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Approval of the Final Draft of the Cyber-Crime Convention

Irene Gentile
European Audiovisual Observatory

On 22 June 2001, the Council of Europe Committee on Crime Problems (CDPC), an intergovernmental expert body reporting to the Council of Europe's Committee of Ministers, approved the final draft of the cyber-crime Convention. The Council of Europe Parliamentary Assembly had given its opinion on the draft in April this year (see IRIS 2001-5: 3).

The Convention, which should be examined and probably adopted by the Committee of Ministers in September this year, will be the first international treaty on computer and computer-related crimes dealing with illegal access and interception, infringements of copyrights, computer-related frauds, child pornography and other types of similar misuses.

The CDPC also decided to complement the Convention by an additional protocol dealing with the dissemination of racist and xenophobic speech through computer networks.

The Convention will enter into force when five states, including at least three Council of Europe member states, have ratified it. ■

Draft Convention on Cyber-Crime and Explanatory Memorandum Related thereto, available at:
http://conventions.coe.int/Treaty/EN/projets/FinalCybercrime.htm

EN-FR

"Approval of the final draft of Cyber-crime Convention by the Council of Europe's Committee on Crime Problems", Press Release of 22 June 2001.
Available at:
http://press.coe.int/press2/press.asp?B=30,0,0,0,0&M=http://press.coe.int/cp/2001/456a(2001).htm

EN-FR

European Court of Human Rights: Case of *VGT Verein gegen Tierfabriken* v. Switzerland

In its judgment of 28 June 2001, the European Court of Human Rights has developed a remarkable approach with regard to the right of access to broadcast "non-commercial" television commercials. Although the judgment of the Court is essentialy declaratory, it can be interpreted as affording arguments for a "right to an antenna", ie a right of access to a particular media controlled by a third person.

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The case originates in an application against Switzerland because of the refusal in 1994 by the *AG für das Werbefernsehen* (Commercial Television Company, now *Publisuisse*) to broadcast a commercial concerning animal welfare at the request of the *Verein gegen Tierfabriken* (Association against industrial animal production – *VGT*). The television commercial was to be considered as a response to the advertisements of the meat industry, and ended with the words "eat less meat, for the sake of your health, the animals and the environment". The Commercial Television Company refused to broadcast the commercial, however, because it considered it to be a message with a clear political character, and Swiss broadcasting law prohibits political advertisements on radio and television. The applicant's administrative law appeal was dismissed by the *Bundesgericht* (Federal Court) on 20 August 1997, relying inter alia on the legitimate aim of the prohibition of political advertising stated in Section 18 Paragraph 5 of the Federal Radio and Television Act.

The European Court of Human Rights in its judgment of 28 June 2001 agreed that a ban on political advertisements on television as such can be considered to have a legitimate aim, in order to prevent financially-strong groups from obtaining a competitive advantage in politics and to spare the political process from undue commercial influence. Such a ban can also help to provide for a certain equality of opportunity between political movements in society, and to support the press which remained free to publish political advertisements. The Court also agreed that the commercial could be regarded as "political" within the meaning of Section 18 Paragraph 5 of the Swiss Federal Radio and Television Act. Indeed, rather than inciting the public to purchase a particular product, it reflected some controversial opinions on an actual debate in society.

On the decisive question of whether the refusal to broadcast the commercial was necessary in a democratic society, the Court took into account several factors. First of all, the Court observed that powerful financial groups obtain competitive advantages through commercial advertising and might therefore exercise pressure on, and eventually curtail, the freedom of the radio and television stations broadcasting the commercials. The Court underlined that such situations undermine the fundamental role of freedom of expression in a democratic society. Here, however, the applicant association, did not constitute a powerful financial group. Rather than seeking to abuse a competitive advantage, the association was intending to participate by means of its proposed commercial in an ongoing general debate on animal protection. Secondly: although a prohibition on political advertising can be compatible with the requirements of Article 10 of the Convention, the Court was of the opinion that Section 18 Paragraph 5 of the Swiss Federal Radio and Television Act was *in casu* not applied in accordance with Article 10 of the European Convention. According to the Strasbourg Court, the Swiss authorities had not demonstrated in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition on political advertising also served to justify the interference in the particular circumstances of the case. Furthermore, the Court underlined that the domestic authorities did not adduce the disturbing nature of any particular sequence, or of any particular words of the commercial as a ground for refusing to broadcast it. Finally, it was also taken into consideration that the Commercial Television Company was the sole entity responsible for the broadcasting of commercials during programmes programmes broadcast nationally, which meant that there were few other possibilities to reach the entire Swiss public with the proposed advertisement.

In light of all these elements, the Court held unanimously that the refusal to broadcast VGT's commercial could not be considered as necessary in a democratic society and that consequently there had been a violation of Article 10 of the European Convention.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Within 3 months any party in the case may request a rehearing by the Grand Chamber of the Court. ■

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

Judgment by the European Court of Human Rights (Second Section), Case of VGT Verein gegen Tierfabriken v. Switzerland, Application no. 24699/94 of 28 June. Available on the ECHR's website at http://www.echr.coe.int

EN

EUROPEAN UNION

Court of Justice of the European Communities: Italy Condemned for Failure to Implement Directive 97/36/EC

On 14 June, the Court of Justice of the European Communities in Luxembourg held that Italy has failed to fulfil its obligations under the EC Treaty by not adopting the necessary measures to transpose Directive 97/36/EC into its national law.

Directive 97/36/EC was adopted by the European Parliament and the Council on 30 June 1997. It amends the "Television Without Frontiers" Directive (89/552/EEC of 3 October 1989), introducing, *inter alia*, a revision of the principle whereby only the laws of the State of establishment apply to broadcasting activities taking place in the EC (Art. 2a), different rules on television advertising and teleshopping (Arts. 10 to 21), as well as a new provision concerning the transmission of major events (Art. 3a). According to Art. 2, para. 1, of the 1997 Directive, Member States were required to implement it in their national legislation not later than 31 December 1998, and to notify the Commission thereof.

Not having received any notification from the Italian Government, the Commission initiated the infringement procedure under Article 226 of the EC Treaty. The Italian Government replied that it had presented to the Senate a Draft Law (A.S. No 1138) to give full effect to Directive 97/36/EC and that it expected that the draft would be approved rapidly.

The Court did not consider this argument. Referring to its settled case law, it held that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that it cannot take account of any subsequent changes. In the case in question, the reasoned opinion allowed the Italian Republic a period of two months from notification to comply therewith. Since the reasoned opinion was notified on 4 August 1999, the prescribed period expired on 4 October 1999.

Accordingly, the Court concluded that by failing to adopt, within the prescribed period, the laws, regulations and administrative provisions necessary to comply with Articles 1(c), 2(1) and (2), 2a, 3a(3) and 10(1)(3) and (4), Article 12, inasmuch as it regulates teleshopping, and Articles 13 and 16(2) of Directive 89/552/EEC, as amended by Directive 97/36/EC, the Italian Republic has failed to fulfil its obligations under that directive. ■

Roberto Mastroianni
University of Naples

Court of Justice of the European Communities, Decision of 14 June 2001, Case C-207/00, Commission v. The Italian Republic, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=62000J0207&lg=EN

DE-EN-FR-IT

Council of the European Union: Further Attention to Protection of Minors and Human Dignity

Tarlach Mc Gonagle
Institute for Information Law (IViR) University of Amsterdam

At a recent meeting on culture, the Council of the European Union turned its attention once again to the protection of minors and human dignity. The Council's Conclusions trace - at length - the instruments and initiatives adopted in these areas in recent times. The Council offered, in particular, its reaction to the Commission's Evaluation Report of 27 February 2001 on the application of the Council Recommendation 98/560/EC of 24 September 1998 concerning the protection of minors and human dignity (see IRIS 2001-5: 4 and IRIS 1998-10: 5).

While broadly welcoming the Report, the Council took note of the observation contained therein about the lack of involvement of users in its preparation. It also noted the reservations expressed in the Report about the shortness of the time-scale chosen for fully applying the Recommendation. These considerations prompted the Council to invite the Commission to continue its work on the basis of the encouraging results achieved so far and to contribute to the continued application of the Recommendation by advancing, at the European level, the exchange of information relating to the protection of minors in respect of all audiovisual media. The Council also requested a report from the Commission by 31 December 2002 on the impact of the Recommendation. Finally, the Council advocated the continued promotion of dialogue between the Commission and interested parties with a view to examining "possibilities for implementing technical systems for parental control in the digital environment."

In a similar vein, the Council requested Member States to continue to ensure the application of the Recommendation, through interaction with interested parties. It also asked Member States to make available in all relevant quarters any information of relevance to the development of skills, best practices and new initiatives for the protection of minors. ■

2361st Council Meeting (Culture), Press Release of 21 June 2001, available at: http://europa.eu.int/comm/avpolicy/c2361.htm

EN

Council of the European Union: Exchange of Information with Candidate Countries

Tarlach Mc Gonagle
Institute for Information Law (IViR) University of Amsterdam

The Council of the European Union recently adopted a Resolution aimed at intensifying the exchange of information and experience regarding the audiovisual sector between the European Union and its Member States and the candidate countries. More specifically, the objective of the Resolution is to ensure the setting up of a suitable framework for the adoption and implementation of the *acquis communautaire*; a development which could play a catalytic role in the accession negotiations.

Underpinning the Resolution is an appreciation of "the importance of the audiovisual sector in an enlarged European Union and [...] its role in safeguarding general democratic values in preserving and promoting Europe's cultural diversity." The Resolution recognises that the realisation of the full potential of existing fora and networks is crucial to the aim of redoubling the exchange of information in the audiovisual sector. It also suggests the possibility of exploring various avenues of financial cooperation between the EU and the candidate countries (eg. the Phare Programme) for audiovisual purposes. ■

2361st Council Meeting (Culture), Press Release of 21 June 2001, available at: http://europa.eu.int/comm/avpolicy/c2361.htm

EN

Council of the European Union: Resolution to Promote Exchanges on Conditions for Professional Artists

Tarlach Mc Gonagle
Institute for Information Law (IViR) University of Amsterdam

The Council of the European Union recently adopted a Resolution on the exchange of information and experience on the conditions for professional artists in the context of the enlargement of the EU.

To this end, the Resolution encourages the exchange of information between the Member States, and between the Member States and candidate countries. This aim grew out of the recognition of the mutual interest of all countries concerned in information on best practices and policies, at both the national and European levels. The Resolution also stresses the need for appropriate levels of representation for artists by relevant organisations at the Community level.

The Resolution calls for cooperation by Member States with the Commission in the "development and implementation" of these exchanges of information and experience. The "importance of artists' work for freedom of expression and the enhancement of cultural diversity in Europe as well as for the development of international exchange and cultural linking" is underlined, as is the importance of the mobility and free movement of persons engaged in cultural activities. ■

2361st Council Meeting (Culture), Press Release of 21 June 2001, available at: http://europa.eu.int/comm/avpolicy/c2361.htm

EN

European Commission: *e*Europe Plus Action Plan Launched

On 16 June 2001, an *e*Europe Plus Action Plan was launched by the candidate countries for EU accession. This initiative, prepared with the assistance of the European Commission, is the result of a process started at the European Ministerial Conference held in Warsaw on 11-12 May 2000, where Central and Eastern European Countries decided to launch an "*e*Europe-like Action Plan" for those countries. In February 2001, the Commission invited Cyprus, Malta and Turkey to join with those countries in defining this plan.

The *e*Europe Plus Action Plan is aimed at adopting all the strategic goals and objectives of *e*Europe (see IRIS 2000-6: 5) but with specific national measures and tar-

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

get dates. It contains the same three key objectives set out in the original *e*Europe Action Plan as well as the same indicators adopted for monitoring and benchmarking of progress. It also introduces an additional objective, the acceleration of the putting in place of the basic building blocks for the Information Society in the candidate countries.

The deadline for the achievement of the *e*Europe Plus targets is set for 2003. After that date, the impact and results of the plan will be reviewed with the aim of determining the need to develop further recommendations and to propose policy measures in areas of special importance to the candidate countries. ■

eEurope+ Action Plan, June 2001, available at:
http://europa.eu.int/information_society/international/candidate_countries/index_en.htm

EN

European Commission: Viviane Reding Urges a Revision of the "Television without Frontiers" Directive

Irene Gentile
European Audiovisual Observatory

On 22 June 2001, on the occasion of the Luxembourg RTL Group conference held in Venice, Viviane Reding, the member of the European Commission responsible for Education and Culture, spoke about the amendments to be made to the "Television without Frontiers" Directive (hereinafter "the Directive") in the light of technological changes.

In particular, Ms Reding considered that there are some areas where technological and market changes are posing serious challenges to the regulatory framework. The provisions of the Directive concerning advertising, for example, should be rethought, given the new range of advertising and marketing techniques that become possible with digital technology. Moreover, concerning the protection of minors, the increasing use of a wide range of electronic media by children (television, Internet, computer games, video cassettes and DVD's) would call for a coherent classification system of content, according to its suitability for children, in order to create filtering devices. Finally, in a new landscape where the number of channels is no longer limited, the question arises of knowing whether quotas are still an effective means of ensuring cultural diversity and pluralism or whether a flexible regulatory framework encouraging innovation and transition would be a more appropriate tool.

The Commissioner also envisaged the publication of three studies in early 2002. They will concern the impact of measures to promote the distribution and the production of European TV programmes, technological developments in the audiovisual sector and new advertising techniques. A proposal for amending the Directive will be published by the end of 2002. ■

Ms Viviane Reding, Member of the European Commission responsible for Education and Culture: "Television without Frontiers : amending the directive". RTL Group Management Conference, Venice, 22 June 2001. Speech/01/304 available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/304|0|RAPID&lg=EN

EN

European Commission: DVD Regional Coding System under Investigation

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

On 11 June 2001, the third European Competition Day took place in Stockholm. It was organised by the European Commission in the framework of the Swedish Presidency of the EU. On that occasion, the Commissioner for Competition, Mr Mario Monti, made a speech in which he addressed amongst other issues the question of the Regional Coding System for Digital Versatile Discs (DVD). DVDs are encoded so that they can only be played in machines in the region in which they were purchased. This system was introduced by the major film production companies in agreement with the major equipment manufacturers in order to ensure that the DVD release of a film in one chosen region would not interfere with the cinema run of the same film in another region.

Due to the fact that DVD prices are significantly higher in the EU than in the USA, the Commission has recently received a number of complaints concerning the regional coding system. Complainants argue that such a system would allow the film production companies to charge higher DVD prices because EU consumers are artificially prevented from purchasing DVDs from overseas. Mr Monti declared that, as a result of these complaints, the Commission has contacted the major film production companies, and declared that "we do not permit a system which provides greater protection than the intellectual property rights themselves, where such a system could be used as a smoke-screen to allow firms to maintain artificially high prices or to deny choice to consumers". ■

Mario Monti European Commissioner for Competition Policy: "Content, Competition and Consumers: Innovation and Choice". European Competition Day. Speech/01/275 available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/275|0|RAPID&lg=EN

EN

European Commission: Endorsement of Recommendations for Promotion of Online Government Services

Tarlach Mc Gonagle
Institute for Information Law (IViR) University of Amsterdam

A joint Swedish Presidency / European Commission conference entitled "eGovernment in the service of European citizens and enterprises – what is required at the European level" recently provided the occasion for the endorsement, by senior civil servants from 28 European countries, of a set of recommendations aimed at developing online government services.

The central aims of the conference were to identify and promote e-Government services at the European level. The general conclusions of the conference prioritise, *inter alia*, the need to develop a common conception of the future evolution of e-government services. Such a conception would, according to the conclusions, have to be informed by clear decentralisation and well-defined roles for Member States and relevant European Union institutions. Reference is made to the need to deal with the prevalent mistrust of new technologies, by tackling privacy and security issues. The conclusions also stress the need to include measures designed to promote transparency and citizen participation "in the EU and national administrations' regulatory processes".

The conference was organised in the context of the eEurope 2002 Action Plan. This Plan, drafted by the Council of Ministers and the European Commission, was adopted by the European Council in June 2000 (see IRIS 2000-6: 5). It highlights the importance, for citizens and enterprises alike, of the development of efficient online services of public administration, both at the national level and also at the level of the EU institutions. Also of significance was the composition of the conference's participants: it was the first time that senior civil servants from the EU Member States, European Economic Area countries, EU candidate countries and European institutions had gathered together to deliberate on these matters. ■

"Top officials from across Europe agree plans for on-line government services", Press Release of 19 June 2001 (IP/01/859), available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/859|0|RAPID&lg=EN

DE-EN-FR

IRIS LEGAL OBSERVATIONS
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European Commission: Strengthen Security on Internet

Tarlach Mc Gonagle
Institute for Information Law (IViR) University of Amsterdam

Pursuant to a request by the Stockholm European Council in March 2001, the European Commission recently unveiled a set of policy recommendations to render the Internet more secure for both citizens and enterprises.

Awareness-raising is a pivotal objective of the outlined measures. Coordination and cooperation at the European level should help to strengthen a so-called "European warning and information system". The measures also give priority to support for (i) the development of technology designed to enhance security and (ii) market-oriented standardisation and certification in this domain. The adoption of relevant legislative initiatives at the national level is also encouraged, as is the incorporation by Member States of "effective and interoperable security solutions in their e-government and e-procurement activities". Finally, the measures stress the importance of international cooperation for the achievement of their other goals. ■

"Commission boosts security on the Internet", Press Release (IP/01/794) of 6 June 2001, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/794|0|RAPID&lg=EN

DE-EN-FR

"Network and Information Security: Proposal for A European Policy Approach", Communication of 6 June 2001 from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, available at: http://europa.eu.int/information_society/eeurope/news_library/new_documents/index_en.htm

DE-EN-FR

NATIONAL

BROADCASTING

AT – Amendment to Broadcasting Act Adopted

Albrecht Haller
University of Vienna

On 27 June 2001, the Austrian National Assembly's Constitution Committee adopted a far-reaching amendment to the *Rundfunkgesetz* (Broadcasting Act), which regulates the *Österreichische Rundfunk* (Austrian Broadcasting Corporation - *ORF*). The Act, which will in future be known officially by its abbreviation "*ORF-Gesetz*", was passed by the plenary National Assembly on 5 July 2001.

The amendment will impose a new legal status on the *ORF*, which will become a public law foundation by 1 January 2002. Its official role will be to provide a universal broadcasting service for the benefit of the general public. In order to preserve the *ORF's* independence, the foundation will not be privately owned.

Under the new Bill, the *ORF* will be run by a Foundation Board, a Director General, a Public Council and a Monitoring Committee. The composition of the future Foundation Board, which will be elected for a four-year term, is based on that of the current *ORF* Committee. However, the new Board will have much greater powers than the current Committee. In return, its members will have the same duty of care and responsibility as the board members of a joint-stock company. The Director General, who will replace the current General Manager, will have general authority to issue directives. He will be appointed for a five-year term by means of a simple majority vote by the Foundation Board, although as before, a two-thirds majority will be required to remove him from office. The *ORF's* management bodies may no longer include MPs, regional administrative officials, employees of political parties, parliamentary associations of MEPs and educational institutions, or ministry staff. The Bill stipulates that the *ORF* will be under the legal responsibility of the *Bundeskommunikationssenat* (Federal Communications Authority).

The universal service is defined in two parts: technical aspects and programme content.

On the technical side, the *ORF* will continue to broadcast three nationwide and nine regional radio stations as well as two national TV channels. It can also provide a foreign service with a public Internet service. The universal service also includes teletext and online services linked to radio and TV stations. As well as traditional public service broadcasting activities, the *ORF* is allowed to carry out commercial, profit-oriented projects (eg broadcasting specialist channels). However, the organisation of and accounts relating to these activities must remain separate from those of the *ORF's* public service activities, as the EU requires. Income from commercial channels must not be used to support the universal service. The *ORF* may set up subsidiaries to carry out its commercial activities, which incidentally must be approved by the Foundation Board.

The *ORF's* obligations regarding programme content have been overhauled and that content has been extended. It must, for example, promote understanding of European integration. The *ORF* is also required to provide programmes of consistent quality on all channels and, in particular, to offer a choice of high-quality programmes during peak viewing hours (8 to 10 pm).

Provisions relating to advertising and programme sponsorship will be stricter than before in many areas. Particular restrictions will apply to product placement and commercial breaks. The *ORF* will not be permitted to advertise its radio stations on its own TV channels and vice versa, apart from references to individual programmes. The explanatory memorandum to the Bill explains that these restrictions are necessary in order to give private TV broadcasters adequate funding opportunities. ■

***Bundesgesetz, mit dem das Bundesgesetz über die Aufgaben und die Einrichtung des Österreichischen Rundfunks (Rundfunkgesetz – RFG), BGBl. Nr. 379/1984, in der Fassung des Bundesgesetzes BGBl. I Nr. 32/2001 und das Arbeitsverfassungsgesetz 1974, BGBl. Nr. 22/1974, in der Fassung des Bundesgesetzes BGBl. I Nr. 14/2000 geändert werden* (Federal Act amending the Federal Act on the role and organisation of the Austrian Broadcasting Corporation (Broadcasting Act - *RFG*), Federal Gazette No. 379/1984, in the version contained in Federal Gazette No. 32/2001, and amending the 1974 Labour Constitution Act, Federal Gazette No. 22/1974, in the version contained in Federal Gazette No. 14/2000)**

DE

AT – Commercial Terrestrial TV

Albrecht Haller
University of Vienna

***Bundesgesetz, mit dem Bestimmungen für privates Fernsehen erlassen werden (Privatfernsehgesetz – PrTV-G)* (Federal Act on Commercial Television (Commercial Television Act))**

DE

In addition to commercial cable and satellite television, commercial terrestrial TV will soon be permitted in Austria. The National Assembly adopted a *Privatfernsehgesetz* (Commercial Television Act) on 5 July 2001. The Act regulates, on the one hand, the provision of free-to-air television services (terrestrial television) and, on the other, the organisation of radio and television via cable networks (cable broadcasting) and satellite (satellite broadcasting), which are already permitted. The Act should enter into force on 1 August 2001, when the *Kabel- und Satelliten-Rundfunkgesetz* (Cable and Satellite Broadcasting Act) will be abolished.

The new Commercial Television Act makes provision for two types of licence for companies broadcasting analogue commercial terrestrial television. Firstly, a national broadcaster can only be licensed if it covers at least 70% of the Austrian population. Secondly, local and regional commercial terrestrial television will also be permitted on frequencies currently used at certain times by the *Österreichische Rundfunk* (Austrian Broadcasting Corporation - *ORF*) for its regional programmes.

Licences to broadcast analogue terrestrial television will be granted by the media authority *KommAustria* in accordance with a public tender procedure. When awarding national licences, *KommAustria* will have to apply the following selection criteria: diversity of opinion, broad range of programmes, proportion of self-produced programmes, coverage of population and the relevance of programmes to Austria. Only after those licences have been granted will any remaining regional or local frequencies be allocated. Here, similar criteria will be applied as for national broadcasters, although the regional or local relevance of the programmes will also be taken into account. Licence-holders must ensure that they begin broadcasting within 12 months of being awarded their licence. Cable and satellite TV will remain governed by the provisions currently set out in the Cable and Satellite Broadcasting Act, while rules on content, advertising restrictions and relations between journalists and their employers are also taken directly from the same Act.

Frequencies that are not allocated to commercial broadcasters and those also available, on the basis of a recent frequency study, for the third national TV channel are to be used for new digital terrestrial television stations. In order to accelerate digitalisation, the Commercial Television Act provides for the creation of a working group called "*Digitale Plattform Austria*", which will be open to members of any interested group (industry, commerce, science, network operators, *Länder*, consumers, etc) and the *ORF*. In partnership with the *KommAustria* media authority, this body is intended to carry out much of the groundwork for the introduction of digital terrestrial television and other digital services in Austria. According to the digitalisation plan, a multiplex operator will then be licensed to develop the technical infrastructure for the distribution of digital signals.

In connection with the licensing of commercial terrestrial television, restrictions on commercial TV broadcasters' shareholdings are also brought into line with the *Privatradiogesetz* (Commercial Radio Act - see IRIS 2001-4: 3). Under a new "overlap rule", individual broadcasters may no longer use both national frequencies and regional or local frequencies for commercial terrestrial television. A company may only hold more than one regional or local licence if the areas it serves do not overlap. Finally, media companies which already hold a particularly strong market position (with a range or coverage of over 30%) in another section of the media - radio, cable network infrastructure, daily or weekly press - are prohibited from broadcasting commercial television. ■

CH – Amendment to Radio and Television Ordinance

Dr Oliver Sidler,
lawyer, Zug

On 26 June 2001, the Swiss *Bundesrat* (Council of Ministers) adopted an amendment to the *Radio- und Fernsehverordnung* (Radio and Television Ordinance - *RTVV*), which will enter into force on 1 August 2001.

The definition of advertising is brought into line with the amended Council of Europe Convention on Transfrontier Television, which was adopted by the Swiss parliament in 2000. This means that self-advertising by a broadcaster, ie promotion of its own products and services (merchandising), is subject to advertising regulations (separation of advertising, maximum duration of advertising). References to a broadcaster's own programmes and ancillary products do not qualify as self-advertising. In parallel to the Ordinance amendment, the ban on radio advertising set out in the *SRG* licence will be changed in order to allow *SRG* radio stations to advertise some of their own products (eg recordings of radio programmes). This does not in any way broaden the scope for advertising on *SRG* radio stations, but merely continues the existing situation.

The *Bundesrat* has also decided to relax the obligation on cable network operators to carry certain channels ("must carry rule"). The operators' choice of channels will only be restricted insofar as is necessary for the *SRG* to provide a universal service. TV channels that primarily re-broadcast programmes from other channels will be exempt from the "must carry rule". This new provision applies to the *SRG's "SF Info"* channel, for example, which repeats programmes previously broadcast on other *SRG* channels.

Another amendment to the *RTVV* concerns the collection agency, *Billag AG*, which must now, on application, exempt any person receiving an old-age or invalidity pension and on supplementary benefits from the duty to pay the licence fee. This change corresponds with a decision of the *Bundesgericht* (Federal Court) of 5 January 2001, stating that the previous rule was unfair and therefore unconstitutional. In addition, nursing home residents with special care needs are explicitly released from their obligation to inform *Billag AG* that they are able to receive radio or television services. ■

CH – Teleclub not Allowed to Use "d-box" Technology in Switzerland

Teleclub SA will have to drop "d-box" technology from its plans for digital television and use an open interface converter instead. In a decision delivered on 5 June 2001, the Swiss Federal Council rejected the appeal entered by Teleclub SA against a decision of the Federal Department of the Environment, Transport, Energy and Communications (*DETEC*). The Federal Council said that "d-box" technology imposes a closed encryption system that constitutes a threat to the diversity of what is on

offer and of opinions, thereby compromising the principle of integration incumbent on television broadcasters.

Teleclub SA, a 40% owned subsidiary of the German Kirch group, was planning to broadcast its pay-television programmes digitally using "d-box" technology. Using this system, programmes can be decoded using a special reception device – the set-top box – which was to be distributed free of charge to the subscribers of the encrypted channel. The set-top box makes it possible to transform the digital signal sent by satellite into an analogue signal that the television set can receive. The rights for the encrypting code are held by the company BetaResearch, a 100% owned subsidiary of the Kirch group.

Patrice Aubry
Lawyer (Geneva)

According to the *DETEC*, this technology imposes a closed system on subscribers, as it uses a single encryption system. This system allows reception of only those programmes encrypted using the Kirch group's coding key, so that subscribers wishing to receive programmes encrypted differently or broadcast by a different television channel, would be obliged to acquire a second set-top box, unless that broadcaster concluded a licence contract with BetaResearch. Thus, "d-box" technology restricts the public's free choice of digital pay-television programmes. The Federal Council therefore upheld the *DETEC*'s decision requiring the use of an open interface and the internationally-recognised Multicrypt encryption and access system. The open interface of this system enables viewers to receive programmes encrypted in different ways using the same set-top box.

Lastly, the Federal Council noted that this position was in line with that adopted by the European Parliament which, in a European Parliament legislative resolution on the proposal for a European Parliament and Council directive on access to, and interconnection of, electronic communication networks and associated facilities (COM(2000) 384 - C5-0433/2000 - 2000/0186(COD)), was proposing to require programme broadcasters to use open interfaces in order to guarantee the diversity of what was on offer and of opinions, and to guarantee the principle of integration imposed upon television. ■

The press release by the Federal Department of Justice and the Police of 6 June 2001 can be viewed on the web site of the federal authorities of the Swiss Confederation at the following address: http://www.admin.ch/cp/d/3b1e5985_1@fwsrvg.bfi.admin.ch.html (DE) http://www.admin.ch/cp/f/3b1e5c4e_1@fwsrvg.bfi.admin.ch.html (FR)

FR-DE

CZ – New Broadcasting Act

The Parliament of the Czech Republic has passed a new Broadcasting Act, against which the President of the Republic has exercised his veto. He rejected the Act because it prevented competition by more or less entitling current broadcasters to have their licences automatically extended. However, the second parliamentary chamber overturned the veto on 26 June 2001. The Act is designed to transpose Directive 89/552/EEC on the Co-ordination of certain Provisions laid down by Law, Regulation or Administrative Action in Member States concerning the Pursuit of Television Broadcasting Activities, as amended by Directive 97/36/EC ("Television Without Frontiers") and also deals with several difficult issues that have more recently arisen. The Act's provisions therefore comply with those of the "Television Without Frontiers" Directive and the European Convention on Transfrontier Television.

The Act contains provisions on the issue of broadcasting licences. These are awarded by the Broadcasting Council, which is still elected by the second parliamentary chamber. A new addition is the possibility of extending the validity of licences. Broadcasters who do not commit serious or repeated breaches of the regulations can therefore apply once for their licences to be extended - by 12 years for TV broadcasters and 8 years for radio stations. The Act sets out a simplified licensing procedure for programmes broadcast in connection with public events for a restricted period of time. Companies wishing to re-broadcast channels need only to register, which they may do provided they fulfil certain conditions. Once a licence has been issued, the regulatory authority must be immediately informed of any changes to the company's ownership structure, some of which may require the authority's approval. The provisions regarding the promotion of European and independent (commissioned) production conform with European law. Broadcasters must keep the regulatory authority informed as to how they are fulfilling these quotas.

The Act also covers the broadcasting of events of particular importance to society. The list of events is determined by the Ministry of Culture in consultation with the Broadcasting Council. At present, it comprises the Olympic Games, the football World Cup, the European Championships and the world athletics and ice hockey championships.

Reporting and news programmes must always respect recognised journalistic principles. The Act also regulates the duration and other aspects of advertising and teleshopping in the commercial and public broadcasting sectors. Provision is made for teleshopping windows and channels broadcasting only self-advertising or teleshopping. Short reporting in the sense of the Council of Europe Convention is also regulated. The new Act also contains provisions guaranteeing diversity of opinion, stipulating that media concentration should be restricted at national and local levels.

The regulatory authority, as the supervisory body, decides on breaches of the Act and can impose fines, order the revocation of licences or prohibit re-broadcasting.

The new Broadcasting Act replaces the existing Broadcasting Act (Act No. 468/1991 Coll. of 30 October 1991) and the Broadcasting Council Act (Act No. 103/1992 Coll. of 21 February 1992). It therefore also regulates the position and role of the Broadcasting Council. ■

Jan Fučík
Broadcasting Council of the Czech Republic Prague

***Zákon č. /2001 Sb. o rozhlasovém a televizním vysílání* (Broadcasting Act) 2001**

CS

FR – Dispute between TPS and Canal+ Goes Back to the National Council on Competition

The dispute between the TPS satellite package and its pay-per-view channel Multivision, on the one hand, and its competitor Canal+ and its Kiosque channel (see IRIS 1999-2: 7; 1999-7: 8 and 2000-6: 7) is not over yet. At the beginning of the year, Multivision and TPS had again applied to the *Conseil de la concurrence* (National Council on Competition), claiming that Canal+ had concluded on 20 May 2000 a general agreement with certain organisations representing the French cinematographic

industry. Multivision and TPS considered that the combined effects of the provisions of this agreement and those of the contracts between Kiosque and producers resulted in the channel reserving exclusive rights over a period of 24 months for broadcasting on a pay-per-view basis. The producers of French films were consequently prevented from selling television broadcasting rights to Multivision. The complainants thus considered that Canal+ was persisting in "abusing its dominant position in order to maintain its control over pay-per-view television". The council found that Kiosque's practice of purchasing exclusive television broadcasting rights for recent French films for broadcasting on a pay-per-view basis and of freezing these rights for a period of 24 months (starting from the first cinema showing of the films) was serious and immediate. In fact, it could not contractually exercise such rights for more than three months. The situation would affect the sector adversely by weakening Multivision, Kiosque's only competitor in the market for pay-per-view broadcasting, which was already in the red. In fact, it made it impossible for Multivision to meet its obligations as regards quotas for broadcasting French-language films, which could in turn prevent the CSA renewing its operating authorisation and leave it open to penalties inflicted by the latter which could go as far as withdrawing its authorisation. The council also felt that reducing the choice of attractive recent films available to viewers on a pay-per-view basis was counter to the interests of consumers. Although Kiosque finally agreed to renounce exclusivity for all but five films, the council felt that the practice, even if limited in this way, could distort competition for some time, since it may be assumed that the five films would naturally be selected because they were particularly attractive. The council therefore ordered Canal+ and Kiosque to refrain from acquiring exclusive television rights either directly or indirectly for recent French-language cinema films for pay-per-view broadcasting, with no exceptions, until a decision was reached on the merits of the case. ■

Amélie Blocman
Légipresse

***Conseil de la concurrence* (National Council on Competition), decision no. 01-MC-01 of 11 May 2001 in response to an application and a request for interim measures submitted by Multivision and TPS**

FR

GB – New Government Signals Major Regulatory Changes

Announcing the new Labour Government's legislative programme in the House of Lords on 20 June, the Queen said that "a draft Bill to create a single regulator for the media and communications industries and reform the broadcasting and telecommunications regulations will be published."

The draft Bill is likely to be prefaced in the next weeks by a Bill that will set up OFCOM – the unified regulator which will combine the roles of the Broadcasting Standards Commission; the Independent Television Commission; Oftel; the Radiocommunications Agency; and the Radio Authority (see IRIS 2001-1: 8).

The draft Bill, which will deal with wider issues, eg cross-media ownership, may be published for consultation later this year, with the aim of putting the Bill to Parliament in the autumn of 2002.

The management consultancy, Towers Perrin, has been appointed by the Chief Executives of the five existing regulators to determine the process for the establishment of the new regulator.

"The initial work by Towers Perrin will be to:
- provide a clear overall view of the functions, processes, structures and resources in each of the existing organisations;
- assess the options for OFCOM under each of these four headings;
- propose criteria for evaluating these options;
- set out a clear timetable for the stages of work that will need to be carried out in order to get from where we are now to a fully functioning OFCOM by 2003."

The consultants are to report by the end of August 2001 to a steering group consisting of the five Chief Executives and officials from the Department of Trade and Industry and the Department of Culture, Media and Sport. ■

David Goldberg
DeeJgee Research/ Consultancy

Queen's Speech, available at: http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds01/text/10620-01.htm#10620-01_head0
"Regulators Work Together to Lay the Foundations for OFCOM", Joint Press Release issued by the five communications regulators cited in the above text, available at: http://www.ofcom.gov.uk/press/20jun01.htm

IE – Political Advertising

The recent referendum in Ireland on the question of whether to accept the Nice Treaty re-awakened some of the controversy surrounding political advertising. In the referendum campaign, activists from both sides of the debate were prevented from placing advertisements relating to the campaign on national and local radio and television.

Section 10 subsection 3 of the Radio and Television Act, 1988 prohibits the broadcasting on radio or television of advertisements directed towards any religious or political end, or related to an industrial dispute. Earlier challenges to the constitutionality of this provision had been unsuccessful (see IRIS 1998-9: 6 (political advertising); IRIS 1998-1: 6 and 1998-7: 9 (religious advertising)).

During the campaign leading up to the referendum on the Nice Treaty, an Irish businessman set up a website to encourage a "No" vote. He sought to advertise his website on a local radio station, but was prevented from doing so by the 1988 Act. In future, section 65 of the new Broadcasting Act, 2001 (see IRIS 2001-4: 9) will allow some religious advertising, but the prohibition on political advertising will remain.

During the recent campaign, an exception to the general prohibition on political advertising was made for broadcasts sponsored by the Referendum Commission, because it was providing a public information service in a neutral way. The Referendum Commission is an independent body that may be set up by the government when referendums are being held. It provides information on both sides of the proposed amendment in a simple and impartial manner. It was first established as a result of a successful challenge to the manner in which the national broadcaster RTÉ had allocated uncontested broadcasting time during a referendum on the issue of divorce (see IRIS 1998-6: 7 and 2000-2: 7). ■

Candelaria van Strien-Reney
Law Faculty
National University of Ireland, Galway

"Ban prevents activists from placing radio ads", The Irish Times, 2 June 2001, available at: http://www.ireland.com/newspaper/ireland/2001/0602/courts14.htm

KZ – Mass Media Statute Amended

Yana Sklyarova
Moscow Media Law and Policy Center

On 3 May 2001, the President of the Republic of Kazakhstan, Nursultan Nazarbayev, signed into law amendments to the existing 1999 Statute "On the Mass Media".

The amendments adopted earlier by the Parliament modify the conditions for the rebroadcasting of non-Kazakh programmes. Art. 14 of the statute (as amended) limits the time-share for rebroadcasting foreign TV and radio programmes, and establishes a schedule for broadcasters to bring their plans into line with the changes. Beginning from 1 January 2002, foreign rebroadcasts shall not exceed 50 per cent of the overall broadcasting time, and by 1 January 2003 the broadcasters shall reduce this share to 20 per cent. However, cable broadcasting and microwave multipoint distribution services (MMDS) are exempt from this limitation. The adoption of the amendment is likely to reduce the total broadcasting time of those Kazakh channels that are unable to produce a sufficient volume of national programmes.

Another set of amendments expands the scope of the statute "On the Mass Media" to include such means as "periodical or continuous distribution of mass information" via publicly-accessible telecommunications networks. The law defines a website as "an electronic demonstration page of an individual or a legal entity, created by specific technical and programme means, whereby the owner places information for mass dissemination. According to the amendments, websites are included as a form of the mass media subject to regulation under the Statute "On the Mass Media". This confers specific rights and imposes obligations on their owners and editors. The creation and maintenance of any website, as well as any informational activity by means of telecommunications networks, now falls under the jurisdiction of the governmental regulatory body (currently – the Ministry of Culture, Information and Public Concord). However, the amended statute exempts websites from the obligation to obtain a registration certificate from the regulatory body before commencing operations. ■

Statute *O vnesenii izmeneniy i dopolneniy v zakon RK "O sredstvakh massovoy informatsii"* (amendments to the existing 1999 Statute "On the Mass Media"), published in *Yuridicheskaya gazeta* on 14 May 2001, and also available in Russian at: www.internews.kz/rus/law/law2900.htm

KK-RU

NL – Dutch Council of Ministers Accepts Procedure for DVB-T Licensing

Marieke Berghuis
Institute for Information Law (IViR) University of Amsterdam

The Dutch *kabinet* (Council of Ministers) has agreed with the proposal of the Minister of State for Education, Culture and Science, Rick van der Ploeg, to grant licences for Digital Video Broadcasting-Terrestrial (DVB-T). One licence - covering four of the five multiplexes to be awarded by the Government - will be granted to a commercial operator on the basis of a "beauty contest". The other licence, that covers one multiplex, will go to the public broadcasters. At least 80% of the capacity will be allocated for broadcasting traditional television programmes. The remaining capacity may be used for data services and other broadcasting services. The Council of Ministers intends to award the licences soon after the end of the summer. The first digital broadcasts are expected to start six months later. The licences will be granted for a period of fifteen years, in order to give the licensee a reasonable period to recover the high costs involved.

The Council of Ministers expects that digital terrestrial television prove a viable alternative to cable television because of the combination of public and commercial television and additional new digital services. The frequencies for commercial use are meant to be used for programme offers that would compete with cable programme offers. The Council of Ministers chose the allocation procedure of a "beauty contest" to allow for the overseeing of whether the licensee actively pursues the desired competition between the infrastructures. The policy plan will be discussed in the Dutch Parliament on 27 June. ■

"*Kabinet stemt in met procedure voor vergunning van digitale ethertelevisie*", Press Release of the Council of Ministers of 1 June 2001, available at: http://www.minaz.nl/nieuws/persber_minraad/index.html
Policy of the Council of Ministers on the Distribution of Frequencies for Digital Terrestrial Television, *Kamerstukken II* 2000-2001, 24 095, nr. 70, available at: http://www.overheid.nl/op/

NL

SK – First Amendment to the Act on Broadcasting and Retransmission

Eleonora Bobáková
International Relations and European Affairs of the Council for Broadcasting and Retransmission

On 1 May 2001, the new *zákon o reklame a doplnení niektorých zákonov* (Act on Advertising and on Amendments of Certain Rules) was enacted. It replaces the *zákon o reklame v znení neskorších predpisov* (Act on Advertising) of 1996 and it amends for the first time the *zákon o vysielaní a retransmisii* (Act on Broadcasting and Retransmission) of 2000.

The main change is the implementation of the new concept of comparative advertising into the new Act on Advertising of 2001. Comparative advertising was not allowed in the past and the incentive to deal with this type of advertising followed from efforts to harmonise the legislation of Slovakia with EC rules.

The general terms under which comparative advertising can be used are established by the Act on Advertising, e.g. that a comparative advertisement must not be misleading. The notion of a misleading advertisement is defined more precisely in the Act and it amends the relevant provision in the *Obchodný zákonník* (Business Code).

Concerning the division of competences, the Council for Broadcasting and Retransmission is not the body expected to supervise the compliance of comparative forms of advertising broadcast via radio or television with the terms set. Instead four other state authorities are charged with this duty, each taking over the powers according to the nature of advertised products. For this reason alimentary, cosmetics products and tobacco products are under the jurisdiction of Slovak Agricultural and Alimentary Inspection. The Medicine Control Authority supervises drugs, complementary food and suckling babies' food. The Veterinary Medicines and Bio-substantives State Control Authority will monitor the products relevant to its area. Finally, the Slovak Trade Inspection is the body responsible for supervising the compliance of comparative advertising of the different products mentioned above with the legal terms. Administrative procedures are laid down, whereby these bodies can decide on the breach of the relevant legal provisions and on the imposition of relatively high fines of up to SKK five Million (app. EURO 116,000). ■

All legal documents mentioned above are available in the Slovak language on http:// www.zbierka.sk

SK

FILM

IE – Film Censor Issues New Ratings Certificates

Candelaria van Strien-Reney
Law Faculty
National University of Ireland, Galway

The Irish Film Censor, Sheamus Smith, has made changes in two audience classification certificates for films released for cinema exhibition in Ireland. The new 12 PG certificate (replacing the Over 12's certificate) indicates that the film is suitable for persons of twelve years and older and for children under that age, provided they are accompanied by a parent or guardian. The new 15 PG certificate (replacing the Over 15's certificate) indicates that the film is suitable for persons of fifteen years and older and for those under that age, provided that they are accompanied by a parent or guardian. In effect, this transfers a certain amount of responsibility to parents. In addition, the existing General classification (films suitable for a general audience of all ages), PG classification (parental guidance recommended for persons under 12 years of age) and 18 classification (films suitable only for those of 18 years or older), remain in force. The new classifications coincided with the release in Ireland of the film "Pearl Harbor", the first film to be certified 12 PG.

Mr Smith has also dropped the words "Film Censor" (the English-language title of his office) from film certificates, preferring the Irish-language version "*Scrúdóir na Scannán*" ("Examiner of Films"). The certificates remain bilingual in other respects.

In Ireland, films shown in a public cinema must be preceded by a certificate from the Film Censor, under the Censorship of Films Acts, 1923-1992. In the past, film censorship in Ireland was criticised for being unduly strict. However, the recent changes are typical of a more liberal approach.

The Office of the Film Censor also has responsibility for classification of videos, under the Video Recordings Act, 1989, but the new certificates outlined above do not apply to videos. That Act does not extend to the classification of video games. However, video games distributors recently introduced their own voluntary age-rating system (see IRIS 2001-2: 13). ■

"New Film Classification Certificates", Information Statement by the Film Censor of 1 June 2001
"Ireland drops 'Censor' and changes certificates", Screendaily.com, 1 June 2001, available at http://www.screendaily.com, by entering the words "Ireland drops" into the website's search engine.

NEW MEDIA/TECHNOLOGIES

CH – Draft of a Federal Law on Electronic Signatures

Patrice Aubry
Lawyer (Geneva)

The Swiss Federal Council has adopted the message relating to the draft of a federal law on certification services in the sphere of electronic signatures (*SCSél*). The new law is intended to replace the statute on electronic certification services that came into effect on 1 May 2000 (see IRIS 2000-10: 9). The *SCSél* essentially repeats the statute's content, notably the principle of recognising certification service providers on a voluntary basis. These service providers are experienced in providing authenticated digital certificates attesting that a public code is linked to a specified person. The combination of the private and the public codes identifies the sender of a document carrying an electronic signature and establishes whether the document has been amended after signature.

In general, the draft law has been favourably received by interested parties. It is expected to be submitted to the Federal Assembly before the end of the year. The *SCSél* envisages treating an electronic signature as a written signature when it is covered by a certificate provided by a recognised certification service provider. This basic provision is aimed at facilitating electronic commercial transactions. The equal treatment of an electronic signature as regards a written signature will therefore enable contracts to be closed electronically, whereas up until now they have had to be signed in the traditional written form.

The *SCSél* regulates the conditions for the recognition of certification service providers. It also provides that the owner of a private signature code may be made responsible for any abuse of the code if he has failed to take the necessary measures to keep his signature code secret. The certification service providers, for their part, must guarantee the quality of their service. The *SCSél* thereby creates the appropriate conditions for guaranteeing the security of electronic commercial transactions.

The draft law essentially covers the use of electronic signatures between private individuals. In terms of electronic communications with the authorities the *SCSél* creates the legal basis for individuals to communicate electronically with the land and commercial registers. Specifically it enables the electronic notification and transmission of authentic information regarding the content of these registers. The terms and conditions of these electronic communications will be specified in a regulation to be drawn up by the Federal Council. ■

***Message du Conseil fédéral du 3 juillet 2001 relatif à la loi fédérale sur les services de certification dans le domaine de la signature électronique* (Message of the Federal Council of 3rd July 2001 on the federal law on certification services in the sphere of electronic signatures). Available at: http://www.admin.ch**
FR-DE-IT

DE – No Liability Exemption For ISPs Who Breach Copyright

In a ruling of 8 March 2001, the *Oberlandesgericht München* (Munich Court of Appeal - *OLG*) dismissed an appeal by an Internet Service Provider (ISP) against a judgment of the *Landgericht München I* (First Munich District Court - *LG*), which had decided in principle that the appellant was entitled to compensation from the ISP.

The case concerned the operation of an online forum for the exchange of MIDI files. MIDI files are digital recordings of synthesized music, usually pop music. Members of the forum were able to upload MIDI files onto the server or download them onto their own computers with complete anonymity. The ISP's employees checked the files for copyright notices. If there was no such indication in the appropriate place, the file would be made available for downloading. While inspecting the forum, the appellant had found three files which she had com-

missioned. However, as the rightsholder, the appellant had not given permission for the files to be made available on the Internet.

The First Munich District Court had ruled that, although Section 5.2 of the *Teledienstegesetz* (Teleservices Act - *TDG*) applied, the ISP was obliged to pay compensation for a breach of copyright regulations, principally under Section 97 of the *Urhebergesetz* (Copyright Act - *UrhG*). Section 5.2 TDG contains a liability exemption for ISPs which make third-party content available for use without knowledge of that content. The Court had based its decision on the fact that, although the ISP would have had to know about each individual piece of music in order to be liable, since such music was almost always protected by copyright, opening an exchange forum should be considered, to some extent, a deliberate act. The ISP could not, therefore, rely on the liability exemption.

Although it did not call the ISP's liability into question, the *OLG* ruled that Section 5.2 *TDG* did not, in principle, apply to breaches of copyright or related rights. The Court argued on the basis of the wording and origin of Section 5 *TDG*. Section 5.2 was to be interpreted as referring only to cases in which the admissibility of publishing content was actually questionable under public, criminal or civil law. Therefore, it could not apply to breaches of copyright or related rights. Since the Court found a causal connection between the opening of the forum and downloading of files in breach of copyright, the *OLG* largely upheld the District Court's decision. ■

Wolfram Schnur
Institute of European Media Law (EMR)

Judgment of the *Oberlandesgericht München* (Munich Court of Appeal - *OLG*), 8 March 2001, case no. 29 U 3282/00

DE

DE – Court Pulls Plug on Merger between *Callahan Nordrhein-Westfalen* and *NetCologne*

On 11 April 2001, the *Oberlandesgericht Düsseldorf* (Düsseldorf Regional Court of Appeal - *OLG*) issued temporary injunctions to prevent *Callahan Nordrhein-Westfalen GmbH (CNRW)* from taking over cable network operator *NetCologne*.

The *Bundeskartellamt* (Federal Cartels Authority - *BKartA*) had sanctioned the proposed merger on 4 April 2001. It had decided that, bearing in mind the number of *NetCologne* customers, the merger would only slightly strengthen the dominant market position of the cable network operator *CNRW* in respect of programme providers and level 4 network operators. It also thought that the advantages of the merger for the fixed network telephony market and narrow- and broadband Internet services outweighed the disadvantages of market dominance. By acquiring *NetCologne*, *CNRW* would sooner be able to compete with *Deutsche Telekom AG* (*DTAG*). Due to legitimate arrangements made under company law and the economic necessity for *CNRW* to venture into markets currently dominated by *DTAG*, the Cartels Authority did not consider that *DTAG*, which owns 45% of *CNRW* through its subsidiary *Kabel Deutschland GmbH*, would pose a considerable threat to competition.

Responding to a complaint about the Cartel Authority's decision, however, the *OLG Düsseldorf* issued an urgent ruling, expressing serious doubts over its legality. It particularly questioned the Authority's view that *NetCologne* had little competitive power and its positive endorsement of *CNRW's* accelerated entry into the fixed network telephony market through its acquisition of *NetCologne*. The Court also had reservations about the legality of the company law arrangements concerning highly restricted information rights for *Kabel Deutschland GmbH* and therefore *DTAG* as a shareholder in *CNRW*. As well as the legal possibility of withholding information from a shareholder, the Court thought consideration should also be given to whether a shareholder in this specific situation might in fact also be denied market-related information. ■

Wolfram Schnur
Institute of European Media Law (EMR)

Ruling of the *Oberlandesgericht Düsseldorf* (Düsseldorf Regional Court of Appeal) – *Kartellsenat* (Cartel Chamber), case no. Kart 22/01 (V)

DE

DE – Policy Document on Access to Broadband Cable Network

On 12 June 2001, the directors of the *Landesrundfunkanstalten* (Regional Public Service Broadcasting Companies) adopted a policy document on access to the broadband cable network.

The document calls in particular for equal, non-discriminatory access for public service channels to the cable network. The question of access is expected to cause problems in the future because, following the sale of the regional cable companies, the new majority shareholders are not only network operators, but also own shares in programme providers. The danger of vertical market structures that arises when networks and content providers are no longer kept separate is supposed to be eliminated by the fact that the public service digital bundle enjoys "must-carry" status, while a certain number of channels must also be carried on the analogue cable network. Cable network operators are meant to restrict their activities to those directly connected with transmission. They must broadcast public service channels at the same time, in full, unaltered and unencrypted, and may not unbundle and re-package digital bundles without permission. Public channels must also be receivable via any digital platform used by a cable network operator - including the set-top box - without restriction and in their entirety. This is designed to prevent dependencies developing from the use of closed technologies and proprietary standards. The public service channels must be clearly indicated and positioned so that they are easy to find on the upper functional levels of navigators (EPGs). The broadcasters are seeking contractual agreements with the network operators as well as urging the legislator to determine fixed transmission capacities for public service broadcasters in the cable networks. These should foster mutual consensus on the carrying of their channels under reasonable conditions, so that the public service broadcasters can fulfil their duty to provide a universal service in the public interest. ■

Peter Strothmann
Institute of European Media Law (EMR)

Policy document of the *Landesrundfunkanstalten* (Regional Public Service Broadcasting Companies), 12 June 2001

DE

FR – Opinion of the CSA and the CNIL on the Information Society Bill

Mathilde de Rocquigny
Légipresse

The Information Society Bill (see IRIS 2001-5: 14) was adopted on 13 June 2001 by the Council of Ministers without any major changes. The *Conseil supérieur de l'audiovisuel* (the audiovisual regulatory authority – CSA) and the *Commission national informatique et libertés* (CNIL – National Commission for IT and Civil Liberties), both closely concerned with the subject, have given their opinions on the provisions of the Bill.

The length of time during which connection data is retained for investigative purposes remains fixed by the Council of Ministers at a maximum of one year. This very controversial point has been heavily criticised by the CNIL, which had wanted this period reduced to three months. It regretted the fact that determination of the categories of data and of their duration, according to the activity of the operators and the nature of the communications, was to be covered by a decree. On advertising by electronic means, the Government maintained the principle of the freedom to send unsolicited commercial communications, unless the addressee is on a list opposing this. The CNIL finds this measure insufficient; it favoured the possibility of controlling unsolicited commercial communications on-line. As for the responsibility of providers of technical services, the present Bill removes the requirement to promptly inform the appropriate public authorities of any unlawful activities or information that comes to their notice in the exercise of their activity.

The CSA's opinion, delivered on 9 May 2001, was largely directed at the legal scheme covering on-line communication services and at broadcasting networks. On these two points, the CSA called for "technological neutrality" and "equal treatment". In general, the CSA approved the draft Bill, and in particular the principle of applying the statutory deposit requirement to the content of on-line communication services and the exercise of the right of reply. However, it stressed the need to bring into line the time periods applicable for defamation and the right of reply. It also hoped for further details of the category of services covering on-line services that provide the public with images or sound, and rejected the limited areas of responsibility allocated to it by the draft Bill for all of these services, as it would prefer to "exercise its general areas of responsibility". Lastly, on the responsibility of operators, the CSA pointed out that the draft Bill does not fully transpose the scheme for e-commerce set out in the Directive (Directive 2000/31 of the European Parliament and of the Council of 8 June 2000) into national law. ■

IE – Company Ordered Not to Use Domain Name

Candelaria van Strien-Reney
Faculty of Law National University of Ireland, Galway

In October 2000, the Irish High Court issued a temporary order to restrain a company from using a domain name on the grounds that it would be likely to cause confusion.

The second-named plaintiff is a company that provides information relating to Ireland to Internet users in a simple manner and free of charge. In 1997, the company registered with an international control organisation a number of domain names, using various combinations of the words "Local" and "Ireland". These domain names, together with other intellectual property rights, were subsequently transferred to the first-named plaintiff, Local Ireland Limited. The website was one of the busiest in Ireland and also gained a considerable reputation abroad.

Last year, Local Ireland Limited became aware that the first-named defendant had begun trading under the business name "Local Ireland-Online Limited" and had registered the domain name "Localireland-online.com" for its subscription business listing service.

With regard to the domain names, Local Ireland Limited claimed that the use of such a similar domain name by the defendant resulted in a loss of Local Ireland Limited's business and reputation, as Internet users were misled and confused.

The Court agreed that Local Ireland Limited had established that there was a high probability that users would be deceived into thinking that the services offered by Local Ireland-Online Limited were those of Local Ireland Limited, especially as the companies were offering similar services. Taking into account the greater length of time that Local Ireland Limited had been trading, the amount of money it had spent on the development and advertising of its website, and the reputation it had acquired in Ireland and abroad, the Court granted a temporary order preventing Local Ireland-Online Limited from using the domain name "Localireland-online.com" or the alternative domain name "Locallyirish.com", which Local Ireland-Online Limited had also registered.

The temporary order lasts until a full hearing of all the issues can take place. In Ireland, such a temporary order often serves as a final decision, and the parties often agree not to take any further action. However, in this particular dispute the parties were unwilling to do this, therefore a further and more extensive examination of the case is to be expected. ■

Local Ireland Limited and Nua Limited v Local Ireland-Online Limited and Con Daly trading as Daly Financial, High Court, 2 October 2000, available at:
http://www.bailii.org/ie/cases/IEHC/2000/67.html

RELATED FIELDS OF LAW

CZ – Journalist Acquitted

Jan Fučík
Broadcasting Council Prague

The first Prague District Court has acquitted a former TV reporter after a case lasting 18 months. The public prosecutor's office had taken proceedings against him for revealing state secrets, an offence punishable under criminal law by a prison sentence of two to eight years. The journalist was accused two years ago of showing viewers a secret document, thus threatening the national interest and endangering an official's life by possibly revealing his identity. The secret document also contained details of an attempt by the current head of the security service to protect an official who had apparently been drink-driving. During the proceedings, however, it emerged that certain identifying features of the official had been changed in the document concerned, so that even witnesses could not identify him with any degree of certainty.

The case was heard *in camera*, with only two representatives of the accused and one member of the public present. The summing-up and judgment were made public. The defence lawyer argued that the case should never have been brought before the court because the freedom of journalists to reveal information embarrassing to the State authorities was being challenged as became clear in the final judgment. ■

Press releases available in Czech at:
http://nazory.idnes.cz/komentaremfd.asp?r=komentaremfd&c=A010615_232828_komentaremfd_was
http://zpravy.idnes.cz/domaci.asp?r=domaci&c=A001122_220638_domaci_was&t=A001122_220638_domaci_was&r2=domaci
http://www-ext.rozhlas.cz/izurnal/domaci/_zprava/10124
CS

DE – Federal Government Passes a Bill on Copyright Contracts

Caroline Hilger
Institute of European Media Law, Saarbrücken

On 30 May 2001, the *Bundeskabinett* (Federal Cabinet) approved a new Bill on copyright contracts, designed to strengthen the legal position of creators of original works, particularly freelance artists, writers, translators, journalists and photographers.

Until now, German copyright law has lacked specific provisions on copyright contracts, even though they were first promised in the explanatory memorandum of the Copyright Act, which was introduced in 1965 and is still in force today. The key purpose of the proposed Act, which will amend the existing Copyright Act, is to establish the inalienable right of authors or artists to reasonable remuneration for the use or exploitation of their work (Section 32 of the Bill). This means that the right to remuneration arises whenever the work is used, irrespective of any contractual rights to payment. Depending on the sum involved, however, this amount decreases by the sum agreed between the author and the user. This right expires three years after the author becomes aware of it, or ten years from the time a claim arises without the author's knowledge. The provision also entitles authors to the information they require to enforce their claim for remuneration.

Another important part of the Bill is Section 36, which deals with joint remuneration rules. These are to be jointly drawn up by the respective groups of authors and users. It is assumed that, when such an agreement is reached by the parties concerned, the payment is "reasonable" in the sense of Section 32. If the two groups cannot come up with mutually acceptable remuneration arrangements, however, arbitration proceedings should be an option if both parties agree. The arbitral award in such cases should set out the applicable joint remuneration arrangements.

These amendments to the existing Copyright Act should put an end to the inferior position – in both economic and organisational terms - of creative artists in relation to users of their work - a situation which has already been noted by the *Bundesverfassungsgericht* (Federal Constitutional Court) in a decision of 8 April 1987 (*Entscheidungssammlung Band* 75, page 108). ■

***Entwurf und Begründung des Gesetzes zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern (Stand 30. Mai 2001)* (Bill on strengthening the contractual position of authors and performing artists, and Explanatory Memorandum (as at 30 May 2001)), available at: http://www.bmj.de/ggv/urhebver.pdf**

DE

FI – Legislative Changes Simplify Decision-making for Cable and Digital TV Reception

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

On 6 April 2001 the *Laki asunto-osakeyhtiölain 5 ja 39 §:n muuttamisesta* (Act on Amendments to the Housing Companies Act) was ratified by the Finnish President. The Act entered into force on 1 June 2001.

Changes were made to the previous Housing Companies Act (Act No. 809/1991) in order to simplify decision-making. According to the previous Act, costs for renovations in a block of apartments that only improved the standard of the apartments could be recouped only from those shareholders (ie those who own the individual apartments) who wanted the renovation to be carried out in their own apartment. Now, as a result of the new regulations, decisions on all renovations and reconstruction are to be taken by a simple majority of shareholders' votes and the costs are to be carried by all shareholders. The precondition is that the renovations are in accordance with the "usual demands of the time" (which includes cable television) and that the effect on the shareholders' monthly payments is reasonable. This simplifies decision-making on, for example, alterations to permit reception of digital television broadcasts or other changes to the telecommunications network (i.e. the part of the network that is located within the building and thus owned by the housing company). It also simplifies decision-making on connecting housing companies to cable television networks. ■

***Laki asunto-osakeyhtiölain 5 ja 39 §:n muuttamisesta* (Act No. 316/2001 of 6 April 2001), available at: http://www.finlex.fi**

FI-SV

FR – The Public's Right to Information Does not Override the Principles of the Protection Afforded by Copyright

Mathilde de Rocquigny
Légipresse

During an evening news programme, France 2 broadcast a report on an exhibition devoted to Maurice Utrillo in which it showed about a dozen of his paintings in full. The artist's beneficiary claimed that this full representation of the works, without any authorisation having been obtained or even requested, was unlawful, and asked France 2 to hand over a copy of the report in order to calculate the amount of the copyright fees he considered were due. The company refused to do this, maintaining that broadcasting the works in the context of a cultural information report could not give rise to entitlement to remuneration. The artist's beneficiary then had France 2 summoned to appear before the regional court in Paris for infringement of copyright; the court rejected the application.

The judges in the initial proceedings, basing their argument on Article 10 of the European Convention on Human Rights (hereinafter "ECHR"), decided that the viewer's right to be informed rapidly and in an appropriate manner of a cultural event that constituted an item of news immediately related to a work or its author did not constitute competition with the normal exploitation of the work. Accordingly, the judges permitted the broadcasting of the disputed report.

A considerable quantity of case law does not support this idea of predominance of the right to information over the rules for copyright, and the court of appeal did not follow the lower court's reasoning. The public's right to information, arising from the provisions of Article 10 of the ECHR, does not authorise the person exercising that right to disregard the provisions of legislation to protect the rights of others, and specifically the principles safeguarding copyright. The full reproduction and/or representation of a work, as in this case, whatever its form or duration, could not be considered to be a short quotation. France 2 could not validly claim that making the broadcasting of the report subject to the authorisation of the artist's beneficiary was tantamount to depriving the public of knowledge of the existence of the work and adversely affecting the equality of all in terms of receiving information. It was therefore ordered to pay the sum of FRF 30 000 in compensation to the artist's beneficiary. ■

Paris court of appeal, 4th chamber, A section, 30 May 2001, Fabris v. France 2

FR

HU – Parliament Adopts Communications Act

Gabriella Cseh
Attorney at Law
Squire, Sanders & Dempsey

The Hungarian Parliament adopted the new consolidated Act on Communications drafted on the basis of EU communications legislation.

The Act sets out rules for the telecommunications sector, the cable TV market and postal services.

Its main objectives are to ensure the infrastructural development of the information society, to liberalize the Hungarian voice telephony market and to lead the Hungarian communications market to international standard. The Act is also aimed at ensuring competition, and calls for co-operation among communications networks.

In addition to general competition regulation on companies with "significant market power" the law includes new regulations regarding fees for calls from fixed-to-mobile networks, Internet phone rates and a few protective steps favouring local telecom operators against the current Hungarian market-leader *Matáv Rt*.

The regulations on Internet phone rates include provisions on how the communications service providers' revenues should be split with the Internet service providers that help to generate those revenues.

Aiming to create a framework for competition, the Act re-defines the framework for co-operation between service providers, eg by introducing the concept of unbundling of the local loop. Additionally the Act specifies that companies with "significant market power" shall offer their services to other telecommunications service providers based upon equal conditions.

The Act only outlines some basic rules. Therefore its interpretation will depend on the executory decrees, which will be elaborated in the coming months.

With the exception of a few provisions, the Act will enter into force on 23 December 2001. ■

IE – Court Restricts Release of Information to Media

Candelaria van Strien-Reney
Law Faculty
National University of Ireland, Galway

Recently, the High Court restricted the parties' use of the media while proceedings were still ongoing. The plaintiffs were Microsoft Corporation and Symantec Corporation, companies incorporated in the USA, involved in publishing, developing and producing computer software programs, and Business Software Alliance, a trade association of software publishers incorporated in the USA. The defendant was Brightpoint Ireland Ltd., a company incorporated in Ireland, engaged in distributing, incorporating and installing telephones.

The plaintiffs began proceedings for copyright infringement, trademark infringement and passing off against the defendant. They alleged that the defendant was unlawfully copying, using, distributing and networking the plaintiffs' software.

When the plaintiffs made their *ex parte* application in June 2000, there were no members of the press or media present, although the application was not heard *in camera*. In Ireland, the courts are open to the public (including the media), except in very limited circumstances.

The plaintiffs were granted a number of temporary orders, including that the defendant should stop the alleged infringements and passing off, and deliver up all copies of the plaintiffs' computer programmes. In addition, by way of what is known as an "Anton Piller order", representatives of the plaintiffs were to be allowed to enter the defendant's premises to inspect, detain and preserve the allegedly infringing computer programs and any related documents. The Anton Piller order is particularly useful in cases of software piracy. To be effective, it is necessary to have an element of surprise, so that any incriminating materials cannot be destroyed before the order can be carried out. However, the Court said that it was not essential that the application for an Anton Piller order be held *in camera*.

After the plaintiffs had carried out the Anton Piller order, details of it appeared in the print and broadcast media and on the plaintiffs' websites. The defendant then succeeded in preventing the plaintiffs from referring in any way to the Anton Piller order, or to the information thus obtained, in the print or broadcasting media.

In July 2000, the plaintiffs sought a continuation of the original temporary orders until the full hearing of the case. They succeeded, except in relation to the use of the print and broadcast media. The Court held that, although the release of information to the media regarding the execution of the Anton Piller order did not constitute contempt of court, the parties would not be permitted to communicate directly or indirectly with the media concerning the proceedings until after the case was finally decided, and also ordered that any such information already on the parties' websites should be erased. This was to ensure that the parties did not litigate their case through the media. ■

Microsoft Corporation and Symantec Corporation v Brightpoint Ireland Ltd.; Decision of the High Court of 12 July 2000, [2001] 1 ILRM 540

Summer break

The next *IRIS* issue will be published at the end of September.
We shall use the summer break to prepare the next two *IRIS Plus* issues.
The September issue of *IRIS Plus* is dedicated to the role of broadcasting authorities in the field of new media.

The editors wish you a safe and pleasant summer break.

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

PUBLICATIONS

Baudenbacher, Karl; Simon, Jürg (Hrsg.).-*Neueste Entwicklungen im europäischen und internationalen Immaterialgüterrecht: Drittes St. Galler Internationales Immaterialgüterrechtsforum*.-Basel: Helbing & Lichtenhahn, 2000.-XVI , 197p.

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Overbeck, Wayne.-*Major principles of media law* .-Harcourt Brace College, 2000.-512 p.- ISBN: 0155068954

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