances and phonograms of 15 October 1998.

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Bosnia-Herzegovina: Start of Organising the Media

As of 1 August 1998, the Independent Media Commission (IMC) officially commenced its work in Sarajevo. The High Representative had legally established the IMC when passing the decision on the Commission's work in June and thus enabling the setting-up of the organisational framework for the pursuit of media activities in Bosnia-Herzegovina.
The IMC is projected to serve the following purposes: provide broadcasting licensing, establish professional codes of conduct, receive complaints and monitor the media, and cooperate with local authorities. Following the opinion expressed by the Commission's director, the IMC rests upon two basic principles: The first pillar shall consist of the generally-accepted European media standards and the second is embodied in Article 10 of the European Convention on Human Rights and Fundamental Freedoms. In other words, the IMC's primary task shall be to bring the media in Bosnia-Herzegovina in complete harmony with European media standards. This includes the development of appropriate media legislation.
Among other obligations, the IMC will exercise the management of the frequency spectrum with the aim of preventing mutual interference.
The Commission will transfer as soon as possible and feasible its powers and responsibilities to a domestic body.

Decision of the High Representative of 11 June 1998; Regulation for the Independent Media Commission (IMC) of 25 July 1998; Code of Practice for Broadcasting activities of the IMC, effective as of 1 August 1998.

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France: *CSA* Delivers Its Opinion on the Bill to Reform the Public-Sector Audiovisual Scene

Since the additional protocol to the Treaty of Amsterdam, there has been much discussion in Europe on the identity and strengthening of the public-sector audiovisual scene. The French Government is doing something about it. Before the end of the year it is to submit to a vote in Parliament a bill to reform the public audiovisual scene. The audiovisual regulatory body, the *Conseil Supérieur de l'Audiovisuel* (*CSA*), has already delivered its opinion on the text of the bill.
The provision which is undoubtedly the most significant concerns the method of financing the public-service television channels. It is intended to reduce substantially the space devoted to advertising on the screens of the national companies *France 2* and *France 3*. In practice, advertising would almost completely disappear after 8.30 pm. This would obviously result in a loss of financial income, which would be compensated by subsidies paid by the State. In its opinion, the *CSA* noted that the reduction in revenue from advertising and its compensation in the form of a budget allocation was likely to lessen the obligations incumbent on the public-sector channels to invest in audiovisual production. The *CSA* therefore felt that budget allocations should be made dependent on production obligations.
A further provision in the bill also deserves attention, namely the method of appointing the chairmen of the public-sector channels. Since 1982, these have been appointed by the regulatory body. There is no intention of changing this arrangement but rather the role of the State would be strengthened, as it must be borne in mind – in a context of public-sector television facing stiff competition from the commercial channels – that the State is the sole shareholder of the national channels. The bill therefore provides for the creation of a holding company comprising *France 2* and *France 3*, *Sept-Arte* and perhaps RFO as well. According to the bill, inspired by the legislation on commercial companies, the *CSA* would continue to appoint the chairman of the holding's management board, but on the basis of the prior opinion of the supervisory council, on which representatives of the State would be in a majority. The *CSA* makes some reservations in its opinion, as it feels that the State's influence could be overpowering.

CSA Opinion no.98-4 of 20 October 1998 on the bill to amend Act no.86-1067 of 30 September 1986, *Journal Officiel* [official gazette] of 30 October 1998, p.16408.

Bertrand Delcros
Légipresse

United Kingdom: Regulator Announces Proposals on Interoperability and Open Access for Digital Television

The Independent Television Commission, the UK broadcasting regulator, has announced its proposals for interoperability and open access in the digital age after undertaking a consultation exercise. Its aim is to ensure that viewers can be assured that digital television equipment can be used to access any digital platform. The proposals set out an agreed set of technical specifications across all digital platforms to ensure interoperability and a mechanism for developing them further. In the case of integrated digital televisions cable and satellite operators will not be obliged to support plug-in module versions of their proprietary technology. However, if the technology is embedded in a TV set then there will have to be a facility for a competitor's system to be plugged in via a common interface. Enforcement will be jointly by the Commission and the Office of Telecommunications.

Independent Television Commission, 'ITC Statement on Interoperability and Open Access for Digital Television', available at URL: http://www.itc.org.uk/news/news_releases/show_release.asp?article_id=208.

EN

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Sweden: Amendments to the Radio and Television Act

With the enactment of the Radio and Television Act of 1996 (RTA) (*see* IRIS 1996-9: 11), which came into force 1 December 1996, Sweden got a cohesive set of provisions regulating all transmissions of sound radio and television programmes which are directed to the Swedish public and intended for reception using technical aids. The RTA comprises provisions which earlier were found in several special Acts regarding terrestrial-, satellite-, wire-transmissions etc., provisions which were transferred with relatively few material changes to the new Act. Due to the amendments of Council Directive 89/552/EEC by Directive 97/36/EC of the European Parliament and of the Council, changes in the RTA were necessary. On 25 June 1998, the Swedish Parliament passed Proposition 1997/98:184 *Ändringar i radio- och TV-lagen m.m.* concerning amendments to the Act. The changes will come into force on 1 January 1999, by which time public digital terrestrial TV-broadcasting in Sweden presumably will have started.

The changes to the RTA concern mainly, in line with Directive 97/36/EC, the areas of jurisdiction and events considered to be of major importance for society. Some new provisions about supervision and sanctions will come into force. Some amendments are due to the introduction of digital terrestrial TV-broadcasting.

The matter of applicable law according to Directive 89/552/EEC is quite intricate, and the respective provisions have been open to fairly wide interpretations. Swedish jurisdiction and evasion of Swedish national law are touched upon in the well known joined cases C-34/95, C-35/95 and C-36/95 *KO* v. *De Agostini (Svenska) Förlag AB* and *KO* v. *TV-Shop i Sverige AB*. According to the RTA, Swedish jurisdiction is – as a main rule – connected to a broadcaster's domicile in the country. In the legislative material to the enactment of the RTA it is stated that the domicile concept shall be understood to have the meaning of domicile as defined in the Procedural Act. This rule has been criticized. The Broadcasting Commission of Sweden has, in a decision 1 December 1997 about TV3, found that the Swedish jurisdiction rule concerning transmissions by wire is in conflict with the jurisdiction rule in Directive 89/552/EEC. In the now amended RTA the domicile concept regarding jurisdiction is omitted and it is clearly stated that a broadcaster's establishment in Sweden is – as a main rule – decisive for the Member State's jurisdiction.

The amended RTA also contains a provision concerning evasion of Swedish national law. The new provision states that if a broadcaster establishes in another EEC-State with the intent to evade Swedish national law and the broadcaster's activities mainly are directed to Sweden, the broadcaster shall be considered established in Sweden. This provision refers to the 14th recital of the preamble to Directive 97/36/EC. The Swedish provision – unlike the preamble – states that the broadcaster must have been first established in Sweden, and thereafter in another EEC-state, for the evasion rule to apply.

Regeringens proposition 1997/98:184 Ändringar i radio- och TV-lagen (1996:844), m.m. (The Proposition of the Swedish Government 1997/98:184 Amendments to the Swedish Radio and Television Act (1996:844)).

SV

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Spain: Bill on the Amendment of the Private TV Law

A Bill on the amendment of the Private TV Law 1988 has been presented to the Spanish Parliament. The amendment would allow private broadcasting companies to be listed on the stock exchange. Under the current provisions of the Private TV Law, the broadcasting companies must be public limited companies, and they must have registered shares, in order to allow the public authorities knowledge of who are the owners of these broadcasting companies. Registered shares cannot be sold in a stock market. According to the Bill, the shares would no longer have to be registered. Instead, the relevant individuals or corporations would have to notify the public authorities if they hold a relevant number of shares (5%, 10%, 15%, 20% or 25%, which is the maximum allowed by art. 19 of the Private TV Law). The Bill is up for approvement before the end of the year.

Art. 53 del Proyecto de Ley de Medidas Fiscales, Administrativas y del Orden Social de 1998 (art. 53 of the Law on Certain Taxation and Administrative Provisions and Social Affairs).

ES

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News

European Commission: Preliminary Agreement with British Interactive Broadcasting

On 21 October 1998 the parties participating in the British Interactive Broadcasting joint venture (BiB) and the Commission of the European Union reached an agreement that meets the Commissions competition concerns. BiB is intended to provide digital interactive television-services in the UK. The participants in this joint venture are BSkyB, BT, Midland Bank and Matsushita. The three focal points which have been taken into account by the Commission in deciding the present case can be summarised as follows:
- degree of probability for elimination of the competition;
- degree of probability for strengthening an already existing dominant position;
- degree of probability that distortion of related markets occurs.

In order to avoid the restrain caused by the crucial points, the European Commission and the parties in question have agreed on a set of conditions and amendments to the original plan. All these new conditions are shaped in order to ensure a fair and non-discriminatory access to (subsidised) infrastructure for third parties and to avoid intolerable distortions taking place on the market. BiB has moreover agreed on the elimination of its exclusive rights on access to the box and to an internal rigid separation of tasks, in order to prevent internal conflict of interests.
A term of 30 days has been agreed, during which third parties will have the opportunity to submit their views and comments on the matter.

URL: http://europa.eu.int/comm/dg10/avpolicy/whatsnew.html.

EN

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France: Results of the FM Band Audit

At the end of 1997, the Minister for Culture and Communication expressed the desire for a thorough reconsideration of the FM band by the *Conseil Supérieur de l'Audiovisuel* (*CSA* – government television and radio monitoring body), in order to check objectively and definitely if there were any frequencies available or ways in which some could be freed.
As soon as it was set up by the *CSA* in May 1997, an audit follow-up committee comprising operators and broadcasters defined the aims of the audit. These were to see whether it was possible to plan frequencies more profitably, and to render use of the FM band more transparent. The committee also felt that optimising the frequencies schedule should be carried out in the general interest, without giving an advantage to any specific category of radio, and should cover both the public and private sectors. To achieve this, the *CSA* decided that an initial study would be carried out in a test area – the Rhône-Alpes region – with an extension to the whole country depending on the results obtained.
After tendering, two companies were selected to carry out the work, which started in February this year. After reading the technical reports submitted by these companies on completion of their task, the audit follow-up committee met at the *CSA* on 20 October to consider the results of this first stage, and to submit its conclusions.
The committee noted that the present state of affairs as reported did not reveal any "anomaly" in the overall occupation of the spectrum. Nevertheless, "disparities in terms of power, cover and recovery rate between private operators and public-service operators" were noted, as well as the fact that a relatively large number of public-service frequencies were not being used (the figure for the test region is estimated at 139 according to officials at *Radio France*). The committee felt that, although it appeared an interesting solution at first sight, an overall reconfiguration of the entire spectrum would be impossible to carry out now given the "technical constraints connected with the international coordination and budgets its implementation would require". In the light of this work and the solutions put forward by the companies carrying out the study, the audit follow-up committee did not feel it appropriate to extend the audit to the rest of the country. Nevertheless, the committee wished to consider the matter further, in conjunction with operators, broadcasters and the *CSA*. An ad hoc working party is therefore to be set up for this purpose in order to continue this work.
A number of radio operators had been hoping for a thorough investigation with the prospect of seeing new frequencies freed up, and therefore regret that the audit is being "put on a back burner". The lack of elasticity as regards resources for terrestrial broadcasting – exacerbated by the fact that in France mass-market radio frequencies are concentrated in the FM band alone – should however be relieved by the prospects opened up by digital radio.

Results of the audit of the FM band; communiqué from the *Conseil supérieur de l'audiovisuel (CSA)* dated 27 October 1998.

FR

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Légipresse

United Kingdom: Independent Television Commission Publishes Network Monitoring Report

Since 1993, the ITC has published data relating to the network commissioning arrangements and process for Channel 3 in its Annual Report. This year, the 1997 Report was published prior to the information being fully available. The Networking Arrangement Reports are published following a 1993 investigation by the

Monopolies and Mergers Commission into the networking arrangements; as part of the conclusion, it was agreed that the ITC would monitor, analyse and report on them. The Report deals with: Letters of Intent; contracts signed (numbers, programme hours and rights) ; and transmission data. General network programmes information is contained in the ITC's 1997 Annual Report, "Overview of Channel 3 Performance"

1997Channel 3 Networking Arrangements. URL: http://www.itc.org.uk/documents/upl_88.doc.

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David Goldberg
IMPS-School of Law
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Poland: The National Broadcasting Council Submits Its Report

In March 1998 the National Broadcasting Council submitted an annual report on its operation as well as basic problems faced by the broadcasting sector to the Lower House of Parliament, the Senate and the President. The first part of the document - the Report - includes information on the decisions taken by the Council, the second - Information - describes the processes that were brought about by those decisions and presents the development of the media market in Poland and its prospects for the future.
The Report analyses the licensing policy pursued by the Council in 1997 and the completion of the second licensing process. It also discusses major problems the Council encounters while controlling broadcasters. It focuses on monitoring radio and TV programmes and, first of all, on the coverage of significant social and political events (constitutional and electoral campaigns, emergency situations).
The informative part of the NBC's report offers various data concerning Polish electronic media. Apart from an evaluation of the size and dynamics of this sector (ranked as number four in Europe in terms of its size and rate of transformation) it highlights issues connected with media convergence and European integration, especially in view of the harmonisation of Polish media legislation with that of the European Union. The informative part also touches upon problems such as economic operating conditions for radio and TV stations, development of information society, and the future of digital of broadcasting in Poland.

Hanna Jedras
National Broadcasting Council

Romania: Suicide on Television - Broadcasting Council Objects

Television coverage of a woman's suicide recently prompted the Romanian Broadcasting Council to draw attention to certain provisions in the law and insist that they must be respected.
Various news programmes had shown the woman in question setting fire to herself, and then struggling desperately to put out the flames, while screaming for help.
The Council considered the effects of such reports on the general public highly questionable. It specifically referred to the European Convention on Transfrontier Television (Article 7) and Recommendation No. R(97)19 of the Council of Europe's Committee of Ministers on the portrayal of violence in the electronic media. It also pointed out that Sections 1 and 2 of the Electronic Media Act and Article 1 of its own Resolution No. 12/1997 prohibited incitement to physical, psychological or verbal violence. Showing scenes of violence on television was an affront to human dignity – and punishable as such by the authorities concerned.

Mariana Stoican
Radio Romania International

PUBLICATIONS

Barta, Janusz; Markiewicz Ryszard.- *Internet a prawo*. (Internet and Law).- Krakow: UNIVERSITAS, 1998.-357 s.

Randall, Vicky.- *Democratization and the media.*-Ilford: Frank Cass, 1998.- 258p.-ISBN 0-7146-48949.-£29.50

Reber, Nikolaus.-*Die Beteiligung von Urhebern und ausübenden Künstlern an der Verwertung von Filmwerken in Deutschland und den USA.*-München: Verlag Beck, 1998.-XXXI, 371 S.- (*Urheberrechtliche Abhandlungen*, Heft 30).-ISBN 3-406-44156-4.- DM 158

WIPO International Forum on the Exercise and Managment of Copyright and Neighboring Rights in the Face of the Challenges of Digital Technology, Sevilla, May 14 to 16, 1997.- Geneva: WIPO, 1998.-*(WIPO Publications*, No.756/E)-SFr 30

AGENDA

Legal Aspects of Licensing of Mass Media and Mass Communications Organisation in Russia and the West
This conference that we announced last month has been postponed to 19 December 1998.
Information & Registration:
e-mail: arichter@galsnet.ru

A Seventh European Video Perspective
3 - 5 December 1998
Organiser: Perspectives de l'édition Vidéo Européenne
Venue: Strasbourg
Information & Registration:
Tel: +32 (0) 2 2482400
Fax: +32 (0) 2 2482330

Comment gérer les droit d'auteurs en toute sécurité Juridique
16 December 1998
Organiser: EUROFORUM
Venue: Terrass Hotel, Paris
Information & Registration:
Fax: +33 (0) 1 44881499

2nd International Congress on Electronic Media & Citizenship in Information Society
6 - 9 January 1999
Organiser: The Finnish National Fund for Research and Development
Venue: Finland
Information & Registration
Tel: +358 (0) 9 440822
Fax: +358 (0) 9 492810
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