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INTERNATIONAL

WTO

Copyright Dispute Settlement Results in Compensation for European Performers and Composers

Martin Senftleben
Institute for Information Law (IViR) University of Amsterdam

The European Union and the United States have reached a procedural agreement on the handling of the WTO Copyright Dispute concerning Section 110(5)(B) of the US Copyright Act, which the EU challenged on the initiative of the Irish Music Rights Organisation (IMRO). On 27 July 2000, the WTO Dispute Settlement Body adopted a WTO Panel Report holding that the so-called "business exemption" laid down in Section 110(5)(B) does not meet the three abstract criteria set out in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). The three-step test of Article 13 TRIPs can be perceived as a comprehensive clause preventing all kinds of copyright limitations from encroaching upon the exclusive rights of authors.

Under the "business exemption" of Section 110(5)(B), commercial establishments such as bars, shops, and restaurants which do not exceed a certain size (2,000-3,750 square feet) or which meet certain equipment requirements, may play radio and TV music without paying any royalty fees to collecting societies. On 15 January 2001, the WTO determined that the US had to accomplish the task of implementing the findings of the WTO Panel Report by 27 July 2001. As this initial deadline expired without a corresponding amendment of the US Copyright Act, the parties have now agreed on procedures for exploring possible means to compensate the EU music industry for the losses flowing from the exposure to the "business exemption" until such time as the US Copyright Act is amended.

In the course of the WTO copyright dispute, the US sought to safeguard Section 110(5)(B) of the Copyright Act on the basis of the so-called "minor reservations doctrine". The latter can be qualified as an implied exception to public performing rights that has been introduced into the Berne Convention for the Protection of Literary and Artistic Works (1971) by an express mention in the General Report of the 1948 Brussels Revision Conference. Although the WTO Panel concluded that the incorporation of Articles 11 and 11*bis* of the Berne Convention into the TRIPs Agreement by virtue of its Article 9(1) includes the entire *acquis* of these provisions and therefore the "minor reservations doctrine", the "business exemption" could not survive the more thorough scrutiny of the Panel. By contrast, it made the application of the "minor reservations doctrine" subject to the three-step test of Article 13 TRIPs. The subsequent examination of Section 110 (5)(B) brought to light that the "business exemption" fails to meet any of the three criteria of the test, as interpreted by the WTO Panel. ■

"EU and US agree on procedures for exploring compensation in the Copyright dispute", Press Release of the European Commission (IP/97/549) of 25 July 2001, available at: http://www.europa.eu.int/comm/internal_market/en/intprop/news/01-1098.htm

DE-EN-FR

Report of the WTO Panel on United States – Section 110(5) of the US Copyright Act, Document WT/DS160/R, dated 15 June 2000, available at: http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm

EN-ES-FR

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

• **Comments and Contributions to:**
IRIS@obs.coe.int

• **Executive Director:** Wolfgang Closs

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• **Documentation:** Edwige Seguenny

• **Translations:** Michelle Ganter (co-ordination) – Brigitte Auel – Véronique Campillo – Paul Green – Katherine Parsons – Patricia Priss – Erwin Rohwer – Marco Polo Traductions – Stefan Pooth – Erwin Rohwer – Sylvie Stellmacher – Nathalie-Anne Sturlèse – Mariane Truffert – Catherine Vacherat

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

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COUNCIL OF EUROPE

European Court of Human Rights: Case of Ekin Association v. France

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

In a judgment of 17 July 2001, the European Court of Human Rights analysed Section 14 of the French Act on Freedom of the Press, 1881, from the perspective of Articles 10 and 14 of the European Convention. This provision of the French Act empowers the Minister of the Interior to impose a ban on the circulation or distribution of foreign publications. The Court noted that Section 14 of the 1881 Act does not state the circumstances in which the power can be used. In particular, there is no definition of the concept of "foreign origin" and no indication of the grounds on which a publication could be banned. With regard to the banning in 1987 of the book "Euskadi at war", published by the Basque cultural organisation Ekin, the Court was of the opinion that the applicant had not been given the possibility to rely on an effective judicial review to prevent the abuse of Section 14 of the French Freedom of the Press Act. According to the Court, this provision also appeared to be in direct conflict with the actual wording of Article 10 § 1 of the European Convention, which provides that the rights recognised in that Article subsist "regardless of frontiers". The Court ruled that a system of control on publications merely based on their foreign origin is indeed to be considered as a kind of discrimination. Finally, the Court held that the content of the book did not justify so serious an interference with the applicant's freedom of expression as that constituted by the ban imposed by the French Minister of the Interior. Besides the violation of Article 10 of the Convention, the Court also noted that the total length of the proceedings, more than nine years, could not be considered "reasonable", although the issue of the litigation was of particular importance. Consequently, there was also a violation of Article 6 § 1 of the Convention.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Any party to the case may request a rehearing by the Grand Chamber of the Court within three months. ■

Judgment by the European Court of Human Rights, Case of Ekin Association v. France, Application no. 39288/98 of 17 July 2001 (Third Section), available at: http://www.echr.coe.int

FR

European Court of Human Rights: Case of Feldek v. Slovakia

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

In a judgment of 12 July 2001, the European Court of Human Rights decided, by five votes to two, that there had been a violation of Article 10 because of the conviction of a publicist who had sharply criticised the Slovak Minister of Culture and Education. This is the second time in only a short period that the Strasbourg Court has found a breach of the right to freedom of expression in Slovakia (See also: Judgment by the European Court of Human Rights (Second Section), Case of Marônek v. Slovakia, Application no. 32686/96 of 19 April 2001.

After the publication in 1995 of a statement in several newspapers referring to the "fascist past" of the Minister of Culture and Education of the Slovak Republic, the author of this statement, Mr Feldek, was convicted by the Supreme Court. The Court applied Articles 11 and 13 of the Slovak Civil Code, which offer protection against the unjustified infringement of one's personal rights, civil and human dignity. The statement was indeed considered as having a defamatory character and Feldek was ordered to ensure the publication of the final judgment in five newspapers.

The judgment of the European Court of Human Rights recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest and that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Emphasising the promotion of free political debate as a very important feature in a democratic society, the Court underlined that allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for freedom of expression in general in the state concerned. In the Feldek case, the Court was satisfied that the value judgment referring to the "fascist past" of the Slovak Minister of Culture was based on information which was already known to the wider public. The Strasbourg Court refused to subscribe to a restrictive definition of the term "fascist past", as such an interpretation could also mean that a person participated in a fascist organisation, as a member, even if this was not coupled with specific activities propagating fascist ideals. The Court of Human Rights reached the conclusion that the Slovak Court of Cassation had not convincingly established any pressing social need for putting the protection of the personal right of a public figure above the applicant's right to freedom of expression and the general interest of promoting this freedom when issues of public interest are concerned. As the interference complained of by Feldek was not necessary in a democratic society, the Court found that there had been a violation of Article 10 of the Convention.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Any party to the case may request a rehearing by the Grand Chamber of the Court within three months. ■

Judgment by the European Court of Human Rights, Case of Feldek v. Slovakia, Application no. 29032/95 of 12 July 2001 (Second Section), available at: http://www.echr.coe.int

EN

European Court of Human Rights: Case of Perna v. Italy

In its judgment of 25 July 2001, the European Court of Human Rights held unanimously that there had been a violation of Article 10 on account of the applicant's conviction for alleging, by means of symbolic expression, that a senior Italian judicial officer had sworn an oath of obedience to the former Italian Communist Party.

The applicant, Giancarlo Perna, who is a journalist, published an article in the Italian daily newspaper *Il Giornale* sharply criticising the communist militancy of a judicial officer, Mr G. Caselli, who was at that time the public prosecutor in Palermo. The article raised in substance two separate issues. Firstly, Perna questioned Caselli's independence and impartiality because of his political militancy as a member of the Communist Party. Secondly, Caselli was accused of an alleged strategy of

gaining control of the public prosecutors' offices in a number of cities and the use of the *pentito* (i.e. criminal-turned-informer) T. Buscetta against Mr Andreotti, a former Prime Minister of Italy. After a complaint by Caselli, Perna was convicted for defamation pursuant to Articles 595 and 61 § 10 of the Criminal Code and Section 13 of the Italian Press Act. Throughout the defamation proceedings before the domestic courts, the journalist was not allowed to admit the evidence he sought to adduce. In 1999 Perna alleged a violation of Article 6 and Article 10 of the European Convention on Human Rights.

The refusal by the Italian Courts was not considered by the Strasbourg Court as a breach of Article 6 § 1 and 3(d) of the Convention, which guarantee everyone charged with a criminal offence the right to examine witnesses or to have witnesses examined on their behalf. The Court was of the opinion that the applicant had not explained how evidence from the witnesses he wished to call could have contributed any new information whatsoever to the proceedings.

After repeating the general principles of its case law on Article 10 of the Convention, the Court emphasised the distinction that is to be made between facts and value judgments in order to decide if there has been a breach of Article 10. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The Court noted that the criticism directed at the complainant had a factual basis that was not disputed, namely Caselli's political militancy as a member of the Communist Party. By such conduct, a judicial officer inevitably exposes himself to criticism in the press, which may rightly see the independence and impartiality of the State legal service as a major concern of public interest. The Court agreed that the terms chosen by Perna and the use of the symbolic image of the "oath of obedience" to the Communist Party was hard-hitting, but it also emphasised that journalistic freedom covers possible recourse to a degree of exaggeration or even provocation. According to the Court, the conviction of Perna was a violation of Article 10 of the Convention as the punishment of a journalist for such kinds of criticism of a member of the judiciary is not necessary in a democratic society.

With regard, however, to Perna's assertions about the alleged strategy of gaining control over the public prosecutors' offices in a number of cities and especially the use of the *pentito* Buscetta in order to prosecute Mr Andreotti, the Court came to the conclusion that the conviction of Perna was not in breach of Article 10 of the Convention. In contrast to the general criticism in the impugned newspaper article, these allegations obviously amounted to the attribution of specific acts to the complainant. As this part of the article did not mention any evidence or cite any source of information, the Court considered that these allegations were not covered by the protection of Article 10. Referring to the extremely serious character of such allegations against a judicial officer, with a lack of factual basis, the Court came to conclusion that this part of Perna's article indeed overstepped the limits of acceptable criticism.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Any party to the case may request a rehearing by the Grand Chamber of the Court within three months. ■

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

Judgment by the European Court of Human Rights, Case of Perna v. Italy, Application no. 48898/99 of 25 July 2001 (Second Section), available at: http://www.echr.coe.int

EN-FR

EUROPEAN UNION

European Commission: Infringement Proceedings against UK in Favour of Performers and Producers of Phonograms

On 26 July 2001, the European Commission announced its decision to refer the United Kingdom to the Court of Justice for the incomplete implementation of Council Directive 92/100/EEC of 19 November 1992. Besides rental and lending rights, that Directive deals with certain rights related to copyright in the field of intellectual property. Article 8(2) of the Directive awards performers and producers of phonograms a single equitable remuneration each time a phonogram published for commercial purposes, or a reproduction of such a phonogram, is used for broadcasting by wireless means or for any communication to the public. Limitations to this right can be based on Article 10 of the Directive.

The UK Copyright, Design and Patents Act 1988 exempts, pursuant to Article 189 and Article 18 of Schedule 2 thereof, the public showing or playing of a broadcast from the rights in performances, provided that the audience need not pay for admission to the place of presentation. The Commission, however, perceives this possibility to broadcast without paying equitable remuneration as a limitation to the right laid down in Article 8(2) of the Directive that goes beyond the scope of permissible limitations delineated by its Article 10. In order to strengthen the claim for equitable remuneration, it emphasises the similarity of the provisions of Directive 92/100/EEC to those of the Rome Convention for the Protection of Performers and Producers of Phonograms (1961) as well as the Berne Convention for the Protection of Literary and Artistic Works (1971).

The reference to international copyright law is of particular interest in respect of Article 10(2) of Directive 92/100/EEC. This provision is aligned with Article 15(2) of the Rome Convention and permits the extension of limitations to copyright to the field of protection of performers and producers of phonograms. In relation to copyright, the UK Copyright, Design and Patents Act 1988 enshrines in its Article 72 a provision that is similar to the limitation provided for by Article 18 of Schedule 2 (outlined above). Within the realm of international copyright law, however, the exemption of broadcasting in places accessible to the public has already led to litigation. On 27 July 2000, the WTO Dispute Settlement Body adopted a WTO Panel Report holding that Section 110(5)(B) of the US Copyright Act does not meet the criteria of the three-step test set out in Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights. Under the so-called "business exemption" of Section 110(5)(B), certain commercial establishments such as bars, shops and restaurants may play radio and TV music without paying any royalty fees to collecting societies. As the case was initiated by the EU, it can be regarded as the background to the decision of the European Commission to refer the United Kingdom to the Court of Justice. ■

Martin Senftleben
Institute for Information Law (IViR) University of Amsterdam

"Equitable remuneration for performers and producers of phonograms: infringement proceedings against the United Kingdom", Press Release (IP/01/1098) of the European Commission of 26 July 2001, available at: http://www.europa.eu.int/comm/internal_market/en/intprop/news/01-1108.htm

DE-EN-FR

European Commission: Right to Use Satellite Dishes in Internal Market

Rik Lambers
Institute for Information Law (IViR) University of Amsterdam

In a recently-adopted Communication concerning a user's right to satellite reception, the European Commission provides a set of guidelines on national rules governing conditions for the use of satellite dishes. The Communication deals in particular with the application of the general principles of free movement of goods and services in this context.

Satellite dishes have become increasingly popular and by virtue of their provision of access to a wide range of transfrontier services, the Commission considers them to be an essential tool for interchange within the European Union, *inter alia*, in social, economic and cultural terms. They are often the only means of access to broadcasts and services which are otherwise unavailable. Access to modern technologies is a precondition for the competitiveness of European industry and a must in the Information Society.

The Commission has received a growing number of complaints and questions about national measures on the use of satellite dishes. It states that these measures should comply with the fundamental principles of the EC Treaty. Restrictions must not be in conflict with the free movement of goods and services (Articles 28 to 30 and 49 *et seq*. of the EC Treaty), nor with Article 10 of the European Convention on Human Rights, which, according to the case law that has grown up around it, includes the right to reception by satellite.

For the moment, the Commission does not intend to initiate any legislation, but the Communication does offer a reference source for users and national governments alike. Technical, administrative, urban planning, tax and reception obstacles are only acceptable if they meet certain conditions. They must be applied in a non-discriminatory way; be justified by relevant legitimate interests; guarantee the achievement of the intended aim and be proportional to that aim. A follow-up to the guidelines will be provided by the Commission in the future. ■

"Services: Commission sets out right to use a satellite dish in the Internal Market", Information Note of the European Commission of 2 July 2001 and the Commission Communication on the Application of the General Principles of Free Movement of Goods and Services - Articles 28 and 49 EC Treaty - Concerning the Use of Satellite Dishes, both of which are available at:
http://europa.eu.int/comm/internal_market/en/services/services/antenna.htm
DE-EN-FR

Commission Challenges UEFA's Sale of TV Rights to Champions' League

Tarlach McGonagle
Institute for Information Law (IViR) University of Amsterdam

The European Commission has formally registered its objections to the current arrangements governing the sale of television rights by the *Union des Associations Européennes de Football* (UEFA) for the UEFA Champions' League. The Commission's action was prompted by fears that "UEFA's commercial policy of selling all the free and pay-TV rights on an exclusive basis to a single broadcaster per territory for a period lasting several years may be incompatible with EC competition law".

The Champions' League, which generated EURO 670 million revenue in 2000/2001, is an annual tournament involving the leading football clubs from states right across Europe. An estimated EURO 530 million of its revenue comes from television rights, which are currently sold by UEFA to a single broadcaster in each EU Member State for three- to four-year periods. Contracts with broadcasters are of an exclusive nature.

The Commission takes the view that restricted competition for the broadcasting of major sporting events in general and the Champions' League in particular is not conducive to stimulating wider coverage, lower subscription fees, improved quality of coverage or a willingness to embrace new broadcasting technologies.

However, when positing its objections to the current arrangements, the Commission was careful not to challenge the European Council's stated preference for a redistribution of a part of the revenue from the sale of television rights at the appropriate levels. This preference was articulated in the acknowledgement of the specificity of sport in the Declaration of the European Council in Nice in December of last year. Nor will the Commission's statement of its objections prejudice the eventual outcome of the Commission's investigation into the matter, which is specific to the Champions' League television rights. Arrangements for the sale of television rights for other football tournaments (see, for example, IRIS 2001-5: 4) are not implicated in this investigation. ■

"Commission opens proceedings against UEFA's selling of TV rights to UEFA Champions League", Press Release (IP/01/1043) of the European Commission of 20 July 2001, available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1043|0|RAPID&lg=EN.
DE-EN-FR

"The UEFA Champions League Background Note", MEMO/01/271, of 20 July 2001, available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/01/271|0|RAPID&lg=EN
DE-EN-FR

NATIONAL

BROADCASTING

AL – Offences against Electoral Code

Hamdi Jupe
Former Member of Albanian Parliament Media Commission

Public and private Albanian television stations have been sentenced to fines by the National Council of the Radio and Televisions which monitored the role of the media during the general elections in July 2001. The broadcasting stations were accused by the Council of violating the Electoral Code. The obligations of the public and private electronic media during the electoral campaigns in Albania are clearly defined in a special chapter of the Electoral Code (Law No 8609 of 8 May 2000). Eight Articles of this Code, *ie* Articles 129, 130, 131, 132, 134, 135, 136 define the rights and the obligations of the media in the election process as well as the sanctions in case of violations of the Code. Fines especially had been imposed because of the violation of the campaign silence period during 24 hours before election day. ■

Law No. 8609 dated 8 May of 2000, The Electoral Code of the Republic of Albania

AT – List of Important Events Adopted

Peter Strothmann
Institute of European Media Law (EMR)

On 13 August 2001, the Austrian Council of Ministers adopted a regulation containing the list of events which must be broadcast on freely-accessible television.

The regulation transposes Article 3a of Directive 89/552/EEC as amended by Directive 97/36/EC ("Television Without Frontiers") into Austrian law.

The following events are deemed as being of major importance for society and must therefore be shown on a freely-accessible television channel available to at least 70% of the viewing public: the Olympic Summer and Winter Games, European Championship and World Cup football matches involving the Austrian national team plus the opening match, semi-finals and final of each tournament, the final of the Austrian FA Cup and the FIS Alpine and Nordic skiing world championships. In addition to these sporting events, the Vienna Philharmonic's new year concert and the Vienna opera ball are listed as cultural events of major importance to society. Broadcasts of the Olympic Games, the skiing world championships and the Vienna opera ball may be deferred or shown in parts if separate parts of such an event of major importance or several such events take place simultaneously, or if in the past the event has not been shown in full because of its length.

The regulation is expected to enter into force on 1 October 2001 and is based on Article 4 of the *Bundesgesetz über die Ausübung exklusiver Fernsehübertragungsrechte* (Federal Act on the Exploitation of Exclusive TV Broadcasting Rights), which only came into force itself on 1 August 2001. ■

***Verordnung zur Ausführung des § 4 Gesetz über die Ausübung exklusiver Fernsehübertragungsrechte* (Regulation on the Implementation of Article 4 of the Federal Act on the Exploitation of Exclusive TV Broadcasting Rights)**
***Gesetz über die Ausübung exklusiver Fernsehübertragungsrechte* (Federal Act on the Exploitation of Exclusive TV Broadcasting Rights)**

DE

BE – End of Political Broadcasting on Public Radio and Television

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

By an Act of 6 July 2001, the Flemish Parliament has abrogated the provisions in the Flemish Broadcasting Act guaranteeing the direct access of political parties to public broadcasting. According to Article 27*ter* and 27*quater* of the Broadcasting Act 1995 (as amended) and a Decree of the Flemish Government of 15 October 1999, every political party represented in the Flemish Parliament was guaranteed access to public radio and television (*VRT*) to broadcast their political messages on a regular basis. The *VRT* was obliged to broadcast programmes produced by the political parties for two ten-minute periods per week. It has been argued for many years that the public is no longer interested in watching or listening to programmes of this kind and that they interfere with the public broadcasting organisation's autonomy in programming. The new Act of 6 July 2001 brings this system of political broadcasting to an end: from 1 January 2002, the *VRT* will no longer be obliged to guarantee access to political broadcasting. During pre-election periods (i.e. two months before elections), it is the *VRT* that decides on the modalities of organising political programmes and to give access to political parties in respect of Article 27*ter* § 9 and Article 27*quater* § 6 of the Broadcasting Act; guaranteeing 50% equal and 50% proportional access. ■

***Decreet houdende wijzigingen van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie gecoördineerd op 25 januari 1995* (Act of the Flemish Parliament Modifying Some Provisions of the Broadcasting Act), 6 July 2001, *Moniteur belge* (Official Journal) of 28 July 2001 (2nd edition), available at: http://www.moniteur.be**

NL-FR

CY – Decisions on a List of Events of Major Importance

Andreas Christodoulou
Ministry of the Interior Head of the Cinema and Audiovisual Productions Section

On the 11 July 2001 the Council of Ministers of the Republic of Cyprus issued two Decisions regarding the list of "events of major importance to society" as envisaged by Art. 3a of the Directive 89/552/EEC as amended by Directive 97/36/EC.

The Decision No. 53.992 therefore brings into force the obligation for private television stations to broadcast events of major importance on the basis of Art. 27A paragraph 3 "Laws concerning Private Radio and Television Stations 1998 to 2000" from 1 October 2001 while Decision no. 54.001 imposes similar obligations on the public service Cyprus Broadcasting Corporation in accordance with Art. 19B paragraph 3 "Law concerning the Cyprus Broadcasting Corporation and associated laws 1959 to 2000". The Decisions also contain the – identical – lists of the events of major importance.

The list includes major world, European and international sports events such as the Olympic Games (summer and winter), small nation-states (of Europe) Games, Pan-European Games, Mediterranean, Commonwealth and Pan-Hellenic Games. Furthermore, in the field of football, basketball and volleyball, the World and European Cups and Championships, the final phase and the games of the national football team of the World and European Football Cup, UEFA Champions League and Cup and the final phases of European Basketball and Volleyball Champions Cup.

Besides, the lists contain political, cultural, social, economic and scientific events of national, European and international interest *e.g.* the Independence Day Anniversary Celebrations, the Oscar Awards Ceremony, Limassol Wine Festival and major local sports events.

The next step will be the preparation of specific implementation measures for the enforcement of these lists by the Cyprus Radiotelevision Authority. This is expected to take place by the end of the year. ■

Decisions No. 53.992 and No. 54.001 of the Council of Ministers

EN

ES – Supreme Court Allows Autonomous Community to Provide Digital Terrestrial TV Services

On 24 May 2001 the *Tribunal Supremo* (Supreme Court) decided to allow the Government of the Autonomous Community of Canarias to provide Digital Terrestrial Television (DTTV) services.

Decree 2169/1998 on the National Technical Plan on Digital Terrestrial TV currently identifies a regional multiplex in each Autonomous Community, which will initially carry four DTTV programme services. The regional DTTV programme services shall be operated by private

broadcasters, once they have been awarded a concession following a public tender. However, the Decree reserves two DTTV programme services for the regional public service broadcasters which were duly authorised to provide analog terrestrial TV services when the Decree was passed (October 1998), i.e. the public service broadcasters of Catalonia, the Basque Country, Madrid, Comunidad Valenciana, Galicia and Andalusia.

Alberto Pérez Gómez
Dirección de Internacional Comisión del Mercado de las Telecomunicaciones

***Sentencia del Tribunal Supremo, Sala 3ª, de 24.05.2001, (Ponente: Sr. Campos Sánchez-Bordona)* (Judgment of the Supreme Court (Administrative Chamber) of 24 May 2001)**

ES

The regional public service broadcaster of the Autonomous Community of Canarias was authorised to provide analog terrestrial TV services in December 1998 and according to Decree 2169/1998, no DTTV programme service was reserved for this broadcaster. The Government of Canarias considered that the Decree was restricting its ability to provide DTTV services in a discriminatory and unjustified way and it decided to ask the national government for authorisation to provide DTTV services. As this request was not answered by the national government, it was deemed to have been rejected. The Government of Canarias decided to appeal to the Supreme Court. This appeal was successful, so it must now be understood that any regional public broadcaster may have the right to operate up to two DTTV programmes in the regional multiplex mentioned in Decree 2169/1998, regardless of the date on which that public regional broadcaster started providing analog terrestrial TV services. ■

ES – *CMT* Approves Several Resolutions Concerning Audiovisual Services

The *Comisión del Mercado de las Telecomunicaciones* (the Telecommunications Market Commission - *CMT*), is an independent regulatory body whose main duty is to safeguard the existence of free competition in the telecommunications and audiovisual and interactive services markets. The *CMT* recently approved several resolutions related to the audiovisual market:

- In March 2001, the *CMT* launched a public consultation on the shared use of decoders in a digital environment. According to Act 17/1997, which incorporates Directive 95/47/EC into Spanish Law, the *CMT* must ensure that the providers of conditional access services for digital TV use decoders which are directly and automatically open, either because they use an open system, or because the decoders' owners reach an agreement with the other digital TV operators.

In Spain there are currently five registered providers of conditional access services for digital TV (digital satellite platforms *Canal Satélite Digital* and *Vía Digital*; digital terrestrial TV platform *Quiero TV*, and cable operators *Euskaltel* and *Madritel*), which have not yet reached any agreement on the shared use of their decoders. This situation could hamper the development of the digital TV market, especially as regards digital terrestrial TV, which is due to replace analog terrestrial TV before 2013. The *CMT* decided to launch a consultation in order to ask all affected parties for their views on the potential bottlenecks which may exist in this market (not only as regards decoders, but also associated facilities, such as APIs, EPGs, hard disk...), and for their views on a possible intervention by the *CMT* on this matter.

- In April 2001, the *CMT*, responding to a request made by the Government of the Autonomous Community of Murcia, approved its Opinion on a draft Decree on the Awarding of FM Concessions in the Autonomous Community of Murcia. According to the second additional provision of this draft Decree, the Autonomous Community of Murcia shall exchange information relating to radio concessionaires with the *CMT*. The *CMT* is in charge of the management of the Public Registry for national radio concessionaires, while the Autonomous Communities manage the Public Registries for regional and local radio concessionaires, including those entitled to provide FM radio services. The *CMT* is trying to reach collaboration agreements in this field with the Autonomous Communities, in order to gather the information needed to provide a complete picture of the Spanish radio market.

- In June 2001, the *CMT* passed a resolution in response to a request made by the Government of Castilla-La Mancha about the provision of cable services by *Telefónica Cable*, a subsidiary of the telecommunications incumbent *Telefónica*.

Although *Telefónica* has been granted cable concessions in all geographic areas, it is planning not to invest in cable but to opt for ADSL technology instead, in order to use its upgraded public switched telephone network for the provision of broadband communications services.

The *CMT* has stated that *Telefónica Cable* should fully conform with the conditions attached to the cable concessions it obtained by virtue of the 1995 Cable Telecommunications Act. This implies that *Telefónica Cable* should have started providing cable services in the Autonomous Community of Castilla-La Mancha by June 1999. The *CMT*, however, does not determine whether the provision of ADSL services by *Telefónica* shall be taken into account when assessing whether this company is fulfilling the conditions established by its cable concessions as regards the deployment of the cable networks and the availability of cable services. These matters are regulated by the provisions of an undisclosed Annex to the agreement on the provision of cable services signed by *Telefónica* and the Spanish Administration in 1999.

In July 2001, the *CMT* launched its Annual Report, which provides an overview of the activities of the *CMT* in 2000, as well as an analysis of the situation of the Spanish telecommunications and audiovisual and interactive services markets. ■

Alberto Pérez Gómez
Dirección de Internacional Comisión del Mercado de las Telecomunicaciones

***Consulta pública sobre el uso compartido de descodificadores en el ámbito de la televisión digital* (Public Consultation on the Shared Use of Decoders in a Digital Environment) http://www.cmt.es/cmt/centro_info/c_publica/pdf/descodificadores.pdf**

***Acuerdo del Consejo de la Comisión del Mercado de las Telecomunicaciones de 05.04.2001, por el que se aprueba el Informe sobre el Proyecto de Decreto del Gobierno de la Región de Murcia, por el que se establece el régimen de concesión de emisoras de radiodifusión sonora en ondas métricas con modulación de frecuencias y su inscripción en el Registro de empresas de radiodifusión* (Resolution of the CMT Approving its Opinion on a Draft Decree on the Awarding of FM Concessions in the Autonomous Community of Murcia)**

***Resolución del Consejo de la CMT de 07.06.2001 por la que se aprueba el Informe a la Junta de Comunidades de Castilla-La Mancha sobre ciertos aspectos del despliegue de las infraestructuras de cable de Telefónica, S.A* (Resolution of the Council of the CMT of 07 June 2001 in response to a request from the Autonomous Community of Castilla-La Mancha Related to the Deployment of the Cable Network of *Telefónica, S.A.*) http://www.cmt.es/cmt/document/decisiones/RE-01-06-07-10.html**

***Informe Anual de la CMT 2000* (CMT Annual Report 2000) - http://www.cmt.es/cmt/centro_info/publicaciones/Inf%20Anual%202000/informe_anual_2000.htm**

ES

FR – New Decree on Channels' Contribution to Cinema Film and Audiovisual Production

An Act of 1 August 2000 has amended the Freedom of Communication Act of 30 September 1986, and in particular its Articles 27 and 71 on the contribution of channels to the development of cinema film and audiovisual production. The aim was to increase the financing of production by the television channels, reinforce the eco-

nomic independence of production companies and improve the circulation of cinema film and audiovisual works. The Decree of 9 July 2001 now replaces the Decree of 17 January 1990 adopted on the basis of the 1986 Act.

Heading I covers contributions to the development of cinema film and audiovisual production. Television services broadcasting more than 52 full-length cinema films per year are now required to devote 3.2% of their net annual turnover to European cinema film production (compared with 3% under the previous regulations). The percentage to be devoted to works originally in French remains the same, at 2.5%. At least three-quarters of the contribution must be devoted to independent production. Heading II of the decrees covers contributions to the development of audiovisual production. The minimum rate of contribution applicable to the production of audiovisual works originally in French is increased from 15% to 16% of annual turnover. As before, this investment is tied to the obligation to broadcast 120 hours of European audiovisual works or works originally in French that have never been broadcast, and to start their first broadcast between 8 and 9 pm.

The Decree also confirms the option scheme whereby channels undertaking to pay a higher financial contribution may reduce the number of hours of broadcasting of works not previously broadcast. A scheme of this type is currently being used for M6 and for France 2 and France 3, whereas TF1 and La Cinquième remain subject to the basic scheme. The Decree confirms that at least two-thirds of the contribution must be devoted to independent production. The criteria used for determining independence have been relaxed somewhat and brought into line with those in force in the cinema sector. The duration of exclusive broadcasting rights allowed by the producer is limited to eighteen months for a single broadcast on the network operated by the editor service. It should be emphasised that this reform, which is to come into force on 1 January next year, concerns the unencrypted channels broadcast terrestrially in analog mode. It will be supplemented subsequently by other regulatory provisions covering analog terrestrially-broadcast channels that charge their users, channels broadcast terrestrially in digital mode, and cable and satellite channels. ■

Amélie Blocman
Légipresse

Decree No. 2001-609 of 9 July 2001 adopted in order to apply Articles 27(3) and 71 of Act No. 86-1067 of 30 September 1986 and concerning the contributions of editors of television services broadcast terrestrially without encryption in analog mode to the development of the production of cinema film and audiovisual works, Official Journal dated 11 July 2001

FR

FR – "Cable Decree" Amended and Extended to Include Channels Broadcast by Satellite

Adopted on the basis of Article 33 of the Act of 30 September 1986 (as amended), the Decree of 1 September 1992 sets down the obligations incumbent on each category of radio and television services distributed by cable. A decree adopted on 9 July this year amends the text in two ways.

The purpose of the first set of amendments is to ensure that the 1992 Decree is compatible with Community law. On 19 April 1999, the European Commission applied to the Court of Justice of the European Communities claiming that French regulations failed to comply with a number of provisions of the "Television Without Frontiers" Directive of 3 October 1989. The Commission entered a second complaint on 29 March 2000 for failure to transpose into national legislation the amendments made to the Directive by Directive 97/36/EC. The complaints brought by the European Commission concerned more particularly the Decree of 1 September 1992. The fact that the text applies to programmes "broadcast from" France could indeed appear to be out of line with the criterion of the place of establishment which, according to the amended Directive on "Television Without Frontiers", is the only valid criterion for determining which national law within the European Union is applicable to any given television broadcasting body. The new Decree also deletes the second paragraph of Article 4 of the 1992 decree that provided for the application of French regulations to a service established in another country if the sole purpose of such establishment was to evade the regulations in force in France. The new Decree also discontinues the agreement procedure previously applicable to channels under the authority of another member State, substituting a straightforward scheme of prior declaration. Lastly, the provisions concerning teleshopping and self-promotion have been adjusted to correspond more closely to the requirements of the amended "Television Without Frontiers" Directive.

The purpose of the second series of amendments is to bring the Decree of 1 September 1992 into line with the new provisions of the Freedom of Communication Act. In a new Article 33, the Act of 1 August 2000, amending the Act of 30 September 1986, unifies the agreement scheme for channels broadcast by satellite and that of channels broadcast on cable networks. Thus the new text extends the scope of the 1992 Decree, limited until now to cable programmes, to include channels broadcast by satellite.

The obligations of channels broadcast exclusively by cable and satellite should moreover be defined in the near future in a new decree that is currently in preparation. ■

Amélie Blocman
Légipresse

Decree No. 2001-610 of 9 July 2001 amending Decree No. 92-882 of 1 September 1992 and concerning the scheme applicable to the various categories of radio and television broadcasting services distributed by cable or broadcast by satellite, Official Journal dated 11 July 2001.

FR

FR – Call Put Out for Applications for Operating Terrestrially-broadcast Digital Television

The launch of terrestrially-broadcast digital services in France was one of the main features of the Act of 1 August 2000 reforming audiovisual communication. This Act amended the Act of 30 September 1986. On 24 July this year, further to wide-ranging consultation with the parties concerned, the CSA (*Conseil supérieur de l'audiovisuel* – the audiovisual regulatory authority) put out a call for applications for operating terrestrially-broadcast digital television. After due consideration, the CSA has decided that it ought to be possible to broadcast thirty-three television services on six multiplexes. It should be borne in mind that the Act of 30 September 1986 (as amended) gives priority to the public sector, which is to have eight terrestrially-broadcast digital channels – the present France 2, France 3, La Cinquième, Arte and the parliamentary channel, plus three new channels (news, regional channels, re-runs) that the Government decided to finance last March. The CSA will

also ensure the total simultaneous take-over of the private national television services already authorised (TF1, M6 and Canal+), and will issue the other authorisations required by comparing the applications of the private operators according to predefined criteria (experience, protection of diversity, operating prospects, production commitments, etc). Applications must reach the CSA by 29 November. The successful candidates will be selected in March 2002 and agreements signed in July 2002.

Amélie Blocman
Légipresse

Decision no. 2001-387 of 24 July concerning a call for applications for offering national digital services terrestrially, Official Journal dated 4 August 2001.
Act No. 2001-624 of 17 July 2001 covering various provisions of a social, educational and cultural nature, Official Journal dated 18 July 2001.

FR

The legal framework for terrestrially-broadcast television has been supplemented by the Act of 17 July 2001 covering various provisions of a social, educational and cultural nature, amending the "49% rule" (maximum share that any single natural or legal person may hold in the capital of a company authorised to provide a national television service broadcast terrestrially), which was not appropriate to terrestrially-broadcast digital television. The 49% now only applies to the operators of channels with an annual average audience exceeding 2.5% of the total audience for television services on all supports and using all types of broadcasting. Two decrees are currently in preparation – one is to detail the obligations of the new services in terms of production and broadcasting, and the other covers "must carry" arrangements (the conditions for issuing authorisations to cable operators will include the re-broadcasting of terrestrially-broadcast services received in the area they cover). In view of the schedule for the call for applications, these decrees ought to be published officially by 15 October this year. ■

FR – *CSA* Renews *M6* Agreement

On 24 July, the CSA (*Conseil supérieur de l'audiovisuel* – the audiovisual regulatory authority) signed a new agreement with the company Métropole Télévision (M6). Appended to the decision to prolong the channel's authorisation to broadcast, this will govern the channel's obligations for the next five years. A considerable proportion of the content of the agreement results from the high-profile debate aroused by the broadcasting of *Loft Story* on M6. A number of points have been added to the agreement with the channel, whose ethical obligations have been reinforced, particularly as regards the rights of the individual. The CSA indeed demonstrated its concern to address the possible excesses of "reality television", based on its own recommendations which were made while the series was being broadcast (see IRIS 2001-5: 6 and 2001-6: 7). Thus Article 10 of the new agreement states: "The dignity of the human being constitutes one of the elements of public order. It may not be waived by specific agreements, even if the person concerned expresses consent". M6 must also ensure that participation in "reality television" broadcasts does not involve any renunciation on the part of participants of "their fundamental rights, in particular their right of personal portrayal, their right to privacy, and their right to claim compensation for prejudice suffered", and the CSA has expressed the desire that the channel should "undertake to refrain from placing excessive emphasis on the spirit of exclusion" in future games of this type.

Going beyond its obligations, the channel undertakes in this new agreement to invest 18% of its turnover in the production of audiovisual works and 1% of its turnover in the production of animated films. The CSA has nevertheless for the moment rejected the channel's requests concerning firstly the evolution of its musical format and secondly a relaxation of the provision limiting the average daily duration of advertising to six minutes. The CSA prefers to delay considering the evolution of M6's format until its unencrypted musical offering is sufficiently visible. The CSA also said that it wanted to carry out a study on the development of the media market before considering the possibility of relaxing the advertising regulations applicable to M6. ■

Mathilde de Rocquigny
Légipresse

Agreement between the *Conseil supérieur de l'audiovisuel* acting in the State's name and the company Métropole Télévision, available at http://www.csa.fr/html/dos142-3.htm

FR

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

The highest UK court, the House of Lords, has overturned the earlier decision of the Court of Appeal which had struck down a decision of the Independent Television Commission refusing to consent to *TV Danmark 1* exercising exclusive rights to Danish football matches (See IRIS 2000-8: 7 and 2000-10: 6. See further IRIS 2001-4: 6). In the process, the Court gave a different interpretation of the "Television Without Frontiers" Directive from that of the Court of Appeal. There is no further right of appeal in the UK legal system.

TV Danmark 1, a broadcaster established in the United Kingdom, had acquired exclusive rights to broadcast to the Danish population football matches involving the Danish national team in World Cup 2002. This broadcaster only reaches 60% of the Danish population. The Danish public service broadcasters had sought to acquire the rights but had made a much lower offer; however the UK regulator had, under the Directive, refused consent to *TV Danmark 1* as the public service broadcasters had expressed a renewed interest in acquiring shared rights. The Court of Appeal had held that, although the object of the Directive was maximum coverage, this had to be balanced against other factors such as the need to sustain competition and to uphold contracts.

The House of Lords held that the purpose of article 3a(3) of the Directive is perfectly clear: "It is to prevent the exercise by broadcasters of exclusive rights in such a way that a substantial proportion of the public in another member state is deprived of the possibility of following a designated event. The obligation to achieve that result is in no way qualified by considerations of competition, free market economics, sanctity of contract and so forth". It was not sufficient merely to provide an opportunity for public service broadcasters to bid for the rights in a fair auction. Both the Directive and the UK implementing legislation (Part IV of the Broadcasting Act 1996) concern the exercise of rights, not their acquisition. Therefore it was not unlawful for the UK regulator to take into account the renewed interest of the public service broadcasters; indeed it was obliged to do so by the Directive. ■

Tony Prosser
School of Law
University of Glasgow

R v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd., House of Lords, 25 July 2001, [2001] UKHL 42, available at:
http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd010725/dan-1.htm

GB – Regulator Fines Broadcaster for Breach of Rules on Product Placement

Tony Prosser
School of Law
University of Glasgow

The UK regulator, the Independent Television Commission (ITC), has fined a major private broadcaster, London Weekend Television, GBP 100,000 for breaches of its Code of Programme Sponsorship.

The breaches occurred in a series "Club@vision" which was aimed at young people and included features on nightclubs. The series was produced by an independent production company and commissioned by ITV, the major private network, as a co-production with London Weekend Television. A complaint was made to the regulator that clubs were being asked to pay a fee and to contribute to production expenses to ensure inclusion in the programme. An enquiry revealed that an event promoter, working on behalf of the production company, had contacted clubs, and several had paid fees. Although some clubs appearing in the programme had not paid fees, all those willing to pay fees had been included and a substantial number of clubs believed that payment was a prerequisite to inclusion. The Commission thus concluded that the selection of clubs to appear in the programme was influenced by payments and this compromised the production company's editorial judgement.

The selection of clubs amounted to a breach of s. 15.1 of the Commission's Code of Programme Sponsorship, which prohibits product placement, defined as "the inclusion of, or a reference to, a product or service within a programme in return for payment or other valuable consideration to the programme-maker or ITC licensee (or any representative or associate of either)." The promoter was deemed to be a representative or associate of the programme-maker. Although it had not been made aware of the relationship between the production company and the promoter, London Weekend Television should have been more rigorous in its management of the production, and a fine of GBP 100,000 was thus appropriate. ■

'ITC Imposes £100,000 Penalty on LWT', Independent Television Commission Press Release 41/01, 27 July 2001 and the ITC Code of Programme Sponsorship, both available at: http://www.itc.org.uk/

HU – Media Authority Asks Foreign Company to Pull Out

Alexander Scheuer
Institute of European Media Law (EMR)

In a decision published at the end of August, the *Országos Rádió és Televízió Testület (ORTT)*, the Hungarian national radio and television authority, expressed its views on *Bertelsmann's* media involvement in Hungary.

Bertelsmann, which operates the Hungarian commercial TV station *RTL Klub* through its involvement with the *RTL Group*, and which also controls the high-circulation national newspaper *Nepszabadsag*, was ordered to give up its ownership of one of these companies within 180 days.

Under Chapter 8 of Media Act No.I/1996, which contains regulations on media ownership, a company that holds shares in TV channels may not also own or have significant control over a national daily newspaper (Sections 125-126). The *ORTT* referred to these provisions in its decision. *Bertelsmann* has announced that it intends to find a solution to the problem soon. ■

See *Financial Times* article available at http://globalarchive.ft.com/globalarchive/article.html?id=010829001694

IE – Restrictions on Freedom of Information and Media Reporting

Tarlach McGonagle
Institute for Information Law (IViR)
University of Amsterdam

In a recent judgment with implications for all sections of the media, the High Court of Ireland granted an appeal by the Minister for Education and Science against a decision of the Information Commissioner ordering the disclosure of certain information.

The Information Commissioner had decided that three newspapers should, under the terms of the Freedom of Information Act, 1997 (see IRIS 1997-10: 8), be given access to certain Department of Education records relating to the results of the Leaving Certificate Examination (the State examination which takes place at the end of the second-level education cycle) held in 1998. The Minister, however, appealed this decision on a number of grounds.

One basis for the Minister's refusal to allow the newspapers access to the information in question was Section 53 of the Education Act, 1998. This section empowers the Minister – "notwithstanding any other enactment" – to "refuse access to any information which would enable the compilation of information (that is not otherwise available to the general public) in relation to the comparative performance of schools in respect of the academic achievement of students enrolled therein…"

The High Court ruled that the Information Commissioner had erred in law in his construction and/or application of Section 53. The Court found that even though the Education Act was passed after the Freedom of Information Act, the former Act was retroactive (not retrospective). The Commissioner had said that results for 1998, i.e. after the Freedom of Information Act came into force but before the Education Act 1999 did, should be released, subject to certain safeguards to protect the privacy of individual students. If the government were to include similar provisions in other legislation, the Freedom of Information Act could conceivably be deprived of much of its vigour.

The significance for the media of the overturning of the Commissioner's decision is that the judicial interpretation of Section 53 confirms that the effect of the section is to cordon off an entire vista of information that is of great potential interest to the public. The Court explicitly stated that the provisions of the Freedom of Information Act could not "be construed as granting a vested right in favour of an Applicant although the Act is framed in a manner such as to confer *prima facie* entitlement to information."

In his recently-published Annual Report 2000, the Information Commissioner stressed that the "sensible use of freedom of information by the media represents a very real contribution to the creation and maintenance of open and accountable government." The report also noted that there had been a 58% increase in the number of requests for information from journalists between 1999 and 2000. This represents a total of 19% of all requests received in the course of the year 2000. ■

In the Matter of the Freedom of Information Act 1997 and in the Matter of an Appeal Pursuant to Section 42(1) of that Act (The Minister for Education and Science v. The Information Commissioner), Judgment of the High Court of 31 July 2001 (1999 No. 99MCA – as yet unreported)
Annual Report of the Information Commissioner 2000, 29 May 2001, available at: http://www.irlgov.ie/oic/report00/Pub.htm

IE – Jurisdiction over Broadcast Film

Marie McGonagle
Faculty of Law
National University of Ireland, Galway

The controversial Oliver Stone film "Natural Born Killers" has recently been released on video in Ireland, seven years after it was banned by the Film Censor under the Censorship of Films Acts, 1923-70. The ban was upheld by the Films Appeal Board in January 1995. A ban lasts for seven years, after which the film can be resubmitted to the Censor for a certificate for public showing (see IRIS 2000-2: 8). The reason for the ban was the film's depiction of violence and its propensity to incite to crime.

In January 2000, TV3, the national commercial broadcaster, planned to broadcast late at night (10.45pm) an edited "made for television" version of the film. That version had removed the most offensive sequences and was to be preceded by regular warnings to viewers. The day before the planned broadcast, the Department of Justice threatened to seek a court injunction to prevent it. TV3 reluctantly decided to withdraw the film.

The Censorship of Films Acts are concerned with the exhibiting of films "in public by means of a cinematograph or similar apparatus". The Department of Justice contended that a film banned by the Censor could not be broadcast.

TV3, as a commercial broadcaster, is regulated by the Independent Radio and Television Commission. The Act which established the Commission, the Radio and Television Act, 1988, requires the Commission to ensure that broadcasters do not broadcast anything which may reasonably be regarded as offending against good taste or decency, or likely to incite to crime. TV3 took the view that the Commission - and not the Film Censor - had jurisdiction over material broadcast on television. The Commission's own legal advice supported that view. Procedures and practices for the assessment of exceptional television programme material were subsequently adopted by the Commission, in addition to its existing procedures and practices for considering certain television programme material. TV3 was advised of the new procedures and it was then a matter for it to decide whether to proceed with the broadcast. In any event, the ban was lifted and the film was finally broadcast on TV3 late on Saturday 25 August of this year. ■

The text of the Acts referred to are available at http://www.irlgov.ie by clicking on "Irish Statute Book" and then on "Acts of the Oireachtas 1922 – 1998". The website of the Independent Radio and Television Commission is: http://www.irtc.ie

IE – Digital Broadcasting

Marie McGonagle
Faculty of Law
National University of Ireland, Galway

RTÉ, the national public service broadcaster, established under the Broadcasting Act, 1960, has dual funding from an annual licence fee and advertising income. Successive governments in recent years have declined to increase the level of the licence fee, which at IEP 70 (EURO 88.88) remains one of the lowest in Western Europe. The Broadcasting Act, 2001 (see IRIS 2001-4: 9) makes provision for RTÉ to be involved in digital terrestrial television. In preparation, RTÉ sought an increase of IEP 50 (EURO 63.49). However, the Government, on the basis of a consultant's report, only awarded IEP 14.50 (EURO 18.42). Despite that setback, RTÉ has announced plans to launch four new digital channels, beginning in autumn 2002. A review of the licence fee is scheduled for 2003.

Meanwhile, the licence to operate the service, which will carry thirty channels on RTÉ's transmission network, is to be awarded on the basis of a hybrid beauty contest (80%) and auction (20%) competition. The process is expected to be completed by October. A separate competition to sell off RTÉ's transmission network is expected to begin shortly. The Minister for Arts, Heritage, the Gaeltacht [Irish-language speaking areas of the country] and the Islands is authorised to license six multiplexes, while the Director of Telecommunications Regulation may award further licences. The Director has issued a Consultation Paper (31 August 2001) in respect of regional and local digital services. The Independent Radio and Television Commission, which regulates the commercial radio and television sector, also has a role in regulating certain of the new services under the Broadcasting Act, 2001. The Commission, which is to be renamed the Broadcasting Commission of Ireland under the 2001 Act, is in the process of revising its policy on pluralism and diversity (Consultation Document, June 2001) in relation to existing and proposed new broadcast services. ■

The Broadcasting Act, 2001, is available at http://www.irlgov.ie/oireachtas by clicking on "Legislative Information" and then on "Acts of the Oireachtas 1997-2001";
"Licensing Regional or Locally Based Digital Television Delivery – Consultation Paper", Office of the Director of Telecommunications Regulation, Doc. No. 01/69 of 31 August 2001, available at: http://www.odtr.ie/docs/odtr0169.doc
"Regulating for Pluralism and Diversity in Broadcasting - The Way Forward", Independent Radio and Television Commission Consultation Document of June 2001, available at: http://www.irtc.ie/vaca1.html

LT – Public Information Law Updated

On 21 December 2000 the President of Lithuania signed into law amendments to the law "On provision of information to the public (1996)". The amendments provide for further changes in broadcasting law pursuant to Lithuania's obligations under the European Convention on Transfrontier Television.

First, the law clarifies the requirements to protect minors from programmes detrimental to their physical, intellectual and moral development, particularly that which is linked with pornography and (or) gratuitous portrayal of violence (Art.18). It eliminates the requirement to mark with a special visual symbol and acoustic warnings those programmes of violent or erotic nature. The law clearly prohibits broadcasting of such programmes between 06:00 and 23:00 hours.

Another amendment deals with the implementation of provisions on broadcasting events of major importance for society of the Republic of Lithuania. Article 38 confers on the Lithuanian Radio and Television Commission (in the case of commercial broadcasters) and on the Council for the Lithuanian National Radio and Television (in the case of the public broadcasting company) the right to make regulations in this regard.

Article 48 imposes on the Lithuanian Radio and Television Commission the obligation of including in its regular analytical review of audiovisual policy in Lithuania the statistical data on implementation of the requirements on the accessibility of the events of major importance to the public. It shall eventually indicate the reasons for the failure to achieve the required progress

Yana Sklyarova
Moscow Media Law and Policy Center

and the measures taken or envisaged to eliminate shortcomings. Broadcasters shall have a corresponding obligation to submit to the Commission similar data and, in case of non-compliance, they must provide reasons for their failure to implement these provisions, as well as report on the measures taken or envisaged to eliminate these shortcomings.

Article 39 extends the scope of the advertising-related provisions of the law to teleshopping. ■

Republic of Lithuania Law of December 21, 2000 No. IX – 131 *Lietuvos Respublikos Visuomenas Informavimo Estatymo 27, 39 Straipsnia Pakeitimo Ir Papildymo Estatymas* (On Amendment of Republic of Lithuania Law On provision of Information to the Public, of July 2, 1996, No. I-1418), available on the Internet at: http://www3.lrs.lt/c-bin/eng/preps2?Condition1=123793&Condition2

EN

NL – Dutch Media Authority Bans Broadcaster from Exploitation of Internet Site

Rik Lambers
Institute for Information Law (IViR) University of Amsterdam

On 19 June 2001, the *Commissariaat voor de Media* (the Dutch Media Authority) announced its decision to ban the regional public broadcasting station *L1* from the further exploitation of its commercial Internet site, www.L1boulevard.nl.

The site is a virtual shopping mall, where regional companies can place their latest offers and consumers may search for desired products and services. It is a cooperative venture with the Belgian regional broadcaster *TV Limburg*, which has an almost identical site and a link to its Dutch counterpart. According to the Dutch Media Authority, this kind of commercial exploitation contradicts the important principle that a public broadcaster should be non-commercial. Participation in the commercial Internet site is in conflict with Article 57a1(b) of the Dutch Media Act, 1987, which states that any sideline activity should be "connected with or support" the broadcaster's task of providing the public with high quality, non-commercial programmes. *L1*'s participation in this site was deemed not to be such an activity.

Reacting to the decision, the broadcaster expressed its surprise at the ban, contending that www.L1boulevard.nl is not *L1*'s main site and that there would be several other portals (currently under construction) in the near future. ■

***"Toetsing betrokkenheid Stichting Omroep Limburg bij internetsite www.L1boulevard.nl"*, Announcement of the *Commissariaat voor de Media* of 19 June 2001, available at: http://www.cvdm.nl/index.html?article=294**

NL

PL – Withdrawal of Licence granted to *Canal+ Polska*

Hanna Jedras
National Broadcasting Council of Poland International Relations Department Warsaw

On 19 June 2001 the National Broadcasting Council issued a decision to withdraw its licence no. 197/96-T granted to *Polska Korporacja Telewizyjna* (PKT) for terrestrial transmission.

On 10 May 2001 the Chairman of the National Broadcasting Council of Poland addressed a letter to PKT, a Polish licensee who transmits a television programme under the name of *CANAL+ Polska*, in which he asked for an explanation concerning the licensee's fulfilment of technical requirements contained in item XII of the aforementioned licence. The terms specified in the item mentioned above oblige the broadcaster to transmit terrestrially its television programme service using defined transmitters located in 9 major Polish cities. Additionally, PKT was requested to indicate the number of subscribers who receive the programme through respective stations. As a result of the data provided by the licensee and regarding the limited number of viewers (about 14.000) the Chairman of the National Broadcasting Council issued a provisional decision on a partial expiry of licence no. 197/96-T within the scope covered in item XII, which was followed by the final withdrawal. ■

Decision No. DK 122/2001 of 19 June 2001-08-31

SI – Telecommunication and Broadcasting Regulators Merged

Matjaz Gerl
Secretary General of the Slovenian Broadcasting Council

In order to give effect to the new Telecommunications Act (see IRIS 2001–5: 16) and in particular Article 156 of the Act, the Government of the Republic of Slovenia established the *Agencija za telekomunikacije in radiodifuzijo RS,* the Telecommunications and Broadcasting Agency of the Republic of Slovenia by a decree that came into force on 21 July 2001.

The new Telecommunications and Broadcasting Agency is an independent body, financed from fees collected from telecommunication and broadcasting operators. The agency has powers to manage the telecommunications and broadcasting spectrum, settle disputes among operators on prices, infrastructure etc., set the prices of some services, decide on concentration in certain cases, collect fees from operators, supervise telecommunications and broadcasting operators, and also has competence for the accreditation of electronic signatures. It is managed by a director and two deputies - one for the telecommunications and one for the broadcasting field - nominated by the government. Applications for appointment to the post of Director of the Agency were advertised publicly in August and his nomination is expected at the beginning of September. Until then, the Agency is not really operational. The Agency is acting independently by taking its own decisions, which can only be challenged before the courts. It is financed from fees paid by operators for using the frequency spectrum.

The operating staff is advised and controlled by two councils: the Telecommunications Council which advises the Director on telecommunications issues and the Broadcasting Council which has a power to make final decisions on granting the licences. The professional and administrative support for both councils is provided by the Agency. Both councils have the power to give/refuse their consent to the statutes of the Agency.

Both councils have been already established by the *Državni zbor* (Parliament) and they already held their first meetings. ■

Available at: http://www.gov.si/urst/angl/frames.htm

FILM

ES – New Act on Promotion of Film Industry and Audiovisual Sector

Alberto Pérez Gómez
Dirección de Internacional Comisión del Mercado de las Telecomunicaciones

In July 2001, the Spanish Parliament passed a new *Ley de fomento y promoción de la cinematografía y el sector audiovisual* (Act on the promotion of the film industry and the audiovisual sector). The main aims of this Act are to promote the production, distribution and exhibition of European and Spanish audiovisual works and to protect the Spanish audiovisual heritage.

At the national level, the authority in charge of achieving these aims will be the *Instituto de Cinematografía y Artes Audiovisuales* (Cinema and Audiovisual Arts Institute - *ICAA*). This autonomous body derives its authority from the *Ministerio de Educación, Cultura y Deporte* (Ministry for Education, Culture and Sport). The *ICAA* shall collaborate with the administrative competition authorities in order to safeguard the existence of effective competition in the markets for the production, distribution and exhibition of films (Art. 8.2). The *ICAA* will also manage a registry of audiovisual companies (Art. 11); it will have the responsibility for protecting the Spanish audiovisual heritage (Art. 3) and it will be in charge of the rating of films and audiovisual works (Art. 10).

The Act sets out that the Spanish Government will put in place a system for the promotion of European audiovisual production (Art. 5) and distribution (Art. 6). It also establishes a quota system to promote the exhibition of European films (Art. 7). According to this system, the general rule is that each year, cinema theatres must show one day's exhibition of European films for each three days' exhibition of films from third (i.e. non-EU) countries dubbed in Spanish or in any other language considered as co-official in some parts of Spain (such as Basque, Catalan or Galician).

The new Act includes the sanctions that will be imposed by the Administration in case of breach of its provisions (Arts. 12 and 13).

This Act also amends Article 5.1 (promotion of audiovisual production) of Act 25/1994 on the incorporation into Spanish Law of the "Television Without Frontiers" Directive:

The former wording of Art. 5 of Act 25/1994 established that broadcasters, besides complying with the quotas of European programmes, were also obliged to allocate at least 5% of their annual income to the financing of films (including TV movies).

According to the new version of Art. 5.1 of Act 25/1994, as amended by the Second Additional Provision of Act 15/2001, those broadcasters in charge of channels whose programming includes recently-produced feature films (i.e. those produced less than seven years ago) must allocate at least 5% of their annual income towards the financing of European feature films and short films and TV movies. 60% of this financing must be allocated to productions originally recorded in one of the languages accepted as official in Spain. The new article 5.1 of the Act 25/1994 also defines the term "TV movie".

Act 15/2001 on the promotion of the film industry and the audiovisual sector, repeals Act 17/1994, which dealt with the same matters. However, some of the Decrees implementing Act 17/1984 remain in force, insofar as they are not in conflict with the provisions of the new Act. ■

***Ley 15/2001, de 9 de julio, de fomento y promoción de la cinematografía y el sector audiovisual, B.O.E. n. 164, 10.07.2001* (Act 15/2001 of 9 July 2001, on the Promotion of the Film Industry and the Audiovisual Sector), available at:**
http://v2.vlex.com/es/asp/boe_detalle.asp?Articulo=13268

ES

FR – New Definition of Classifications for Cinema Films

Mathilde de Rocquigny
Légipresse

Last summer the *Conseil d'État* cancelled the exploitation licence issued to the film *Baise-moi* allowing the film to be shown to anyone over the age of 16 years. The case gave rise to considerable controversy regarding gaps in the classification of cinema films in France. According to the 1990 decree, there are four common-law classifications for cinema films – authorisation for showing the film to the general public, authorisation for showing the film to anyone over the age of 12 years, authorisation for showing the film to anyone over the age of 16 years, or a total ban on showing the film. In addition to these four common-law classifications there is a further category – the film may be included on the list of films that are "pornographic or encourage violence" and referred to as "X-rated"; such films may not be shown to anyone under the age of 18 years. Thus the case of the film *Baise-moi* highlighted a legal gap, since it was impossible to guarantee the protection of minors without giving the film an X-rating. However, the economic consequences of such a rating (specific taxation and total exclusion from the State's support mechanisms for the cinema), and the additional obligation that such films may only be shown in specialist cinemas, are considerable and usually mean their economic failure.

The Government therefore wanted to address the problem and made a considerable effort to allow the showing outside specialist cinemas of films including violent or sexually explicit scenes that, although they undoubtedly should not be shown to minors, are nevertheless of real artistic value. The Decree of 12 July 2001, amending that of 23 February 1990, now sets out six categories for the Film Classification Board that advises the Minister for Culture, who in turn issues exploitation licences. Those categories are – authorised for showing to the general public; authorised, but not to be shown to anyone under the age of 12 years; authorised, but not to be shown to anyone under the age of 16 years; authorised, but not to be shown to anyone under the age of 18 years; listing as a "pornographic film or a film inciting violence" (and not to be shown to anyone under the age of 18 years); and total ban.

Thus the film *Baise-moi* is now being shown in a cinema in Paris; it is now authorised for showing to anyone over the age of 18 years but is not X-rated, so it can be shown in an ordinary cinema. ■

Decree No. 2001-618 of 12 July 2001 amending Decree No. 90-174 of 23 February 1990 adopted in application of Articles 19 to 22 of the Film Industry Code, concerning film classification, Official Journal dated 13 July 2001

FR

NEW MEDIA/TECHNOLOGIES

DE – Policy Document by Media Authorities and Broadcasters on Restructuring of Broadband Cable Network

The *Direktorenkonferenz der Landesmedienanstalten* (Congress of *Land* Media Authority Directors - *DLM*), the body responsible for monitoring private broadcasting in Germany, has repeated its call for a comprehensive digital cable network to be set up in Germany as quickly as possible. In a new policy document, it has laid down some fundamental principles for the transition from analog to a digital cable system.

The *DLM* believes that, for technical and financial reasons, splitting levels 3 and 4 of the network structure is not advisable in view of the need to build digital network structures quickly. Economically-workable structures are needed, even if there is a danger they might pose new problems from the point of view of concentration. The *DLM* is therefore calling for the development and introduction of open decoder standards. It also believes that equipment with CIs (Common Interfaces) and CI-CAMs (Common Interface Conditional Access Modules) should be available to all operators. Even in a digital cable market, according to the *DLM*, broadcasters' views should be taken into account on the basis of their constitutional position; it is therefore unnecessary to stipulate a certain capacity when allocating cable space. With the separation of content and transmission methods likely to disappear, access must be more strictly regulated so that all service providers may be guaranteed equal opportunities. The *DLM* believes that the transition to a digital cable network should be accompanied by specific regulations on the form and duration of so-called simulcasting, the simultaneous use of analog and digital technology. Such regulations should be introduced gradually, both for financial and technical reasons. Two different models are proposed, although a combination of the two is also conceivable. Under the first model, the situation for all analog channels would remain unaltered, provided the network concerned did not reach more than 20% of connected households with digital terminal equipment. For each 5% over the 20% mark, one channel would have to be digitised. However, if users were equipped with the appropriate analog and digital receivers, all channels on a single network could be switched over at once.

The public broadcasters and the *Verband Privater Rundfunk und Telekommunikation* (Private Broadcasting and Telecommunications Union - *VPRT*) have also published a joint document expressing their views on technical and operational requirements of a new broadband cable allocation system. They argue that terminal equipment (subscriber connection boxes) should not be an exclusive component of the cable network. Providers believe that the technical specifications of the cable network should be disclosed. The relevant content and service providers would have to agree to any changes to network technology or to the terminal equipment used by the network operator, eg change of encryption system or programming interface. The document states that content and services must be displayed by the terminal equipment's basic navigator in a fair and non-discriminatory way, so that the services offered by the network operator are not given special priority. Services must be directly accessible and a bundle-specific electronic programme guide (EPG) should be provided. The cable network operators would have to ensure that the required transmission capacity was available to broadcasters. ■

Peter Strothmann
Institute of European Media Law (EMR)

Policy document of the *Landesmedienanstalten* (*Land* Media Authorities), *"Eckwerte für den Übergang analog/digital im Kabel"*; available at: http://www.alm.de/aktuelles/presse/pos_kabel_l.doc

***"Technische und betriebliche Anforderungen an ein neues Breitband-Kabelverteilsystem in Deutschland"* by *ARD, ZDF* and *VPRT*; available at: http://www.vprt.de/db/positionen/referenzmodell_endfassung200601.pdf**

DE

RELATED FIELDS OF LAW

EE – Public Information Act Enters into Force

On 1 January 2001, the Public Information Act of the Republic of Estonia came into force. It guarantees public access to information and establishes a mechanism for government agencies to provide information to the public. The law considers Internet to be one of the major means of access to information, and therefore stipulates specific rules regarding Internet use in order that government agencies fulfil their obligations to provide information.

The law enumerates different types of information that shall be available to the public. They concern primarily the activities of national and local government bodies, statistical and factual information that is considered vital for the "life, health and property of persons" (e.g., environmental information), as well as official documents and other acts (draft law and regulations submitted for passage/approval to the authorities, court judgements that have entered into force, administrative agencies' registers, etc.). Article 29 obliges the holders of such information to publish it on their respective websites as well as disseminate it by other means. The law obliges the major public institutions of the Republic (the Chancellery of the *Riigikogu* (the Estonian Parliament), the Office of the President, the Office of the Legal Chancellor, government agencies, etc.) to maintain their websites for the dissemination of information. Municipal governments shall also maintain websites to provide details of their activities and to disclose information in their possession.

Art. 32 establishes specific requirements as to the contents of such websites. The national and local government agencies shall provide up-to-date information, as well as details of how to contact them. They shall not post on the sites outdated, inaccurate or misleading information. On its website, a holder of information shall indicate the date of issue of each document and that of the update of the information. Those agencies shall also be responsible for resolving technical problems that might hinder access to the site.

The law establishes the Data Protection Inspectorate to supervise the compliance with the prescribed procedures of providing information, including the obligation on certain holders of information to create and maintain websites pursuant to the procedure provided by law. Within its competence, the Inspectorate may issue an order requiring a holder of information to bring its activities into accordance with the law, e.g. if the Inspectorate finds that the former "has not performed the obligation to maintain a web site as required" (Art. 50). ■

Yana Sklyarova
Moscow Media Law and Policy Center

***Avaliku teabe seadus* (Public Information Act of the Republic of Estonia), passed 15 November 2000, entered into force 1 January 2001. Officially published in *Riigi Teataja* (State Gazette) (I 2000, 92, 597). The text of the Act in English is available on the Internet at: http://www.legaltext.ee/en/andmebaas/ava.asp?m=022**

EN

FI – New Name and Duties for Communications Regulatory Authority

On 29 June 2001 the *Laki viestintähallinnosta* (625/2001) (Act on Communications Administration) was ratified. The Act entered into force on 1 September 2001 and replaced the *Laki telehallinnosta,* (518/1988) (Act on Telecommunications Administration).

As of 1 September 2001, the Telecommunications Administration Centre (TAC) has a new name and expanded duties. Now called the Finnish Communications Regulatory Authority (FICORA), it is the general administrative authority for communications and Information Society Services. Its mission is to promote the development of the Information Society in Finland. The specific duty of the Authority is to safeguard the functionality and efficiency of the communications markets in order to

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

ensure that consumers have access to competitive and technically-advanced communications services that are of good quality and affordable. FICORA is subordinate to the Ministry of Transport and Telecommunications. Its duties include tasks defined in the Telecommunications Market Act (396/1997), the Radio Act (517/1988), the Act on Postal Services (907/1993), the Act on Television and Radio Operations (744/1998), the Act on the State Television and Radio Fund (745/1998) and the Act on the Protection of Privacy and Data Security in Telecommunications (565/1999).

While the general guidance, development and supervision of television and radio is the responsibility of the Ministry of Transport and Communications, the duties of FICORA include supervision of compliance with the Act on Television and Radio Operations as well as of the provisions and regulations issued thereunder, with the exception of the ethical principles of advertising, teleshopping spots and the protection of children. Under the Act on the State Television and Radio Fund, the duties of FICORA include the management of the Fund, including the collection and overseeing of television fees from households and the collection of operating licence fees from broadcasters. It is also responsible for technical licences, radio frequencies and the inspection of telecommunications equipment. These duties did not change. ■

FICORA's website is: http://www.ficora.fi
***Laki viestintähallinnosta* (Act on Communications Administration), No. 625/2001 of 29 June 2001, available at: http://www.finlex.fi**

FI

All other Acts mentioned can be found in English either on that website or at: http://www.mintc.fi/www/sivut/english/tele/statutes/index.html

EN

FR – Court of Cassation Gives Verdict on Journalists' Copyright

In recent years judges have had to deal with a number of cases concerning journalists' copyright when their articles are re-used on-line, and the Court of Cassation has just delivered an important decision on the subject. In the case in question, an appeal had been lodged with the Court by a freelance journalist whose former employer had, without his consent, re-used – in several issues of the same magazine – photographs he had taken that had been published previously in the magazine. The substance of the case did not therefore concern their re-use on-line, but the principle behind the Court of Cassation's decision should permit its extension to such use.

The Court of Appeal in Versailles, interpreting Article L. 761-9 of the Employment Code that the Court of Cassation had used in its arguments in the past, held that the publisher was entitled to re-publish – in the same publication – photographs taken by the journalist without his authorisation and without further remuneration. It is true that, by virtue Article L. 761-9 of the Employment Code, entitlement to publish journalists' contributions in more than one newspaper or periodical is subject to specific agreement setting out the conditions under which reproduction is authorised. However, the Court of Appeal found that these provisions did not apply in the present case, considering that the phrase "more than one newspaper or periodical" was intended to refer to the issues of a newspaper or a periodical published by the same press group under the same title.

Amélie Blocman
Légipresse

In its decision on 12 June, however, the Court of Cassation overturned this reasoning. Referring to Article L. 111-1, paragraph 3 of the Intellectual Property Code and Article L. 761-9 of the Employment Code, the Court stated in very broad terms that "the existence of an employment contract did not waive the enjoyment of the originator's intellectual property rights". Thus, "in the absence of a specific agreement, concluded in accordance with the statutory conditions, an originator does not transfer the right to reproduce his work to his employer by the sole fact of the initial publication". The publisher must therefore request authorisation from the salaried originator for any re-use of his works (probably including on networks), unless there is a clause to the contrary that meets the requirements of the Intellectual Property Code. ■

Court of Cassation (1st civil chamber)*, 12 June 2001, *Rillon v. Société Capital Méda

FR

RU – Supreme Court Cancels Government's Regulation

On 11 April 2001, the Supreme Court of the Russian Federation considered in public proceedings a complaint lodged by the Kostroma city telephone network against the Government of the Russian Federation.

The complainant alleged that article 4.2 of the Regulation of the Government of the Russian Federation " On Licensing of Activities in the Communications Sector " of 5 June 1994 # 642 conflicted with the Federal Statute "On Licensing of Certain Kinds of Activities" of 25 September 1998 #158-FS; thereby infringing the complainant's rights. In fact, while the impugned article stipulated that the Ministry of Communications may issue a license within the territory limitations of an operator's activity, according to article 7 of the Federal Statute "On Licensing of Certain Kinds of Activities" if the federal bodies (currently the same Ministry of Communication), regulating licensing activity, issue a license, the activity may be performed on the whole territory of the Russian Federation.

The Government's representatives asked the Court not to uphold the complaint, because the Federal Statute "On Licensing of Certain Kinds of Activities" stipulated that the licensing procedure of some type of activities was carried out in accordance with acts already in force. The Government representatives referred to the fact that earlier the licensing of activities in the communications sector was regulated through the Federal Statute "On Communications" of 16 February 1995 # 15-FS, and the aforementioned Regulation of 5 June 1994 # 642.

However, the applicant claimed that the Regulation "On Licensing of Activities in the Communications Sector" of 5 June 1994 # 642 takes effect entirely regardless of the fact that such kind of rules should only apply if it does not contradict the Federal Statute "On Licensing of Certain Kinds of Activities". According to article 7 of this statute, if the federal bodies, regulating licensable activity, issue a license, the activity may be performed on the whole territory of the Russian Federation. At the same time, the Regulations "On Licensing Activities in Communications Sector" of 5 June 1994 # 642 allows for geographical limitations to be placed on the license. Hence this provision contradicts the federal act and should not be considered legal.

The Court also found that the reference to the fact that the provisions of the federal statute "On Licensing of Certain Kinds of Activities" do not apply to the licensing procedure in the communication's sphere were not well-grounded.

In accordance with the Federal Statute "On Communications" of 16 February 1995 # 15-FS, matters concerning licensing (such as types of license and periods of validity, terms of issue, suspension and termination and other matters) are regulated by the legislation of the Russian Federation. This is significant as such matters are

regulated through not only the Federal Statute "On Communication" but also the Federal Statute "On Licensing of Certain Kinds of Activities". The latter is a basic act that concerns essential licensing matters, and determines the manner in which a license may be issued for an activity even if this activity is not included in the list of kinds of activities which are subject to licensing.

In fact, article 19 of the Federal Statute "On Licensing of Certain Kinds of Activities" stipulates that the licensing procedure, established by this act shall not affect the licensing procedures already determined by the existing acts. The Regulation "On Licensing of Activities in the Communications Sector" came into force earlier than the above-mentioned act.

As it was determined before the Federal Statute "On Licensing of Certain Kinds of Activities" came into force, the establishment of a licensing procedure in the communication sector has been delegated by the Federal Statute "On Communication" to the Government of the Russian Federation.

The Court took into consideration the Government's licensing procedure had been established before the federal act "On communication" was passed, and another procedure of licensing was not yet in place.

In accordance with article 19 of the Federal Statute "On Licensing of Certain Kinds of Activities" Presidential decrees and Government regulations concerning the licensing procedure on the territory of the Russian Federation shall be applied in that part which does not conflict with this law.

Thus article 4 of the Regulation, which limits the geographical area of the license, is contrary to article 7 of the Federal Statute "On Licensing of Certain Kinds of Activities" and therefore is not to be applied.

Hence the Court did not consider the Government's representatives' reference to the necessity of taking into account the capability of exploitation by technical means because it does not determine the limits of application of the issued license.

Thus the Court found that Article 4 of the "On Licensing Activities in Communications Sector" was not lawful and upheld the complaint. ■

Natali Budarina
Moscow Media Law and Policy Center

Judgment of the Supreme Court of the Russian Federation of 11 April 2001 # GKPI01-751
RU

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AGENDA

Koregulierung zwischen Selbstkontrolle und staatlicher Aufsicht
18 October 2001
Organiser:
Institut für Europäisches Medienrecht (EMR), Freiwillige Selbstkontrolle Fernsehen (FSF)
Venue: Medientage Munich
Information & Registration:
Tel.: +49 (0) 681 99275 11
Fax: +49 (0) 681 99275 12
E-mail: veranstaltungen@emr-sb.de
http://www.emr-sb.de