IRIS
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OF THE EUROPEAN AUDIOVISUAL OBSERVATORY
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http://services.obs.coe.int/en/espace.htm

# EDITORIAL

This issue brings another year of IRIS to a close. For the year 2000, we have decided to make IRIS more reader-friendly, which is something we shall be working on during the winter break. We are also planning to introduce a new dimension to the newsletter format of IRIS with its short, densely-packed articles: every other month, we shall be including a detailed report on a specific legal theme of particular current interest. These articles will be written with the same high level of care to which you have become accustomed as IRIS readers.

At the end of November/early December this year, we shall also be launching
a new and so far unique publication, our:
Legal Guide to Audiovisual Media in Europe
which summarises
*Recent Legal Developments in Broadcasting, Film, Telecommunications and the Global Information Society in Europe and Neighbouring States*
(focusing mainly on 1998).

This book is, to a large extent, a product of the IRIS network of partner organisations and correspondents. It is a superb complement to IRIS, whose reports on new legal developments tend to be more selective.
I would like to wish you Happy Holidays and a good start to the year 2000!

Susanne Nikoltchev
IRIS co-ordinator

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





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## The Global Information Society

### France: Libel on Internet and Qualification of Services

Two District Courts (which have jurisdiction for hearing civil cases where the amount of the claim does not exceed FRF 50 000) have recently had to deliberate on disputes concerning libel on the Internet. The facts of the two cases were broadly similar, which makes the divergence between the two judges involved all the more remarkable. Both courts, on the basis of completely different grounds and arguments, declared themselves unable to deal with the disputes.
In the first case, on 3 August, the District Court of the 11th *arrondissement* in Paris declared it was unable to deal with a case concerning the publication, on a website, of critical comments about computer magazines. The company which produces the magazines in question was suing the author of the comments for libel. In declaring itself unable to deal with the case, the court referred firstly to Article R 321-8 of the French Judicial Code which makes District Courts responsible for hearing cases of public libel, whether spoken or written, other than in the press. It went on to recall that Article 1 of the Act of 1 April 1986, reforming the legal system applicable to the press, defines as a press publication «any service using a written method of distribution of thoughts made available to the general public or categories of the public and appearing at regular intervals». The court held that the guide at issue, which also contains editorials, advertisements and a list of addresses, and which is updated regularly, could be assimilated to a specialised magazine aimed at providing its readers with information, and should therefore be considered as a press publication. The dispute was therefore quite logically outside the jurisdiction of that court.

In September, the District Court of Puteaux followed a completely different path of reasoning.
The judge took as his starting-point the assumption that Internet, in its capacity as a means of telecommunication, was an audiovisual communication service since the service consisted of transmitting signs, signals, images or sounds which did not constitute private correspondence, to unspecified persons. This was the case here, namely a server making personal pages available to the public. By virtue of the rules of competition referred to above, the court was therefore able to hear this case of libel by a means of telecommunication. However, the amount of the damages claimed put the case beyond the jurisdiction of the court, as the court duly declared.
Press publication or audiovisual communication service? The debate necessary for the proper regulation of Internet is now in the hands of the regional courts.
In the second case, the district court of Puteaux was also called upon to deliberate on the matter of the host's liability. Being assimilated to the director in charge of the publication on an audiovisual communication service, the host cannot be held responsible unless the disputed messages had already been fixed in some manner. In the present case, experts' reports had shown that the transfer between the author and the public had taken place electronically and at extremely high speed, such that no control on the part of the service provider would have been possible; the latter could not therefore be held to be the principal instigator of the libel. This analysis, although in line with the current legislative trend (as in the Bloche amendment or in the draft directive on electronic trading), has nevertheless been seriously criticised in some doctrinal quarters in France.

*Tribunal d'Instance* (District Court) of Puteaux, 28 September 1999 - *Axa v. Infonie* and others.
*Tribunal d'Instance* (District Court) of Paris (11th *arrondissement*), 3 August 1999 – *SA Groupe Test v. SARL Groupe Worldnet.*

FR

Charlotte Vier
Légipresse

### Malta: New Internet and Other Data Networks Regulations

The debate over data transmission services via cable network has entered a new phase. As was previously reported (IRIS 1999–8: 16), Malta's ISPs voiced their opposition to Internet access being offered directly through the island's network of cable providers. The conflict reached a brief climax when local ISPs, in a press release of 4 October 1999, announced a boycott of Melita Cable's network with immediate effect. Citing previous efforts to "spur the Telecom Regulator, the Government and Melita Cable to […] enforce Open Access to guarantee that the Internet in Malta remains a fully functional, free and competitive market", the ISPs justified their action on grounds that Melita itself, was denying access to its network. The boycott effectively cut off all e-mail connections to and from the cable provider's network.
The action was called off the next day following a meeting between the five local ISPs and the Minister for Communications. New regulations were announced and have since come into effect. The new «Internet and Other Data Networks (Service Providers) Regulations» now state clearly that: "The provision of Internet and other data networks access services shall be made through a company whose sole business is the provision of such services". They prohibit cross-subsidisation to or from other telecommunications services or from other activities in respect of Internet- and other Data Networks Access Services. Areas such as concentration of ownership, interconnection etc. are also regulated. The ISPs are required to prepare a Code of Practice containing provisions concerning data protection, customer service, charges, as well as protection against harmful content of the services.
In a news conference on 13 October 1999 Melita Cable announced that it would suspend the proposed new service until a number of issues have been clarified.

Internet and Other Data Networks (Service Providers) Regulations, 1999

EN

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## Spain: Decree-Law on Electronic Signatures

The Spanish Government has approved a Decree-Law regulating electronic signatures. This legal provision is based on the common position adopted by the Council of the European Union with a view to adopting a Directive on a Community framework for electronic signatures.
The purpose of the Spanish Decree-Law is to regulate the use of electronic signatures, their legal recognition and the provision of certification-services. The provisions of this Decree-Law apply to service providers established in Spain.
The Decree Law differentiates between "electronic signatures" (meaning data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication) and "advanced electronic signatures" (meaning an electronic signature which is uniquely linked to the signatory, which is capable of identifying him/her, which is created using means that the signatory can maintain under his/her sole control, and which is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable).
According to the Decree-Law, advanced electronic signatures will be considered equivalent to a hand-written signature if they meet certain requirements, e.g. they are based on a qualified certificate, and are created by a secure signature creation device. Electronic signatures that do not meet these requirements shall not be denied legal effect and admissibility in legal proceedings solely on the grounds that they are in electronic form.
The Spanish Decree-Law regulates the provision of certification services by
– establishing a Registry for certification service providers;
– prescribing the use of electronic signatures by public bodies;
– requiring certification-service providers to issue qualified certificates and to secure signature-creation devices;
– determining the fees for the recognition of accreditations and certifications, and the penalty system in the event of non-compliance with the Decree Law.

*Real Decreto-Ley 14/1999, de 17 de septiembre, sobre firma electrónica* (B.O.E. nº 224, of 18 September 1999, pp. 33593-33601).

ES

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# Council of Europe

## European Court of Human Rights: Recent Judgments on the Freedom of Expression and Information (28 September 1999)

On 28 September 1999 the European Court of Human Rights delivered its final judgment in two cases concerning Article 10 of the Convention.

In the case of *Dalban vs. Romania*, the "grand chamber" of the Court unanimously reached the conclusion that there has been a violation of the freedom of expression by the Romanian authorities. The case concerned an application by Mr. Ionel Dalban who was a journalist and ran a local weekly magazine, the Cronica Romascana. In 1994, Dalban was convicted for criminal libel because of some articles that exposed a series of frauds allegedly committed by a senator (R.T.) and the chief executive (G.S.) of a State-owned agricultural company, *Fastrom*/State Farm. Dalban died on 13 March 1998. His widow continued the proceedings in Strasbourg in the applicant's stead. In the meantime, on 2 March 1999 the Romanian Supreme Court quashed the conviction of Dalban and acquitted the applicant of the charge of libelling G.S. The proceedings in the case on the charge relating to Senator R.T. were discontinued due to Mr. Dalban's death. In its judgment of 28 September 1999 the European Court was of the opinion that the applicant's conviction constituted an "interference by public authority" with his right to freedom of expression, without the interference being necessary in a democratic society. The Court underlines that the articles in issue concerned a matter of public interest and that the press has to fulfil an essential function in a democratic society. According to the Court there was no proof that the description of events given in the articles was totally untrue. It is also emphasised that Dalban did not write about aspects of the private life of senator R.T., but about his behaviour and attitudes in his capacity as an elected representative of the people. The European Court could not agree with the Romanian courts that the fact that there had not been a court case against R.T. or G.S. was sufficient to establish that the information contained in Dalban's articles was false. The Court reached the conclusion that the applicant's conviction of a criminal offence and the sentencing to imprisonment amounted to a disproportionate interference with the exercise of his freedom of expression as a journalist.

The second case of 28 September 1999, *Öztürk vs. Turkey,* strongly reflects the Court's case-law of 8 July 1999 in the Turkish cases (IRIS 1999-8: 4-5). Öztürk was convicted for helping to publish and distribute a book that was considered by the Turkish courts to incite the people to crime, hatred and hostility. The book described the life (and torture in prison) of one of the founding members of the Communist Party of Turkey. While the publisher of the book was convicted, in a separate case the author of the book was acquitted. In evaluating the application of Article 10 of the Convention, the Strasbourg Court explicitly referred to its case-law of 8 July 1999, in which it emphasised that "there is little scope under Article 10 § 2 of the Convention for restrictions on

political speech or on debate on matters of public interest". The European Court was not convinced that in the long term the book could have had a harmful effect on the prevention of disorder or crime in Turkey. Nor was there any indication that Mr. Öztürk bore any responsibility whatsoever for the problems caused by terrorism in Turkey. Sitting in "grand chamber" the Court unanimously reached the conclusion that once again the Turkish authorities had violated the freedom of speech and of the press guaranteed by Article 10 of the Convention.

Available in English and French on the ECHR's website at http://www.dhcour.coe.fr

EN FR

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# European Union

## European Court of Justice Sees the Grossed-Up Principle as Settled in TV Directive

The European Court of Justice (ECJ) decided in a judgement announced at the end of October that the "Television without Frontiers" Directive 89/552/EEC in the 97/36/EC version of 30 June 1997 is to be so construed that the calculation of scheduled transmission times for given programmes is to include advertising featured (the grossed-up principle). Member States are nonetheless free to lay down stricter rules in this regard for broadcasters coming under their jurisdiction, while abiding by other relevant provisions of Community law.
The case brought before the ECJ under an interlocutory application by the Stuttgart Regional Court of Appeal concerned a dispute between the German group of public service broadcasters (ARD) and the private broadcaster (*ProSieben*) (See IRIS 1998-3: 6; IRIS 1999-7: 6). The ARD had pleaded, on considerations of competitiveness, that the application of the grossed-up principle by private broadcasters was in breach of the provisions of the Agreement between the *Rundfunkstaatsvertrag* (the Federal States on Broadcasting*).* The private broadcaster thus gained competitive advantage from this unlawful action. The defendant (*ProSieben*) objected that the Television Directive prescribed the grossed-up principle, so that the broadcasting legislator in Germany was not entitled to bring in tighter rules, in the form of what is known as the net principle, for broadcasters under his jurisdiction.
Just as Advocate General Jacobs had earlier argued in his final pleadings, the Court came to the conclusion that the wording of the disputed passage of Article 11 of the Directive is ambiguous. In these circumstances, it must be considered that a provision setting limits to such a basic freedom as the free transmission of television programmes must be clearly articulated. If it was not, it must be subject to strict interpretation and accordingly could only be construed as providing for the application of the grossed-up principle in calculating transmission times. Nonetheless, Member States were entitled to bring in stricter rules in accordance with Article 3 of the Directive for broadcasters under their jurisdiction. As regards the provisions of the Agreement between the Federal States on Broadcasting, it was not clear that the application of the net principle ran counter to other provisions of Community law.
In its final judgement, the Stuttgart OLG must consider how the provisions of the Agreement between the Federal States on Broadcasting and the implementing regional broadcasting laws are to be interpreted; since it has indicated that, like the lower court, it is inclined to favour the net principle, the case brought by ARD may still have some prospects of success.

Judgement by the European Court of Justice of 28 October 1999, case C-6/98, *Arbeitsgemeinschaft Deutscher Rundfunkanstalten* (ARD) vs. *ProSieben Media AG.*

DE

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## European Court of Justice Decides against Ireland

On 12 October 1999, the ECJ found Ireland guilty of failure to transpose the 1992 Directive on Rental and Lending Rights into Irish law. The Court did not accept Ireland's argument that it was engaged in a major revision of Irish copyright law and that the current Bill (IRIS 1999-5: 11), in preparation for several years, contained provisions designed to give effect to that and other Directives (section 41, in particular, deals with rental and lending rights). The Court emphasised the fact that Member States cannot invoke difficulties or the slowness of internal procedures as a reason for not transposing European Directives.
Copyright in Ireland is still governed by the Copyright Act 1963 and only adjustments to detail have been made since. This means, as the Government's Intellectual Property Unit noted when the new Bill was being introduced in April 1999, that Ireland was "facing the 21st century with a technology-specific Act drafted with the technological context of the 1950s in mind. While the Irish courts have been sensible in applying the terms of the 1963 Act to current situations", it was clear that "a legislative basis of this nature is far from adequate to meet the challenges of the Information Society ...". Hence, comprehensive reform was required.
The problem with comprehensive reform, especially in a technology-based field as complex as copyright, is that it takes time. This problem is accentuated when one attempts to introduce comprehensive reform in a single piece of legislation. The new Irish Copyright Bill, which contains 355 sections and is almost 200 pages long, has

a three-fold purpose: to update the law to put in place a modern, effective, technology-neutral regime of copyright protection; to transpose into Irish law a number of EC Directives, including the 1992 Rental and Lending Rights Directive; and to bring Irish law into conformity with all its obligations under international law.
The Bill was introduced in the Senate (Upper House of Parliament) earlier this year, where it has been debated and amended. While it has almost completed its passage through that House, it still has to be considered and passed by the *Dáil* (House of Elected Representatives). The ECJ decision may be a timely spur to ensure that Ireland finally has a new copyright regime before the dawn of the new millennium.

The Government's Intellectual Property Unit is at the Department of Enterprise, Trade and Employment. The Copyright and Related Rights Bill, 1999 (No. 18 of 1999) is available from Government Publications, Dublin 2 at Euro 17.78. The Irish Government's website is: www.irlgov.ie

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## European Commission: Approval of Public Funding of 24-Hour News Channel

The European Commission has approved the financing from state resources of a 24-hour news channel in the United Kingdom. In 1997 a private competitor had objected to the financing of this news channel by licence fees arguing that it would constitute illegal state aid. The news channel concerned, BBC News 24, is delivered free of advertising and free of charge for carriers and is financed entirely by licence fees.
The Commission considers the public funding of the channel through the transfer of monies collected from licence fees to be state aid. The transfers, however, are considered compatible with the EC Treaty because they allow for public service remits for public broadcasting. The financial means granted to the channel are proportionate to the public service. Also, trade within the EU does not seem adversely affected by BBC News 24. Therefore, all conditions of Article 86(2) EC Treaty are met and funding the channel through licence fees is deemed compatible with the European rules.

Press release IP/99/706, 29 September 1999

EN

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# National

## CASE LAW

## Germany: Constitutional Court Rejects Appeal against Licence Fee Decision

In a decision announced on 6 September 1999, the *Bundesverfassungsgericht* (German Constitutional Court – *BVerfG*) rejected a complaint lodged by the owner of a hotel and conference centre against the duty to pay the television licence fee.
The case was taken to the Constitutional Court after the broadcasting company *Süddeutscher Rundfunk* decided to charge the licence fee for each of the hotel's 114 television sets. The complainant's initial appeal and proceedings brought before the Administrative Court both failed. She claimed that the decision breached the basic right to freedom of information (Article 5.1.1 of the *Grundgesetz* (Basic Law) – *GG*), the guarantee of property (Article 14 *GG*) and general freedom of action (Article 2.1 *GG*). She also argued that §2.2.1 of the *Rundfunkgebührenstaatsvertrag* (Agreement between Federal States on Radio and Television Licence Fees) was unconstitutional. This provision states that the licence fee must be paid for any television set, whether or not the owner wishes to view public service channels.
The Constitutional Court did not accept this argument and rejected the complaint, referring to previous judgements concerning the licence fee, since the Constitution itself was inconclusive and the situation was largely the same as it had been at the time of the previous judgements. In its detailed explanation, the Court said that freedom of information did not include a right to free information, that the mere obligation to pay a fee did not affect property in the sense of Article 14 of the Basic Law, and that general freedom of action was legitimately restricted by the regulations set out in the Agreement on Radio and Television Licence Fees. The Court stated that, in a structure where private broadcasters were dependent on the correct functioning of public service broadcasting, it was fair to link the licence fee solely to the number of receivers owned, irrespective of how they were used.

Judgement of the *Bundesverfassungsgericht* (Constitutional Court), 6 September 1999, case no. 1 BvR 1013/99

DE

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## Germany: Courts Allow "Television Fairy" to Block Advertising

In its decision of 23 September 1999, the Frankfurt Appeal Court (*Oberlandesgericht – OLG*) rejected an appeal lodged by a private commercial television company against a ruling of the Frankfurt District Court (*Landgericht – LG*). The District Court had refused to grant a temporary injunction against the sale of the so-called "television fairy" (*Fernsehfee*).
The defendant sells a television attachment ("television fairy") which automatically switches to a channel without advertisements whenever there is a commercial break. The appellant claimed that its own existence was threatened by this product, since its advertising revenue might fall as a result. It asked for an injunction against the defendant on grounds of a breach of §1 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – *UWG*) and §823.1 of the Civil Code.
The *OLG* did not consider the sale of the "television fairy" a breach of competition law as set out in §1 *UWG*. It said that §1 *UWG* did not guarantee companies a general and comprehensive right to protection from interference from third parties. The whole nature of competition was such that new technical developments were constantly altering market conditions. In this case, at least according to current information, the "television fairy" did not cause interference, which was in any way unlawful or open to question.
The Appeal Court also found no breach of the basic rights to protection enjoyed by private commercial broadcasters and rejected the claim that freedom of broadcasting had been infringed. After weighing up all conflicting interests, the *OLG* concluded that (i) the company selling the "television fairy" had a guaranteed right to engage in unhindered commercial activity, that (ii) in accordance with general freedom of action and Art. 2.1 of the *Grundgesetz* (Basic Law – *GG*), television viewers were entitled to avoid unwanted advertisements, and that (iii) these rights took precedence. It could not be assumed at the time that the private broadcaster's actual existence was under serious threat.
Moreover, on 22 October 1999 the *Kammergericht* Berlin (Court of Appeal) lifted the temporary injunctions against the "television fairy" granted by the Berlin District Court to two other private broadcasters. A written explanation of this decision is not yet available.

Judgement of the *Oberlandesgericht* (Frankfurt Appeal Court – OLG), 23 October 1999; case no. 6 U 74/99

Karina Griese
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## Germany: Advertisements Making Use of Historic Figures of our Time

In its judgement of 2 September 1999, the *Oberlandsgericht* Munich (Regional Court of Appeal - (OLG) fully endorsed the temporary injunction granted by the *Landgericht* Munich (District Court). The *Landgericht* (LG) had restrained the publishing house concerned from making use of a portrait of the plaintiff's mother for commercial purposes, in particular for television advertising, inasmuch as this picture was not reproduced in the editorial section of the same issue of the newspaper being advertised. A general ban on the use of portraits in advertising, for which the plaintiff had petitioned, was refused by the LG.
The plaintiff's deceased mother was an historic figure of contemporary history. The publishing house concerned had put out a TV advertisement for a supplement on contemporary history for inclusion in its newspaper, featuring a portrait of the mother. The plaintiff considered this as unacceptable.
The OLG referred firstly to the principle that the obligation under the *Kunsturhebergesetz* (the law on copyright of artistic works) § 23 para. 1 N° 1 (KUG) to accept portrayals is not unlimited § 23 para 2 (KUG). The general case for publication and public information had to be weighed against the right of privacy of the person portrayed. Graphic representations of historic figures did not require consent in the light of their historical significance. In the case at issue, special weight had to be given to the fact that the defendant's primary interest was in advertising value. The person portrayed should not be turned into an object of commerce. The protection of the general public's interest in being informed went only so far as making it aware of information also contained in the product on offer. Otherwise, it would be mere advertising, in which the use of portraits may not freely be made.
The OLG made a distinction between this case and others dealt with in case-law, in which the person portrayed on the cover is representative of the content.

Judgement of the *Oberlandesgericht* (Munich Regional Court of Appeal - OLG) of 2 September 1999; file N° 6 U 3740/99.

DE

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## Germany: Protection of Journalists' Information

In a criminal case involving official secrets, the *Landgericht* Bremen (District Court - LG) held, in its verdict of 13 August 1999, that the search of a broadcasting organisation's newsroom together with the seizure of a draft report and the decisions leading thereto were unlawful due to the absence of authority to prosecute on the part of the high regional authorities concerned.
The plaintiff is a broadcasting organisation. It reported in a TV magazine on the Bremen City Court of Audit's budget, which was still confidential at the time of transmission. Information on the budget had until that time been communicated only to the regional high authorities. The President of the Court of Audit issued the relevant Public Prosecutor's Department with the authority to prosecute required under § 353b para. 4 of the criminal code. The Public Prosecutor accordingly had the plaintiff's premises searched and the report found there was

seized. In the view of the Public Prosecutor, investigations indicated that the report had been leaked to the media by the finance department. The finance minister rejected the issuing of the authority to prosecute and proceedings were suspended.
The Court had to weigh the government's interest in successfully pursuing a criminal case against the requirements of press and broadcasting freedom. It considered the fact that the provisions of the code of criminal procedure on the possible seizure of objects in the possession of members of a broadcasting organisation are only consistent with Article 5 § 1 sentence 2 of the Constitution when, in a given instance, the Public Prosecutor observes the principle of proportionality, i.e. by refraining from excessive use of his powers of intervention or causing lasting prejudice to media activity.
In Germany, press freedom is safeguarded by the right of media employees to refuse to give evidence. Here, it was a case of an exception to the ban on seizure linked to the right of refusal to give evidence due to criminal implication i.e. involving objects emanating from a criminal act or used for a criminal purpose. However, it was precisely because the case lay in the the sensitive area of the press that, in the view of the LG, only limited use of powers of search and seizure might be made. Before applying to the local court for a search to be made, it was imperative that prior authority to prosecute be obtained from the other regional high authorities concerned. The search and seizure proceeded despite this latent constitutional rights impediment - which subsequently materialised. At the time of the search, the continuance of the investigative proceedings had not been secured - hence the unlawfulness of the action by the Public Prosecutor.
In this connection, the current discussion and legislative initiative on the extension of journalists' right of refusal to give evidence to cover their own researched material is of interest. According to present law, under the constitution a journalist is entitled only in isolated cases not to disclose material he has developed himself. This is not yet embodied in the rules of criminal procedure, which until now cover only journalists' right to silence on those persons providing them with information, and information communicated. Henceforward, the coverage may be extended to include the authors of productions not appearing regularly and the staff of information and communications services.

Judgement by *LG Bremen* of 13 August 1999; file N°. 14 Qs 356/96#1.

DE

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## France: Soundtrack of an Audiovisual Work Comprises Pre-existing Music

The question of the scope of legal licence, i.e. cases where the use of a commercial phonogram does not require the authorisation of the producer and the performer, is currently under debate before a number of courts in France. These cases are listed in Article L 214-1 of the French Intellectual Property Code (CPI), which states that «where a phonogram has been published for commercial purposes, the performer and the producer may not object to:
1. its direct communication in a public place, as long as it is not used as part of a show, or
2. its broadcast or the simultaneous distribution in full of such broadcast by cable». In such cases, the user pays a certain sum to a collection society, which then pays half the sum to the producer of the phonogram and half to the performer. Theoretically, other uses of commercial phonograms require the prior authorisation of the producer, under Article L 213-1 of the CPI. However, some broadcasters claim that the definition of a «broadcast» enables them to make free use of phonograms to provide the soundtrack of the audiovisual works they produce. This is the background to the dispute between the broadcaster France 2 and the EMI Records company, which produces phonograms; the television channel had reproduced, without the production company's authorisation, the recording of the song *All you need is love* on the soundtrack for the credits of a programme it was producing. The Court of Appeal in Paris, to which the case was referred, was clear in its refusal on 26 October of the claims of France 2, thereby upholding the judgment handed down when the case was first heard by the regional court of Paris on 7 September 1998. The court held that the reproduction of a commercial phonogram prior to its broadcasting did not fall within the scope of the legal licence instituted by Article L 214-1 of the CPI. In support of its claims, the broadcasting company referred in particular to Article 12 of the 1961 Rome Convention and Article 8 of the European directive of 19 November 1992 on rental and lending rights. The Court concurred that, according to these texts, the use for broadcasting purposes of a reproduction of a commercial phonogram gives the entitlement to a fair, single sum in remuneration. These texts could not, however, be used to cancel the requirement of prior authorisation from the producer of the phonogram, whose exclusive right in respect of reproduction is recognised by Article 10 of the Rome Convention (according to which the producers of phonograms enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms).
The Court of Appeal went one step further and categorised the disputed credits as a video. Thus France 2 effected neither a «broadcast» nor a «direct communication in a public place» within the meaning of Article 214 of the CPI, but a communication to the public of the *reproduction* of the phonogram by means of a video which included this reproduction. For having failed to apply to the producer of the phonogram for authorisation before firstly reproducing this, and secondly broadcasting the disputed credits, France 2 was ordered to pay the producer FRF 150 000 in damages.

Court of Appeal of Paris (1st chamber, section A), 26 October 1999 – S.A. France 2 (national television company) v. the company EMI Records Ltd, UK.

FR

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## France: CD Writer Shops – the First Convictions

The appearance of digital recorders making it possible to produce copies of audio CDs or CD-ROMs which are perfectly identical to the original on low-cost supports increases the risk of the work of creative artistes being copied. After the Regional Court in Valence on 2 July, it was the turn of the Regional Court in Clermont-Ferrand to find against the manager of a free access CD writer shop for forgery. The shop made available to its customers, equipment for copying CDs and a computer used for personalising inlays. Having been informed of this situation by a television programme, the Public Prosecutor took up the matter at the instigation of a number of societies of authors and producers. To appreciate the material element of the offence the court recalled that, under Article L 122-5 of the French Intellectual Property Code (CPI), «where the work has been made public, the author may not prohibit (…) copies or reproductions strictly reserved for the private use of the person making the copy and not intended for collective use». This waiver of the author's right of publication has always been interpreted in its strictest sense by the courts.
In the present case, the court adopted the argument developed by the Court of Cassation concerning the photocopying of books in the famous decision in the Rannou-Graphie case on 7 March 1984, recalling that «the person making the copy» means the person who owns the machines on which the disputed copies are made. It is therefore irrelevant whether their production may be entrusted, whether occasionally or otherwise, to an employee or to the actual clients. In the present case, the copying equipment acquired for the purpose of copying CDs or software belonged to the company managed by the defendant and he could therefore not contest that he was the person making the copies. The exception for private copying only refers to the use of the person making the copies and, according to the court, the use the clients intended to make of the copies they requested was of little importance. Thus the mere fact of the manager of the shop selling the copy he had produced on a blank CD he had supplied was sufficient proof that he was making commercial use of them, excluding private use. Having demonstrated the material element of the offence of forgery, the court looked at the element of intent, which the defendant contested. The court took note that the defendant had also, at the request of performers, made lawful copies for which he had proper authorisation, and found that the defendant could not seriously claim ignorance of the legal difficulties his project would come up against. The element of intent could therefore be deduced from the circumstances in which the offences had been committed. The judges categorised the facts as serious because of the harm done to the rights of authors, editors and producers, and ordered the confiscation of the equipment at the centre of the dispute and the closure of the establishment in order to prevent the forger from continuing his activities. Moreover, because of the harm done to the collective rights of authors, editors and producers as a result of his activities, the defendant was ordered to pay damages to a number of societies for the collective management of royalties, which had associated themselves with the Public Prosecutor in the case.
This decision should be viewed in the light of the recent amendment to the European Commission's proposal for a directive on the harmonisation of certain aspects of copyright and related rights in the information society, which extends the exception of reproduction rights to private digital copying. Under its current wording, the Member States would have the possibility of providing this exception for reproductions on a digital support of sound, visual or audiovisual recordings by an actual person for a private and strictly personal use for non-commercial purposes, without prejudice to effective technical means intended to protect the interests of beneficiaries.

Regional Court of Clermont-Ferrand (deliberating in criminal matters), 27 October 1999, Public Prosecutor v. D. Baffeleuf.

FR

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## Bulgaria: Law on Radio and Television Passes Constitutional Test

On 25 June 1999, the Constitutional Court ruled on the constitutionality of the Bulgarian Law on Radio and Television (LRT) that had been adopted a year ago (see IRIS 1999-1: 8). The case had been initiated by 52 Parliamentarians from the opposition. They had alleged that a large number of provisions of the LRT were in violation of the Constitution. The Parliament, the Council of Ministers, the State Commission on Telecommunications (SCT), the National Council for Radio and Television (NCRT), the Bulgarian National Television (BNT), the Bulgarian National Radio (BNR) and the Bulgarian Media Coalition were parties in this case. Among the many different subjects addressed in the complaint were the rules concerning the constituting of the NCRT and the functions of the SCT. In particular, these were attacked for violating political pluralism, freedom of communication among citizens and freedom of the conscience and thought.
The Constitutional Court rejected the claims concerning all the provisions of the LRT with the exception of one single and rather minor point related to Art. 93 para 4. Art. 93 concerns the way in which public radio and television activities are financed. There it is generally stated that the main source for financing of the public radio and television shall be a monthly fee, which shall be paid by each person who has a radio and/or television set. Persons who do not have radio and/or television should make an official declaration in writing to this effect and submit it to the «respective institution». According to para 4 of Art. 93 the «respective institution» shall be entitled «at any time» to check the information stated in those declarations. The constitutional Court declared the paragraph anti-constitutional only in its part regarding the expression «at any time». The Court agreed with the claim that giving that institution the authority to carry out inspections for the reliability of the declarations «at any time» could result in violation of the inviolability of the home guaranteed by Art. 33 of the Bulgarian Constitution.

Decision No 10 of 25 June 1999 on Constitutional Case No 36 of 1998 concerning the Bulgarian Law on Radio and Television

EN

Gergana Petrova
Georgiev, Todorov & Co.

## Spain: Developing the Revised Spanish "Television Without Frontiers" Law

The most important legal provision in Spanish Broadcasting Law as far as content regulation is concerned is Law 25/1994, on the implementation of the "Television Without Frontiers" Directive. The Law 25/1994 was amended in June 1999 by Law 22/1999, which incorporated into Spanish Law the new "Television Without Frontiers" Directive (EC Directive 97/36/EC).
Now, Spanish Law 25/1994 (as amended by Law 22/1999; *see* IRIS 1999-7: 10) has been developed by a Regulation approved by the Government. This Regulation, which only applies to national broadcasters, deals with several matters:

– *The right of TV users to receive accurate information on the programme planning of TV channels*. This Regulation establishes that a broadcaster shall release its programme planning at least eleven days before broadcast. Broadcasters are required to provide information about all the programmes lasting more than fifteen minutes. The information must consist of, at least, the name and type of each programme. If the programme is a film, it is also compulsory to indicate the name of the film's director and the year in which the film was made, while, in the case of musical programmes, the information must include the name of the main artists participating in the event. Broadcasters cannot change the announced programme planning, except for justifiable reasons beyond their control, which could not have been foreseen when the programme planning was released.
– *The notion of "announcements made by the broadcaster in connection with its own programmes"*. Those advertisements related to the programming of the broadcaster, and in which the name of the latter appears, shall not be taken into account when applying the limit to the proportion of advertising spots that may be broadcast within an hour.
– *The duty of conditional access services providers to provide information about the channels included in their packages*. Conditional access services (CAS) providers which operate in more than one Autonomous Community have a duty to provide information to the *Ministerio de Fomento* (Ministry of Development) on the channels included in their packages, indicating whether the channels have been produced by the CAS provider itself or by a third party. In the latter case, the CAS provider has to identify the individual or corporate entity which has editorial responsibility for the channel.
– *The duty of broadcasters to provide information about the fulfilment of their obligation to allocate at least 5% of their annual income for the financing of films (including TV movies).*
– *The setting-up of a notification procedure for those broadcasters to which special rules apply*. This procedure affects: a) broadcasters whose channels are exclusively devoted to teleshopping and self-promotion; b) broadcasters whose channels only broadcast news, sports events, games, advertising, teletext services and/or teleshopping (i.e. channels to which the European quotas do not apply); and c) broadcasters which broadcast over several channels which are commercialised in the same package (i.e. channels to which special provisions apply regarding the calculation, for the purposes of the fulfilment of the European quotas, of the programme transmission time).

*Real Decreto 1462/1999, de 17 de septiembre, por el que se aprueba el Reglamento que regula el derecho de los usuarios del servicio de televisión a ser informados de la programación a emitir, y se desarrollan otros artículos de la Ley 25/1994, de 12 de julio, modificada por la Ley 22/1999, de 7 de junio.*

ES

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## Spain: Regulation of the Audiovisual Sector by the Autonomous Communities

The Parliament of Galicia (one of the seventeen Spanish Autonomous Communities) has recently approved an Audiovisual Law. This Law is mainly concerned with the promotion of the Galician film industry and the Galician language in audiovisual works. The Law also establishes a series of principles that will regulate those activities related to the audiovisual sector, and it provides, *inter alia,* that the Galician authorities may provide ratings for films, or approve regulations regarding audiovisual content broadcast by regional and local operators. In addition, these authorities will control the enforcement in Galicia of the legal provisions which deal with the audiovisual sector.
The wording of this Law is somewhat vague, in that the provision merely sets out a general framework. Thus, the real scope of this legislation will depend on the implementation measures that are to be adopted by the Galician authorities.
According to Article 149.1.27 of the Spanish Constitution, the responsibility for the regulation of the audiovisual sector is shared by the State and the *Comunidades Autónomas* ("Autonomous Communities", the regional political entities). The State has the power to approve the basic legislation for press, radio, television and any other media, without prejudice to the powers of the Autonomous Communities to implement and to enforce this basic legislation.
The activities of the Autonomous Communities are especially relevant as far as regional and local radio and television (including the provision of cable TV services) are concerned.

*Ley 6/1999, de 1 de septiembre, del audiovisual de Galicia, Diario Oficial de Galicia* (Galician Official Journal) n. 174, 8 September 1999, pp. 11032-11036.

ES

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## Bosnia-Herzegovina: Law on Radio-Television of the Republic Srpska Amended

According to the Dayton Peace Agreement (DPA), Bosnia-Herzegovina is composed of two entities: the Federation of BiH (FBiH) and the Republika Srpska (RS). But unlike the FBiH, which consists of 10 cantons, the RS is a highly centralized state. This is reflected on the media sector and in particular the broadcast media.
Since the Government and the National Assembly of the RS did not take any action to ensure compliance of the restructuring of Srpska Radio–Televizija (SRT) with European standards for public service broadcasting, the High Representative issued the Decision on Amending the Law on Radio-Television of Republika Srpska.
By this Decision, the Law on Radio-Television of the RS is amended as an interim measure, which shall be replaced by a legislative act from the National Assembly of the RS by 29 February 2000 at the latest. The envisaged legislation must conform to the present Decision, unless the High Representative agrees in advance to amendments or supplements. Furthermore, the Decision of the High Representative does not abrogate the superseding regulatory powers of the Independent Media Commission (IMC) or its successor agency.
The important provision of this Decision, although it appears to be of a formal nature, concerns the name given to the former *Srpska Radio-Televizija*, which is renamed *Radio–Televizija Republike Srpske* (RT RS). The rewording abrogates the exclusive ethnic prefix, which is in line with the international community's efforts to give both BiH entities a multiethnic character, and their televisions the character of public services.
Many articles of the former law are repealed in their entirety, and are replaced, *inter alia*, by the following: programming should
– fulfill the cultural and linguistic needs of the citizens of the RS;
– contribute to the affirmation of the national values of all the citizens of the RS, to general and health education, the protection of environment, expert improvement and the spread of knowledge in all fields;
– cherish human, moral, aesthetic and artistic values.
In addition, the changes introduced by the Decision envisage the enhanced maintenance and development of the technical basis for broadcasting and transmission system, and to foster the introduction and use of new technologies, etc.
It is now expected that future staffing of the RT RS will be balanced in that it will also include employees of non-Serb nationality. For its financing, the RT RS will rely mostly on subscription fees, but also on a government subsidy.

The High Representative's Decision on Amending the Law on Radio-Television of Republika Srpska of 31 August 1999.

EN

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## Italy: Implementation of the Distance Marketing Directive

On 19 October 1999 the Distance Marketing Decree (*Attuazione della direttiva 97/7/CE relativa alla protezione dei consumatori in materia di contratti a distanza, Decreto legislativo* of 22 May 1999, no. 185, in *Gazzetta Ufficiale* 1999, 143) entered into force. By this decree Italy transposes Directive 97/7/EC on the protection of consumers in respect of distance contracts. The decree applies to any contract concerning goods or services concluded between a supplier and a consumer under an organised sales or service-provision scheme run by the supplier, who makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded (Articles 1, 2 and 7). Among the means of distance communications covered by the decree, annex 1 specifically mentions catalogues, letters, e-mail, fax, telephone communications, audiovisual services, hereunder teleshopping. As already required by the Door-to-door Sales Decree (*Attuazione della direttiva 85/577/CEE in materia di contratti negoziati fuori dei locali commerciali, Decreto legislativo* of 15 January 1992, no. 50, in *Gazzetta Ufficiale* 1992, 27), the main provisions for consumer protection are the obligation upon the company to provide clear and complete information and the right of withdrawal.
In due time prior to the conclusion of the contract, the consumer shall be provided with information on the identity of the supplier, the characteristics and the price of the goods or services including all taxes and delivery costs, the arrangements for payment, delivery or performance, the existence of a right of withdrawal, the cost of using the means of distance communication, the period for which the offer or the price remain valid and eventually the minimum duration of the contract (Article 3). All these terms require written confirmation at the latest at the moment of conclusion of the contract (Article 4).
For any distant contract the consumer shall have a period of ten working days in which to withdraw from the contract without penalty and without giving any reason. Where the obligations laid down in Article 4 have been fulfilled, the period of exercise of this right shall begin, in the case of goods, from the day of receipt by the consumer and, in the case of services, from the day of conclusion of the contract. In any case the right of withdrawal expires after three months and may not be exercised in respect of contracts, among others, for the supply of audiovisual products or computer software whose seal was broken by the consumer (Article 5).
As stated in the Directive, unless the parties have agreed otherwise, the supplier must execute the order within a maximum of thirty days from the day following that on which the consumer forwarded his order to the supplier. The decree prohibits the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment and exempts the consumer from the provision of any consideration in cases of unsolicited supply, as the absence of a response does not constitute consent. None of the rights conferred by the Distant Marketing Decree may be waived by the consumer and the more favourable provisions have even to be applied to door-to-door sales contracts until the provisions contained in

decrees no. 50/92 and no. 185/99 will have been co-ordinated. According to the Consumer Rights Act (*Disciplina dei diritti dei consumatori e degli utenti, Legge* of 30 July 1998, no. 281, in *Gazzetta Ufficiale* 1998, 189) any consumer association is entitled to bring an action in order to ensure that the provisions referred to in this decree are complied with.

*Decreto legislativo of 22 May 1998, no. 185, Attuazione della direttiva 97/7/CE relativa alla protezione dei consumatori in materia di contratti a distanza,* available over the Internet at http://www.parlamento.it/parlam/leggi/deleghe/99185dl.htm

IT

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## Finland: Production and Distribution of Computer Viruses Is a Criminal Offence

*Laki rikoslain muuttamisesta,* the Act on the amendment of the Penal Code, was confirmed on 14 October 1999 and will enter into force on 1 December 1999.
In the amendment, the production, making available and the distribution of computer viruses is defined as a criminal offence. Regardless of whether harm has actually been done, what makes the deed a criminal offence is the intention to cause damage to a data processing system or a data and telecommunications system. Though the distribution of viruses previously was not a criminal offence as such, the distributor could be punished if the virus had caused damage.

Act No. 951/1999 of 14 October 1999.
The Act is available in Finnish at http://www.edita.fi

FI

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## United States: Revision of Cable Horizontal Ownership And Attribution Rules

On 20 October, 1999, the Federal Communications Commission ("FCC") released two *Report and Orders* revising the number of cable subscribers an entity may serve and the method for determining an "attributable interest" in a cable system. In 1993, the FCC promulgated horizontal ownership rules which limited ownership by an individual person or entity of cable systems to no more than 30% of all homes passed nationwide where an individual person or entity owns an attributable interest. In addition, the rule permitted a individual person or entity's cable systems to reach up to 35% of all homes passed nationwide provided the additional cable systems beyond the 30% mark were minority-controlled. The rules were successfully challenged in the United States District Court for the District of Columbia by cable operators on the grounds that their First Amendment rights were violated by the ownership cap. As a result of the court's decision, the FCC stayed the implementation of its horizontal ownership rule.
The new horizontal ownership rule maintains the 30% ownership limit, however, it provides a different test to calculate the homes passed nationwide. Previously, the rule limited horizontal ownership to the nationwide number of homes receiving cable television. The new rule calculates the ownership limit based on the nationwide number of subscribers of cable, direct broadcast satellite ("DBS") and other multichannel video program distributors ("MVPD"). The FCC has stated that 30% of cable, DBS and MVPD subscribers is effectively equal to 36.7% of current cable subscribers. Therefore, while the cap was not actually altered, the calculation method in the new rule effectively permits cable operators to serve more homes than the previous rule. However, the new rule eliminates the "minority-controlled" exemption, as the FCC concluded that it has never been utilized and that its retention would not be beneficial.
The new rule also revises aspects of the term "attributable interest," for purposes of determining whether the horizontal ownership rule is triggered. The revised definition of attributable interest retains the 5% or more active voting stock benchmark, raises the passive, institutional investor benchmark from 10% to 20% and permits limited liability companies to insulate their interests from attribution by using insulated partner criteria. Additionally, the new rule adopts a equity/debt principle, which requires that where an investor holds over 33% of the total assets of an entity, that investor will be deemed to have an attributable interest.
The most immediate beneficiary of the new horizontal ownership rule is AT&T. Upon the consummation of its pending acquisition of MediaOne, AT&T was poised to become the United State's largest cable television operator. Yet under the old, stayed horizontal ownership rule, AT&T would have exceeded the limits on national cable television ownership. However, because the new rule expands the number of homes a cable operator may reach and modifies the definition of an attributable interest, it is believed that AT&T, upon acquisition of MediaOne, will not violate the new national cable horizontal ownership and attribution rule.

Third Report and Order, In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, FCC 99-264; MM Docket No. 92-264 (Released: 20 October 1999).
Report and Order, In the Matter of the Cable Television Consumer Protection and Competition Act of 1992, FCC 99-288; CS Docket No. 98-82; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996: Review of the Commission's Cable Attribution Rules, FCC 99-288; CS Docket No. 96-85 (Released: 20 October 1999).

EN

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## LAW RELATED POLICY DEVELOPMENTS

### The Netherlands: Modification of the Media Act and the Dutch Penal Code, and Revocation of the Act on Film Showings

Further to the «Television without Frontiers» Directive a bill was introduced on 11 October 1999 to modify the Media Act and the Dutch Penal Code (PC), as well as to revoke the Act on Film Showings. The objective of this bill is to better protect young people against audiovisual images which are harmful for them. The starting-point of the proposal is self-regulation. Each audiovisual product will be classified on account of the possible harmfulness of exhibition to the young, under the responsibility of the area of business which puts the products in question on the market. The proposal adopts an interrelated approach of all relevant audiovisual media.
In addition to the system of self-regulation, a legal safety net is offered. This safety net is composed of the modified version of Article 240a PC and the modifications of the Media Act. The purpose of Article 240a PC is to prevent persons under the age of 16 from being confronted by harmful images. The criterion of harmfulness must be objectified, which means that showing the image would be considered to be harmful for the relevant age group and that the harmfulness has to be proven.
Showing television programs which are harmful to the young is not covered by this article. However, Article 52d paragraph 1 of the Media Act fully excludes those parts of television programs which would severely harm any person under 16 years of age either physically, mentally or morally. With regard to those parts of television programs which indeed can harm young people, but which do not produce serious harm, transmission of the program cannot be forbidden in its entirety. Therefore, paragraph 2 of the article offers a framework for a system of self-regulation, in which broadcasting organisations and external experts will formulate classification criteria and rules of execution and create conditions to apply these consistently. To this end Article 53 paragraph 1 of the Media Act allows for the creation of an organisation which can examine after the fact whether the programs comply with the criteria. Considering that this system of self-regulation and classification also applies to other suppliers of audiovisual products, such as cinemas and video stores, the Act on film showings will become redundant. On the basis of the Act on film showings, an independent organ of the government takes care of the classification of age for feature films. Under the new policy this is considered to be a task for the media producer. Considering the developments within the audiovisual sector, it is most probable that an independent organisation for self-regulation will be set up. It is recommended that the demands made in the Act on film showings with regard to the publication of the age-limits and the consequences thereof for showing films to the young, be embodied in full in the regulations drawn up by this self-regulatory organisation.

*Kamerstukken II* 1999/2000, 26841, nrs. 1-3 en A

NL

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### The Netherlands: Fiscalisation of the Licence Fee

The Dutch Government has sent a proposal to the parliament that would abolish the existing licence fee system. Based on the present Media Act, every holder of a radio and/or television set has to pay a - national, regional and sometimes also a local - licence fee. This fee is used exclusively to finance the public broadcasting system (consisting of national, regional and local broadcasting). The proposed amendment introduces a special tax that will be collected by the ministry of finance. This tax will be at the same level as the existing licence fee. The main reason for introducing the tax instead of the licence fee is to cut the level of costs that are attached to the present system. In fact, the special office (*Dienst omroepbijdragen*) that collects the licence fee will disappear. The positive effect of the increased efficiency could be as high as DFL 60 million (Euro 27.3 million) in the year 2002. Parliament is now looking at the proposal and has put forward a substantial number of questions dealing with issues such as the independence of the public broadcasters, and transitory measures. The government would like to have the new system in place next year.

*Wijziging van de Mediawet in verband met nieuwe regels omtrent de financiering van de publieke omroep (afschaffing omroepbijdrage), Kamerstukken II,* 1998/1999, nr. 26.707.

NL

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### Germany: Regulatory Authority Condemns Failure to Observe Watershed

The *Versammlung der Landeszentrale für private Rundfunkveranstalter Rheinland-Pfalz* (the Rhine-Palatinate Assembly of private broadcasting organisations - LPR) objected to two TV films shown by SAT 1 which, in view of their linkage of sex and violence, were such as to endanger children and young people.
The SAT 1 production shown on 23 February 1999 at 8.15 p.m. entitled „The price of innocence“ opened with

a bondage and torture scene linking sex and violence. Viewers had the sadistic murder of a young girl presented acoustically though not visually. In the LPR's view, the scene was very long drawn out and so presented as to be exceedingly disturbing for minors. The LPR also considered the TV film „Seduced – a dangerous affair" shown by SAT 1 on 2 March 1999 at 8.15 p.m. as endangering the young, also due its linkage of sex and violence: the film portrayed an unusual sex practice that here could be presumed to lead to death. This form of presentation could give rise to confusion among children and young people who were finding their way into sex. The LPR Assembly's primary objection concerned the timing of the programme (8.15 p.m.), when it should be considered that these films might well be watched by minors between 12 and 16.
Thus, the showing of these films did not comply with the Rhine-Palatinate broadcasting regulations on the protection of minors (§32 para 2 LRG), under which programmes likely to impair the physical, mental or moral development of minors may not be authorised unless the broadcaster has ensured, by selecting the time of transmission or other measures, that young people in the age group concerned would not normally watch them. The broadcaster might assume this to be the case in transmitting between 11 p.m. and 6 a.m. A comparable regulation is to be found in the Agreement between Federal States on Broadcasting.
The LPR's objection is sustainable. The joint office on protection of minors and programming of the regional media institutes agreed with the LPR proposal, after nationwide consultation, to condemn the broadcasting of these two films.

Press release in German obtainable under http://www.lpr-online.de/presse/pres2709.htm

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## Hungary: Draft Bill on Detailed Rules of Broadcast Transfer

According to section 121 paragraph 3 of the Hungarian Act I of 1996 on Radio and Television broadcasting: "A separate Act shall be created in respect of detailed rules of broadcast transfer." In accordance with this law, the Hungarian government decided to submit to parliament the Bill on Detailed Rules of Broadcast Transfer in the second part of this year. According to the legislative schedule of the Hungarian Parliament, the Bill will be adopted this year and the law will enter into force in the year 2000. The objectives of the law are laid down in the Preamble of the text. They are: "fulfillment of expectations related to broadcast transfer; economic development of broadcast transfer services; ensuring cooperation of telecommunications services and efficient protection of consumers". Paragraph 2 subsection 4 of the Bill defines broadcast transfer as «commutative telecommunications service ensuring transmission of signals for subscribers (group or individual) or consumers».
The Bill consists of 17 paragraphs and the following eight titles: The Scope of the Law; Definitions; Governmental Tasks related to Broadcast Transfer; Procedure of the Authorities; Entitlement for Broadcast Transfer; Contracts governing the Operation of Cable Network; Subscribers' Contracts; Entering into Force.
The legal experts, who have been engaged in preparing the Bill, took two different conceptual positions with regard to the need to adopt this law. One faction claimed that the law is unnecessary because a new Hungarian law will be introduced in 2000 on uniform telecommunications activities and services. which will also cover broadcast transfer activities and services. Therefore, the Bill should not be adopted, or should be valid only until the law on uniform telecommunications has been passed. According to the successful argument of the other experts, the Bill is most necessary in order to eliminate existing loopholes in those laws currently governing cable transfer activities in Hungary.
The most important rules currently regulating broadcast transfer activities in Hungary can be found in the following acts: Act LXXII of 1992 on Telecommunications; Act I of 1996 on Radio and Television broadcasting; Act XVI of 1991 on Concessions.

Draft Bill on Detailed Rules of Broadcast Transfer

HU

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## United Kingdom: Protecting Journalists' Sources

The so-called Bloody Sunday Tribunal (a Tribunal to inquire into "a definite matter of urgent public importance, namely the events on Sunday, 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day") has issued a ruling dealing with eight specific issues involving various media organisations which have made applications to the Tribunal; and also in connection with an instance of destruction of a journalist's notes.
And, in a decision which has implications for all audio-visual media news editors, the Lord Chief Justice of Northern Ireland, Sir Robert Carswell, ruled in the High Court in Belfast, on 27 October, that the northern Ireland editor of the Dublin "Sunday Tribune", Mr Ed Moloney, did not have to hand over notes of an interview with a police informant to the London Metropolitan police force who were conducting a murder investigation at the invitation of the Royal Ulster Constabulary. The crucial legal basis for the decision was, Sir Robert said, that «Police have to show something more than a possibility that the material will be of some use. They must

establish that there are reasonable grounds for believing that the material is likely to be of substantial value to the investigation.» The High Court's decision reversed the lower court's finding.

The Bloody Sunday Inquiry
http://www.bloody-sunday-inquiry.org.uk/rulings/october99.htm
In the matter of an application by detective inspector Todd Clements (applicant) and Ed Moloney (respondent)
http://www.nics.gov.uk/pubsec/courts/ruling19990902.htm

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## United Kingdom: New Guidelines for the Classification of Films and Videos

The British Board of Film Classification has published new guidelines at the end of October 1999. The BBFC is an independent, non-governmental body which classifies films on behalf of the local authorities who license cinemas under the Cinemas Act, 1913 and videos, DVDs and digital games under the Video Recordings Act 1984. The new draft is intended to be clearer and simpler, but also to provide a more comprehensive, practical guide to BBFC's classification policy. There are 7 classification categories: U (Universal), Uc (this video-only category denotes particular suitability for young or pre-school children) and PG (Parental Guidance) which are advisory only, 12, 15 and 18 which restrict viewing by age and R18 which is only available to adults through licensed outlets. In classifying films, videos or digital media, the BBFC gives consideration to the following basic principles: (i) the work should be allowed to reach the widest audience that is appropriate for its theme and treatment; (ii) adults should be free to choose what they see, providing in particular that it remains within the law and is not harmful; (iii) while precedent is an important factor, classification policy must continue to develop in line with changes in public taste, attitudes and concerns; (iv) no two works are identical, and the context in which something (e.g. sex or violence) is presented is central to the question of its acceptability. Consultation with the general public, interest groups, opinion-formers and representatives of the film, video and broadcast industries is currently taking place, before finalising the guidelines.

The draft guidelines are available on the website of the BBFC: http://www.bbfc.co.uk/ or can be obtained from the BBFC, 3 Soho Square London W1V 6HD, Telephone: (+44) 020 7439 7961.

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## Italy: Proposal for Competition Rules in the Cinematographic Sector

On 20 October 1999 the Italian Government submitted a proposal to the *Camera dei Deputati* (Chamber of Deputies of the Italian Parliament) concerning new provisions on the free movement of feature films. The aim of the bill is to define specific competition thresholds with reference to concentrations, as defined by the Competition Act of 10 October 1990 no. 287 (*Norme per la tutela della concorrenza e del mercato. Gazzetta Ufficiale 1990, 240*), which create or strengthen a dominant position in the cinematographic sector that underlies the control of the *Autorità Garante della Concorrenza e del Mercato* (Italian Competition Authority).
According to the bill, a dominant position is deemed to arise where more than 20% of the existing cinema halls on the national territory are owned or controlled by the same person or undertaking. This threshold is reduced to 16% if the person or undertaking concerned, in addition to the management of cinema halls, also deals with the production or with the distribution of films; a further reduction to 12% is provided, if all these three activities are carried out by the same person or undertaking or by controlled subjects.
With particular reference to 12 towns (*città capozona*) – Roma, Milano, Torino, Genova, Padova, Bologna, Firenze, Napoli, Bari, Catania, Cagliari, Ancona – the creation or the strengthening of a dominant position is deemed to arise where more than 30% of the existing cinema halls are owned or controlled by the same person or undertaking; if the person or undertaking concerned also deals with the production or the distribution of films the threshold is reduced to 24%; if the three activities of management of cinema halls, production and distribution of films are carried out by the same person or undertaking, a further reduction to 18% of the cinema halls is applicable.
Concentrations shall be in any case notified to the Italian Competition Authority if a person or undertaking owns or controls, even in only one of the mentioned towns, more than 20% of the global turnover of the market of film distribution and more than 10% of the number of cinema halls.
It is not permitted for a single person or undertaking, directly or indirectly, to distribute films which cover more than 25% of the yearly programming days of each cinema hall. For this purpose the period from 1 July to 31 August is not taken into account.
The bill also introduces economic contributions for subjects operating in the sector of film distribution, and gives the *Dipartimento dello Spettacolo del Ministero per i beni e le attività culturali* (Entertainment department of the Ministry of Culture) investigative powers and powers of sanction.

*Progetto di legge* of 20 October 1999, C. 6467, *Disposizioni per favorire la circolazione delle opere cinematografiche,* available over the WWW at http://www.senato.it/att/ddl/schede/c6467i.htm

IT

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## Austria: Levy for Reproduction of Compressed Music Files (MP3)

Background: Under Sections 42 and 42a of the Austrian Copyright Act (*Urheberrechtgesetz – UrhG*), music may be copied for personal use, which means that, under certain conditions, people may legally breach what, in principle, are exclusive reproduction rights. In order to compensate for the financial losses that such copying entails for rightsholders, Section 42b of the Copyright Act provides for two types of levy that have to be paid to collecting societies: the blank tape levy and the reproduction levy (the latter comprises an equipment levy and an operator's levy).
The blank tape levy is designed to compensate the rightsholder for loss of earnings from the sale of sound and picture carriers caused by private copying: "Since it is inevitable that a work which is broadcast or stored on a sound or picture carrier for commercial purposes will be copied onto a sound or picture carrier for personal use, the copyright owner is entitled to appropriate compensation (blank tape levy) if carrier material is offered for sale on the domestic market; carrier material includes blank sound or picture carriers which are suitable for such reproduction and other sound or picture carriers produced specifically for that purpose".
Whereas CD-Rs and CD-RWs have been subject to the blank tape levy since 1 March 1998, five collecting societies only recently (with effect from 1 November 1999) announced a "common levy for the recording, for personal use, of compressed music files (MP3, etc.) onto integrated and/or interchangeable carriers (e.g. Multimedia Card, Smart Card, Compact Flash Card), which are typically used for this purpose on portable equipment (e.g. RIO, Yepp, MPaxx, MPMan)".
Insofar as neither an overall agreement nor a set of rules is in force, the levy owed to authors, performing artists and sound carrier manufacturers (or those who have acquired the respective copyright) amounts to ATS 150 (plus sales tax) per hour of music.
The levy is to be paid by whoever, for commercial reasons, brings first onto the domestic market a carrier of the sort mentioned above (in these cases liability is shared by suppliers and retailers). It is payable when the item is brought onto the market. The collecting society *AUSTRO-MECHANA Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft m.b.H.* is responsible for collecting the levy on behalf of the other collecting societies involved.

*Tarif für die Vervielfältigung komprimierter Musikdateien (MP3),* (Levy for reproduction of compressed music files (MP3)), *Amtsblatt zur Wiener Zeitung,* 20 October 1999 (no. 51177).

DE

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Considering the long break until the next IRIS issue will be published and the importance of some information that we would be unable to communicate this year, we decided to offer you additional entries on the Observatory's Internetsite at http://www.obs.coe.int/oea/docs/00002449.htm

## PUBLICATIONS

Bertrand, Claude-Jean.-*L'arsenal de la démocratie : médias, déontologie et M*A*R*S.*-Paris: Economica, 1999.-372 p.-ISBN 2-7178-3939-9.- FRF 200

Feintuck, Mike.-*Media regulation: public interest and the law.*-Edinburgh: Edinburgh University Press, 1999.-ISBN 0-7486-0997-0 Pb; 0-7486-1192-4 Hb.-£16.95 Pb/£45 Hb.

Rossnagel (Hrsg.).-*Recht der Multimedia-Dienste : Kommentar.*-München: C.H. Beck, 1999.-1900 S.-ISBN 3-406-44463-6.-DM 248 bestellung@beck.de

Van Leeuwen, C.H.J.; Koedooder, M.T.M.; Mens, N.F.M; Vollenbroek A.J.E.M. (ed.).-*Praktijkgids Artiest en Recht 1999. Fiscale, sociale en juridische informatie voor artiest, organisator, manager en adviseur.*-Deventer: Kluwer, 1999.- 390 p.-ISBN 90268 3440 3

Wadlow, Christopher.-*Enforcement of intellectual property in European and Intellectual Property Law.*-London: Sweet & Maxwell, 1998.-XLVII + 639 p.-ISBN 0421 50160 X.-£95

Watson, Christopher; Wheadon, Tom (Eds.).-*Telecommunications: the EU law.*-Bembridge, Palladian Law Publishing, 1999.-448 p.-ISBN 1-902558-15-4.-£65 (Beach Rd, Bembridge, Isle of Wight, PO35 5 NQ., tél. 44-1983-872524; fax. 874322 palladian@compuserve.com

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