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LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

INTERNATIONAL

WIPO

Diplomatic Conference on the Protection of Audiovisual Performances

Hatice Dilek Baytan
European Audiovisual Observatory

The WIPO Diplomatic Conference on the Protection of Audiovisual Performances took place in Geneva, from 7 to 20 December 2000. The participants at the Conference considered a number of different proposals for the substantive provisions of a legal instrument on the Protection of Audiovisual Performances, but the divergence between the United States of America and Member States of the European Union concerning the right of transfer, (namely the question of whether the producers will acquire the performers' rights by law or agreement) could not be reconciled.

The Diplomatic Conference concluded with a provisional agreement on 19 articles under the title "WIPO Audiovisual Performances Treaty". The Provisional agreement covers: national treatment, moral rights and economic rights including the right of reproduction, the right of distribution, the right of rental and the right of broadcasting and communication to the public. On the one hand the protection of audiovisual performances which was not part of WPPT (see IRIS 2000-2: 15) would now be provided and on the other hand, the rights of performers which are already protected by WPPT would be enhanced by the provisional text.

In order to reach an agreement on the outstanding issues, it has been recommended that the WIPO Member States, which will meet in September 2001, should reconvene the Diplomatic Conference. ■

A list of documents concerning the Diplomatic Conference on the Protection of Audiovisual Performances is available at:
http://www.wipo.org/eng/document/iavp/index.htm
WIPO Press Release PR/2000/251. Geneva, December 20, 2000. Available at:
http://www.wipo.org/pressroom/en/releases/2000/p251.htm

EN-FR-ES

COUNCIL OF EUROPE

Slovenia Joins EURIMAGES

Hatice Dilek Baytan
European Audiovisual Observatory

Eurimages is the support fund for the co-production, distribution and exhibition of European cinematographic works of 25 Member States. On 1 January 2001, Slovenia joined Eurimages following a decision of the Fund Board of Management at its meeting in Strasbourg held from 27 to 29 November 2000. ■

Council of Europe press release of 18 December 2000, available at:
http://press.coe.int/cp/2000/913a(2000).htm

EN-FR

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

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EUROPEAN UNION

Court of First Instance: Admissibility of National Restrictions on the Free Movement of Television Services

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University of Florence

Article 2 of the "Television without Frontiers" Directive (89/552/EEC) permits Member States to restrict the provision of broadcasting services from the territory of another Member State only in case of transmissions which manifestly, seriously and gravely infringe the rules relating to, *inter alia*, the protection of minors (Article 22). The measures adopted are notified to the Commission of the European Communities, whose task is to verify within two months whether the measures are compatible with Community law.

On 22 December 1998, the Commission adopted a decision confirming some restrictive measures adopted by the UK against Danish TV, a Danish company whose programmes, which are received also in the UK, were considered by the British authorities to be in breach of Article 22 of the Directive. The action for annulment, which was brought by the broadcasting company against the decision before the Court of First Instance in Luxembourg, was dismissed on 13 December 2000. According to the Court, the application was inadmissible since the applicant could not be considered as directly concerned by the Commission act, which was directed against the United Kingdom and did not directly affect the legal situation of the company. The Court held that the Commission decision was limited merely to pronouncing *ex post facto* on the compatibility of the UK measure with Community law, whereas the Order adopted by the UK authorities existed in law independently of the contested act. In these circumstances, the companies concerned must seek judicial protection before the national courts, where they can challenge the validity of the national measures restricting the retransmissions of television broadcasting services. ■

Court of First Instance of the European Communities, judgement of 13 December 2000, case T-69/99, Danish Satellite TV v. Commission of the European Communities. Available at: http://www.curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79998786T19990069&doc=T&ouvert=T&seance=ARRET&where=()

EN-FR-DE

Council of the European Union: Regulation on Unbundled Access to the Local Loop Adopted

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 5 December 2000, the Council of the European Union adopted the Regulation on Unbundled Access to the Local Loop as amended by the European Parliament during the plenary session of 26 October 2000 (see IRIS 2000-10: 3-4).

The aim of this Regulation is to increase competition in Internet access services and multimedia applications based on digital subscriber line (DSL) as well as in voice telephony services, thus leading to reduced costs for consumers and fostering the development of the Information Society in Europe. This 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). ■

Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on Unbundled Access to the Local Loop. Official Journal of the European Communities L 336/4 of 30 December 2000. Available at: http://europa.eu.int/eur-lex/en/oj/index.html

DE-EN-FR

Council of the European Union: Adoption of eContent Programme

Shoba Sukhram
Institute for Information Law University of Amsterdam

On 22 December 2000, the Council of the European Union adopted the new programme "eContent" which is aimed at promoting the use of European digital content on the Internet and stimulating the linguistic diversity of European websites (see IRIS 2000-5: 4 and 2000-6: 5). The adoption follows a Call for Proposals for Preparatory Actions launched by the European Commission on 20 April 2000 and the proposed Programme for a Council Decision on 24 May 2000. The new eContent programme follows the same lines as the proposed programme, but in Article 1 it also stresses the need to stimulate the use of, and access for all to, the Internet. ■

Press release of 22 December 2000, available at http://www.cordis.lu/econtent/release.htm

Council of the European Union: Resolution on National Aid to the Film and Audiovisual Industries

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

Following the discussions on the question of national aid at the meeting of 26 September 2000, the Council issued a resolution concerning national aid to the film and audiovisual industries on 23 November 2000. In the September meeting, several Member States had expressed their concern at seeing their national support systems called into question by the Commission as to their compatibility with the Treaty's provisions on competition.

The Council sees the audiovisual industry as a cultural industry and national aid as a means to ensure cultural diversity. It considers as justified the support of national policies in regard to film and audiovisual creations, which may also contribute to the emergence of a European audiovisual market. Therefore, appropriate means of increasing legal certainty for these measures should be examined. Besides, the Council states that the ongoing dialogue between the Commission and the Member States should be continued. The Resolution ends with a call to the Commission to submit its thoughts on this subject no later than by the end of 2001. ■

Council Resolution on National Aid to the Film and Audiovisual Industries. 2311th Council meeting (Cultural/Audiovisual Affairs). Brussels, 23 November 2000. Available at: http://ue.eu.int/Newsroom/LoadDoc.cfm?MAX=1&DOC=!!!&BID=95&DID=64395&GRP=2973&LANG=1

EN-FR-DE

European Commission: Third Report on the Application of the "Television without Frontiers" Directive

Shoba Sukhram
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As provided in Art. 26 of the "Television without Frontiers" Directive, on 15 January 2001, the European Commission submitted its third report on the application of the Directive to the European Parliament, the Council and the Economic and Social Committee (see IRIS 1995-7: 4 and 1997-10: 5). The report deals with application of the Directive since it was amended in July 1997 up until the end of 2000.

After giving a description of the development of the television market in Europe during the period 1997 to 2000, the report takes a closer look at the functioning of several of the directive's key articles. The report focuses respectively on the principles of jurisdiction (Art. 2), application of Art. 3a on events of major importance for society, the promotion of distribution and production of television programmes (Arts. 4 and 5), application of the rules on advertising (Arts. 10-20) and Arts. 22-22b on protection of minors and public order. Furthermore, the report deals with the topics of co-ordination between national authorities and the Commission, and the Community's co-operation with the Council of Europe. It also includes an analysis of audiovisual legislation in the candidate countries.

The report concludes that whilst the Directive is currently achieving its objective, the changes broadcasting is undergoing as a result of the introduction of digital technology and the development of Internet will make it necessary to review certain provisions in the Directive. The next report on the application of the Directive is due by 31 December 2002. By this date the Commission will carry out a full review of the Directive taking into account, *inter alia*, the above-mentioned changes. ■

Third Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the application of Directive 89/552/EEC "Television without Frontiers", available at:
http://europa.eu.int/comm/avpolicy/regul/twf/applica/ap-int-e.htm

EN-FR-DE

European Commission: Approval of EUTELSAT's Restructuring Proposals

Shoba Sukhram
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On 27 November 2000, the European Commission approved the restructuring proposals put forward by EUTELSAT. EUTELSAT is an intergovernmental organisation with 48 Member States whose main purpose is the management of the space segment of a European communications satellite system. In May 1998, the decision was taken to transform the organisation's structure in order to ensure its development and to meet the challenge of increasing competition. Now that its proposals have been approved, EUTELSAT plans to streamline its structure into two tiers: a limited company (S.A.) based in France, holding all the operational parts of EUTELSAT (assets and activities) and a reduced intergovernmental organisation with limited tasks. The re-organisation should take place by 2 July 2001. ■

Press release issued by the European Commission on 27 November 2000, available at http://www.eutelsat.org/pdf/5_4_1/2000/pr281100.pdf
More information concerning EUTELSAT's restructuring available at:
http://www.eutelsat.org/about_eutelsat/rub_part3.htm

NATIONAL

BROADCASTING

AM – Broadcasting Act Adopted and Challenged

On 9 September 2000, the President of the Republic of Armenia signed the Act on Television and Radio adopted by the National Assembly (Parliament) of Armenia. The Act regulates the procedures for licensing and establishment, as well as the activities of television and radio broadcasting companies. It determines the structure of the national broadcasting system, providing for the co-existence of commercial and public broadcasting companies. The State must ensure that at least one radio and one television programme of the Public Broadcasting Company is received in all the territory of Armenia (Art.4). Broadcasters acquire equal legal status regardless of their ownership profile.

The act guarantees the freedom of "selection, production and dissemination of television and radio programmes" and specifically stipulates the professional right of journalists to seek and obtain information necessary to prepare television and radio programmes. Art. 19 protects broadcasting companies from interference by state officials except for the cases stipulated by law (in states of emergency and war).

The Act defines a television or radio broadcasting company as a legal entity operating under a license issued by the governmental regulatory body. Both physical persons and legal entities are entitled to be founders of broadcasting companies. Among those not eligible to found a broadcasting company are political parties, religious organisations, and members of government and local municipal bodies. The act limits the possible share of foreign investment in a broadcasting company to the amount of the controlling interest, but it does not prevent a foreign citizen from being a founder. The antimonopoly provision of Art. 20 prevents an individual or legal entity from holding more than one license for television or radio.

Art. 24 contains several restrictions on programme content, violations of which involve the most serious sanctions. According to this provision, dissemination of pornography, programmes advocating "violence and atrocity, denigration of human rights, and damaging the psychological development of children" are prohibited, as are programmes that advocate any activity forbidden by the existing law. These restrictions apply both to encoded programmes and conventional broadcasting. The same article establishes a time frame for showing erotic programmes and horror movies (from midnight to 6 a.m.), which does not apply to encoded channels.

The Act contains a number of provisions to protect national heritage in broadcasting. Broadcasting companies must devote at least 65 percent of overall airtime to national programmes with the exception of live broadcasts of news, sports, educational and cultural programmes. Encoded programmes are exempt from this rule. The Act provides a transitional schedule to reach the quota by 2005, while the Public Broadcasting Company shall apply this quota immediately.

Programmes of foreign broadcasting companies shall be disseminated only under international agreements, provided that they occupy not more than a third of the spectrum space in each band. Russian RTR channel is currently one of the five existing VHF frequencies in the Republic of Armenia and is broadcast under such an agreement. This provision has created obstacles to the transmission of the Russian ORT channel, which earlier was broadcast in the same band. As a result ORT was moved to a UHF frequency in January 2001.

Commercial broadcasting shall be regulated by the National Commission, whose members are appointed by the President of Armenia. The Commission grants licenses, monitors the implementation of laws and imposes sanctions (issues warnings, imposes fines, suspends particular programmes or licenses, revokes licenses) upon broadcasters. A license can be revoked by a decision of the Commission according to Article 55 of the Act (for example for repeated violations of license conditions for which the licensee received at least three written warnings from the Commission in one year).

The Commission issues three types of licenses: for the production of radio and television programmes, for the broadcasting of programmes, or for both types of activities. The Commission shall grant programme production licenses to all eligible applicants. Other types of licenses shall be granted only through competition. The act specifies selection criteria for such competitions, which include a higher priority for local and national programmes, and for technical and professional qualifications of the staff. The license shall not be transferred or sold to another person (Art. 47).

The act stipulates license fees for granting broadcasting rights, the amount depends on the territory served and transmission characteristics. The licensee must also pay an annual fee for using the frequency aimed at recovering the State's expenses for its maintenance.

The Public Broadcasting Company shall have a special status as a state enterprise designated to guarantee the constitutional right of citizens to obtain information. Specific obligations of the public broadcaster are enumerated in Art. 28. The public broadcaster shall schedule programmes concerning issues of public importance at the most appropriate broadcasting time and present various viewpoints on those issues, avoid political bias and excessive political advertising, and provide programmes that meet the interests of social and ethnic minorities. Public television and radio are allowed to broadcast advertising provided it does not exceed 5 percent of air time (Art. 28).

The President appoints the executive body of public television – the Council (as was done by a president's decree on 19 January 2001). The activity of the public broadcaster is supervised by the National Assembly, which approves the Rules of the Public Broadcasting Company and approves its annual budget and expenses. These prerogatives of the National Assembly were challenged in January 2001 by the President before the Constitutional Court, which found the articles of the Act that deal with the Council's accountability unconstitutional and suspended them. ■

Yana Sklyarova
Moscow Media Law and Policy Center

Act of the Republic of Armenia on Television and Radio, adopted on 9 October 2000, promulgated in the Official Bulletin of the Republic of Armenia on 28 November 2000

EN

BE – Flemish Parliament Opens the Possibility for Teleshopping TV-Stations

On 24 January 2001, the Flemish Parliament agreed on some new provisions in the Flemish Broadcasting Act regarding teleshopping. The new provisions create the possibility for private organisations to obtain a licence as a TV-station programming only teleshopping. Until now, the existing commercial TV-broadcasters were allowed to programme teleshopping only within a restricted framework. The new provisions that will soon be published in the *Moniteur* (Official Journal) create a new type of broadcasting licence allowing a TV-station to programme exclusively teleshopping. At the same time, the articles of the TV-Directive 89/552/EEC (as modified by the Directive 97/35/EC) with regard to teleshopping (Arts. 10-20) are implemented by these new provisions of the Flemish Broadcasting Act. This means that the other Flemish TV-stations must restrict their teleshopping programmes to a maximum of 3 hours a day (Art. 18bis of the TV-Directive). Teleshopping is not allowed during a time period of 15 minutes before and after programmes targetting children younger than 12. The advertising time for teleshopping broadcasters is limited to 15 percent of the daily transmission time of the station. Teleshopping broadcasters who in the future will have obtained a licence from the *Vlaams Commissariaat voor de Media* (Flemish Media Authority) may be transmitted by the cable networks in the Flemish Community. However, there is no "must carry" obligation in regard to the cable transmission of this type of TV-station. ■

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

***Decreet houdende wijzigingen van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie gecoördineerd op 25 januari 1995*. Flemish Parliament, 2000-2001 (Statutory instrument nr. 488 modifying some provisions of the Broadcasting Act) Available at: http://jsp.vlaamsparlement.be/docs/stukken/2000-2001/g488-4.pdf and (soon) on http://www.moniteur.be**

NL

BE – System of Identification - the French Community in Line with France

In 1999, after much hesitation, the Government of the French-speaking Community of Belgium adopted a first order designed to protect minors from television broadcasts likely to be damaging to their physical, mental or moral development. It classified broadcasts into four groups, three of which had to be broadcast with a pictogram – programmes subject to parental agreement, programmes banned for anyone under the age of 16, and programmes banned on all but encrypted channels.

The identification marking, which corresponds to the Belgian system for classifying films shown in cinemas, was nevertheless confusing, as it was not the same as the system required of French channels, which have many viewers in Belgium.

On 12 October 2000, at the request of the television channels, the Government therefore adopted a new order imposing a system of identification identical to that in use in France. Broadcasts are now classified into five categories, four of which require a pictogram - parental agreement desirable, parental agreement essential, banned for anyone under the age of sixteen, and banned for anyone under the age of eighteen. ■

François Jongen
Catholic University of Louvain

Order of the Government of the French-speaking Community on protecting minors from television broadcasts likely to be damaging to their physical, mental or moral development. Text published in the Moniteur belge of 23 December 2000, available at: http://194.7.188.122/cgi/article_body.pl?language=fr&caller=summary&pub_date=2000-12-23&numac=2000029445

FR-NL

DE – Court-TV Ban Upheld

Peter Strothmann
Institute of European Media Law (EMR)

In a judgment of 24 January 2001, the *Bundesverfassungsgericht* (Federal Constitutional Court - *BVerfG*) dismissed a complaint by television broadcaster *n-tv*. The latter had claimed that the ban on television coverage of court proceedings contained in Section 169.2 of the *Gerichtsverfassungsgesetz* (Code of Judicial Organisation - *GVG*) was unconstitutional.

Section 169.2 of the *GVG* bans all sound and radio/picture recordings intended for publication.

The Constitutional Court explained its decision firstly by pointing out that Article 5.1.1 of the *Grundgesetz* (Basic Law - *GG*), which guarantees the freedom of information, did not entitle anyone to demand that an information source be made public. Therefore, the State legitimately determined how access to State processes should be granted and the extent to which such sources of information should be open. However, the State's right to lay down these conditions on access should still be judged against the Basic Law.

The idea that oral proceedings should be held in public should therefore not only tally with this constitutional principle, but also take into account other, opposing interests. When assessing public access to court proceedings, it was necessary to ensure that the aims of allowing the public to monitor those proceedings and of providing access to information were guaranteed. This included the right of media representatives to attend trials in person. It also meant that the media should be allowed to report on court proceedings in accordance with their status. The Court stated that television recordings did not guarantee greater authenticity, as claimed by the complainant, because the pressure of competition between TV broadcasters meant that they often failed to give an accurate account of proceedings. On the other hand, the contrary interests of other parties should be given greater precedence. In particular, personality rights, the right of defendants and witnesses to personal privacy, the right to a fair trial and the right to establish the truth without interference would all be threatened, if not destroyed, if court proceedings were televised. The legislator was not obliged to authorise exceptions to the strict ban on recordings for particular types of case or phases of proceedings. Since there were risks in all phases and all cases, the practical effects and dangers in individual trials were hard to predict. Therefore, it was impossible to create a legal regulation that took every aspect into account.

However, this final point is not consistent with the view of three judges who consider a total ban to be excessive. They point to the increasing importance of the audiovisual media and claim that the Constitution's requirement of media access is not being fulfilled, since the reasons for restricting access are not predominant in every phase and type of proceedings. The legislator is therefore expected to authorise pilot projects as a first step, should a suitable opportunity arise.

The *Landesmedienanstalten* (*Land* media authorities - *LMS*), which are responsible for monitoring commercial television, are currently checking whether television broadcasts of foreign court proceedings are legally admissible. Such transmissions might breach the personality rights of the people involved and thus contravene German law. ■

Judgment of the *Bundesverfassungsgericht* (Federal Constitutional Court), 24 January 2001, case nos. 1 BvR 2623/95, 1 BvR 622/99

DE

DE – Decision on TV "Cross-Promotion" Adjourned

Wolfram Schnur
Institute of European Media Law (EMR)

In a decision of 4 October 2000, the *Verwaltungsgericht Berlin* (Berlin Administrative Court) ordered, at the request of *ProSieben Media AG*, that its complaint against a decision by the supervisory *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg Media Authority - *MABB*) should have suspensory effect. Following the merger of *ProSieben Media AG* and *SAT1 Holding GmbH* on 2 October 2000, *ProSiebenSAT1 Media AG* is the legal successor to the dissolved firm *ProSieben Media AG*.

The case concerned advertising on *ProSieben* for news broadcaster *N24*, which is wholly owned by *ProSiebenSAT1*. It was alleged that the requirement for advertisements to be separated from other items and announced as such, set out in Article 7.3, sentences 1 and 2 of the *Rundfunkstaatsvertrag* (Agreement between Federal States on Broadcasting - *RfStV*), had been breached. It was also pointed out that the advertisement for TV channel *N24* should be calculated as part of *ProSieben's* total allocation of advertising time.

On 25 August 1999, the *Arbeitskreis Werbung der Landesmedienanstalten (Land* media authorities' working group on advertising) had defined the disputed practice as "self-advertising" and announced that it should not be counted as part of the allocated advertising time.

The *MABB* claims that *ProSiebenSAT1* cannot rely on the rule set out in Article 45.3 of the *RfStV*, which states that advertisements for the broadcasters' own programmes do not count towards official advertising time. It argues that this rule does not apply here, since, in accordance with Article 1(b) of Directive 89/552/EEC ("Television Without Frontiers"), the "broadcaster" has editorial responsibility for the composition of television programming schedules, ie in this case, the broadcaster is *N24 Gesellschaft für Nachrichten und Zeitgeschehen mbH*.

The Court was unable to deem the decision clearly lawful. Doubts were raised concerning whether cross-promotion within a broadcasting group actually constituted advertising as defined in Article 2.2.5 of the *RfStV* and whether a channel's legal owner was the "broadcaster". The Berlin Administrative Court ruled that these questions could only be finally resolved as part of the main proceedings. Having weighed up the interests involved, the judges gave precedence to the interest of *ProSiebenSAT1 Media AG* for its application to have suspensory effect. They took the decision firstly on the grounds of the economic interest in carrying out cross-promotion for the purposes of viewer relations and, secondly, in view of pending proceedings on the establishment of a standard national procedure as described in Article 38.2 of the *RfStV*. ■

Decision of the *Verwaltungsgericht Berlin* (Berlin Administrative Court), 4 October 2000, case no. VG 27 A 217.00

DE

DE – Hessen Passes New Media Laws

On 19 December 2000, after much strong criticism of the government coalition's proposals in the early drafting stages, the Hessian *Landtag* (state parliament) adopted amendments to the regional broadcasting laws, which had been improved in several respects.

In the end, the *Gesetz über den Hessischen Rundfunk* (Hessian Broadcasting Act - *HR-Gesetz*) did not mention the so-called "compulsory mandate" for members of the Broadcasting Council. The original draft stated that all members of the Council could be immediately withdrawn by the organisations they represented, whereas the previous version of the *HR-Gesetz* only made this provision for members of the *Land* government.

Public service broadcaster *Hessische Rundfunk* (*HR*) had argued that this measure would jeopardise the independence of the Council members and had threatened to

make an official complaint about its unconstitutionality, as a result of which the Hessian government coalition withdrew it.

Contrary to the original plan, the *Gesetz über den privaten Rundfunk in Hessen (*Hessian Private Broadcasting Act - *HPRG)* makes no statutory provision for programmes with unacceptable content to be monitored before being broadcast. This possibility had been criticised as being in breach of Article 5.1.3 of the *Grundgesetz* (Basic Law - *GG*). The government coalition said it was confident that no broadcaster would transmit material that infringed upon human dignity. In this connection, the programming guidelines contained in Section 13 of the *HPRG* refer to the constitutional law, while, as far as protection of minors and unacceptable programme material are concerned, Section 19 mentions the relevant provisions of the *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting) as amended on 21 February 2000.

A new provision is contained in Section 6.2, no.4 of the *HPRG*, which prohibits political parties from owning an interest in media companies, even their private subsidiaries. The same applies to trusteeships, which must be disclosed according to Section 6.2, no.4 sentence 2.

Section 12.5 of the *HPRG* contains regulations concerning so-called commercial "conurbation-TV". The original idea was that each broadcaster should broadcast at least 240 minutes of its own programme material every weekday. This requirement was ultimately amended, so that on Sundays and public holidays only 120 minutes must be devoted to regional events in the political, economic, cultural and social spheres. According to the government, this rule was altered in order to enable as many broadcasters as possible to be economically viable, since the costs of producing programme material were relatively high.

Further new provisions concern programme allocations in the broadband cable network. Under Section 12.6 of the *HPRG*, local and regional broadcasters and media services must be given the opportunity to broadcast their programmes alongside national channels. At the request of private network operators, channels that are only carried by cable also now require a licence under the terms of Section 12.6 sentence 3. ■

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***Gesetz zur Änderung des Hessischen Privatrundfunkgesetzes und des Gesetzes über den Hessischen Rundfunk* (Act to amend the Hessian Private Broadcasting Act and the Hessian Broadcasting Act), 22 December 2000 (Official Gazette vol. I p.566)**

DE

DE – Licensing of "Customer-TV"

The *Landesmedienanstalten* (*Land* media authorities - *LMS*), which are responsible for monitoring commercial television broadcasters, are planning to license special television channels aimed at all actual and potential customers of a specific company, ie an unlimited number of people, as "self-advertising channels".

The *LMS* felt they needed to take this step because this new phenomenon is becoming increasingly common, combining information about the company itself with other material, which differentiates it from so-called "Business-TV". Companies use "Business-TV" purely for the internal transmission of information.

Whereas "Business-TV" generally falls under the national *Teledienstgesetz* (Tele-Services Act), "Customer-TV" will be subject to the *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting - *RStV*) or the *Mediendienstestaatsvertrag* (Inter-State Agreement on Media Services - *MDStV*), which were drawn up by the *Länder*. This is because of the more general nature of the content and the advertisements (by third parties) regularly shown on these channels.

Difficulties in classifying a channel as a "self-advertising channel" caused by the broadcast of programme material produced by outside bodies on subjects other than the company itself would have to be resolved on a case-by-case basis. However, responsibility for channels whose own content is combined with the programmes of a licensed broadcaster will remain with that broadcaster.

Whether such a "Customer-TV" channel is subject to the regulations of the *RStV* or the *MDStV* depends on its level of journalistic relevance which, taking into account all relevant circumstances, is determined by the extent of its impact, topicality and capacity for provoking thought. It can therefore only be treated as a media service without the need for a licence if its programme content is similar to that of a teleshopping channel, ie exclusively designed to promote directly the sale of goods or services and having no significant impact on the formation of public opinion.

The distinction is important because the *LMS* treat "Customer-TV" channels as "self-advertising channels" in the sense of Section 45b of the *RStV*, which means they are subject to the advertising regulations that apply to such channels. As such, requirements concerning advertising content also apply to self-advertising on these channels, whereas other restrictions on elements such as the amount of advertising and the time-gap between commercial breaks only apply to third-party advertising. ■

Peter Strothmann
Institute of European Media Law (EMR)

Joint submission to the 129th meeting of the *DLM*, 14-15 November 2000, available at: http://www.alm.de/aktuelles/presse/kundtv.doc

DE

DE – New TV Contract Between *ARD/ZDF* and Sports Authorities

Sports rights agency *SportA*, acting for the public service broadcasters *Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands (ARD)* and *Zweites Deutsches Fernsehen (ZDF)* has concluded a new television contract with the governing bodies of 32 different sports.

Under the new deal, the broadcasters can report on the sports concerned (which do not include football) until 2006. They will enjoy exclusive global broadcasting rights, which will also cover transmissions via the Internet. The sports bodies will no longer have to pay for television coverage, although some sports will lose their right to a guaranteed minimum amount of airtime. These clauses were also contained in the previous agreement, to which private broadcaster *Deutsches Sport Fernsehen (DSF)* was also a party.

On the other hand, the public service broadcasters have not yet secured broadcasting rights for the 2002 Football World Cup from *KirchHolding*. A contract has already been agreed, under which the rights are to be bought for around DEM 225 million, partly offset by the transfer to *Kirch* of pay-TV rights to the Olympic Games. However, this is subject to the approval of the appropriate *ARD* and *ZDF* bodies, which are unhappy with the price, since not all World Cup matches are covered by the proposed agreement. Furthermore, the respective ranges of the broadcasts are not clearly defined and there are doubts about the clause which only gives the public service broadcasters an option, which is considered non-binding, to purchase the rights to broadcast the 2006 World Cup in Germany. ■

Peter Strothmann
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***SportA* press release, 6 December 2000, available at: http://www.sporta.de/deutsch/02b/02b001.cfm**

DE

ES – Approval of Several Regional Provisions Related to Media Law

Alberto Pérez Gómez
Dirección Internacional Comisión del Mercado de las Telecomunicaciones

According to Article 149.1.27 of the Spanish Constitution, responsibility for the regulation of the audio-visual sector is shared by the State and the *Comunidades Autónomas* (Autonomous Communities, the regional political entities). The State has the power to approve the basic legislation for press, radio, television and any other media, without prejudice to the powers of the Autonomous Communities to implement and enforce this basic legislation.

Several Autonomous Communities have recently decided to approve provisions concerning the implementation of the basic legislation in the field of media law:

– The Parliament of Extremadura (one of the seventeen Spanish Autonomous Communities) has recently approved a Law (Law 4/2000, of 16 November 2000) on the creation of a regional public broadcaster. This public regional broadcaster has been created in accordance with State Law 43/1983 (the so called Third TV Channel Law). This Law states that regional public TV services must be provided by a company whose capital shall be wholly owned by the regional Government. The main bodies of the public regional broadcasters shall be the Board and the Director. Both of them are placed under the control of the regional legislative chamber. This regional public broadcaster will obtain its revenues from the regional budget and from advertising.
– The Andalusian Government has approved a Decree on Local Terrestrial TV. This Decree regulates the granting of concessions for the provision of local TV services in Andalusia in accordance with the national Act 41/1995. However, these concessions cannot be granted yet because, five years after the Act 41/1995 was approved, the necessary Technical Plan for the allocation of frequencies still has not been approved by the national Government. The Decree shall nevertheless apply to those Andalusian broadcasters covered by the Transitional Provision of the national Act 41/1995 on Local Terrestrial TV, which establishes that the local TV operators that were providing services before January 1995 are authorized to continue their activities until the concessions are granted.
– The Catalan Government has passed a Decree implementing some provisions of the national Act 25/1994 (as amended by the Act 22/1999), which incorporates into Spanish Law the "Television Without Frontiers" Directive. The main goal of this Catalan Decree is to regulate the right of TV users to receive accurate information on the programme planning of TV channels, as recognized by article 18 of the Act 25/1994. According to this Decree, a broadcaster should release its programme planning at least eleven days before broadcast.

The Catalan Decree also deals with other subjects, such as the jurisdiction of Catalan authorities, and the duty of conditional access service providers and broadcasting carrier networks operators to provide information about the channels they are distributing. However, the Decree does not cover some provisions of the Act 25/1994 which might need further implementation in order to be applied by the relevant authorities, such as article 5 of the Act 25/1994 (on the duty of broadcasters to allocate at least 5% of their annual income for the financing of European films and TV movies). ■

***Ley 4/2000, de 16 de noviembre, por la que se crea la Empresa Pública "Corporación Extremeña de Medios Audiovisuales"* (Act 4/2000 of the Autonomous Community of Extremadura, on the creation of the regional public broadcaster *Corporación Extremeña de Medios Audiovisuales*), *Diario Oficial de Extremadura* no. 147, 19 December 2000, pp. 12516-12522**
***Decreto de Andalucía 414/2000, de 7 de noviembre, por el que se regula el régimen jurídico de las televisiones locales por ondas terrestres* (Andalusian Decree 414/2000, on local terrestrial TV), *Boletín Oficial de la Junta de Andalucía*, no. 139, 2 December 2000, pp. 18.008-18.013**
***Decreto de Cataluña 295/2000, de 31 de agosto, por el que se desarrolla el derecho a la información de los usuarios de los servicios de televisión* (Catalan Decree 295/2000, on the right of TV users to receive accurate information on the programme planning of TV channels), available at: http://www.gencat.es/cac/legislacio/cd31-8-2000.htm**

ES

ES – Non Adoption of Three Bills on the Creation of a Regulatory Authority for the Broadcasting Sector

Alberto Pérez Gómez
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Spain is one of the few countries within the European Union and the Council of Europe in which the main authority for the audio-visual sector is not an independent regulatory body. There is a regulatory authority in Catalonia (*Consell de l'Audiovisual de Catalunya*) and, at national level, there is an independent authority, the *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission), which has some powers concerning the audio-visual sector. However, at national level the authority that has power to enforce most of the provisions related to Spanish media Law is the *Ministerio de Ciencia y Tecnología* (Ministry for Science and Technology).

In April and May 2000, three opposition parliamentary groups presented bills on the creation of an independent national regulatory authority for the broadcasting sector. On 21 November 2000, the bills were voted on in the *Congreso* (Lower House) in order to decide whether they were going to be accepted for further discussion or rejected. The bills were rejected by the Popular Party, which considered that these bills did not provide adequate solutions to some problems raised by convergence and that it would be better to wait until the Government presented its bill on this subject (scheduled for 2001). Some parties that also opposed the bills urged the Government to meet its obligations in this field. ■

Proposición de Ley de creación del Consejo Superior de los Medios Audiovisuales (Orgánica), presentada por el Grupo Parlamentario Socialista, nº 20-1, 25.04.2000.
Proposición de Ley de creación del Consejo de la Comunicación, presentada por el Grupo Parlamentario Federal de Izquierda Unida, nº 35-1, 08.05.2000.
***Proposición de Ley de creación del Consejo de la Comunicación, presentada por el Grupo Parlamentario Mixto, nº 53-1, 22.05.2000* (Bills presented by the Socialist Party, United Left and the *Grupo Mixto* on the creation of an audio-visual Council). Available at: http://www.congreso.es/cgi-bin/congreso/iniciativas/tramitadas_proposiciones**
Diario de Sesiones del Congreso de los Diputados – Pleno, VII Legislatura - nº 42, Sesión Plenaria nº 40, 21.11.2000, pp. 2058-2067. Available at: http://www.congreso.es/public_oficiales/L7/CONG/DS/PL/PL_042.PDF

ES

GB – Revised Procedure for the Application of Statutory Sanctions

The UK regulator of private broadcasters, the Independent Television Commission (ITC), has issued a revised procedure for the application of sanctions to licensees where they are considered to be in breach of the provisions of the Broadcasting Act 1990, for example, those relating to programme standards or impartiality. These sanctions range from the requirement to broadcast

a correction or apology, through financial penalties (which may be very large), to shortening or revoking the licence. The new procedure replaces those set out in guidance notes for different types of licence and takes into account the coming into effect of the Human Rights Act 1998, which incorporates the European Convention on Human Rights into domestic law. The latter point is particularly important as the Act does not provide any appeal from the decisions of the Commission and its decisions can only be challenged by judicial review, which is concerned with the legality and reasonableness of decisions rather than permitting the courts to undertake a fresh examination of the merits of the decision. The Commission was thus potentially vulnerable under Article 6(1) of the Convention which requires a fair hearing to be provided, and hopes that the new procedures will protect it against such challenge.

Tony Prosser
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The new procedure distinguishes between "lesser sanctions" (the requirement to broadcast a correction or apology, or not to repeat a programme) and "greater sanctions" (financial penalties, and the shortening or revocation of a licence). The investigation of possible licence breaches which may lead to lesser sanctions is to be delegated to the Senior Management Group of the Commission's staff and reported to the Commission, although in exceptional cases the Commission may decide the issue itself. In all of these cases the licensee will be given the chance to make written representations before the decision is taken. In cases where greater sanctions may be applied, the case will be delegated to a sub-committee of members of the Commission, though in some cases it may be considered by the full Commission. In all such cases the licensee must be given the opportunity to request an oral hearing before the sub-committee or the Commission. In both types of case, all the information to be used will be disclosed to the licensee subject to limited exceptions required by law. ■

Independent Television Commission, "Outline Procedure for Application of Statutory Sanctions". See ITC Press Release 02/01, 9 January 2001, available at: http://www.itc.org.uk/news/news_releases/show_release.asp?article_id=465

GB – Radio Authority Publishes Revised Advertising and Sponsorship Code

The Radio Authority, established by the Broadcasting Acts 1990 and 1996 to license and regulate Independent Radio, adopted and published its original Advertising and Sponsorship Code ten years ago. The 1990 Act obliges the Authority to review the Code from time to time. In March 2000, the Authority initiated a consultation process with the aim of revising and modernizing the Code.

The new Code was published on 4 January 2001. Broadly, the aims of the revision are to (a) bring the Code into line with current and pending legislation (b) restructure the Code, to highlight the more important rules (c) continue and strengthen consumer protection (d) "lighten regulation" (provided that consumers' interests will not be prejudiced) and (e) strengthen scheduling rules.

As regards advertising, the changes include: to reflect EC obligations, the rules on "misleadingness" have been strengthened and new rules on "misleading comparative advertising have been adopted; new categories of advertiser are permitted (e.g. hypnotherapists, psychiatrists and investments bodies); other category changes include motor vehicles (to do with speed issues and performance limitations for safety) and lawyers (regarding "no win, no fee"); health etc services are subject to more stringent "bona fides" tests; and rules regarding advertising for religious purposes, food and slimming products are changed too. "Masthead" programming is also dealt with.

David Goldberg
deeJgee Research/ Consultant

Sponsorship rule changes include: sponsorship credits can include a combination of slogans, addresses, phone numbers and websites; presenters can voice live sponsorship messages with their own programme; current affairs and review programmes can attract sponsorship, with certain safeguards; and the Code provides guidance on scheduling sponsorship tags to avoid any impression that news bulletins are sponsored.

Even since the publication of the revised Code, the Authority has announced a fresh consultation on a revision to the Code. The Tobacco Advertising and Promotion Bill, currently before Parliament, envisages no advertising of any such category of product. Therefore, existing Rule 10, Section 3, which states that: "Advertisements for cigarettes, cigarette tobacco and papers, but not cigars and pipe tobacco, are prohibited." would have to be changed to "Advertisements for tobacco products (including cigarettes, cigarette tobacco and papers, cigars and pipe tobacco) are prohibited."

Further, Section 1, Rule 3.9(c) and (d), Limited Sponsorship by Betting and Gaming Companies, has been further amended. The effect of the change is that no gaming company or gambling brand "may sponsor programming specifically aimed at children (those aged below 18 years)." In addition, "sponsor credits for betting and gaming companies (excluding football pools and permitted lotteries) may include only a concise, factual statement of the company's business (e.g. "xxx, the online betting company"). No advertising content is permitted." This change has been thought necessary partly because of the increasing trend for such companies to use names that do not make the nature of their business clear. ■

The Code on Advertising and Sponsorship is available at: http://www.radioauthority.org.uk/downloads/pdf/Ad%20code%202000.pdf

IT – New Deadlines for Television and Radio Digital Frequency Plans

On 23 January 2001, the Italian Government approved *decreto-legge* (decree-law) no. 5/2001 containing urgent provisions on local radio and television broadcasting (*Gazz. Uff.* no. 2001/19). The decree postpones and establishes several deadlines concerning analogue and digital television and radio broadcasting. According to Article 77 of the Italian Constitution, a decree-law is an act having the same force of law as an ordinary statute of the Parliament. The Government may only issue a decree-law in exceptional cases, and it must be converted into a parliamentary statute within sixty days of its publication.

As far as television broadcasting is concerned, it must be recalled that the national analogue television broadcasting frequency plan was adopted by the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications Authority - AGC) on 30 October 1998 by Regulation no.

68/98 (see IRIS 1998-10: 12) and then integrated on 14 July 1999 by Regulation no. 105/99 (see IRIS 1999-8: 8) in order to define the relevant areas for local broadcasting. Decree-law no. 5/2001 postpones until 15 March 2001 the deadline for the renewal of concessions to local analogue television broadcasters, formerly due to expire on 31 January 2001 according to Law no. 5/2000 (see IRIS 2000-2: 7). Concessions for analogue transmission will be a preferential condition for digital terrestrial transmission (DTT) in the future. Broadcasters not already transmitting but who obtain a concession are entitled to acquire installations that are already working; broadcasters already transmitting but who do not obtain a concession are entitled to continue their broadcasting activity until the adoption of the national DTT frequency plan, the deadline for which falls on 31 December 2002.

As far as radio broadcasting is concerned, the scheme is reversed. The decree entrusts the AGC with the power to adopt the national digital audio broadcasting (DAB) frequency plan before 31 December 2001. Only after the effective realisation of the digital frequency plan, will the AGC adopt the analogue frequency plan.

Finally, the decree contains some temporary provisions concerning existing radio and television installations that have to be transferred according to the new sites established by the respective frequency plans. The *Ministero delle Comunicazioni* (Ministry of Communications) and the *Ministero dell'Ambiente* (Ministry of Environment) will decide on the electromagnetic compatibility of the installations with human health. ■

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

***Decreto-legge* of 23 January 2001, no. 5, *Disposizioni urgenti per il differimento di termini in materia di trasmissioni radiotelevisive analogiche e digitali, nonché per il risanamento di impianti radiotelevisivi* (Gazz. Uff. 24 January 2001, *Serie generale* no. 19). Available at: http://www.camera.it/parlam/leggi/decreti/01005d.htm**

IT

MD – Constitutional Court Rejects Amendments to the Television and Radio Act

On 22 June 2000, the Parliament of Moldova passed amendments to the Act on Television and Radio of 3 October 1995. According to the amended Article 23 (1) of the Television and Radio Act, retransmission from foreign countries of programmes by means of "broadcasting networks and transmitters" which are state property shall be performed by public or private companies holding a broadcasting license and if necessary of a technical license, or having a contract to rent the "broadcasting networks and transmitters."

The second part of the amended article prohibits broadcasting companies from combining retransmission of foreign programmes with compilation, production and release of the original programmes onto the air on the frequencies (channels) used for such retransmission, with the exception of commercial advertising.

These provisions were challenged before the Constitutional Court by the President of Moldova and a Deputy of the Parliament as being unconstitutional. They considered that the above-mentioned rules set obstacles not only to freedom of thought and opinion, but also hinder realisation of freedom of expression through word, image and other possible modes and infringe the right to access any information that concerns public matters. Therefore creative activity and the mass media are subjected to state censorship.

The Constitutional Court decided that the ban was not justified and that it was contrary to the universally recognised principles of international law in this sphere. Referring to the Act on Television and Radio, the Court considered that the ban on combining the retransmission and the compilation, production and release of the original programmes on the same frequencies was against freedom of opinion and the right to seek, obtain, and distribute information and ideas by any means and irrespective of state boundaries. These amendments were also in contradiction with the Act on Television and Radio as regards international co-operation. The Act states that international co-operation in the television and radio sphere is regulated through treaties and agreements made between the Television and Radio Co-ordination Council or the broadcasting companies, on the one hand, and foreign companies, on the other. These treaties and agreements lay down terms, procedures of reception and retransmission of programmes from foreign countries, as well as the nature of their combination with original programmes.

Commercial advertising, programmes and films produced by the broadcasting companies are intellectual works covered by copyright law and their protection is guaranteed in any form if it does not contravene public interests. This intellectual property right also applies to all the "creative workers" of television and radio companies. Having allowed commercial advertising and having excluded the original programmes from the process of retransmission from abroad, the legislator infringed upon the constitutional provisions that give equal protection of all forms of ownership.

According to the amended Act on Television and Radio, broadcasting companies that have the right to retransmit programmes obtained through satellite facilities must also retransmit national programmes, while the companies providing services by means of cable networks have the right to retransmit programmes transferred by radio-electronic terrestrial or satellite means, retransmit programmes pre-recorded by various means and distribute their own programmes.

The Constitutional Court considered these amendments to be an attempt to censor broadcasting activities. In its Decision, the Court stated that the provisions of the second section of Article 23 did not correspond to the constitutional rules. ■

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***Republica Moldova Curtea Constitutionala, Hotarire #42* of 14 December 2000, case 48a/2000. Published in *Monitorul Oficial al Republicii Moldova*, #163-165, 29 December 2000**

RU

FILM

IE – Film Industry

In December 2000, the Audiovisual Federation of IBEC (the Irish Employers' organisation) published its annual report for 1999. It concluded that the Irish film industry is in the doldrums and losing competitiveness against the British industry. Key recommendations of the 1999 Report on the Strategic Development of the Irish Film

and Television Industry 2000-2010 (see IRIS 1999-8: 12), it said, had not yet been implemented. There was a significant increase in Irish expenditure on feature films and major television dramas but a fall in expenditure on independent television productions. A decrease in direct employment in the industry resulted. Problems with tax relief, costs and incentives for investment were identified.

Marie McGonagle
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The Economic Impact of Film Production in Ireland – 1999, 15 December 2000. The annual report is available at:
http://www.ibec.ie/ibec/ibecdoclib3.nsf/7ddce1f4694b8d9e802568d200532a90/3c455a0afdec5803802569b6003fae61/$FILE/IBEC+Film+Report+Dec+00.pdf
Statement by the Minister for Arts, Heritage, Gaeltacht & the Islands on the Irish Film Industry, Press Release of 16 August 2000. Available at:
http://www.irlgov.ie/ealga/press/3287.doc
The text of the Irish Film Board (Amendment) Act 2000 is available at
http://www.irlgov.ie/bills28/acts/2000/a3500.pdf
See also *The Irish Times,* 11 November 2000

During the year 2000, however, a number of developments occurred. Firstly, the European Convention on Cinematographic Co-production was ratified on 2 August 2000. Secondly, increases in the amount of revenue that may be raised by producers under the tax scheme (Section 481 of the Taxes Consolidation Act 1997 – see IRIS 1999-8: 12 and IRIS 2000-2: 8) were announced, following approval of the scheme by the European Commission under the State aid rules. Thirdly, new legislation, the Irish Film Board (Amendment) Act 2000, was passed. It increases from IEP 30 million to IEP 80 million the budget of the Irish Film Board. That is the amount that the Film Board may give to film production companies by way of loans and grants. This implements one of the key recommendations of the Film Industry Strategic Review Group (see above and IRIS 1999-8: 12).

Meanwhile, the film *Ulysses*, directed by Joseph Strick, has finally been passed by the Irish censor, thirty-three years after it was first refused a certificate for public showing by the Film Censor and the Films Appeal Board in 1967. It has now been passed without cuts and with an "Over 15" age classification (see IRIS 2000-2: 8). ■

NEW MEDIA/TECHNOLOGIES

CH – "Last Mile" Unbundling Decreed

The Swiss Federal Communications Commission (*ComCom*) is taking its first step towards the unbundling of local loops and, in a decision of 10 November 2000, issued as a precautionary measure, ordered *Swisscom* to grant a request by *diAx* for the unbundling variant Bitstream Access. In partnership with *diAx*, *Swisscom* must work out a standard offer for both Shared Line Access and Full Access.

As part of the standard prognoses made during the process of taking precautionary measures, *ComCom* found that unbundling should almost certainly be considered part of the requirement for interconnection. All three forms of unbundling (Bitstream Access, Shared Line Access and Full Access) would involve *Swisscom*'s access lines being connected to the telecommunications installation of an alternative service provider in local exchanges. *ComCom* bases this view on a detailed interpretation of the *Fernmeldegesetz* (Telecommunications Act) of 30 April 1997. Furthermore, on the basis of a report by the Competition Commission (*WEKO*) published in February, *ComCom* concluded that *Swisscom* held a dominant position in the telecommunications access market, since there were currently no adequate alternatives to *Swisscom*'s extensive network.

Oliver Sidler
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Press release of the Swiss Federal Communications Commission (*ComCom*) of 10 November. Available at:
http://www.fedcomcom.ch/ger/press/mitteilung/142.html
DE-FR-IT

ComCom's decision forces *Swisscom* to offer *diAx* xDSL services with Bitstream Access and in the four band widths 256 kbit/s, 512 kbit/s, 1,024 kbit/s and 2,048 kbit/s. Broadband services are to be introduced in stages: firstly, the technical and administrative conditions for the introduction of Bitstream Access must be established within three months in the seven Swiss cities where *Swisscom* already offers its "Broadband Connectivity Service" (Lausanne, Geneva, Zürich, St. Gallen, Basel, Bern and Lucerne). The same conditions must be in place in all access switchboards with more than 3,000 active connections within six months of the *ComCom* decree, and, although only at the request of *diAx*, in those with more than 1,000 active connections within nine months.

In principle, service providers must pay *Swisscom* cost-related compensation for the use of unbundled access lines. In the absence of any other guidelines, *ComCom* had to fix these wholesale prices in line with European benchmarks. One-off set-up costs must also be paid.

ComCom's decision, which *Swisscom* is to challenge before an Administrative Court, is consistent with developments across Europe. It enables Switzerland to remain in step with EU countries. Unbundling has already taken place or is about to become a reality in some EU countries (Denmark, Germany, Finland, Italy, Netherlands, France and Austria). In addition, following the lead of the European Council of Ministers, the European Parliament passed a Regulation on 26 October 2000, obliging all Member States to introduce unbundling by 31 December 2000. ■

DE – Statement on Proposed Regulatory Framework for Electronic Communications Networks and Services

In December 2000, the *Direktorenkonferenz der Landesmedienanstalten* (Congress of *Land* Media Authority Directors - *DLM*) issued a statement on the European Commission's proposals for a new regulatory framework for electronic communications networks and services.

The Proposal for a Directive on a Common Regulatory Framework (COM (2000) 393 final) aims, in view of the convergence phenomenon, to create a common regulatory framework for all electronic communications networks and services. The Proposal for a Directive on Access (COM (2000) 384 final) seeks to secure the further development of the electronic communications services market by safeguarding access and interconnection. The Proposal for a Directive on Universal Service (COM (2000) 392 final) essentially extends the existing obligation for telecommunications networks to provide a universal ser-

vice. The Proposal for a Directive on Authorisation (COM (2000) 386 final) is meant to replace the current Directive 97/13/EC in relation to a common framework for general and individual authorisation for telecommunications services. The Commission has also proposed a European Parliament and Council Decision on a Regulatory Framework for Radio Spectrum Policy in the European Community (COM (2000) 407 final).

In its statement, the *DLM* stresses that it evaluates the Commission's proposal primarily in terms of whether it is deemed capable of providing and ensuring broadcasting (content) diversity. Broadcasting must be able to fulfil its function in a democratic and pluralistic society as a medium for, and a factor in, forming public and private opinion. In this respect, the *DLM* points out that the links between infrastructure and content must also be taken into account and that networks should provide access for local and regional broadcasting services in particular. It demands that specific, national ex-ante regulations should continue to be allowed, since competition law and ex-post regulations are often insufficient to deal with broadcasting issues.

The *DLM* therefore proposes that the scope of the Directive on a Common Regulatory Framework should be such that Member States are free to take measures to ensure that broadcasting services have access to communications networks and that users have access to broadcasting services (Section 1 Paragraph 2). The *DLM* also suggests that the regulatory authorities should take responsibility for content diversity and pluralism of expression (Section 7 Paragraph 4). As far as the assignment of radio spectrum is concerned, the *DLM* argues that radio spectrum management should take into account the cultural functions of broadcasting and the need for sufficient broadcasting services (Section 8 Paragraph 1).

The *DLM* considers the scope of the proposed Directive on Access to be too narrow. It points out that the regulation of conditional access (CA) systems alone is not enough, since access to other types of bottleneck such as Electronic Programming Guides (EPGs) or Application Programming Interfaces (APIs) also needs to be regulated (Section 6). In this respect, the *DLM* refers to the clause on freedom of access to digital services in Section 53.7 of the *Rundfunkstaatsvertrag* (Inter-State Agreement on Broadcasting - see IRIS 2000-7: 9 and IRIS 2000-3: 11). It also criticises the fact that the proposal merely provides for ex-post measures, which are unsuitable for the audiovisual sector (Section 8).

The *DLM* argues that the possibility for Member States to impose "must carry" obligations for the transmission of specified radio and television broadcasts as part of the universal service should also apply to new types of broadcasting service (Section 26 Paragraph 1). It makes the same demand in relation to the Directive on Authorisation (Part A number 6). Finally, the *DLM* claims that the proposed Decision on a Regulatory Framework for Radio Spectrum Policy is not within the competence of the Community. ■

Wolfram Schnur
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Position of the *DLM* on the European Commission's Proposal for a New Regulatory Framework for Electronic Communications Networks and Services, December 2000
http://www.alm.de/aktuelles/presse/dlm_stellungnahme_engl.doc
DE-EN

FR – Proper Use of Hypertext Links

In a judgment on 26 December, the commercial court of Paris defined – for the first time ever, to our knowledge – the rules for using hypertext links. "Keljob.com", a free employment search engine listing offers of jobs presented on other sites (including that of the company *Cadres on line*), was charged by the latter with modifying and altering the source codes of its web pages. The Keljob site used hypertext links to present the pages of the site at "cadresonline.com" at a different URL address to that of the site. The company Keljob claimed that there was no rule of law that obliged it to inform the owner of an Internet site or obtain prior authorisation before establishing a hypertext link to another site. However, according to the court, "the proper use of the possibilities offered by the Internet network" demanded this. Moreover, hypertext links could not be set up "except on the sine qua non condition of compliance with legislation on intellectual property" (including Article L 122-4 of the CPI, which made it an offence to represent a work without the consent of its originator). Having laid down these basic principles, the court drew a distinction between ordinary hypertext links, which were considered to be implicitly authorised by all website operators, and "deep" links, such as those at the heart of the present case, which sent visitors straight to the secondary pages of a target site rather than via the site's homepage. Unfair parasitic behaviour was characterised by the appropriation of the work and financial efforts of others, in this case by the creation of hypertext links which could result in distorting the content or image of the target site or making it appear to be the defendant's own site, specifically by modifying its address. As these characteristics were present in the case in hand, the company Keljob was ordered to cease such action on penalty of being fined. ■

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Commercial court of Paris, 26 December 2000 – Havas and Cadres on line v. Keljob.
FR

IE – Conditional Access Directive Implemented

The Irish government has recently implemented the provisions of Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access. The Directive is aimed at approximating provisions in the Member States concerning measures against illicit devices that give unauthorised access to protected services. The Directive has been implemented into Irish law by means of Ministerial Regulations.

For the purposes of the Regulations, "protected services" means:
- television broadcasting (but does not include communication services such as telecopying or electronic banks, for example, which provide items of information or other messages on individual demand),
- radio broadcasting,
- Information Society services,
- it also includes the provision of conditional access to any of these services.

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The Regulations make it an offence for any person to do any of the following for commercial purposes: manufacture, import, distribute, rent, possess, install, maintain or replace illicit devices, or to use commercial communications to promote illicit devices. "Illicit devices" are defined as any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the protected service provider concerned.

Where an offence is committed by a company, legal proceedings may be taken against the officers of the company who have taken part or acquiesced in the offence, as well as against the company itself. Penalties include the forfeiture of any illicit device, and a maximum fine of IEP 1,500 (EUR 1,905) and/or 12 months' imprisonment. The Director of Telecommunications Regulation is entrusted with certain powers, particularly in regard to search and seizure, in order to ensure that the Regulations are complied with. ■

Statutory Instrument S.I. No. 357 of 2000, European Communities (Conditional Access) Regulations, 2000, available on the Irish Government website http://www.irlgov.ie/tec/communications/comlegislation/3572000.htm

IE – Computer Games - New Initiative

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The legislation in Ireland, which regulates the content and supply of videos, is the Video Recordings Act 1989. That Act designated the Film Censor's office as the regulatory body to deal with videos as well as films. The Film Censor has power to classify videos according to age and to refuse certificates for the supply of videos if their content is such that they may *inter alia* corrupt viewers or incite to crime. The Act, however, does not extend to video games. Initially, this omission did not pose a problem. More recently, developments in the content and range of video games have given rise to concerns regarding their suitability for children. In response to those concerns, Sony Playstation and other video games distributors, at the end of the year 2000, undertook voluntarily to introduce an age-rating system as a guide for parents.

The availability of the ELSPA (European Leisure Software Providers Association) rating system, applied to all computer games distributed in Europe, will be highlighted as a means of giving clear information to parents regarding content. Prominent symbols will appear on both the packaging and the games themselves. In addition, the Distributors have recommended to their members that all games which are rated in either of the age categories "Over 15" or "Over 18" should be submitted to the Film Censor for classification and certification.

Earlier last year the Minister for Justice had responded to concerns that laws such as the Censorship of Films Acts 1923-70 and Censorship of Publications Acts 1929-67 were out-of-date in many respects. He announced a wide-ranging review of the entire area of censorship across all media. A discussion paper on this topic is expected in 2001. The Minister's key concern is the protection of children. ■

Speech by Mr. John O'Donoghue, *Teachta Dala* (Member of Parliament), Minister for Justice, Equality and Law Reform at the Launch of a New Information Initiative in Relation to Computer Games Age Rating Symbols, 6 November, 2000. Available at: http://www.irlgov.ie/justice/Speeches/Speeches-2000/sp-0611.htm
The texts of the Acts mentioned are available at http://www.irlgov.ie/ag/

RELATED FIELDS OF LAW

DE – Complaints about Shock Advertising Ban Upheld

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In a judgment of 8 November 2000, the first chamber of the *Bundesverfassungsgericht* (Federal Constitutional Court) overturned rulings by the *Bundesgerichtshof* (Federal Supreme Court - *BGH*), which had prohibited the appellant, a press firm, from printing three advertisements for the *Benetton* company.

The *BGH* had deemed the advertisements, which contained images of child labour, a duck covered in oil and an HIV carrier, to be immoral on the grounds that the portrayal of serious human and animal suffering was likely to arouse feelings of sympathy which were being exploited without good reason for advertising purposes.

However, the Constitutional Court ruled that banning the advertisements contravened the freedom of the press.

The Court began by arguing that even the publication of an outside, commercial advertisement was protected by the freedom of the press. This basic right was not, however, guaranteed without restriction. However, contrary to the *BGH's* opinion, banning these images could not be justified on the basis of Article 1 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - *UWG*), which in a general sense prohibits competitive activities such as press advertising if they offend common decency, because restricting the freedom of the press was only possible on the grounds of important public interests or the rights of third parties.

Confronting the reader with unpleasant or pitiable images was acceptable because the need to protect citizens from such social phenomena as shown by these pictures was not so great that the State should restrict basic freedoms, even if many people disapproved of the advertisement.

Also, the lack of relationship between the pictures and the products being advertised did not give rise to a nuisance that affected the rights of others, since many modern advertising techniques did not establish such a relationship and were seen as positive rather than arousing feelings of pity. Even though the *Benetton* advertisements did not criticise the terrible situations depicted, they could not simply be condemned because they were protected by the freedom of the press enshrined in Article 5 of the *Grundgesetz* (Basic Law).

The Court disagreed with the *BGH's* view that the portrayal of AIDS sufferers was a breach of human rights, since it was not necessarily to be interpreted as excluding these people from human society, but rather as an accusatory reference to the danger that AIDS sufferers might be or were already excluded. On this basis, the picture certainly did not constitute a breach of human dignity. ■

Ruling of the *Bundesverfassungsgericht* (Federal Constitutional Court), 12 December 2000, case nos. 1 BvR 1762/95 and 1 BvR 1787/95
DE

ES – Amendment of Several Provisions Relating to Communications Law

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In December 2000, the Government approved the *Ley de Medidas fiscales, administrativas y del orden social* 14/2000 (Act on Taxation, Administrative Provisions and Social Affairs), which introduces slight amendments to several provisions relating to Communications Law.

An Act on taxation, administrative provisions and social affairs (hereinafter referred to as the "Special Measures Act") is approved each year, together with the Budget Act. The main object of the Special Measures Act is to introduce amendments to existing provisions, thus acting as a "container" of amendments. For example, this year's Special Measures Act amends more than forty different acts. Such Special Measures Acts, which have been used since the mid 90's by socialist and conservative Governments alike, have been severely criticized by many experts because of their heterogeneity and lack of transparency and because of the insufficient amount of debate that precedes the approval of these acts.

This year's Special Measures Act states that *Ente Público Radio y Televisión Española* (the national public broadcaster – *RTVE*) will enter the Spanish State holding company *Sociedad Estatal de Participaciones Industriales* (*SEPI*). The *SEPI* will try to clear *RTVE's* debt, which exceeds EUR 3.000 million. Some opposition parties have expressed their concern about possible interference of the *SEPI* in the activity of *RTVE*, and they have requested information concerning the participation of *RTVE's* Director and board members in the process. The *SEPI* does not intend to privatise any of *RTVE's* companies in order to solve its economic problems, and it will have a financial plan ready for *RTVE* by June 2001.

Other provisions of this year's Special Measures Act amend the General Telecommunications Act, as regards the control of the fulfillment of public service obligations by telecom operators, the licensing of some telecom services, the assessment of conformance of equipment and apparatus, the management of the national domain name system (.es) and telecommunications fees. The new measures relating to telecommunications fees, together with some measures included in the Budget Act, have given way to a substantial increase in the amount of money that telecommunications and broadcasting operators have to pay for the use of radio spectrum. ■

Artículos 14, 15, 55, 56, 60, 61, 62, 66, 80 y Disposiciones Adicionales Undécima, Decimotercera, Decimoctava y Vigésimo Tercera de la Ley 14/2000, de 29 de diciembre, de Medidas Fiscales, Administrativas y del Orden Social* (Act 14/2000, on Taxation, Administrative Provisions and Social Affairs), BOE no. 313 of 30 December 2000, pp. 46631 *et seq.
Artículos 6.Uno, 51 y 66 de la Ley 13/2000, de 28 de diciembre, de Presupuestos Generales del Estado para el año 2001* (Budget Act 2001), BOE no. 312, of 29 December 2000, pp. 46513 *et seq.

ES

FR – The Court of Cassation Aligns Itself with the European Court of Human Rights

Amélie Blocman
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The Court of Cassation has just taken note of the decision of the European Court of Human Rights against *France 3* last October (see IRIS 2000-9: 3), when the European Court found that the provision contained in Article 2 of the Act of 1931 banning the publication of specific information concerning a court case before the judgment of the court was delivered was contrary to Article 10 of the Convention. The Court of Cassation for its part had always rejected claims based on such incompatibility. Thus on 14 June last year, the criminal chamber of the Court qualified the ban imposed by the Act of 1931 as "necessary", within the meaning of the Convention, for "the protection of the rights of others, including the presumption of innocence, and the guarantee of the authority and impartiality of the judicial authorities". In the case brought before it on 16 January, the judges in the initial proceedings had sanctioned the appellant journalists for reporting on a complaint brought against a former Minister; the journalists based their defence in court on violation of Article 10 of the Convention. The criminal chamber of the Court of Cassation was therefore obliged to align itself with the European Court of Human Rights. Contrary to its decision of 14 June last year, it found that "the general and absolute ban required by Article 2 of the Act of 2 July 1931 constituted a restriction on the freedom of expression which was not necessary for the protection of the legitimate interests listed in Article 10(2) of the Convention". As the disputed provision was incompatible with these provisions of the Convention, the Court found that it could not be advanced as the foundation for an adverse judgment in a criminal case. ■

Court of Cassation (criminal chamber), 16 January 2001 – Gouyou-Beauchamps et al.

FR

FR – Ownership of Rights Concerning Agency Photographs

The number of disputes concerning the re-exploitation of agency photographs is on the increase. The regional court in Nanterre recently had to reach a decision in a case concerning the ownership of rights in respect of photographs. On the termination of the contract between a photographer and his agency, the photographer requested the return of all the photographs he had submitted, which the agency (Gamma) refused. The photographer therefore took the case to court and the court had to determine the true owner of the rights concerning the photographs in question – the photographer as their originator, or the agency, which claimed co-ownership of the rights. As some of the disputed photographs had been pooled, the judges divided the photographs into two separate categories. In refusing to return the photographs as requested, the agency Gamma claimed co-ownership of the economic rights attached to the photographs on the grounds of the concept of co-production. The agency claimed that this concept was contained in Article L 761-9 of the Employment Code, which governs relations between reporters and press companies. The court rejected the extension of the scope of the article and the assimilation of photographic agencies to press companies. It also recalled that the concept of co-production claimed by Gamma did not confer any economic rights in respect of the works, as the agency had had no part in their creation. Ownership of the originator's intangible rights was not dependent on the economic conditions of the production of the work. Thus, as the photographs had not been lawfully transferred by the photographer to the agency, the agency could not be

considered as a co-owner of the works and could not object to their return. Ownership of the photographs exploited in a pool was determined by the legal status of the productions resulting from the practice, which consisted of gathering together a number of photographers covering the same event who then pooled their work, using the best. Because of the number of photographers involved, the agency Gamma held that that the photographic production resulting from pooling constituted a collective work and that this in turn conferred on it, as instigator of the pool and in charge of it, ownership of copyright. The court did not agree. It found that the photographs concerned were not the result of merging a number of contributions, but that each had a "single, individual, perfectly identifiable originator allowing the separate exploitation of each contribution". The photographs could not therefore be termed a collective work, and each photographer retained the economic rights in respect of his own works. Lastly, in the case of pooled photographs, the revenue was shared among its members without this affecting the amount due to the agency. The agency's rights in respect of these photographs were therefore the same as for photographs exploited individually. The agency Gamma could not therefore claim any rights in respect of the photographs, and the court ordered the photographs to be returned to the applicant, subject to the authorisation of the other members of the group. ■

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Regional Court in Nanterre, 1st chamber A, 13 December 2000 – case of Francis Apesteguy et al. v. Société Gamma Presse Image.

FR

FR – Private Copy Commission Sets Scales of Rates for Digital Supports

Under Article L 311-1 of the *Code de la propriété intellectuelle* (French Intellectual Property Code - CPI), introduced by the Act of 3 July 1985, the authors and performers of works fixed on phonograms and videograms are entitled to receive remuneration if their works are reproduced for private use. The Private Copy Commission, instituted by Article L 311-5 of the CPI, is responsible for determining the level of this remuneration and how it is to be paid, according to the type of support and the duration of the recording on it. The amount is normally paid by the manufacturers or importers of recording supports which may be used for the private copying of phonograms and videograms (thereby excluding other types of copy, such as texts or software, for example) when they are put into circulation in France, to collecting bodies representing all the companies that receive and redistribute sound and audiovisual fees. The amounts gathered in this way are distributed among the beneficiaries in proportions laid down by law (author 50%, performer 25% and producer 25%), after 25% has been deducted in order to finance action to assist creative work. In addition to its chairman, the Commission comprises twenty-four members, equally divided between representatives of beneficiaries on the one hand and representatives of consumer organisations and manufacturers on the other. It met last March, fourteen years after reaching its one and only decision. It had become necessary to adapt the method of remuneration to the new possibilities for private copying opened up by digital processes. On 4 January, after nine months of discussion, the Commission set the remuneration rates for mobile recording supports. The basic hourly rates fixed in 1986 for analogue audio and video supports are now 25% higher (FRF 1.87 per hour for audio and FRF 2.81 per hour for video). Moreover, and most important of all, remuneration has been extended to blank mobile digital supports (minidisc, audio CDR and RW, video DVDR and RW, etc), at the rate of FRF 3 per hour for audio supports and FRF 8.25 per hour for video supports. The Commission has not yet fixed the remuneration for supports forming an integral part of recording equipment, except for MP3-format mobile personal player/recorders ("Rio" type – FRF 2.20 per 32 Mo = 44 minutes). Backtracking on her own recent statements, the Minister for Culture nevertheless stated in Parliament on 16 January that "the Government did not envisage levying a tax on those computers which were not used exclusively for copying". ■

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Decision no. 1 of 4 January 2001 of the Commission as provided for in Article L 311-5 of the French Intellectual Property Code on remuneration in respect of private copying, *Journal officiel* (official gazette) of 7 January 2001

FR

NL – Real Estate Database Not Protected by the Dutch Database Act

The Court of Appeal of the Hague has ruled that an on-line database set up by an organisation of real estate brokers and containing information on real estate property that is for sale, is not protected by the *Databankenwet* (Database Act). The *Databankenwet*, an implementation of the European Database Directive, requires a "substantial investment" to be made by the owner of the database. Considering that the database was created for the organisation's internal purposes prior to on-line publication, the Court judged that there had not been a substantial investment by the organisation. Therefore, search engine *ElCheapo*, operated by Dutch newspaper publisher De Telegraaf, could not be prevented from retrieving data from the database. ■

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Court of Appeal 's-Gravenhage, Judgement of 21 December 2000, case 00/1053, De Telegraaf v. NVM

NL

US – Merger between America Online and Time Warner Approved

On 11 January 2001, the Federal Communications Commission (FCC) approved the proposed merger between America Online, Inc. and Time Warner, Inc., thereby creating AOL Time Warner, Inc. The merger of the United States' largest Internet Service Provider (ISP) with its second-largest cable operator was approved subject to several conditions. The conditions primarily impact the AOL Time Warner's provision of Internet Service and Instant Messaging. First, the FCC reaffirmed a merger approval condition previously made by the Federal Trade Commission, whereby the merged entity must negotiate with unaffiliated ISPs seeking access to its cable systems in good faith and offer access in a

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non-discriminatory manner. For example, AOL Time Warner must allow unaffiliated ISPs to control the content of their customer's first screen and bill subscribers directly, if they choose to do so. Additionally, AOL Time Warner must offer unaffiliated ISPs the same technical performance standards available to affiliated ISPs.

The FCC also prevented AOL Time Warner from introducing new Instant Messaging-based high speed services, such as one- or two-way streaming video, until the merged entity demonstrated that the new services were interoperable with unaffiliated ISPs, that AOL Time Warner entered into written contracts with these ISPs to ensure interoperability or the public interest no longer warranted the condition. The terms impacting Instant Messaging were harshly criticised by Commissioner Powell as unnecessarily constraining the provision of a service that has yet to be offered. The day after the AOL Time Warner Order was released, Commissioner Powell was named Chairman of the FCC, replacing outgoing Chairman William Kennard. ■

Memorandum Opinion and Order, In the Matter of Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America On Line, Inc., Transferors, to AOL Time Warner, Inc., Transferee, CS Docket No. 00-30; FCC 01-12 (11 January 2001). Available at:
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AGENDA

IViR International Copyright Law Summer Course
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