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European Court of Human Rights: Recent Judgments on the Freedom of Expression. The Cases of Erdogdu v. Turkey and Constantinescu v. Romania

Once again the European Court of Human Rights has held that the Turkish authorities have acted in breach of Article 10 of the Convention, this time by convicting Ümit Erdogdu, the editor of the review *Işçilerin Sesi* ("The Workers' Voice"). In 1993 Erdogdu was sentenced to six months' imprisonment and fined by the National Security Court: an article published in the review was considered to be propaganda against the territorial integrity of the State, which is an offence under the Prevention of Terrorism Act. The Court especially took into account that the article referred to parts of Turkish territory as Kurdistan and applauded acts of violence and the national resistance against the State by the PKK. In 1997 the National Security Court deferred sentencing Mr. Erdogdu, ordering that he would be sentenced if, within three years from the date of deferral, he was convicted in his capacity as editor of an offence with intent.

In a judgment delivered at Strasbourg on 15 June 2000 the European Court of Human Rights (Fourth Section) has found that by convicting Erdogdu the judicial authorities of Turkey violated Article 10 of the European Convention on Human Rights. According to the Strasbourg Court, the Turkish authorities did not take sufficient account of the freedom of the press or the right of the public to have access to a different perspective on the Kurdish problem. Although the Court underlined its awareness of the concerns of the authorities regarding the fight against terrorism, it was not persuaded that the litigious article would have highly detrimental consequences for the prevention of disorder and crime in Turkey. Nor was the article to be considered as an incitement to violence and hatred. As to the applicant's benefiting from a deferral of sentence, the Court was of the opinion that because this order only took effect if Mr. Erdogdu committed no further offences with intent as an editor, this was to be considered as a ban effectively censoring the applicant's exercise of his profession. The Court also regarded the ban as unreasonable, as it forced Mr. Erdogdu to refrain from publishing any article that would be considered contrary to the interests of the State. Such a limitation on freedom of journalistic expression was disproportionate because it meant that only ideas that were generally accepted, welcome or regarded as inoffensive or neutral could be expressed. Consequently, the Court concluded that there had been a violation of Article 10 of the Convention. The Turkish judge of the European Court of Human Rights, Judge Gölcüklü delivered a separate opinion. Although he voted with the majority of the Court, Judge Gölcüklü expressed his doubts on the political opportunity to protect the freedom of expression in a way that this freedom can be abused to undermine the democratic rights and freedoms itself.

In the case of Constantinescu v. Romania, the European Court of Human Rights in its judgment of 27 June 2000 (First Section) found no violation of Article 10 of

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• **Publisher**:
European Audiovisual Observatory
76, allée de la Robertsau
F-67000 STRASBOURG
Tel.: +33 (0)3 88 14 44 00
Fax: +33 (0)3 88 14 44 19
E-mail: obs@obs.coe.int
URL http://www.obs.coe.int
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• **Comments and Contributions to:**
IRIS@obs.coe.int

• **Executive Director:** Nils A. Klevjer Aas

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• **Documentation:** Edwige Seguenny

• **Translations:** Michelle Ganter (co-ordination) – Véronique Campillo – Paul Green – Martine Müller – Patricia Priss – Erwin Rohwer – Stella Traductions – Sylvie Stellmacher – Nathalie-Anne Sturlèse

• **Corrections:** Michelle Ganter, European Audiovisual Observatory (co-ordination) – Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory – Géraldine Pilard-Murray, section Droit du Multimédia et des Systèmes d'Information, University R. Schuman, Strasbourg (France) – Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland)

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the Convention. The case concerns the applicant's conviction for criminal defamation. Constantinescu, the president of a teachers' trade union, was convicted by the Bucharest District Court in 1994 following the publication in the press of comments he had made regarding an internal dispute in the Union and the functioning of the judicial system. More specifically, in an interview with a journalist of the newspaper *Tineretul Liber* Constantinescu had referred to three members of the previous trade union leadership who had refused to return money belonging to the Union after the election of new leaders as *delapidatori* (receivers of stolen goods). It was also mentioned that the new leadership of the Union had lodged a criminal complaint against them. The Bucharest District Court considered these statements by Constantinescu as defamatory, as he must have been aware when making this remarks in the presence of journalists that the prosecution had dropped the charges against the three teachers concerned. Before the Strasbourg Court Constantinescu alleged a violation of Article 6 (fair trial) and Article 10 (freedom of expression) of the European Convention. He maintained that he had not been allowed to prove that his comments were true and had not been informed that the charges had been dropped by the prosecution when the article appeared. As a matter of fact, the European Court of Human Rights noted a violation of Article 6 of the Convention because the Bucharest District Court found the applicant guilty of defamation without affording him an opportunity to give evidence and defend his case. On the other hand, the Court found no violation of Article 10 of the Convention. The European Court of Human Rights underlined that the Bucharest District Court had based its conviction on the use of the defamatory word *delapidatori* by Constantinescu referring to the three teachers, and not on the fact that he had expressed opinions criticising the functioning of the system of justice in trade union disputes. The Court considered that Constantinescu could quite easily have voiced his criticism and contributed to a free public debate on trade union problems without using the word *delapidatori*, which explicitly refers to a criminal offence, of which the three teachers were never convicted. Accordingly, Constantinescu should have refrained from using this description. Hence, the Strasbourg Court reached the conclusion that the State's legitimate interest in protecting the reputation of the three teachers did not conflict with the applicant's interest in contributing to the aforementioned debate. The Court also found that the penalty imposed, namely a fine of 50,000 ROL (leu) and an award of 500,000 ROL (leu) to each teacher for non-pecuniary damage, was not disproportionate. It was within their margin of appreciation for the Romanian courts to consider the conviction of Constantinescu "necessary in a democratic society" in order to protect the rights of others, which is fully in accordance with para. 2 of Article 10 of the Convention. In a partially dissenting opinion judge Casadevall (Andorra) expressed his opinion that the arguments developed by the Romanian authorities were neither pertinent nor sufficient to legitimise the interference in the applicant's freedom of expression. Casadevall *inter alia* referred to the judgment of the Romanian Supreme Court in 1999 which annuled the applicant's conviction because the motive of intent to defame was not proven. According to Casadevall this judgment in itself contained an implicit confirmation of a violation of Article 10 of the European Convention. ■

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

Judgments by the European Court of Human Rights, Case of Erdogdu v. Turkey, Application number 00025723/94, of 15 June 2000; Case of Constantinescu v. Romania, Application number 00028871/95, of 27 June 2000. Available in French (and soon in English) on the ECHR's website at http://www.echr.coe.int.

FR

EUROPEAN UNION

Council of the European Union: Decision to Combat Child Pornography on the Internet

On 29 May 2000, the Council of the European Union released its Decision to Combat Child Pornography on the Internet. The Decision substantially endorses the draft Decision presented by Austria on 16 December 1999 (see IRIS 2000-1: 5), while most of the amendments introduced by the European Parliament (see IRIS 2000-5: 3) have been rejected. For instance, the form of a Council Framework Decision proposed by the Parliament has not been accepted, neither has the definition of the actual offence of child pornography. Also, the Decision does not suggest that Member States take the necessary measures to ensure that child pornography is punishable by effective, proportionate and dissuasive penalties or to include provisions concerning possession of child pornographic material. On the other hand, the Council followed the Parliament's proposal to allow law enforcement authorities to defer actions when tactically necessary for getting at those behind the criminal operations, or at networks (child pornography rings). ■

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

Council Decision of 29 May 2000 to combat child pornography on the Internet (2000/375/JHA). Official Journal of the European Communities L 138/1 of 9 June 2000. Available in all EU official languages at: http://www.europa.eu.int/eur-lex/en/oj/2000/l_13820000609en.html

DE-EN-FR

Council of the European Union: Agreement on a Directive on Copyright in the Information Society

On 8 June, the Council of the European Union ("Council") confirmed that a political agreement was reached on a draft for a Directive on Copyright and Related Rights in the Information Society (for a detailed description of the amended proposal, see IRIS 2000-2:15-20 and IRIS 1999-6: 4; for the original proposal, see IRIS 1998-1: 4). The Council is expected to endorse the proposal for the Directive via formal Common Position before the end of July. The proposal could then go to the European Parliament for a second reading under the co-decision procedure of Art. 251 EC Treaty (*ex* Art. 189 EC Treaty).

The main amendments introduced in the proposal concern the exceptions to exclusive rights including the relationship to legal protection of anti-copying devices, technical copies and fair compensation. The original exhaustive list of 9 exceptions to the reproduction right and right of communication to the public that Member States may apply is now extended to more than 20. This has already been criticized by the industry as a way of weakening the level of protection that already exists in

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

a majority of EU countries. The proposal revises the circumstances that trigger the mandatory exceptions from the exclusive reproduction right for incidental technical copies made in the context of a transmission via a network. Such copies must be an integral and essential part of a technological process. Their sole purpose must be to enable a transmission in a network between third parties by an intermediary or a lawful use of a work or other subject matter to be made. In addition, they must have no independent economic significance. The proposal strikes a compromise between the legal protection of copying devices and the exceptions thereto. Notwithstanding the rightsholders right to control the manufacturing, distribution etc, of devices designed to circumvent their own anti-copying devices, Member States must ensure that rightsholders provide for a scope of application of the exceptions by those who shall benefit therefrom (e.g. schools, libraries in the case of teaching). Fair compensation must be granted to rightsholders for legally-made reproduction and private copying, but Member States will have great flexibility in transposing measures concerning this subject. ■

Draft for a Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, to be presented to the Council of the European Union for adoption of a formal Common Position (unofficial version)

EN

European Parliament: Resolution Concerning the Development of the Market for Digital Television

Annemique de Kroon
Institute for Information Law, University of Amsterdam

The European Parliament has issued a resolution on the Commission Communication on "The development of the Market for Digital Television on the European Union". Article 6 of Directive 95/47/EC on the use of standards for the transmission of television signals in part provides that "Before 1 July 1997, and every two years thereafter, the Commission shall examine the implementation of this Directive and the development of the market for digital television services throughout the European Union and submit a report to the European Parliament, to the Council and to the Economic and Social Committee." The Parliament's resolution concerns the first report issued by the Commission. In its resolution, the Parliament recognises that the late delivery of the report indicates that the implementation of the Directive has been difficult.

According to the Parliament, the growth rate of the penetration of digital television in Europe is "encouragingly high" and Directive 95/47/EC has fostered the creation of an environment in which it is advantageous to invest in digital television services.

Some of the more important conclusions of the Parliament in its resolution are as follows:

- some provisions, such as the dispute resolution mechanism regarding conditional access licenses, have been poorly implemented;
- open access for digital television should be recognised as a fundamental principle;
- "must carry" rules remain justified in the digital broadcasting environment in order to secure the distribution of public services such as minority-language channels;
- the Parliament supports the continuation of a policy guaranteeing that different systems of access to digital television are interoperable at consumer level while recognising that interoperability can be achieved through different approaches to standards.

Furthermore, the Parliament regrets that rights to broadcast are sold on a purely national basis. This prevents people living in one Member State from subscribing to television services from Member States. This non-existence of an internal market in digital television should be the focus of action for the Commission. ■

European Parliament resolution on the Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on "The development of the Market for Digital Television in the European Union - Report in the context of Directive 95/47/EC of the European Parliament and of the Council of 24th October 1995 on the use of standards for the transmission of television signals" (COM(1999) 540 - C5-0114/2000 - 2000/2074(COS))

EN-FR-DE

European Commission: Action against Italy for Lack of Implementation of the Revised Television Without Frontiers Directive

Roberto Mastroianni
University of Florence

On 23 May 2000, the Commission brought an "Article 226" action against Italy before the European Court of Justice for violation of the obligation to transpose into national legislation Directive 97/37/EC of 30 June 1997 amending the 1989 "Television Without Frontiers" Directive (89/552/EEC; see also IRIS 2000-6: 4 for a parallel action concerning Directive 89/552/EEC). Directive 97/37/EC required Member States to adopt the implementing national measures before 30 December 1998, and to inform the Commission accordingly.

According to the Commission, Italy is responsible for not having transposed any of the provisions of the Directive. In line with the established case-law of the European Court of Justice, the Commission does not accept the argument, proposed by the Italian government during the preliminary stage of the infringement procedure, that Parliament will soon adopt a bill, which will suffice to remove any inconsistencies between Italian law and the Directive. ■

Case Commission vs. Italy, no. C-207/00 of 23 May 2000.

DE

European Commission: Proposed Amendments to VAT Regulations

On 7 June 2000 the European Commission presented a proposal for an amendment to Council Directive 77/388/EEC regarding the value added tax arrangements applicable to certain services supplied by electronic means and a proposal for an amendment to Regulation (EEC) No.218/92 on administrative co-operation in the field of indirect taxation (VAT). The amendments also concern subscription services and pay-per-view broadcasting, while a legal definition of "services supplied by electronic means", in connection with the new fiscal provisions, is clearly set out.

The proposed amendments result from problems that have been experienced under the current Directive (Sixth VAT Directive) in correctly applying VAT to products delivered in digital form via electronic networks. The original Directive was not designed with e-commerce in mind, which is leading not only to a possible loss of

revenue, but also to discrimination by EU companies at the expense of customers in non-Member States. In turn, this could hinder the development of electronic trade within the Community. Definite discrimination arises from the fact that most digital products sold by EU companies are taxed in the EU, even those sold to customers in non-Member States. Conversely, such products can be sold untaxed by a company established outside the EU to a consumer living in the EU.

The proposal for an amendment to the Sixth VAT Directive adds a new point (f) to Article 9.2. This states that, in future, VAT shall be levied in the place where the customer has established his business or has a fixed establishment to which the service is supplied or, in the absence of such a place, the place where he has his permanent address or usually

resides, when these services are supplied by a taxable person

- established in the Community to customers established outside the Community; or
- established in the Community to taxable persons established in the Community but not in the same country as the supplier; or
- established outside the Community to persons established in the Community.

However, when such services are supplied by a taxable person identified in accordance with the provisions in force to non-taxable persons established in the Community, the place of supply shall be the place where the supplier has established his business or has a fixed establishment from which the service is supplied.

Under the proposed amendment to the Sixth VAT Directive, any service-provider with an annual turnover below EUR 100,000 is exempt from paying VAT (Article 24.2a). The draft also contains various provisions to simplify the tax registration and actual taxation processes. These reforms are supported by the draft amendment to Regulation (EEC) No.218/92, which brings the system of co-operation between administrative authorities into line with the changes. ■

Susanne Nikoltchev
European Audiovisual Observatory

COM (2000) 349 final, 2000/0147 (COD), 2000/0148 (CNS), European Commission proposal for a Regulation of the European Parliament and of the Council amending Regulation (EEC) No 218/92 on administrative co-operation in the field of indirect taxation (VAT) and proposal for a Council Directive amending Directive 77/388/EEC as regards the value added tax arrangements applicable to certain services supplied by electronic means, 7 June 2000
http://europa.eu.int/eur-lex/en/com/availability/en_availability_2000_7.html
DE-EN-FR

European Commission: Sale of North Rhine-Westphalia Cable Network Authorised

In a ruling made in connection with the Merger Control Regulation (4064/89), the European Commission has approved the sale of *Kabel Nordrhein-Westfalen* (North Rhine-Westphalia Cable Network – *KNW*) to *Callahan Invest Limited*. The vendor, *Deutsche Telekom*, will retain a minority interest of 45% in *KNW*. Under the terms of Commission Directive 1999/64/EC of 23 June 1999 amending Directive 90/388/EEC, in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities, Member States are obliged to ensure that companies with a dominant market position do not operate narrowband telecommunications networks and broadband cable television networks through the same legal entity. Accordingly, *Deutsche Telekom* had taken the initial step of splitting its broadband cable company between two subsidiaries, *Kabel-Deutschland GmbH* and *MediaServices GmbH*. The network was subsequently subdivided into nine regional networks, whereby the majority shareholding was sold to *Callahan Invest* in Baden-Württemberg and North-Rhine Westphalia, and to *Klesch & Company Limited* in Hessen. The Commission was convinced that *KNW* would have a *de facto* monopoly for pay-TV in North-Rhine Westphalia. However, the sale would neither create nor strengthen a dominant position in the pay-TV market, since *KNW* was merely taking over the position previously held by *Deutsche Telekom*. The Commission also welcomed the fact that *Callahan Invest*'s planned expansion of the cable network would also accommodate services such as telephony services and Internet access services and thus create competition in these areas. The agreements between *KNW* and *Deutsche Telekom*'s subsidiary *MediaServices GmbH* concerning the provision of pay-TV are expressly excluded from the decision to authorise the operation. ■

Wolfram Schnur
Institute of European Media Law (EMR)

Commission Press Release IP/00/637, 20 June 2000
DE-FR-EN
Deutsche Telekom Press Release
http://www.telekom.de/dtag/presse/artikel/0,1018,x542,00.html
DE

NATIONAL

BROADCASTING

BE – Hidden Camera Infringes Right to Image

In a ruling of 19 May 2000, the Brussels Court of First Instance dealt with a case involving a hidden camera.

On 2 October 1998 the applicant, Mrs P., had attended the recording of a talk-show on Flemish TV channel *VTM*, entitled "I'm looking for a millionaire", which concerned people attracted by money. Once the recording was officially over, the studio audience, including Mrs P., and the programme guests, including one man who was supposed to be a millionaire, had been invited by *VTM* for a drink. It was then that, by means of a hidden camera. Mrs P. had been filmed in conversation with the supposed millionaire. *VTM* subsequently broadcast both recordings to the general public on 30 November 1998. In the hidden camera scene, the applicant was perfectly recognisable and TV viewers could easily hear her conversation. Mrs P. claimed that the broadcast of the hidden camera scene had been wrong and that she was entitled to compensation.

The Brussels Court of First Instance ruled that, although the applicant had given her consent to use her image as part of the scheduled recording, she had not had the opportunity to give prior permission for it to be used in a hidden camera scene which she had no idea was being filmed. According to the Court, the studio audience could reasonably have assumed that they were no longer being filmed after the first recording was over.

Peter Marx, lawyer
Marx, Van Ranst, Vermeersch & Partners

In these circumstances, *VTM* had been in the wrong because it had infringed the applicant's rights over her own image, protected in particular by Article 10 of the Copyright Act of 30 June 1994. This Article entitles any individual to object to their image being used without their consent. In this case, *VTM* had not obtained the applicant's express permission to use her image, which had been filmed by a hidden camera.

Moreover, the Brussels Court of First Instance took aggravating circumstances into account because, firstly, the applicant had been portrayed as someone who would only become romantically involved if she thought she could gain financially, and secondly because the programme presenter had introduced the hidden camera sequence with words to the effect of "how to attract flies into a jam pot", while subtitles which appeared in the broadcast on 30 November 1998 were considered insulting to the applicant.

In view of the large ratings attracted by this *VTM* programme, the Court awarded moral damages *ex aequo et bono* of BEF 1 per viewer (a total of BEF 702,000) and made *VTM* publish its ruling in seven different daily newspapers at its own expense. ■

Brussels Court of First Instance, 19 May 2000, Mrs P. vs. *S.A. Vlaamse Media Maatschappij (VTM)*

FR

DE – Media Authority Complains about Pornographic Broadcasts

Dominik Mann
Institute of European Media Law (EMR)

The *Hessische Landesanstalt für privaten Rundfunk* (Hessian Regional Private Broadcasting Authority – *LPR Hessen*), which monitors the programmes of the private television channel *RTL2*, has complained about the broadcasting of seven pornographic films. Also on 15 June 2000, the broadcaster was prohibited from showing similar programmes in the future. *LPR Hessen* had decided to investigate the pornographic content of erotic films shown by *RTL2* in recent months. As a result, seven out of more than thirty films that were examined were classified as "pornographic". *LPR Hessen's* classification therefore differed from that of the *FSF*, German private television's own self-regulatory body, which had previously decided that these programmes were not pornographic and could therefore be broadcast after either 11 pm or midnight. The *Juristenkommission* (legal committee – *JK*) of the film industry's governing body concurred with the *FSF's* classification of two of these films. One of them, however, had already been classified as pornographic by the *Hamburgische Anstalt für neue Medien* (Hamburg New Media Authority) after it was broadcast by another channel in 1993.

According to the Amendment to the *Rundfunkstaatsvertrag* (Agreement between Federal States on Broadcasting), programmes are prohibited if they breach the provisions of the Criminal Code. As before, therefore, the distribution of pornographic literature and films is forbidden. *LPR Hessen* based its decision on a different definition of pornography to that used by the *FSF*. The main reason it classified the films as pornographic was the fact that their overall intention was to arouse the viewer's sexual interest and that they portrayed sexual activities in a totally obtrusive or attention-seeking manner. It specifically pointed out that a film did not necessarily have to show sexual organs openly in order to constitute pornography. Moreover, *LPR Hessen* thought that the evaluations by the *FSF* and *JK* had no binding effect in relation to its own decision. ■

***LPR Hessen* Press Release, 15 June 2000**
http://www.lpr-hessen.de/pmlpr/15.06.00.htm

DE

DE – Copyright Infringed as TV Film Is Produced without its Director

Dominik Mann
Institute of European Media Law (EMR)

In a ruling of 24 February 2000, the *Landgericht München* (Munich District Court) upheld the complaint of a TV director and prohibited the production company *Bavaria* from producing and broadcasting the German version of an English-language television programme directed by the plaintiff.

Since 1993, the director had been working on a film set in Australia, which had been established as a German-Australian co-production before filming began. On this basis, he directed the original English version. However, he had certain disagreements with the production company, which was producing the German version of the film. In the end, the director was excluded from the production and mixing of the German-dubbed version, which *Bavaria* wanted to produce alone.

In the production contract, the parties had agreed that the director would not exercise his temporary rights over the film. Moreover, under the terms of the contract, *Bavaria* was entitled, at any time, to dispense with the services of the director and produce the film in its own way without the director's involvement.

However, the Munich Court considered these clauses to be null and void. Through the third-party effect of basic rights, the guarantee of recourse to legal action provided in Article 19.4 of the *Grundgesetz* (Basic Law) must also apply to disputes between private individuals. Therefore, the director must be legally entitled to demand his rights and to claim temporary rights over the film.

The Court also concluded from the right of publication enshrined in Article 12.1 of the *Urherberrechtsgesetz* (Copyright Act – *UrhG*) that a director, as an author of a film, should be allowed to help add the soundtrack to and mix the film. Also, the specific rules for cinematographic works set out in Articles 88 to 94 *UrhG* did not restrict the rights of directors in such a way as to allow production companies to finish producing a film without the director's involvement. *Bavaria* has announced its intention to appeal the decision.

In the past, the protection of authors against their financially stronger contractual partners has frequently been a topic of discussion among producers and exploiters of TV programmes. Producers claimed that, since the parties were free to draw up contracts, the previous legal position stemmed from freedom of contract and, moreover, had proved its worth.

The Federal Minister of Justice is currently examining a draft Bill, prepared by a group of experts, which is designed to strengthen the contractual position of authors and performing artists. The main provisions of the Bill are to give these individuals legal entitlement to reasonable compensation and to create the possibility of drawing up standard contracts between authors' associations and bodies representing the exploiters of their work. Such contracts, containing certain minimum conditions, would form the basis of individual contracts between authors and exploiters. ■

Ruling of the *Landgericht München* (Munich District Court), 24 February 2000, case no. 7 O 21058/99
Draft Bill on authorship contract law
http://www.bundesjustizministerium.de/misc/2000/m_35_20.htm

DE

GB – New Tests to Be Satisfied Before the Announcement of New Public Services

Tony Prosser
IMPS-School of Law University of Glasgow

For some time there has been concern in the United Kingdom about the development of new services by the BBC. The Corporation is financed mainly by a compulsory licence fee levied on all users of television sets. Complaints have been made by commercial broadcasters that this can be used to fund services which compete unfairly with their own offerings. As a result, a strict division is expected between BBC public services financed by the licence fee and its commercial services financed from other sources such as the sale of rights. The United Kingdom minister has now issued a stricter definition of what may be included in the public services. He must give his consent before any new public service is launched or an existing one is subject to material change. He will also periodically review existing services.

When a new service or a material change to an existing service is proposed, the minister will publish details and invite written representations from the broadcasting industry, the regulatory authorities and consumer groups. He will seek to establish that the proposed service is compatible with the BBC's public service duties and that the value to the public of the services is proportionate to its likely impact on the market. He will pay particular attention to whether the BBC has consulted licence fee payers and published the results, the nature and coverage of commercial services of a similar nature, the likely impact of the proposed services on commercial services and the distinctiveness of the proposed services from those provided by other broadcasters. He will also need to establish that the service will be universally accessible within a reasonable period of time and free at the point of use. He will then publish details of his decision. ■

BBC: The Criteria for Public Services, Department for Culture, Media and Sport, 2-4 Cockspur Street, London SW1Y 2DH, 21 June 2000, available at: http://www.culture.gov.uk/creative/index.html (click on 'Forms and Documents')

IT – Parliament Informed about Dominant Positions in the Television Broadcasting Market

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

Pursuant to the *Istituzione dell'Autorità per le Garanzie nelle Comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo* (Communications Act of 31 July 1997, no. 249, see IRIS 1997-8: 10, hereinafter: "Act") and to the *Regolamento in materia di costituzione e mantenimento di posizioni dominanti nel settore delle comunicazioni* (Dominant Positions Regulation no. 26/99; see IRIS 1999-7: 11), on 13 June 2000 the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications Authority – *AGC*) adopted Decision no. 365/00/CONS ascertaining the existence of dominant positions on the television broadcasting market.

According to Article 2, paragraph 8 of the Act, a dominant position is presumed when a broadcaster earns more than 30% of the economic resources of the broadcasting sector. As a general rule, when the *AGC* discovers the existence of a dominant position that is the result of agreements or mergers of undertakings, it is also deputed to impose sanctions on the broadcasters concerned, which may consist of an order to separate the undertakings or combined assets. However, the following paragraph of that article introduces an exception where, prior to the entry into force of the Act (1 August 1997), a dominant position has been reached by a spontaneous growth of the undertaking in question, which does not restrict competition or affect pluralism. In this case the *AGC* shall instead inform the Parliament.

On 2 December 1999 the *AGC* started proceedings to verify the situation of the Italian broadcasting market with reference to 1997 and gave notice of preliminary proceedings to the two main Italian broadcasters, *Rai* and *RTI*, and their advertising agencies, *Sipra* and *Publitalia*, in order to verify whether they had exceeded the thresholds fixed by the Act. In its decision the Authority has ascertained that the two economic units - *Rai* & *Sipra* and *RTI* & *Publitalia* - have both exceeded the thresholds, but that their positions on the market, though dominant, have been reached by means of a spontaneous growth of their undertakings without restricting competition or pluralism. Consequently the Parliament has been duly informed, and it has also been decided that the *AGC* will promptly carry out a broader analysis of the television broadcasting market, paying particular attention to the distribution of technological and economic resources, to the access to production facilities, to the number, strength and audience of the undertakings of the relevant market and to the impact of multimedia and digital technologies. ■

Decision of the *Autorità per le Garanzie nelle Comunicazioni* of 13 June 2000, no. 365/00/CONS, *Accertamento della sussistenza di posizioni dominanti ai sensi dell' articolo 2, comma 9, della legge n.* 249/1997, available from the AGC website, http://www. agcom.it/provv/D365_00_CONS.htm

IT

RO – Glorification of Violence to Be Banned

Mariana Stoican
Radio Romania International

UNESCO's national commission in Romania has asked the Romanian Parliament to enact a law prohibiting publication by the mass media of printed and electronic articles, books and CDs in which any form of violence is glorified.

Ruling no.47/2000 of the *Consiliul National al Audiovizualului* (National Audiovisual Council – *CNA*) makes provision for several restrictions on the content of broadcasting channels which are designed to protect minors and which – based on self-regulatory mechanisms – ought to prevent the electronic media from publishing anything that might have negative consequences.

A recent positive example of self-regulation in the television sector was the announcement of measures to be applied by public TV companies in Romania from summer 2000. These concern the use of coloured warning symbols to inform the viewer of the type of film being broadcast. The *CNA* expects that, from July, commercial broadcasters in Romania will also use these symbols, which are already standard in France and other European countries. Only television programmes suitable for the whole family will not carry a symbol. For example, films containing scenes of violence which could harm children will be denoted by a green circle, while a small orange triangle will indicate a film unsuitable for children under 12. A red rectangle will mean that the film should only be viewed by adults. In accordance with the *CNA*'s standards for all public and private TV broadcasters, it is forbidden to show pornographic or extremely violent scenes.

The warning symbols must "appear clearly" in the corner of the screen throughout the film. ■

D.C.N.A. 47/20 aprilie 2000 privind restrictii si avertizari în scopul protectiei minorilor

RO

US – Court of Appeals Upholds Cable Television Ownership Rules While the FCC Approves AT&T/MediaOne Merger

Carl Wolf Billek
Communications Media Center New York Law School

Only days after the United States Court of Appeals for the District of Columbia upheld the Federal Communications Commission's (FCC) cable television ownership rules, the FCC approved a merger between AT&T and MediaOne, creating the nation's largest cable television operator.

On 19 May 2000, the United States Court of Appeals for the District of Columbia upheld the FCC's rules limiting the number of subscribers a cable television operator may serve to 30% of the nation's cable market. In doing so, it rejected the claim of Time Warner Entertainment Co. (Time Warner) that the subscriber limit was a content-based restriction and therefore subject to "strict scrutiny" by the court. Rather, the court concluded that the limit was content-neutral and, as such, would be sustained if it advances important governmental interests and does not burden substantially more speech than necessary to further those interests.

The court concluded that this test was met because the rules advanced the important interest of preventing concentration of media ownership and promoting diversity of information available to the public. Furthermore, the court concluded that Time Warner did not demonstrate that subscriber limits burdened more speech than necessary to advance these government interests. Immediately after the court announced its decision, the FCC announced that it would begin enforcing its cable television ownership rules (which were stayed pending the outcome of the court's decision) in 180 days.

Next, on 5 June 2000, the FCC approved the merger of AT&T and MediaOne, creating the nation's largest cable television operator. Finding that the combined entity would serve approximately 40% of the nation's cable subscribers, the FCC required the company to sell assets necessary to bring it within the 30% cable television ownership cap. This required divestiture is in addition to the sale of RoadRunner, a cable Internet service, which the companies had previously agreed to sell in order to secure a recommendation of merger approval from the Department of Justice. While not dictating which assets the company would have to sell, the FCC gave the company 12 months to meet the 30% ownership cap. It is anticipated that the company will either sell MediaOne's 25% interest in Time Warner Entertainment or sell enough individually-owned cable systems to bring the company within the ownership cap. ■

Time Warner Entertainment Co., L.P. v. United States of America, No. 96-5272, (D.C. Cir. Ct. of App.) of 19 May 2000

EN

US – Supreme Court Finds Section 505 of the Telecommunications Act of 1996 Unconstitutional

Carl Wolf Billek
Communications Media Center New York Law School

On 22 May 2000, the Supreme Court of the United States held that Section 505 of the Telecommunications Act of 1996 ("1996 Act") was not the least restrictive means available to block access to sexually-oriented cable television programming and, as such, violated the First Amendment of the Constitution. The Supreme Court's decision affirms an earlier decision from the United States District Court for the District of Delaware.

Section 505 required cable television operators providing channels primarily dedicated to sexually-oriented programming either to fully scramble or block those channels or limit their transmission to the period between 10 p.m. and 6 a.m. Rather than risk having the sexually-oriented programming viewable through imperfect signal scrambling technology (a phenomenon known as "signal bleed"), approximately 70% of cable operators limited such programming to the permissible safe harbour period.

In reviewing the constitutionality of Section 505, the Supreme Court determined that the statute was content-based and therefore, could only stand if it satisfied the legal standard known as "strict scrutiny." Under strict scrutiny, a statute must be narrowly tailored to promote a compelling government interest, and if a less restrictive alternative would serve the government's purpose, the legislature must use that alternative.

While the Supreme Court stated that protecting children from viewing sexually-oriented programming is a compelling government interest, it also concluded that restricting the affected programming to the safe harbour period deprived programmers of 30 to 50% of their audience. As such, the statute was not "narrowly tailored" to promote the government's interest. Furthermore, the Supreme Court held that Section 504 of the 1996 Act, which requires a cable operator to block or scramble cable programming upon the request of individual subscribers, was a less restrictive alternative that would equally serve the government's purpose. ■

United States, *et al.* v. Playboy Entertainment Group, Inc., 2000 WL 646196(U.S.); No. 98-1682 (May 22, 2000)

EN

FILM

FR – Film Approval Certificate Withdrawn

In an Order of 30 June 2000, the *Conseil d'Etat* (Council of State) upheld the application by an association which disputed the award of an approval certificate on 22 June by the Minister of Culture and Communication to the controversial film *Baise-moi* ("Screw me"). The certificate only banned children under 16 from watching the film and stipulated that a warning about the nature of the film should be posted at the cinema entrance and included in all publicity for the film.

In accordance with Article 19 of the film industry code, films may only be shown in French cinemas if they have been awarded an approval certificate by the Minister of Culture on the basis of the opinion of the *Commission de classification des oeuvres cinématographique* (Film Classification Commission). There are three types of certificate: one for films suitable for everyone, one for films unsuitable for children under 12 and one for films unsuitable for children under 16. The Minister can also decide to ban a film altogether. Finally, if a film is classified as pornographic or inciting violence, it may not be shown to minors under the age of 18.

In this case, the Council of State noted that the film *Baise-moi* was more or less composed of a succession of scenes depicting extreme violence and non-simulated sex, while the remainder of the film failed to live up to the directors' claim that it denounced violence against women by society. It therefore constituted a porno-

Amélie Blocman
Légipresse

graphic film which incited violence and which might be viewed by minors. It might also contravene the provisions of Article 227-24 of the Criminal Code (which imposed a three-year prison sentence and a FRF 500,000 fine on anyone who produced, distributed, broadcast or sold a violent or pornographic film likely to be seen by a minor). Since under the provisions of Article 3 of the Decree of 23 February 1990, the only way minors under the age of 18 could be prevented from seeing a film was if the film were classified as pornographic or inciting violence, then it should appear on the list of such films. The Council of State therefore cancelled the approval certificate awarded by the Minister and the film cannot be shown until it has been granted a new certificate. ■

Council of State (litigation department), 3 June 2000 – *Association Promouvoir* et al.
FR

NEW MEDIA/TECHNOLOGIES

AT – Supreme Court on the Subject of Web Cameras

Albrecht Haller
University of Vienna and Höhne & In der Maur, Lawyers

A decision on the subject of web cameras was given recently by the Supreme Court (*OGH*). While, on the surface, this is only a matter of the photograph producer's analogous protection right, in reality it is also a question of the admissibility of hyperlinks.

The events surrounding the case took place in a skiing area of Western Austria. At the behest of the high ridge cable railway an Internet provider had bought some digital cameras and installed them around this cable railway's highest station. The cameras produced images that were transmitted into the valley and onto a computer belonging to the Internet provider, via a PC belonging to the cable railway, and a telephone line. The pictures were distributed, on the one hand, within the Internet provider's online service and, on the other hand, on the cable railway's website. With the cable railway's consent, a third party transferred the images into its own online service, operated at the addresses, www.montafon.at and www.montafon.com (according to the plaintiff's claim, using framing); as a result, the Internet provider petitioned for a restraining injunction against this third party.

The Supreme Court (following an in-depth treatment of the notion of ownership of the photograph producer's analogous protection right, continuing for many pages) reached the conclusion that, in view of its the services it provided, the plaintiff at least contributed to the production of the photographs, so has entitlement to copyright protection, in any case. Moreover, this judgement is surprising in that, entirely uncritically, the Supreme Court assumes that whoever sets up a hyperlink (in this instance in the form of framing) is reproducing the 'linked-in' contents. The Supreme Court did not think it needed to go into the aspects of the case pertaining to unfair competition law. ■

Judgement of the Supreme Court dated 1 February 2000, Reference No.: 4 Ob 15/00k
DE

DE – Rules on Freedom of Access to Digital Services Put to Final Vote

Wolfram Schnur
Institute of European Media Law (EMR)

After hearing the views of those involved and taking into consideration the statements that had been submitted, the *Direktorenkonferenz der Landesmedienanstalten* (Conference of Regional Media Authority Directors – *DLM*) has established rules on freedom of access to digital services on the basis of Article 53.7 of the *Rundfunkstaatsvertrag* (Agreement between Federal States on Broadcasting). The rules had previously been submitted in draft form on 21 February 2000 (see IRIS 2000-3: 11). The version that was finally adopted also mentioned the unbundling of API (Application Programming Interface) and CAS (Conditional Access Services). A new addition was the fact that, through the possibility of using Conditional Access Services with a Common Interface Module, the requirement for accessible interfaces was sufficiently met (Rule 13.1.3). The amended rules also stipulate that technical services and subscriber management services should be offered unbundled (Rule 13.1.4). Mention is also made of the MHP (Multimedia Home Platform) standard, which is based on the programming language JAVA. The MHP standard is expressly referred to in Rule 13.2.2 as a state-of-the-art programming interface based on common European standards. The rules, which await the approval of the individual regional media authorities, are expected to enter into force on 1 November 2000. ■

Rules of 26 June 2000 on freedom of access to digital services
www.alm.de/bibliothek/digsatz1.doc
DE

DE – Distance Marketing Act Comes into Force

The *Fernabsatzgesetz* (Distance Marketing Act), which was adopted on 9 June 2000, entered into force on 30 June 2000. Directive 97/7/EC on the protection of customers in respect of distance contracts (see IRIS 1997-7: 7) was thus transposed into German law (see IRIS 1999-7: 14 concerning the draft Act).

The *Fernabsatzgesetz (FernAbsG)* sets out basic conditions for purchases made via distance communication systems, ie letter, catalogue, e-mail, fax, telephone and broadcasting, telecommunications and media services.

According to Article 3 of the Act together with Article 361a of the *Bürgerliches Gesetzbuch* (Civil Code – *BGB*), customers have 14 days in which they may cancel an agreement made via a distance communication system or return goods at the supplier's expense (if they are worth more than DEM 80) and demand a refund. German law therefore goes beyond the requirements set out in Directive 97/7/EC, which only makes provision for a 7-day cancellation period.

Suppliers are also obliged to describe goods and set out the terms of contract in a transparent, ie clear way (Article 2 *FernAbsG*). According to Article 2.3, this information must be made available to the customer in permanent form immediately after the contract has been agreed and, where goods are involved, by the time they are delivered. If a supplier fails to disclose important information such as its address, the customer's right to cancel or return the goods (Articles 3 and 4 of the Act) or the general terms and conditions, the period in which the goods may be returned is automatically increased to four months (Arti-

cle 2.3 in connection with Article 1.1 *FernAbsG*).

A further measure designed to protect consumers was incorporated in Article 661a of the Civil Code. From now on, companies that try to attract new customers by giving them the impression that they have won a prize must actually award that prize.

Finally, the law on the delivery of unsolicited goods has also been amended. Whereas such goods delivered with an invoice were previously not supposed to be returned, but kept, Article 241a of the Civil Code now states that they need neither be paid for nor kept.

The transposition of Directive 97/7/EC also entailed an amendment to provisions on joint petitions, which at the same time led to Directive 98/27/EC on injunctions for the protection of consumers' interests being incorporated into German law. Under the amended Articles 13.2.1 and 13.2.2 and Articles 22.3.1 and 22.3.2 of the *Gesetz über allgemeine Geschäftsbedingungen* (General Terms of Business Act – *AGB-Gesetz*) of 9 December 1976 (Federal Gazette I p.3317), consumer groups, for example, which are included on a list of approved institutions in accordance with Article 22a of the *AGB-Gesetz*, can lodge a joint petition in order to take proceedings against dubious business practices. Before this amendment was introduced, whether a consumer group was entitled to make a complaint depended, according to Article 13.2.1 of the *AGB-Gesetz*, on its statutes and whether it had actually been involved in a specific case. ■

Kerstin Däther
Institute of European Media Law (EMR)

Act on Distance Contracts and Other Consumer Law Issues, 9 June 2000

DE

FR – Advertising Internet Sites – Council of State Sanctions *CSA*

In an Order of 3 July 2000, the *Conseil d'Etat* (Council of State), the supreme administrative court in France, annulled Communiqué 414 of the *CSA* (French Independent Broadcasting Authority) of 22 February 2000, which authorised the television advertising of the Internet sites of companies in sectors banned from advertising (press, distribution, cinema, literary works) under the terms of Article 8 of the Decree of 27 March 1992 (see IRIS 2000-3: 12).

The Council of State thus upheld the request of professional organisations in the film and radio sectors, which thought that the *CSA*'s decision was likely to upset the economic balance in these sectors, as well as the distribution of advertising income between television and radio. However, the main reason for the Council of State's decision was the fact that the regulatory authority had acted beyond its remit. Article 27 of the amended Act of 30 September 1986 entrusts the Government, acting by decree, with the task of setting out the conditions and restrictions under which advertisements may be shown on television. On the grounds that the restrictions on television advertising imposed by Article 8 of the Decree of 27 March 1992 on the press, distribution, cinema and literary publishing sectors should not apply to the Internet sites of these sectors because those sites constituted a new and specific economic sector, the *CSA* limited the scope of those restrictions by means of a mandatory and general provision. Thus, the Council of State ruled that "by allowing television advertising of these sites which, through their activity, help to promote companies in sectors which are banned from advertising on television by the Decree of 27 March 1992, the *CSA* did not merely interpret the Decree's provisions, but laid down a new legal regulation". Insofar as there was no legislative instrument giving the *CSA* the power to enact such a regulation, the Council of State held that the regulatory authority had gone beyond its remit and that Communiqué 414 should therefore be annulled. There was an established precedent (Council of State, 16 November 1990, *SA LA Cinq*) according to which the *CSA* was not empowered to create regulatory measures, but was only competent to interpret existing legislation or regulations. In response to this decision, the Minister of Culture and Communication announced that she would carry out a broad consultation on access to television advertising for banned sectors with a view to a possible amendment to Article 8 of the 1992 Decree. However, the Minister pointed out that current restrictions had been laid down as part of a policy of pluralism and that such objectives remained a priority. ■

Amélie Blocman
Légipresse

Council of State (litigation department), 3 July 2000 – Society of authors, directors, producers et al.

FR

RELATED FIELDS OF LAW

CH – Hard Porn – the Federal Council Takes a Softer Line

The Swiss Federal Council wants to put an end to the consumption of hard porn being exempt from criminal sanctions. Its bill, adopted on 10 May 2000, proposed the addition of a paragraph 3.a) to Article 197 of the Criminal Code. This makes not only anyone manufacturing or commercialising hard porn liable to prosecution - it also includes anyone in possession of such items, regardless of how they have been obtained (purchase, rental, loan, exchange or gift). So that the prosecuting authorities are not inundated, mere consumption will not warrant prosecution – the passive viewer of works of child pornography will not be prosecuted.

In the context of the Internet, possession will give rise to criminal proceedings if users download pornography onto their own data supports (eg hard disk or diskettes). On the other hand, where the search motor carries out an "intermediate save" of data with pornographic content in temporary files, the Federal Council does not consider that the existence of such temporary data constitutes possession.

Whereas the draft bill from the Department of Justice and Police was aimed at hard porn in general, the Government's bill is limited to child pornography and representations of sexual violence. According to the Federal Council, the latter do not include representations of acts of sado-masochism carried out by common consent where other offences are committed at the same time (eg physical injury). Nor does possession of representations of sexual acts involving animals fall within the scope of the new provision. The sexual maltreatment of animals nevertheless remains a punishable offence as it is now under Article 27 of the Animal Protection Act.

A further type of hard porn not covered by this reinforcement is pornography showing sexual acts involving human excreta.

And what of virtual representations? Contrary to the German and Austrian Criminal Codes, the Swiss Federal Council considers that these should be treated as representations of real scenes as it feels that, since it is not always possible to determine whether a scene is real or virtual, this would complicate the battle against child pornography. Moreover, certain virtual images – such as

Denis Barrelet
Medialex

cartoon strips and animated films – were mainly directed at young people, and it would therefore be "inadvisable for them not to be subject to criminal law, in view of the need to protect young people".

The maximum penalty will be less than that imposed on persons involved in the manufacturing or commercialising of pornography – a maximum of one year's imprisonment (compared with three years) or a fine. Although not requested to do so by the Chambers, the Federal Council feels it is necessary to include Article 135 in the revision. Mere possession of cassettes stressing scenes of cruelty towards humans or animals will also be punishable in future. Here again, the Government's explanation is that, since the serious offences being committed are demand-driven, it is at the demand level that action needs to be taken. ■

Rapport explicatif et avant-projets concernant la modification du code pénal suisse et du code pénal militaire relativement aux infractions contre l'intégrité sexuelle (prescription des infractions contre l'intégrité sexuelle des enfants et interdiction de la possession de pornographie dure)
http://www.ofj.admin.ch/themen/stgb-sinteg/intro-f.htm

DE-FR

CH – Principle of Transparency in the Federal Administration

Oliver Sidler
Medialex

On 19 April 2000, the Swiss Executive National Council adopted the draft consultation document for a federal law concerning transparency in administration. The aim of this draft law is to give the public easier access to official documents, thus making the administration more transparent. According to the draft law every person would have what is termed a "right to access", i.e. they could require that they be given the opportunity to inspect official documents and obtain information about such documents. The principle of transparency would be introduced together with the right, for the federal administration, to immunity from disclosure. However, the "right to access" is not unlimited; if it conflicts with prevailing public or private interests, it may be restricted, deferred, or denied entirely. Prevailing public interests are present, for example, when the free development of opinion and intent on the part of an authority would be impaired by the premature publication of official documents, or if this would jeopardise Switzerland's internal or external security. Prevailing private interests are present, for example, when privacy would be substantially impaired or a professional, business or manufacturing secret would be disclosed if the information in question were to be made available. ■

Preliminary Draft of a Federal Law concerning Transparency in the Administration, dated 19 April 2000
http://www.ofj.admin.ch/themen/oeffprinzip/intro-d.htm (in German)
http://www.ofj.admin.ch/themen/oeffprinzip/intro-f.htm (in French)

DE-FR

CZ – New Copyright Act

Jan Fučík
Broadcasting Council of the Czech Republic

Zakon ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s právem autorským a o zmìnì nìkterých zákonù (*autorský zákon*) (the new Copyright Act) was adopted by the Parliament of the Czech Republic on 7 April 2000. The Act will come into effect on 1 December 2000. It harmonises the Czech copyright legislation with the EC directives on the term of protection of copyright and certain related rights applicable to Satellite Broadcasting and Cable retransmission, on rental and lending rights, and on computer programmes and databases (including the *sui generis* protection of the database producer).

The new Act also includes provisions implementing the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (see IRIS 2000-2: 15). It regulates copyrights and related rights – namely, the rights of the author regarding his work, of the performing artist regarding his performance, of the producer of a sound recording regarding his recording, of the producer of an audiovisual recording regarding his recording, of the radio or television broadcaster regarding his original broadcast, of the person who made public a hitherto unpublished work for which the term of protection has expired, the rights of the publisher to remuneration in connection with the making of a reproduction for individual use of a work published by him, and of the creator of a database concerning that database.

The new Act regulates claims of the author or another copyright holder brought before the court in a specific country. The new law regulates the collective administration of copyright and related rights and the right to special remuneration in connection with the reproduction of the work for private use.

The term for copyright protection will be extended to 70 years after the death of the author. The term for economic rights related to the use of an audiovisual work shall be calculated from the death of the last surviving of the following persons: director, scriptwriter, author of the dialogue, and composer of the music (if specially composed for the audio-visual work).

The new Act governs legal relations that are established as of or after the date on which the Act comes into force. Legal relations established before this date, rights and obligations derived therefrom, and legal obligations from a breach of contract concluded before this date, shall be still governed by the old rules.

Except for economic rights (see *infra*), the previously applicable rules shall also be applied to all terms that started running before the date on which the new Act came into effect, as well as to terms concerning the application for rights still governed by the old provisions. The latter shall apply even where such terms start running after the date of the coming into force of the new Act.

The new Act also determines the term for economic rights even where the term started before the Act comes into effect. Where the term for economic rights has expired before the Act becomes applicable, the term is automatically renewed starting from the date on which the new rules come into effect and for the full period foreseen by the new Act. Reproductions of copyright-protected items, for which the term for intellectual property rights is being renewed and which were legitimately acquired before the new Act comes into effect, may be freely disseminated for another two years after the new Act becomes applicable.

The new Act extends protection to items that under the old rules were unprotected or enjoyed or a different kind of protection. For instance, the National Film Archive shall be deemed to be the producer of any Czech audiovisual recording of a work made public during the period from 1 January 1950 to 31 December 1964. The State Fund of the Czech Republic for the Support and Development of Czech Cinematography which, in compliance with special legal provisions, exercises the copyright to audiovisual recordings of audio-visual works made public during the period from 1 January 1965 to 31 December 1991, shall be deemed to be the producer of these works.

The provisions concerning protection of databases shall be applied as appropriate where the works are databases pursuant to the provisions of the new Act, provided that they were made not earlier than 15 years before the new Act comes into effect. ■

***ZÁKON ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s právem autorským a o zmìnì nìkterých zákonù (autorský zákon), 121/2000 Sb.* (Copyright Act), coming into effect on 1 December 2000.**

CZ-EN

DE – Amendment to Law on Comparative Advertising Passed

Dominik Mann
Institute of European Media Law (EMR)

On 9 June 2000 the *Bundestag* (Federal Parliament) amended parts of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - *UWG*) in order to standardise what is known as comparative advertising. Previously such advertising was not expressly regulated in Germany. In most cases, the courts used to classify comparative advertising as anti-competitive.

The amendment transposes European Parliament and Council Directive 97/55/EC of 6 October 1997 into German law. The Directive itself contains individual conditions that must be fulfilled if comparative advertising is to be considered legal. According to the new standards, which include the requirements set out in the Directive, comparisons may only be drawn between goods that meet the same need or fulfil the same purpose. Furthermore, only essential, objectively verifiable features or the price of goods may be compared, while the comparison must be made without disparagement. There must also be no risk of confusion between different products. Comparative advertising of pharmaceutical products is prohibited, except in specialist circles.

The *Bundesgerichtshof* (Federal Supreme Court) had already decided in 1998 that comparative advertising should be allowed if the Directive's requirements were met (see IRIS 1998-7: 6). Apart from liberalising competition law, the main aim of the amendment is to create legal clarity and certainty. ■

Bundestag **Plenary report 14/109 of 9 June 2000 concerning a resolution**
Bundestag **circular 14/3818 of 19 May 2000 concerning a recommendation for a resolution**
http://dip.bundestag.de/btd/14/034/1403418.pdf

DE

DE – Complaint against *Kirch/Murdoch* Merger

Alexander Scheuer
Institute of European Media Law (EMR)

In mid-June, the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten in der Bundesrepublik Deutschland* (Union of German public broadcasters – *ARD*) filed a complaint with the European Court of Justice concerning the European Commission's decision to authorise the partnership between the *Kirch* Group and Murdoch (*BSkyB*) in the German pay-TV market.

In the document submitted to the Court of First Instance as part of an individual nullity suit in accordance with Article 230.4 of the EC Treaty, the *ARD* questioned in particular whether the conditions imposed by the Commission were actually likely to prevent a dominant position from being created or strengthened.

Mention was made of *KirchPayTV*'s dominant positions in the German pay-TV market and in the interactive television services market, which was especially worrying (see IRIS 2000-4: 4). The members of the *ARD* believe that these markets are particularly threatened unless the decoders can be used by other service providers and the channels they operate. ■

ARD **Press release, 14 June 2000**

DE

DE – Kirch Group creates largest German TV company and forms Holding Company for Sports Agencies

Wolfgang Closs
Institute of European Media Law (EMR)

Media companies *ProSieben Media AG* and *SAT. 1*, which operate TV channels *ProSieben*, *Kabel 1*, *N24* and *SAT. 1*, are merging to form the largest German television company with a current market share of 24.5%. Between them, the two companies, which have a total of 3,000 employees, achieved a turnover of more than EUR 2 billion and pre-tax profits of around EUR 200 million in 1999. The main shareholder in the new company will be *KirchMedia*, which will hold 88.52% of the ordinary shares. The merger is still subject to the approval of the companies' own management bodies and the monopolies and media authorities.

At the same time, *KirchMedia* has put its shares in various sports rights agencies into a single holding company. Thus, *Kirch's* shares in the London-based *Prisma Sport & Media AG*, Swiss publicity rights marketing company *CWI Telesport & Marketing* and *ISPR*, have been brought under the same umbrella. Through the newly formed *KirchSport GmbH*, the three agencies will be responsible for marketing important national and international sports events such as the 2002 and 2006 football World Cups, the Wimbledon tennis tournament, and football matches, including internationals. ■

KirchMedia **press releases, 9 and 27 June 2000, available at: www.kirchmedia.de**

FR – Act Strengthening Presumption of Innocence and Victims' Rights

Act no. 2000-516 of 15 June 2000 strengthening the protection of the presumption of innocence and victims' rights was promulgated in the Official Gazette on 16 June. Described as one of the most ambitious reforms of criminal procedure since the Code of Criminal Procedure was introduced in 1958, the Act includes a chapter of provisions concerning communication (Chapter VIII).

Designed above all to protect the image and dignity of victims, the Act adds an Article 35d to the Act of 29 July 1881 on freedom of the press, making it a criminal offence to disseminate, without the victim's permission, a description of the circumstances of a crime or an offence which seriously infringes the victim's dignity. The Act also adds an Article 35b to the Press Act, prohibiting and making subject to a fine of FRF 100,000 the dissemination of the image of a person not implicated in a criminal procedure and who has not been convicted, but which gives the impression that the person is either in handcuffs or has been remanded in custody. In such cases, the person must lodge a complaint if any action is to be taken.

The Act also harmonises the period of right of reply in the audiovisual sector and the written press. This used to be eight days for the audiovisual sector, which consi-

Amélie Blocman
Légipresse

derably restricted the right of reply on radio and television. The Act extends the period to three months. For the written press, however, the period is reduced from one year to three months.

The Act also adds an Article 64 to the 1881 Act, making it possible to suspend the provisional enforcement of an emergency measure if the measure restricts the dissemination of information. Finally, prison sentences are abolished for the main press-related offences (false reporting, defamation, slander, libel against the President of the Republic, etc). However, they remain in place for racist offences (vindicating crimes, racist defamation and slander, disputing crimes against humanity, provoking racial hatred or discrimination). ■

Act no.2000-516 of 15 June 2000 strengthening the protection of the presumption of innocence and victims' rights, Official Gazette, 16 July 2000, p.9038

FR

IT – Draft Law on Copyright

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

On 21 June 2000 the *Camera dei Deputati* (Chambers of Deputies) approved the Governmental Draft Law no. C 4953bis *Nuove norme di tutela del diritto d'autorei* (Law on Copyright), and passed the text to the second chamber of the Parliament, the *Senato della Repubblica* (Senate) with no. S. 1496B for the final approval. The Draft modifies the Act *Protezione del diritto d'autore e di altri diritti concessi al suo esercizio* (Copyright Act no. 633/1941, in *Gazz. Uff.* 16 July 1941, no. 166), and specifies, as a general rule, that exclusive distribution rights apply to any long-distance infrastructure, such as telegraph, telephone, radio, television, satellite and cable transmission, even if codified. Copying from works stored in public libraries is free only if made for personal purposes, while pay copy services must not exceed 1/5 of each work. For each copy the authors must receive a minimum royalty, which will be collected by the *Società Italiana degli autori ed editori* (Italian Society for Authors and Editors – *SIAE*). The *SIAE* also has competence in regard to the copyright of audiovisual and cinematographic works, and is empowered, together with the *Autorità per le garanzie nelle comunicazioni* (Communications Authority), to carry out the necessary proceedings aimed at checking compliance with the rules laid down in the draft. Controls will also apply to radio and television broadcasting provided by any means. Any infringement is subject to penal sanctions, which may even consist in four years imprisonment. ■

Draft Law no. C. 4953bis, *Nuove norme di tutela del diritto d'autore* (Copyright Act), available from the Senate website at http://www.senato.it/leg/13/Bgt/Schede/Ddliter/12253.htm

IT

IT – Draft Law on Publishing and Editorial Products

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

On 8 June 2000, the *Commissione cultura, scienza e istruzione* (Commission for cultural affairs) of the *Camera dei Deputati* (Chambers of Deputies) started the analysis of Governmental Draft law no. C 6946 on *Nuove norme sull'editoria e sui prodotti editoriali* (Publishing and Editorial Products). About 20 years after the last intervention on this issue, this Draft Law modifies the Publishing Act n. 416/1981 (*Disciplina delle imprese editrici e provvidenze per l'editoria*, in *Gazz. Uff.* 12 January 1985, no. 10) in several areas. Article 1 updates the definition of editorial products to include both products printed on paper or in electronic format provided that they are intended to be distributed by any means or through radio and television broadcasting. Cinematographic and discographic products are excluded from this category. The other articles of the draft provide for financial contributions to publishing enterprises established in the European Union, but active in Italy, through a specific fund. For this reason the law, when adopted, will be notified to the European Commission under Council Regulation (EC) no. 659/1999, laying down detailed rules for the application of Article 93 of the EC Treaty. ■

Draft Law no. C. 6946, *Nuove norme sull'editoria e sui prodotti editoriali* (Publishing and Editorial Products), available from the Senate website at http://www.senato.it/leg/13/Bgt/Schede/Ddliter/11954.htm

IT

IT – Government Will Be Able to Reduce the Number of Licenses for UMTS

Marina Benassi
Van der Steenhoven, attorneys-at-law

The current Telecommunication Authority decided on 1 June 2000 that the Italian government would be allowed to cut the number of UMTS licenses that can be obtained (at present the actual number is five), when five or fewer bids are received. The Italian Authority, moreover, considered the competence of the government with regard to the possibility of postponing the deadline for applications. Following the allocation of the 5 UMTS licenses, the Authority will leave room for a second auction, to be reserved for "new entries". This second auction will oversee the adjudication of two extra portions of the spectrum. The run on the UMTS licenses is at present dominated by the four biggest telephone license owners: TIM, OMNITEL, WIND and BLUE. Quite a few Italian and foreign runners-up are listed among the possible applicants. The rules for assigning the five UMTS licenses will be published towards the end of July. The assignment of UMTS licenses is deemed to be one of the main topics in Europe for the coming months. This is also due to the importance of other areas covered by UMTS beside the field of "pure" telecommunication infrastructure; the future developments of UMTS technology will remain very relevant in multimedia and audio-visual services applied to mobile telephony. ■

***Deliberazione numero* 388/00/CONS, 21 June 2000, *"procedure per il rilascio delle licenze individuali per i sistemi di comunicazioni mobili di terza generazione e misure atte a garantire condizioni di effettiva concorrenza."* to be obtained from the Autorità per le Garanzie nelle Comunicazioni (Authority for Telecommunications Guarantees).**

IT

NL – Producer is not a Performing Artist under Neighbouring Rights Act

Peters and Co are producers and members of the *Genootschap van Onafhankelijke Geluidsproducenten* (a Dutch independent association of soundproducers – GONG). Peters and Co has requested *de Stichting ter Exploitatie van Naburige Rechten* (Foundation for the Exploitation of Neighbouring Rights – *SENA*) to distribute the *SENA*-revenues also to them and to other producers,

but *SENA* refuses. Peters and Gong want producers to be considered as performing artists according to Article 1 sub a of the *Wet op de Naburige Rechten* (the Dutch neighbouring rights act – *WNR*) or producers of phonograms in the sense of Article 1 sub d *WNR*.

The question arose: does the notion of performing artist exclusively stand for the person who performs a literary or an artistic work?

The Amsterdam District Court found that although a producer delivers an artistic and creative performance, this performance is always connected to a recording. Therefore, a producer does not perform, but produces or influences the recording of the performance and, hence, the producer differs from the performing artist of article 1 sub a *WNR*.

However, a producer is not a phonogram producer as mentioned in article 1 sub d of the *WNR*. The Amsterdam District Court stated that the primary task of a producer of phonograms is the assumption of financial responsibility for producing the first recording of the performance on a disk or soundcarrier. The fact that either the producer of phonograms himself produces or that he lets another producer produce the recording – at the phonogram's producer's commercial risk – makes no difference. Only when the producer and the record company, from a financial point of view, are more or less equally responsible for the first recording is the producer, together with the record company, to be considered as phonogram producer. The Amsterdam Court thus denies to sound-producers the status of neighbouring rightsholders. ■

Willem Heemskerk
Institute for Information Law, University of Amsterdam

***Rechtbank Amsterdam*, Peters and Co vs. SENA, decision of 14 June 2000**

NL

NL – Preliminary Questions on Equitable Remuneration

In 1986, the *Nederlandse Omroep Stichting* (the Netherlands Broadcasting Foundation – *NOS*) and the *Nederlandse Vereniging van Producenten en Importeurs van Beeld en Geluidsdragers* (the Dutch member of IFPI – the International Federation for the Phonographic Industry) reached an agreement obliging the *NOS* to pay annual remuneration for the use of the rights of performers and producers of phonograms.

On 1 July 1993, the *Wet op de Naburige Rechten* (the Dutch neighbouring rights act – *WNR*) came into force. Article 15 *WNR* appoints *Stichting ter Exploitatie van Naburige Rechten* (Foundation for the Exploitation of Neighbouring Rights – *SENA*) as the representative of the rightsholders. *SENA* is concerned with the collection and distribution of the equitable remuneration mentioned in Article 7 of the *WNR*.

NOS and *SENA* disagree upon how to define equitable remuneration. The Court of Appeal in The Hague, in an appeal against a decision of The Hague District Court, stated that the *WNR* does not provide guidance for the determination of equitable remuneration. Due to the fact that the Dutch legislator saw no need to change Article 7 *WNR* in light of Directive 92/100/EEC, the Court of Appeal concluded that the Directive was not intended to harmonise national laws with regard to determining equitable remuneration. Consequently, the defining equitable remuneration remained the prerogative of the Member States. However, *SENA* must take into consideration the criteria by which other Member States define equitable remuneration.

On further appeal, the Supreme Court has now adjourned the case and, in accordance with Article 234 EC-Treaty, submitted preliminary questions to the European Court of Justice. *Inter alia*, the Supreme Court wants to know whether the equitable remuneration mentioned in Article 8 paragraph 2 of the Directive is a "notion communautaire" and if so, according to which criteria it should be determined. And if not, are the Member States completely free to determine the amount of the equitable remuneration? ■

Willem Heemskerk
Institute for Information Law, University of Amsterdam

***Hoge Raad* (Dutch Supreme Court), 9 June 2000, *SENA Stichting ter Exploitatie van Naburige Rechten* (Foundation for the Exploitation of Neighbouring Rights) vs. *NOS Nederlandse Omroep Stichting* (Netherlands Broadcasting Foundation)**

NL

PT – Government Sets Up a Public Sector Holding Company

On 24 February 2000, the Presidency of the Council of Ministers approved legislation (as "decree-law") creating a holding company designed to manage the state's participation in the media sector. The newly-created holding company, *Portugal Global, SGPS, S.A.*, comprises the Public Service Television Company, *Radiotelevisão Portuguesa*, the Public Service Radio Company, *Radiodifusão Portuguesa* and the national news agency, *LUSA*.

Portugal Global, led by the former Budget minister, João Carlos Silva, has the immediate task of co-ordinating the restructuring processes of these three major national media companies. *Radiotelevisão Portuguesa*, in particular, has accumulated substantial debts over the years, and *Portugal Global* is supposed to develop a financial clearance programme.

The setting up of a holding company encompassing three distinct state-owned companies with very different traditions has been highly controversial. Some members of the government, namely the minister of Culture and the minister of Science, have openly demonstrated their opposition regarding the media strategy of the Council of Ministers. ■

Helena Sousa
Departamento de Ciências da Comunicação Universidade do Minho

***Comunicado do Conselho de Ministros de 24 de Fevereiro de 2000* (Communication of the Council of Ministers of 24 February 2000) available at http://www.pcm.gov.pt/comunicados/textos/20000224.htm**

PT

RU – Mass Media Act Amended through New Ban

On 24 May 2000 the State *Duma* (Parliament of the Russian Federation) adopted by an overwhelming majority (363 votes for and 13 against) an Act adding a new paragraph to Article 4 of the 1991 Mass Media Act. On 7 June the members of the *Sovjet Federazii* (Federal Council of the Russian Federation) unanimously approved the Act, which was signed by President Putin on 22 June 2000.

The new third paragraph of Article 4 of the Mass Media

Act prohibits the distribution of the following types of information via the mass media and computer networks: information concerning the discovery, manufacture or use of drugs and substances that affect the human psyche and details of where such drugs and substances can be bought. The dissemination of positive information on the advantages of using a specifically named drug or substance compared to others is also prohibited. These types of drugs and substances may only be advertised in the pharmaceutical and medical mass media.

Meanwhile, Article 16 of the Mass Media Act stipulates that the *Ministerstvo Rossijskoj Federazii po delam petschati, teleradioveschtschanija i sredstv massovich kommunikazij* (Press Ministry) may only apply to a court to close down a mass media company if the company has received two official warnings within a period of at least 12 months for breaches of Article 4 of the Mass Media Act. In this respect, the addition to Article 4 of the Act makes it easier for such companies to be closed down. This is arousing concern among the mass media, particularly with regard to the following ambiguous phrase in the amended Article 4: "The dissemination of other kinds of information, which is forbidden by other federal laws, is prohibited". In particular it is unclear whether this refers only to federal laws on drugs and thus prohibits only the distribution of other kinds of information about drugs, or whether it means all federal laws in the Russian Federation and therefore forbids the dissemination of virtually any kind of information in every conceivable field (eg information on the genuine imminent bankruptcy of a company prior to the official publication of the court decision declaring the company bankrupt). ■

Fjodor Kravtschenko,
Moscow Media Law and Policy Center

***Federal'nyj Zakon „O vnesenii dopolnenija v statju 4 Zakona Rossijskoj Federazii „O sredstvach massovoj informazii" v svjazi s prinjatijem Federal'nogo Zakona „O narkotitscheskich sredstvach i psichotropnych veschtschestvach"* (Act of the Russian Federation on the amendment to Article 4 of the Russian Federation Mass Media Act in connection with the Act on drugs and substances that affect the human psyche), published in the newspaper *Zakonodatel'stvo i praktika sredstv massovoj informazii* #6(70), June 2000 (available on the Internet at www.medialaw.ru).**

SK – Act on Access to Information Passed

On 17 May 2000, the Slovak Parliament adopted the Act on Free Access to Information. A group of Slovak parliament members had submitted the draft of this *Lex specialis* last year. It was aimed at transposing the main philosophy of the principle of the right to information – as enshrined in Chapter III/Political Rights, Article 26 of *Ústava Slovenskej republiky* (the Constitution of Slovakia) and in the Act No. 460/1992 Collection of Laws – into the relations of the public with state administrative and self-governmental bodies.

"Everyone has the right to seek information and to disseminate it freely. The right to information can be restricted only in cases set out in legislation" says the preamble of the new Act.

The state administration will be obliged to make public information on its activities so that the information becomes accessible to everyone interested.

The Act on Access to Information provides the right to access even documents relating to pending administrative procedures. The public discussion on this matter, in which powerful NGOs participated, persuaded deputies to adopt this provision without any limitations with regard to the appearance of documents and their suitability for publication. The Act is to enter into force in six months. ■

Eleonora Bobáková
Dpt. of International Relations and European Affairs Council of Slovakia for Radio and Television Broadcasting

National Council of Slovakia Press release, May 2000 Press Releases of Press Agency of Slovakia (TASR) and Slovak Information Press Agency (SITA), 17 May 2000

SK

US – Federal Communications Commission Approves Transfer of CBS to Viacom While It Proposes to Modify Media Ownership Rules

On 3 May 2000, the Federal Communications Commission (FCC) approved the transfer of control of the CBS Corporation to Viacom, Inc. The approval will result in the transfer of 38 television stations and 162 radio stations, as well as several translator and satellite stations.

In its order approving the transfer, the FCC granted the combined company twelve months to comply with the FCC's "Dual Network Rule." The Dual Network Rule prevents an entity from owning two or more television networks. Presently, CBS owns the CBS television network, one of the nation's four largest networks, while Viacom owns UPN, one of the nation's two smaller networks.

Additionally, the FCC gave the combined entity twelve months to meet the National Television Ownership Cap, which limits the aggregate number of households reached by a network's owned and operated television stations to 35%. The FCC noted that upon consummation of the merger, the audience reach of the combined entity would be 41%.

Furthermore, the FCC gave the combined entity six months to conform to the Radio-Television Cross-Ownership Rules in several cities where the rules would be violated as a result of the merger. Generally, these rules permit same-market joint ownership of radio and television facilities, but only in a manner proportionate to the number of independently-owned media voices in the market.

Shortly after the FCC released its order approving the merger, on 31 May, 2000, it announced that it would soon release a Notice of Proposed Rulemaking (NPRM) addressing many of the issues presented in the CBS/Viacom merger, including the Dual Network Rule, the National Television Ownership Cap and several rules impacting Local Radio Ownership Rules. The FCC announced that in its NPRM it would propose modifying the Dual Ownership Rule to permit ownership of one of the four major networks (CBS, ABC, NBC and Fox) and one of the smaller networks (UPN and WB). However, it also announced that it does not intend to modify the 35% National Television Ownership Cap. It remains unclear at this time how such proposed rule changes, if enacted, would impact on the CBS/Viacom merger or future network mergers. ■

Carl Wolf Billek
Communications Media Center New York Law School

Memorandum Opinion and Order, In the Matter of the Applications of Shareholders of CBS Corporation and Viacom, Inc., FCC 00-155 (May 3, 2000)

EN

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Tel.: +33 (0) 3 88 41 31 67
Fax: +33 (0) 3 88 41 27 05
E-mail: rudiger.dossow@coe.int
http://www.humanrights.coe.int/media

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