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tute IViR. The IRIS team thanks Annemique de Kroon for her excellent and dependable work and wishes her the very best in her new position with the Dutch Association of Publishers.

Dear Reader,

Susanne
Nikoltchev

This IRIS issue will be the last issue compiled with the help of Annemique de Kroon, who has been a very competent and equally a pleasant colleague at the Observatory's partner insti-

This IRIS will also end the year 2000 edition. IRIS will now take its winter break before starting its new and seventh season in January 2001. In the name of the IRIS team, I wish you – though a little early – Happy Holidays and a good start into the new year. ■

INTERNATIONAL

WIPO

Isabelle Adjani wins case at the WIPO Arbitration and Mediation Center

The French actress Isabelle Adjani complained to the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) in Geneva on 25 July 2000 to have the Californian company Second Orbit Communications stopped from using the domain name "isabelle-adjani.net". In a decision delivered on 4 October 2000, the Administrative Panel set up by the Arbitration and Mediation Center found that the complaint was justified and ordered the disputed domain name to be transferred to the actress.

The Administrative Panel's decision was based on the Uniform Domain Name Dispute Resolution Policy adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) on 26 August 1999. Under Article 4a of the Policy, the registration of a domain name is wrongful where three conditions obtain simultaneously: (1) the domain name is identical or confusingly similar to a trade mark or service mark in which the complainant has rights, (2) the domain name registrant has no rights or legitimate interests in respect of the domain name, and (3) the domain name has been registered and is being used in bad faith.

In this case, the first condition was examined in the light of the law of both the United States – the defen-

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dant has its registered office in California – and Switzerland – Isabelle Adjani lives in Geneva. Referring to a decision delivered on 29 May 2000 in the case between Julia Roberts and Russell Boyd (case no. D2000-0210), the Administrative Panel recalled that in the United States the name of a famous actress was covered by the protection of brand-name copyright. This did not apply in Swiss

Patrice Aubry
Lawyer (Geneva)

Decision of 4 October 2000 in case no. D2000-0867, Isabelle Adjani v. Second Orbit Communications Inc. Available at the following address:
<http://arbitr.wipo.int/domains/decisions/html/d2000-0867.html>

EN

COUNCIL OF EUROPE

European Court of Human Rights: Recent Judgments on the Freedom of Expression

In a judgment of 10 October 2000 the European Court of Human Rights (first section) has held in the case of *Akkoç v. Turkey* that a disciplinary sanction because of an interview published in a newspaper, was not in breach of Article 10 of the Convention. The applicant, a former teacher, received a disciplinary punishment in 1994 for a statement made to the press in which she declared that at a meeting some teachers were assaulted by the police. In 1998, however, the Supreme Administrative Court decided that the disciplinary sanction was unlawful. In 1999 the Administrative Court adopted the reasoning of the Supreme Administrative Court and finally cancelled the disciplinary sanction imposed on the applicant. The Strasbourg Court decided that although five years and nine months is a considerable period of time, it did not deprive the domestic procedures of efficacy in providing adequate redress. The Administrative Court quashed the disciplinary sanction which thereby ceased, retrospectively, to have any effect, vindicating the applicant's right of freedom of expression. In such circumstances

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Judgment by the European Court of Human Rights of 10 October 2000, Case of *Akkoç v. Turkey*, Applications nos. 22947/93 and 22948/93. Available on the ECHR's website at:
<http://www.echr.coe.int/hudoc>

EN

Judgment by the European Court of Human Rights of 10 October 2000, Case of *Ibrahim Aksoy v. Turkey*, Applications nos. 28635/95, 30171/96 and 34535/97. Available on the ECHR's website at:
<http://www.echr.coe.int/hudoc>

FR

EUROPEAN UNION

European Parliament Approves Proposal on Unbundled Access to the Local Loop

On 26 October 2000, the European Parliament adopted a Legislative Proposal based on the Commission's proposal for a regulation of the European Parliament and of the Council on unbundled access to the local loop. The Commission's proposal is a response to the call of the Lisbon European Council for a reduction in the costs of using the Internet (see IRIS 2000-4: 3). A regulation has been preferred as a legal instrument over a directive, which is normally the legal instrument used in telecommunication matters. This choice has been justified on two grounds: the speed of implementation and the need for technical consistency. The Parliament welcomed the

law, but Articles 28 and 29 of the Swiss Civil Code protect personality rights and allow anyone to denounce the wrongful use of his or her name, and the Panel felt that these legal provisions offered similar protection to brand-name copyright.

The Panel also considered that Second Orbit Communications, which made no response to the actress' complaint, had not demonstrated that it had any legitimate rights or interests in respect of the disputed domain name. Lastly, in respect of the third condition required by Article 4a of the Policy, it was not established that the defendant had registered the domain name with a view to preventing Isabelle Adjani from making similar use of her name, nor that it had attempted to make money out of the domain name by selling it to the actress. The Panel nevertheless found that the good faith of the defendant was not proven, recalling that the passive holding of a domain name could amount to bad faith use. ■

the applicant cannot longer claim to be a victim of an interference with her right of freedom of expression under Article 10 of the Convention.

In the same case, however, the Court found a violation of Article 2 of the Convention (right to life) and Article 3 of the Convention in respect of the torture of the applicant in police custody.

In another judgment of 10 October 2000 the European Court of Human Rights (3rd section) in the case of *Ibrahim Aksoy v. Turkey* concluded that Article 10 of the Convention had been violated. The applicant, a writer and former Member of Parliament, was convicted several times in Turkey for disseminating separatist propaganda. Neither the speech at a regional congress, nor the publication of an article in a weekly magazine, nor the content of a leaflet, could justify these convictions according to the Strasbourg Court. The Court was of the opinion that the speech, the article and the leaflet did not constitute an incitement to violence, armed resistance or an uprising. The Court emphasised that one of the principal characteristics of democracy is the possibility to resolve a country's problems through dialogue and without recourse to violence, even when it is irksome. According to the Strasbourg Court, the conviction of the applicant could not be regarded as necessary in a democratic society and hence violated Article 10 of the European Convention on Human Rights. This judgment is not final. Either party to the case may, within three months from the date of the judgment of a Chamber, request that the case be referred to the Grand Chamber (Art. 43-44 of the Convention). ■

original proposal (see IRIS 2000-8: 3), but introduced more detailed provisions in order to ensure that the regulation would be fully operational. These amendments were fully accepted by the Commission. The text is also the result of an ongoing dialogue between the Parliament and the Council, which has already accepted most of its provisions. Therefore a swift approval of the amended proposal by the Council without any further reading is expected.

The local loop is the physical circuit connecting the customer's premises and the main distribution frame or equivalent facility in the fixed public telephone network. Local loops are normally owned by former telecommunications monopolies, and therefore pose an obstacle to competition. It is expected that unbundled access to the

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local loop will increase competition in Internet access services and multimedia applications based on digital subscriber line (DSL) as well as in voice telephony services, and will lead to reduced costs for consumers and foster

Informal consolidated text of the proposed Regulation of the European Parliament and of the Council on unbundled access to the local loop, including the amendments voted by the European Parliament during the plenary session of 26 October 2000. Available at: http://www.europa.eu.int/comm/information_society/policy/telecom/localloop/pdf/infregep_en.pdf

EN

Report on the proposal for a regulation of the European Parliament and of the Council on unbundled access to the local loop, Final A5-0298/2000 (COM(2000) 394 - C5-0432/2000 - 2000/0185(COD)), available in all EU-languages at:

http://www2.europarl.eu.int/omk/OM-Europarl?PROG=REPORT&L=EN&SORT_ORDER=D&REFERENCE=A5-2000-0298&F_REFERENCES=A5-0298%2F00&PUBREF=&PART=&LEG_ID=5&I_YEAR=00&I_YEAR=01&I_YEAR=02&I_YEAR=03&I_YEAR=04&I_NUM=0298&LEVEL=2

DE EN FR

NATIONAL

BROADCASTING

BE – Prohibition on Broadcasting Election Debate Ignored

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A few days before the local elections of 8 October, the website of the public broadcasting organisation VRT announced a special programme on the election campaign in Louvain. It was announced that in a programme of 4 October two candidates for mayor, Mr. Tobback (former Minister of Internal Affairs, and mayor of Louvain at the time of the campaign) and Mr. Daems (Minister responsible for Telecommunications and leader of the biggest opposition party in Louvain) would participate in a debate. Mr. Devlies, who considered himself also a candidate for mayor, requested in a summary proceeding on 4 October an injunction against the VRT not to schedule this debate, unless the participation of Mr. Devlies was

President of the Court of first instance (ex parte request), Brussels 4 October 2000. See *Juristenkrant* 24 October 2000, 2-3

NL

BG – Recent Amendments to the Bulgarian Law on Radio and Television:

Recently, the Bulgarian Parliament adopted amendments to the *Zakon za Radioto i Televiziata* (Bulgarian Law on Radio and Television – LRT). They came into force in October 2000. The amendments concern several key aspects of LRT, some of which are connected with the initial disputes over the very adoption of the LRT several years ago (see IRIS 1999-1: 8, IRIS 1998-9: 1 and IRIS 1998-9: 10-11).

Firstly, through changes made to the provisions contained in Articles 3, 5, and 6 LRT, sole traders are now included in the list of subjects entitled by the Law to undertake radio and television activities. The previous text of the Law allowed only “natural persons” and “legal entities” to carry out these activities. Because the sole traders do not fall into either of these categories they had practically been deprived of the right to establish themselves in radio and television, a result for which the

the development of the Information Society in Europe.

The Proposal requires notified operators from 31 December 2000 to make an offer for unbundled access to their local loops and related facilities. Notified operators are only those network operators that have been designated by their national regulatory authorities as having significant market power in the network supply market of fixed public telephone under Annex I Part 1 of Directive 97/33/EC or Directive 98/10/EC. A minimum of items to be included in the offer is listed in the Annex to the Proposal. Notified operators will also give from 31 December 2000 unbundled access to their local loops and related facilities, under transparent, fair and non-discriminatory conditions. Prices will be charged on the basis of cost-orientation until the national regulatory authority accepts that the competition in the local access market is sufficiently developed. Each national regulatory authority will ensure fair and sustainable competition and non-discrimination. Each of them can impose changes in the offer for unbundled access to the local loop, including prices, and require relevant information from the notified operators. ■

guaranteed. Few hours later, the president of the Court granted the unilateral request and ordered the VRT not to broadcast the scheduled debate. The president of the Court was of the opinion that the VRT was not acting with sufficient objectivity in not inviting the leader of the second largest political party of Louvain. The absence of this candidate in the television debate of that evening might give the electorate the impression that Devlies was not a candidate for mayor. In order to protect the interests of Mr. Devlies, the VRT was ordered not to broadcast the television debate, on threat of a fine of BEF half a million. The VRT nevertheless decided not to change the format of the programme and that same evening broadcast the election debate with only Mr. Tobback and Mr. Daems. The decision of the Brussels judge as well as VRT's refusal to obey the judgment were sharply criticised in the press and in legal commentaries. According to the VRT the decision of the judge was to be considered as a kind of censorship in breach of the constitutional guarantees regarding to the freedom of expression. ■

old LRT had not given any particular reason.

The term “radio- and television operators” as used by the LRT has been clarified by the adoption of the new definition contained in point 23 of Section 1 of the LRT's Additional Provisions. This shall prevent ambiguities with regard to the scope of application of the LRT.

A considerable part of the amendments to the LRT aim to align Bulgarian radio and television with European standards, as has been strongly recommended by EU bodies and the Bulgarian media authorities.

For example the amendments to Article 10 paragraph 2 and 3 LRT provide for a fixed minimum percentage of the European production from the total broadcasting time (excluding the news, sports programs, radio and television games, advertisements, tele-text and teleshoping). The amended Section 1 of the LRT's Additional Provisions define explicitly and in detail the term “European production”. The main criterion is whether the country of origin of the respective programme is a mem-

ber of the EU and/or is party to the European Convention for Transfrontier Television.

Another new item introduced by the recent amendments is aimed at tightening the requirements imposed on radio and television programmes with regard to their moral aspect. Art. 10 paragraph 1 of the LRT, which sets out the main and obligatory principles to be followed by electronic media operators, has been expanded. Programmes that contain pornography are thus explicitly

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Georgiev Todorov & Co

Zakon za Radioto i Televiziata (Law on the Radio and Television), Prom. SG 138 1998; Amend Sg. 60 1999; Amend. SG 81 1999; Amend. and Suppl. SG 79 2000

EN

ES – Supreme Court Rejects Appeal Against the National Technical Plan on DTTV

On 7 February 2000 the *Tribunal Supremo* (Supreme Court) rejected an appeal by the local Government of Viladecans against the *Real Decreto 2169/1998, de 9 de octubre, por el que se aprueba el Plan Técnico Nacional de la Televisión Digital Terrenal* (Decree 2169/1998, on the National Technical Plan on Digital Terrestrial TV) (see IRIS 1998-10: 11).

According to the applicant, the Decree does not regulate the provision of Digital Terrestrial TV (DTTV) services by local governments nor does it reserve part of the spec-

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Dirección Audiovisual Comisión del Mercado de las Telecomunicaciones

Sentencia del Tribunal Supremo, Sala 3ª, of 7 February 2000 (Ponente: D.S. Menéndez Pérez) (Judgment of the Supreme Court – Administrative Chamber)

ES

ES – New Code of Listed Sports Events

On 31 July 2000, the Plenary Meeting of the *Consejo para las Emisiones y Retransmisiones Deportivas* (Committee for the Broadcasting of Sport Events) approved the Code of Listed Sports Events for the 2000/2001 season. Sports affected are football, cycling, basketball, handball, motorcycle racing, track & field events and tennis. The Code indicates which events in each of these

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Dirección Audiovisual Comisión del Mercado de las Telecomunicaciones

Resolución de 31 de julio de 2000, del Consejo de Emisiones y Retransmisiones Deportivas, por la que se ordena la publicación del Acuerdo del Pleno del Consejo de Emisiones y Retransmisiones Deportivas por el que se aprueba el Catálogo de Competiciones o Acontecimientos Deportivos de Interés General para la temporada 2000/2001 (Resolution of the Committee for the Broadcasting of Sport Events, on the code of listed sport events for the 2000/2001 season), BOE n. 191, of 10 August 2000, p. 28656

ES

ES – Limit of CMT's Power to Grant Concession

On 14 September 2000, the *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission – CMT) rejected a submission for a permit to provide local terrestrial TV services. This submission was presented by Tele K, a local TV operator which started to provide its services before the Spanish Act 41/1995 on Local Terrestrial TV was passed, and therefore is affected

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Dirección Audiovisual Comisión del Mercado de las Telecomunicaciones

Acuerdo del Consejo de la Comisión del Mercado de las Telecomunicaciones of 14 September 2000, por el que se resuelve el Expediente LI-2000/2509 (Tele K – Casandra Desarrollo y Animación, S.L.) (Resolution of the CMT on the procedure LI-2000/2509 – Tele K), available at

<http://www.cmt.es/cmt/document/decisiones/RE-00-09-14-19.html>

ES

prohibited as are programmes inciting racism, or discrimination. The term “pornography” is, however, not defined in the LRTs Additional Provisions. Some additional restrictions are introduced to the provisions concerning advertising spots. For example, advertisements with erotic elements shall not be transmitted during children’s or teenagers’ programmes.

Furthermore, the amendments introduce new regulations of the advertising schedule in the electronic media aimed mainly at harmonizing the LRT with the applicable EC law in this area (see for example the amended Art. 80 LRT).

These amendments to the LRT are not likely to stop all controversies surrounding the law and they will hardly be the last change to it. Yet they could be viewed as a step towards a more complete regulation of a still extremely disputed legal area, namely the area of Bulgarian media law. Moreover, they are another step towards the harmonization of Bulgarian with EC law. ■

trum to allow the migration of the existing local TV managed by local authorities from analogue to digital transmission techniques.

The *Tribunal Supremo* rejected the appeal on the grounds that the possible omissions in Decree 2169/1998 would only render it illegal if they necessarily implied that the Decree was not in line with the basic legislation in this field, and, according to the *Tribunal Supremo*, this was not the case. Moreover, the Tribunal said that Decree 2169/1998 does mention local DTTV services, and the fact that it does not expressly state that these services can be provided by local authorities does not alter or modify the regulation of the provision of local terrestrial TV services by local authorities (arts. 5, 9, 12 and 13 of the Law 41/1995, on local terrestrial TV). ■

sports must be broadcast on free-to-air TV (provided a free-to-air broadcaster is interested in doing so). In addition, it ought to be noted that Art. 5 of Law 21/1997 states that a match from every league or cup competition game day, for those sports in which such competition systems apply, must be broadcast live, free and throughout the entire national territory. This Code of Listed Sport Events, as well as the Codes passed by the Committee since its creation in 1998, has not yet been notified to the European Commission. ■

by the Transitional Provision of this Law, which states that the local TV operators that were providing services before January 1995 are authorised to continue with their activity until the concessions are granted. The concessions should be granted by the Autonomous Communities (Spanish regions, which have legislative and administrative powers and functions in certain fields, including broadcasting), but they cannot do so because the necessary Technical Plan has not been approved by the national Government. The CMT acknowledges the uncertainty created by this situation, but it has stated that it has no powers to grant concessions for the provision of local TV services. ■

ES – CMT Approves New Resolutions Related to Audio-Visual Services

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Mercado de
las Telecomu-
nicaciones

On 28 September 2000, the *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission – CMT) adopted a Resolution stating that it will investigate the impact of the use of proprietary APIs (Application Programming Interfaces) in the Digital Terrestrial TV market.

Acuerdo del Consejo de la Comisión del Mercado de las Telecomunicaciones of 28 September 2000, por el que se aprueba la resolución sobre la solicitud de intervención presentada por Sogecable, S.A. relativa a la adopción de determinadas medidas para garantizar la libre competencia en la prestación de servicios de la sociedad de la información en el sector de la televisión digital de ámbito estatal y el derecho de los usuarios de acceder a la pluralidad de ofertas existentes en el mercado (Resolution of the CMT on the intervention of the CMT requested by Sogecable in relation to the adoption of certain measures for the safeguard of free competition in the DTTV market), available at: <http://www.cmt.es/cmt/document/decisiones/RE-00-09-28-06.html>

ES

FR – Canal Satellite Obligated to Amend its Subscription Contract

In response to a claim brought by a consumer protection association, the company Canal Satellite (which markets a range of services and broadcasts digital television channels by satellite to its subscribers) has been ordered by the Regional Court of Paris to delete a number of clauses which were considered abusive from its subscription contract. According to the terms of Article L 132-1 of the Consumer Protection Code, clauses in contracts concluded between professionals and non-professionals or consumers are deemed to be abusive if their purpose or effect is to create a significant imbalance to the disadvantage of the non-professional or consumer between the rights and obligations of the contracting parties; such abusive clauses are to be considered as void. However, according to Article 2 of the Canal Satellite subscription contract, the duration of the subscription is six or twelve months and the contract may only be terminated by the subscriber on the normal renewal date of the subscription. The applicant association maintained that this article created an imbalance between the rights of the parties, in particular in combination with a further clause which allows Canal Satellite to amend, without prior notification, the composition of the selection of theme channels offered. The Court found that a consumer did not have the possibility of terminating the contract except on its renewal date, and was therefore

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L'Équipe

Regional Court of Paris (1st chamber), 10 October 2000 – *Association Consommation Logement Cadre de Vie v. Canal Satellite*

FR

GB – Court Overturns Regulator's Refusal of Consent for Exclusive Broadcasting of Danish Football Matches

The case concerning the broadcasting of Danish football matches referred to in IRIS 2000-8: 7 has now been resolved by the UK Court of Appeal in favour of the private broadcaster. The background is that TVDanmark 1, a broadcaster established in the United Kingdom, had acquired exclusive rights to broadcast to the Danish population football matches involving the Danish national

The API's perform in the digital TV decoders a similar function to that of the operating systems in the PC's. They translate interactive TV applications written in a high-level software programming language into a low-level language the decoder can understand. If a decoder has a proprietary API embedded, it will not be able to understand interactive TV applications broadcast by a digital TV platform that uses a different proprietary API.

In Spain, the main operator in the DTTV market, Quiero TV, has chosen a proprietary API, Open TV. One of its rivals, the broadcaster Sogecable, has complained that this choice may affect competition in the DTTV market, and could restrict the ability of customers to receive all digital TV and interactive TV services with a single decoder. Quiero TV has argued that when it started operating it had to choose a proprietary API because there were no open APIs at that time, and that it then accepted a compromise to start the migration to an open API (the Multimedia Home Platform - MHP - fostered by the Digital Video Broadcasting group) as soon as it is available. Nevertheless, the CMT has decided to open an inquiry in order to assess the impact of the choice of API made by Quiero TV on the digital TV market. ■

unable to end it for legitimate reasons, particularly in the event of channel amendments being made. Article 2 of the contract was therefore found to be abusive and the Court ordered its deletion. The same applied to the provisions concerning the amendment, termination and the interruption of certain programmes by Canal Satellite without first informing the subscriber and without the subscriber having the possibility of terminating the contract. The association also challenged Article 7-1 on the subscription charge, as subscribers are only informed of changes by a notice in the company's magazine, *Le magazine des abonnés*. Here again the Court upheld the applicant's arguments; it considered that the subscription charge constituted a substantial element in the agreement binding the parties and that the consumer should be informed of any change made to it. This information could not be reduced to a circular memorandum appearing in a magazine produced by Canal Satellite; it should be notified to each subscriber individually. The Court also cancelled the clause in the subscription contract which waived any liability on the part of Canal Satellite in the event of technical difficulties arising in the functioning of the broadcasting satellites. The Court found that this clause was not specific enough and prevented determining whether it was possible for the company to take steps to prevent or remedy any malfunction.

Since a number of clauses in the disputed subscription contract had been deleted, the Court found that it was in the interests of consumers for the judgment to be brought to their attention, and consequently ordered its publication in a television magazine. ■

team in World Cup 2002. This broadcaster only reaches 60% of the Danish population. The Danish public service broadcasters, which reach a much higher percentage of the population, had sought to acquire the rights but had made a much lower offer. The UK regulatory body, the Independent Television Commission, had however refused to consent to TVDanmark exercising the rights as the public service broadcasters had expressed a renewed interest in acquiring the rights. The Commission considered that the amended "Television without Frontiers" Directive prevented a substantial proportion of the

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public from being deprived of coverage through the granting of exclusive rights. The Commission's Code on Sports and Other Listed Events, to which it was required by law to have regard, permitted consent to be given if

**Regina v Independent Television Commission, Ex parte TVDanmark 1 Ltd, The Times, 25 October 2000, available at <http://www.thetimes.co.uk/article/0,,24383,00.html>
The Commission's Code is available at <http://www.itc.org.uk/>**

GB – Regulator Publishes New Sponsorship Code

The Independent Television Commission, the UK regulator of private broadcasters, has published a new code on the regulation of television sponsorship. It hopes that the new code will provide "a streamlined and more user-friendly approach" to regulation.

The two key principles have been retained from the earlier code; the requirement of editorial independence from the influence of sponsors and the requirement that advertising and sponsor credits are clearly distinguished. These are designed to prevent programmes from being distorted for commercial purposes and sponsor credits from being used as extra advertisement time.

The code has however been relaxed in other ways. Although there must still be no sponsor credits within programmes, the sponsor's credits at the beginning or

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**Independent Television Commission, Code of Programme Sponsorship, available at <http://www.itc.org.uk/>
The Press Release announcing the change is available on the same site as ITC Press Release 71/00, "ITC Publishes Simpler and Streamlined Sponsorship Code"**

NL – Broadcasting Prohibited to Protect Privacy

625 is a producer of a television show called *Spookhuis* (Haunted House) which is broadcast by *Holland Media Group* (HMG). With the help of a hidden camera the programme sheds some light on the way repairs in and around the house are carried out by professional repairmen. Through the programme HMG and 625 intend to expose fraud committed by the workmen. For *Spookhuis* 625 filmed the repair activities of both Luiten (electrical equipment repairman) and Schinkel (central heating serviceman). The film and the comments added afterwards suggested that Luiten and Schinkel did not carry out their work properly and questioned their professionalism and what they charge.

In both cases the President of the District Court of Amsterdam found that the plaintiff's interest in the protection of his private life prevails over the interest of HMG and 625 in exercising their right of freedom of

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President District Court Amsterdam, Judgment of 11 September 2000, KG 00/2095, Luiten v. HMG and 625 TV Producties (625 TV Productions), and President District Court Amsterdam, Judgment of 25 September 2000, KG 00/2197, Schinkel et al v. HMG and 625 Producties (625 TV Productions)

NL

US – FCC Receives Strong Rebuke as Personal Attack and Political Editorial Rules Are Repealed

In a decision highly critical of the Federal Communications Commission ("FCC"), the United States Court of

other broadcasters had had a fair opportunity to bid for rights themselves.

The Court of Appeal decided that, although the object of the Directive was maximum coverage, it was not an object to be achieved at any cost and other factors had to be borne in mind, such as the need to sustain competition and to prevent public service broadcasters from becoming over-dominant as well as the need to have regard to the binding nature of a contract. It was sufficient compliance with the Directive to regulate at the point of acquisition of rights and it would be a radical departure from the Commission's Code to attempt to regulate post-acquisition, as the Commission had attempted to do. ■

end may now contain a representation of the sponsor's products provided that this is done so as to reflect the link between the sponsor and the programme. The credits may also include contact details such as a website or telephone numbers so long as they do not form part of an explicit encouragement to purchase or to contact the sponsor. Presenters of news programmes during the last twelve months must not be used to present sponsor credits.

The prohibition on the sponsorship of news programmes, current affairs programmes and consumer advice programmes is retained to prevent any influence on editorial content. However, the sponsorship of business and finance programmes will not be prohibited in other cases, though they may be restricted in their choice of sponsor. Short specialist reports after news programmes, such as information on weather, travel or sport, may be sponsored if clearly separated from the news programme. The former prohibition in all cases on sponsorship by political parties, tobacco companies, pharmaceutical and gaming companies remains. ■

expression. As a result, he prohibited the transmission of the programme. According to the President the defendants have not made a plausible argument that Luiten or Schinkel are frauds whose practices have to be exposed in the public interest. No submission was made or evidence produced that either of them is known as a fraud or as unprofessional, nor that there have been complaints from consumers. The President attached weight to the fact that a hidden camera was used. The use of a hidden camera must be justified by the gravity of the alleged fraud and the absence of other means to expose the possibly fraudulent practices.

In the case of Luiten, the President considered that the fact that Luiten did not explicitly object to the shootings and responded in front of the camera, does not mean that he gave tacit permission. In the case of Schinkel, the President held that plaintiffs are still recognisable by figure, posture and clothes despite the fact that their faces and voices were made unrecognisable. The President even felt that to make plaintiffs in this way anonymous even strengthened the impression that they were criminals. Therefore he recognised the plaintiffs' reasonable interest in prohibiting transmission. ■

Appeals for the District of Columbia directed the FCC to immediately repeal its personal attack and political editorial rules.

Generally, the personal attack rule provides that when an attack is made on a person's integrity during a

program on a controversial issue of public importance, the broadcast licensee must inform the subject of the attack and provide an opportunity to respond on the air. Similarly, the political editorial rule provides that if a broadcast licensee airs an editorial supporting a political candidate, it must notify other candidates for that office of the editorial and provide them an opportunity to respond on the air.

The rules have long been criticized by broadcasters and subject to various legal challenges over the past twenty years. Proponents of the rules claim that they promote diversity of opinion and the right to information whereas critics complain that the rules' reply requirements discourage the discussion of controversial topics and political coverage. The rules' critics received some support for their position in 1999 when the D.C. Court of Appeals held that the rules "chill at least some speech and impose at least some burdens on activities at the heart of the First Amendment." In light of this finding, the court remanded the case to the FCC with the instruction to expeditiously "explain why the public interest would benefit from rules that raise these policy and constitutional doubts."

Despite the court's emphasis on expeditious action, the FCC took more than nine months to advise the court that any such action had been taken. Finally, on 4 October 2000, the FCC released an "Order and Request to Update the Record." In the Order, the FCC suspended the personal attack and political editorial rules for sixty days and asked interested parties to then submit evidence on the effect of the suspension of the rules in order to create a record upon which the FCC could review the

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Order and Request to Update the Record, In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules, MM Docket No. 83-484, FCC 00-360 (4 October, 2000).

Radio-Television News Dirs. Ass'n et al. v. FCC, ___ at ___ (D.C.Cir. 2000).

Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 887 (D.C.Cir. 1999).

EN

YU – Code of Conduct for the Broadcasting Media in Kosovo

The UN Civil Administrator, the Special Representative of the Secretary-General (SRSG), for Kosovo has issued Regulation No. 2000/36 on the Licensing and the Regulation of the Broadcast Media in Kosovo, which came into effect on 17 June 2000. By this regulation, the SRSG appointed a Temporary Media Commissioner (TMC), who is responsible for the implementation of a temporary regulatory regime for all media in Kosovo, pending the creation of a licensing and regulatory authority in Kosovo.

A Code of Conduct for the Broadcast Media has been issued by the TMC on 8 September 2000, according to Section 1 of UNMIK Regulation No. 2000/36 on the Licensing and Regulation of the Broadcast Media in Kosovo (17 June 2000).

Apart from the Preamble, which cites cornerstone articles of main international instruments dealing with

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UNMIK Regulation No. 2000/36 on the Licensing and Regulation of the Broadcast Media in Kosovo of 17 June 2000; UNMIK Regulation No. 2000/37 on the Conduct of the Print Media in Kosovo of 17 June 2000; TMC Code of Conduct for the Broadcast Media in Kosovo of 8 September 2000; TMC Temporary Code of Conduct for the Print Media in Kosovo. For all Kosovo media laws and regulations see: <http://www.osce.org/kosovo>

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rules. Among the evidence requested was (1) the number of political editorials run during the suspension period; (2) the number of editorials run during prior election cycles; (3) the nature of the elections on which they editorialize; and (4) whether other media outlets editorialized on those races.

The Order was approved by a 3-2 majority, with the two Republican Commissioners critical of the delay in reaching a decision and of the decision itself. Both Commissioners favored a repeal of the rules. However, the three Democratic Commissioners voted to approve the Order.

The criticism of the Order by the Commission's Republican members was supported and magnified in the court's recent decision. Upon its review of the Order, the court stated that "Neither the timing nor the substance of the Order responds to the court's remand." Of the delay between the earlier decision and the FCC's Order, the court held that "[we] can only conclude that [our] remand order for expeditious action was ignored." The court was equally critical of the substance of the Order, stating "it is folly to suppose that the 60-day suspension and call to update the record cures anything" and "the Order provide[s] short notice for broadcasters to change their plans [and] their conduct will in any event be affected by the fact that the rules will be reinstated on 3 December 2000." Moreover, the court expressed little confidence that the Order would lead to a timely review of the impact of the rules' suspension, stating "The Order provides no assurance whatsoever that the Commission will proceed expeditiously once it receives the requested information."

As a result of its findings, the court issued a writ of mandamus directing the FCC to immediately repeal the personal attack and political editorial rules. Whether the repeal of the rules effected television coverage of political or controversial issues during the recent election campaign is open to debate. However, it is likely that the outcome of the Presidential election may determine whether the FCC institutes a new rulemaking to determine whether the public interest requires the rules: the Republican Party has generally maintained that the rules should be abandoned while the Democratic Party has called for broader public interest obligations for broadcasters. ■

human rights and press freedom, the Code of Conduct comprises the following 12 Sections: Application, Provocative Statements, Privacy, Fairness and Impartiality, Applicable Law, Separation of News and Opinion, False and Deceptive Material, Language, Right of Reply, Complaints by the Public, Archives and Undertaking.

A Temporary Code of Conduct for the Print Media in Kosovo has also been issued by the TMC, pursuant to Section 1 of UNMIK Regulation No. 2000/37 on the Conduct of the Print Media in Kosovo (17 June 2000).

With a Preamble almost identical to that of the Broadcasting Code, the Print Media Code of Conduct comprises 10 Sections: Application, Provocative Statements, Privacy, Applicable Law, Separation of News and Opinion, False and Deceptive Material, Right of Reply, Complaints by the Public, Archives and Termination.

Sanctions for breaches of the two Codes are similar – ranging from a warning, the requirements to publish a reply, correction or apology, to financial penalties, to seizure of equipment and/or printed material, to suspension or closedown of operation.

As is the case in Bosnia-Herzegovina, all media laws and regulations in Kosovo that were issued by the international community (i.e. the UN administration and independent bodies established by the relevant instruments) take precedence over domestic legislative. ■

NEW MEDIA/TECHNOLOGIES

CH – Decree on Electronic Certification Services Comes into Force

The Swiss Federal Council's adoption of the Decree on Electronic Certification Services (*Oscert*) constitutes a decisive step towards acknowledging the use of digital signatures and securing electronic trading in Switzerland. The Decree came into force on 1 May 2000; it lays down the legal, technical and financial conditions which providers of electronic certification services must meet if they wish to be covered by the Decree and be acknowledged by the appropriate authority. Being covered by the Decree remains optional, however; providers of certification services are therefore still free to offer such services outside the system provided for by the Decree. Thus the acknowledgement system is aimed at conferring greater legitimacy and a "quality label" on those providers who so desire. The principal demands made by the Decree concern the generation and use of encryption

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Decree on Electronic Certification Services of 12 April 2000. Federal Office for Communications, Berne. Available at the following address:
http://www.admin.ch/ch/f/rs/784_103/index.html

FR DE IT

keys, electronic certificates and the providers of certification services; these demands correspond to those laid down in the appendices to Directive 1999/93/EC of 13 December 1999 on electronic signatures.

Acknowledgement of providers of certification services is issued by the certification bodies accredited by the Swiss Accreditation Service (SAS) of the Federal Office of Metrology (*Ofmet*). The conditions for acknowledgement laid down by the Decree refer in particular to staff qualifications, the reliability of the IT systems and products used, and the financial resources and guarantees of the service providers. The latter must have the necessary insurance to cover their liabilities. They are also responsible for any prejudice suffered as a result of erroneous certification, unless they are able to demonstrate that they were not at fault in any way. In addition, the list of acknowledged providers of certification services is published. The Decree also provides for the possibility of obtaining a statement from the certification bodies confirming the conformity and validity of an electronic certificate at a given time. Lastly, the Decree defines the minimum requirements which electronic certificates issued by acknowledged providers must meet.

Providers of certification services must physically check the identity of the persons applying for a certificate. In order to guarantee the authenticity of the certificate, this is signed electronically by the service provider before being listed in a register which may be consulted freely by the public. In addition, providers of certification services must cancel a certificate immediately if its holder so requests, for example in the event of losing the private key, or if it transpires that the certificate was obtained fraudulently, or if it ceases to guarantee the connection between a person or an administrative entity and a public key. ■

FR – E-mail Protected by Privacy of Correspondence

For the first time to our knowledge, the Courts have pronounced on the legal status of e-mail correspondence. The dispute was between a research student in a laboratory, and the director and two IT network administrators at the laboratory, charged with having violated the privacy of correspondence by reading the student's e-mail correspondence without his knowledge. The defendants claimed that e-mail messages could not have the benefit of the rules of confidentiality enjoyed by postal correspondence since these messages, which were unencrypted, were entrusted to intermediary servers which carried them with no protection and delivered them to their addressees. It was therefore necessary, in view of the potential amount of damage they could cause, to be able to check them on arrival in a network. The regional criminal court of Paris did not accept these arguments, however. It held that correspondence was protected by

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Regional Court of Paris (17th chamber), 2 November 2000 – Public Prosecutor v. Virieux, Fermigier and Hermann

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the law "as long as its content was exclusively sent by one particular person to another particular person, unlike messages made available to the public". The privacy of correspondence was governed by Articles 226-13 and 432-9 of the Criminal Code, embodied in the rule laid down in Article 1(1) of the Act of 10 July 1991 according to which "the privacy of correspondence effected by means of telecommunications is guaranteed by law". It was therefore necessary to determine whether the disputed electronic mail was protected by such privacy. The messages in question were sent exclusively to a natural or legal person; they were sent to a specific person (where the address was nominative) or to a person occupying a specific post (where the address was functional) and were personalised in that they established a relationship between the sender and the receiver. The Court concluded that "the sending of electronic messages from one person to another constitutes private correspondence". The plaintiff's mail was therefore entitled to the protection of privacy of correspondence by means of telecommunications, violation of which was covered by criminal law. The defendants were therefore ordered to pay fines of FRF 10 000 and FRF 5 000. ■

IT – Pay-TV Digital Platforms Fined for Infringement of Decoder Provisions

According to Law no. 78/99 (IRIS 1999-4: 8) and to the Regulation of the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications Authority – AGC) of 7 April 2000, no. 216/00/CONS (IRIS 2000-6: 9) a common decoder for pay-TV broadcasters established in Italy should have been introduced by 1 July 2000. For that purpose the operators of the two existing Italian digital

platforms Telepiù, controlled by CANAL+, and Stream, controlled by Telecom Italia, should have informed the AGC before 20 June 2000 about how they intended to comply with this obligation, under which they had to ensure that consumers were granted the enjoyment of all conditional access digital programmes and the reception of free-to-air broadcasting through the same decoder. In particular, the two parties could choose between Simulcrypt and Multicrypt systems, the former working between different proprietary conditional access

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architectures, the latter operating through a common interface.

Decision of the *Autorità per le Garanzie nelle Comunicazioni* of 12 September 2000 no. 578/00/CONS, *Attuazione della delibera n. 216/00/CONS: sanzioni e diffide alle società Stream S.p.A. e Telepiù S.p.A.* Available on the AGC website, http://www.agcom.it/bu00_5/sanzioni/578_00_CONS.htm
Decision of the *Autorità per le Garanzie nelle Comunicazioni* of 4 October 2000 no. 656/00/CONS, *Attuazione della delibera n. 216/00/CONS: nuove sanzioni e ulteriori diffide alle società Stream S.p.A. e Telepiù S.p.A.* Available on the AGC website, http://www.agcom.it/bu00_5/sanzioni/656_00_CONS.htm
Press release of the *Autorità per le Garanzie nelle Comunicazioni* of 25 October 2000. Available from on the AGC website, http://www.agcom.it/comunicati/cs_251000.htm

IT

RU – The Supreme Court of Russian Federation Partially Cancels the Decree on SORM

On 25 September 2000, the Supreme Court of the Russian Federation considered a complaint that had been lodged regarding the Decree regulating the implementation on the so-called Operational-Investigative Activity on telephone, mobile, wireless connection and personal radio communication network (*SORM*), issued by the Ministry for Communication and Informatization (see IRIS 2000-8: 11).

The complainant Pavel Neptunskiy asserts that under the Decree, neither service providers nor supervising bodies can check who is subject to eavesdropping and what is the volume of security services' activity in this area. For this reason, it was alleged that certain provisions of the Decree were not compatible with the Constitution of the Russian Federation and the Federal Statutes *O svyazi* (On Communication) and *Ob operativno – rozysknoi deyatel'nosti* (On Operational Investigation) and, hence, were illegal.

The Supreme Court decision confirms that Article 2.6 of the Decree is illegal and thus not applicable. The Court held that in essence this rule prevented service providers from adhering to their obligation to respect the right to privacy of telephone conversations, established by Article 32 of the Federal Statute On Communication. Article 32 further envisages that any restriction of privacy in communication, such as eavesdropping, inspection of communication messages, as well as a delay, examina-

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Prikaz Ministerstva Rossijskoj Federatsii po svyazi i informatizatsii No. 130 "O poriadke vnedreniya tekhnicheskikh sredstv po obespecheniju operativno-rozysknykh meropriyatiy (SORM) na setyakh telefonnoy, podvizhnoy i bezprovodnoy svyazi i personal'nogo radiovyzova obshchego polzovaniya" (Ministry of Communication 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) and the judgment the Supreme Court of Russian Federation of 25 September 2000 were published in *Zakonodatel'stvo i praktika sredstv massovoy informazii* (Media Law and Practice) journal # 10, 2000 (available at www.medialaw.ru).

RU

RELATED FIELDS OF LAW

CZ – Transposition of the Distance Marketing Directive

Directive 97/7/EC on the protection of consumers in respect of distance contracts was transposed into the law of the Czech Republic by the Amendment of the Civil Code Articles 52 – 57 in Part Five of the Code, entitled Consumer Contracts.

The provisions of the Civil Code give legal protection to

On 7 July 2000 Telepiù and Stream were warned not to infringe the Law by using different decoders and on 12 September they were fined LIT 300 million (approximately Euro 155 000). When the infringement of the Law persisted, on 4 October 2000 a new fine of LIT 500 million (approximately Euro 260 000) was imposed. On 25 October the AGC examined a draft agreement reached by the parties on 20 October, according to which the common decoder would be introduced in April 2001. Because the agreement was not deemed to be satisfactory with respect to the interest of consumers, the AGC ordered that the parts of the draft that were lacking should be included within ten days, under penalty of suspension of the transmissions. ■

tion, and suppression of messages may be allowed only by a court ruling.

The Supreme Court did not take into account the Ministry's representatives' argument that the officials of the bodies, who are entitled to conduct operational-investigative activity, bear the liability for such measures, because this disclaimer did not release the service providers from their own obligation to observe privacy in communications at any time. The Supreme Court concluded that as a result of the introduction of *SORM* activity, service providers *de facto* disclose private correspondence without the consent of the subscribers or the court's permission.

The Supreme Court did not uphold the complainant's second claim with regard to the legality of Article 1.4 of the Decree on *SORM* related to a number of measures on installation of the system of technical means to provide for operative investigative activity on telephone, mobile, wireless communication and personal radio communication networks. According to the Supreme Court decision, the Decree on *SORM* introduced these measures in order to implement the Federal Law "On Operational Investigation". Article 1.4 in fact indicates the necessity to observe the technical specifications, which were originally introduced by the earlier decrees of the State Committee on Communication of 20 April 1999 No. 70, the State Committee on Telecommunication No. 15 of 9 July 1999, and the Ministry for Communication No. 2 of 29 November 1999. The applicant, however, argued that a number of these decrees on installing the technical means affect human rights, and had not been officially promulgated and therefore were not subject to the application.

The Ministry's representatives referred to the argument that the orders have a technical but not a normative character and therefore their promulgation in a departmental publication had been sufficient. Following this argument, the Supreme Court found Article 1.4 to be legal and rejected the claim of the applicant in this respect. ■

consumers who purchase goods and services by means of a distance communication – that is, where the consumer and the supplier do not have face to face contact. The regulation therefore covers, among others, the sale of goods via e-mail, but also sales effected by teleshopping.

The consumer shall be offered information about the goods and services before the contract is concluded. Hence, suppliers must provide consumers in particular with information concerning the supplier's identity and

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address, a description of the goods or services, their price including all taxes, the arrangements for payment, delivery and performance, and the existence of the consumers right to cancel the contract.

The consumer may withdraw from the contract within a period of fourteen days without giving any reason. The

Zákon č.367 ze dne 14. září 2000, kterým se mění zákon č. 40/1964 Sb., občanský zákoník, ve znění pozdějších předpisů a některé další zákony. (Act No. 367 of 14 September 2000 amending the Civil Code and some other Acts)

CS

DE – Cable Operator Must Revise Cable Allocation

The dispute between the *Sächsische Landesanstalt für privaten Rundfunk und neue Medien* (Saxony Land Authority for Independent Broadcasting and New Media – *SLM*) and cable network operator PrimaCom over cable allocations in Leipzig is, for the time being, being kept out of court.

Targeting several hundred households in Leipzig on an experimental basis, PrimaCom had moved several freely-available independent channels such as ProSieben, RTL 2 and VOX from its analogue package to its digital subscription service. This had aroused fierce protests from the selected households and broadcasters. The *SLM* claimed that this arrangement breached the legal provisions set out in the *Sächsisches Privatrundfunkgesetz* (Saxony Independent Broadcasting Act – *Sächs-PRG*).

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Sächsische Landesanstalt für privaten Rundfunk und neue Medien (Saxony Land Authority for Independent Broadcasting and New Media – SLM) press releases 27/2000 and 29/2000, available at:

http://www.slm-online.de/aktuell/prm00_27.htm

http://www.slm-online.de/aktuell/prm00_29.htm

DE

DE – Confiscation Did Not Breach Press Freedom

In a ruling of 22 August 2000, the *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*) rejected a complaint by daily newspaper *TAZ* that the Constitution had been infringed. The newspaper had appealed against rulings concerning the seizure and confiscation from its editorial offices of an original letter of confession that it had published, as well as the application of Article 97.5.2 in comparison with Article 97.2.3 of the *Strafprozessordnung* (Code of Criminal Procedure – *StPO*).

In September 1995, *TAZ* had published an abridged version of a letter it had received from the group “*Das K.O.M.I.T.E.E.*”. In the letter, the group admitted carrying out an arson attack in October 1994 and an attempted bombing. The original letter was confiscated from the newspaper offices. The confiscation order was upheld by the *Bundesgerichtshof* (Federal Supreme Court – *BGH*) on the grounds that, since writing the letter had constituted a criminal offence, it was not protected from confiscation by Article 97.1 *StPO*. The freedom of the press had therefore not been breached.

The Constitutional Court explained that, in principle, the freedom of the press guaranteed under the Constitu-

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Decision of the Bundesverfassungsgericht (Federal Constitutional Court), 22 August 2000, case no. 1 BvR 77/96

DE

period shall begin on the day on which the consumer receives the goods. If the supplier has failed to provide the required information, the period shall be 3 months. If the information referred to above is supplied within the three-month period, the 14 days period referred to above shall begin as from that moment.

There are situations where Articles 52-57 of the Civil Code do not apply. For example, they are not applicable to financial services, to contracts for the supply of food, beverages or other goods intended for every day consumption and supplied to the consumer's residence, contracts concluded by means of vending machines, contracts concluded at auctions, contracts for the sale of land and contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes to provide these services on a specific date or within a specific period.

The Amendment enters into force on 1 January 2001. ■

The *SLM* wanted the dispute to be settled by the court in a test case. It intended to pass a decree requiring PrimaCom to include in its “basic package” in both analogue and digital formats the “must-carry” channels described in Article 38 paragraphs 1 and 3 of the *SächsPRG* at the very least. Moreover, the selection of channels should depend essentially on viewers' wishes and on the principle that there should be a balanced range of public and independent broadcasters. PrimaCom had already declared its intention to appeal against any such decree.

In a completely separate development, the *Wohnungsbaugenossenschaft Leipzig* (Leipzig housing co-operative) obtained a ruling from the *Landgericht Leipzig* (Leipzig District Court) whereby PrimaCom had immediately to restore the original package of 34 analogue TV channels. This was a civil law judgement relating only to the contractual relations between PrimaCom and the co-operative.

As a result of this ruling, the dispute between PrimaCom and *SLM* has been put on ice. The case will not resume unless *SLM* decides to issue a decree, which it will only do if it believes that the structure of PrimaCom's programme packages elsewhere in its Saxony cable network is illegal. ■

tion included protection of the relationship of trust between the press and private informers. The press could not ignore private statements. However, this source of information would only be productive if informants could rely on the confidentiality of the press.

Nevertheless, the freedom of the press was restricted by general laws, which themselves were to be interpreted with regard to the freedom of the press as well as Articles 53.1.5 and 97.5 *StPO*. The protection from confiscation provided for in Article 97.5 *StPO* did not infringe the Constitution because it created a reasonable balance between the freedom of the press on the one hand and the interests of criminal prosecution on the other. The way the law had been applied in this particular case was also beyond reproach: the *BGH* had weighed up the importance of the unsolved crime and the confiscated letter's value as evidence on the one hand, and the right of the press to an unrestricted flow of information on the other. In doing so, it had considered the possibility that such confiscations could in future stem the flow of information between the press and terrorists. Such a risk was thought to be rather small in this case, since the authors of the letter had deliberately used the press informants in order to pursue aims that went beyond the mere publication of the letter. The authors had attempted to avert suspicion surrounding the accused in a criminal case. ■

DE – Press Entitled to Consult Land Register

The *Bundesverfassungsgericht* (Federal Constitutional Court – *BVerfG*) has again given the press greater freedom through its decision of 28 August 2000.

A finance magazine publisher asked the land registry – initially without explaining her reasons for doing so – to grant an editor access to certain pages of the land register. The request was rejected on the grounds that the registered landowner should be consulted first. Furthermore, the land registry thought that the journalist should explain her reasons for consulting the register in order to weigh up the public interest, as asserted by the press, against the individual interests of the landowner. The publisher's appeal against this decision

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Decision of the *Bundesverfassungsgericht* (Federal Constitutional Court), 28 August 2000, case no. 1 BvR 1307/91

DE

ES – Annual Report of Telecommunications Market Commission

Alberto Pérez Gómez
Dirección
Audiovisual
Comisión del
Mercado de
las Telecomu-
nicaciones

The *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission – *CMT*), is an independent regulatory body whose main duty it is to safeguard the existence of free competition in the telecommunications and audio-visual and interactive services markets.

Informe Anual de la *CMT* 1999 (*CMT Annual Report 1999*), available at http://www.cmt.es/cmt/centro_info/publicaciones/pdf/informe_anual_1999.htm

ES

FR – Television Trailers Constitute Advertising outside the Scope of the Legal Licence

The judgment delivered on 28 September 2000 by the Court of Appeal in Versailles will add further fuel to the debate which has been going on for a number of years on the scope of the legal licence for using commercial phonograms. In the initial proceedings (see IRIS 1998-2: 6), the Regional Court in Nanterre delivered a judgment in this case between the musician Johnny Clegg and his producers, and the company TF1 on 5 November 1997. At the same time, the Court of Appeal in Paris had already delivered a judgment in another case involving the same occurrences and had found the television company France 2 guilty of infringing copyright by using extracts of phonograms to provide background music for its advertising trailers, and the judgment of the Court of Cassation is still pending.

Referring more specifically to the latest decision of the Court of Appeal in Versailles, the facts of the case involved the use by the company TF1 of two of the best-known songs by the musician Johnny Clegg to provide background music for a trailer and the credits for broadcasting rugby matches in the World Cup series. The case was brought by the artist and his producers, and the television company was ordered by the Court in the initial proceedings to pay a large sum in damages for having infringed copyright and for having exceeded the scope of the legal licence.

The question here was whether or not such use could be considered to be covered by the protocol signed by TF1 with the *Société des Auteurs, Compositeurs et Editeurs de Musique* (Association of Authors, Composers and Music Editors – *SACEM*) enabling it to use works in the *SACEM*

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Court of Appeal of Versailles, 28 September 2000; *Société TF1 v. Johnny Clegg et al.*

FR

was subsequently rejected by the *Oberlandesgericht* (Court of Appeal – *OLG*).

In her complaint to the Constitutional Court, the publisher complained of a breach of the freedom of the press to gather information. The Court quashed the disputed ruling on the grounds that the *OLG's* interpretation and application of Article 12.1 of the *Grundbuchordnung* (land registry code – *GBO*) had unfairly restricted the freedom of the press. The Constitution did not prevent the *OLG* from requiring the press to explain their reasons for consulting the land registry. However, the Court ruled that the requirement that legitimate reasons be given and explained should take into account the peculiarities of the free press. As a result, the right of access enjoyed by the press often took precedence over the registered landowner's personal rights where issues of essential public concern were involved, provided the land register was consulted as part of a serious and relevant debate. The Court of Appeal's conclusion that the landowner should be consulted in every case was incompatible with the freedom of the press. The success of the investigation could be permanently jeopardised if the land registry were to inform the landowner that enquiries were being made. This in turn could lead to countermeasures being taken, in particular the destruction of evidence. The case was referred back to the Court of Appeal. ■

In September 2000, the *CMT* presented its Annual Report, which provides an overview of the activity of the *CMT* in 1999, as well as an analysis of the situation of the telecommunications and audiovisual and interactive services markets. ■

repertoire in its programmes and whether, concerning neighbouring rights, this fell within the framework of the legal licence provided for in Article L 214-1 of the Intellectual Property Code. On both these points the Regional Court had replied that the trailers constituted advertising material and that the use of phonograms as background music for them therefore required express, specific authorisation. The Court of Appeal upheld the Regional Court's decision, and held that the disputed sequences were indeed trailers produced by TF1 to promote its programmes and that, even if they did not correspond to the characteristic content and form of advertising material, they undeniably constituted advertising since they concerned a specific product and its producer. The Court also stated, in response to an argument put forward by TF1, that the fact that the *CSA* did not consider such trailers as advertising was irrelevant. As the protocol between TF1 and the *SACEM* prohibited any use of the repertoire for purposes other than those of the requirements of its television broadcasts, the television channel's disputed use of Johnny Clegg's songs therefore constituted infringement of copyright. It infringed both his moral rights by diverting the work from its intended use and the economic rights of the company which held the rights for using the work.

As regards neighbouring rights, the Court continued the same line of reasoning; considering that the legal licence system authorised the broadcasting of a work but in no way its use in advertising material – which was the case here – and that the broadcasting covered by Article L 214-1 of the Intellectual Property Code allowed a work to be presented to the public, the purpose of such presentation being to make the said work known to the public, whereas in the case in question the songs had been used for advertising purposes as a means to an end and not in their own right, the rights of both the artist and the producer had been infringed. ■

LT – New Regulation of Alcohol Advertising

Yana Sklyarova
Moscow
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On 16 March 2000 amendments to the *Alkoholio Kontroljės Estatymo* (Statute on Alcohol Control) of 18 April 1995 entered into force. The amendments impose a total ban on the advertising of alcohol during television and radio programmes intended for children and teenagers. The changes are in response to the requirements of the "Television Without Frontiers" Directive. Other (generally

Alkoholio Kontroljės Estatymo (the Law On Alcohol Control) of the Republic of Lithuania, 1995, #44-1073 (as amended in 2000) is available at:
<http://www3.lrs.lt/c-bin/eng/preps2?Condition1=101593&Condition2=alcohol>

EN

LT – New Regulation of Tobacco Advertising

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New restrictions designed to implement the basic principles of the "Television Without Frontiers" Directive were introduced into the 1996 *Tabako Kontroljės Estatymo* (Statute on Tobacco Control). The amendments entered into force on 16 March 2000. Article 11 imposes a total

Tabako Kontroljės Estatymo (the Law on the Tobacco Control) of the Republic of Lithuania, 1996, #11-281 (as amended in 2000) is available at:
<http://www3.lrs.lt/c-bin/eng/preps2?Condition1=101595&Condition2=tobacco>

EN

PL – Telecommunications Authority Established

Hanna Jedras
National
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On 27 October 2000 the Prime Minister designated a president of the Office of Telecommunications Regulation (OTR) for a five year-term.

Established under the Act of 21 July 2000 on Telecommunications, the OTR and its statutory 16 regional units established in each *województwo* (administrative district) of Poland will become fully operational by 1 January 2001. The new authority, a regulatory body for the strategic sector of telecommunications, will be in charge of awarding licences for telecommunications operators, supervising and ensuring compliance with authorisation conditions, resolving interconnection and tariffs disputes as well as frequency reservation for digital radio and television.

permissible) advertising may not link the use of alcohol to driving, improvement of physical well-being, mental activity, personal problem solving, social well-being and increased sexual activity. It may not emphasise stimulating, sedative or other beneficial characteristics of alcohol and it should not use prominent public figures, their image or name to promote alcohol.

The amendments introduce transmission time restrictions for alcohol advertising on national television and radio (from 3 p.m. until 10 p.m. on weekends, from 8 a.m. until 10 p.m. on weekdays) except for advertising beer and wine with an alcohol content not exceeding 15 per cent. The Statute now prohibits any alcohol advertising aimed at persons below the age of 18, advertising at various public, cultural, educational and health care institutions, at petrol stations and transport facilities. In addition, alcohol advertising should not be put on postcards, envelopes etc. The Ministry of Healthcare should establish the form, content and place of the text warning of the harmful effects of alcohol on health. This must appear in the alcohol advertising. ■

ban on the advertising of tobacco products. The Statute defines advertisement as "information disseminated in any form and through any means of transmission that directly promotes acquisition and use of tobacco products". Hence it includes various ways of depicting the product logo or presenting positive information about tobacco. Surreptitious advertising that presents information about enterprises involved in tobacco trade or manufacturing and that may mislead consumers about the real aim of this advertisement is also prohibited. ■

The competence of the OTR is far-reaching in terms of covering a wide range of the telecommunications environment – the new regulatory body partly takes over the powers of the Ministry of Post and Telecommunications, State Radiocommunications Agency and State Telecommunications and Post Supervision.

According to ongoing discussions in the academic world, the power that will be assigned to the president of the OTR might probably give rise to conflict with the regulations concerning the area of frequency assignment which are laid down in the Broadcasting Act. The scope of application and functioning of Art. 22 of the Telecommunications Law, especially its paragraph. 2 with sub-paragraphs 2 and 4, in reference to the frequency reservation could show the need for intense legal interpretation. This may slow down in future the process of granting multiplex licences. ■

RO – Large Fines for Pirate Copies

Mariana Stoican
Radio
Romania
International

Ordonanta Nr. 124 pentru completarea cadrului juridic privind dreptul de autor si drepturilor conexe prin adoptarea de masuri pentru combaterea pirateriei in domeniile audio si video, precum si a programelor pentru calculator (Government Decree no.124 on the completion of the legal framework governing copyright and related rights through the adoption of measures to combat

piracy in the audiovisual sector and piracy of computer software) was passed at the end of August 2000.

In order to stem the increasing manufacture and sale of pirate and imitation copies of music and video cassettes and computer software, mainly smuggled onto the Romanian black market, the Government has introduced a series of new measures to combat piracy. The provisions include the obligation for businesses that make, sell or hire out audiovisual products to apply to the Romanian Copyright Office for a specific mark showing the number of manufactured copies. This mark must be stamped on every audiovisual product intended for sale or hire. Depending on the offence, financial penalties ranging from ROL 20 million to ROL 100 million (Euro 949,487 to Euro 4,747,436) can be imposed on anyone who breaches the provisions of the Government Decree. ■

Ordonanta Nr. 124 pentru completarea cadrului juridic privind dreptul de autor si drepturilor conexe prin adoptarea de masuri pentru combaterea pirateriei in domeniile audio si video, precum si a programelor pentru calculator 31.8.2000 (Government Decree no.124 of 31 August 2000 on the completion of the legal framework governing copyright and related rights through the adoption of measures to combat piracy in the audiovisual sector and piracy of computer software)

RO

RO – New Advertising Act Passed

On 1 November the *Legea privind publicitatea* (Advertising Act no.148), adopted by the Romanian Parliament on 29 June 2000, came into force. Previously, advertising in the Romanian audiovisual sector had been regulated by the *Consiliul National al Audiovizualului* (National Audiovisual Council) or merely self-regulated by advertising agencies and media institutions. The main purpose of the new Act is to protect consumers from misleading advertisements. Advertising is considered "misleading" if there is a deliberate intention to mislead the consumer by concealing essential information concerning the identity and features of advertised goods or services. An advert can also be considered misleading on other grounds, however, such as the description of goods or services, their price or the way it is calculated, services provided during the warranty period, or even the identity, social benefit, qualification, industrial right of ownership or other rewards that the customer receives.

Mariana
Stoican

Radio Romania
International

Legea Nr 148 privind publicitatea (Advertising Act no.148), 29 June 2000

RO

The Act prohibits subliminal advertising in the audiovisual sector, discriminatory advertising which might offend people's religious or political convictions and any advertisement that glorifies or incites violence, harms human dignity or public morals or plays on people's superstitions or fears. Comparative advertising is also forbidden if it is misleading, ie if a comparison is drawn between goods or services that are essentially different, or if the features or prices of different articles are not compared objectively, pertinently and verifiably for example, or if the comparative advertisement is designed to discredit a competitor and its products.

The advertising of tobacco products and alcoholic beverages is forbidden in the audiovisual sector. The Act contains a series of provisions designed to protect children from harmful consequences of advertising.

Apart from cases of misleading advertising or unlawful comparative advertising (regarding which only the advertiser bears responsibility for breaching the relevant provision), the authors of an advertisement and those legally responsible for the TV channel on which it is broadcast are also held liable if it infringes the Act.

The penalties set out in the Act range from ROL 5 million to ROL 40 million (equivalent to approximately Euro 237,372 and Euro 1,898,975). Depending on the case, these fines can be imposed by the *Oficiul pentru Protectia Consumatorului* (Consumer Protection Authority), the *Administratia Publica Locala* (local public authority), the *Oficiul Concurentei* (Competition Commission), the *Ministerul Sanatatii* (Ministry of Health) or the *Consiliul National al Audiovizualului* (National Audiovisual Council). ■

YU – Serbian Public Information Act (Un)Repealed?

Changes that happened in Yugoslavia as a consequence of the federal elections of 24 September 2000 and the demonstrations of 5 October 2000 have strongly influenced the reporting of so-called "regime broadcasters". Within hours, they opened up their programmes for opinions different from the ones favoured by the former regime. However, the legal situation does not follow the pace of actual changes, and the situation regarding laws, regulations, and decisions of former authorities remain in place, with only few exceptions. So far, the only legal change introduced is the revocation of the Conclusion passed by the former Government of Serbia on 16 May 2000 (Official gazette of the Republic of Serbia Nr. 53/1995-2005) by which the Government had taken over Belgrade's broadcasting station Studio B and discharged all of its managing staff. Before its replacement that Government also decided to revoke the Conclusion at one of its last sessions held on 9 October 2000. As a consequence the founders rights are returned to the Belgrade City Assembly, now held by the Democratic Opposition of Serbia. However, the destiny of Studio B still remains unclear because, in 1995, it was nationalised and

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to ANEM

placed under the control of the Belgrade City Assembly, and the applications of the then expropriated shareholders which are aimed at annulling the nationalisation of the Station are still pending.

The future of the Law on Public Information of Serbia from October 1998 remains also unclear (see IRIS 1999-1: 14). The Assembly of the Republic of Serbia was dissolved on 25 October 2000, and new elections have been scheduled for 23 December 2000 (see Official gazette of the Republic of Serbia NR. 39/2000-945). The repeal of the Law on Public Information had been on the agenda of the dissolved Assembly, but never decided upon because of the priority given to the formation of a transitional Government of Serbia. Therefore the Law on Public Information is formally still in force, while its enforcement has stopped since 5 October 2000. The final destiny of the Law on Public Information of Serbia may be determined either through a decision of the Constitutional Court of Serbia, which is still considering several initiatives for examination of that Law's compliance with the Constitution of the Republic of Serbia, or through a decision to repeal the Law to be taken by the new Assembly, once it is constituted after the elections of 23 December 2000. As a transitional solution, most probably the Law on Public Information of Serbia of 1991 will be applied. ■



Who Owns Electronic Rights?

A round table conference was held on 27 May 2000 at the Institute for Information Law of the University of Amsterdam (IvIR) to discuss the issue of the ownership of copyrights, with special focus on the new electronic media. The conference was organised by the Institute for Information Law in co-operation with the European Audiovisual Observatory (EAO).

A. Opening and Introduction Professor Bernt Hugenholtz (IvIR)

The problems concerning the allocation of copyrights are as old as the history of copyright itself. The contractual struggle over the ownership of those rights was essentially a simple one in the sense that both authors and "exploiters" (broadcasters/publishers/producers) wanted all rights in copyright works. The arguments put forward by the authors quite simply is that they are the authors, and that this justifies the allocation of the authors' rights to the authors themselves. The exploiters argue that they need protection from third parties – a protection they would have if they had separate publishers' rights or exploiters' rights or broadcasters' rights. Secondly, the exploiters argue that they need the rights so that they can freely further exploit the works that they have commissioned. Finally, it could be said that the exploiters should have the rights because they have paid for the works and that this justifies the allocation to the exploiters themselves.

The digital environment has fuelled the discussion over the allocation of rights and raised it to a spectacular level that has been highlighted in the flurry of case law in Europe and the United States. Journalists, largely, initiated these cases, and they have won practically all those cases brought. The Courts called upon to address the cases have considered that any rights in pre-existing works belong to the authors unless specifically licensed or transferred. This case law has led, in turn, to the redrafting of the contractual language between authors and exploiters, and has even led to some preliminary legislative initiative.

The aim of the workshop was to take stock of what the current position is regarding the allocation of rights and to exchange knowledge and information about the issue. Finally it was hoped that some practical solutions could be found.

B. The Existing Statutory Framework Jean-Paul Triaille (Centre de Recherches Informatiques et Droit - Namur)

Jean-Paul Triaille discussed the various types of rules on the allocation of rights. The first type of statutory rule is concerned with who is the actual owner of the rights. It will not always be the original creator, for example, in cases of employment agreements, "work for hire" situations, audiovisual productions, and "collective works". Generally these ownership rules are default rules - they will only apply unless

otherwise agreed. In the field of software development and employment agreements there probably has not been any employment agreement that deviate from the general principle that the employer is the owner of all intellectual property rights.

The second type of rule governs copyright transfers or licenses. In some countries there are no copyright specific rules, only general principles of contract law. In the countries where there are copyright specific provisions there are, in general, three types of rules. Firstly, rules regarding formalities, for example, the agreement must be in writing or there must be written documents to evidence the transfer. Secondly, rules regarding the content of the contract often include the obligation to be detailed or explicit on the type of right being transferred or the type of media concerned. Some laws provide for a mandatory right to proportional or adequate remuneration. Alternatively, there may be provisions requiring that the author must have a share of the benefits. Other provisions concern the prohibition on transferring rights in respect of "unknown uses" of the work, restrictions on assigning rights in future works, or rules that enable termination of a copyright contract if rights transferred or licensed are not used. Finally, rules of interpretation of copyright contracts will generally favour the authors. An example is the "purpose of grant rule", which implies that the grant only comprises those rights that are necessary for the purpose of the agreement itself. Besides these general rules there are particular rules for particular agreements and these can be specifically regulated.

The unsatisfactory answer as to whether these rules are default or mandatory is that it depends. The rules allocating rights to non-creators are generally default rules. Others imposing formalities, or the obligation to be precise, or to provide for proportionate remuneration, or to exclude unknown uses, will generally be mandatory. Rules of interpretation will generally be mandatory as well. What is not clear, however, is when these rules are mandatory, how mandatory will they be? In addition, it may be possible to avoid these rules by applying foreign law to the agreement.

When the rules are default rules, or where there are no author-protective rules in place, then general principles will apply. For example, competition law can be invoked in favour of the author or producer, or unfair terms legislation, undue influence provisions or general principles of good faith. If more protection is needed for the authors, the solution is to gather more bargaining power and to go for collective solutions.

Author-friendly rules exist because they protect the weaker party. Producer-friendly rules are justified for economic reasons as producers provide the finance and take the risk. It is argued that for the sake of efficiency it is too difficult and too time-consuming to go back to the author every time a new work is produced, or every time a new form of exploitation is discovered. There is also the continuity argument that says that exploitation in digital form is a normal consequence of analogue exploitation, and the convergence of technology should imply the convergence of rights in the hands of the same parties.



At present the case law has interpreted old (or pre-digital) agreements and decided in favour of the author. The response of the producers has been to re-draft (standard-form) agreements in order to acquire all rights for all possible uses in all territories.

Discussion

From the journalists' point of view the experience is that the rules work and they don't work. They work in the sense that they defend against "robbery" by publishing houses or employers. They do not work, however, in a situation where there is a concentration of media (printed or electronic) in one international company. It was felt that this would become more common in the future. Copyright is an instrument for the integrity of the media, and that integrity is important, not only for the interests of journalists, but also for the protection of society. In the Netherlands, for example there is very little copyright contract law written into statutes, and the collective agreements are used to "mend the holes" in the Dutch law. It was feared that with the development of more international owners, the owners would simply say that the Dutch collective agreements do not interest them. Journalists, certainly in the Netherlands, are vulnerable from attack from international media concentration and the lack of protection from Dutch law. This would certainly seem to confirm the view that internationalisation of the industry might make national solutions redundant, especially if private international law allows circumvention of national systems.

With regard to the mandatory nature of copyright contract law, it was noted, in the Netherlands there are specific rules on audio-visual works. Under a provision that was introduced into the law in 1985 producers are presumed to have been assigned certain exploitation rights and, in return, the authors are entitled to "equitable remuneration" for each mode of exploitation of the work. However, it is still unclear whether or not payment of a lump-sum qualifies as "equitable remuneration", or whether additional remuneration can always be claimed for modes of exploitation not specifically mentioned in the agreement. The conclusion, certainly in the Netherlands, is that the rules do not work in practice, and do not help the creators in obtaining fair compensation. The situation remains as it always was – rights are assigned and money (a lump-sum) is paid.

In respect of actors, the situation is largely the same in the Netherlands. In practice what happens is that the payment is split up and dedicated to different modes of exploitation, and therefore in the long run the actor will not benefit at all. In practice an actor in many cases will receive one single payment for all modes.

Some insight was given regarding the situation in France, where rules differ according to whether the case concerns an actor or an author. In contracts concerning authors everything needs to be mentioned in the contract, and normally there has to be proportional remuneration. In practice, there are no problems for film producers as there is a long tradition of transfer clauses. Therefore it was felt that the problem of exploitation of film on the Internet would not occur, as the producers will already have the rights. In other media, apart from audio-visual, there is no tradition of transfer clauses.

What does exist is a right to receive a separate payment for each new mode of exploitation, and the author will be paid for each use on a separate basis. There is a possibility that lump-sum payments will be made, but certainly for the moment, there are no contracts that contain separate exploitation clauses for the Internet, so it would seem that authorisation by the author is necessary. In the audio-visual context, film producers need to acquire all the rights to exploit the film. In fact, there is a public register in Paris that provides information on questions of film ownership and contractual clauses.

The view was expressed that strong laws were actually a sign of weakness, and what should happen is that authors should create their own power. It was felt that protective laws were in fact just "crutches for the lame", and in the end the mightier would always prevail in any event. Strong unions winning collective contracts would mean that speculative legal niceties would become superfluous. There was some agreement with this view – it was felt that laws that were too protective did not benefit authors, but on the other hand, in the Netherlands, for example, journalists felt that their hands were tied as the law favoured the owners.

In Belgium, the law provides for rather detailed author-protective rules. If such a rule, however, becomes too difficult or provides too much uncertainty, then it will not work. For example, in an employment agreement, the employee can transfer all rights in respect of unknown uses of a work; however, the contract must guarantee the author a proportional share of the profits. However, often this is so vague and brings about so much uncertainty that the parties will not accept it. Parties will therefore rather not agree and leave some matters to chance, rather than put specific clauses in the contract.

Within this context a short overview was given of the German draft bill amending the Copyright Law, which was published on 22 May 2000. An expert group, initiated by the Ministry of Justice, has drafted it; the drafters are generally seen as "author-friendly". The starting point for the draft bill was to strengthen creators' rights that were protected by German constitutional law. Germany has had cases where the Constitutional Court said that where there is a structural imbalance, and where there is an unequal bargaining position and private autonomy is not safeguarded, the legislature has a duty to intervene to restore the balance between the parties. The rationale therefore behind the draft bill can be equated to consumer protection and labour law or other laws protecting the weaker party.

The draft bill only concerns the initial phase between creators and producers, and does not affect contracts further down the line between producers. The two main features of the draft bill are, firstly, to create a mandatory claim for adequate remuneration for each use and, secondly, to create the possibility for all authors to negotiate collective agreements. The latter will particularly affect freelance authors who at present are hindered by competition law restrictions. Other relevant features of the draft bill are that all claims for remuneration are non-transferable (except for transfers to a collecting society). There is a possibility of revocation after thirty years; a license can be revoked after thirty years if the initial work is to be re-marketed. There is also a limited possibility of revocation in the case of the sale of a producer's business.



Article 31(4) of the existing German Copyright Act states that any transfer in respect of future unknown uses is null and void. The courts are very reluctant to apply this, but have done so in relation to musical rights in respect of CD uses and rights in printed matter. According to the draft bill, article 31(4) will not apply in two situations. Firstly, it will not apply to contracts between collection societies and authors. This will therefore enable collection societies to represent these authors. German collection societies in the literary fields have recently tried to sell rights in local area networks, but their claims were rejected because they could not prove their rights. With the new draft this situation will be rectified. Secondly, in the past, future uses had to be actually "unknown". However, deals could still be valid if parties took or envisaged the risk of future technological developments. Under the proposed regime, risk transactions will essentially be barred.

The draft bill has been received favourably, although it was felt that the thirty-year revocation provision was too long. Granted, it was "crutches for the lame", but it provided the opportunity for authors to organise themselves and to flex their muscles. However, it was noted that it was only a national approach and it was doubtful that it would help in an international context.

Regarding harmonisation, it was noted that the issue of electronic rights was already on the agenda for the International Conference on Management and legitimate use of intellectual property, which was organised by the European Commission in Strasbourg (10 July 2000), but it would take some time for anything concrete to emerge from the Brussels legislature. For some Member States harmonisation might eventually imply a lower level of author protection; other Member States might have to introduce or strengthen author-protective rules. It was felt that the burden on the EC could be alleviated if some Member states took the initiative in this matter.

Generally, it was felt that author-protective measures by statute would only work in practice if they were supported by collective bargaining agreements. It was important that authors organise themselves to negotiate agreements as protective measures had to be supported by power.

C. The Existing Contractual Framework **Jonathan Tasini (National Writers Union - USA) and** **Heijo Ruijsenaars (European Broadcasting Union)**

Traditionally in the United States authors are (from an organisational point of view) not very well organised. This was relevant to the question of contract and power, as in the United States there are hundreds of authors' organisations. The National Writers Union, for example, represents only about 5% of freelance authors. In the United States there is a very bad environment for freelance authors to the point where it undermines the law of copyright from a public policy point of view. Contracts have become very broad "all rights contracts", and most magazines/newspapers are issuing rights contracts on a "take it or leave it" basis. Trying to find enough authors willing to challenge the newspapers in the courts on the basis of unfair trade practices is difficult. Book publishing is a little different, but there is a

worsening situation that has to do with the scope of primary rights. In the United States there are very few standard negotiated terms of agreement, and collective bargaining agreements that are union-negotiated only account for a very small percentage. This has to do with the issue of competition and freelance authors not having collective bargaining rights. Traditionally, the environment in the United States is very anti-unionist, and the trend is not to have collective bargaining agreements or collective action. Electronic rights are rarely administered collectively. The Copyright Clearance Centre is relatively weak in that it administers a very small part of the market, mostly photocopying, although it is trying to move into electronic rights, and has just signed a deal with a major newspaper.

On the other hand, the situation in the film industry is much better; this is because of the traditionally strong union position, not because of anything in the law. However, internationalisation of companies is certainly weakening the strength of the unions. The Screen Actors Guild is on strike over commercials. It is a very difficult strike for them, as their traditionally strong position has been weakened. Freelance authors in the United States tend to be a sort of "hybrid" because authors give up their copyright to become employees of a film company in order to receive decent remuneration and health care benefits. In the eyes of the law they are employees. Still, they are essentially a hybrid because they are not traditional employees, but freelance authors who do not own their copyrights. Essentially they create "works for hire".

Members of the European Broadcasting Union were questioned in 1998 regarding their collective bargaining practices. The results were that there were already a number of collective agreements in place with certain categories of freelancers that include rights for exploitation. Yet not all rights were covered. The answers further suggest that the existing differences between writers/musicians/journalists/photographers would remain the same in the context of the "new" media, especially in relation to payments "Generally, contracts would be flexible as regards payments, and might possibly include a flat-rate fee per contribution based on quantity, royalties based on income received by third parties, or royalties based on renewal payment".

In Europe, different countries have different ways of negotiating – the BBC for example negotiates differently from an equivalent Portuguese company. The UK, Germany and the Nordic countries use collective agreements, and find that electronic rights are part of those agreements. Broadcasters see a flexible system as being the most important. One member of the EBU has an internal agreement with a union where the relevant parties have acquired rights by contract. However, in accordance with the agreement the level of payment depends on a separate agreement to be negotiated with the union at a later stage. One might say that the European broadcasters are essentially in the same boat as the authors, in the sense that large media conglomerates (such as AOL/Time Warner) pose a serious threat to public broadcasters. Public broadcasters are also under pressure to acquire rights to broadcast productions on the Internet. Broadcasters are obliged to serve the public in a neutral way, and therefore they cannot exclude the Internet from their activities. Payment is a difficult issue. It is hard to predict how the Internet will develop, and there-



fore the question really is: what use is commercially efficient and what is the consumer willing to pay for?

Discussion

The question was raised as to why in the digital age equitable remuneration of the authors has become such a difficult issue. Part of the answer may be the changing structure of the market. Previously, public service broadcasters had 100% of the market, but now if they had 30% that was considered to be good. The service has become very fragmented, and therefore the calculation of figures has become much more difficult.

According to the law in Finland, copyright can be transferred entirely or in part. Moral rights can only be partially waived. The Labour Unions are very strong and there is a long history of collective bargaining. Publishers and journalists see that they cannot rely on the law, and therefore all transfers are contained in collective bargaining agreements. Articles 15 and 16 of the Collective Bargaining Agreement concerning copyright, which is an agreement in Finland between the Federation of the Printing Industry and the Union of Journalists, concerns only employed journalists. From 1996 publishers have enjoyed all the rights without providing any additional remuneration. The same applies to electronic distribution channels, like the Internet and CD-ROMs as well as any other electronic media. As an archive service, traditional or electronic, publishers may provide articles to customers for private use. If it is for something else, then there has to be separate agreement and separate payment. There is no recall right for electronic rights, and without a separate agreement copyright cannot be transferred to third parties. Under the collective bargaining agreements electronic rights are transferred. Salaries for employed journalists were increased in 1996, and traditionally journalists will sell all rights to magazines (even "unknown rights"). The collective bargaining agreement comes up for renewal every two years. With regard to freelancers, most publishers have made agreements with freelance journalists regarding Internet use. Publishers will usually have electronic rights, but not exclusive rights. Freelance journalists will be paid by way of compensation that will include electronic rights. Generally, new audio-visual companies will only commission works on the basis of "all rights" contracts and will use freelance works only once they have negotiated the rights.

In the US the Screen Actors Guild (SAG) applies a system of "residuals". The actor enters into an agreement with his/her producer, which stipulates that the latter will pay a certain percentage for additional uses in case a film is sold for distribution on video. The SAG acts as a union and collection society in that it distributes residuals. In 1985 an agreement with the Motion Picture Association of America was executed, whereby a screenwriter would receive a percentage from income derived from home copying levies. This is seen by most screenwriters as an advantage, as usually they will only be taken on in a work for hire situation and usually they will have no rights at all. It is in fact the paradox of the situation that writers have to give up rights to be organised in a union. On the other hand, through collective bargaining they get rights they would otherwise not have had.

The view was expressed, however, that in the future segmentation of the work force and the involvement of a few global companies would turn collective agreements into weak instruments for the protection of authors, and that collective agreements would disappear in the European media industry. Alternatively, it was felt that it would only take a very small percentage of workers to re-negotiate their rights particularly in the context of the strong Nordic labour union model. It was clear that there was interplay between the various power positions and that this in itself was a good thing.

D. The Role of Authors and Media in a Multimedia Environment

Professor Bernt Hugenholtz (IViR)

Why do producers need "all rights"? The classical argument is the risk argument, i.e. the producer bears the entire economic risk for the media production, and therefore "deserves" all rights. Another argument might be that media productions, particularly in the audiovisual field, are typically created by multiple authors. Concentration of rights in the producers obviously facilitates rights management. Another argument might be that producers have become multimedia publishers. Media companies have become large concentrated conglomerates that are active in a variety of media (e.g. AOL/Time Warner). The counter-argument is that the conglomerate, in reality, consists of an array of different companies competing with each other; "synergy", in practice, rarely happens. An argument increasingly encountered is that producers want all rights simply because licensing has become their primary source of income. Producers no longer produce, but trade intellectual property rights. "We're in the rights business, now". This has already been happening for a long time in the area of music publishing.

From the author's point of view the world looks a very different place. Copyright ownership is the independent author's primary source of income, and enables authors to live a life independent from media companies or state control. Moreover, why should an author give up any rights that the publisher does not truly require? In practice, hardly any media company actually publishes in all media; the multimedia publisher is more myth than reality. From a practical perspective, the pivotal question is whether authors are truly capable of exploiting electronic rights individually, or perhaps collectively.

Discussion

It was observed that the allocation of rights has an immediate effect on the market structure. If the first exploiter gets all the rights this then cuts out the possibility of other companies putting those rights to secondary uses, thus preventing others from coming into the market to exploit them. If a large company has these rights they can be used as a defensive measure.

The question of multiple authorship is an important issue in respect of archive material. The public service broadcasters need the rights, but it takes enormous administrative effort to get clearance. Authors need to be identified, then traced;



then rights have to be negotiated. For an average television programme this can cost up to Euro 650,000 just for the process, and can take between four months to two years. For older productions clearing rights may be simply impossible.

There was some debate as to whether the problem of clearing rights was something for the legislature or not, and it was suggested that a solution might be along the lines of a requirement of “reasonable efforts” to trace the author. Alternatively, a system of compulsory collective administration of rights might be helpful in solving the problem of trying to trace authors, and would lead to some remuneration. However, under such a system, electronic rights would stay secondary forever; this would imply that the authors could never sell those rights exclusively, and that this in turn would take away much of the value of those electronic rights. The view was also expressed that archive issues were essentially past history. All material is now digital, electronic rights have become primary rights almost by definition.

An example was cited from Canada where potential users of copyright material had to do two things; firstly, to make serious efforts to find the authors, and secondly, to deposit money into a fund. If this had been done, then the users were allowed, without risk, to use the work. For archived work this seems a very equitable solution. Looking to the future it was felt that information would be included in all copyright material pinpointing contact details as to where the rights owner/author/agent/collective society could be found.

Finally, the view was again expressed that the concentration of power in worldwide companies was a dangerous development, and that allocating copyrights to these companies might make matters worse. It was felt that the independence of authors is under threat from the concentration of rights and power in large media companies. This development, in turn, might pose a threat to freedom of expression and diminish the plurality of voices necessary in a democratic society.

E. Solutions

Professor Thomas Dreier (University of Karlsruhe)

Professor Dreier presented a summary of the questions discussed during the workshop, and offered a few tentative solutions.

He recalled the suggestion that a solution to the question of an equitable allocation of rights between authors/publishers/producers could be achieved in the future if the perspective of the argument was changed. The argument involved the fight for control over exploitation, and the solution could be to transform the right from an exclusive right into a mandatory claim for remuneration. Thus, the bottom line would be that every author, at least, receive fair compensation. Consequently, the question of who is in the driver’s seat becomes more of a technical problem than a question of power.

As to model contracts, Professor Dreier suggested that a competition law exception was probably required, and that there should be a duty to negotiate and to conclude binding

collective agreements. He felt that there was a role for collecting societies, but that the need for collective administration might decline due to increased electronic control possibilities. Collecting societies represent authors, but the problem was if certain major authors opted out, then the position of smaller authors would become more tenuous. Even with the possibility of on-line tracing there was certainly a need for collective administration in the interim transition period. However, questions remained as to who would maintain the database – would it be a trusted third party? To strengthen the role of collecting societies, there might be a need for the legislator to become involved.

Finally, it was established that there was a definite need for harmonisation of statutory law governing copyright contracts, be it on a European or an international level (even if it was just to provide crutches for the lame). It was acknowledged that huge organisational and political differences need to be overcome. The solution could be to produce a self-regulatory body of like-minded players, who would bind themselves to what they will and will not promise to do, and to act by certain guidelines. Law does not define these guidelines, but national/European “hard” law and international “soft” law will encourage the players to comply. The more international a law becomes, the more general the principles become (hence “soft law”). It is incredibly difficult to come up with precise harmonised rules, and therefore self-regulation might be a solution.

Discussion

It was observed that journalists need exclusive rights to negotiate equitable remuneration. Self-regulation was strongly supported by the journalists, nevertheless the problem of exclusive rights needed to be tackled first (in terms of remuneration).

It was also felt that the model of mandatory remuneration was difficult to implement in a situation where electronic uses have become not secondary, but primary uses; exclusivity is needed if only to negotiate a fair price. Another problem might be that in a model of mandatory remuneration, the producer has less incentive to exploit the rights. It was suggested that this problem could be solved by rules stating that the grant could be revoked if exploitation did not take place within a certain time.

With regard to the problem of globalisation and the possibility of using the law of conflicts to circumvent protective regimes, the courts in Germany have said that the applicable law is the law where the protection is being sought.

There was also some sympathy expressed with the soft law approach. It was much easier to achieve a result if people “sought it out amongst themselves” rather than getting the lawmaker to do it.

Finally the forthcoming WIPO Treaty on the protection of performers in audiovisual productions was discussed. It was observed that the transfer of rights was an important issue in this context, with the European Union and the United States taking different positions. ■

Reporter: Christina Lampe

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