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INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Judgment on the Freedom of Expression in the Case Şener v. Turkey.

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Once again the European Court of Human Rights has held that the Turkish authorities have acted in breach of Article 10 (and Article 6) of the Convention, this time by convicting the owner and editor of the weekly review *Haberle Yorumda Gerçek* ("The Truth of News and Comments"). In 1994 Şener was sentenced to six months' imprisonment and a fine by the Istanbul State Security Court: an article published in the review was considered to be an offence under the Prevention of Terrorism Act 1991. In the proceedings before the European Court, the Turkish government asserted that the applicant was responsible for separatist propaganda since the article encouraged terrorist violence against the State. In the

government's opinion, the message that the article conveyed was that the only means of resolving the Kurdish problem was the maintenance of terrorist activities against the State.

In its judgment of 18 July 2000, the European Court of Human Rights (Third Section) has summarised the basic principles established in its case law concerning Article 10 of the Convention, referring in particular to the essential role of journalism and the media in ensuring the proper functioning of political democracy. The Court also underlined, in line with its case law, that there was little scope under Article 10 paragraph 2 for restrictions on political speech or on debate on matters of public interest. In contrast with the Turkish judicial authorities, the European Court was of the opinion that although the impugned article contained certain phrases that were aggressive in tone, the article as a whole did not glorify violence, nor did it incite people to hatred, revenge or armed resistance. On the contrary, the Strasbourg Court considered the article to be an intellectual analysis of the Kurdish problem calling for an end to the armed conflict. The Court was of the opinion that the domestic authorities failed to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective might be for them. The Court finally came to the conclusion that by convicting Şener the Turkish judicial authorities infringed Article 10 of the European Convention on Human Rights.

The Court also reached the conclusion that because of the presence of a military judge on the bench of the Istanbul State Security Court, Şener was denied a fair trial, in breach of Article 6 § 1 of the Convention.

The Turkish judge Gölcüklü expressed a dissenting opinion and argued that in the present case he did not find any violation imputable to the respondent State. ■

Judgment by the European Court of Human Rights, Case Şener v. Turkey, application no. 26680/95 of 18 July
Available on the ECHR's website at <http://www.echr.coe.int>

EN

The objective of IRIS is to publish information on all legal and law related policy developments that are relevant to the European audiovisual sector. Despite our efforts to ensure the accuracy of the content of IRIS, the ultimate responsibility for the truthfulness of the facts on which we report is with the authors of the articles. Any opinions expressed in the articles are personal and should in no way be interpreted as to represent the views of any organizations participating in its editorial board.

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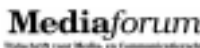
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EUROPEAN UNION

European Court of Justice: Advocate General Opts For Annulment of EC Directive on the Advertising and Sponsorship of Tobacco Products

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On 15 June 2000, Advocate General Fennelly delivered his Opinion on joined cases C-376/98 (Germany v. European Parliament and Council) and C-74/99 (The Queen v. Secretary of State for Health and Others ex parte: Imperial Tobacco Ltd. and Others). Both cases concern the validity of E.P. and Council Directive 98/43/EC, of 6 July 1998, on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products (OJ 1998 L 213, p. 9; hereinafter: the "Directive"). In the first case the applicant is the German State; in the second case, the applicants are some tobacco manufacturers, which brought proceedings in the United Kingdom in order to prevent the implementation of the Directive into domestic law.

Advocate General Fennelly Opinion of 15 June 2000, on joined Cases C-376/98 (Germany v. European Parliament and Council) and C-74/99 (The Queen v. Secretary of State for Health and Others ex parte: Imperial Tobacco Ltd. and Others).

EN

European Commission: Transparency Directive in Force

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On 18 August 2000, Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings entered into force. The Directive, based on Article 86.3 of the EC Treaty, aims to promote transparency with regard to the costs and revenues of undertakings entrusted by the Member States with the operation of services in the general economic interest (see also IRIS 2000-2: 3).

Public service broadcasters are particularly affected by the provision that accounts relating to activities carried out in the general economic interest should be kept separately from those relating to other activities (Article

Directive 2000/52/EC of 26 July 2000 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings

DE-EN-FR

European Commission Adopts Draft Competition Directive Consolidating Existing Directives on Competition in the Telecommunications Sector

On 12 July 2000, the European Commission put forward a new Competition Directive that will replace, by a single text, all relevant provisions of the existing liberalisation Directives in the telecommunications markets. The Competition Directive consolidates, without imposing any new obligation on Member States, Directive 90/388/EEC – as amended by Directives 94/46/EC, 95/51/EC, 96/2/EC, 96/19/EC and 1999/64/EC – which set principles for the liberalisation of the telecommuni-

The Directive provides for an almost total ban on the advertising of tobacco products, and it applies to any means of dissemination of advertising messages (radio, magazines and newspapers, information society services; a general prohibition of advertising on television is already provided in the "Television Without Frontiers" Directive, Article 13). It was adopted pursuant to Articles 57 (now 47), par. 2 and 100A (now 95) of the EC Treaty, concerning the abolition of restrictions to the free movement of services, respectively the approximation of national rules in order to foster the functioning of the internal market.

The Advocate General followed the suggestion of the applicants, which argued that the Community was not competent to adopt the Directive since the chosen legal basis does not confer a general power to harmonise any national rules unless there is serious impact on the functioning of the internal market. According to the Advocate General, taking another view would create the risk of transferring general regulatory competence to the Community, thus violating the principle governing the split of competencies between the Community and the Member States.

The Attorney General notes that the only effect that the ban of tobacco advertising and sponsorship has on the internal market is to prohibit trade in goods and services to which the Directive relates. No benefit for the internal market can result from this comprehensive ban, since no removal of barriers to trade results from the Directive nor does it equalise the conditions of competition. Thus, according to the Attorney General, having regard to the internal market objectives invoked by the Community legislator, the latter was not competent to adopt the Directive.

The Decision of the Court is expected by the end of the year. ■

1.2). However, according to Article 4.2 (c), this does not apply if the State aid in any form whatsoever, including any grant, support or compensation received was fixed for an appropriate period following an open, transparent and non-discriminatory procedure.

In view of this exception, particularly in Germany, reference was made to the process of determining the financial needs of broadcasters, which is to serve as the basis for fixing the licence fee. According to the provisions of the *Rundfunkstaatsvertrag* (Agreement between Federal States on Broadcasting) and the *Rundfunkfinanzierungsstaatsvertrag* (Agreement between Federal States on the Financing of Broadcasting), this is the responsibility of the independent commission appointed to review the financial requirements of the broadcasting corporations (KEF). The KEF, after considering the application for funding submitted by each broadcaster and having verified their expenditure and income, publishes a report on this matter every two years. ■

cations sector. Only those provisions that are still necessary for attaining the objective of full competition in the telecommunications sector will be maintained.

In its 1999 Communications Review, the Commission announced the adoption of a new legislative framework to bring more competition into the local communications market and to introduce greater flexibility. The purpose of the Competition Directive is to recall the obligation imposed on Member States to abolish exclusive and special rights in the field of telecommunications, which derives directly from the Treaty itself. In this respect, the Directive merely interprets and clarifies the scope of the Treaty's fundamental provisions.

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Provisions which have become obsolete have been deleted, certain definitions have been amended in order to reflect the latest technological developments and the wording of certain provisions has been clarified in order to facilitate their application, taking into account the package of six new harmonisation Directives proposed by the Commission on the same day (Proposal for a Directive of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities, COM(2000) 384; Pro-

Commission adopts a draft Competition Directive consolidating existing Directives on competition in the telecommunications markets, 12 July 2000, IP/00/766

EN

European Parliament: Resolution on Community Audiovisual Policy in the Digital Age

On 6 August, the European Parliament adopted a Resolution on the Communication from the European Commission "Principles and guidelines for the Community's audiovisual policy in the digital age" (see IRIS 2000-1: 5).

The Resolution endorses in general terms the Commission's guidelines. As to the revision of the "Television without Frontiers" Directive, the European Parliament considers that it should be implemented in the course of 2002. The revised Directive should take a more incisive and effective approach as regards independent production and the circulation of European works.

The Commission shall use the revision to identify a core of key principles for all audiovisual services, irrespective of the method of transmission to users. Alternatively, it may draft directives laying down general rules for each type of audiovisual service, irrespective of transmission or broadcasting technique. Rules governing the new digital services should reaffirm the specific nature of audiovisual services in comparison with all the services of the Information Society.

The principle of separate legislation for transmission and content should be safeguarded. Right of access to

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Report on the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions 'Principles and guidelines for the Community's audiovisual policy in the digital age' (COM(1999) 657 - C5-0144/2000 - 2000/2087(COS)), Final A5-0209/2000, of 18 July 2000. Available in all EU languages at:

http://www2.europarl.eu.int/omk/OM-Europarl?L=EN&PROG=REPORT&PUBREF=-//EP//TEXT+REPORT+A5-2000-0209+0+NOT+SGML+V0//EN&LEVEL=0&SAME_LEVEL=1

EN-DE-FR

NATIONAL

BROADCASTING

AT - Legal Basis of Commercial Broadcasting Authority Unconstitutional

After examining, on its own initiative, Article 13 of the *Regionalradiogesetz* (Regional Radio Act - RRG), which established the *Privatrundfunkbehörde* (Commercial

positional for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, COM(2000) 385; Proposal for a Directive of the European Parliament and of the Council on the authorisation of electronic communications networks and services, COM(2000) 386; Proposal for a Directive of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, COM(2000) 392; Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, COM(2000) 393; Proposal for a Regulation of the European Parliament and of the Council on unbundled access to the local loop, COM(2000) 394).

The draft will be submitted for public consultation, and the final adoption by the Commission itself (under Article 86 of the EC Treaty) will take place at a later stage, in order to maintain the link with the above-mentioned package of harmonisation proposals. ■

networks should be guaranteed in accordance with the criteria of universality and affordability, and access to their content in accordance with criteria of universality, affordability, non-discrimination and transparency. Regulation must always be minimal, clear, simple, predictable and consistent, and applied only where competition is inadequate.

The European Parliament calls on the Commission, the Member States, and all major operators in the audiovisual sector to step up experiments with systems for filtering programmes and other methods of parental control for the protection of minors and, if applicable, to create the appropriate legal framework in the Member States. Self-regulation for audiovisual content should consist of a set of principles, preferably accompanied by shared codes of conduct, laid down by the relevant national and Community authorities.

Concerning competition and the audiovisual market, the European Parliament suggests assessing whether it would be advisable to put forward appropriate initiatives on media ownership in the new digital environment, with particular reference to vertical mergers. It especially calls on the Commission to promote the creation of a European body to safeguard transparency in the audiovisual and multimedia market and to counter market concentrations which may pose a threat to pluralism.

The European Parliament considers of crucial importance the role of public service broadcasting, which should be provided free-to-air. The Resolution closes with a list of initiatives concerning the audiovisual and related sectors as well as remarks on the international aspects of the audiovisual policy, especially stressing the necessity of defending Europe's cultural diversity and pluralism. ■

regional and local radio licences were awarded.

The VfGH deemed the establishment of the *Privatrundfunkbehörde* as an independent collegiate tribunal with judicial powers to be unconstitutional because (a) the Constitution only allowed such bodies to be founded in exceptional circumstances and (b) special dispensation was required to establish such a body in view of the fact that it was no longer under the authority of the supreme governing organs or of Parliament itself. In the Constitutional Court's opinion, the administrative duties that

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Decision of the *Verfassungsgerichtshof* (Constitutional Court), 29 June 2000, file no. G 175-266/99-17 (<http://www.vfgh.gv.at/vfgh/presse/G175-17-99.pdf>).

DE

BE – RTBF Pulls Out of Canal+ Belgique

The RTBF has been a shareholder in *Canal+ Belgique* ever since its launch in 1989. Indeed it was a requirement that all pay television companies were to allow the RTBF (either directly or through one of its subsidiaries) a capital holding of at least 26% or a blocking minority holding.

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Janson
Baugniet,
lawyers

At the end of 1999 it was announced that the Defi Group, one of the other Belgian shareholders in *Canal+ Belgique*, had sold its holding in the channel. The RTBF was then tempted to sell its holding at a comparable price in order to make extremely useful capital gains.

In May 2000, *Canal+ Benelux BV* acquired the 333 163 shares in *Canal+ Belgique* held by the RTBF and the

Decree of 5 July 2000, published in the *Moniteur belge* (official gazette) dated 25 July 2000: <http://www.just.fgov.be/cgi/welcome.pl>

FR

BE – Demand for a European Ban on TV-Advertising Immediately Before and After Children's Programmes

Since 1991 the Flemish Broadcasting legislation, with some modifications, stipulates a ban on advertising immediately before and after children's programmes. In a time period of 5 minutes before and after programmes targeting children under 12, no advertising or sponsorship messages are allowed. For many years the commercial broadcasting organisation *VTM* and its second channel *Kanaal 2* have been opposed to this provision of the Broadcasting Decree and have sought the abrogation of the 5-minute rule. A decree proposed in the Flemish Par-

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Resolute betreffende een Europese regelving in verband met reclame rond kinderprogramma's (Resolution of 7 June 2000 concerning a European regulation with regard to TV-advertising before and after children's programmes), *Parl. St. Vlaams Parlement, 1999-2000*, nr. 92/1-5 and nr. 254/1-5, <http://www.vlaamsparlement.be>

NL

CH – Adoption of a List of Major Events for Free Broadcasting on Television

The Federal Department of Environment, Transport, Energy and Communications (DETEC) has adopted a list of events of major importance which must remain freely accessible on television channels and therefore cannot be broadcast exclusively on pay channels in Switzerland.

the *Privatrundfunkbehörde* carried out, i.e. the award of broadcasting licences, did not justify its being given such a status.

In addition, the VfGH considered the provision that decisions of the *Privatrundfunkbehörde* (until the law was amended on 1 August 1999) were not subject to the higher authority of the *Verwaltungsgerichtshof* (Administrative Court) also to be unconstitutional.

Although since August 1999 appeals against decisions of the *Privatrundfunkbehörde* can be lodged with the Administrative Court, its status as an independent collegiate tribunal with judicial powers has so far remained unchanged. For the time being, therefore, doubts remain concerning the constitutionality of the *Privatrundfunkbehörde*.

The VfGH is expected to overturn the disputed licensing decisions at its October session. However, the legislature has meanwhile made provision in the *RRG* that, if licences are revoked, existing licence-holders should be able, under less stringent conditions, to obtain temporary broadcasting permits. ■

698 441 shares in the company held by the *RMB* (an advertising body owned by the RTBF) for an estimated total price of BEF 832 000 000 (almost EUR 21 000 000). In order to allow this sale to go through without raising any difficulties for Canal+, Article 19(1)(4) of the Decree of 17 July 1987 on audiovisual matters, which required the RTBF to have a holding in pay-television channels, was repealed by a decree of 5 July 2000 which came into force on 25 July 2000.

The money still has to be allocated. Claiming its status as an autonomous undertaking, the RTBF would like to have the use of these resources for itself. However, arguing that it is actually paying the money, the government has already announced that part of the amount is to be allocated to offsetting the deficit of the French-speaking Community in the form of a reduction of the allocation to the RTBF on renewing its management contract, which is scheduled for 2001. ■

liament some months ago, however, went in the opposite direction and suggested changing the time period of the ban from 5 minutes to 15 minutes in order to have a more efficient rule preventing TV-commercials targeting children. After several hearings in Parliament and taking into account the advice of the *Vlaamse Mediaraad* (Flemish Media Council) and the advice of the *Kinderrechtencommissariaat* (Commissariat for Children's Rights), the Flemish Parliament has now decided not to modify the 5-minute rule. A more severe ban would be too disadvantageous for Flemish broadcasters. At the same time Parliament has requested the Flemish Government to take the necessary steps towards harmonizing European legislation on this topic and more precisely to promote the 5-minute rule on the European level. The Resolution also refers to a Swedish initiative concerning a European ban on TV-commercials just before and after children's programmes. ■

The list has been drawn up by the Federal Office for Communication (OFCOM) after consulting some 70 sport and media associations, including the Swiss Olympic Association.

The list approved by the DETEC covers sports events only, and is broadly similar to the lists adopted by other Member States of the Council of Europe. It includes the Olympic Games, the World Cup and the European Cup for football, the *Tour de Suisse* (cycling), the European and

world athletics championships, the Athletissima meeting in Lausanne, the Davis Cup and the Fed Cup (tennis), the World Cup for downhill skiing in Switzerland, and the world downhill skiing championships.

The rules concerning events of major importance are based on Article 20a of the Federal Order on Radio and Television (ORTV). According to this provision, in force since 1 August 1999, television broadcasters which have

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Press release from the Federal Department of Environment, Transport, Energy and Communications on 21 August 2000 and list of events of major importance for society, General Secretariat of the DETEC, Parliament Building Nord, Kochergasse 10, 3003 Bern - tel.: +41 31 322 55 11, fax: +41 31 311 95 76 - <http://www.uvek.admin.ch>

FR-DE

DE - Media Authority Bans Right-Wing Extremist Programmes

On 3 July 2000, a user of the *Offener Kanal Berlin* (Berlin Open Channel) was permanently banned from using the channel by the Media Council of the Berlin-Brandenburg Media Authority (MABB) after repeatedly using it to disseminate right-wing extremist material.

The person concerned was responsible for *Radio Germania*, which had broadcast a total of fourteen times on the *Offener Kanal Berlin* since 1996. He had been banned from the channel for one year in 1997 for disseminating material liable to corrupt young people. The Media Council based its decision to ban the broadcaster permanently on Section 10.1.1 of the *OK-Satzung* (Regulations on Access to the *Offener Kanal Berlin*). Under this Article, users can be banned temporarily or permanently from the *Offener Kanal Berlin* if they breach their legal obligations. The permanent ban resulted from a programme broadcast on 29 October 1999. The Media Council considered the programme to have breached

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<http://www.mabb.de/aktuell/ok-ausschluss.html>

DE

DE - Germany: Media Authority Complains about Surreptitious Advertising in *Big Brother*

The Hessen state authority for commercial broadcasting (*LPR Hessen*), which is responsible for monitoring the programmes of private broadcaster *RTL-2*, has complained that an episode of the TV show *Big Brother* contained illegal surreptitious advertising.

On 16 May 2000, an episode of the controversial TV programme *Big Brother*, in which several volunteers are confined in a building cut off from the outside world and monitored round the clock by cameras and microphones (see IRIS 2000-3: 7), showed these people building a model railway. The manufacturer's name, which appeared in unusually large characters on each of the model railway's freight wagons, was shown in close-up on several occasions.

LPR Hessen had to verify whether the depiction of the model railway constituted illegal surreptitious adverti-

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<http://www.lpr-hessen.de/pmlpr/23.08.00.htm>

DE

signed an exclusive contract to broadcast an event of major importance for society, thereby depriving a considerable proportion of the public of the possibility of following the event either live or recorded, must pass the transmission signal on to one or more broadcasters under suitable conditions to enable them to make the event accessible to the public. Article 20a of the Federal Order also stipulates that the DETEC is to draw up a list of national and international events; the list is to be updated each year and communicated to the Standing Committee of the Council of Europe on Transfrontier Television.

The principle and methods for drawing up of a list of events of major importance for society are defined in Article 10 of the Protocol of 1 October 1998 amending the European Convention on Transfrontier Television of 5 May 1989. The Protocol was approved by the Swiss Parliament on 23 June 2000 by means of an Order subject to optional referendum. At the end of the referendum period, the Federal Council will be authorised to ratify the Protocol. ■

criminal law as well as the programming principles set out in the *Medienstaatsvertrag* (Agreement between Federal States on Media- *MStV*), which governed co-operation between Berlin and Brandenburg in the broadcasting field.

The Media Council explained that the programme broadcast on 29 October 1999 contained remarks concerning the late President of the German Central Jewish Council that infringed Section 189 of the *Strafgesetzbuch* (Criminal Code), concerning "disparagement of the memory of deceased persons". Another programme dealing with the events of 9 November 1938 (*Kristallnacht*) was deemed slanderous under the terms of Section 185 of the Criminal Code. At the same time, the programme breached Section 3.3.1 of the *Rundfunkstaatsvertrag* (Agreement between Federal States on Broadcasting), since it contained material from a book banned in accordance with Section 1 of the *Gesetz über die Verbreitung jugendgefährdender Schriften und Medieninhalte* (Act on the Dissemination of Literature and Media Content Liable to Corrupt Young People). Moreover, the "constantly aggressive anti-Semitic programming of *Radio Germania*" breached the programming principles set out in Section 47.1 of the *MStV*, which applied to *Offener Kanal* users as well as commercial broadcasters. ■

sing under the terms of Section 7.6 in connection with Section 2.2.6 of the *Rundfunkstaatsvertrag* (Agreement between Federal States on Broadcasting - *RfStV*). The Agreement states that surreptitious advertising takes place if the manufacturer's trademark or name is shown "deliberately by the broadcaster for advertising purposes" and can mislead the general public as to the real purpose. In individual cases, this is to be judged according to certain indicators such as the intensity of the presentation and whether the name or trademark is shown on its own. *LPR Hessen* highlighted the fact that there were repeated lengthy close-ups of the product and the brand name, while the manufacturer's name appeared in "clearly oversized" characters. This went beyond a simple portrayal of the actual scene. The media authority concluded that the intensity of the presentation indicated that the depiction of the model railway was a deliberate form of advertising.

LPR Hessen had referred the case to the regional media authorities' advertising office, which had recommended that *LPR Hessen* take action itself. The breach was therefore brought to the attention of *RTL-2*, which was asked to refrain from repeating such practices. ■

DK – Football Match on TVDanmark 1

A press release published on 30 August 2000, by the Ministry of Culture has announced that problems have risen concerning the broadcast of a football match between Denmark and Iceland on 2 September 2000.

Article 3a of Directive 97/36/EC amending Council Directive 89/552/EEC on the pursuit of television broadcasting activities provides for free access for the public to TV broadcasting of events important to society. A substantial proportion of the public in a Member State may not be deprived of the possibility of following such events as are regarded by that Member State as being of

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Business School

The press releases of the Ministry of Culture are available at: http://www.kum.dk/dk/con-2_STD_1702.htm respectively http://www.kum.dk/dk/con-2_STD_1696.htm
The Danish Executive Order no. 809 of 19 November 1998 on the exploitation of TV-rights in events of major interest to the public is available at: http://www.kum.dk/dk/con-37_STD_614.htm

FR – Act Reforming the Audiovisual Sector Adopted At Last

After three years of preparation and any amount of being passed back and forth in Parliament, the Act reforming the audiovisual sector, aimed in particular at strengthening the public sector and opening the way for the development of terrestrially-broadcast digital television in France, was adopted on 29 June. Apart from a few minor points, most of the text was declared to be in compliance with the Constitution by the Constitutional Council on 27 July.

Firstly, the Act restructures public-sector audiovisual communication, making considerable amendments to the Act of 30 September 1986. The central feature is the creation of a holding company called *France Télévision*, responsible for defining strategic orientations and promoting the policies of three national programme companies – *France 2*, *France 3*, and *La Cinquième*, of which it holds all the capital. The term of office of the Chairman of the Board of Directors of *France Télévision* (who is also chairman of the boards of directors of *France 2*, *France 3* and *La Cinquième*) is extended from three to five years. On 22 August the *Conseil supérieur de l'audiovisuel* (CSA) elected Marc Tessier, the previous Chairman of *France 2* and *France 3*, as Chairman of the new holding company for a period of five years. The Act reduces the amount of time devoted to advertising on public-sector television to eight minutes per hour from 1 January 2001. The amount of advertising had already been reduced from 12 to 10 minutes per hour in the budget for 2000, starting on 1 January 2000. A further aim of the new Act is to perpetuate the financing of the public sector, with multi-annual contracts setting out aims and means between the State and *France Télévision* and the full repayment of waived licence fees.

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Act no. 2000-719 of 1 August 2000 amending Act no. 86-1067 of 30 September 1986 on the freedom of communication, published in the *Journal Officiel* (official gazette) dated 2 August 2000, p. 11903 et seq.
Constitutional Council, Decision no. 2000-433 DC of 27 July 2000, published in the *Journal Officiel* (official gazette) dated 2 August 2000, p. 11922 et seq.

FR

major importance for society. The commercial TV channel *TVDanmark1* has defied this rule by refusing to allow the Danish public service stations *DR* (*Danmarks Radio*) and *TV2* to purchase broadcasting rights. These stations are able to cover the whole country. *TVDanmark1* reaches only about 55% of the population whereas *Bekendtgørelse om udnyttelse af tv-retigheder til begivenheder af væsentlig samfundsmæssig interesse* (the Danish Executive Order no. 809 of 19 November 1998 on the exploitation of tv-rights to events of major interest to the public) provides for access to these events for 90% of the population, cf. section 4 no1.

TVDanmark1 is established in England and its broadcasting activities are subject to the law of England where the relevant rules of the TV Directive are implemented. The English Independent Television Commission (ITC) has supported the Danish implementation of the TV Directive by prohibiting *TVDanmark1* from broadcasting the match unless the offer of purchase has been given to the Danish *DR* and *TV2*. However, the decision of the ITC has been appealed to the High Court in London which - after a very brief delay - issued on Friday 1 September 2000 an interim declaration granting *TVDanmark1* the sole right to broadcast the match without further conditions. The High Court shall make its final decision in early September. ■

The Act of 1 August also defines the legal framework within which terrestrially-broadcast digital television is to be developed. Six multiplexes (block of six channels on the same frequency) are to be created nationally and the allocation of digital frequencies should give priority to the public service at the same time as opening the market to new nationwide operators and allowing television companies run by associations to apply for these frequencies. The Constitutional Council was asked to consider the matter, and decided that there was a "strict framework" for the priority access for the public-service sector to terrestrially-broadcast digital television. The CSA has been instructed to issue authorisations valid for ten years; no single operator may be allocated more than five channels, no single person may hold more than 49% of any one digital channel, and the "existing" channels will be automatically entitled to use a frequency for terrestrially-broadcast digital television to show their programmes in simulcast.

The Act redefines and extends the duties of the CSA, which is in particular responsible for ensuring compliance with the "Television without Frontiers" Directive as regards the protection of minors and public access to "events of major importance", the list of which is to be drawn up shortly by decree. The CSA's operating procedures for guaranteeing the diversity and independence of information (particularly when examining applications and issuing authorisations) have also been redefined.

Because of the scope of the reform, it is not possible to present all the new provisions introduced by the Act in full here. It should nevertheless be mentioned that distribution by satellite is to be subject to a system of authorisation, there are to be quotas for broadcasting French-language songs by radio, *TPS* will no longer have exclusivity for broadcasting public-sector television, with all satellites having to carry the public-sector channels, and there will be new provisions concerning the status and liability of Internet intermediaries. (see report in this IRIS). ■

GB – Regulator Orders Re-Timing of Main News Bulletin

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The Independent Television Commission, which regulates private broadcasting in the UK, has determined that the Channel 3 (ITV) companies have not complied with conditions set when it allowed them to move its main

Independent Television Commission, "ITC Direction to ITV on Rescheduling Nightly News", 27 July 2000, available at http://www.itc.org.uk/documents/upl_277.doc
For background see: Independent Television Commission, "ITC Calls for Proposals from ITV to Arrest Decline in News Audiences", ITC Press Release 33/00, 25 April 2000, available at: <http://www.itc.org.uk/> and Culture, Media and Sport Committee, "Whatever Happened to News At Ten?", HC 289, 1999-2000, available at: <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcmcomeds/289/28902.htm>

NL – Concession Granted to the Netherlands Broadcasting Corporation

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On 31 March 2000, the *Concessiewet* (Concession Act) became effective. The Concession Act contains a description of the tasks assigned to public broadcasting and new rules concerning the granting of concessions and recognition of broadcasting associations aimed at facilitating the fulfilment of these tasks. The *Mediawet* (Media Act), as amended by the Concession Act, allows only one concession to be granted. In accordance with Article IV of the Concession Act and Article 30a of the *Mediawet* a concession for a period of ten years has been granted by Royal decree dated 17 August 2000 to the *Nederlandse Omroep Stichting* (the Netherlands Broadcasting Corporation – NOS) for the realisation of the assignment

Staatscourant 30 August 2000, nr. 167/ pag. 13
<http://www.omroep.nl/cbp/algm.html>
<http://www.omroep.nl/cbp/print.html>
<http://www.minocw.nl/pers2000/00108.htm>

NL

PL – Closer Co-operation with ARTE

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Polish public television corporation *Telewizja Polska SA* (TVP) is strengthening its co-operation with the European cultural TV channel ARTE.

The basic guidelines for co-operation between TVP and ARTE were originally established by an agreement signed in 1996. TVP thus became the first public service broadcaster in Central and Eastern Europe to reach such an agreement with the Franco-German channel. ARTE (*Asso-*

ciation Relative à la Télévision Européenne) was founded in 1991 as a consortium of European economic interests (GEIE) by its two equal shareholders ARTE Deutschland TV GmbH and ARTE France.

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SK – Act on Radio and Television Broadcasting Amended

The most recent amendment of Act No. 468/1991 o *prevádzkovaní rozhlasového a televízneho vysielania* (Act on Pursuing of Radio and Television Broadcasting) has been published on 20 June 2000. The adoption of this amendment comes only three months before the expected passing of a completely new Act on broadcasting and retransmission. The *Zakon 227/2000 ktorým sa mení zákon 468/1991 v znení neskorších predpisov a zákon*

č. 81/1966 v znení neskorších predpisov (Act No. 227/2000 to amend the Act No. 468/1991 and Act No. 81/1966 on Periodical Press) is the thirteenth modification of the Radio and Television Broadcasting Act and deals with a provision of § 5, letter b that states:

"§ 5 Operators are obliged:
(...) b) To ensure that broadcast programmes do not promote war and do not describe cruel or other inhuman actions in such a way as to downplay, excuse or approve them;

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Radio and
Television
Broadcasting

And not to promote or to describe the abuse of drugs and any psychotropic matters in a way that is a one-sided down-playing, excusing or approval of this behaviour."

Zákon 227/2000 ktorým sa mení zákon 468/1991 v znení neskorších predpisov a zákon č. 81/1996 v znení neskorších predpisov (Act of 20 June 2000 to amend the Act No. 468/1991 on Pursuing of Radio and Television Broadcasting as amended and completes the Act No. 81/1966 of Coll. on Periodical Press and Other Means of Mass Communication as amended. Published in Collection of Laws, Sect. 98/2000 p. 2868), in force since 1 August 2000.

SK

FILM

DE - SAT.1 Increases Involvement with Film Industry

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Private TV broadcaster *SAT.1* and the *Länder* (State) of Bremen and Lower Saxony are planning to step up their co-operation in the field of film production.

Under an agreement that was largely negotiated at the beginning of August, three films are to be produced over the next three years at an overall cost of up to DEM 9 mil-

Moreover, due to a change of section 20, paragraph 5 of the Act related to sanctions, the amount of the possible fine has been doubled: The maximum fine of 5.000 000 SKK has been increased to the 10.000 000 SKK (1 EURO = 42,58 SKK on 15 August 2000).

This change might be related to the massive reaction of the public, professionals and politicians to a recent television programme. An interview with a show business celebrity dealt with the positive influence of drugs on the creativity of the artist.

An identical provision has already become part of the draft of the new Act on broadcasting and retransmission, in Part V. § 19, letter d. Currently this Act is in second reading in the Slovak parliament. The enactment of this new Act is expected for 1 October 2000. ■

FI - Only Films for Minors to Be Censored as of 1 January 2001

Marina Österlund-Karinkanta
Finnish
Broadcasting
Company YLE,
EU and
Media Unit

On 25 August 2000, the Act on Classification of Audiovisual Programmes, the Act on the Finnish Board of Film Classification, the Act on the amendment of the Penal Code (§ 19) and the Act on the amendment of the Act on Television- and Radio Operations (*Laki kuvaohjelmien tarkastamisesta, laki Valtion elokuvataarkastamosta, laki rikoslain 17 luvun muuttamisesta ja laki televiisio- ja radiotoiminnasta annetun lain 19 pykälän muuttamisesta*) were confirmed and will enter into force on 1 January 2001. The acts replace the Act of Film Classification (299/1965), the Act Relating to the Inspection of Video and other Audiovisual Programmes (697/1987) and the Act on the Execution of Film Classification (300/1965).

As of 1 January 2001, censorship of audiovisual programmes for adults is abolished and preventive audiovisual programme classification concerns only programmes for persons under the age of 18. Under the new law, a programme should not be accepted for viewing for persons under 18 if it is likely to disturb the psychological development of a child due to the programme's violent, sexual or shocking content. The new age categories are: suitable for all, restricted from persons under 7, 11

or 15. Without classification the rating will be 18. Programmes exempted from examination are: advertisements, music, sport, small children's (under-7) programmes including cartoons for them, showings in the film archive, in schools, universities, libraries etc. Also, video and computer games are exempted as before. However, these programmes must be reported to the Finnish Board of Film Classification and marked with age recommendations.

An investigation into whether and how regional laws on film subsidies may need to be adjusted as a result of this agreement is currently under way in Lower Saxony. ■

Films shown on television are also exempted from the examination set out by this law. Rulings concerning television broadcasts are found in the Act on Television and Radio Operations (744/1998), which states that a television broadcaster shall ensure that programmes which are likely to cause detriment to the development of children due to their sexual content or violent nature are transmitted at times when children do not usually watch television. This list now also includes programmes that are likely to be shocking. The TV companies have agreed on a joint national framework for self-regulation where programmes are divided into suitable or unsuitable for children under 16. Programmes that are unsuitable for children must be broadcast after 9 p.m. and be marked with the symbol F in the television schedules in newspapers and on teletext. The television announcer must also mention if a programme is not suitable for children.

When Parliament approved the acts it also issued the following statement: Parliament urges the government to intensify measures at EU level to prevent Internet distribution of material that is harmful to minors. ■

Act No. 775/2000, 776/2000, 777/2000 and 778/2000 of 25 August 2000.
The Acts are available in Finnish and Swedish at <http://www.edita.fi> and will be made available in English at <http://www.vet.fi>

FI-SV

FR - Monopolies Board Pronouncement on the UGC Season Ticket

On 29 March the company *UGC* put on sale an annual season ticket giving unlimited access, for FRF 98 a month, to the 350 cinemas in its network. The launch of the card produced an immediate reaction from the other distribution networks (*MK2, Cinévog SARL, Studio du Dragon* and *Les Cinq Parnassiens*). This led the Minister

for Culture and Communication to call for sales of the *UGC* card to stop, as of 9 May, because of the negative opinion expressed by the cinema mediator. At the same time the other networks appealed to the Monopolies Board, calling for protective measures. The complainants said that the unlimited *UGC* card was being issued by a company in a dominant position in the Paris market for operating cinemas, and constituted an offer to provide

services subject to a price and conditions which would have the effect of eliminating other undertakings which were not in a position to make a similar offer.

In its decision published on 25 July, the Monopolies Board stressed that the fact that a company was attempting to gain the loyalty of its clientele was not in itself a breach of competition legislation. It was only if this took the form of counter-competitive practices that it could be dealt with under competition law. Moreover, many cinema managers, including the complainants, already used season tickets as a means of encouraging loyalty among their clientele. The Monopolies Board held that the fact that the company *UGC Ciné-Cité* was trying to achieve the loyalty of the cinema-going public by means of a system of season tickets could not in itself be qua-

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Monopolies Board, Decision no. 00-MC-13 of 25 July 2000 on the applications for protective measures submitted by the companies *Cinévog SARL, Les Cinq Parnassiens SA, SNC Studio du Dragon and MK2* concerning the practices of the company *UGC Ciné-Cité* in the sector of cinema management.

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lified as an anti-competitive practice of diverting custom. Moreover, after studying the statistics on cinema attendance in other cinemas, particularly the independent and experimental cinemas which were claiming a considerable drop in their attendance figures since the card had been on sale, the Board found that no serious, immediate threat to the complainant companies or to the cinema sector caused by the sale of the *UGC* card could be established. As no serious, immediate damage to the general economy or to the consumer could be established, the Monopolies Board refused to grant the protective measures requested on the grounds that the conditions required by Article 12 of the Order of 1 December 1986 were not met. Although the decision does not prohibit *UGC's* sale of its season ticket, the Monopolies Board nevertheless reserves the possibility of studying the principle of the matter in order to determine, in the light of the figures over a longer period of time, whether *UGC* is indeed in a dominant position.

Further to this decision, Catherine Tasca, the Minister for Culture and Communication, announced that she would be instigating a "sanctions procedure" against *UGC* for failure to abide by the Code of the Cinematographic Industry, which requires transparency in respect of revenue and its distribution. In her opinion, the season ticket system did not achieve the total transparency required by statute. ■

NEW MEDIA/TECHNOLOGIES

BE – National Frequencies for Commercial Radio Stations and Plan for the VRT Regarding E-Services, Digital Television and the Internet.

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The Flemish Minister responsible for the media has recently made public the results of a study on the technical possibilities of allocating radio frequencies for two commercial radio stations in the Flemish Community. After a coordination procedure of the new available radio frequencies and after modification of some provisions of the Flemish Broadcasting Decree by Parliament, the *Vlaams Commissariaat voor de Media* (Flemish Media

Argus, *Nieuwsbrief voor Media en Communicatie*, 2000/12, 1-3 en *Knack*, 2000/18, 32-36.

Authority) will be in a position to allocate the new radio licences and FM-frequencies. The commercial TV-broadcasters *VTM* and *VT4* already have showed strong interest in the new radio licences.

The Minister also announced an ambitious plan for the public broadcasting organisation *VRT*. The *VRT* will have the mission of creating a Media Platform for access to all kinds of electronic services and digital television. The Media Platform will fully integrate television on the Internet and will be developed in collaboration with the Flemish telecom operator and Internet provider *Telenet*. It is not very clear at the moment how this ambitious plan for the public broadcasting organisation will be financed. The Technological Media Platform of the *VRT* should be operational in 2006. ■

FR – Liability of Hosts in the Act of 1 August 2000

The Act of 1 August 2000 reforming the audiovisual sector (see report in this IRIS) inserts four articles concerning the Internet in the Act of 30 September 1986 (as amended) in Section 6 entitled "Provisions concerning on-line communication services other than private correspondence". The provisions were introduced during the parliamentary debate on the initiative of the member of parliament Patrick Bloche in reaction to recent case-law on the matter (cases involving *Estelle Halliday* and *Lynda Lacoste*; see IRIS 1999-5: 3 and IRIS 2000-1: 12), and have been much amended. The new Articles 43-9 and 43-10 of the Act of 30 September 1986 (as amended) introduce an obligation of identifying the originators of Internet sites, while Articles 43-7 and 43-8 deal with the liability of hosts.

Under Article 43-10, "persons whose activity consists of editing an on-line communication service other than private correspondence" must make known to the public their surname, first name and address if they are natural persons, or their title or company name and the address

of their registered office if they are legal persons (companies). Professional editors must also give the name of the director of the publication and, if appropriate, the name of the person responsible for editorial content. In addition to this information, the name and address of the site host must also be given. Non-professional editors may preserve their anonymity by transferring all this information to the host, whose name and address will still be given on the site.

Article 43-9 of the Act extends this provision and requires hosts and access providers "to hold and retain data permitting the identification of any person who has contributed to the creation of the content of services that they provide". A decree, adopted in accordance with the opinion of the National Commission on Information Technology and Freedoms, will soon determine what data should be retained in this way, and for how long.

At the same time, the Act of 1 August 2000 defines the conditions that invoke the civil and criminal liability of hosts. Theoretically they cannot be held liable for the content of the sites they host, except "where, having been informed by the courts, they do not take prompt action to prevent access to such content". The text

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adopted by Parliament on 28 June originally included a second possible case of the liability of hosts, where "having been informed by a third party that the content they host is unlawful or prejudicial to that party, they do

Act no. 2000-719 of 1 August 2000 amending Act no. 86-1067 of 30 September 1986 on freedom of communication, published in the *Journal Officiel* (official gazette) dated 2 August 2000, p. 11903 et seq.

Constitutional Council, Decision no. 2000-433 DC of 27 July 2000, published in the *Journal Officiel* (official gazette) dated 2 August 2000, p. 11922 et seq.

FR

IE – Electronic Commerce Act 2000

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New legislation on electronic commerce (See IRIS 2000-4: 13) was enacted in July 2000. Using a unique signing key and digital certificate, the President of Ireland digitally signed the new legislation into law.

The Electronic Commerce Act 2000 is designed to make Ireland one of the first jurisdictions to have a formal set of laws regulating e-commerce. It is intended to transpose into Irish law the Electronic Signatures Directive 1999/93/EC, as well as certain articles of the draft Electronic Commerce Directive. Many sections of the new Act are based on the Model Law on Electronic Commerce published by the United Nations Commission on International Trade Law in 1996. The Act gives legal recognition

Electronic Commerce Act 2000, available at the Irish Government website:
www.irlgov.ie/tec/communications/act27-00.pdf

EN

NL – Systematical Deeplinking Not Prohibited

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Several daily newspapers published by *PCM Uitgevers* (PCM Publishers) have a web site on the Internet, which contains a selection of news reports and articles originating from their published newspapers. Each of these reports and articles has a title and the homepage of every newspaper contains a complete list of titles that are inserted on the web site. Eureka, a company that provides internet services, has a web site at "www.kranten.com" ("kranten" means newspapers). One of the web pages of this site contains the names of the daily newspapers and also a list (updated daily) of the titles of reports and articles placed on the web site of these newspapers. The titles and title lists on Eureka's site correspond with the ones on the site of the daily newspapers. These titles and lists inserted by Eureka are deeplinks:

District Court Rotterdam, Judgement of 22 August 2000, case 139609/KG ZA 00-846, *PCM Uitgevers* (PCM Publishers) v. *Eureka internetdiensten* (Eureka Internet Services).

NL

RU – Internet Control Decree

On 25 July 2000 the Ministry for Communications and Informatizations ("Communications Ministry") issued a decree regulating implementation of the so-called System for Operational-Investigative Activity (*SORM*, by Russian acronym). These technical means enable security services to collect information from communications net-

not take appropriate action". In its decision on 27 July, however, the Constitutional Council immediately removed this third sub-section from Article 43-8 of the new Act on the grounds that, by "omitting to state the form such notification should take and not stating the essential characteristics of the offending behaviour which would invoke, as appropriate, the criminal liability of those concerned", the legislator was failing to respect the principle of offences and punishments being strictly defined by law as required by Article 34 of the Constitution. In the end, only one ground for invoking the liability of hosts remains in the Act.

Although these provisions aim to address the growing amount of case-law on the question of the status and liability of Internet professionals, the question of the compatibility of this Act with the Directive on e-trading of 8 June nevertheless remains. ■

to electronic signatures and electronic forms of writing. It also protects the right of business and individuals to use encryption.

The main provisions of the Act include:

an electronic signature can be used to meet the requirement of a written signature, procedures are set out for witnessing such a signature;

creation of new offences for the fraudulent use of electronic signatures, as well as penalties of up to 500,000 Irish Pounds and/or 5 years imprisonment;

regulation of "certification service providers" *ie*, bodies that will issue and verify certificates of authenticity of electronic signatures;

strong protection for users of encryption, which forbids the requiring of disclosure of unique data (e.g. codes, passwords, encryption keys or mathematical formula) that may be necessary to render information or an electronic communication intelligible;

the Act also provides for registration and regulation of the "ie" domain name. ■

when you click on the title, you will be directly transferred to the corresponding page on the site of the relevant newspaper, passing over the homepage of the newspapers web site.

According to The President of the District Court of Rotterdam, *PCM Uitgevers* has not invested substantially in publishing the newspaper titles. Therefore, there has not been a violation of the *Databankenwet* (Database Act). Neither is the systematic offering of lists of articles by way of hyperlinks in conflict with the *Auteurswet 1912* (Copyright Act 1912), because under the *Auteurswet 1912* it is permitted to present a summary of reports and articles originating from several daily newspapers in this manner. At the same time the "linking" did not take place by "framing", therefore the course of action taken by Eureka is not unlawful. The President is of the opinion that the service offered by Eureka does not interfere with the exploitation of web sites by *PCM Uitgevers*. According to the President it is not likely that *PCM Uitgevers* sustains any damage as a result of Eureka's publications. ■

works. The Decree allows access to the contents of personal communications in any form, including e-mail messages. The Decree was issued as part of enforcement steps for the Federal Statute *Ob operativno-rozysknoi dejatelnosti* (On Operational Investigation) of 1995 and other laws dealing with security matters.

The Decree obliges communications service providers, regardless of their ownership status, to install at their

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own expense relevant equipment to assist security services in conducting investigations. The providers should adopt a schedule for the introduction of the *SORM* system

Prikaz Ministerstva Rossijskoj Federatsii po svyazi i informatizatsii No. 130 "O poriadke vnedreniya tekhnicheskikh sredstv po obespecheniju operativno-rozysknykh meropriyatiy (SORM) na setiakh telefonnoy, podvizhnoy i bezprovodnoy svyazi i personal'nogo radiovizuovaya obshego polzovaniya" (Ministry of Communications and Informatization of the Russian Federation, decree No. 130 On the order of implementation of technical means of providing the operational-investigative measures on telephone, mobile, and wireless communication and personal radio communication network) is available in Russian at: <http://www.telenews.ru/lawtext.phtml?id=29>

RU

US – Website Can Not Provide Software Which Allows Users to Decrypt and Copy Motion Pictures from DVDs.

On 17 August 2000, Judge Lewis A. Kaplan of the United States Federal District Court for the Southern District of New York granted a permanent injunction against the owners and operators of www.2600.com. The injunction prevents the website from offering the computer program DeCSS, or providing links to other websites that offer the program. DeCSS enables users to "break" CSS, a copy protection system encoded into all digital video disks (DVDs), and make digital copies of movies and other material contained on DVDs.

The injunction was requested by eight major American motion picture studios pursuant to the Digital Millennium Copyright Act ("DMCA"). The motion picture studios alleged that offering DeCSS violated the DMCA by: (1) making available technology developed to defeat technological protections against unauthorized access to protected work; (2) compromising the copyright protection for DVDs; (3) requiring the movie studios to expend resources to combat piracy; and (4) reducing revenue from the sale and rental of DVDs.

The defendants raised several exceptions contained within the DMCA in their defense, but the court rejected each argument. The defendants first claimed their actions fell within the "reverse engineering" exception of the DMCA, which permits a person to employ technological means to circumvent access control measures in order to achieve interoperability with another computer program. The court rejected this claim because the exception is

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Universal City Studios, Inc. et al. v. Shawn C. Reimerdes, et al., 00 Civ. 0277 (LAK) (U.S. Dist. Ct. S.D.N.Y.) (17 August 2000).
Digital Millennium Copyright Act, 17 U.S.C. section 1201 et seq.

EN

RELATED FIELDS OF LAW

BE – Decree on the Standards for the Transmission of Television Signals

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After a delay of more than 3 years, the Flemish Community implemented Directive 95/47/EC of 24 October 1995 on the use of standards for the transmission of television signals (see IRIS 1996-2: 5). This Directive was

Decreet betreffende het gebruik van normen voor het uitzenden van televisiesignalen, (Decree of 3 March 2000 on the use of standards for the transmission of television signals) *Belgisch Staatsblad/Moniteur* 29 March 2000 (second ed.), <http://www.moniteur.be>, <http://www.staatsblad.be> or <http://www.just.fgov.be>

NL

in co-operation with the Federal Security Service (*FSB*) and guarantee that the equipment meets the necessary technical specifications.

The Decree emphasizes the necessity of "taking into account" that any limitation of the right of citizens to confidentiality in communications is only acceptable under a court ruling. Unless authorized by the court, the use of eavesdropping or any similar equipment would violate Article 23 of the Constitution of the Russian Federation. The leading officers of the *FSB* are responsible for ensuring that this requirement is satisfied before requests for information are made. However, according to the Decree, the service provider that has been asked to deliver personal information to security services is not entitled to obtain a copy of the *FSB*'s warrant. ■

available only to the person who does the reverse engineering and does not apply to public dissemination of the means of circumvention. The defendants then claimed their actions fell within the "encryption research" exception of the DMCA. The court rejected this claim because the defendants were not engaged in "good faith" encryption research. The defendants also claimed that their actions fell within the "security testing" exception of the DMCA, however the court rejected this claim because the defendants did not obtain the required authorization from the copyright owners. Finally, the defendants claimed their actions fell within the "fair use" exception of the DMCA, which permits a person to make limited use of portions of a copyrighted work. The court rejected this claim as well because the defendants were not sued for copyright infringement, but rather for providing technology designed to circumvent technological measures that control access to copyright works.

The defendants also put forward several allegations that the DMCA, as applied to the public dissemination of DeCSS, violated the First Amendment of the Constitution. First, the defendants claimed that computer code is protected speech and that the DMCA's prohibition of dissemination of DeCSS therefore violates the defendants' First Amendment rights. The court rejected this claim, finding that the prevention of the public dissemination of DeCSS is consistent with the important governmental interest of copyright protection and does not unduly restrict protected expression. Second, the defendants claimed that the DMCA was unconstitutionally overbroad and vague because its prohibition of the dissemination of decryption technology prevents third parties from making fair use of encrypted works. The court rejected these claims, finding that by explicitly permitting copying for "fair use," the DMCA was neither overbroad nor vague for the purpose of a First Amendment analysis. ■

IE – Copyright and Related Rights Act 2000

After lengthy delays, the Copyright and Related Rights Act 2000 has finally been enacted. The delays were mainly due to the large number of proposed amendments to the draft legislation that was published in 1999 (See IRIS 1999-5: 11).

The Act implements various recent EC Directives and anticipates forthcoming ones. It also fulfils Ireland's international obligations as a signatory of the TRIPs Agreement 1994 and the WIPO Treaties of 1996. It is a complex and comprehensive piece of legislation, being over 200 pages long.

New provisions in the Act include rental and lending rights, and copyright protection for databases and cable programmes. The Act also introduces into Irish law moral rights for authors and performers of copyright works. There is a new right to privacy in photographs and films. A lengthy portion of the Act is devoted to performers' rights (some aspects of performers' rights were already covered by the Performers Protection Act 1968).

The Act also regulates commercial collecting societies and provides for a system of compulsory registration for such bodies. The draft legislation had envisaged a voluntary system of registration, but it was felt that compulsory registration was needed to ensure the proper operation of collecting societies. In addition, an amendment to the draft legislation governs the playing of

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Copyright and Related Rights Act 2000. Available at the Irish Government's website:
<http://www.entemp.ie/copyright.pdf>

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RU – Russia's Chief Communications Executive Authority Is Upgraded

The passing on 28 March 2000 of the Russian Government's decree No. 265 "On Approval of the Statute on the Russian Federation's Ministry for Communications and Informatization" is a well-timed step to mark the culmination of the main stage of reforming the executive authority structure in the field of communications. The keynote of this reform has been, above all, the upgrading of the status of the federal department. In 1997, Russia's Ministry for Communications was transformed into the State Committee for Communications and Informatization and, later, into the State Committee for Telecommunications. The return to the status of a ministry, based on the Presidential decree of 12 November 1999, No. 1487, means that the Ministry for Communications and Informatizations ("Communications Ministry") will now not merely exercise interdepartmental co-ordination over matters of its concern, but also define and implement policies in the field of communications under the Government's general guidance. Among others, the Minister for Communications must regularly attend the Government's sessions to defend the interests of the players of the telecommunications market and inform the country's top leadership on reform issues in the field of communications that are on the agenda.

The Communications Ministry will supervise some bodies that carry out operative (day-to-day) administration and whose importance has also been strengthened by the current reform. Mainly, they are three commissions whose powers have been laid down in the Govern-

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The Russian Government's decree No. 265 of 28 March 2000 *Ob utverzhdenii polozheniya o ministerstve Rossiyskoi Federatsii po svyazi i informatizatsii (On Approval of the Statute on the Russian Federation's Ministry for Communications and Informatization*)* was published in the official release *Sobraniye zakonodatelstva RF ("Digest of Russian Federation Laws")*, 3 April 2000, No.14, st. 1498.

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sound recordings in public and the inclusion of such recordings in broadcasts and cable programme services. Commercial users of sound recordings will be afforded a licence of right. This will allow them to use such recordings provided they agree to make fair payments to the rightsholder. There is also provision for a dispute resolution mechanism.

New provisions are introduced to safeguard the originals and copies of copyright works and databases that are protected by technological means (such as encryption). It will now be an offence to unlawfully receive broadcasts or cable programmes to which technological protection measures have been applied.

As well as the totally new provisions, the Act also expands existing areas: for example, in relation to copying, the prohibited acts are more comprehensively defined, particularly with regard to types of copying made possible by newer forms of technology. In addition, the Act states that to provide the means for making copies that infringe the right in the work concerned, or to permit the use of premises or apparatus for performances which infringe copyright, may constitute a secondary infringement of copyright. An amendment to the draft legislation has resulted in the introduction of offences governing false claims of copyright and false claims of rights in performances.

Amendments to the draft legislation limit qualification for the rights concerned in the Act to materials protected by corresponding laws in countries with which Ireland shares obligations under international law. This is in accordance with the principles of normal international practice in this area. The draft legislation had proposed a more liberal approach, but it was felt that this would be inappropriate, given the differing levels of protection in some jurisdictions, particularly in the area of performers' rights.

The increased criminal and monetary penalties which were enacted in the Intellectual Property (Miscellaneous Provisions) Act 1998, in an attempt to stem Ireland's growing problem of copyright piracy, are repeated in the Act, but are applied to a wider range of offences. ■

ment's decree No. 346 of 15 April 2000 "On Approval of the Statutes on the State Commission for Radio Frequencies, the State Commission for Electrical Communications and the State Commission for Informatization at the Russian Federation's Ministry for Communications and Informatization". Major control powers over players of the telecommunications market is now delegated to the *Gossvyaznadzor* (State Communications Inspection), an agency subordinated to the Minister of Communications, that works through a system of agencies, which are directly responsible to the Communications Ministry. The Government's decree No. 380 of 28 April 2000 "On Re-organizing the State's Supervision over Communications and Informatization" had changed the status of the State Communications Inspection by widening its competence and formally adding new functions.

As laid down by the Governmental decree No. 265 of 28 March, the Communications Ministry will now deal with the following matters: license activities in the field of communications, regulation of the use of the radio frequency spectrum and orbital fixes of civil-application communications satellites (except for the frequency bands and satellite fixes allocated for the purposes of television and radio broadcasting), organize the development and implementation of concepts for the principal scheme of development of the electrical communications networks, organize work on the development of the national information and telecommunications infrastructure, carry out the implementation of interactive systems of information services, determine technical requirements for communications hardware used in general-purpose communications networks, carry out accreditation of certification and testing centres, define major guidelines in charge-rate policy in the field of electrical communications, etc.

The government decree in question, besides upgrading the Communications Ministry, devotes much attention to regulating the introduction of new technologies used in electrical communications networks. ■

MP3: Fair or Unfair Use?

"For the holder of the copyright, cyberspace appears to be the worst of both worlds – a place where the ability to copy could not be better, and where the protection of law could not be worse."¹ These words summarize the deepest fears of copyright holders with regard to new technological developments – fears that are nurtured by a compression technology called MP3² and the various ways of using it via the Internet.

What is MP3, and why does it pose a threat to traditional copyright models? Roughly described, MP3 is an audio compression file format designed to facilitate downloading and storage of digitised sound recordings, significantly reducing the volume of information while retaining near-CD quality sound. MP3 is not the only compression format available for music files, but it has become the *de facto* standard on the cyberspace. Users can create MP3 files from CDs using softwares available for free on the Internet, and they can listen to them directly from their computers, portable MP3 players (similar to portable CD players), or MP3 car players. They can also send their MP3 files to friends as e-mail attachments or even offer them via web sites or through file-sharing groups.

Whereas the characteristics appear to be fully beneficial to consumers, MP3 technology poses a real threat to the recording industry. Due to the ease of transmission and to the fact that each further MP3 copy is identical to the original, illegal distribution of copies of protected works has become too easy and also too inexpensive. A MP3 sharing movement has flourished, which includes a culture of indulgence towards piracy.³

So far MP3 is changing the world of audio works, in particular the market for CDs. Yet the principal technology is equal to that for digital versions of movies and most likely it is only a question of months until the capacity of Internet connections and further developed software allows movies to be transported as easily as is already the case for sound files today. As a consequence, the file-sharing phenomenon may soon revolutionize the audiovisual sector as a whole.

The MP3 technology itself has been greeted as a positive development that will benefit the consumer and the author/composer. In particular, representatives of the music industry declared that they would not block the exploitation of the new technology as long as the users sufficiently respect authors' and all derivative rights.⁴ The main challenge, however, is to determine in practice the threshold for sufficiently respecting copyrights. This task is particularly difficult in light of international treaties and domestic laws that allow the duplication of copyrighted audio, visual, or audiovisual works for private use, or "fair use" in the terminology of the United States Copyright Act.

The WIPO Digital Treaties⁵ leave to the contracting parties the possibility of restricting exclusive rights (including a reproduction right) to certain special cases that do not conflict with the normal exploitation of the work, performance or phonogram and do not unreasonably prejudice the legitimate interests of the author, performer or phonogram producer.⁶ This leaves the door open to contracting States to permit the digital private copying of works. The amended proposal for an EC Directive on Copyright and Related Rights in the Information Society,⁷ which is expected to be adopted at the end of 2000 or the beginning of 2001, will also allow EU Member States to impose limitations on the exclusive right of reproduction for audio, visual, or audio-visual digital recording media made by a natural person for private and strictly personal use.⁸

Not surprisingly, the application of private use exceptions has become one focal point of recent case law on the legality of MP3 copying and/or distribution schemes. Courts have been required to draw the bright line between legal private use, on the one hand, and illicit commercial copying schemes set up to look like private use, on the other hand. In addition, they have had to review other domestic law exceptions such as public performance rights and the limited liability of Internet service providers. Public discussion has increased since the development of more sophisticated systems for sharing and exchanging MP3 files, some of which have led to the distribution of copyright works on a large scale.

This article explores some of the legal problems arising from current uses of MP3 technology by considering case law from various European countries and the United States. The case law is selected and presented according to the chronology of technical developments.

A. MP3 Files Offered through Individuals

Once the MP3 technology became exploitable on the Internet, web sites containing MP3 files came into being as well. These sites list music works each of which could be downloaded with a simple click on the title by any visitor to that web site. The question arose whether the creation of, or hyperlinking to, such web sites is legal. The following cases demonstrate that if files are offered to unspecified customers and therefore lie outside the scope of private/fair use,⁹ it is generally not legal and may even lead to criminal sanctions.

1. United States:

Conviction for Listing MP3 files

On 23 November 1999, the United States District Court in Eugene, Oregon released details of the first criminal copyright conviction for unlawful distribution of MP3 files on the Internet under the "No Electronic Theft" (NET) Act.¹⁰ The NET had been enacted in December 1997 to prevent copyright infringements on the Internet by instituting criminal penalties. Since then section 2319 in conjunction with section 506 (a) United States Copyright Act (U.S.C.A.) render punishable the illicit and willful reproduction or distribution of copyrighted works, even if the defendant acts without a commercial purpose or does not expect any private financial gain.¹¹

Gerard Levy, a student at the University of Oregon had, among others, illegally posted musical recordings and digitally-recorded movies on his University-based web site, allowing anyone to download and copy them for free. System administrators became suspicious when they discovered a large volume of bandwidth traffic from Levy's web site, and accordingly brought the case before law enforcement officials. After a search of his apartment, Levy pleaded guilty to criminal infringement of copyright in violation of the U.S.C.A.¹² He was sentenced to a period of two years on probation with conditions.¹³

2. France:

Conviction for Offering MP3 Web Site

On 6 December 1999, the *tribunal de grande instance de Saint-Etienne* convicted Vincent Roche and Frédéric Battie of counterfeiting.¹⁴ The two Defendants had created a web site called "MP3 Albums", offering the free downloading of whole albums in MP3 format by linking to other web sites owned by Roche, which were located outside of France and contained the sound files of pro-



tected musical works. The *Société Civile des Producteurs Phonographiques (SCPP)* and the *Société des Auteurs, Compositeurs et Editeurs de Musique/Société pour l'Administration du Droit de Reproduction Mécanique des Auteurs, Compositeurs et Editeurs (SACEM/SDRM)* jointly brought criminal action.

The Court ruled that, by reproducing, distributing and making available to Internet users unauthorized MP3 copies of protected musical works, the Defendants were guilty of counterfeiting as prescribed in Arts L 335-2 and L 335-4 of the French Criminal Code, and sentenced Roche to three months and Battie to two months on probation and ordered them to pay damages.

3. Belgium:

Preliminary Injunction against Hyperlinking

On 21 December 1999, the *Rechtbank van eerste aanleg* (Court of First Instance) of Antwerp in a summary proceeding ordered Werner Guido Beckers, a Belgian student who maintained a web site with 25,000 links to sites where MP3 files could be downloaded without the right holders' permission, to refrain from hyperlinking any web site to Internet sites containing unauthorised MP3 files.¹⁵

The International Federation of the Phonographic Industry (IFPI) had warned Beckers several times that in its view his activity was illegal. After Becker's site had been closed down by the site host at IFPI's request, Beckers quickly set up two other sites, again offering the same content. In June 1999, IFPI started injunction proceedings.¹⁶ The Court granted the injunction and prohibited the Defendant from including hyperlinks in any web site to Internet sites containing unauthorised MP3 files. It reasoned that hyperlinking to a web site that contained unauthorized material, provides potential users with the key for locating, accessing and downloading protected music files without paying the right holders and therefore constitutes an offence (section 1382 of the Civil Code). The Defendant's argument that banning such links amounts to a restriction on freedom of expression was rejected.¹⁷

4. Sweden:

Hyperlinking Allowed as Public Performance

Although in a Belgian civil case hyperlinking was viewed as illegal, the Supreme Court of Sweden exonerated a Teenager from the criminal charge of committing music piracy.

On 15 June 2000, the Supreme Court of Sweden upheld the verdict of the *Göta Hovrätt* (Court of Appeal of Göta) pronouncing Tommy Olsson not guilty of taking, or participating in, actions by which unauthorized sound files were made available to the general public without the consent of the phonogram producers or their rights owners.¹⁸

The Defendant, student Tommy Anders Olsson, ran a web site containing links to an illegal MP3 archive. Olsson was sued for distributing copyright-protected songs free of charge over the Internet without the authorization of the phonogram producers.

The Court stated that under section 47 of the Swedish Copyright Act¹⁹ Olsson's making available of music files was to be considered as "public performance" of a sound recording, which is exempt from the exclusive right otherwise enjoyed by performing artists and phonogram producers (sections 45 and 46). Therefore Olsson's action did not constitute a criminal offence.

It should be noted, however, that the claim had been limited to the "making available of music files" and to rights of "phonogram producers" – that is, to a direct infringement by Olsson. Accordingly, the Court had neither to consider whether Olsson aided and abetted the illegal production or distribution of copies by those downloading sound files with the help of his links, nor to evaluate

the lack of consent of other rights holders such as composers and songwriters.

B. Liability of Internet Service Providers

The lawsuits against individuals are complemented by complaints against Internet service providers whose services are required for the online exchange of MP3 files and the hosting of web sites. Accordingly, Internet service providers are mainly in the firing line for indirect infringements of copyright. The question whether an Internet service provider is liable for facilitating the illicit reproduction or distribution of MP3 files might raise a discussion as broad and as fierce as that about their liability for transmitting illegal content in general.²⁰ Yet the technical developments have shifted the focus to Internet services (see below C and D), which are more complex than the mere transmission of data, where service providers also seek to benefit from the private/fair use exceptions. Hence, the following cases concerning the specific Internet services of hosting web sites and Internet fora may suffice to demonstrate the potential liability of Internet service providers in the context of MP3.

1. Belgium:

Liability under Trade Practices Act

On 2 November 1999, the *tribunal de commerce* (Commercial Court) of Brussels ruled against the Internet service provider Belgacom Skynet for having violated the Belgian Trade Practices Act (*Loi sur les pratiques du commerce et sur l'information et la protection du consommateur*).²¹

The Defendant not only provided Internet transmission services but also hosted web sites, including two web sites containing links to unauthorized sound files, in which the Plaintiffs claim copyrights-. When the Plaintiffs' request for removal of these links was not honored by Defendants, the Plaintiffs filed suit.

The Court followed the decision of the *Rechtbank Den Haag* (District Court of The Hague) in the Scientology case²² that established the liability of a service provider for hosting sites with links on his server that, when activated, reproduced a copyright work on the computer screen of the user without the Plaintiff's consent. This rule applies on condition that the server provider has been notified, the correctness of the alleged facts cannot be reasonably doubted, and the service provider does not remove the link from the server as soon as possible.

Based thereupon, the Court held that the Defendants were liable for indirect infringements, namely the provision of a service (web site hosting) for distributing information on the Internet.²³ It concluded that the Defendants had acted (as vendor of this service) in conflict with fair trading practice within the meaning of Art. 93 Trade Practices Act²⁴ and caused damage to the Plaintiffs' interests by knowingly storing information on the Defendants' server and thereby brought about the unlawful electronic distribution of musical recordings in which Plaintiffs owned copyrights.

2. Germany:

Liability under Copyright Act and Tele-Services Act

On 30 March 2000, the *Landgericht München* (Munich Regional Court) ruled that an online service provider breached the terms of the *Urheberrechtsgesetz* (Copyright Act – *UrhG*) by making pieces of music protected by copyright available on a server without permission.²⁵

The Defendant, an online service provider, runs a music forum where users can store music files that can then be downloaded by other users. The Defendant only allows the files to be downloaded if they have been checked by a supervisory body for viruses and



recognised indications of copyright. In January 1998, three music files in which the Plaintiff held the copyright were made available on the server. Visitors to the music forum could copy the files onto their own computers.

The Court ruled that the Defendant had made the music available for downloading even though signs indicating copyright could easily have been recognised. It was true that, since the music files had been saved on the server by third parties, they did not constitute "own content" in the sense of section 5.1 of the *Teledienstegesetz* (Tele-Services Act – *TDG*) and the Defendant was therefore not responsible for them under general law. However, section 5.2 of the *TDG* stated that service providers were responsible for third-party content that they made available to others if they had knowledge of such content and if they were technically able and could reasonably be expected to block access to it.²⁶

The Court explained that an online service provider could, in principle, be held liable for third-party content even if it was not aware of the copyright situation in every single case.²⁷ It was a fact that many pieces of popular and light music were subject to copyright since, under section 64 of the Copyright Act, such rights only expired 70 years after the author's death. For this reason, enabling people to store and download the files was a breach of the author's reproduction and distribution rights. Since it was impossible to trace users who stored protected music files on the server, the author had no means of preventing infringements of his rights. It was therefore the responsibility of the online service provider if he knew the actual piece of music by name.²⁸

C. The MP3.com Case

The lawsuit against MP3.com targeted a Defendant who claimed to have merely facilitated the formatting of music from CDs into MP3 files and their storing for the private use of CD owners. The case is peculiar because the Defendant denied direct infringement of copyrights by its customers claiming that their activities were protected fair use. As a consequence, the Defendant also contested that it had any indirect liability.

MP3.com, Inc., is a company,²⁹ that offers over its Internet site, *inter alia*, the so called "My.MP3.com service" ("My.MP3"). My.MP3 is advertised as allowing subscribers to store, customize, and listen to the recordings contained on their CDs from any place where they had an Internet connection. In order to do so, a customer had two options. He could demonstrate that he already owned the CD version of the recording that he wished to access in MP3 format by using the "Beam-it Service". This meant he had to play his copy for a few seconds using his computer CD-ROM drive. Alternatively, he could purchase the CD from one of MP3.com's cooperating online retailers via the "Instant Listening Service." Then the customer could call up, and listen to, the music contained on this particular CD from any computer around the globe through MP3.com's Internet services. Yet what the company was re-playing for the customer was a copy made by MP3.com from CDs for which in most cases it did not possess copyrights. Neither did it have authorization for copying.

Therefore several music recording and publishing companies that claimed to hold copyrights for these recordings brought an action against MP3.com for illegal copying of several thousand commercial audio CDs onto its computer servers.³⁰

On 28 April 2000, U.S. District Judge Jed Rakoff granted the Plaintiffs' motion for partial summary judgment confirming that Defendant had infringed the Plaintiffs' copyrights. The District Judge even went so far as to state that: "The complex marvels of cyber spatial communication may create difficult legal issues; but not in this case."³¹

Indeed the only legal issue raised by the Defendant, who did not contest the facts usually amounting to a direct infringement of copyrights, concerned the affirmative defense of "fair use". The equitable "fair use" doctrine is based on the idea that copyright protection as provided for in the United States Copyright Act (U.S.C.A.) "has never accorded the copyright owner complete control over all possible uses of his work. Rather the Copyright Act grants the copyright holder 'exclusive rights' to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies. All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a 'fair use;' the copyright owner does not possess the exclusive right to such a use."³²

The fair use doctrine has been endorsed by section 107 U.S.C.A., which establishes the factors to be considered when balancing the conflicting interests. These factors include (but are not limited to):³³

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyright work;
- (3) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyright work.

With regard to the first factor, the purpose of My.MP3 was found to be commercial, because the Defendant sought to attract a sufficiently large subscription base to draw advertising and otherwise make profit.³⁴ According to the Judge the service essentially repackaged or republished existing recordings to facilitate their transmission through another medium, even though the Defendant claimed it entailed a transformative "space-shift".³⁵ With regard to the second factor, the Judge found that the type of copyright work at issue in the case was not one amenable to fair use. As for the third factor, he held against the Defendant as he had copied the entire work. Concerning the fourth factor, the Judge found that Plaintiffs had begun to enter into a new market deriving directly from reproduction of their copyright works by concluding licensing agreements for offering their works in MP3 format over the Internet.³⁶ The Judge further held, that aside from Plaintiffs' new market activity, they would have even been entitled to refuse licensing for the development of such a new MP3 market.

The MP3.com case facilitated matters for the music industry in that the industry could target a single company rather than individual copyright pirates. By winning the partial summary judgment against MP3.com, the industry took the first step in closing the gate against thousands of illegally copied CDs.³⁷

D. The Napster Case

While My.MP3 was vulnerable to legal claims because its operator had created a database containing a significant number of illicit copies, which were offered to third parties outside the scope of fair use, the next generation of MP3 uses aimed to avoid elements that could trigger such liability. Possibly the most prominent example is the sophisticated system for trading MP3 files provided by Napster, Inc. (Napster), an Internet start-up based in San Mateo, California. This system was designed to connect Internet users directly with each other and thus avoid the problems faced by MP3.com.

In order to understand the Napster case, it is useful to look at



the system from which it emerged, namely Internet Relay Chat (IRC) channels. IRC channels allow people to find online the music of their choice. Yet any individual can do so only after having downloaded special IRC software, hooked up to a special IRC server, and selected a particular channel focusing on MP3. MP3-links can be received only from group members who have joined this particular channel. Also the person in search of his favourite music must be present in the “chat room” while the relevant information is being supplied.

The Napster system build on the same “club principle” and improved it by keeping a log of the information exchanged in the “chat room” concerning Napster users and the files they had stored and were willing to share. This Information remained available and accessible on a Napster provided Index after it was dispatched on Napster’s channel and as long as the dispatcher stayed online. In order to transfer files, users had to be logged on to the Napster system so that they could establish a direct connection to each other as the MP3 files remained stored with the individual users/owners. By this token not the file itself, but the possibility to access a single private copy in MP3 format, was multiplied. The private copy could then be shared with an unlimited number of people to whom the owner was connected solely via the Napster system.

In contrast to My.MP3, the Napster system did not involve any direct copying by Napster nor did Napster appear to maintain its own music archive. Nevertheless, on 6 December 1999, several record and music entertainment companies (the Plaintiffs) brought suit against Napster, Inc. (the Defendant) alleging contributory and vicarious federal copyright infringement.³⁸

On the first count, the Plaintiffs claimed that the Defendant violated and continues to violate their exclusive rights to distribute and reproduce sound recordings embodied in phonorecords to the public by knowingly and systematically inducing, causing, and materially contributing to the unauthorized reproduction and/or distributions of copies and thus to infringements of their copyrights (sections 106 (1) and (3) and 501 U.S.C.A.). They argued that Napster services facilitate and encourage the unauthorized downloading of MP3 music files by one Napster user from another user’s computer. This, the Plaintiffs claimed, constitutes unauthorized distribution and results in illicit copies.

In addition, the Plaintiffs alleged vicarious liability because the Defendant had the right and ability to supervise and/or control the infringing conduct of its users by preventing or terminating a user’s access to its servers and/or by refusing to index and create links to infringing music files. According to the Plaintiffs, the Defendant at all times derived substantial financial benefit from the infringements of copyrights by soliciting advertising and also, most likely, by charging fees for advertising on Napster.

The Defendant tried to rebut these allegations by describing Napster services as merely facilitating the swapping of music files among users for personal use. The fair use defense implied that the Napster service was used for legal purposes and did not infringe upon copyright laws. The Defendant claimed that the Napster technology was even protected by copyright law, namely by the Audio Home Recording Act of 1992, which prohibits actions against certain noncommercial copying of sound recordings (see section 1008 U.S.C.A.). In addition, the Defendant portrayed its services as a vehicle for new performers to gain exposure to the public.

Seeking to terminate the lawsuit even before going to trial, the Defendant filed a motion for summary adjudication under section 512 (a) U.S.C.A., a safe harbour provision introduced by the Digital Millennium Copyright Act (D.M.C.A.) that limits the liability of

service providers for vicarious and contributory infringement of copyrights.³⁹ Because the Plaintiff did not object to the qualification of Napster as service provider, the consideration of the Defendant’s motion focused on the question as to whether the Defendant enabled transmission or another alternative service, as required under section 512 (a) “through” its server. This was denied because the transfer of MP3 files takes place directly from the computer of one Napster user through the Internet to the computer of the requesting user and, thus, it bypasses the Defendant’s server.⁴⁰ The same evaluation was made regarding potential alternative routing, providing connections or storage activities.⁴¹ The Defendant had also failed, at least at the beginning of its operations, to set up and respect a copyright compliance policy, an additional requirement contained in section 512 (i)(A) U.S.C.A. Finally, it was noted that other functions of Napster services such as the offering of location tools (search engine, searchable directory, index, and links), would have had to be reviewed under the more rigorous safe harbour provision of section 512 (d),⁴² which, however, had not been invoked by the Defendant. As a consequence, the Defendant’s motion for summary adjudication failed.⁴³

On 26 July 2000 oral proceedings took place addressing the Plaintiffs’ motion for preliminary injunction. US District Judge Marilyn Hall Patel granted the injunction because the Plaintiffs had shown “a strong likelihood of success on the merits” on both counts and none of the potential defenses could be invoked by Napster.⁴⁴

In her reasoning the judge first established that a majority of Napster clients used the service to download and upload copyright music and that this *prima facie* constituted a direct infringement of the Plaintiffs’ copyright musical compositions and recordings.⁴⁵ She then went on to reject the defenses of fair use and therefore, could not find a “substantial noninfringing use”⁴⁶ of Napster services either.⁴⁷ Regarding the fair use criteria, she explained that the exchange of music files among Napster clients is not a typical personal use, given its enormous volume and anonymous setting.⁴⁸ She stressed that Napster users would get for free what in most cases they would otherwise have to pay for. She underlined that the substantial or commercially significant use of the service was and continues to be copying pieces of popular music in their entirety, most of which are copyright and for which no authorization has been obtained. Considering the possible effect on the potential market for copyrighted work, she cited evidence that Napster use reduces CD sales among college students, raises barriers to the Plaintiffs’ entry into the market for the digital downloading of music and, thus, harms the market. Finally, she concluded that even a potential fair use such as the authorized distribution of the work of new artists would not be substantial and noninfringing within the meaning of the affirmative defense.

The judge also denied protection of the file-sharing technology under the Audio Home Recording Act (“A.H.R.A.”) of 1992, which *inter alia* excludes liability for copyright infringement for making or distributing a digital audio recording device or for using these devices to create personal, noncommercial recordings (§ 1008 U.S.C.A.).⁴⁹ First, the A.H.R.A. was irrelevant because the Plaintiffs had not brought any related claims. Second, the judge found that neither computers nor hard drives were audio recording devices, for which the A.H.R.A. had been conceptualized.⁵⁰ Third, she did not accept the only potential personal, noncommercial use, namely space-shifting,⁵¹ as being commercially significant.

The judge enjoined Napster from causing, assisting, enabling, facilitating or contributing to the copying, duplicating or other infringement of all copyright songs, musical compositions or mate-

rial in which Plaintiffs held copyright and ordered that the injunction should come into effect on 28 July 2000. On that same day, however, the 9th U.S. Court of Appeals granted the Defendant an emergency stay.⁵²

The Appeals Court saw substantial questions being raised about the merits and form of the injunction and its potential for precedent-setting. The Appeals Court found that the ruling had possibly been overly broad because Napster services were at least also used to swap non-copyright works. In addition, it was concerned about the scope of the damage that the shutdown of Napster would have entailed. The stay allows the Defendant to deliver additional arguments against the injunction (deadline 18 August) and the Plaintiffs to bring forward their counter-arguments (deadline 12 September) before the appeal will be decided and the case referred back to the District Court for a final decision.

E. Scour, Gnutella, Freenet, and the Future

The importance of the Napster litigation for the audiovisual industry has recently been underlined by the setting up of a company called Scour.com (Scour). The company offers software called Scour Exchange (SX) enabling file-sharing among SX users. Like other file-sharing tools, SX is based on the same principles as Napster with the sole difference that its users can exchange not only MP3 files, but also video and image files. Accordingly, a lawsuit similar to that against Napster has been brought by the audiovisual industry against Scour.⁵³

In a way, the Napster system resembles the file-sharing through hyperlinking, where individuals offer on their web site hyperlinks to other web sites from which visitors can download music in MP3 format. In both settings, litigation focuses on the connecting party rather than on the individuals who download or upload the file. In both cases, the file-sharing system and the illegal copies for downloading are offered from different entities. However, whereas Napster connects two individuals with each other, the hyperlink providers direct unspecified users to a web site. In addition, Napster might be able to claim that their users respect copyrights but the hyperlink providers had been warned that the content of the web sites included copyright material.

This explains why fair use was invoked as a defense in the Napster case while its European equivalent of private use is lacking as argument in the hyperlinking cases. Whether the fair use defense of Napster will be successful remains open and is questionable, even in light of the stay granted by the Court of Appeals. The stay was used by new technology lobbyists to reiterate their position that the fair use exception is vital for the further deve-

lopment of Internet services.

The ongoing discussions help to pin-point two main aspects, which are likely to define the scope of traditional copyrights in the future: the legal limits of private/fair use in light of digitalization, and the desirability of promoting digital technology and Internet services. To the extent Europe is concerned, these two aspects are supplemented by the question of what system of remuneration could be introduced (and enforced!) to compensate copyright holders for financial losses incurred because of private use or similar exceptions.⁵⁴

Furthermore, the cases indicate that MP3 users are likely to find many more and different offers of MP3 related services in the future. Companies will not wait until the cases have made it through to the highest courts before they continue to explore the possibilities of the MP3 world. Rather we can expect to witness further refined "swapping" techniques aimed at reaching the safe harbours of specialized laws or designed for private and strictly personal – and therefore protected – use. And we can expect more litigation. The more sophisticated technology gets, the more the feasibility of legal control may become a serious question.

Some people think that the end of legal control has already come with Gnutella – software that allows the transfer of all kinds of files directly from user to user without a centralized server. Users are part of a peer-to-peer network, that is, everybody on the network acts as a client and as a server. When one user connects to another user on the network, he is virtually connected to many others. To launch a search, the user sends his request to the user or users, to whom he is connected. They in turn send it to the users to whom they are connected in a chain reaction, until the desired file is found. In the end, only one private user will download only one MP3 file from another private person, who is even likely to be the owner of the original CD and the perhaps legally-made copy. It will become much harder for the record industry to target those who set up the file-sharing systems. At the same time, suing individual infringers has little attraction when balancing the costs and benefits of such lawsuit. In addition, Gnutella users will also argue that their transactions adhere to fair use criteria.

Freenet is another variant of the "peer-to-peer" idea. The main difference between it and Gnutella is that users remain completely anonymous. As a result, nobody is able to track down their activities on the Freenet. As soon as the exchange of MP3 files leaves no traces behind, copyright enforcement becomes practically impossible. It might turn out to be a challenge to courts and legislators to counter these developments. ■

Susanne Nikoltchev & Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

1) Lawrence Lessig, *Code and other Laws of Cyberspace*, Basic Books 1999, page 125.

2) MP3 stands for "MPEG 1 (Moving Picture Experts Group 1), audio layer 3".

3) "Some 14% of Internet users, about 13 million Americans, have downloaded free music files on the Internet that they do not own in other forms. Only a fraction of Internet users, just 2%, say they have paid for downloading music and a similarly small percentage say they own the same music they have grabbed online in other forms such as compact disks or cassette tapes. The act of pulling free music files from online sources – an act we call "freeloading" – is particularly popular with students and it is especially appealing to young men. Still, 42% of those who have done freeloading are between the ages of 30 and 49 and they tend to be those with a lot of experience online." Quote from Internet Tracking Report, Pew Internet & American Life Project: "13 million Americans 'freeload' music on the Internet; 1 billion free music

files now sit on Napster users' computers", available at: <http://www.pew-internet.org/reports/toc.asp?Report=16>

4) "As for MP3 technology, RIAA [Recording Industry Association of America] only has a problem with the illegal uses of the format to distribute copyrighted recordings without the permission of the artist or record company. To the extent that artists use MP3 technology to distribute their work - music that they own the rights to - that's great; in fact, it's a potent example of the ways in which the Internet can connect creators and fans and produce new opportunities for the distribution of music." Napster Lawsuit Q&A, available at: <http://www.riaa.com/Napster.cfm>

5) WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). See IRIS 2000-2: 15-20.

6) The entailed loss of copyright protection is normally softened by a requirement of fair compensation for the right holders.

- 7) Amended proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, Brussels, 21 Mai 1999 COM(1999) 250 final 97/0359/COD. See IRIS 2000-2: 15-20.
- 8) The draft proposal also envisages that for all digital private copying fair compensation for all rightholders must be provided. See Article 5 2. b) bis of the draft Copyright Directive.
- 9) The national laws of the countries from which these cases originated all provide the right to reproduction for private purposes (though mostly supplemented by a system aimed at remunerating the artists). See for the United States section 107 Copyright Act, for France Articles L 122-5 (2) and L 211-3 (2) of the Intellectual Property Code, for Belgium Articles 22 (1) 5. and 46 4. of the Law on Copyright and Neighbouring Rights, for Sweden Art. 12 of Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (the Act on Copyright in Literary and Artistic Works and for Germany section 53 et seq. Copyright Act).
- 10) See Press Release, US Department of Justice, United States Attorney's Office, District of Oregon, 23 November 1999.
- 11) According to the definition laid down in 17 U.S.C. § 101, the term "financial gain" includes even the expectation of receipt of anything of value including the receipt of other copyrighted works.
- 12) 18 U.S.C. § 2319(c)(1) and 17 U.S.C. § 506(a)(2). The latter states: "Any person who infringes a copyright willfully either... (2) by the reproduction or distribution, including by electronic means, during any 180-day period, or 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$ 1,000, shall be punished as provided under section 2319 of title 18, United States Code. ..."
- 13) Section 2319 (c)(1) addresses first-time copyright infringers whose contravention concerns works with a total retail value of USD 2,500 and it provides for a maximum prison term of 3 years and a fine of up to USD 250,000. The probation in the Levy Case is explained by the fact that the precise retail value could not be exactly determined.
- 14) Tribunal de Grande Instance de Saint-Etienne, SCPP et al. v. Roche and Battie (3561/1999), Judgement of 6 December 1999.
- 15) Court of First Instance of Antwerp, Case IFPI Belgium v. Werner Guido Beckers (ARK no. 99/594/C), Order of 21 December 1999.
- 16) At the time of finishing this article, the judgement on the merits was still pending.
- 17) The Judge, *ibid.*, page 4, responded that "Freedom of expression is in fact limited and offers no alibi for committing an offence."
- 18) *Högsta Domstolen* (Supreme Court), *Case Dr Record Kommanditbolag et al. v. Tommy Anders Olsson* (no. B 413-00), Judgement of 15 June 2000.
- 19) The relevant part, section. 47 states: "Notwithstanding the provisions of sections 45, second paragraph, and 46, first paragraph, sound recordings may be used in a sound radio or television broadcast or in another public performance. In such a case, the producer and the performers whose performances are recorded have a right to remuneration."
- 20) See for example the judgements in the German Compuserve case reported in IRIS 1998-6: 4 and IRIS 2000-5: 12.
- 21) Commercial Court of Brussels, IFPI V.Z.W. and Polygram Records N.V. v. Belgacom Skynet N.V. (V.S. 2192/99), Judgment of 2 November 1999.
- 22) District Court of The Hague, Church of Spiritual Technology c.s. v. XS4ALL c.s./Spaink (96/1948). Decision of 9 June 1999. See IRIS 1999-7: 4, 1996-4: 3 and 1995-9: 4.
- 23) The specific liability of Skynet in the present case was not affected by the fact that others might also be liable concerning the illegal distribution of music.
- 24) Article 93 Trade Practices Act states: *Est interdit tout acte contraire aux usages honnêtes en matière commerciale par lequel un vendeur porte atteinte ou peut porter atteinte aux intérêts professionnels d'un ou plusieurs autres vendeurs.*
- 25) Ruling of the Munich Regional Court, 30 March 2000; case no. 7 O 3625/98.
- 26) In this context the announcement of America Online is noteworthy that it will take down a new Internet search engine that allows users to find MP3 files, because this service cannot distinguish between legal and illegal MP3 files. Until this function is properly installed, the search engine will be down. See <http://www.zdnet.co.uk/news/2000/31/ns-17219.html>
- 27) In contrast, in the Compuserve case the same Court applied the limitation of liability set out in Article 5.3 of the Tele-Services Act. See IRIS 2000-5: 12.
- 28) The summary of the case was contributed by Kerstin Däther, Institute of European Media Law (EMR) and edited by the authors.
- 29) MP3.com, Inc. is organised under the laws of Delaware, with its principal place of business in San Diego, California.
- 30) UMG Recordings, Inc. Sony Music Entertainment Inc., Warner Bros. Records Inc., Arista Records Inc., Atlantic Recording Corporation, BMG Music d/b/a The RCA Records Label, Capitol Records, Inc., Elektra Entertainment Group, Inc., Interscope Records, and Sire Records Group Inc., v. MP3.Com, Inc., Case 00 Civ. 0472 (S.D.N.Y. filed 21 January 2000).
- 31) Opinion in Case 00 Civ 472 (JSR) of 4 May 2000, first page.
- 32) Sony Corporation of America, et al. v. Universal City Studio, Inc. etc., et al., 464 U.S. 417, 104 S.Ct.774 (II).
- 33) See 17 U.S.C. § 107. "Other relevant factors may also be considered, since fair use is an equitable rule of reason to be applied in light of the overall purposes of the Copyright Act.", Opinion in case 00 Civ 472 (page 4).
- 34) The company not only created an enormous archive of music works (RIAA complains that 45000 audio CDs have been recorded) but it also became extremely popular.
- 35) In *Recording v. Diamond* of the U.S. 9th Circuit Court of Appeals "space-shifting" is explained as rendering portable or "space-shift", those files that already reside on a user's hard drive. See the opinion under II B 2 c. The opinion is available at <http://laws.findlaw.com/9th/9856727.html>
- 36) Currently, MP3.com has reached a settlement with three record companies (EMI, Warner Music Group, BMG Entertainment and Sony Music Entertainment) in the copyright infringement suit. In addition the labels have granted MP3.com a license to use their music catalogue in My.MP3.com service. See <http://progress.mp3.com/?mc=hpim01>
- 37) On 6 September, Judge Jed S. Rakoff ruled that MP3.com willfully infringed Universal Music Group's copyrighted works, and ordered MP3 to pay Universal USD 25,000 per CD made available on the site, creating potential liability of USD 118 million. Previously, MP3.com enjoyed a slight victory, when Judge Jed S. Rakoff refused the plaintiffs' request to be awarded a summary judgement that tacked damage costs onto each song MP3.com used without authorisation, and not onto each CD. MP3 has announced that they will take the case to the Court of Appeals.
- 38) Case No. C99-5183-MHP, filed 6 December 1999.
- 39) See section § 512 (a) U.S.C.A.
- 40) The Defendant had indeed argued that its services enables the connection of users' hard-drives and the transmission of MP3 files directly from the Host hard drive and Napster browser through the Internet to the user's Napster browser and hard drive. Yet it had also alleged that Napster's servers and Napster's MusicShare browsers on its users' computers (but not their computers!) were all part of Napster's overall system and as a result the activity would take place through the Defendant's server.
- 41) The three remaining factors determined by section 512 (a) - that recipients are not selected (but by automatic response), no copy of the material is maintained on the system or network, and no modifications are made to the transmitted material - were satisfied.
- 42) According to § 512 (d) (1) a service provider who offers search engines linking to pirated material is exempt from liability if he does so unknowingly, a case hard to make for MP3 files of which it is known that the majority are unauthorised copies. In addition § 512 (d) (2) requires that the service provider does not receive a financial benefit.
- 43) Opinion of US District Judge Marilyn Hall Patel of 5 May 2000.
- 44) For the full opinion addressing all potential defences and discussing in great detail all technical aspects of Napster services, see Opinion No. C 99-5183 MHP and No. C 00-0074 MHP, published 16 August 2000 and available at [http://www.cand.uscourts.gov/cand/tentrule.nsf/4f9d4c4a03b0cf70882567980073b2e4/74bf2867dde99f0f88256938007a1205/\\$FILE/NapsterF%26C2.pdf](http://www.cand.uscourts.gov/cand/tentrule.nsf/4f9d4c4a03b0cf70882567980073b2e4/74bf2867dde99f0f88256938007a1205/$FILE/NapsterF%26C2.pdf)
- 45) Direct copyright infringement is a necessary requirement for the finding of contributory and/or vicarious liability.
- 46) For further explanations, see *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
- 47) See the Transcript of Proceedings of 26 July 2000, page 72 et seq.
- 48) In her opinion, *ibid.*, page 19 line 18-19, she writes: "At the very least, a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester."
- 49) On 8 September, the United States submitted a brief as an *amicus curiae*, to address the effect of the immunity provision of the Audio Home Recording Act of 1992, 17 U.S.C. § 1008. In this brief, it is affirmed that Section 1008 of the A.H.R.A. does not excuse Napster from liability, therefore supporting the district court's views on this subject. See <http://www.loc.gov/copyright/docs/napsteramicus.pdf>
- 50) See *Recording v Diamond* of the U.S. 9th Circuit Court of Appeals (under II B 2 a), which deals with the playback device for MP3 files called Rio.
- 51) See above footnote 35 for further explanations of space-shifting.
- 52) United States Court of Appeals for the 9th Circuit, Order in cases No. 00-16401 DC# CV-99-5183-MHP and No. 00-16403 DC# CV-99-5183-MHP of 28 July 2000.
- 53) Plaintiffs Twentieth Century Fox Film Corporation et al. v. Scour Inc., complaint filed 26 July 2000, see <http://www.mpa.org/Press/ScourComplaint.htm>
- 54) See for example the levy for reproduction of compressed music files in Austria reported in IRIS 1999-10: 16.

On 1st September 2000, Wolfgang Closs took over the office of Executive Director of the European Audiovisual Observatory. Mr Closs is already very well acquainted with IRIS, having contributed articles to it in his previous position as Managing Director of the Institute of European Media Law (EMR), a partner organization of the Observatory.

Another noteworthy development is that on 21st September 2000, during the 722nd session of the Committee of Ministers, changes to the Observatory's statutes were approved, opening the way for the European Community to become its 35th member.

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