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

EDITORIAL

After three months in which IRIS has been unable to report on any decisions of the European Court of Human Rights, this issue contains a particularly important judgement on the balance between journalists' freedom and the protection of privacy. The Court ruled in favour of the right to information, basing its decision on the responsibility of journalists to satisfy justifiable public interest in certain information. It also considered the limits inherent in this task, in particular the ethical principles of protecting the individual.

In Belgium, an amendment to the constitution is on the cards, under which the freedom of the press, currently restricted by the wording of the constitution to the printed media, would be expressly extended to cover other forms of media. Meanwhile, in Uzbekistan, information offered via the Internet will in future be subject to the prior authorisation of *UzPak*, the responsible State authority.

Susanne Nikoltchev
IRIS co-ordinator

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The Global Information Society

Uzbekistan: Governmental Control of Information Flow

On 5 February 1999, the Cabinet of Ministers of Uzbekistan Republic adopted the Decree "On creation of a National network of data transmission and on regulation of access to the international networks". The stated goals of the Decree are the protection of the radio frequency spectrum, and a wider access to the international information networks.
According to the Decree, functions of the national provider are laid upon the state organization UzPak.
UzPak will make providers' linking up to the information networks, such as Internet. That means that many of the local providers will realise the right to access to the international networks only by getting a licence under the permission of UzPak. Without the permission of the state organization, the Internet becomes inaccessible.

Postanovlenie "O sozdanii Natsionalnoi seti peredachi dannyh i uporiadochenii dostupa k mirovym informatsionnym setyam" (On creation of a National network of data transmission and on regulation of access to the international networks) *published in Uzbek Tilida, No. 3,* 1999

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Council of Europe

European Court of Human Rights: Two Recent Judgements on the Freedom of Expression and Information

1. *Bladet Tromso* and *Stensaas* v. *Norway:* defamatory allegations, the publication of a secret document and article 10 of the European Convention for the Protection of Human Rights
In 1992, the newspaper company *Bladet Tromso* and its editor, Pal Stensaas, were convicted by a Norway District Court for defamation. The newspaper had published several articles on seal hunting as well as an official – but secret – report that referred to a series of violations of the seal-hunting regulations (the Lindberg report). The article and the report more specifically made allegations against five crew members of the seal-hunting vessel *M/S Harmoni* who were held responsible for using illegal methods of killing seals. Although the names of the persons concerned were deleted, the crew members of the *M/S Harmoni* brought defamation proceedings against the newspaper and its editor. The District Court was of the opinion that some of the contested statements in the article and the report as a matter of fact were "null and void", and the newspaper and its editor were ordered to pay damages to the plaintiffs.
The European Court of Human Rights, however, reached the conclusion that the conviction by the Norwegian district court was in breach of Article 10 of the European Convention. The Court took account of the overall background against which the statements in question had been made, notably the controversy that seal hunting represented at the time in Norway and the public interest in these matters. The Court also underlined that the manner of reporting in question should not be considered solely by reference to the disputed articles but in the wider context of the newspaper's coverage of the seal hunting issue. According to the Court "the impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported". The Court emphasized that Article 10 of the Convention does not guarantee an unrestricted freedom of expression even with respect to media coverage of matters of public concern, as the crew members can rely on their right to protection of their honour and reputation or their right to be presumed innocent of any criminal offence until proven guilty. According to the Court some allegations in the newspaper's articles were relatively serious, but the potential adverse effect of the impugned statements on each individual seal hunter's reputation or rights was significantly attenuated by several factors. In particular, the Court was of the opinion that "the criticism was not an attack against all the crew members or any specific crew member". On the other hand, the Court underlined that the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research, because otherwise, the "vital public-watchdog role" of the press might be undermined. The Court reached the following conclusion: "Having regard to the various factors limiting the likely harm to the individual seal hunter's reputation and to the situation as it presented itself to *Bladet Tromso* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.". It should be mentioned that 4 of the 17 judges dissented manifestly with the majority. In the dissenting opinions, annexed to the judgement, it is argued why the articles are to be considered as defamatory towards private individuals. According to the minority, the Court had not given sufficient weight to the reputation of the seal hunters. The minority opinion also disagrees with the publication of the secret report and the fact that the newspapers took the allegations formulated in the report for granted: "How could it have been "reasonable" to rely on this report when the newspaper was fully aware that the Ministry had ordered that the report not be made public immediately because it had contained possibly libellous comments concerning private individuals?". In an unusually sharp conclusion, the minority held that the Court sends the wrong signal to the press in Europe and that the judgement undermines respect for the ethical principles which the media voluntarily adhere to. Their final conclusion was: "Article 10 may protect the right for the press to exaggerate and provoke but not to trample over the reputation of private individuals".
However, let there be no misunderstanding: the judgement of 20 May 1999 in the case of *Bladet Tromso* v. *Norway* has far reaching implications for the interpretation of the balance between journalistic freedom and the protection of the rights or reputation of individuals. It is obvious that a clear majority of the Court argues in favour of the public watchdog-function of the media and the critical reporting of matters of public concern. And albeit that this freedom is not wholly unrestricted, according to the actual jurisprudence of the Court, the freedom with respect to press coverage of matters of serious public concern is very wide.

2. *Rekvényi* v. *Hungary:* politics, police and freedom of expression
This case concerns the constitutional ban in Hungary on political activities by police officers and members of the armed forces. According to Mr. Rekvényi, a police officer living in Budapest, the ban not only violates his freedom of assembly and association (article 11), but also his freedom of (political) expression (article 10). Although the Court agreed that the curtailing of the applicant's involvement in political activities interfered with the exercise of his right of freedom of expression, the Court was of the opinion that this interference is in accordance with the second paragraph of article 10. As a matter of fact, the Court held that the interference is prescribed by law, has a legitimate aim (the protection of national security and public safety and the prevention of disorder) and is necessary in a democratic society. The Court recognized that it is a legitimate aim in any democratic society to have a politically neutral police force. On the other hand, the Court stated that the ban on political activities by policemen is not an absolute one and that in fact police officers remain entitled to undertake some activities enabling them to articulate their political opinions and preferences, e.g., policemen may promote candidates, participate in peaceful assemblies, make statements to the press, appear on radio and television or publish works on politics. The Court unanimously reached the conclusion that there had been no violation of article 10 or of article 11 of the Convention.

The Judgements are available at: http://www.dhcour.fr

EN FR

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European Commission: Amended Proposal for a Directive on Copyright and Related Rights in the Information Society

On 21 May 1999, the European Commission presented an amended proposal for a Directive on copyright and of related rights in the information society (concerning the original proposal see *IRIS* 1998-1:4). The proposed Directive aims at establishing a level playing field for copyright protection in the new environment. It will in particular address the rights of reproduction, communication to the public, and distribution, and also legal protection of anti-copying and rights management systems. It would ensure that films, music and other copyright protected material enjoy adequate protection in the single market. Thus, a new Directive would facilitate cross-border trade, with particular emphasis on new "information society services" (both on-line and on physical carriers).
The amended proposal includes most of the modifications suggested by the European Parliament in its February 1999 Opinion on the Commission's original proposal. It does not, however, include the requirement proposed by the European Parliament consisting of a specific limitation of the exemption to the reproduction right concerning 'cache' copies and similar acts of technical reproduction.
On the other hand, with regard to private copying, as well as scientific research and teaching-related copying, the Commission has followed the indications of the European Parliament, by ensuring a right of fair compensation for the rightholders and leaving the further determination of this right to the individual Member States.
Furthermore, the amended proposal presents an enhanced legal protection on the issue of technical devices in order to comply with the need for certainty felt in the Information Society.

Amended proposal for a Directive on copyright and of related rights in the Information Society, presented by the European Commission on 21 May 1999. The document and a pressrelease are available at: http://europa.eu.int/comm/dg15/en/intprop/intprop/copy2.htm

EN

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European Commission: Reasoned Opinion for Belgium regarding Tax on Satellite Dishes

The European Commission has decided to send a reasoned opinion to Belgium concerning taxes imposed by some municipal authorities on satellite television dishes. A reasoned opinion is the second stage of a formal infringement procedure under Article 169 of the EC Treaty. Over the past few years a number of municipal authorities in Belgium have introduced an annual tax on the possession of all dishes for receiving satellite television. According to the Commission, these taxes are an obstacle to the reception and distribution of television signals broadcast by satellite from other Member States and they therefore constitute a violation of Article 59 of the EC Treaty on the free movement of services.
The Commission considers the tax to be discriminatory since it particularly affects certain categories of viewers and listeners, foreign TV and radio channels and satellite distributors. Certain municipal authorities claim that the tax is to preserve the aesthetic appearance of buildings. The Commission, however, considers the tax to be unjustified since it is applied irrespective of the size of the dish; whether the dish is visible or not; whether the dish is placed on a building or elsewhere, and whether the building is classified or not. Moreover, income collected from the tax is not used to improve the urban environment and other protuberances such as antennae and flagpoles are not subject to a similar tax.
The Commission also considers the obligation to seek prior authorisation from the municipal authorities for the installation of a satellite dish, sometimes involving administrative expenses, to be excessively restrictive.
In principle, a Member State may be required to refund a tax collected in violation of Community law.

Press release IP/99/281, 3 May 1999 http://europa.eu.int/comm/dg10/avpolicy/whatsnew.html

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CASE LAW

France: Can a Film-Set Photographer Claim Copyright?

In a decision on 9 March 1999 the Paris Court of Appeal held that a film-set photographer had the benefit of copyright protection for a photograph taken during the making of a film. The dispute involved the magazine *Télérama*, which had published a special issue entitled «The best films of the century – 100 years of cinema», including a photograph of the actor Jean-Paul Belmondo in Jean-Luc Godard's film «*Pierrot le Fou*». When the publication refused to pay the photographer the royalties he claimed, the case was brought before the Court of First Instance in Paris, which dismissed the photographer's claim. The Court of Appeal has now quashed that decision. Article L 112-9 of the Code of Intellectual Property allows copyright protection for photographic works, on condition that they are original and are recognisably by the particular photographer. The Court held that a film-set photographer was free to choose the techniques (lens, film, lighting, exposure time) and artistic options (framing, colours, choice of an expression or of a movement) he used. In the present case it had been demonstrated that the photographer had taken the disputed photograph by standing in front of the cinema camera after shooting and not during filming. Moreover, the photographic scene did not form part of the film and the actor was looking straight at the camera. The judges felt this was enough to define the personality of the photographer who had been able, by his own means, to take his own photograph of the actor. He could therefore claim copyright in respect of the photograph. The magazine, which had not requested the photographer's authorisation to publish the shot and had not given the photographer's name, was therefore found guilty of infringement of copyright. In addition to the payment to the photographer of FRF 3 000 in damages to compensate for the monetary and moral prejudice suffered, the Curt ordered that his name be shown underneath the disputed photograph in a rectification. Lastly, the Court allowed the third-party appeal lodged by the magazine against the specialist bookshop which had sold it the disputed photograph, as it was the professional duty of this company – which specialised in supplying film photographs – to seek the photograph's originator and obtain his/her authorisation before offering the photograph for sale.

Paris Court of Appeal (8th chamber, A), 9 March 1999; P. Georges v. SA Magazine Télérama.

FR

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Belgium: Copyright and Distribution by Cable (continued)

The Brussels Court of Appeal heard an appeal against a decision reported in an earlier issue (IRIS 1999-1: 7).
The original dispute was between SABAM, a company which manages copyright fees, and the Professional Union for Radio and Television Distribution (RTD), an umbrella organisation for Belgian cable distributors.
In the original case, the presiding judge of the Court of First Instance in Brussels sitting in urgent matters had decided that the content of a letter sent by RTD to SABAM as part of negotiations on cable re-transmission rights constituted a violation of the exclusive right of authors to authorise the re-transmission by cable of their works.
In its letter the RTD had informed the SABAM that it felt it was contradictory to have to obtain authorisation for the re-transmission by cable of programmes whose re-transmission was rendered compulsory by the Belgian Communities authorities («must carry» programmes). The RTD also questioned the need for authorisation to re-transmit satellite broadcasts, as these could be received freely by anyone, using a satellite dish.
The presiding judge delivered his decision on 26 June 1998, applying Article 87, paragraph 1, of the Copyright and Neighbouring Rights Act of 30 June 1994, which enables the presiding judge to note an infringement and order it to cease.
In its decision of 9 March 1999, however, the Court of Appeal rejected the issue of violation of copyright as raised by SABAM in the initial proceedings and allowed the appeal lodged by RTD and its members. The court of appeal has decided that RTD has not violated the copyright protection of authors represented by SABAM merely by expressing its position during negotiations.
Moreover, quite apart from the interpretation and import of the correspondence between SABAM and RTD, the Court held that it was not necessary to order the re-transmission by cable to cease.
The court noted that, in an order by the presiding judge of the Court of First Instance in Brussels sitting in urgent matters on 15 November 1996, it had been decided that cable distributors should pay provisional compensation in exchange for authorisation to re-transmit by cable pending the outcome of the negotiations between the parties, of the mediation procedure, or of a decision on the merits.
In the circumstances, the court allowed the appeal lodged by the RTD and cancelled the decision of 26 June 1998 by the presiding judge of the Court of First Instance in Brussels.

Brussels Court of Appeal, 1998/AR/2516-1998/AR/2632-1998/AR/2784, 9 March 1999; SABAM v. RTD and its members.

FR

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Germany: Federal Supreme Court Bans Sale of CD-ROM Telephone Directories

On 6 May this year, the 1st Civil Court of Appeal (*I. Zivilsenat*) of the Federal Supreme Court (*Bundesgerichtshof – BGH*), which hears cases concerning copyright and competition law, ruled that companies selling telephone directories in CD-ROM format require a licence to use information on subscribers contained in telephone books published by *DeTeMedien*, a subsidiary of *Deutsche Telekom AG*. *DeTeMedien*, which also publishes its own electronic telephone directory on CD-ROM containing data provided by *Deutsche Telekom*, had sought an injunction against and damages from two companies selling CD-ROM electronic directories. In one case, more than 30 million entries had been scanned from the telephone directories, while in the other, the data had been copied from actual phone books by several hundred workers in the People's Republic of China. The Courts of First Instance had ruled differently in each case: whereas the complaint against the producer of the *Tele-Info-CD* had been rejected in the first and second instances, the one made against the manufacturer of the *D-Info-CD* had been upheld in both instances. The Federal Supreme Court explained that telephone directories were generally not protected by copyright, since neither the entries themselves nor the selection, organisation and arrangement of the data provided sufficient scope for a separate creation, which was necessary for a product to be protected by copyright. Nevertheless, the *BGH* decided that the plaintiff was entitled to apply for a future restraining order under copyright law because, since 1 January 1998, databases were protected uniformly across the European Community. Under the provisions of §87b of the Copyright Act (*Urheberrechtsgesetz – UrhG*), database manufacturers were granted copyright which included exclusive rights to copy, distribute or publicly reproduce complete databases or substantial parts of them. The Court ruled that this protection covered conventional telephone directories as well as electronic databases. However, it also granted the plaintiff's claim for retrospective damages. In this respect, it decided that the direct copying of data from telephone directories – whether by hand or by means of a scanner – constituted unacceptable competitive practice (§1 of the Unfair Competition Act – *Gesetz gegen den Unlauteren Wettbewerb – UWG*). The Court decided that the applicant company, which together with *Deutsche Telekom* had spent considerable effort and money in order to produce the telephone directories, should not have to put up with competitors directly copying its work in order to manufacture rival products without incurring the corresponding costs of collecting the individual data and, moreover, profiting from the good reputation which the plaintiff and *Deutsche Telekom* had acquired through the reliability and completeness of their databases. The legislator assumed that such a database was an economic asset which could be marketed independently, since the Telecommunications Act (*Telekommunikationsgesetz*) expressly stipulates that *Deutsche Telekom* or any other telephone service provider should make its telephone directories available, in return for payment, to any third party wishing to produce its own directory.

Judgements of the Federal Supreme Court *(Bundesgerichtshof),* 6 May 1999, file nos. I ZR 199/96 and I ZR 5/97

DE

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Germany: Koblenz Appeal Court on Protection of Telephone Directory Entries

Replying to an application for a temporary order, the Koblenz Appeal Court (*Oberlandesgericht – OLG*) decided on 27 October 1998 that in future no telephone directories may be sold in CD-ROM format without the telephone subscribers' prior permission.

The applicant, a computer software manufacturer, who also produced a CD-ROM telephone directory with which subscribers could be identified by means of their telephone number, neighbourhood searches could be carried out and business numbers found, had been prohibited from selling these CD-ROMs by means of an injunction. As a result of this, she had obtained from the Mannheim District Court (*Landgericht*) an order banning a producer of similar CD-ROMs from selling them. However, this order had been ignored.

The applicant had claimed before the Koblenz District Court (*Landgericht – LG*) that, by selling the CD-ROMs, the defendant had broken competition regulations. The Court had dismissed the complaint on the grounds that there was no concrete competitive relationship between the parties.

In the appeal before the *OLG*, the defendant had submitted a declaration of discontinuance with a penalty clause, which the applicant had accepted. After both parties had agreed on the settlement of the case, the Appeal Court had decided that the costs should be borne by the defendant, not only because of the declaration she had made but also because, on the basis of the substance of the case and the arguments put forward, the overwhelming evidence suggested that the applicant's wish had finally been met and that she therefore had a right to forbearance under §1 of the Unfair Competition Act (*Gesetz über unlauteren Wettbewerb – UWG*).

The Court ruled that the defendant had broken the rules on unfair competition and had breached §4.1 and §43 of the Federal Data Protection Act (*Bundesdatenschutzgesetz – BDSG*) and §27 of the Criminal Code (*Strafgesetzbuch – StGB*). The defendant had not infringed the provisions of §4 and §29 of the Data Protection Act, since these only prohibited the processing and use of personal data whereas she had merely sold copies of the CD-ROM. However, in the Appeal Court*'s* opinion, by selling the CD-ROMs the defendant had enabled third parties to violate the Data Protection Act and was therefore punishable under §27 of the Criminal Code as an aider and abettor for the transmission and use of data. The Appeal Court did not consider that the defendant had been given consent to use the data (§4.1 *BDSG*) nor permission under the terms of §29 of the Data Protection Act. The infringement of §4 and §43 of the Data Protection Act and §27 of the Criminal Code also constituted an offence under §1 of the Unfair Competition Act, since only by imposing the same legal restrictions on all competitors could equal conditions be created for fair competition. There had been a breach of competition law in this case in particular because the Data Protection Act's provisions were not value-free and irrelevant to competition law, but enshrined certain values, protected individual rights and laid down moral legal requirements. The Court also granted the applicant's claim that competition law had been violated since there had in fact been a concrete competitive relationship with the defendant. Such a relationship existed even if the competition was in the future and, since the injunction was not yet in force, future competition could certainly not be ruled out. The Appeal Court said that the objection over abuse of

the law did not rule out the applicant's claim for an injunction, since the applicant was not currently breaking competition rules herself by selling the CD-ROMs.
In the meantime, the applicant has lost a case brought before the Federal Supreme Court (*Bundesgerichtshof – BGH*), in which she appealed against the order that she refrain from selling the CD-ROMs.

Judgement of the Koblenz Appeal Court *(OLG Koblenz),* 27 October 1998; file no. 4 U 1196/98

DE

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Germany: No Protection for Private Broadcasters under the Südwestrundfunk State Agreement

In a decision of 27 April 1999, the Baden-Württemberg Higher Administrative Court (*Verwaltungsgerichtshof – VGH*) dismissed an appeal by a private broadcaster against the decision by the Stuttgart Administrative Court (*Verwaltungsgericht*) of 28 October 1998, file no.1 K 4787/98.
The private broadcaster hoped, by applying for a temporary order, to oblige the supervisory authority, the *Land* of Baden-Württemberg, to prohibit the public broadcasting corporation *Südwestrundfunk (SWR)* from broadcasting the programme "*SWR 3 Metro*". *SWR 3 Metro* was broadcast on two Stuttgart frequencies at particular times as part of the standard *SWR 3* programme. At the same time, the regular *SWR 3* programme could also be received in certain parts of the region. *SWR* also broadcast the radio stations *SWR 1, SWR 2* and *SWR 4*. In the plaintiff's opinion, *SWR 3 Metro* constituted a fifth station, which was forbidden under §3.1 of the *SWR* State agreement (*SWR-Staatsvertrag*).
The Court's main task was to decide whether the regulations set out in the *SWR* State agreement were sufficient to establish individual rights for competing private broadcasters. In the Court's view, the provisions of §37 of the agreement alone, which gives alternating supervisory responsibility to the Rheinland-Pfalz and Baden-Württemberg *Länder*, did not entitle any third party to appeal to the supervisory authority to take action. Furthermore, according to the Senate, the overall framework of the State agreement did not provide for any third-party protection for private broadcasting companies because the number and type of programmes broadcast laid down in §3 of the *SWR* State agreement merely reflected the *status quo* at the time when the agreement was concluded. The fact that the broadcasting of further programmes was subject to a proviso under §3.3 of the State agreement was irrelevant, especially since authorisation to broadcast such programmes could only be granted because of the guarantee to maintain and develop public broadcasting. Complaints from private competitors could therefore not be taken into consideration. In conclusion, the Court recognised that even if the proviso in §3.3 of the *SWR* State agreement were relevant, private competitors could not in any case appeal on the basis of the rule.
The Federal Administrative Court (*Bundesverwaltungsgericht – BVerwG*) had previously ruled on 21 October 1998, in a dispute over the interpretation of the State agreement on the broadcasting corporation *Mitteldeutscher Rundfunk (MDR)*, that §3.1 of the agreement did not limit once and for all the number of programmes which may be broadcast, but rather that §3.4 of the agreement made provision for comparable development possibilities in the fields of broadcasting technology and the programming of public broadcasting corporations, which also covered the number of programmes they could broadcast.

Decision of the Baden-Württemberg Higher Administrative Court *(Verwaltungs-gerichtshof – VGH),* 27 April 1999, file no. 1 S 165/99; Judgement of the Federal Administrative Court *(Bundesverwaltungsgericht – BVerwG),* file no. BverwG 6 A 1.97

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Germany: New Rulings on Extended Advertising Programmes and Surreptitious Advertising

In two judgements delivered on 15 April 1999, the Berlin Administrative Court (*Verwaltungsgericht – VG*) upheld earlier rulings made in the granting of provisional legal protection.
The first case (file no. VG 27 A 289.98) concerned whether the feature film "*Feuer, Eis und Dynamit*" should be indicated as being an extended advertising programme (see IRIS 1999-1:6). The applicant broadcaster had appealed against the decision of the Berlin-Brandenburg media authority (*MABB*) under which the film could only be broadcast if it were indicated as being an extended advertising programme.
In the Court's opinion, the Berlin-Brandenburg State Agreement on Media (*Medienstaatsvertag*) contained no legal basis for the supervisory authority to go beyond the existing range of measures available, i.e. complaints, levies and fines. According to the Court, the *MABB* therefore had no right to rule that the film should only be broadcast if it was indicated as being an extended advertising programme. In the substance of the case, the Court ruled that, on account of the broadcaster's application, the film could be shown in accordance with broadcasting law provided an announcement was made at the beginning of the film that it contained brand names in return for payment by the brand owners. Following the ruling made in granting provisional legal protection, the Court confirmed its opinion that the action of the film remained to the fore despite the simultaneous appearance of brand names and that, as such, the programme met the criteria of a feature film rather than those of an extended advertising programme. The Court also confirmed its findings concerning surreptitious advertising and the principle of separation of advertising and programme material. Since it did not contain any element of deception, the film could not be described as surreptitious advertising and so any obligation to indicate that the film was an extended advertising programme would constitute a disproportionate restriction of broadcasting freedom. Moreover, the classification of the film as programme material meant that advertising regulations did not apply.
In the second case (file no. VG 27 A 20.98) the Court considered a television programme which featured and recommended hotels and restaurants in and around Berlin. The *MABB* had ruled that the programme should be classified as an extensive advertising programme and had ordered that it be labelled as such throughout the broadcast. By means of provisional legal protection, the broadcaster concerned had been allowed to broadcast the programme without any such indication until the main issue was settled (see IRIS 1998-8:7). In its latest ruling, the Court finally confirmed the decision taken when provisional legal protection had been granted. Although the initial ruling had essentially been made on the grounds that the hotels and restaurants concerned had not paid to be

featured in the programme, the judgement was based on the finding that the programme was more informative than commercial in character. According to the Court, the question as to whether or not a programme should be classified as an extensive advertising programme should have nothing to do with whether it contained promotional elements in return for payment. Against the background of broadcasters' basic right to broadcasting freedom provided for in Article 5.1.2 of the German Constitution (*Grundgesetz*), the Court held that only programmes in which advertising was an editorial concept should be classified as extensive advertising programmes. Surreptitious advertising had to contain a deceptive element while the requirement for separation of advertising and programme material could not have been breached as the broadcast had been classified as programme material.

Decisions of the Berlin Administrative Court *(Verwaltungsgericht – VG),* 15 April 1999, file nos. VG 27 A 289.98 and VG 27 A 20.98

DE

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Germany: Decision on Split-Screen Advertising Upheld

In a judgement delivered on 1 April 1999, the Higher Administrative Court (*Oberverwaltungsgericht – OVG*) in Berlin dismissed the appeal of the Berlin-Brandenburg media authority against the decision of the Berlin Administrative Court (*Verwaltungsgericht – VG*) of 17 December 1998.
In its decision, the *VG Berlin* had held the practice followed by the television broadcaster *n-tv,* using a crawling display simultaneously with the normal picture for advertising purposes, to be admissible (see IRIS 1999-2:6).
In its judgement, the *OVG* agreed with the court of first instance that the crawling text, as a "comparable text service" was subject solely to the regulations set out in para 2 no.3 of the Agreement between the Federal States on Media Services (*Mediendienste-Staatsvertrag – MDStV*). In the *OVG's* opinion, this conclusion did not contradict the first structural paper on the powers of the *Land* media authorities in the grey area between broadcasting and media services, nor did it contradict – regarding the distinction between the two – a paper adopted on 16 December 1997 but which has no legal force (see IRIS 1999-1:12 and IRIS 1998-7:15). This was due to the fact that, in the view of the 8th Chamber of the *OVG*, a textual advertisement, according to this paper, was only subject to broadcasting law if there was a connection with the actual pictures on the screen. In this case, however, the court did not find there to be such a connection.

Decision of the Higher Administrative Court *(Oberverwaltungsgericht – OVG)* in Berlin, file no. OVG 8 SN 26.99, 1 April 1999

DE

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Switzerland: Advertising for Alcohol-Free Beer Judged Inadmissible

The second channel of the Swiss television company *DRS (SF2)* broadcast a large number of matches in the football World Cup held in France in special programme blocks. During the commercial breaks, *SF2* regularly showed an advertising spot for the company "*Feldschlösschen*". This commercial showed two football teams going to the dressing rooms at the end of a match. The players of the winning team, together with one member of the losing team, were seen gathered round a crate of beer.
The complainant claimed that the advertisement breached the ban on advertising of alcoholic beverages as provided for in broadcasting legislation. The Independent Radio and Television Complaints Authority (*Unabhängige Beschwerdeinstanz für Radio und Fernsehen – UBI*) did not follow up the complaint because the Federal Communications Office (*Bundesamt für Kommunikation – BAKOM*) was the body responsible for monitoring the application of this regulation. In this case, the decisive factor in the distinction between the competencies of *BAKOM* and the *UBI* was not whether or not the commercial was classed as trade advertising, but which point of law was appropriate to settle the issue. "If aspects of content that are likely to harm the development of public opinion are to the fore, the *UBI* is primarily responsible, but if financial or technical issues are involved, then *BAKOM* is the competent authority. In contrast to actual programme material, however, these aspects of content are generally much less important where advertising is concerned."
Nevertheless, the *UBI* examined whether the commercial infringed the ban on misleading advertising. Agreements on transfrontier television and Swiss radio and television regulations contain provisions in this field.
The advertisement in question mainly promoted the alcohol-free brand "*Schlossgold*" produced by "*Feldschlösschen*". The name "*Schlossgold*" was only mentioned towards the end of the commercial, however. Much greater prominence was afforded to the name and logo of the "*Feldschlösschen*" company, which was mainly known for its alcohol-containing beer. The public would be under the impression that, after a strenuous match, the footballers in the advertisement would drink an ice-cool beer produced by the "*Feldschlösschen*" company, and therefore one which contained alcohol. The *UBI* therefore decided that the commercial contravened the ban on misleading advertising and upheld the complaint.

Decision of the Independent Radio and Television Complaints Authority *(Unabhängige Beschwerdeinstanz für Radio und Fernsehen – UBI),* 22 January 1999 (b.371)

DE

Oliver Sidler
Medialex

Switzerland: Inadmissible Traffic Information

The fact that the automobile associations *ACS* and *TCS* were named as partners of the Swiss radio station *DRS* in connection with traffic information constituted an infringement of the ban on political advertising set out in the Radio and Television Act (*Radio- und Fernsehgesetz*) as it took place in the run-up to a Swiss vote on traffic issues.
The frequent mention of the two automobile associations as sponsors of traffic information had already been the subject of a complaint about two years previously. On that occasion, the Independent Radio and Television Complaints Authority (*Unabhängige Beschwerdeinstanz für Radio und Fernsehen – UBI*) had ruled that the naming of the associations was compatible with programming law. It had pointed out in particular that the broadcast had not been made in connection with an actual imminent vote or ballot.
The situation in this case was different, however. The complaint was made during the campaign for the vote on the Bill on financing the infrastructure of public transport (*Vorlage zur Finanzierung der Infrastruktur des öffentlichen*

Verkehrs – FinöV). Both automobile associations were involved in the committee which was opposing the Bill. The general director of the *ACS* had even taken part in a controversial discussion programme broadcast on the *DRS* radio station. Since the facts of this case were different, the *UBI* upheld the complaint on the grounds that the ban on political advertising had been breached.

Decision of the Independent Radio and Television Complaints Authority *(Unabhängige Beschwerdeinstanz für Radio und Fernsehen – UBI),* 28 December 1998 (b.376)

DE

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LEGISLATION

Portugal: Parliament Revokes the Cinema, Audiovisual, and Multimedia Law

On 29 April 1999, the Portuguese Parliament revoked Law decree nº15/99 of 15 January 1999 on Cinema, Audiovisual and Multimedia. The law decree 15/99 was approved by the Council of Ministers and regulated the sector since early this year but the opposition parties struck down the legal framework defined by the government for this sector. Thus bringing back into effect the former Cinema and Audiovisual law of 1993 (Law decree nº 350/93 of 7 October 1993).
According to the introductory words of the Law decree nº 15/99, this new legal tool was necessary because the previous law was 'insufficient' and 'inadequate' for the new audiovisual/multimedia environment. The new law decree perceives cinema, audiovisual and multimedia as converging areas and expects to take advantage from fast-moving developments in the information society context. This law regulates a number of aspects of the cinema/audiovisual area such as the support of artistic production, distribution, exhibition, audiences, and the maintenance and preservation of audiovisual archives.
The Popular Party was nevertheless dissatisfied with this law decree and required a Parliamentary review. The Law decree nº15/99 was therefore discussed on 23 April 1999 and, on 29 April 1999, all opposition parties voted for the repeal of the existing law, arguing that the document was contradictory and unlikely to create the right conditions for the development of a cinema industry in Portugal.

Law decree nº15/99 of 15 January 1999 on Cinema, Audiovisual and Multimedia in the Republic's official Journal (Diário da República), I series-A of 15 January 1999. Resolution Project *(Projecto de Resoluçao)* nº 131/VII of 23 April 1999. Parliament Resolution *(Resoluçao da Assembleia da República)* nº 41/99 approved on 29 April 1999.

PT

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Denmark: Development of the Broadcasting Legislation

Radio and television broadcasting is organised at three levels in Denmark. "Danmarks Radio" (DR) and "TV2" are public service stations with nation-wide range. TV2 also has a particular obligation to serve regional interests. Furthermore, regional communication is undertaken by regional broadcasters connected to DR and TV2, as well as other (licensed) radio- and TV stations, such as independent satellite or cable broadcasters. Finally, the local interests are served by about 50 local TV stations and 300 radio stations.
Radio and TV broadcasting is subject to the Broadcasting Act 1992, which since then has been amended several times. The rules actually in force are laid down in the consolidated *Bekendtgørelse af lov om radio- og fjernsynsvirksomhed* (Broadcasting Act – BA) no. 208 of 6 April 1999. The EU regulation on harmonization laid down in the "Television without Frontiers" Directive and other EU legislation has been currently implemented by the Broadcasting Act and executive orders.
The obligations of DR and TV2 to broadcast public service programmes are described in the Executive Orders of 21 January 1999 on Statutes for DR (Order no. 38) and for TV2 (Order no. 37) respectively. The orders are issued on the basis of the BA § 10 (4) and § 19 (5).
DR is financed mainly through licence fees (BA § 8), and does not broadcast TV-advertising. TV2 and associated regional stations are supported partly by licence fees, partly by advertising and other income, cf. BA § 18 (3). Independent commercial regional and local enterprises subject to Danish jurisdiction normally are financed by advertising and user payment.
The most important amendments since the passing of the 1992 Act concern the liberalization of the tele-communications sector: cable systems may cross the borders of one municipality, and users of cable systems may influence programme selection, actually exercised by voting procedures (BA § 5). Local broadcasting entities have been permitted to exercise certain networking activities (BA § 44 (4)-(6) and § 50 - § 50a). The freedom for DR and TV2 to dispose of licence fees and advertising income in the exercise of its activities has been broadened, cf. BA § 14. Another innovation is the implementation of the European ruling on the exercise of exclusive rights to TV broadcasting which may not be exercised in such a way that a substantial proportion of the public is deprived of following events of major importance to society via live coverage or deferred coverage on free television (BA § 75). It also provides that pirate decoders are not permitted (BA § 75a).

The Broadcasting Act no. 208 of 6 April 1999 is available at: http://www.retsinfo.dk/_GETDOC_/ACCN/A19990020829-REGL
Executive order no. 37 of 21 January 1999 on Statutes for TV2 is available at: http://www.retsinfo.dk/_GETDOC_/ACCN/B19990003705-REGL
Executive order no. 38 of 21 January 1999 on Statutes for DR is available at: http://www.retsinfo.dk/_GETDOC_/ACCN/B19990003805-REGL

DA

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Romania: Audiovisual Act Amended

By enacting an emergency decree which amends and supplements *Legea audiovizualului* (the Audiovisual Act) no. 48/1992, the Romanian government has introduced an important new regulation primarily concerning private operators.
The period of validity of licences was lengthened by two years. This means that, in the radio sector, licences are now valid for 7 years, while those for television broadcasters will, in future, last for 9 years.
The validity of licences granted by the Audiovisual Council since 1992 has been extended accordingly.

Emergency decree amending and supplementing the Audiovisual Act no.48/1992 *(Ordonanta de Urgenta pentru modificarea si completarea Legii audiovizualului Nr. 48/1992),* 21 April 1999 *(Monitorul Oficial al romaniei, Anul XI – Nr.173,* 23 April 1999)

RO

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Russian Federation: Regulations on conducting a Tender Procedure for the use of Radio Frequencies for the Allocation of Television Programmes using the MMDS, LMDS and MVDS Systems

On 16 February 1999, the Russian government adopted a new procedure (#179) with respect to the regulation of television and radio broadcasting. This provision outlines a method of providing a tender, for obtaining the right to use radio frequencies for television and radio broadcasting using MMDS, LMDS and MVDS systems.
The need for this document is related to the adoption on 2 June 1998 of Government Regulation # 552, which introduced the system of payment for the use of the radio frequency spectrum (until that time, payment was required only for the obtaining of a licence). A tender procedure for new licence applications was introduced by that regulation.
Until very recently, this process of tendering a payment for the right to use the radio frequency spectrum was regulated solely with respect to cellular telephony services (regulation #578 of 10 June 1998). However, that document has now been supplemented by a regulation in regard to the use of television.
The content of the regulation on providing a tender in order to obtain the right to use radio frequencies for the purpose of the allocation of television programmes using the MMDS, LMDS and MVDS systems, was also influenced by the recently adopted Russian federal statute "On Licensing" (see IRIS 1998-10: 10).
The regulation is entirely devoted to the description of the tender procedure and the calculation of payments. In particular, the following features may be noted: according to this regulation, it is the State Committee of the Russian Federation on Communications and Information that decides to initiate a tender, and that organizes the process. A candidate appends to the application for participation in a tender a sealed envelope containing his proposal for an annual payment during the entire period of his use of the radio frequency spectrum. The only criterion for the awarding of the tender is the amount of the proposed payment. A tender procedure in which only one candidate participates is considered invalid. The agreed-upon tender amount to be paid by the successful candidate on an annual basis may be changed no more than once in a two-year period in proportion to the alteration of the minimal salary.

Regulation of the Government of RF of 16. February 1999 # 179 *Ob utverzhdenii Polozheniya o provedenii konkursa na predostavlenie prava ispolzovaniya radiochastot dlya tselei raspredeleniya televizionnykh programm s primneniem sistem MMDS, LMDS I MVDS* (On adoption of the regulations on conducting a tender for obtaining the right to use radio frequencies for the purpose of allocating television programmes using the MMDS, LMDS and MVDS systems) Officially published in *Sobranie zakonodatelstva Rossiyskoy Federatsii,* 22. February 1999, #8, art. 1033

RU

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Russian Federation: New Election and Referendum Act

The new version of the Act containing important amendments to the previous Election and Referendum Act was published on 6 April 1999 and has entered into force. Five of the 48 paragraphs of the Act are concerned with amendments to current provisions regulating mass-media coverage of election campaigns.
Among the most significant provisions of the Election Act (including its amended version) are the following:
– once a complete list of election candidates has been drawn up, all candidates and parties on that list are equally entitled to election advertising in the mass media;
– all state broadcasting companies and other broadcasters which receive funding from the federal or regional state budget and broadcast in places where elections are being held, are obliged to offer, free of charge, to all official candidates and parties a certain amount of air-time for election advertising, together with the possibility of purchasing additional air-time for election advertising. The cost of additional air-time should be the same for all candidates and parties.
– air-time offered free of charge to all candidates and parties for the purposes of election advertising should total one hour per weekday on each national station during federal elections and 30 minutes on each regional channel during federal or regional elections. Stations which broadcast for less than 2 hours per day should devote at least one quarter of that time to election advertising. At least as much additional air-time should be available for sale to candidates and parties for election advertising as is offered free of charge. Election advertising should be broadcast during peak viewing hours.

The most important new regulations include the following:
– the amended Act stipulates that any broadcasting company which receives at least 15 % of its total annual budget from state funding is obliged to offer free air-time for election advertising;
– broadcasting companies which receive various tax benefits (more than 85 % of all Russian broadcasters) or which have not received any funding from the federal or regional state budget for more than a year prior to the elections, are exempt from the obligation to offer free air-time for election advertising;
– broadcasting companies must give equal prominence in their news broadcasts to all candidates and parties.

Federal'nyj Zakon „O vnesenii izmenenij i dopolnenij v Federal'nyj zakon «Ob osnovnych garantijach izbiratel'nych prav i prava na utschastie v referendume grazhdan Rossijskoj Federazii» (Federal law on amendments and additions to the federal law on the basic guarantees of election law and the participation rights in referenda of citizens of the Russian Federation, No.55-FZ of 30 March 1999). Officially published on 6 April 1999 in the newspaper *Rossijskaja gaseta.*

RU

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Finland: The Personal Data Act

On 22 April 1999, the Personal Data Act (*Henkilötietolaki*) was confirmed. It entered into force on 1 June 1999 and replaces the Personal Data Files Act (*Henkilörekisterilaki*), Act No. 471/1987.
The Personal Data Act implements the EU Directive on Data Protection (Directive 95/46/EC) into Finnish law. The Act expands the right of access to data for the data subjects. A new feature is that, besides private individuals, the definition of a data subject includes other legal persons, e.g., businesses. Finnish regulations concerning sensitive data now also cover trade union membership. This is a relatively new feature in the Nordic countries. It was introduced by provisions of the Swedish Personal Data Act of 1998 (Act 1998: 204). Nevertheless, trade unions are allowed to process union membership data. The right of access to public registers is defined in the legislation on the openness of Government activities. For purposes of direct marketing, opinion polls and market research, data can be given in accordance with specific rulings or if the data subject has not prohibited disclosure. The Data Protection Ombudsman's responsibilities are extended in the new Act and his decisions are binding on those concerned. Permissions for the processing of personal data is granted by the Data Protection Board.

Act No. 523/1999 of 22 April 1999. The Act is available in Finnish at: http://www.om.fi/1073.htm
The Act will be made available in English by the Data Protection Ombudsman: http://www.tietosuoja.fi
The press release is available in Finnish at: http://www.om.fi/1049.htm

FI

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Finland: The Act on the Openness of Government Activities

On 21 May 1999, the Act on the Openness of Government Activities (*Laki viranomaisten toiminnan julkisuudesta*) and 73 related Acts were confirmed. The Act will enter into force on 1 December 1999. It replaces the Act No. 83/1951 on the Publicity of Official Documents (*Laki yleisten asiakirjain julkisuudesta*).
The purpose of the reform is to increase the openness of government activities. The right of access to information will be extended. In addition to administrative authorities and the courts, the Act will also apply to State and municipal enterprises, private-law organisations, and private individuals performing functions involving the exercise of public authority or performing a function commissioned by a public authority. The authorities will have an obligation to promote openness by disseminating information on their activities and by producing relevant information material. Preparatory documents relating to decision-making will enter the public domain at the latest when the decision has been made. The authorities will also have to make available information on pending projects, e.g., by means of a project register. The authorities will have to ensure that documents essential to their activities are easily available. Access to a document is the main rule and secrecy is the exception. The criteria for secrecy are clarified and made uniform.

Act No. 621/1999 of 21 May 1999. The Act is available in English at http://www.om.fin/1148.htm and the press release at http://www.om.fi/853.htm

EN FI

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LAW RELATED POLICY DEVELOPMENTS

Switzerland: New Film Act Proposed

The current Film Act entered into force in 1962. Since then, rapid technical and economic developments in the production, rental and sale of films, as well as in their presentation and distribution, have led to enormous changes in the industry world-wide. A committee chaired by Prof. Pierre Moor has been working since June 1998 on a new

draft Film Act which should not only take into account today's needs and conditions, but also provide a solid and meaningful medium- to long-term foundation for film production and film culture in Switzerland. The committee's proposal for a new federal law on film production and film culture is built on three pillars: a modern system of film support, a liberalised body of regulations and a specific tax to support diversity. According to Article 21 of the draft, for example, any sales and rental company which hires out films to be shown simultaneously at a large number of cinemas must pay a maximum of one centime per screen on which a film is shown and per ticket sold. This levy also applies, however, to the sale of films on video cassette, DVD or any other type of carrier. The proceeds will go not only to the Swiss film industry but will also support small productions in other European countries.
Several issues for debate should be provided by Article 22 of the draft, under which the Federal Office for Culture is to find ways of maintaining or increasing the variety of films available on the Swiss market. For example, cinemas might be obliged to show films at certain times which they would not normally show.
The profit-related film support scheme, previously set up on an experimental basis, is introduced definitively by the draft. Cinema owners will need to register rather than simply requiring official authorisation. The Act is expected to come into force in early 2002.

Comments to the draft law concerning film production and film culture

FR DE

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Medialex

The Netherlands: Dutch Media Authority Takes Tougher Stance Against Public Channels' Ties with Sponsors

Commissariaat voor de Media (the Dutch Media Authority), which oversees the rules formulated in the Dutch Media Act as well as the regulations based on the act, has fined TROS, one of the public broadcasting channels, for having one of their television series sponsored by two major insurance companies.
The themes of each episode of the series were directly connected with the themes of the subsequent commercials. The editorial content of the series and the accompanying commercials had been attuned to such a degree that the commercials had more impact than they would have had, if they had been broadcast without this programme. The parent company of both insurance companies was involved in the planning of the series, in editing the episodes and in the selection of commercials.
The Dutch Media Authority has commenced similar proceedings against AVRO, another public broadcasting channel. AVRO is threatened with a 200.000 guilder fine for linking part of its activities to the beer brewery *Heineken*. In a show called 'Heineken Night of the Proms', the *Heineken* logo was prominently shown 150 times, for relatively long periods of time. AVRO and *Heineken* are accused of having made agreements in conflict with the most important principles of the Media Act, i.e. non-commerciality and editorial independence. On 3 June 1999 AVRO will be given the opportunity to bring evidence to the contrary.
According to one of the high-ranking officials of the Dutch Media Authority, the cases against TROS and AVRO show that sponsorship rules for public broadcasting organisations need to be made more strict.

Press release Dutch Media Authority, 12 May 1999, *Commissariaat pakt verwevenheid publieke omroepen met sponsors aan*

NL

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United Kingdom: Authorities Block Bid By BSKYB For Manchester United Football Club

The British minister for Trade and Industry decided in April to block the proposed take-over by broadcaster BSkyB of the leading English football club, Manchester United. This followed a report and advice from the competition authorities, i.e. the Monopolies and Mergers Commission and the Director General of Fair Trading, both stating that the merger would operate against the public interest and therefore should be prohibited.
The major basis for the decision was that the Commission had concluded that the merger would reduce competition for the broadcasting rights to matches in the English Premier League. This would occur because it would bring together the leading pay TV broadcaster, also the only significant provider of sports premium channels, and the biggest and most successful English football club. It would increase BSkyB's market power, in particular by giving it advantages over other broadcasters in negotiations over TV rights and would deter other broadcasters from competing for them. It would also restrict entry into the sports premium channel TV market, which would in turn reduce competition in the wider pay-TV market. The overall effect would be reduced competition for broadcasting rights and so lead to less choice for the Premier league and less scope for innovation in the broadcasting of Premier League football. The Commission also considered that the merger would damage the quality of English football by increasing the inequalities between larger, richer clubs and the smaller, poorer ones and by giving BSkyB additional power over Premier League decisions about the organisation of football.
The Minister decided that no remedy short of a ban would be adequate, especially as the adverse effects of the merger would be very serious. He also referred to the general issue of future mergers involving football clubs, and as a result of his decision in the Manchester United case a bid by NTL, the UK's third largest cable television operator, for Newcastle United, another leading Premier League team, was dropped. A case is currently being heard before the Restrictive Practices Court concerning the question of whether the collective sale of television rights by the Premier League is anti-competitive and should be replaced by individual sales by each club. That will be

determined later this year, and until the decision there is considerable uncertainty about the future arrangements for sports rights negotiations. The BSkyB and Manchester United decision suggests that the competition authorities and government will adopt a tough attitude in protecting competition in this field.

Stephen Byers Blocks BSKYB/Manchester United Merger, Department of Trade and Industry Press Release P/99/309, 9 April 1999, available at: http://www.open.gov.uk/ (Department of Trade and Industry Press Release Menu)

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Belgium/Flemish Community: Preparation of List of Major Events and some other recent Developments in Flemish Broadcasting Law

On 4 May 1999, the Flemish Government agreed in principle on a list of events of major social significance with regard to the application of article 3bis of the "Television without Frontiers" Directive. The list contains an enumeration of international and/or national sport events (e.g., Olympics, football, cycling, tennis, athletics, motor racing, F1 car racing) and recognizes one cultural event as being protected in the sense of article 3bis of the Directive (the Queen Elisabeth Contest). The State Council, the Contact Committee in regard to application of article 23bis of the Directive and the European Commission will now be asked for advice. The Flemish Government will after this consultation decide on the final version of the list.
On 11 May 1999, the Decree of the Flemish Parliament of 30 March 1999 was published in the official publication *Belgisch Staatsblad/Moniteur*. The Decree modifies some articles of the Flemish broadcasting legislation, especially with regard to the new Council for the guarantee of the protection of minors (see IRIS 1999-4:8). In IRIS 1999-4:8, it was mentioned that two of the nine members of the new Flemish Viewing and Listening Council "must be lawyers, specialised in media law or youth law". This has to be read as two members "must be judges, specialised in media law or youth law".
Again there is some news about the procedures by or against VT4, a broadcasting organisation operating with an ITC-licence under UK law but targeting the Flemish Community. In a decision of 23 March 1999, the Flemish Media Authority declared the appeal by VT4 inadmissible. This meant that the Media Authority's decision of 17 February 1999 was upheld (see IRIS 1999-3:11). The Media Authority is of the opinion that VT4 in reality is a Flemish broadcasting organization and that VT4 has to request a licence under the Flemish Broadcasting Decree. The Media Authority has ordered VT4 to do this before 15 September 1999. VT4 has initiated a new procedure against the decision of the Media Authority, this time before the Administrative High Court (State Council, Raad van State/Conseil d'Etat). On the other hand, the case in which VT4 requested the State Council to annul a Ministerial Order of 16 January 1995 to stop the Flemish cable networks from distributing the television programmes of VT4 was dismissed at the request VT4 (State Council, 27 April 1999, case nr. 79.952) (see also: IRIS 1995-1:14, 1995-2:6, 1995-3:11, 1996:3-11 and 1997-7:5).

Decreet van 30 maart 1999 houdende wijziging van de artikelen 78 en 79 van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 25 January 1995, Belgisch Staatsblad/Moniteur, 11 May 1999 and Verklaring tot herziening van de Grondwet van 5 mei 1999, Belgisch Staatsblad/Moniteur, 29 May 1999, both published on www.moniteur.be or www.staatsblad.be
Decision of 23 March of the Flemish Media Authority in the case VT4 and the judgement of the State Council of 27 April 1999

NL

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Italy: Comparative Advertising allowed by the Self-regulatory Advertising Code

At the end of 1998 the Italian Committee of Advertising Practice approved the 27th edition of the Code of Advertising and Sales Promotion, which partly entered into force on 29 November 1998.
Articles 13 and 15 of the Code, concerning comparative advertising, became effective only on 18 May 1999. The Code applies to advertising disseminated on all kinds of media, and thus also to television broadcasting.
Article 13 provides that any advertising that copies or imitates must be avoided even if it relates to non-competitive products, particularly if it is likely to create confusion with other advertising. In addition, any exploitation of the name, trademark, notoriety and the image of others must be avoided, if intended to obtain an undue advantage.
Article 15 states that comparison is allowed if it seeks to illustrate technical or economic advantages and characteristics of goods and services, objectively compares relevant, verifiable and representative features of those goods and services, which meet the same needs or intended for the same purposes. Comparison should be fair and not misleading, and should not create confusion, nor discredit or denigrate other products or services. It should not take unjustified advantage of the notoriety of others.
The latter provision represents a first self-regulatory implementation of EC Directive 97/55, amending Directive 84/450/EEC concerning misleading and comparative advertising, and allows for the first time direct comparative advertising in Italy.
The Misleading Advertising Decree (*Attuazione della Direttiva 84/450/CEE in materia di pubblicità ingannevole* of 25 January 1992, no. 74, in *Gazzetta Ufficiale* 1992, 36) did not deal with comparative advertising, and the previous editions of the Advertising Code allowed only indirect comparison.

Pursuant to article 1, paragraph 1, and Annex A of the Community Act - 1998 (*Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee – legge comunitaria 1998*, of 5 February 1999, no. 25, in *Gazzetta Ufficiale* 1999, 35), the Government will soon adopt a specific decree in order to implement EC Directive 97/55.

Codice dell'Autodisciplina Pubblicitaria (Code of Advertising and Sales Promotion) 27 edition, The Code is available in Italian at: http://www.iap.it/codice.html

IT

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News

Germany: Federal Cartel Office Authorises *Kirch* Group's Take-over of *Premiere*

In mid-April the Federal Cartel Office (*Bundeskartellamt*) authorised the acquisition by the *Kirch* group of shares in the pay-TV provider *Premiere* previously owned by *Bertelsmann (CLT/UFA)* and *Canal+.*
As a result, when this merger is complete, almost all of the shares – *CLT/UFA* has retained 5 % – will be owned by the company whose digital subscription channel *DF1* is the only other competitor on the German market.
This change in ownership is to be the last major development in the German pay-TV market for the time being. Most previous initiatives proposed by the former shareholders to reorganise pay-TV in Germany, some of which had been launched in collaboration with *Deutsche Telekom AG*, the dominant company in the cable TV sector, had been rejected by the European Commission (see IRIS 1998-6:14). It now seems that a way has been found to manage successfully the future structure of the German pay-TV market which, owing to the wide variety of services offered by free-TV providers, is subject to certain conditions.
In the Cartel Office's opinion, the merger does lead to a *de facto* monopoly situation; however, it also improves competition. The connections in the pay-TV sector between the two largest private broadcasting companies in Germany have been broken. In the end, the companies followed the reasons given by the national competition authorities last October when they rejected a plan to divide shares in *Premiere* equally between the two companies.
The Cartel Office also saw this as an opportunity not only to reduce limits on market access in the pay-TV sector but also to ensure more competitive openings in the free-to-air television market. It is also assumed that competition between free-TV broadcasters and pay-TV providers will increase.
With regard to the purchase of combined pay- and free-TV broadcasting rights, the agreements between *CLT/UFA* and the *Kirch* group include certain obligations specific to the German market concerning the sale and purchase of such rights. However, the Federal Cartel Office merely envisages that the position of *CLT/UFA* in the free-TV sector will be strengthened, so the move does not infringe the ban on monopolies.

http://www.bundeskartellamt.de/14.04.1999.html

DE

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Germany: Champions League Rights Sold

In early May, the television broadcaster *tm3* secured the television rights to football matches in the European Champions League. For a total outlay of around DM 800 million, the partners in *tm3*, the *News Corporation* owned by media entrepreneur Rupert Murdoch – majority shareholder in *tm3* with 66 % – and the *Tele München* group, jointly acquired national television broadcasting rights for the next four years' matches in the top European league from the European football union, UEFA. The four-year contract covers exclusive free-TV and pay-TV rights.
tm3 was set up in August 1995 as a specialist women's television channel, but had difficulty in gaining access to German cable networks, even after it began broadcasting via the Astra satellite. The notion of pure women's television was unsustainable. *tm3* can now be received via cable and satellite by almost 80 % of German TV households, but has less than 1 % of the market share.
Murdoch controls a world-wide newspaper, book, film and television empire. He owns two-thirds of the daily press in his home country of Australia, "*The Times*" and the most popular tabloid "*The Sun*" in Great Britain, and the "*New York Post*" in America. He also owns 15 television stations in the USA, together with the *Twentieth Century Fox* film studio. His satellite channels are available not only in Australia, the USA and Great Britain, but also in Northern Europe, Latin America and Asia. Murdoch has already used popular sports to make small broadcasting companies in the USA and Great Britain into major players in national broadcasting markets.
In May of this year, in collaboration with the Italian media group *Cecchi* and the football clubs Lazio, Parma, Fiorentina and AS Roma, Murdoch acquired 65 % of *Telecom Italia's* digital TV subsidiary *Stream* for 130 billion lire. *Stream* had previously purchased exclusive rights to broadcast matches involving the four first division clubs until 2005.

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Institute of European Media Law (EMR)

Belgium: Towards a Revision of the Constitutional Guarantees on the Freedom of the Press and other Media?

The official publication of 5 May 1999 contains the new declaration of the revision of the Belgian Constitution. One of the articles that can be modified by the new federal parliament after the elections of 13 June 1999 is article 25 of the Constitution, an article which has not been modified since 1831. The declaration for revision of the Constitution stipulates that the guarantees with regard to the freedom of the press ("The press shall be free; there shall never be any censorship; no security can be demanded of writers, publishers or printers ... ") also have to be made applicable to other means of information. For many years there has been extensive discussion why some of the constitutional guarantees with regard to the print media are not similarly or equally applied to radio, television and other means of mass communication.

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United Kingdom: ITC Publishes Annual Review of Performance of Private Broadcasters

The Independent Television Commission (ITC) which regulates the private sector of British broadcasting has published its annual Performance Review examining the performance of the regional Channel 3 companies, Channels 4 and 5 and public teletext services during 1998. The Review assesses the compliance of the companies with their licence obligations; these include diversity and quality and so it is able to take a broad overview of the standard of commercial television.

In its overall assessment of Channel 3, the Commission noted that whilst its total share of terrestrial audience had fallen from 37.3 % to 36.4 % it had achieved its target of 38 % of audience during peak periods. Overall there was a marked improvement in the supply of documentaries, of entertainment and drama specifically for children and of sport. However, there were shortcomings in areas such as current affairs, comedy and arts. The amount of coverage of current affairs fell, partly because there was no national election, and there was some concern about a lighter and more consumerist tone and content to some current affairs programmes. Although some individual documentaries were of high quality, material that was genuinely innovative in style, content or approach was limited. Concern was also expressed at the use of cheap late-night material to make up Channel 3's commitment to arts programming. A marked increase in the number of programmes which breached the Programme or Sponsorship Codes was also noted, especially lack of sensitivity to the requirements of family viewing policy. Overall, priorities for 1999 should include greater diversity in the weekday peak-time schedule, more and stronger current affairs material and factual programming, and greater sensitivity to the needs of family viewing.

In the case of Channel 4, the Review found more innovation than in the previous year, responding to criticisms that the Channel had begun to lose its distinctive character. News coverage sustained its reputation for serious, measured and high-quality reporting. The arts record was strong, but adult education requirements were not fully met. The number of breaches of the Codes fell although one breach had been serious. Channel 5 had consolidated, but there was scope for improvement in drama, both for children and for adults, and failure to provide adequate drama was a breach of the licence commitments. Some material treated by the Channel as current affairs did not meet the Commission's definition of this, including for example showbiz material.

Independent Television Commission, Performance Reviews 1998, accessible on the Commission's Website at: http://www.itc.org.uk

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United Kingdom: British Board Of Film Classification Publishes its Annual Report

The 1998 Annual Report of the BBFC has just been published. Marking his retirement after 24 years, the outgoing Director, James Ferman, writes that the most important achievement has been the formulation of a clear set of principles and policies; the key issue of his term is said to be violence, particularly sexual violence. The principles and procedures have now been codified into the "Classification Guidelines" (see Appendix 1 of the Report). The BBFC has also increased its commitment to transparency, by publishing press releases explaining "controversial or high-profile" decisions. A new "Advisory Panel on Childrens' Viewing" is being set up, constituting a panel of 12 members. Statistics reveal that 393 cinema features were classified (of which cuts were ordered to be made in respect of 14, 3.6 %); 3823 certificates were issued (or refused) for videos, with 325 requiring cuts; and 41 digital works were classified (27 computer games and 14 interactive CD-Roms). The Board is concerned about the challenge posed by DVD for classification. Five videos were rejected, but one producer appealed successfully to the Video Appeals Committee.

BBFC ANNUAL REPORT FOR 1998. Available from the BBFC, 3, Soho Square, London, W1V 6HD. See website http://www.bbfc.co.uk

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France: The CSA Sanctions Eight Radio Stations for Failure to Comply with the Quota for French-Language Songs

Having noted that in February, as had been the case for some months, eight radio stations broadcasting nationally (NRJ, Fun, Europe 2, Vibration, Vitamine, Top Music, Oui FM and Contact FM) had not complied with the quota of 40 % of songs broadcast being in French as required by the Act of 1 February 1994, the CSA served notice on them. This is an essential preliminary to being able to implement its powers of sanction.
The operators strongly contest this requirement which imposes an obligation on all radio stations that 40 % of the songs they broadcast between 6.30 am and 10.30 pm must be in French, with at least half of them being by new talent or new productions. It is true that current legislation takes no account of the growing specialisation of radio formats and does not now appear to be suited to a diversified radio scene. In view of this, and because of the growing number of sanctions issued by the CSA in this respect, the Minister for Culture and Communication has asked the CSA to draw up a report on application of the Act. In the light of this study, the CSA considers it would be desirable to improve the present text by permitting a modulation of quotas and by giving priority to the promotion of new talent. Thus the CSA would like to be able to offer three alternatives to radio stations (option A: the present quotas; option B: 50 % of songs in French and 15 % new talent, basically more suited to formats aimed at adults; option C: 30 % of songs in French in the original and 25 % new talent, more suited to formats aimed at young people). The stations would then be free to choose which option suited them best.
The bill to reform the audiovisual area adopted by the *Conseil des Ministres* on 21 April makes no reference to quotas for songs in French on the radio; in its opinion on the bill, the CSA could do no more than «regret that none of the methods providing for greater flexibility which it had proposed had been included».

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Williams, Alan; Calow, Duncan; Higham, Nicholas.-*Digital media: contracts, rights and licensing.*-2nd ed.- London: Sweet & Maxwell, 1998.-ISBN 0752-00420-4

AGENDA

Globalization of Intellectual Property Law; Piracy, Enforcement & Socio-economic Challenges
7–9 July 1999
Organiser: The Amsterdam-Maastricht Summer University
Venue: Maastricht
Information & Registration:
Tel: +31 (0) 20 6200225
E-mail: Caroliner.Janssens@amsu.edu

Digital Distribution of Music; Grasp the Law, Trends and New Developments for the Direct Delivery of Music on the Internet
8–9 July 1999
Organiser: Euro Forum
Venue: London,
Royal Garden Hotel
Information & Registration:
Tel: +44 (0) 171 878 6888
Facsimile transmission:
+44 (0) 171 878 6885
E-mail: roy@euroforum.co.uk

The Future of European Sports Law
9 July 1999
Organiser: IBC Conferences
Venue: Brussels
Tel: +44 (0) 171 453 5492
Facsimile transmission:
+44 (0) 171 636 6858