IRIS
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY
MARCH 1999 - VOL. V - N° 3

CONTENTS

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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

EDITORIAL

Following last month's edition of IRIS, which reported on numerous new laws and amendments from a broad geographical area, this issue includes many articles from German-speaking countries, particularly Germany and Switzerland. Two German court judgements are concerned with issues of copyright law in relation to CDs (revenue from blank cassettes and re-use on CD-ROM) and are therefore linked in terms of content to the Irish decision reported in IRIS 1998-10:9. Meanwhile, courts in France and Switzerland have been tackling the problem of liability for providing access to contents of the Internet, issuing positive verdicts in each case. Finally, this issue, in addition to several reports on broadcasting law, also contains three articles on the financing of public broadcasting companies in the context of the European Communities. The first concerns the Council decision of 25 January 1999 on public broadcasting, while the second refers to investigations into appeals lodged with the Commission against public broadcasters in France, Italy and Spain. The third addresses the financing of public special interst channels in Germany.
Before I leave you to read these reports, I would like to point out that our subscribers can now access IRIS on-line in all three languages. Not only are the 1999 issues already available, but all issues since 1995. Our subscribers have already been sent a username and password in a separate letter. Please make a note of the website for this comprehensive new service: http://services.obs.coe.int/en/espace.htm. Happy reading!

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.

Documentation: Edwige Seguenny • Translations: Michelle Ganter (co-ordination) – Amanda Beddows-Larivière – Véronique Campillo – Katherina Corsten – Paul Green – Katherine Parsons – Stefan Pooth – Nathalie-Anne Sturlèse – Kerstin Temme – Catherine Vacherat – Stella Traductions • Corrections: Michelle Ganter, European Audiovisual Observatory (co-ordination) – Johan H Lans, European Audiovisual Observatory – Susanne Nikoltchev, European Audiovisual Observatory – Frédéric Pinard, Rennes (France) – Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland) • Subscription Service: Anne Boyer • Marketing manager: Markus Booms • Contributions, comments and subscriptions to: IRIS, European Audiovisual Observatory, 76 Allée de la Robertsau, F-67000 STRASBOURG, Tel.: +33 388144000, Fax: +33 388144419, E-mail: Obs@Obs.coe.int, URL http://www.obs.coe.int /oea/en/pub/index.htm • Subscription rates: 1 calendar year (10 issues + a binder): FF 1,600. • Subscriptions will be automatically renewed for consecutive calendar years unless cancelled before 1 December by written notice sent to the publisher. • Typesetting: Pointillés, Strasbourg (France) • Print: Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3-5, 76350 Baden-Baden (Allemagne) • Layout: Thierry Courreau • ISSN 1023-8565 •

The Global Information Society

France: Paris Court of Appeal Acknowledges Liability of an Internet Site Host

The Court of Appeal in Paris recently delivered its decision in the dispute between a well-known model and an Internet service provider. The provider had allowed one of the web sites it hosts to show nude photographs of the model. Maintaining that publication of the photographs infringed her right of personal portrayal and her right to personal privacy, the model had applied to the urgent applications judge, whose powers include putting a stop to a manifestly unlawful nuisance. In his order of 9 June 1998, this judge found that the matter of liability on the part of the access provider or host and the model's application for advance damages required full debate in court. Nevertheless, in view of the urgency of the matter, the judge had ordered the site host, on pain of paying a pecuniary penalty of FRF 100 000 (EUR 15 245) a day, to implement means of rendering any circulation of the disputed photographs impossible from a site it hosts. An appeal has been lodged against this decision.
In its decision on 10 February, the Paris Court of Appeal found that the matter of the liability of the site host could only be properly adjudicated after a full debate in court on the merits of the matter. The Court nevertheless considered that in the case at hand, by offering to host anonymously on the disputed site any person who, under whatever name, applied for the purpose of making available to the public messages of any kind not constituting private correspondence, the site host went beyond the technical role of a mere transmitter of information. It must therefore assume the consequences of such an activity in respect of those people whose rights it may infringe. Thus the circulation of the disputed photographs incurred its liability and, because the model's right of personal portrayal and to privacy had been infringed, justified granting advance damages. In deciding the amount (FRF 300 000 / EUR 45 735), the Court took into account the victim's profession, her celebrity and the extent of circulation technically possible on the Internet. Lastly, the Court ordered the publication of a press release in three magazines in the form of a legal insertion, at the expense of the party liable.
This decision has been heavily criticised by all the site hosts, and adds further fuel to the much-debated question of the liability of those involved in the Internet.

Paris Court of Appeal (14th chamber, A), 10 February 1999, V. Lacambre v. E. Halliday

FR

Amélie Blocman
Légipresse

Switzerland: Mailbox Operator Convicted of Distributing Pornography

The High Court of the Zurich Canton, in a revolutionary judgement concerning the dissemination of pornography via the Internet, has established a legal precedent. The operator of a mailbox was fined for giving unrestricted access to pornographic material to any user, including children under the age of 16. After viewing the material, which was transferred into the mailbox not by the defendant himself but by other users, he had moved it to the appropriate section, created by himself, and had failed to delete it, leaving it on file sometimes over a period of years. Under the terms of Art. 197.1 of the Criminal Code, anyone who offers, shows or gives pornographic literature, photographs or images to a child under the age of 16, makes them accessible or broadcasts them on radio or television, is punishable by law. In the High Court's opinion, the defendant, as the mailbox operator, made the stored pornographic material accessible under the terms of Art. 197.1 of the Criminal Code. The Court based its decision partly on the Federal Court's judgement no. BGE 121 IV 109 ff, under which the part of the national telecommunications company (*PTT-Betriebe*, now known as *Swisscom AG*) responsible for introducing "Telekiosks" (a pornographic telephone service) had been found guilty of aiding and abetting pornography by offering to the "Telekiosks" company equipment which it had known would be used to disseminate pornographic recordings accessible to people under the age of 16. In the present case, the Court went one step further and deemed the mailbox operator not only as an abettor, but as an accomplice, because he had the power to cut access to the material. Since the defendant had the equipment needed to operate the mailbox and had connected it up to the electricity and telecommunications networks, users had been given access to the mailbox, which was why the defendant was responsible and punishable as an accomplice. He could have avoided committing a criminal offence by turning off the equipment. The judgement is not yet final since a nullity appeal has been lodged with the Federal Court.

Judgement by the *Obergericht* (High Court) of the Zurich Canton on 7 December 1998, no. SB980616/yb.

DE

Oliver Sidler
Medialex

Germany: Admissibility of Comparative Advertising on the Internet

In a recently published judgement, the Wiesbaden Regional Court (*Landgericht*) ruled that comparative advertising on the Internet was not in itself inadmissible (see also IRIS 1998-3:3 and 1998-7:6).
In 1997 the defendant, a health insurance company, had introduced a facility on its Internet site enabling people to compare its prices with those of other health insurance companies. If the user inputted his or her personal data and other information, the company's premium appeared on the screen. Another health insurance company could then be selected and its own premium would be shown. The premiums of the defendant and of the other insurance companies selected were shown at the same time.
The Regional Court had to decide whether the defendant was allowed to quote the actual premiums of other health insurance companies or even just to ask prospective customers to compare their prices. The Court based its decision on the fact that this kind of comparative advertising on the Internet was different from other

kinds of publicity because it was not directly "imposed" on the public. Rather, it had to be actively sought on the Internet. A prospective customer had to call up the individual pieces of information himself.
Furthermore, the Regional Court believed it was important to note that the legislator had allowed competition between health insurance companies with the intention of bringing prices down. In order to promote such competition, the legislator had given customers the right to cancel any agreement within a certain period if their insurance company raised its premiums within that time.

Judgement by the Wiesbaden Regional Court on 17 September 1997, file no. 12 O 58/97

DE

Tobias Niehl
Institute of European Media Law (EMR)

European Union

Council of the European Union: Resolution on Public Service Broadcasting

On 25 January 1999 the Council of the European Union and the representatives of the governments of the member states of the European Union adopted a resolution concerning public service broadcasting. It emphasises the vital significance of public service broadcasting for safeguarding democracy, pluralism, social cohesion, and cultural and linguistic diversity while recognising that the increased diversification of the programmes on offer underlines the importance of the comprehensive mission of public service broadcasters.
The resolution includes a reaffirmation that the Treaty establishing the European Community shall not hinder the competence of Member States to provide for the funding of public service broadcasting on the conditions that such funding is (a) granted to broadcasting organisations for the fulfilment of the public service mission as conferred, defined and organised by each Member State, and (b) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest.
Furthermore it is noted in the resolution that the fulfilment of the public service broadcasting's mission must continue to benefit from technological progress; that broad public access to various channels and services, without discrimination and on the basis of equal opportunities, is a necessary precondition for fulfilling the special obligation of public service broadcasting; and that public service broadcasting has an important role in bringing to the public the benefits of the new audiovisual and information services and the new technologies.
It is also reaffirmed that the ability of public service broadcasting to offer quality programming and services to the public must be maintained and enhanced. This includes the development and diversification of activities in the digital age. Public service broadcasting must be able to continue to provide a wide range of programming in accordance with its remit as defined by the Member States in order to address society as a whole. In this context public service broadcasters may legitimately try to reach wide audiences.

Council Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting (Official Journal of the European Communities 1999/C 30/01)

EN FR DE

Annemique de Kroon
Institute for Information Law
University of Amsterdam

European Commission: Injunction for France, Italy, and Spain to Submit Information on the Financing Schemes of Their Public Broadcasters

The European Commission has decided to request from the French, Italian and Spanish governments all relevant information for assessing the nature of the financing schemes in favour of public broadcasters.
In the past, private broadcasters have lodged complaints to the Commission (France: TF 1 against France 2 and 3; Italy: RT1 against RAI; Spain: Telecinco and Antena 3 against RTVE and regional public channels) alleging breach of the State aid rules through the use of "dual" financing systems to finance public broadcasters (i.e. use of commercial revenues and State funding in various forms).
Last year, a majority of the Member States disagreed with the idea of a common approach to the issue of financing of public broadcasters and preferred that cases would be dealt with on an individual basis which is what the Commission now tries to do (*see* IRIS 1998-10: 7). The Commission's decision concerns the issuing of an information injunction, in accordance with the jurisprudence of the European Court of Justice in cases where the Commission has doubts as to whether a State measure constitutes existing aid within the meaning of Article 93(1) of the EC Treaty. The Commission is not opening a formal procedure within the meaning of Article 93(2) of the EC Treaty.
For the three cases concerned here, no detailed information on the amount of possible aid involved had been made available to the Commission. Also, the calculation of the extra cost of public service provision is very difficult, in particular because none of the three countries' public broadcasters has implemented a separate accounting system. Therefore, it is impossible to assess whether the public funding received was proportionate to the net costs derived from the public service obligations. Because of this lack of information, the Commission could not take a position on this complex matter. The French and Spanish complainants then sued the Commission before the European Court of First Instance (CFI) for failure to act in accordance with its obligations. In September 1998 the Commission was condemned in the Spanish case (*see* IRIS 1998-9: 5), while the French case has not yet been decided.

The Commission, by this injunction, expects to receive sufficient information to assess whether the financing scheme of public broadcasters has to be considered as pre-dating either the signature of the EC Treaty (France and Italy) or the accession to the Community (Spain). Member States now have one month from the day of receipt of the Commission's injunction to submit their views on the nature of the aid. Where it is considered that a scheme amounts to existing aid, Member States may be required to adopt appropriate measures to ensure that the aid does not impede upon the functioning and development of the common market, in particular given that the broadcasting market is now liberalised.

Press releases IP/99/79, IP/99/80, IP/99/81 and IP/99/82, 3 February 1999.

EN

Annemique de Kroon
Institute for Information Law
University of Amsterdam

European Commission: Approval of Public Special Interest Channels

At the end of February this year, the Commission rejected the complaint filed by the *Verband Privater Rundfunk und Telekommunikation (VPRT)* , the Private Radio and Telecommunications Union against the joint creation of two special interest channels by the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunk-anstalten der Bundesrepublik Deutschland (ARD)* and the *Zweites Deutsches Fernsehen (ZDF)*.
"Phoenix", an event-related documentary channel providing background information on politics and society from Germany and abroad, and "Kinderkanal", a channel broadcasting non-violent programmes particularly suited to children, are delivered free of advertising. They are funded out of the two broadcasting authorities' licence fee revenue.
The complaint focused in particular on this type of funding, seeing it as an unlawful and undeclared subsidy within the meaning of Articles 92 and 93 of the EC Treaty (see IRIS 1997-9:13).
The Commission does indeed conclude, in its assessment, that the allocation of resources from licence fees constitutes state aid within the meaning of Article 92 § 1 of the EC Treaty. However, it is compatible with the Treaty since it serves to fulfil the public service broadcasting mission. In accordance with Article 90 § 2 of the EC Treaty, competition rules shall apply to undertakings entrusted with services of general economic interest as long as their application does not prevent them, either *de facto* or *de jure* from fulfilling their special responsibilities.
The Commission concluded in this connection that the Federal Republic of Germany had not exceeded its powers to determine the remit and funding of public broadcasting. It further found that the resources allocated reflected actual costs and therefore were proportionate to the provision of the public service. Finally, neither the creation nor the financing of the channels was considered to affect trade within the EU to an extent contrary to EU interests.
The Commission further stressed that it did not consider rules relating to the channels' access to the cable network as constituting state aid. It reserved the right, however, to examine the compatibility of the provisions concerned with Article 59 of the EC Treaty relating to the freedom to provide services (see IRIS 1998-4:15).

IP/99/132

EN FR DE

Alexander Scheuer
Institute of European Media Law (EMR)

National

CASE LAW

United Kingdom: Court Clarifies Role of Regulatory Authority

The English High Court has clarified the role of the Independent Television Commission which regulates private broadcasting in the UK. Apart from accepting the legitimacy of economic regulation by the Commission, the court indicated that it will be reluctant in future to overturn decisions of substance made by it.
The facts concerned the distribution of programmes by the satellite service BSkyB and cable operators. Channels were sold in packages and premium channels with a high consumer appeal were only available to subscribers who also took a number of basic channels. The satellite and cable companies were also obliged to distribute channels to a set proportion of their subscribers. The Independent Television Commission prohibited contracts which had the effect of preventing subscribers from buying any premium channel on an à la carte basis from any package of basic channels ('unbundling'). Flextech, a provider of the channels, challenged the decision on the basis that the Commission had no power to ban the arrangements or to interfere with existing contractual rights.
The High Court dismissed Flextech's application, holding that the Commission was under a duty to secure the availability of a wide range of services and to ensure fair and effective competition; this included taking action concerning the basis on which services were offered. The Commission could be successfully challenged only if it acted unreasonably.

R v Independent Television Commission ex parte Flextech plc

Tony Prosser
IMPS - School of Law
University of Glasgow

Germany: Federal Constitutional Court Rejects Radio Bremen Appeal

In January this year, the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) dismissed a complaint by the public broadcasting company "*Radio Bremen*" concerning an alleged infringement of the Constitution.
The appellant had opposed temporary provisions set out in the Act amending the Radio Bremen Act of 27 October 1998, under which the Board of Directors was to be dismissed. The Board of Directors, of which the Executive Director (*Intendant*) was a member under the previous law, was to be dismissed as soon as the Amendment Act came into force. *Radio Bremen's* complaint was partly based on the fact that the Executive Director was being dismissed under the Amendment Act after a previous vote, taken by the appropriate body, the Broadcasting Council (*Rundfunkrat*), had resulted in his dismissal, contrary to political expectations.
The Constitutional Court recognised in principle that organisational changes resulting in terms of office being cut short were, to some extent, open to the suspicion that hidden influences might be affecting the broadcasting company's personnel policy. Improper behaviour could be ruled out, however, if there was an important practical reason for the change, which should have a strong impact on the way the company was run. Moreover, the practical reform should be so urgent that it would be jeopardised if it were not carried out before the term of office had come to an end. The Court held that these conditions had been fulfilled in this case.
The Court stated that the organisational reform being called for had far-reaching implications for the company. By moving away from the model of a board of directors and introducing a new executive body (also known as the *Intendant*), the legislator hoped to find a way of averting an emerging threat to the company's very existence. Not only was the media policy debate on structural reform of the German public service broadcasting union (*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschlands – ARD*) suggesting that *Radio Bremen* be closed down, but calls to abolish or change the way the *ARD's* funding was distributed were having the same effect.
Under the new statutory provisions, the Board of Directors would be subordinate to the new executive body and would have to be aware of the latter's overall responsibility. From now on, the Broadcasting Council responsible for electing the Board of Directors would depend on the new executive body's nominations. In the Constitutional Court's opinion, there was therefore no continuity of duties, which was why the decision to end current terms of office and hold the forthcoming election of new bodies seemed necessary. In this respect, the legislator was not obliged to wait until the terms of office had been completed; rather, considering the urgency of the organisational changes in view of the current threat to the company's existence, swift reforms were perfectly justified.

Judgement by the *Bundesverfassungsgericht* (Federal Constitutional Court), 15 January 1999, no. 1BvR 1946/98

DE

Alexander Scheuer
Institute of European Media Law (EMR)

Germany: Federal High Court on the Admissibility of Electronic Press Archives under Copyright Law

In a judgement on 10 December 1998, the Federal High Court (*Bundesgerichtshof – BGH*), overruled a decision of the Düsseldorf Court of Appeal (*Oberlandesgericht – OLG*) on the admissibility of electronic press archives and remitted the case to that court.
The appellant was the publisher of the "*Handelsblatt*" newspaper and economic magazine "*Wirtschaftswoche*" and also operated an economic database. The defendant used these publications as part of her occupation, which was the subject of the action. The defendant received from her customers original copies of these publications and then digitalised certain articles, chosen by the customer, which she transferred to an archive system also provided by the customer and, if necessary, indexed. The end product was then delivered to the customer in printed form, as a computer fax or on disk.
In the lower instance, the Düsseldorf Court of Appeal had granted the appellant's demand for an injunction preventing the defendant from making "*Handelsblatt*" or "*Wirtschaftswoche*" articles available in computerised format. In the Court's opinion, a claim of unfair competition under Section 1 of the Unfair Competition Act was valid insofar as a competitive advance had been made by means of an infringement of the law.
The Federal High Court opposed this view. It held that any claim based on Article 1 of the Unfair Competition Act in relation to an infringement of copyright law was invalid unless there were particular circumstances, besides copyright protection issues, which rendered the disputed action unfair.
The case was only referred back in order for the Court to clarify whether there was also a valid claim that the appellant's own copyright had been infringed and whether this was therefore a matter of dispute. The High Court gave some indications as to how the case should proceed. The Federal High Court considered that there had been an infringement of copyright law under Article 97.1.1 of the Copyright Act. Company archives in which computerised articles were electronically stored were not covered by the copyright restrictions set out in Article 53.2.2 of the Copyright Act. Under this rule, the reproduction of individual pieces of a work for insertion into a company's own archive was legal, provided it was necessary for this purpose and provided the company's own piece of work was used. In its decision of 16 January 1997 (file no.1 ZR 9/95 CB-Infobank I) the Federal High Court had stated that the exception mentioned in Article 53.2.2 of the Copyright Act only applied if the material was acquired exclusively for back-up and internal use. In a further judgement delivered on the same day (file no.1 ZR 38/96 CB-Infobank II), the Federal High Court had summarised the area of application of Article 53.2.2 of the Copyright Act, stating that the rule did not cover cases where an information department carried out searches before reproducing material. In its current ruling, the Federal High Court followed this precedent and held that electronic press archives were not exempt under Article 53.2.2 since, although the use was internal and searches were not carried out by the defendant, the possible uses of the material far exceeded what the legislator had intended to exempt. Unlike libraries, which stored their data on microfilm, for example, and did not exploit works in any other way, electronic press archives made it possible, according to the Court, to reproduce and disseminate information in a quick, inexpensive and more or less unsupervised way. The Court held that this might result in the defendant's customers cancelling, in full or in part, their multiple subscriptions.

Federal High Court judgement of 10 December 1998, no. I ZR 100/96

DE

Wolfram Schnur
Institute of European Media Law (EMR)

Germany: Federal High Court on Entitlement of Broadcasting Companies to a Share of Revenue from Sales of Recording Equipment and Blank Cassettes

In a judgement on 12 November 1998, the First Court of Appeal of the Federal High Court (*Bundesgerichtshof* – BGH), whose field of competence includes copyright law, asked to consider the long-running debate over whether broadcasting companies, as phonogram manufacturers, should be entitled to a share of revenue from sales of recording equipment and blank cassettes, ruled in favour of the broadcasting companies.

The West German Broadcasting Corporation (*Westdeutsche Rundfunk* – *WDR*) had asked to sign a copyright protection agreement with the Performing Rights Society (*Gesellschaft zur Verwertung von Leistungsschutzrechten* – *GVL*), which protects the rights of performing artists and phonogram manufacturers, on the grounds that it was producing numerous phonograms through its radio orchestras and choir and was granting licences for the marketing of these products. It believed that, like any other phonogram manufacturer, it was entitled to a share of the revenue from sales of recording equipment and blank cassettes. The Performing Rights Society had refused to sign the requested agreement. It believed that the *WDR* was not entitled to any payment, not least because if broadcasting companies were given a share of the revenue, it would be at the expense of the other copyright holders, since the revenue from sales of recording equipment and blank cassettes could not be increased. Whereas the Regional Court (*Landgericht* – *LG*) had dismissed the action, the Court of Appeal (*Oberlandesgericht* – *OLG*) had upheld it insofar as it concerned productions published in phonogram form (CDs, music cassettes). In its judgement, the Federal High Court dismissed the copyright collection society's action against the Court of Appeal's decision.

The Copyright Act grants copyright for the work not only of authors, but also of performing artists (Section 73 ff of the Copyright Act), phonogram manufacturers (Sections 85 and 86 of the Copyright Act) and broadcasting companies (Section 87 of the Copyright Act). In addition, Sections 75 (2), 85 (1) sentence 1 and 87 (1) sentence 2 make provision for the reproduction of phonograms or copyrighted programmes to be prohibited. The law (Section 53 of the Copyright Act) makes certain exceptions as far as reproduction for private purposes is concerned, but these are compensated by the fact that it grants authors and other performing rights holders an entitlement to remuneration (Sections 54, 54a, 54f and 54g of the Copyright Act). As such claims cannot be paid directly to entitled individuals, the law prescribes that, for all recording equipment and blank cassettes suitable for such reproduction, an amount is due which, under Section 54 of the Copyright Act, is to be administered and divided among those entitled by a copyright collection society. On the assumption that broadcasting companies are less damaged by private recordings of their programmes than other copyright holders, the law contains one exception to the effect that such companies are not entitled to any payment for private recordings. The scope of this exception is a matter of dispute.

In its judgement, the Federal High Court crucially took into account the fact that the broadcasting company's rights may coincide with those of the phonogram manufacturer. There was no apparent reason why broadcasting companies should be treated differently with regard to their own marketed products than other phonogram manufacturers. The Federal High Court stressed, however, that a share of revenue could only be considered in respect of a company's own productions sold on the phonogram market. As long as broadcasting companies stored their productions on phonograms without supplying them for other uses, the exclusion from entitlement to remuneration set out by law would stand.

Judgement by the BGH (Federal High Court) on 12 November 1998, file no. I ZR 31/96

DE

Claudia M. Burri
Institute of European Media Law (EMR)

Germany: Hanseatic Court of Appeal Rules on the Re-Publication of Photographs on CD-ROM

In its judgement on 5 November 1998, the Hanseatic Court of Appeal (*Oberlandesgericht - OLG*), responding to an appeal by the *FreeLens* press photographers' association, amended the decision of the Hamburg Regional Court (*Landgericht - LG*) of 29 August 1997.

The proceedings concerned whether the *Spiegel* publishing company was entitled to include photographs originally published in the *Spiegel* news magazine between 1989 and 1993 in annual CD-ROM editions without the specific permission of the photographers concerned. The Hamburg Regional Court had dismissed the original action on the grounds that the use of CD-ROMs was already known in 1989 and was basically no different to the usual practice of making the whole year's issues available again either in printed form or on microfilm (see IRIS 1998-1:7).

The Hanseatic Court of Appeal did not share this opinion, but upheld *FreeLens'* appeal for an injunction and awarded it the right to compensation. This decision was based on the Court's finding that the *Spiegel* publishing company had not been transferred the right to re-use the photographs on CD-ROM. While the Hamburg District Court had denied the existence of a separate use in the sense of Section 31 (4) and (5) of the Copyright Act (*Urheberrechtsgesetz UrhG*), the Court of Appeal was satisfied that this did exist. The Court based its decision on the belief that the CD-ROM was likely to be used more intensively than a printed or microfilm version. The Court did not believe that its decision contradicted the case law of the Federal High Court (*Bundesgerichtshof BGH*), which had ruled (Judgement of 11 May 1989 - cable; Judgement of 4 July 1996 - satellite) that various forms of broadcasting (cable, satellite, terrestrial) did not constitute separate uses since the only difference was in the technical nature of transmission. In contrast, the Hanseatic Court of Appeal held that CD-ROM constituted a separate use because of the quick search facility, its user-friendliness, small size and, in particular, the ease with which digital data could be reproduced and disseminated via international data networks. The Court did not believe that exploitation rights had been transferred either tacitly or by implication. It argued that, under the so-called transfer of purpose principle (Section 31 (5) of the Copyright Act), verbal agreements could not be interpreted as including the transfer of rights with respect to what was then a rare use of photographs, ie the publication of news magazines on CD-ROM.

Judgement of the Hanseatic Court of Appeal, 5 November 1998, file no. 3 U 212/97

DE

Wolfram Schnur
Institute of European Media Law (EMR)

Germany: Niedersachsen Higher Administrative Court on Surreptitious Advertising

In a judgement of 15 December 1998 the Niedersachsen Higher Administrative Court (*Oberverwaltungsgericht OVG*) dismissed the appeal of the television company RTL Television against a decision of the *Land* Media Authority of Niedersachsen.
The subject of the original dispute was the observation that RTL Television, in broadcasting a programme, had violated the ban on surreptitious advertising. A repeat broadcast of the programme had also been forbidden. The children's programme concerned had been devoted to the "Barbie Doll", which was celebrating its thirtieth birthday. During the programme, phrases such as "the Barbie-look has always been absolutely fantastic", "simply enchanting", "you can really get a taste for this" and "mad about Barbie" were used.
Under Article 6 (5) (which corresponds with the existing rule in Article 7 (5) of the Agreement between Federal States on Broadcasting in the third amended version of 26 August-11 September 1996) of the 1991 Agreement between Federal States on Broadcasting, surreptitious advertising is forbidden. In Section 7.1 of the *Länder* Media Authorities' Joint Guidelines on Advertising, to ensure separation of advertising and programme material, and on Television Sponsorship, adopted on 26 January 1993 (with almost exactly the same wording as the current version of 13 December 1997), the portrayal of commercial goods, their manufacturers, services or service providers outside commercial breaks is not classed as surreptitious advertising if it results predominantly from reasons of dramatic effect or the duty to supply information. Section 7.2 of the Guidelines states that, even when the portrayal of products and services is authorised, programme editors should, as far as possible, avoid advertising them. In principle, for a programme to be found to contain surreptitious advertising, it must be shown that it served advertising purposes and that the viewer could have been misled as to its real purpose.
The Court rejected the plaintiff's view that advertising, as described in the Agreement between Federal States on Broadcasting, referred only to third-party advertising. Rather, it held that surreptitious advertising could also be carried out by the programme itself. In this case, the Court decided that the programme had served advertising purposes. Basically, the Court had no objection to the fact that the "Barbie Doll" had been shown on the programme itself on the occasion of its thirtieth birthday, as it saw this as a suitable and objective opportunity to inform the public about the occasion and to help it form an opinion. However, the Court found that not only had the programme taken the form of an advertisement from an objective point of view, but there had also been a commercial intention, which distinguished the permissible portrayal of a product of exceptional public interest from surreptitious advertising, which was prohibited. In the Court's opinion, the portrayal of the "Barbie Doll" exceeded what was necessary to satisfy the public interest and meet dramatic requirements. In addition, it found that the public had been misled in the sense of Article 6 (5) of the 1991 Agreement between Federal States on Broadcasting and Section 7.1 of the Guidelines on Advertising. The Court also found a breach of Article 26 (1) of the 1991 Agreement between Federal States on Broadcasting, which prohibited commercial breaks during children's programmes, since the ban on interrupting children's programmes for advertising purposes applied especially in cases where advertising took place during the programme itself.

Judgement by the Niedersachsen Higher Administrative Court, 15 December 1998, file no. 10 L 5935/96

DE

Wolfram Schnur
Institute of European Media Law (EMR)

Belgium: Advertising Breaks in American Series on RTBF

In a judgement delivered on 2 September 1998, the Brussels Court of Appeal overturned a judgement by the Brussels Commercial Court on 29 December 1997 which, in response to an application by the private-sector channel RTL-TVi, had prohibited RTBF inserting advertising breaks in American series broadcast in the afternoons.
In the initial proceedings, the Commercial Court held that the advertising breaks were contrary to RTBF's contractual management regulations, according to which "advertising may not interrupt programmes, particularly films, or the various sequences of any one programme".
On appeal, the Court found that the series concerned ("The Streets of San Francisco", "Beverly Hills", "Lois & Clark") were originally devised by their makers to comprise a number of sequences in order to include advertising and that as a result RTBF was not violating the provisions of its management contract.

Judgement by the Brussels Court of Appeal, 2 September 1998, *J.L.M.B.,* 1998/37, p.1068.

FR

François Jongen
Auteurs & Media

Hungary: IRISZ TV won case against the Hungarian National and Radio Commission

On 30 June 1997, the Hungarian National Television and Radio Commission (NRTC) awarded two national terrestrial licenses to MTM-SBS and CLT-Ufa's MAGYAR RTL (see IRIS 1998-4:4). The IRISZ TV proposal, submitted by the First Hungarian Commercial Television Stock Company, the enterprise behind IRISZ TV, lost bidders.
On 4 July 1997, IRISZ TV filed a law suit against NRTC asking the Economic Department of the Metropolitan Court to annul the Commission's decision and to instruct the Commission to duly complete the selection process for the television concession proposals. IRISZ TV based it's petition on three major arguments.
First of all IRISZ TV claimed that MAGYAR RTL failed to keep on with the application deadline of the invitation, because submitted it's proposal three hours later. As a result MAGYAR RTL's proposal should be deemed

invalid. Secondly, the petitioner also emphasized that the NRTC's decision considered IRISZ TV's bids for two national terrestrial licenses as one unified bid which was contrary to the invitation. Finally, referring to the relevant minutes of the NRTC meeting IRISZ TV argued, that the Commission ignored the selection process required by Paragraphs 45 and 46 of *Act I of 1996 on Radio and Television* broadcasting when voted first about the winners and than evaluated the bids according to the preliminary decision.
On 25 March 1988, the Economic Department of the Metropolitan Court decided in favor of the Hungarian National Radio and Television Commission and IRISZ TV lost the legal battle on the first instance level. The Court accepted that MAGYAR RTL failed to keep on with the application deadline of the invitation, however the judge argued that according to the media law NRTC, in accordance with § 99 section 3 asked for the completion of deficiencies occurred in MAGYAR RTL' bid. Furthermore, the judge argued there were no cogent rules governing the principles and guidelines for evaluating the bids. In the meantime, the Court didn't find evidence for the violation of competition rules by the NRTC.
The decision of the Hungarian Supreme Court was delivered on 22 February, 1999. The highest court of Hungary partly reversed the decision of the Metropolitan Court in the following way. The Supreme Court ruled that the proposal of MAGYAR RTL was invalid. Therefore, NRTC's acceptance of this bid was against the media law. The judgement of the Supreme Court also found that the selection process employed by NRTC was not in accordance with the media law. The Court declared illegal NRTC's conclusion of the broadcasting contract with MAGYAR RTL. Consequently, the Supreme Court ordered NRTC to terminate immediately the broadcasting contract with MAGYAR RTL. This is the very first law suit in Hungary ever filed and won against an agency which is empowered to award national terrestrial licenses.

Hungarian Supreme Court GF.VI31.856/1998/19, Decision of 22 February 1999

HU

Gabriella Cseh
Constitutional & Legal Policy Institute (COLPI), Budapest

The Netherlands: Conflict between Cable Network Company and Pay TV Channel about Transmission

In a decision of 28 January 1999, the president of the Amsterdam district court held that the refusal of a cable network company to include a clause in a contract with a pay TV channel providing for the possibility of changing the transmission agreement where required by the authorities, was neither fair nor reasonable.
A2000 owns and exploits the cable network in the Amsterdam region. Canal+ offers pay-TV programmes. Only subscribers to Canal+ can receive its programmes by use of a decoder. In the early 1990s, A2000 and Canal+ had an agreement allowing Canal+ to transmit its pay-TV programmes on two channels. This agreement expired on 31 December 1995. After lengthy negotiations, the parties were unable to reach an agreement on the conditions for extension of the transmission contracts, in particular the transmission fee.
The question before the Court was whether A2000 abused its dominant position or else acted contrary to what the principles of reasonableness and fairness require by refusing to accept a transmission contract for six months or, alternatively, an agreement that allows for premature rescission or modification of the contract depending on the decision of the Independent Post and Telecommunications Authority (OPTA, *Onafhankelijke Post en Telecommunicatie Autoriteit*) and/or the Dutch Competition Authority (NMa, *Nederlandse Mededingingsautoriteit*). The OPTA will, on request of Canal+, determine what a reasonable cost calculation for transmission would be. Canal+ has also asked the opinion of the NMa on whether A2000 has abused its position of power by demanding an excessive or unreasonable and discriminatory transmission fee and by refusing to co-operate in the digital transmission of pay-TV signals.
The court held that A2000 has a monopoly position on the market for the transmission of television programmes in the Amsterdam region. The court did not consider A2000's wish to conclude a contract for a year to be unreasonable. The court, however, forbade A2000 to stop the transmission of the Canal+ programmes if Canal+ signs the contract within two working days of this decision. It was ordered that the contract becomes final only after the OPTA and/or the NMa has given an opinion in which case the obligations set by these authorities will apply. Canal+ will now pay the sum stated in the contract as an advance to the rate for the year 1999 that will finally be established.

President Rechtbank Amsterdam 28 January 1999, Canal+ vs. A2000, in: Mediaforum 1999-3, no. 18.

NL

Annemique de Kroon
Institute for Information Law
University of Amsterdam

LEGISLATION

Austria: Reforms to the Austrian Regional Radio Act

On 1 January 1999 the Act amending the Regional Radio Act came into force, bringing various changes to private radio, which is still a recent phenomenon in Austria. Private radio broadcasting licences were awarded for the first time in 1993, but only after a long gap, due to a decision of the Constitutional Court, were more than 50 licences for regional and local radio awarded at the beginning of 1998.
The regulations contained in the Regional Radio Act (*Regionalradiogesetz - RRG*) are specifically restricted, in accordance with Section 1 (1), to the broadcasting of regional and local radio programmes on VHF frequencies by broadcasters other than the *ORF*. National private broadcasting is also excluded. Specialist channels may also only broadcast under a regional or local radio licence.

When the annual adjustment was introduced to rectify any infringement of advertising time limits by the *ORF*, the previous daily limit for private radio stations (90 minutes) was raised to a yearly average of 120 minutes per day with a maximum deviation of 20 % in any one day, ie up to 144 minutes of advertising is permitted in any one day provided the yearly average does not exceed 120 minutes. The previous requirement of six days without advertising was abolished.
Licence-holders may be individuals, legal entities or commercial partnerships, but not private companies. If more than 50 % of the shares in a licence-holder are to be transferred to a third party, prior notice must be given to the Private Broadcasting Authority. The Authority has eight weeks from the date notice is given in which to decide whether the new arrangement meets the basic requirements for private radio companies. Private radio licences are, in principle, not transferable. It is stated in Section 17 (4), however, that the overall rights under company law which result from such a move are not affected. Hence, a *GmbH* (limited company), for example, which wishes to apply for a licence, may become a *GmbH & Co. KG* (limited partnership with a limited company as a general partner) without changing its shareholding structure.
In future, licences will only be awarded after the genre, structure and length of programmes has been approved. The main consequence of this is that a licence may be withdrawn if there is a fundamental change to the programming originally described when the application was made.
Permission may be given for unused frequencies to be used for short periods of time (two weeks maximum) for the coverage of specific local public events. In addition, programmes may be broadcast as part of local training or education in radio broadcasting, provided they relate in a practical way to the particular course syllabus. Such requests may be submitted to the Private Broadcasting Authority at any time.
The Regional Radio Authority (*Regionalradiobehörde*) is to be renamed the Private Broadcasting Authority (*Privatrundfunkbehörde*), although its role and structure will not change. Regulations concerning the granting of licences as part of the so-called public service obligation (frequencies set out in the Appendix to the Regional Radio Act) were abolished. The corresponding provisions of Sections 2b, 2d and 2e (5) come into force on 1 May 1999.

Act amending the Regional Radio Act (BGBl.I Nr 2/1999)

DE

Heinz Wittmann
Medien und Recht

Romania: Audiovisual Act No.48/1992 Amended and Completed

In December 1998 the amendments to the Audiovisual Act No.48/1992 (*Lege pentru modificarea si completarea Legii audiovizualului nr.48/1992*) were approved by Parliament. The amendments were essentially aimed at completing the Act in order to promote European productions.
The new provisions of the Act stipulate that public and private television companies in Romania have until 1 January 2003, as far as possible, to gradually give greater priority to European audiovisual productions until they represent the majority of programmes broadcast, excluding air time devoted to news and sports programmes, television plays, advertising and teletext services.
A "European audiovisual production" is any programme produced in a Council of Europe member State or created wholly or for the most part by producers and authors residing in a Council of Europe member State. At least 40 % of these European audiovisual productions should be Romanian, ie produced in Romania or created wholly or for the most part by producers and authors residing in Romania.
In accordance with audiovisual standards to be laid down by the regional parliament, television stations should also gradually make 10 % of their broadcasting time available to programmes made by independent producers (ie those not employed by the particular broadcasting company).
On 16 December 1997, the Romanian Christian Democratic Agrarian Party MP George Serban, a member of the parliamentary committee concerned, submitted a new proposal for a future Audiovisual Act, under which the wording of the current Act would be amended to 70 %. By means of the proposed new regulations, the author hoped to ensure greater protection of minors from violent or erotic television scenes as well as to push through stricter regulations to control media concentration. The legislative council has not yet given its opinion on these proposals.

Act on the Amendment and Completion of Audiovisual Act No. 48/1992

RO

Mariana Stoican
Radio Romania International

Sweden: Widened Scope of Application of the Fundamental Law on Freedom of Expression

Freedom of expression in the media enjoys a privileged position in Sweden under a comprehensive set of rules. The freedom is specially regulated by constitutional provisions – The Freedom of the Press Act (*tryckfrihetsförordningen* – TF) as regards printed media, and the Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlagen* – YGL) which applies to non-printed media. On 1 January 1999 amendments of YGL and TF, concerning *inter alia* the scope of application of the Acts, entered into force.
In YGL the term electronic recordings (*tekniska upptagningar*) was introduced as a collective term for recordings which contain text, picture or sound, and which can be read, listened to or otherwise be perceived only with technical aid. This broadens the scope of application of YGL, wich before the amendment had been applicable only to sound radio, television and certain like transmissions, films, videograms and other representations of moving pictures, and sound recordings. For example the Law now also applies to CD-roms and computer diskettes which contain solely text, still pictures or moving pictures, or which contain a mixed content (*i.e.* computer and video games *etc.*). The amendment leaves it open to what extent YGL applies to

the Internet. Live transmissions of sound radio and TV-programs over the Internet, however, probably fall under the scope of application of the Law, in parallel with the case of cable TV transmissions.

Lag (1998:1439) om ändring i yttrandefrihetsgrundlagen (Regeringens proposition 1997/98:43 Tryckfrihetsförordningens och yttrandefrihetsgrundlagens tillämpningsområden – barnpornografifrågan m.m.)
Act (1998:1439) About Amendments of the Fundamental Law on Freedom of Expression (Government Bill 1997/98:43 The Scope of Application of the Freedom of the Press Act and the Fundamental Law on Freedom of Expression – the Child Pornography Issue etc.)
http://rixlex.riksdagen.se/

SE

Johan H Lans
European Audiovisual Observatory

Uzbekistan: New Advertising Act Passed

On 25 December 1998 the first Act regulating advertising in the Republic of Uzbekistan was passed. Until then, advertising had been regulated only by presidential edicts and government decrees. According to the new Act, "advertising means specific information about legal and natural persons or products for the generation of income". The Act does not cover political advertising. Experts in Uzbekistan have noted that this Act is generally very similar to Advertising Acts in the other States which were formerly part of the Soviet Union.
Its most important statutory provisions are:
- all advertisements must be translated into the official national language, although the foreign language version may also be included if the advertising agency so wishes;
- commercial breaks during television or radio broadcasts must be clearly denoted as such either on screen or by the presenter;
- the maximum advertising time is 6 minutes per hour; this limit may only be exceeded by special tele-shopping programs;
- apart from "social" information bulletins, advertising during children's and youth (under 16) programmes is forbidden;
- presenters and other participants in television or radio programmes may only advertise products through what they wear or other props within the time limit for advertisements.

Any advertisement is banned if it:
- provides information about products whose manufacture or sale is banned within the territory of the Republic of Uzbekistan;
- contains information which discriminates against different national, social or religious groups, etc.;
- uses or imitates the national flag, coat of arms or anthem of the Republic of Uzbekistan, international organisations or other States;
- uses the name or image of a person without their permission;
- contains pornography.

Additional restrictions were imposed on advertisements for the following products: medicines and cosmetics, tobacco and alcoholic beverages, weapons, stocks and shares, banking services. In addition, advertising for children and young people is regulated separately.
The Act assigns responsibility for the monitoring of advertising to the State Anti-Monopolies Authority.

The *Zakon Respubliki Uzbekistan "O reklame"* (Advertising Act) was published in the newspaper *Khalk suzi* on 6 January 1999. The Russian text can be found on web page www.internews.zu. The unofficial English translation of the Act appears at www.internews.ras.ru.

Theodor Kravchenko
Moscow Media Law and Policy Centre (MMLPC)

LAW RELATED POLICY DEVELOPMENTS

Belgium/Flemish Community: VT4 Established in the Flemish Community and not in the UK

On 17 February 1999 the Flemish Media Authority (*Vlaams Commissariaat voor de Media*) has made an important ruling concerning the application of Article 2 of the "Television Without Frontiers" Directive. The case concerns a complaint by the Flemish commercial TV-broadcaster VTM against VT4, a SBS-station. VT4 is a TV-broadcaster operating with a licence from the Independent Television Commission under UK law, while the programs of VT4 are exclusively targeted at the public of the Flemish Community. VTM argued that VT4 is to be considered a Flemish broadcaster falling under the application of the Flemish media legislation. According to VTM, VT4 manifestly infringes Article 46 of the Flemish Broadcasting Decree that contains the obligation to program at least two TV-newscasts a day.
The Flemish Media Authority found, in applying Article 2 of the Directive, that VT4 is in fact established in the Flemish Community. Although VT4 operates under an ITC-licence in application of the British Broadcasting Act, the Flemish Media Authority is of the opinion that the head office of VT4 is situated in the Flemish Community where the station develops its real economic activity and obtains its income from advertisements. The Media Authority is also of the opinion that the editorial decisions are not taken in London, but on Belgian territory.
By 15 September 1999 VT4 is to request a licence as a Flemish broadcasting organisation and to conform to the media legislation of the Flemish Community. In a first reaction VT4 has announced its intention to appeal against this decision. The decision of the Flemish Media Authority may have the result that VT4's programs may no longer be transmitted by the cable networks in the Flemish Community.
(For TV4 related reports *see* IRIS 1999-2:15; IRIS 1997-9:4; IRIS 1997-8:56; IRIS 1997-7:5)

Flemish Media Authority, decision nr. 1999/002, 17 February 1999, in case N.V. Vlaamse Televisiemaatschappij (VTM) v VT4 Ltd.

NL

Dirk Voorhoof
Media Law Section of the Communication Sciences Department
Ghent University

Switzerland: Time Signal Transmissions May Be Sponsored

On 1 September 1992, the Swiss Radio and Television Corporation (SRG) began broadcasting time signals on its original three (and now four) channels after concluding sponsoring agreements with different sponsors. The time signals were broadcast directly before the start of the daily editions of the news, and later also before the start of the information programme "*10 vor 10*", depending on the content of the different agreements. The time signal sequence was composed of two elements, the one consisting in a grey band in the lower half of the screen, taking up approximately 1/8 of the screen's surface, showing the time in digital form together with the sponsor's billboard. The second element, taking up the remaining screen, is made up of a background freely chosen by the sponsor. In return for the fading-in of their billboard together with the time signal, sponsors pay a lump-sum amount specified in the agreement.
On 21 November 1997, the supervisory authority, the Federal Office of Communication (BAKOM) ruled that by transmitting the sponsored time signals the SRG had violated Article 18 RTVG (Radio and Television Act) (separation of advertising and programmes) in connection with Article 10 RTVV (Radio and Television Decree) and Article 19 RTVG (naming the sponsor at the beginning and end of a programme). The SRG lodged an administrative complaint with the Department of the Environment, Transport, Energy and Communication (UVEK).
The Department, in its decision of 8 December 1998, concluded that sponsored time signals constituted the transmission of information in relation to the time financed by third parties. The requirement of Article 19 § 2 RTVG to fade in or announce the name of the sponsor at the beginning and end of a programme did not apply by virtue of the short transmission duration. Reference to the sponsor throughout the entire duration of the information broadcast was deemed lawful, since viewers recognise that it is a sponsored service. In addition, on account of the clear separation with the previous programme service and/or following news programme, such time signals were considered to possess the characteristic of a programme. Sponsored time signals were not thought to mislead the public as long as the principle of truthfulness and the need for transparency were respected. In the light of these considerations, it had therefore to be considered lawful to refer to sponsors not at the beginning and at the end but permanently in programmes providing an indication of the time of such short duration broadcast prior to news programmes.

Decision of the Federal Department of the Environment, Transport, Energy and Communication (UVEK) of 8 December 1998.

DE

Oliver Sidler
Medialex

France: CSA Issues Formal Notices to TF1 and France 3 in respect of Failure to Observe the Principle of the Honesty of Information

The principle of the honesty of information referred to in Article 2 of the Freedom of Communication Act of 30 September 1986 requires that television viewers should be given correct information and that procedures likely to mislead them should not be used. This principle is taken up in the terms and conditions of the public-sector channels, which are required to "refrain from using procedures likely to be affect the provision of correct information to the viewer". Under their agreement with the CSA (*Conseil supérieur de l'audiovisuel* – official audiovisual regulatory body), the private-sector channels also make extremely precise undertakings as regards the honesty of information.
However, on 5 December 1998 the private-sector channel TF1 broadcast a report containing a number of "reconstituted" sequences, presented as if they had been filmed on the spot, and on 3 February 1999 the public-sector channel France 3 broadcast a report on mountain rescue which contained a number of sequences showing rescue workers undergoing training presented as if they were real rescue operations. The CSA, finding that broadcasting images filmed under conditions different from those announced on the air directly contravened the channels' undertakings in their agreement or in their terms and conditions, took up the cases. The CSA therefore issued the two channels with formal notice in respect of failure to observe the principle of the honesty of information (a pre-requisite for the possible subsequent implementation of the CSA's sanctioning powers). The CSA was keen to stress that the responsibility of broadcasters cannot be delegated in any way to the producers or makers of falsified reports. Moreover, it invited TF1 and France 3 to supply full explanations in order to inform viewers about these incidents, which they have done. In general terms, the CSA's intervention was all the more necessary in that it is attempting to stem the development of "infotainment" which is the result of the competition being waged by the channels.

Releases nos. 384 and 385 by the CSA, 27 January and 9 February 1999; available at http://www.csa.fr

Amélie Blocman
Légipresse

Spain: Dispute over the Participation of Private Broadcasters in Regional Public Television

The Government of the Canary Islands and the *Ministerio de Fomento* (Ministry of Development) have been in dispute since the summer of 1998 over the participation of private broadcasters in regional public television (*see* IRIS 1998-9:14). In July 1998, the Government of the Canary Islands applied to the Spanish Government for a licence in order to create a regional public television, in accordance with the provision contained in Law 46/1983 (Third Channel TV Act). At the same time, the Government of the Canary Islands invited tenders to decide which private broadcaster would provide this service. The process was completed in December 1998 and the successful company was *Productora Canaria de Televisión, S.A.*; *Sogecable-Canal Plus* has a 40 % shareholding in the company.

The *Ministerio de Fomento* stated that it would not grant a licence to the Government of the Canary Islands because the invitation to tender process was contrary to Art. 9 of Law 46/1983, which establishes that only wholly-owned State companies may manage a regional public channel. However, the Government finally decided to grant the licence, after significant political pressure was exerted by the ruling party in the Canary Islands, *Coalición Canaria*, which is an ally of the Government in the national Parliament. Nevertheless, the *Ministerio de Fomento* has said that granting the licence does not mean accepting the management of regional public channels by private broadcasters, and it has appealed against the outcome of the tender process.

Real Decreto 2887/1998, de 23 de diciembre, por el que se concede a la Comunidad Autónoma de Canarias la gestión directa del tercer canal de televisión, BOE no.10 of 12 January 1999, pp. 1198-1199.

ES

Alberto Pérez Gómez
Department of Public Law
University Alcalá de Henares

Bulgaria: Draft Law on Amendment of the Penal Code

On 8 February a draft law that would amend the Penal Code was introduced to the Council of Ministers of the Republic of Bulgaria. The draft Law provides changes to the highly disputed Section "Offence and aspersion" within the Penal Code. Concerned are those provisions, which currently provide different terms of jail for offence and aspersion and which had already been challenged in the Constitutional Court of Bulgaria as being directed against the journalists and the freedom of speech. Yet the Constitutional Court upheld the provisions and saw no violation of the Constitution or the European Convention on Human Rights (*see* IRIS 1998-8:6).
The draft law would lead to substituting the imprisonment penality provided by the Section "Offence and aspersion" with fines varying between 5 and 30 million leva. Up to 20 million leva (= 20,000 DEM) could be imposed for offences and up to 30 million leva (= 30,000 DEM) for aspersion. The draft is decisively opposed by some of the leading members of the governing political party who fear that a change in the type of penalty as proposed by the text of the draft law would stimulate the irresponsibility among the journalists. On the other hand the draft seems to be equally unacceptable to journalists who fear that the financial burden that could result from the new penalties in the draft law would be unbearable for an average monthly remuneration of a Bulgarian journalist, and that journalists accused of offence or aspersion would go bankrupt. As a consequence, journalists fear a (precautionary) decrease in so called "risky" journalistic genres comment, analysis, investigation, which finally would result in a threat to the freedom of speech.

Draft Law on Amendment of the Penal Code of 8 February 1999

BG

Gergana Petrova
Georgiev, Todorov & Co.

United Kingdom: Broadcasting Standards Commission Issues Statement Regarding "Significant Issues"

The Broadcasting Standards Commission has included a statement in its most recent Bulletin, arising from its consideration of complaints made against several programmes "within Channel 5's late night erotic strands". The Commission, relying on recently published evidence, notes the public's increasing acceptance and tolerance of "sex on television" only if it is "justified within a dramatic or informative context". The point of the programmes complained of was "clearly erotic". The Commission stated that "the inclusion, for its own sake, of erotic material in a free to air television service is a step change in the use of sex on British television". This degrades the other difference revealed in the report, namely that the public is more tolerant of matter which is transmitted on pay services. Despite noting that Channel 5 had put out warnings about the material, and that the programmes were transmitted late at night, the Commission expressed its concern at the increasing volume of such material; that the trend constituted a general erosion of standards; and that "gratuitous scenes of violent or coercive sex were unacceptable".

Broadcasting Standards Commission, Statement, January 1999. See Bulletin at http://www.bsc.org.uk/bullitin/bulfr.htm
The Report referred to in the item is called "Sex and sensibility, by Andrea Millwood. It is available from the BSC, Information Department, 7 The Sanctuary, London SW1P 3JS. Telephone: 0171 233 0544. It costs £20.

David Goldberg
IMPS-School of Law
University of Glasgow

United Kingdom: Background Briefing Paper on the "Football Broadcasting Agreements" Case Published by Office of Fair Trading

The paper details the main points to be considered by the court. It describes the content of the rules and the agreements, and it sets out the Office of Fair Trading's overall position on the matter. The case, currently being heard in the Restrictive Practices Court, involves the Office of Fair Trading, the Premier League, BSkyB, and the BBC. It started on January 12, and will go on till some time during April. The judgement is expected during June. The issue concerns the validity of Football Associations' Premier League rules and restrictions,

contained in agreements entered into between the League and BSkyB and the BBC. The question for the court is, do the restrictions operate in a way which is contrary to the public interest, in terms of the Restrictive Trade Practices Act, 1976.

"Football Broadcasting Agreements", Office of Fair Trading, 1525 Bream's Buildings, London EC4A 1PR . The document can be found at http://www.oft.gov.uk/html/new/ football.htm

EN

David Goldberg
IMPS-School of Law
University of Glasgow

News

Ireland: Deregulation of Telecoms

On December 1, 1998, telecoms were deregulated in Ireland, one year ahead of schedule. This was done despite a derogation which would have lasted until January 2000. The decision was taken to end Telecom Eireann's monopoly and introduce full competition early because of fears that delay could affect the economy and especially the e-commerce industry. There had already been competition in some sectors, such as the mobile phone sector and services to the business community, but not in the range of services available to residential customers. However, as Telecom Eireann still controls the network connections, it will be some time yet before other telephone companies will have direct access to enable them to provide additional services, such as video on demand.

Meanwhile, the Telecommunications Regulator has also taken steps to address the problems arising from the exclusive licences issued to cable and MMDS (Multipoint Microwave Distribution System) operators some years ago. She is seeking to limit the period of exclusivity of the licences to five years, after which period other television delivery systems could compete with these operators in their geographical areas. Already, several cable operators have instituted legal proceedings, invoking their exclusive licences, against unlicensed community-based operators who were using deflected signals to provide a much cheaper service in their localities (*see* IRIS 1997-7: 9).

Both the deregulation decision and the outcome of the regulator's proposals for cable and MMDS licences will have an impact on the impending sale of Cablelink, the cable company jointly owned by Telecom Eireann and RTE, the national public service broadcaster. Cablelink needs upgrading to enable it to offer multimedia services such as video on demand and Internet. However, its sale is expected to generate a lot of interest because it has the highest penetration of homes (410,000 homes; 340,000 subscribers) of any cable company in Europe.

Marie McGonagle
Law Faculty
National University of Ireland

France: CSA's Tenth Birthday

In 1982, the creation of an audiovisual regulatory body responded to a political motive, whereas in 1990 questions were being asked about the *raison d'être* of such a regulatory function. And yet the CSA (*Conseil supérieur de l'audiovisuel* - official audiovisual regulatory body), the successor to the *Haute autorité de la communication audiovisuelle* (19821986) and the *Commission nationale de la communication et des libertés* (19861989), has survived, and has reached its tenth birthday.

The composition of the CSA is no longer contested, although the designation of its members remains political. One-third of its nine members is designated respectively by the President of the Republic, the President of the Senate, and the President of the National Assembly, for a period of six years. It would seem that the authority of the two successive Chairmen of the CSA, Mr Jacques Boutet followed by Mr Hervé Bourges, have guaranteed the body's independence, particularly on the occasion of the appointment of the chairmen of the public-sector radio and television channels.

The exercise of the regulatory function is recognised by law. It is nevertheless covered by the regulatory powers of the government and is residual as regards case-law and the growing importance of European law on the audiovisual sector. Thus the *Conseil constitutionnel* and the *Conseil d'État* have recalled that the CSA's regulatory power cannot but be subordinate to the decrees for which the government has responsibility; thus the Directive of Television without Frontiers and case-law at the Court of Justice of the European Communities define the direction which regulatory action should take.

The CSA regulates both support and content, although the universal nature of such competence is becoming increasingly hard to maintain in the face of multimedia developments. The rarity of terrestrial frequencies does probably justify the CSA's intervention in distributing this resource, but its intervention in the use of cable networks is not so easily justified. With the development of digital transmission and broadcasting, such intervention seems even less required. There is now no difference between supports and the principle of the "neutrality of the transporter" might lead to the creation of a regulatory body which would merge, for such matters, the responsibilities of the CSA and those of the telecoms regulatory authority.

The audiovisual sector has become the domain of large industrial groups, but the law merely gives the CSA responsibilities which, basically, regulate the diversity and objectivity of programmes. It can do nothing about the questions of competition and concentration currently being raised in France, and even more seriously on a European and world scale.

In 1982, one writer defined the *Haute autorité* as a "complaints board" because its main work involved ethical problems raised by programmes (violence, sex, etc). In 1999 the CSA is much more than just a "complaints board", but it does not have the ability to regulate communication in the digital era. Reformation seems unavoidable.

Bertrand Delcros
Légipresse

Italy: Agreement Signed Between RAI and SIAE for the Remuneration of Rightsholders

On 4 February 1999 the Italian public broadcaster RAI signed an agreement with the *Società Italiana Autori Editori* (authors collecting society SIAE), who holds a monopoly in the Italian market, to set the conditions for the application of an "equitable remuneration" for the transmission of Italian and European cinematographic and audiovisual works on the three channels of RAI.
The main features of the agreement are the following: it applies for a term of three years; the remuneration is differentiated according to criteria such as the channel on which the work is broadcast, the hour of transmission and the category of the work in question. For every transmission of the work the rightsholders - including authors and neighbouring rightsholders such as directors and screenwriters - will receive a remuneration the amount of which is fixed by the agreement. As to the categories of works covered, the agreement applies also to series, TV movies, documentaries, and cartoons. The agreement is intended to be the first of a series of contracts that SIAE will sign with all the other broadcasters as well as with all those who use the audiovisual repertoire.

Roberto Mastroianni
University of Florence, European Court of Justice

Germany: ProSieben Examination Period Comes to an End

The Investigating Committee on Media Concentrations (*Kommission zur Ermittlung der Konzentration im Medienbereich KEK*) decided at its 21st sitting on 26 January 1999 that changes to shareholdings in the television company ProSieben could not be classified as harmful. Authorisation was required for Thomas Kirch to increase his holdings in the basic share capital, which carried voting rights, of ProSieben Media AG from 24.5 % to 58.4 % and of REWE Zentralfinanz eG from 40 % to 41.6 %. The changes, previously submitted to the Investigating Committee on Media Concentrations for approval, had already taken place.
The Investigating Committee found that, in accordance with Article 28 (2) sentence 1 of the Agreement between Federal States on Broadcasting, the ProSieben group's share of viewing figures should be counted together with that of the Kirch group. The relationship between Dr Leo Kirch and his son Thomas was merely one reason why the figures of the ProSieben and Kirch groups should be combined. A series of clues suggested to the Investigating Committee that there was continuing concurrence between the interests of both groups. For example, ProSieben obtained an unusually high proportion of the programmes it broadcast itself and on Kabel 1 from the Kirch group. The Kirch group and ProSieben not only shared certain premises, but management staff had also moved from one group to the other. Also, the long-term aim of the Kirch Foundation was, to a certain degree, the integration of the Kirch and ProSieben groups. The Commission attached particular importance to the continuing close financial ties between Dr Leo Kirch and Thomas Kirch. These links were the clearest demonstration of the extent to which the two groups were following a common business plan and were mutually coordinating their investment activities.
The combined share of viewing figures of the Kirch and ProSieben groups varied within the prescribed period between 26.61 % and 28 %. This alone was insufficient to constitute a predominant market position. The free-to-air TV viewing figures of the Kirch group were approximately equivalent to those of CLT-UFA, which was just as strong a competitor on the national television advertising market, with a similar market position. Moreover, as far as programming was concerned, public broadcasters were also in a strong position because of licence fees. As part of the assessment as to whether a predominant market position had been obtained, independent of suspicions that Article 26 (2) of the Agreement between Federal States on Broadcasting had been breached, it had been necessary above all to investigate the procurement market for fictional television programmes. All available data suggested that the Kirch group was the market leader for fiction rights. Information available to the Investigating Committee suggested that the Kirch group's rights in this field far outweighed those of all other German programme organisers put together. Furthermore, the Kirch group had access to every part of the market as far as German-speaking programmes were concerned (pay-per-view, pay-TV, primary and secondary rights in free-to-air TV) and could be seen as a strong client by production companies. However, there was insufficient evidence to conclude that this strong position was harming diversity of opinion in national television. Moreover, with all its shareholdings, the Kirch group was also the market leader as far as German television productions were concerned. Its market share did not suggest, however, that broadcasters were dependent on the Kirch group.

Bernd Malzanini
Investigating Committee on Media Concentrations, Potsdam

Germany: End of Examination Period for PREMIERE-Digital

At its 21st sitting on 26 January 1999 in Potsdam, the Investigating Committee on Media Concentrations (*Kommission zur Ermittlung der Konzentration im Medienbereich - KEK*) decided that licence applications made by PREMIERE for digital pay-TV programmes could not be rejected on the grounds of the need for diversity of opinion on television. According to Article 26 (3) of the Agreement between Federal States on Broadcasting, if a company gains a predominant market position by owning the rights to a large number of programmes, further programmes owned by that company may not be granted authorisation or attempts to acquire shares in organising companies may be deemed harmful. The Investigating Committee on Media Concentrations found that PREMIERE's operation of digital pay-TV would only remain harmless as long as the shareholding companies remained independent competitors outside their involvement with PREMIERE.
PREMIERE's operation of digital pay-TV, a joint venture in which the Kirch group and CLT-UFA were equal partners, was examined beforehand in several consolidated processes under European and German competition law. In May 1998 it was prohibited by the European Commission and in October 1998 by the Federal Cartel Authority (*Bundeskartellamt*). Shareholdings in PREMIERE are currently owned by CLT-UFA and Canal+, each with 37.5 %, and the Kirch group, which owns 25 %. Canal+ is to pull out as a PREMIERE shareholder.

It was necessary to check whether either CLT-UFA or the Kirch group, both PREMIERE partners, had a predominant share of the market. This process was based on each company's share of the viewing figures for all German-speaking programmes. In the prescribed period, these figures averaged 27.5 % for the Kirch group and 25.5 % for CLT-UFA. At present, therefore, their involvement in PREMIERE's operation of pay-TV gave neither the Kirch group nor CLT-UFA a predominant market position as far as national television was concerned.
The Investigating Committee on Media Concentrations decided, however, that the Kirch group's influence on public opinion through television was not fully reflected by viewing figures alone. Rather, it held that the Kirch group's position in television funded by subscriptions and advertising had been strengthened by the operation of digital pay-TV by DF1 and now PREMIERE. Moreover, PREMIERE had gained a key position which would enable it to control the access of other pay-TV providers to the viewing public. The Kirch group also had the digital technology developed especially for pay-TV. As part of an overall business strategy, it had the power to combine its use of considerable programme resources not only on pay-TV but also in other markets. Currently, however, the Kirch group's advances in broadcasting and reception technology were primarily affecting pay-TV, without causing long-term hindrance to customer access to channels financed in other ways. It was also unclear, despite the group's strong position in terms of programme resources, whether public television companies or CLT-UFA broadcasters were already or may become dependent on the Kirch group for their programming. In fact, apart from national television, CLT-UFA had greater economic and financial power in the media sector than the Kirch group. However, in the Investigating Committee's estimation, neither its position with regard to technical services for pay-TV nor that in respect of film rights suggested that CLT-UFA, through its involvement in both free-to-air and pay-TV, had reached a predominant market position.

Bernd Malzanini
Investigating Committee on Media Concentrations, Potsdam

Switzerland: Digital Radio and Youth Programme

The Swiss Radio and Television Corporation (SRG) has been authorised and commissioned to establish and operate a new broadcasting network for digital radio (DAB- Digital Audio Broadcasting). The Federal Council (*Bundesrat*) approved the corresponding extension of the SRG's licence on 17 February 1999, thereby launching the start of the new broadcasting technology. In entrusting the SRG with the establishment and operation of the network, the Swiss Government is indirectly promoting the market introduction of DAB through radio and television reception fees. As a national public service provider, the SRG has the economic, technical and programme capacity for launching the new technology with the appropriate programme offer and establishing a broad consumer market in the interest of future service providers. The SRG is also being authorised to offer a new youth programme via satellite and DAB. Under the licensing agreement, the SRG is required to take account of the concerns of young people and to promote youth culture accordingly. In this way, the Federal Council wishes to oblige the SRG, through the new service, to contribute to its public service remit and to entertain young people not just with music.

Oliver Sidler
Medialex

PUBLICATIONS

Broadcasting Authorities in the Member States of the European Audiovisual Observatory http;//www.obs.coe.int/oea/docs/00001809.htm.

Hugenholtz, P.B., Kabel, J.J.C.; Schuijt, G.A.l. (Red.).- *Universiteit en auteursrecht. Wetenschappelijke informatievoorziening in een digitale omgeving*.-Amsterdam: Otto Cramwinckel, 1999.-160 p.- ISBN 90 757 27 070.-É 39,50

Neels,L.; Voorhoof, D.; Maertens, H.- *Medialex, Selectie van bronnen van de media-en informatiewetgeving*.- Vijfde editie.-Antwerpen: Kluwer rechtswetenschappen, 1999. 34 + 872 p.– ISBN 90-5583-439-4.– BFR 5.150 / 4.120, contact Filip.Balduck@wkb.be

Sandberg, Karin.-*Unzulässiger Protektionismus in der europäischen Medienpolitik? Die Massnahmen der Europäischen Gemeinschaft zum Schutz des europäischen Films und ihre Vereinbarkeit mit dem durch das GATT und die WTO-Vereinbarungen gebildeten Rechtsrahmen*.- Frankfurt am Main: Peter Lang, 1998.-306 S.- (Europäische Hochschulschriften: Reihe 2, Rechtswissenschaft, Bd. 2312)

Trautmann, Catherine.- *Projet de loi portant modification du titre III de la loi n° 86-1067 du 30 septembre, de la communication audiovisuelle et transposant diverses dispositions de la directive 89/552 CEE du 3 octobre 1989 modifiée par la directive 97/36/CE du 30 juin 1997*.-Paris: Assemblée Nationale, 1998.-23 p.- (Assemblée Nationale n° 1187)

Woldt, Runar et al.- *Perspectives of public service television in Europe*.-Düsseldorf: The European Institute for the Media, 1998.- 156 S.-(Media Monograph, 24).- ISBN 3-929673-32-0

AGENDA

6. Saarbrücker Medientage, Jugend und Medien in Europa
21–22 April 1999
Organiser: Organisationsbüro Saarbrücker Medientage
Venue: Saarbrücker Schloß
Information & Registration:
Tel: +49 681 9061750
Facsimile transmission:
+49 681 906 1751
E-mail: Info@saarbruecker-medientage.de
Website: http://www.saarbruecker-medientage.de

Europese Richtlijn: Auteursrecht in de informatiemaatschappij
24 April 1999
Organiser: Vermande Studiedagen
Venue: Rotterdam Hilton
Information & Registration:
Tel: +31 320237721
Facsimile transmission:
+31 320 233 158
E-mail:
vermande.studiedagen@sdu.nl

Digital Convergence, Competition and Regulation
17–18 Mai 1999
Organiser:
IBC Global Conferences Limited
Venue:
London,
Copthorne Tara Hotel
Tel: +44 171 636 1976
Facsimile transmission:
+44 171 636 1976
E-mail: cust.serv@ibcuk.co.uk