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INTERNATIONAL

WIPO

Copyright Treaty Enters into Force

Natali Helberger
Institute for Information Law (IViR) University of Amsterdam

The WIPO Copyright Treaty (WCT) (see IRIS 2000-2: 15 and IRIS 1997-1: 5) will enter into force on 6 March 2002. With the accession of Gabon on 6 December 2001, the key number of 30 countries required for its entry into force has been reached, five years after the Treaty was adopted. Nevertheless, the WCT has already inspired modern legislation in the field of intellectual property law, even before its official entry into force. Prominent examples are the US Digital Millennium Copyright Act (DMCA) and the European Directive on the harmonisation of certain aspects of copyright and related rights in the information society (see IRIS 2001-3: 3, IRIS 2000-7: 3, IRIS 2000-2: 15, IRIS 1999-6: 4 and IRIS 1998-1: 4). The goal of the WCT is to become widely adopted by countries in all regions of the world and to thereby guarantee a global minimum standard of advanced copyright protection.

The WCT aims to update and improve significantly the existing international protection for copyright and related rights, focussing particularly on forms of digital distribution and exploitation of protected works (e.g. via the Internet). To mention just some achievements of the WCT, it clarifies that traditional rights, such as the reproduction right, also apply in the digital environment; it qualifies computer programs and databases as being suitable objects for protection; it introduces the "making available" right to cover forms of individualised on-demand communication to individual members of the public. Further influential initiatives of the WCT are its obligations to support technology that can be used by rights-holders to protect and manage their rights in a digital environment, notably the protection of technological measures against unauthorised circumvention activities and of rights-management information in the context of the exploitation of works in digital form.

The WIPO Performance and Phonograms Treaty (see IRIS 2000-2: 15 and IRIS 1997-1: 5) that was also adopted in 1996, has so far been acceded to by 28 countries; accordingly, it has not entered into force yet. ■

"30th Accession to Key Copyright Treaty Paves Way for Entry into Force", Press Release PR/2001/300, available at:
http://www.wipo.int/pressroom/en/releases/2001/p300.htm (EN)

The WIPO Copyright Treaty (WCT), available at:
http://www.wipo.org/eng/diplconf/distrib/94dc.htm (EN)

The WIPO Performance and Phonograms Treaty (WPPT), available at:
http://www.wipo.org/eng/diplconf/distrib/95dc.htm (EN)

EN-FR-ES

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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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• **Council to the Editorial Board:**
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• **Documentation:** Edwige Seguenny

• **Translations:** Michelle Ganter (coordination) – Véronique Campillo – France Courrèges – Paul Green – Isabelle Herold-Vieublé – Katherine Parsons – Stefan Pooth – Patricia Priss – Erwin Rohwer – Catherine Vacherat

• **Corrections:** Michelle Ganter, European Audiovisual Observatory (co-ordination) – Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, 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) – Natali Helberger, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands)

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COUNCIL OF EUROPE

European Court of Human Rights: Case Bankovic and Others v. Belgium and Others

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

On 19 December 2001, the European Court of Human Rights announced its decision on admissibility in the case of Bankovic and Others v. Belgium and 16 Other Contracting States. The application was brought by six citizens of the Federal Republic of Yugoslavia (FRY) and concerned the bombing by the North Atlantic Treaty Organization (NATO) of the building of *Radio Televizije Srbije* (Radio-Television Serbia, RTS) during the Kosovo crisis in April 1999. The building was destroyed; 16 people were killed and 16 others were seriously injured. The applicants, all family members of the deceased or themselves injured in the bombing, complained that the bombardment of the RTS building violated not only Article 2 (right to life), but also Article 10 of the European Convention on Human Rights (freedom of expression).

The Court, however, unanimously declared the application inadmissible as the impugned act is to be considered as falling outside the jurisdiction of the respondent States. The Court came to the conclusion that there was no jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it was not satisfied that the applicants and their deceased relatives were capable of coming withinthe jurisdiction of the respondent States on account of the extra-territorial act in question. As to whether the exclusion of the applicants from the respondent States' jurisdiction would defeat the *ordre public* mission of the Convention and leave a regrettable vacuum in the Convention system of human rights protection, the Court's obligation was to have regard to the special character of the Convention as a constitutional instrument of *European* public order for the protection of individual human beings and its role was to ensure the observance of *the engagements undertaken* by the Contracting States within their legal space. The FRY clearly did not fall within this legal space and the Convention is not considered to be designed for application throughout the world, even in respect of the conduct of the Contracting States.

The Court concluded that the impugned action of the respondent States does not engage their Convention responsibility and that the application could therefore be declared inadmissible. ■

Decision as to the admissibility of Application no. 52207/99 of 12 December 2001 (Grand Chamber) in the case Bankovic and Others v. Belgium and 16 Other Contracting States, available at: http://www.echr.coe.int

EN-FR

Parliamentary Assembly: Call for Protocol to Cybercrime Convention

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

In its Recommendation 1543 (2001), the Parliamentary Assembly of the Council of Europe (PACE) has reiterated its call for the immediate drafting of a protocol to the recently-adopted Convention on Cybercrime in order to address the dissemination of racist expression over the Internet (see IRIS 2001-5: 3, IRIS 2001-7: 2, IRIS 2001-9: 4 and IRIS 2001-10: 3).

The Parliamentary Assembly has consistently argued in favour of the inclusion of the offence of dissemination of racist propaganda by computer technology within the purview of the Convention. This is evidenced, *inter alia*, by its Opinion No. 226 (2001) and its Doc. 9263 ("Racism and xenophobia in cyberspace", Report of the Committee on Legal Affairs and Human Rights of 12 October 2001).

In pursuit of the objectives outlined in Opinion No. 226 (2001), i.e. the immediate drafting of a protocol to the Convention that would define and criminalize the dissemination of racist propaganda and the unlawful hosting of hate messages, PACE has recommended that the Committee of Ministers:

"i. give the Committee of Experts on the criminalization of racist or xenophobic acts using computer networks (PC-RX), which has been instructed to prepare a draft additional protocol to the Convention on Cybercrime, sufficient means to enable it to complete its task by 30 April 2002, when its terms of reference expire. The committee should complete its work in time for the additional protocol to come into force as soon as possible after the entry into force of the convention;

ii. make specific mention of unlawful hosting in the terms of reference of this committee;

iii. specify the means by which it is possible to eliminate racist sites from the Internet and to encourage the effective prosecution of those responsible." ■

"Racism and xenophobia in cyberspace", Recommendation 1543 (2001) of the Parliamentary Assembly of the Council of Europe, adopted by the Standing Committee (acting on behalf of the Assembly) on 8 November 2001, available at: http://stars.coe.fr/ta/ta01/erec1543.htm (EN)

EN-FR

European Commission against Racism and Intolerance: Recommendations for Media in Second Report on the Netherlands

Although adopted on 15 December 2000, the Second Report on the Netherlands by the European Commission against Racism and Intolerance (ECRI) was only recently released to the public. The Report contains, *inter alia*, recommendations relating to the media.

These recommendations are twofold. The first calls for "stricter compliance" with the self-regulatory regime that prevails in Dutch journalism. Among the provisions of this regime are the stipulation that a person's race, nationality, religion, etc., should only be mentioned when relevant and the stipulation that the soliciting of immigrants' viewpoints should not be restricted to issues that directly concern them. Similar guidelines exist for the dissemination of information by the police and their overriding objective is to avoid ethnic stigmatisation by law enforcement officials.

The Report's second major recommendation for the media sector concerns the Internet: Essentially, the "ECRI encourages the Dutch authorities in their efforts to counter the dissemination of racist material through the Internet." This recommendation must be viewed against the backdrop of the establishment in 1997 of the State-funded *Magenta, Meldpunt Discriminatie Internet* (Magenta, Dutch Complaints Bureau for Discrimination on the Internet - MDI), a hotline for discrimination-related offences on the Internet. The *raison d'être* of the MDI is, as outlined in its Mission Statement, to curb the

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

dissemination of discriminatory and racist expression "on the Dutch part of the Internet, including content that is hosted/situated abroad, but is written in the Dutch language and/or is aimed at the Dutch public."

ECRI is a body of the Council of Europe that is committed to the advancement of the struggle against racism, xenophobia, anti-Semitism and other forms of intolerance in Europe. A primary focus of its work is the compilation and, ultimately, the publication of individual country reports. The first country report on the Netherlands was published in June 1998 (after having been adopted one year previously). ■

Second Report on the Netherlands (Adopted on 15 December 2000), Doc. No. CRI (2001) 40 of 13 November 2001, European Commission against Racism and Intolerance, available at: http://www.ecri.coe.int/en/08/01/25/CBC2%20Netherlands.pdf (EN)

EN-FR

The homepage of *Magenta, Meldpunt Discriminatie Internet* is: http://www.meldpunt.nl/

EUROPEAN UNION

Court of Justice of the European Communities: Decision on Satellite Dish Tax

Ot van Daalen
Institute for Information Law (IViR) University of Amsterdam

On 29 November 2001 the European Court of Justice found a Belgian tax regulation on satellite dishes to be contrary to the freedom of services. The ruling is in accordance with the Communication adopted on 2 July 2001 by the European Commission on the use of satellite dishes (see IRIS 2001-8: 5).

The tax was adopted by the Belgian municipality of Watermael-Boitsfort on 24 June 1997. It provided for an annual levy of BEF 5000 on satellite dish owners during the period of 1997 to 2001. The regulation was repealed, with effect from 1 January 1999, in reaction to misgivings raised by the European Commission regarding this subject. On 10 December 1998, a Belgian citizen lodged a complaint against the levy with the *Collège juridictionnel de la Région de Bruxelles-Capitale* (Judicial Board of the Brussels-Capital Region). The *Collège* in turn asked for a preliminary ruling by the Court of Justice regarding the compatibility of its tax on satellite dishes with the freedom to provide services.

The Court noted that no similar tax on cable transmission exists. While broadcasters established in Belgium have unlimited access to cable distribution for their programmes in that Member State, this is not the case for broadcasters established in certain other Member States who would wish to broadcast their programmes by cable in Belgium. The tax imposed on satellites could therefore have had the effect of dissuading Belgian recipients from seeking access to television programmes broadcast from other Member States. It could also have hindered non-Belgian satellite transmission operators, while giving an advantage to the internal Belgian market and radio and television distribution. Articles 49, 50 and 55 EC Treaty regarding the freedom of services therefore prevent the application of the tax introduced by the Belgian municipality.

Environmental considerations - as put forward by the municipality - might be a reason for the regulation of satellite proliferation, the Court noted. However, less restrictive measures, such as those proposed by the Commission should provide for sufficient protection and the tax in question exceeded what is necessary. ■

Case C-17/00, François de Coster v. Collège des bourgmestre et échevins de Watermael, Judgment of the European Court of Justice of 29 November 2001, available at: http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=C-17%2F00&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

DE-EN-FR

Court of Justice of the European Communities: Right of Access to Information Upheld

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

The European Court of Justice (ECJ) has upheld the judgment of the Court of First Instance annulling the Council of the European Union's decision to deny Ms Heidi Hautala access to a report on arms exports.

The Council had refused Ms Hautala's request to access the report (which was produced under the Common Foreign and Security Policy) in 1997 on the grounds that the disclosure of the sensitive information contained therein "could be harmful for" the EU's relations with non-member states. According to Article 4 of Council Decision 93/731/EC on public access to Council documents, "[A]ccess to a Council document shall not be granted where its disclosure could undermine", *inter alia*, the protection of the public interest as regards public security and international relations. The report to which Ms Hautala was denied access concerned the consistent implementation of agreed common criteria for arms exports, and indeed, it aimed to enhance consistency in the implementation of those criteria.

The Court of First Instance reasoned that while Decision 93/731 does not explicitly require the Council to consider whether partial access to documents may be granted, such a possibility is not expressly prohibited either. The Court held *a fortiori* that the spirit of the Decision as a whole, i.e., the principle of the right to information and the principle of proportionality "must be borne in mind for the purpose of interpreting Article 4 of that decision." It went on to state that the Council is obliged to examine whether partial access should be granted to information not covered by the established exceptions to the general principle.

The ECJ, in upholding the Court of First Instance's annulment of the Council's decision to refuse access to the contested report, held the objectives of Decision 93/731 as being (i) "to ensure the internal operation of the Council in conformity with the interests of good administration" and (ii) "to provide the public with the widest possible access to documents held by the Council, so that any exception to that right of access must be interpreted and applied strictly." It continued by stating that the Council's interpretative approach "would have the effect of frustrating, without the slightest justification, the public's right of access to the items of information contained in a document which are not covered by one of the exceptions listed in Article 4(1) of Decision 93/731. The effectiveness of that right would thereby be substantially reduced." ■

Case C-353/99 P, Council of the European Union v. Heidi Hautala, Judgment of the European Court of Justice of 6 December 2001, available at: http://www.curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79988793C19990353&doc=T&ouvert=T&seance=ARRET&where=()

DE-EN-FR

Council of the European Union: Agreement on Amended Data Protection Draft

Ot van Daalen
Institute for Information Law (IViR) University of Amsterdam

On 6 December 2001, the Council of EU Telecoms Ministers agreed on a common position regarding the draft Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector. The agreement differs on several points from the proposal adopted by the European Parliament, and the draft Directive will be given a second reading.

Compared to the position adopted by the European Parliament, the Council takes a more moderate approach towards information-gathering, including the use of cookies. Cookies are devices used by Internet browsers to track, authenticate and gather information about clients. Member States shall ensure that the user is clearly informed about the use of cookies and is offered the right to refuse processing by virtue of art. 5.3 ("opt-out"). On its first reading of the draft Directive on 13 November 2001, the European Parliament obliged Member States in art. 5.2a to prohibit the use of cookies without the explicit consent of the user ("opt-in"). Both provided an exception for technical uses. It is not sure if all parties will come to an agreement on this subject. Industrial stakeholders state that an opt-in solution would hamper e-commerce development, as cookies are an essential part of online businesses.

On the other hand, the agreement leaves less room for Member States to permit unwanted commercial e-mail ("spam"). The proposed wording as agreed on by the Parliament would leave Member States the freedom to choose between an opt-in and an opt-out solution (art. 13.2). The Council adopted this part, but added a paragraph explicitly prohibiting unsolicited e-mail where the identity of the sender is concealed (art. 13.4). ■

For the history of the Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, see Inter-institutional file 2000/0189 (COD), available at: http://europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=158278

DE-EN-FR

Council of the European Union: Resolution for Development of Audiovisual Sector

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

The Council of the European Union recently adopted a resolution aiming to foster the growth of the European audiovisual sector; the latest in a series of developments sharing this objective. In the resolution, the Council expressly welcomes the recent adoption by the European Commission of a communication on certain legal aspects relating to cinematographic and other audiovisual works (see IRIS 2001-9: 6).

The resolution articulates the Council's wish to encourage greater interaction between the audiovisual and banking sectors; to scrutinise the influence of fiscal matters on the audiovisual sector and to support multilateral dialogue concerning State aid and audiovisual production.

In the resolution, the Commission is invited to reinvigorate its efforts to strengthen the European audiovisual sector, including at the global level. In addition, it is encouraged not only to give further consideration to the instrumental value of State aid to the development of the sector, but to seek to facilitate the adoption of such initiatives by Member States. The encouragement of discussions involving industry professionals and relevant (national) authorities on the protection of the audiovisual heritage and the classification of audiovisual works is also identified as a key area of activity for the Commission.

Member States, for their part, are invited to actively cooperate in the depositing and archiving of audiovisual works; to promptly ratify the Council of Europe's Convention on the Protection of the Audiovisual Heritage (see IRIS 2001-9: 3) and to be duly aware of the benefits of specially-conceived financial packages for the stimulation of European audiovisual production. ■

Resolution by the Council of the European Union on the Development of the Audiovisual Sector, adopted at the 2381st Council meeting (Cultural/Audiovisual Affairs) of 5 November 2001, Press: 377 - Nr: 13126/01, available at: http://ue.eu.int/Newsroom/related.cfm?NOREFRESH=1&MAX=1&BID=95&GRP=3932&LANG=1

DE-EN-FR

European Parliament: Telecom Package Adopted

Nirmala Sitompoel
Institute for Information Law (IViR) University of Amsterdam

On 12 December 2001, the European Parliament agreed to compromise on the so-called "Telecom Package" which was proposed by the Commission in July 2000. The Telecom Package is a legislative package that will update and simplify the current regulatory framework for Europe's telecommunications and media sector. The measures are designed to improve access to the Information Society by striking a balance between sector-specific regulation and EU competition rules in a market which has historically been dominated by monopolies, but which has opened up over the last years. It includes four directives that that will now come into force: the Framework Directive, the Access Directive, the Authorisation Directive and the Universal Service Directive, as well as a Decision on Community radio spectrum policy. The Data Protection Directive will not be adopted before spring 2002, because the Parliament and the Council have failed to reach a common position. In October 2000, the Parliament already adopted a regulation aimed at opening up the local telecom markets to competition.

The Telecom Package forms one of the largest legislative packages pushed through by the current European Commission. The compromise was proposed by the Belgian Council Presidency and has been guaranteed acceptance by the Council. Ministers will formally endorse it in January 2002, after which Member States will have 15 months to implement the package in national law.

The main debating point has been the controversial Article 6 of the Framework Directive which, in the original text as proposed by the Commission, gave the Commission a wide-ranging power of veto over the actions of national regulatory authorities. This veto was initially supported by the Parliament but strongly opposed by the Council, which represents Member States. The compromise now adopted restricts the applicability of the veto to just two areas: defining a relevant market and deciding whether an organisation has significant market power.

The new legislation will reduce regulation as competition becomes effective on specific markets; simplify market entry rules; establish strong coordination mechanisms at the European level; maintain the universal service obligations; establish a policy framework for the coordination of radio spectrum policy; provide regulators with tools to cope with evolving technology and market changes; promote European standards for interactive digital television, and ensure that national legal systems allow for appeals on decisions by the national regulatory authorities. ■

"Telecoms agreement is "major boost" to EU economy", Press Release IP/01/1801 of 12 December 2001
Texts adopted by the European Parliament on 11 December 2001, available at: http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=011212&LANGUE=EN&TPV=PROV&LISTING=AfficheTout

DE-EN-FR

European Parliament: New Resolution to Improve Circulation of European Films

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

A recent session of the European Parliament saw the adoption of a resolution on achieving better circulation of European films in the internal market and the candidate countries.

The scope of the resolution is very comprehensive, ranging from concrete proposals to cater for the development of the European film industry in the context of the anticipated revision of the "Television without Frontiers" Directive, to the encouragement of European airlines to show European-produced films during flights. It also includes an array of more traditional measures aimed at stimulating competitiveness and diversity in the European film industry, such as fiscal incentives, budgetary support (at the EU level and also State aid) and advantageous financing arrangements, eg. from the European Commission, the European Investment Bank and the European Investment Fund (in particular for the implementation of the i2i initiative).

The resolution urges the Commission to develop a consistent Community policy for the film sector, but it is also mindful of the need to show due deference to "the diversity of national circumstances" in the EU and candidate countries. The protection and promotion of the European film heritage is also called for in the resolution. The potential of new technological innovations for improving the distribution of European films, especially e-Cinema and those innovations of a digital variety, is given explicit recognition too.

For the purposes of the proposed revision of the "Television without Frontiers" Directive, the resolution recommends the examination of the "desirability and feasibility" of: "(a) introducing a framework for television broadcasters to devote a minimum proportion of their transmission time to promoting European films, (b) introducing a framework for a minimum transmission of non-national, European works, (c) introducing a framework for television broadcasters to invest a share of their annual turnover in the European film industry (either through global contributions to national/regional film funds or through individual co-productions and co-financing), an approach which is being applied successfully in certain Member States".

The preambular section of the resolution presents quite a detailed panorama of existing legal frameworks and ongoing development/financing schemes in this domain. The elaboration and adoption of the resolution have taken place against the background of the market share of European films in cinemas within the EU reaching "an all-time low" in 2000. ■

European Parliament resolution on achieving better circulation of European films in the internal market and the candidate countries (2001/2342 (INI)), adopted on 13 November 2001; provisional text available at:
http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALEND&APP=PV2&LANGUE=EN&TPV=PROV&FILE=011113
DE-EN-FR

NATIONAL

BROADCASTING

AL – Discussion on the editorial Independence of the Public Service Radio-Television

Hamdi Jupe
Albanian Parliament

The Parliament of the Republic of Albania has demanded an effective transformation of the Albanian State Radio-Television into a public service unit, granting it editorial independence through financial independence. In a letter addressed to the Albanian government in mid-December 2001, Parliament demanded the amendment of Law No 8435 dated 28 December 1998 "on the tax system in the Republic of Albania".

Based on this amendment to the law on taxes, the Albanian Radio-Television would benefit directly from the taxes paid by citizens for radio and television sets. This income of about EUR 2,4 million per year, actually makes up 60% of the stations' yearly budget. The Albanian State Radio-television has been changed into a public service broadcaster since the approval of the Law No. 8410 "for the public and private radios and televisions in the Republic of Albania" of 30 January 1998. But the tax law hindered a direct handing-over of these taxes to the public service stations as this amount was added to the Government's general budget. In practice, this put Albanian public service stations under the Government's control by financing their activities according to its interests. ■

Law No 8435 "on the tax system in the Republic of Albania" of 28 December 1998.
Law No. 8410 "for the public and private radios and televisions in the Republic of Albania" of 30 January 1998.
SQ

BE – RTL-TVI Opposes AB 3 to no Avail

Since 6 October 2001, the French-speaking Community of Belgium has had a new private television channel available to it. RTL-TVI, the former Luxembourg channel that became Belgian in 1986, and its little sister Club RTL have now been joined by AB 3. This is AB 3 as in "Antenne belge 3", whose French-sounding name was preferred to YTV (Youth Television), which had originally been chosen to indicate the main target of the new channel (15-35 year olds). But also AB 3 as in the French AB Group, which acquired an important share in the capital of the new channel (originally totally Belgian-owned) during the summer of 2001.

And that is nub of the matter. RTL-TVI wanted to stop AB 3 broadcasting, and consequently brought two urgent court cases. It based its arguments on a provision of the authorisation agreement concluded between YTV and the government requiring the founders of the new channel to undertake to retain at least 50% of its capital for a three-year period. RTL-TVI felt that the involvement of the AB Group in the capital of YTV/AB 3, achieved by means of an increase in capital, should be interpreted as a loss of control by the three original founders, who are natural persons.

RTL brought the first court case directly against the government of the French-speaking Community in an attempt to make it withdraw AB 3's authorisation. This was deemed inadmissible by the presiding judge of the court of first instance in Brussels, who found that no rule

François Jongen
Catholic University of Louvain
Auteurs & Media

or agreement had created any subjective right on the part of RTL to maintain a monopoly over the private television market.

One month later, the presiding judge of the commercial court in Brussels threw out the second case brought by RTL, brought this time against YTV / AB 3. Here the judge noted that the founders of the new company were themselves companies rather than natural persons, and that these companies remained the majority shareholders in the new company, even if the structure of their own body of shareholders had changed. ■

***Civ. Bxl (réf.), 12 novembre 2001, S.A. Tvi contre Communauté française* (Civil courts in Brussels (urgent cases), 12 November 2001, S.A. TVI v. French-speaking Community)**
***Comm. Bxl (Prés.), 5 décembre 2001, S.A. Tvi c. S.A. YTV* (Commercial courts in Brussels (presiding judge), 5 December 2001, S.A. TVI v. S.A. YTV)**
The decisions will be published [in French] in Auteurs & Media, 2002/1.

CH – No Right to Airtime

Oliver Sidler,
lawyer, Zug

The *Eidgenössisches Departement für Umwelt, Verkehr, Energie, Kommunikation* (Federal Department for Environment, Transport, Energy and Communication - *UVEK*) has dismissed a complaint by the *Helvetia Nostra* organisation against the public service TV station *SRG SSR idée suisse*. It ruled that the broadcaster's refusal to report the presentation of a cantonal petition for a referendum was compatible with the freedom of expression protected by Article 10 of the European Convention on Human Rights (ECHR).

In October 1997, *Helvetia Nostra* held a press conference, announcing that a petition entitled "*Sauver le pied du Jura*" had been presented in the Waadt canton. Even though a journalist from the Swiss TV station *SSR* had interviewed the President of the organisation at the press conference, the presentation of the petition was not reported subsequently on *SSR*.

The *UVEK* decided that the freedom of expression enshrined in Article 10 of the ECHR did not justify any claim for specific information to be disseminated by a broadcaster (the "right to airtime"). In this case, there was a conflict between the freedom of expression of the *Helvetia Nostra* organisation and the programming independence of *SSR*, which is also protected by Article 10 of the ECHR. The balance of interests lay in the broadcaster's favour. The decisive factor was that *SSR* had not categorically refused to report the cantonal petition. It had only failed to report its presentation. *SSR* had already reported the start of the collection of signatures and, throughout the complaint proceedings, had repeatedly stressed its intention to report on how the petition was dealt with in Parliament.

In the *UVEK's* view, a TV channel could not be forced to report something as long as it exercised its programming independence in accordance with journalistic principles.

Helvetia Nostra's original complaint to the *Unabhängigen Beschwerdeinstanz für Radio und Fernsehen* (Independent Complaints Authority for Radio and Television - *UBI*) had been upheld. At the request of *SRG SSR idée suisse*, the *Bundesgericht* (Federal Appeal Court) had quashed the *UBI's* decision, since the latter authority was only responsible for programmes that had actually been broadcast. The Court referred the case to the *UVEK*, which has now dismissed *Helvetia Nostra's* complaint.

The *UVEK's* decision may be challenged in the Federal Appeal Court. ■

Decision of the *UVEK*, case no.: 519.1/78 sto/anm
DE

FR – Urgent Referral to the Conseil d'Etat on Broadcasting "Titanic" in two Parts

Amélie Blocman
Légipresse

On 13 November last year, the *Conseil supérieur de l'audiovisuel* (official regulatory body - CSA) authorised the channel TF1 to broadcast the film *Titanic* in two parts on two consecutive evenings the following week. Because of the imminence of the broadcast, ARP, the authors, directors and producers group, submitted to the *Conseil d'Etat* firstly an application in an urgent matter to suspend the execution of the CSA's authorisation, and secondly an application on the merits of the case to have the authorisation cancelled on the grounds of the CSA exceeding its powers. Since 1 January 2001, administrative judges are indeed allowed, under Article L. 521-1 of the Administrative Justice Code, to order postponement of the execution of an administrative decision where an application has been made for its cancellation or alteration "where this is justified by the urgency of the matter and where grounds are put forward that are such as to raise serious doubts in the course of the investigation as to the legality of the decision".

The plaintiff company claimed that the provisions of Article 73 of the Act of 30 September 1986, according to which "the broadcasting of a cinematographic work (…) by an audiovisual communications company cannot be interrupted by more than one commercial break unless a waiver has been granted by the CSA", prevented a film being broadcast over two days. According to the complainant, the purpose of these provisions was to limit breaks in a cinematographic work as much as possible, as these interruptions split up the work and spoil it. Deliberating on the submissions aimed at having the CSA's decision postponed, the *Conseil d'Etat* noted that the investigation concerning the application in an urgent matter did not reveal that "the broadcasting in two parts, on two different days, of the film *Titanic* in a manner accepted by both the film's director and its producer – and indeed approved by another professional organisation of film producers, joined to the proceedings – was damaging to either the public interest, the situation of the complainants or the interests it was their aim to defend". The *Conseil d'Etat* held that the condition of urgency required by Article L. 521-1 of the Code of Administrative Justice could not therefore be deemed met and the request for postponement made to the judge sitting in urgent matters could not be entertained in the present case. TF1 was therefore within its legal rights in broadcasting *Titanic* on 19 and 20 November last year, whereas it was now for the collegiate bodies of the *Conseil d'Etat* to look into the matter of the compliance of the CSA's decision with Article 73 of the Act of 30 September 1986. ■

***Conseil d'Etat statuant au contentieux, ordonnance de référé du 19 novembre 2001, ARP et P. Rogard* (*Conseil d'Etat* deliberating in a dispute, order in an urgent matter of 19 November 2001, ARP and P. Rogard)**
FR

FR – Challenge to the Classification of "Audiovisual Work"

Amélie Blocman
Légipresse

On 15 November last year the *Conseil supérieur de l'audiovisuel* (official regulatory body - CSA) decided to classify the programme *Popstars*, broadcast on M6 since 20 September, as an audiovisual work, as it considered that this televised reality show – the purpose of which is to select candidates with a view to constituting a pop group – did not fall within any of the categories excluded by the official definition. Article 4 of the Decree of 17 January 1990 (amended) indeed provides a negative definition of an audiovisual work, defining it as a broadcast "that does not fall into any of the following categories: cinematographic works, news and information programmes, variety programmes, games, broadcasts other than fiction mainly filmed in a studio, sports broadcasts, advertising; teleshopping, self-promotion, and teletext services". It is for the CSA, as part of its duties to ensure that television services fulfil their obligations, and more particularly as regards the broadcasting and production of audiovisual works, to determine which programmes fall into this category. In the present case the CSA considered that the way the programme was staged and put together meant that it could not be classified as a game. Like a documentary or a work of fiction, the programme therefore had to be included in the calculation of M6's quotas for the production and broadcasting of French and European audiovisual works. Three months earlier, the *Centre national de la cinématographie* (French national cinematographic centre - CNC) had for its part decided that the broadcast was eligible for financial assistance under the support scheme by virtue of the Decree of 2 February 1995 in the same way as fiction broadcasts, animations, documentaries and certain magazine programmes. The CNC had put the broadcast in the "documentary" category at that point, because of the presence of a producer and considerable post-production and the absence of live broadcasting. These two consecutive decisions produced lively reactions from the main professional organisations (producers, collective management companies, etc), claiming that this constituted a "threat to the balance of the system" for aid, support and regulation of audiovisual creation. As this type of programme, which is less expensive, could be to the advantage of the support system and be included in the channels' quotas for production and broadcasting, there was a risk of more of them being produced, to the detriment of audiovisual fiction, documentaries or animated works. In its communiqué of 15 November, the CSA had for its part expressed its desire for consideration in conjunction with creators, producers, broadcasters and the CNC on the suitability of the present definition of an audiovisual work in the light of new concepts for programmes. On 7 December last year Catherine Tasca, the Minister for Culture, therefore decided to entrust the CNC with the task of considering in conjunction with the other parties concerned the evolution of television programmes and the possible consequences for regulation. Its initial conclusions are expected by the end of February. ■

***Communiqué n° 467 du CSA du 15 novembre 2001 – Qualification en œuvre audiovisuelle de l'émission Popstars* (Communiqué no. 467 by the CSA on 15 November 2001 – Classification of the programme *Popstars* as an audiovisual work)**

FR

GB – Television Programme Code Revised

David Goldberg
deeJgee Research/ Consultancy

On 15 November 2001, the Independent Television Commission published a revision to its Programme Code ("the ITC Programme Code"). The Section in question is 2.11 and it deals with the reporting of offences (including sexual offences) involving children (i.e., anyone under the age of 18). The Section now reads:

"Reporting of sexual and other offences involving children

Where children are or have been involved in police enquiries or court proceedings concerning sexual offences, special care needs to be taken to avoid the so called 'jigsaw effect'. This happens when several reports in different media give different details of a case which, when pieced together, reveal the identity of a child involved.

Particular care needs to be taken when reporting sexual crimes within a family. Naming the accused and describing the crime can have the effect of identifying the victim. Giving information about an accused person's address may contribute to the jigsaw which identifies the victim.

In 1993 most of the media agreed in principle to name the accused/convicted person (provided this is not a child) and not to name the victim. The ITC expects licensees to abide by this principle. The offence should be described as 'a serious sexual offence'. If the accused and victim are related, the victim should be described as 'a young woman' or 'a child' and so on.

When covering any pre-trial investigation into an alleged criminal offence in the UK, licensees should pay particular regard to the potentially vulnerable position of any person under 18 involved as a witness or victim, before broadcasting their name, address, identity of school or other educational establishment, place of work, or any still or moving picture of this person.

Particular justification is also required for the broadcasting of such material related to the identity of any person under 18 who is involved in the offence as a defendant or potential defendant." ■

"ITC Revises Programme Code", News Release No. 67/01 of 15 November 2001, available at: http://www.itc.org.uk/news/news_releases/show_release.asp?article_id=532
The Independent Television Commission Programme Code, available at: http://www.itc.org.uk/regulating/prog_reg/prog_code/index.asp?section=regulating

GB – Government Publishes Consultative Proposals on Media Ownership and Concentration

The UK Government's White Paper on Communications (see IRIS 2001-1: 8) promised more detailed proposals for reform of the complex rules on media ownership and concentration currently set out in the Broadcasting Acts 1990 and 1996 (a useful summary of the current rules is included as an annex to the new proposals). These have now been issued for consultation; to some extent they remain vague on key issues, but give some idea of the likely direction of change. A draft Bill will be published in 2002 with more detailed proposals.

The Government accepts the need for continued sector-specific rules in addition to ordinary competition law to ensure plurality of ownership, but states that it is committed to a deregulatory approach to media markets. Its key aims are to create the most competitive market possible whilst ensuring plurality of voice and diversity of content, and to create a robust yet adaptable frame-

work, but also to provide as much certainty and predictability as possible.

With these principles in mind, the Paper proposes to remove the current prohibitions on ownership of broadcasting licences by local authorities and advertising agencies whilst keeping prohibitions on ownership by political organisations and ownership by non-EEA individuals and bodies. Views are sought on the question of lifting the remaining prohibitions on ownership by religious organisations.

On concentration, the Government undertakes to remove the prohibition on the single ownership of the two London independent television licences, and to remove the important rule limiting any company's share of the television audience to 15%; instead ownership could be governed by ordinary competition law or by a rule prohibiting ownership of both ITV and Channel 5, thereby retaining at least four broadcasters providing free-to-air analogue television services. The effect of this change will be to permit (subject to general competition law) further consolidation of the ITV licensees into a single company. In the case of digital terrestrial television, controls have been lifted and there are now no effective limits on the ownership of multiplexes or the provision of programme services. For radio, more detailed deregulatory proposals are made, which will only prevent the accumulation of interests in local areas. Options are also discussed for reforming the current special rules for newspaper mergers under the Fair Trading Act 1973.

The most controversial question of all is that of restrictions on cross-media ownership. Currently this is governed mainly by the "20-20" rule which prohibits the proprietor of national newspapers with a share of 20% of the national market from holding more than a 20% share in an ITV company or Channel 5. The proposals cover a range of options here, from keeping the current rules to ending the restrictions altogether, or developing a "media exchange rate" to incorporate the different influences of different media, or setting new limits on all forms of cross-media ownership, for example that no owner might be allowed to control more than 20% of the audience in any three markets.

Finally, the proposals suggest the new rules might be subject to review every two years by the Office of Communications (OFCOM), the proposed new regulator. Change would require the consent of Parliament, but not new primary legislation.

The proposals will be followed by intense debate, in particular on the position of Rupert Murdoch's News Corporation, which currently has extensive newspaper interests, which in turn prevent a major stake from being taken in national terrestrial television or radio stations. ■

Tony Prosser
School of Law
University of Glasgow

"Consultation on Media Ownership Rules", Department for Culture, Media and Sport and Department of Trade and Industry, available at:
http://www.culture.gov.uk/PDF/media_ownership_2001.pdf

IT – Regulation on DTT

On 15 November 2001 the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority) adopted a regulation concerning the licensing of digital terrestrial radio and television broadcasting pursuant to article 2*bis* para 7, of law no. 66/2001 (*Conversione in legge, con modificazioni, del decreto-legge 23 gennaio 2001, n. 5, recante disposizioni urgenti per il differimento di termini in materia di trasmissioni radiotelevisive analogiche e digitali, nonché per il risanamento di impianti radiotelevisivi*, *Legge* of 20 March 2001, no. 66, in *Gazzetta Ufficiale* of 24 March 2001, no. 70, see IRIS 2001-4: 9). The adoption of the regulation follows a public consultation that was launched in spring 2001 (see IRIS 2001-6: 8).

The regulation lays down (article 1) the procedure for the award of twelve-year authorisations and licences for operators in the field of digital terrestrial radio and television broadcasting: authorisations are required for content and service providers, while network operators need a licence to carry out their activities. The *Ministero delle comunicazioni* (Ministry of Communications) is the competent authority for their award according to the provisions laid down in the present regulation.

Content providers (articles 2-11) are defined as persons who have editorial responsibility for the realisation of broadcasting programmes: any person who is established in the EEA may apply for authorisations, provided that the authorisations do not exceed the limit of 20% of available programmes.

Service providers (article 12) are defined as those who furnish conditional access services through a network operator or Information Society Services, as defined by Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC, or electronic programmes guides. Service providers have to comply with the provisions laid down by regulation n.216/00/CONS of the Authority (see IRIS 2000-6: 9) establishing the standards for decoders.

Network operators (articles 13-23) are defined as those who have the right to install, manage and furnish a network for electronic communications through which content and service providers transmit their services. Specific commercial agreements will regulate the relations between network operators and content and service providers.

Articles 24-29 introduce specific provisions in order to guarantee competition and pluralism of information in the new digital context. Holders of more than one authorisation have to keep separate accounts for each authorisation, while content providers who work as network operators have to provide for a structural separation of their activities. The same content provider may not broadcast programmes both at national and local levels, and a national operator is obliged to broadcast the same programme on the whole national territory. On the other hand, holders of a national licence may also transmit programmes which have been authorised on a local basis and vice-versa. One-third of available television multiplexes are reserved for local television broadcasters. By 31 March 2004, the Authority will adopt a regulation establishing specific provisions in order to ensure access under fair, reasonable and non-discriminatory conditions for content providers that are not linked to any network operator.

As far as radio broadcasting is concerned (articles 30-31), the Authority will adopt a specific regulation after the approval of the radio frequency plan; in the meantime, already-operating analogue radio broadcasters may apply for a temporary licence for experimental digital radio broadcasting where they already carry out their activities.

Articles 32-37 lay down provisions for the experimental phase in the digital terrestrial television broadcasting sector. Until 30 March 2004, television broadcasters who are already entitled to transmit on analogue terrestrial frequencies may apply for temporary licences for experimental digital broadcasting where they already carry

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

out their activities. After that date, broadcasters who have been temporarily authorised may apply for the conversion of their temporary licences into licences for network operators. Holders of a concession for television broadcasting may apply for the conversion of the concession(s) they hold into a licences for network operators at least six months before the expiry date of the concession(s).

The public service broadcaster (articles 38-39) is assured one multiplex for television broadcasting and one multiplex for radio broadcasting and is admitted *ipso iure* to the experimentation on these multiplexes, but may at the same time apply for licences related to further multiplexes pursuant to the same provisions which apply to private broadcasters. ■

***Delibera 15 November 2001, n. 435/01/CONS, Approvazione del regolamento relativo alla radiodiffusione terrestre in tecnica digitale* (Regulation concerning the licensing of digital terrestrial radio and television broadcasting of 15 November 2001), available at: http://www.agcom.it/provv/d_435_01_CONS.htm**

IT

Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, available at: http://europa.eu.int/eur-lex/en/consleg/pdf/1998/en_1998L0034_pr_001.pdf

EN

MT – Transmission of Major Events

Klaus J. Schmitz
Consultant St. Julians, Malta

On 25 September 2001 a list of major events was published as Legal Notice 806 of 2001. Broadcasters are prohibited from broadcasting on an exclusive basis any events that are regarded by the Malta Broadcasting Authority as being of major importance for society. The publication of this legal notice comes as a further step in Malta's efforts to fully transpose the Council of Europe's Convention on Transfrontier Television into domestic law.

The list includes local and international cultural and sporting events, as well as a number of traditional Maltese festivals, such as the Malta carnival and the March and September regattas. It may be interesting to point out that the sporting events include "the final of the local FA trophy", "the final of any European football club competition" and "all the matches in the final stages of the European national football championship and the World Cup". ■

***Trasmissjonijiet ta' Ġrajjiet Ewlenin* (Transmission of Major Events), Legal Notice 806 of 2001, available at: http://www.ba-malta.org/legislation/LN_806_2001.htm**

MT-EN

MT – Publication of Guidelines on Broadcasting Coverage of Tragic Events

Klaus J. Schmitz
Consultant St. Julians, Malta

In August 2001, the Malta Broadcasting Authority published Guidelines on the Broadcasting Coverage of Tragic Events. The guidelines were prepared by the Advisory Committee on Quality and Ethics in Broadcasting and are intended as guidelines for television and radio broadcasters in the reporting of tragedies. In the introductory section it is pointed out that the coverage given by the various television stations in Malta to tragedies that occurred during the summer of 2000 sparked the Broadcasting Authority's initiative to publish a set of guidelines. Similar documents in other countries were consulted, keeping in mind, however, the particular circumstances of Malta. Separate sections are dedicated to the victim of a tragedy, the relatives and the viewer. The guidelines also contain sections on the verification of facts, suicides, children and certain ancillary issues.

Broadly speaking, the guidelines contain an enumeration of general principles and specific restrictions aiming at preserving the dignity of victims of tragedies and their relatives, whilst safeguarding the audience's right to be informed.

A look at the section dealing with the victim illustrates how this is to be achieved. Whilst a tragedy affects primarily the victim and his/her relatives and friends, it is recognised that the event, once it has been reported, also becomes the concern of the audience. However, broadcasters reporting on the tragedy are to keep in mind that the subject is a person or persons who deserve to be treated with respect and dignity. In fact, no other consideration should override such respect and dignity. Specifically, the guidelines prohibit the close-up depiction of injured or deceased victims, unless there are reasons for doing so. Furthermore, they state that care should be taken not to linger unduly on the physical consequences of the tragedy. Also, broadcasters should not show persons dying, and should refrain from unsavoury or sensational speculation on the causes of the tragedy, the state of the victim before the tragedy, how the tragedy happened or any other factor which has not been duly verified.

The considerations regarding the dignity of the victim also apply to relatives and friends. Here again, principles and specific prohibitions are listed, notably, that reporting on the tragedy should not cause further distress. The section on the viewer contains several considerations regarding the impact of televised images on the viewer. In summary, this section and the section titled "Verification of Facts" contain generally-accepted principles of fair and balanced broadcasting.

No mention may be made of suicide except in exceptional circumstances. The relevant section gives expression to widely-shared concerns about the negative aspects of detailed portrayal of suicide, especially when there is some novel aspect which may be copied. This section is perhaps the most prominent example of how the particular circumstances of Malta, a predominantly Catholic country, have been taken into account for the drafting of the guidelines.

The guidelines also deal with the treatment and the rights of children in the event that their parents or the children themselves have been involved in a tragedy.

Finally, the guidelines contain provisions to prevent political or any other exploitation of tragic events. In a section entitled "conclusion", it is said that only a strong, overriding public interest can provide exceptions to these norms, and that, whilst the guidelines are generally geared towards television broadcasting, they also cover radio broadcasting, where applicable. ■

***Linji Gwida Dwar Il-Mod Kif Jigu Rappurtati Tragedji Fix-Xandir* (Guidelines on the coverage of Tragedies in Broadcasting), 20 August 2001, available at: http://www.ba-malta.org/guidelines/m_code_trag.htm#AAAA**

MT-EN

RO – Aggressive Father Christmas

Mariana Stoican,
Radio Romania International

In early December 2001, the Romanian supervisory authority for the electronic media, the *Consiliul Naţional al Audiovizualului* (CNA), criticised a mobile telephone advertisement and, in a communiqué, condemned its makers for disparaging the image of Father Christmas.

The TV commercial, which was produced in Romania by a mobile phone company publicising a special offer for the month of December, depicted three Father Christmases who, as "kung fu experts", fought with each other for the chance to hang their own mobile phone on the Christmas tree. After a few blows were traded, the "strongest" of them managed to drive away his competitors and give away his "presents".

In the CNA's opinion, such a portrayal of Father Christmas damaged the traditions and expectations connected with Father Christmas and could cause public disappointment and displeasure. The supervisory authority referred to Article 3 of CNA Decision No. 65/2000 on advertising regulations, under which "harming the interests of minors should be avoided". The CNA consequently wrote to the TV broadcaster, criticising the commercial as an "over-aggressive portrayal of Father Christmas" and urging the company to comply with the guidelines concerning the protection of minors. However, the advertisement was not actually banned. The public television company stopped showing the commercial after receiving the communiqué. ■

Communiqué of the CNA of 3 December 2001
RO

FILM

DE – Culture Minister Proposes New Film Policy

Caroline Hilger
Institute of European Media Law (EMR), Saarbrücken

On 14 November 2001, the Minister of State and Federal Government Commissioner for Cultural and Media Affairs presented a new film policy. He intends to reform film production aid and to ensure that German films are classified as cultural assets. This should help German films to attain a bigger market share in Germany and Europe and ensure that more German films are featured at international festivals.

The main points of the proposed policy can be divided into five sections. Incentives for the economic success of film productions (section 1), the legal framework for artistic creativity (section 2) and the distribution of German films abroad (section 3) should all be strengthened and improved. In addition, independent film producers should be given a more prominent role as key players in the film industry (section 4) and the cultural value of German and European films in general should be more widely recognised (section 5). Practical suggestions include, for example, as far as screenplays are concerned, a mentoring system and a new type of initial aid. However, this reform of film policy is merely a proposal, to be discussed in greater detail with players in the film industry in preparation for the amended *Filmförderungsgesetz* (Film Production Aid Act), which is due to be adopted in 2003. ■

***Vorschläge zur Reform der Filmförderung und zur Aufwertung des deutschen Films als Kulturgut des Beauftragten der Bundesregierung für Angelegenheiten der Kultur und der Medien Staatsminister Prof. Dr. Julian Nida-Rümelin* (Proposals of the Minister of State and Federal Government Commissioner for Cultural and Media Affairs for a new film policy). The policy is available at:**
http://www.filmfoerderung-bkm.de/internet/03politik/31.htm
DE

RU – Cinematography Deprived of its Tax Benefits

Natali Boudarina
Moscow Media Law and Policy Center

Since 1999 cinematography organizations had enjoyed preferential tax treatment in accordance with the Federal Statute on state support of cinematography in the Russian Federation of 22 August 1996 (See IRIS 1999-2: 11). But the period of validity of the legal rules under which the cinematography organizations were given tax benefits expired on 1 January 2002.

From this date on cinematography organizations shall pay full profit tax. Earlier such organizations were exempt from the part of the profit tax to be paid to the federal budget. These benefits concerned the profits from the production and screening of films.

According to the recent changes in the Tax Law, since 1 January 2002 the profit tax rate is 24 per cent, the part of the tax allocated to federal budget is 7.5 per cent. Under the aforementioned 1996 Federal Statute the profits received from completion of works and providing services on film production, film copying and distribution, as well as exhibition in cinemas were exempt from taxation on condition that the profits were directed to capital investment.

The exemption of such organizations from value added tax (VAT) remains in force. ■

Federal Statute *O gosudarstvennoy podderzhke kinematografii v Rossiyskoy Federatsii* (on state support of cinematography in the Russian Federation) was officially published in *Rossiyskaya gazeta* daily on 29 August 1996
RU

NEW MEDIA/TECHNOLOGIES

CH – Universal Service Extended in Telecommunications Sector

The Swiss government is taking technical and sociological developments into account by extending the universal service. From 1 January 2003, all Swiss residents will be entitled to a digital connection as well as an analogue terminal as part of the universal service. The *Bundesrat* (Federal Council) has fixed a maximum price for the use of a digital connection. The upper price limits for national telephone calls have been reduced in view of recent price developments. The price of an analogue connection remains unchanged.

The minimum quantity and features of public telephones (*Publifone*) have been lowered, since demand is steadily falling as a result of the growth of the mobile telephone sector. In principle, however, every local community will remain entitled to at least one public telephone. Depending on population size, geographical area and structure, further call boxes may be provided in loca-

Oliver Sidler,
lawyer, Zug

tions to be determined in consultation with the local authorities concerned.

The *Fernmeldegesetz* (Telecommunications Act - *FMG*) of 30 April 1997 stipulates that one or more telecommunications service providers should be obliged to make available all elements of the universal service to all sections of the population within the territory covered by their licence. Under an interim regulation, *Swisscom AG* must fulfil this requirement by the end of 2002.

Looking ahead to the expiry of this interim period, the *Eidgenössische Kommunikationskommission* (Federal Communications Commission - *ComCom*) is currently dealing with an invitation for tenders for the next universal service licence. ■

***Verordnung über Fernmeldedienste* (Decree on Telecommunications Services - *FDV*), available at:**
http://www.uvek.admin.ch/imperia/md/content/gs_uvek2/d/kommunikation/fernmelde/2.pdf (DE)
http://www.uvek.admin.ch/imperia/md/content/gs_uvek2/f/kommunikation/fdv/2.pdf (FR)

DE-FR

DK – Legal Regulation of the Networked Society under Consideration

Danish legislation on the information and communication media has to be adapted to the development of new technology by which the separate media shall be able to converge into multifunctional entities. In preparation for the arrival of the future information society a Committee established by the former Minister for Culture, Elsebeth Gerner-Nielsen, issued a report on convergence in the networked society (*Konvergens i netværkssamfundet*) on 7 June 2001. The report – examining the motives, powers and scenarios of future development - evaluates in Chapter 6 the sectoral legislation in force and its suitability for meeting the needs of the future regulation of the networked society. It is against this background that the Committee is considering what legislative initiatives should be taken in order to establish a sufficient legal basis for the future IT structure of the society.

Traditionally, the electronic media have been separated into two distinct sectors: two-way, point-to-point communication, and point-to-multipoint communication in the case of the mass media. As convergence brings these sectors together and makes them interactive, legislation will have to be built up in a non-traditional way. Legal regulation is needed on the one hand concerning the construction and exploitation of the technical infrastructure and on the other hand concerning the content of the activities regarding the promotion of competition between the services, cultural policy and the protection of consumers.

The *Lovbekendtgørelse nr. 701 af 15.7.2001 om radio- og fjernsynsvirksomhed* (Consolidated Act no. 701 of 15 July 2001 on Radio and Television Activities, RTA), deals with a public service regulation imposing obligations on the public broadcasters *Danmarks Radio (DR)* and *TV2* and a general regulation for every kind of broadcaster, in particular concerning broadcast permission. The establishment of convergence between the media requires legislation that regulates technologies other than the actual analogue technology. Public service can no longer be restricted to certain institutions, but has to concern an entire system of public and private broadcasters more or less subject to public service obligations. Article 6a, which is a new article inserted into the RTA in autumn 2000, has made this perspective possible, as it provides for general public service objectives which are not particularly linked to specific technologies, media or institutions. DR and TV2 are still expected to offer public service programmes, but other broadcasters now have the possibility of offering such activities on the new fourth and fifth radio channels. Thus, the public service regulation shall provide for programming policy rather than for certain institutions. This requires clarification of the notion of public service. A Public Service Council shall be established where broadcast activities shall be regulated and submitted to debates concerning public service obligations. Against this background, it is intended to create a balance between quality requirements and freedom for the services to plan their programme policy and exercise their right to freedom of information.

By the same amendment of the RTA in 2000, a new art. 6e was introduced. It provides the framework for introducing digital terrestrial radio and television activities. This form of broadcasting shall compete with digital satellite television, digital cable television and analogue terrestrial television. A wide choice of television channels and services is expected. It has still to be decided whether specific channel types may be offered, such as news channels and children's channels, or whether a balanced set of channels selected on the basis of financial support shall be established, such as channels subsidised by fees, sponsors or pay-per-view.

According to the RTA art. 6b, *cf.* art. 6a section 1, Internet activities have become part of the public service obligations of DR and TV2.

Chapter 2 of the RTA regulates the "must-carry" obligations, i.e., the rules providing for the distribution of radio and television programmes in local area networks. Together with the IT development, a conflict between the different objectives of cultural policy may arise as the "must-carry" obligations provide for a selection of programmes to be broadcast to the consumers which constitutes a bar to the free choice of the consumers. With the future increase of distribution capacity these rules will have to be revised. Similar conflicts are expected to arise concerning the rules based on the EU "Television without Frontiers" Directive on the protection of minors and on the broadcasting of European programmes.

The framework for the liberalisation of the Danish telecommunications sector was set up by a political agreement of 1990. The actual regulation is specified by sector and is subject to asymmetrical competition regulation. It is intended to change the focus from the telecommunications market to a communications market and to open up access for all Danish citizens to the networked society. Convergence has consequences for the delimitation between the telecommunications regulation and the media legislation as the currently distinct and separate services shall be merged on the same platforms and terminals. Overlap, gaps and conflicts between the different sets of rules may arise. An essential problem is that the telecommunications services are only regulated on the technical level. They are not subject to regulations on the content of the programmes on the cultural/political level. However, the international dimension presents obstacles to such regulation.

Concerning the regulation on transmission, it is intended to retain sector-specific regulation only in order to secure the obligations of supply and to establish a balance between the regulation of transmission and the regulation of programme content. The regulation shall be technologically-neutral and shall make it possible to cater for every kind of telecommunications service.

The structure of the future legislation on telecommunications shall be based on framework statutes implemented by ministerial orders in order to make the legal system flexible and smooth. In particular, the legislation on the distribution of frequencies has to be considered in order to set up a sufficient framework for the entry of new technologies to the market. On the organisational level it is intended to keep a common or a coordinated authority

Elisabeth Thuesen
Law Department
Copenhagen Business School

of control and advice.

In relation to consumer protection, access for all end-consumers to fundamental telecommunications services on reasonable conditions has to be secured. Furthermore, the security of application of telecommunications services has to be improved. Act no. 417 of 31 May 2000 on electronic signatures (*lov om elektroniske signaturer*) currently applies to this area. Concerning the regulation of the programme content, art. 89 of Act no. 418 of 31 May 2000 on competition and consumer relationships on the telecommunications market (*lov om konkurrence- og forbrugerforhold på telemarkedet*) provides for the access to establish further rules on the content of information services and other services corresponding to radio and television broadcasts.

The report is expected to be brought before the *Folketing* (Danish Parliament) in Spring 2002 in order to decide how to initiate a coordinated policy on convergence. A parliamentary debate, scheduled for autumn 2001, was postponed because of the general elections that were held on 20 November. The new Minister for Culture, Brian Mikkelsen, is responsible for convergence policy. ■

***"Medie-konvergens - venter vi på anarkiet, stormogulerne eller den tredje vej?"*, Press Release of 7 June 2001, available at:**
http://www.kum.dk/kum.asp?lang=1&color=31&file=/dk/31_IND.asp
***"Konvergens i netværkssamfundet"* (the Report on Convergence in the Networked Society), available at: http://www.moga.dk/konvergens/**
***Lovbekendtgørelse nr. 701 af 15.7.2001 om radio- og fjernsynsvirksomhed* (Consolidating Act no. 701 of 15 July 2001 on radio and television activities), available at:**
http://www.kum.dk/kum.asp?lang=1&color=37&file=/dk/37_IND.asp
Other Danish legislation may be accessed by using the "Kommando" function at: http://www.retsinfo.dk

DK

NL – Dutch Court Addresses Peer-to-Peer Issue

On 29 November 2001, the District Court of Amsterdam ordered a shutdown of the activities of Kazaa in the course of interlocutory proceedings. Kazaa is one of the recent peer-to-peer (P2P) programs enabling users to share computer files over the Internet. The Court also ordered Buma/Stemra, the Dutch music-rights organisation, to continue negotiations with Kazaa over a worldwide streaming-licence for the music of Buma/Stemra members.

Kazaa accused Buma/Stemra of breaking off the negotiations at an advanced stage. Buma/Stemra in turn asked the Court to order Kazaa to take appropriate measures to stop worldwide illegal reproduction and publication of their copyrighted music. Buma/Stemra ceased negotiations because of recent international developments. These include the Los Angeles suit filed by the RIAA, the American music-rights organisation, against MusicCity, Grokster and Kazaa, all services that enable users to share files over the Internet.

Ot van Daalen
Institute for Information Law (IViR)
University of Amsterdam

Buma/Stemra alleged that Kazaa was acting unlawfully by providing the software and services that enable users to download music from each other. Kazaa claimed to be unable to take appropriate measures to stop acts of infringement. Kazaa further denied that by offering the P2P software it infringed copyrights since it only acted as an agent. Thirdly, it stated that its users were not infringing copyright since a) the files are never made available to the public, b) exchange via the network is a form of private communication and c) exchange via the P2P network falls under the exception of article 16b of the Dutch Copyright Act 1912 (as revised), which permits replication for private exercise, study or use.

The Court decided that by enabling its users to download music via the software of Kazaa, it is in violation of Dutch copyright law. By offering the software in combination with the search-engine on its website, Kazaa can be regarded as a user of the music that is downloaded. The fact that the music can be downloaded via the P2P network and not via the website of Kazaa is irrelevant. It therefore ordered Kazaa to take appropriate measures to end this infringement. One of the measures suggested involves shutting down the site of Kazaa, thereby denying Kazaa users access to the search engine.

On the other hand, the Court concluded that the parties had been in a very advanced stage of negotiations. Developments on an international level are such that agreement on this subject could be attained within a reasonable amount of time. As no facts have been sufficiently proved by Buma/Stemra which would prohibit further negotiations between Kazaa and Buma/Stemra, the parties should therefore continue to discuss a licensing agreement. Lastly, Kazaa's allegation of abuse of a dominant position did not succeed.

The judgment is under appeal. ■

***Pres. Rechtbank Amsterdam, 29 November 2001, LJN-nummer: AD6395, Zaaknr: KG 01/2264* (Decision of the District Court of Amsterdam dated 29 November 2001), available at: http://www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=29615**

NL

RELATED FIELDS OF LAW

AL – Severe Sanctions for Piracy

On 5 October 2001 the Parliament of the Republic of Albania passed a "Law on Supplements and Amendments to Law No. 7564 on Copyright".

For the main part the amendments introduce new civil law sanctions for piracy of intellectual property as up to now the Law "On Copyright" provided for criminal prosecution only.

Hamdi Jupe
Albanian Parliament

Accordingly, national radio and television stations, hotels, producers of tapes and video cassettes as well as other producers of artistic works now have to pay fines of EUR 600 to 3000 in cases of violation of intellectual property rights. Local radio and television stations, discos, bars, restaurants and other minor users of the intellectual property could be fined EUR 400 to 1000 in cases of piracy.

The executive body will be the tax authorities, thus avoiding long court procedures as in the case of criminal prosecution. ■

Law No. 7564 on Copyright

SQ

CZ – Validity of "Lustration Act" Confirmed

On 5 December 2001, the Constitutional Court of the Czech Republic decided that the so-called "Lustration Act" did not contravene the Constitution, and therefore could remain in force.

The Act prohibits persons who were linked to the Communist regime from performing important civil service functions, particularly in public-service broadcasting.

The Court based its decision, *inter alia*, on the case-law of the European Court of Human Rights. A democracy should be allowed to defend itself. Moreover, it was not

Jan Fučík
Broadcasting Council Prague

that long since the Communist regime had been overthrown. These considerations outweighed the fundamental rights of the individuals concerned, including their right to work in the public media.

As far as Czech broadcasting is concerned, the Act applies not only to senior managers, but also to those who can influence programme content, such as producers, editors and script-writers. Nominations for these posts are subject to the internal administrative rules of the Czech broadcasting service. Applicants must possess a letter from the Ministry of the Interior, confirming that they were not linked to the Communist regime.

The "Lustration Act" will remain valid until a new Civil Service Act comes into force. ■

Act no. 451/91 Sl. on conditions for the exercise of certain civil service functions
CS

DE – Court Limits Video Sales by TV Broadcaster

Jan-Peter Müßig
Institute of European Media Law (EMR), Saarbrücken

In a ruling of 23 October 2001, the *Oberlandesgericht Düsseldorf* (Düsseldorf Regional Court of Appeal - *OLG*) upheld a complaint concerning the sale by the broadcaster of video recordings of programmes produced by third parties.

The defendant provides a TV recording service in co-operation with public-service broadcasters, selling video recordings of programmes broadcast on their channels. The plaintiff also sells video cassettes of programmes, having bought from two production companies the "exclusive video rights" to their particular productions. The *OLG* granted the injunction sought by the plaintiff.

The Court began by defining a film producer as the person who, in his or her own name, concludes the necessary contracts, bears the economic responsibility and organises the production of the film. In the Court's view, the use of the term "co-production" or "commissioned production" in the contract between broadcaster and producer is irrelevant. In this case, therefore, the two production companies were the film producers in the sense of the *Urheberrechtsgesetz* (Copyright Act - *UrhG*). They therefore had reproduction and distribution rights in accordance with Articles 16, 17.1 and 94.1 of the Copyright Act. The production companies had transferred these rights to the plaintiff under the terms of a contract.

The defendant claimed that, as a result of its contracts with the broadcasting companies, it had acquired the right to "televisual exploitation" or exploitation "for film and broadcasting purposes". However, the Court decided that such a right should, in accordance with Article 31 (paras 4 and 5) of the Copyright Act, be interpreted narrowly. It certainly did not entitle the defendant to sell video recordings.

The Court added that its decision was not altered by the inclusion in a contract between a broadcaster and one of the production companies, which had transferred its rights to the plaintiff, of a clause concerning the producer's duty to abstain from further assignment of rights. In the Court's opinion, such a clause was invalid under Article 9.1 of the *Gesetz über die Allgemeinen Geschäftsbedingungen* (General Terms of Business Act - *AGBG*), since it put the producer at an unreasonable and unfair disadvantage. ■

***OLG Düsseldorf, Urteil vom 23. Oktober 2001, Az. 20 U 19/01* (Düsseldorf Regional Court of Appeal, ruling of 23 October 2001, case no. 20 U 19/01)**
DE

FR – Limitation Period for Press Offences on the Internet

Amélie Blocman
Légipresse

In two consecutive decisions, the criminal chamber of the Court of Cassation has given a firm decision on the application of the short limitation period of three months for press-related offences committed on the Internet, and more specially on the matter of determining the date on which the three-month period starts. Judges have for a long time been divided on this, as some of them hold that the act of publication on the network is in fact continuous (see IRIS 2001-1: 13). This was the view adopted by the Court of Appeal in Paris on 15 December 1999 in a case submitted to the Court of Cassation on 27 November last year. In the initial proceedings, the appellant had been the complainant whose application had been considered out of time following the posting of an article that he considered to be defamatory on the site of an on-line newspaper. According to one of the arguments put forward, "each download to read the article on the screen constitutes a new act of publication marking the start of a new limitation period". Already in a decision made on 30 January last year (see IRIS 2001-4: 11), the criminal chamber of the Court of Cassation had acknowledged implicitly the application of the three-month time-limit for on-line press-related offences and the Court of Appeal had been criticised for not having attempted to determine the date on which the offence had actually taken place. In its decisions of 16 October and 27 November last year, however, the High Court took care to set out the applicable rule clearly and in identical terms. Thus, "where slander and libel proceedings are instigated following the posting on the Internet of a message included on a site, the starting-point of the limitation period for bringing a case provided for in Article 65 of the Act of 29 July 1881 should be determined as the date of the initial posting. This date is the date on which the message is first made available to Internet users". This wording still does not answer a number of questions that could arise from the actual implementation of these principles, such as who is required to furnish proof of the first publication, and how? ■

***Cour de cassation (crim.), 16 octobre 2001 – G. Tranchant et 27 novembre 2001 – Costes* (Court of Cassation (criminal chamber), 16 October 2001 – G. Tranchant; 27 November 2001 – Costes)**
FR

FR – Copyright Protection for Journalists and the Broadcasting of their Work on the Internet

Whereas companies, journalists and representative unions in press circles are currently concluding agreements aimed at regulating the re-use of work on the Internet, this type of agreement appears to be less common in the audiovisual sector. The courts are therefore sometimes called on to deal with disputes arising from the broadcasting of television news programmes on the Internet (see IRIS 1998-10: 3). On 16 November 2001, the regional court in Strasbourg found against a television channel that was broadcasting audiovisual programmes (television news broadcasts) as it could not produce proof of the agreement of the journalists who were the co-originators of the programmes.

The court held that compiling television news broadcasts of this kind constituted an "intellectual work" within the meaning of Article L. 112-2 of the Intellectual Property Code (CPI). They were, moreover, collaborative works, and case-law applies the presumption of Article L. 113-7 of the CPI to any audiovisual work, as this type of work implies the work of a number of contributors collaborating in the choices, selection of subjects

and shots, editing, compositions, presentations, etc. In the circumstances, as the programme could not be regarded as a "collective work", the producer – in this case the France 3 television company – could not be considered as the sole originator and exclusive holder of the economic rights attaching to the work. In the absence of specific provisions in the employment contracts between the applicants and the company France 3 on the matter, the judge referred to the national collective agreement on the work of journalists for guidance on the way in which rights should be transferred. As the agreement had been drawn up in 1983, the judge felt that the rights in respect of the distribution, reproduction and use of works that it covered could not refer to use on the Internet. The court therefore concluded that the company France 3, which could not claim to hold the intellectual property rights attaching to the programmes, should have asked the co-originators of the collaborative works in question for their authorisation.

Moreover, the court threw out the claim made by the company France 3 that the provisions of Article L. 761-9(2) of the Employment Code, according to which any further use of a work was subject to a specific agreement stating the conditions under which reproduction was authorised, were not applicable to a further full broadcasting of the television news programme by the same audiovisual company. Indeed it felt that, although the electronic version of the entire television news programme should be considered as a "further publication in the same newspaper", this did not challenge the principle according to which the right of reproduction was exhausted after the initial publication, as the further use of a work, even in the same newspaper, and whatever the support used, was not exempt from this rule. ■

Mathilde de Rocquigny
Légipresse

Tgi Strasbourg (2e ch. com.) 16 novembre 2001 Snj, Chavanel c/ Plurimedia et France 3
(Regional court in Strasbourg (2nd chamber, commercial section), 16 November 2001; SNJ, Chavanel v. Plurimedia and France 3)

FR

HU – Resolution of the Constitutional Court on the Scope of the Right to Reply and on the Limitation of the Amount of Public Interest Fine

On 5 December 2001 the Constitutional Court delivered a resolution on the amendment of Article 79 of Act 1959 on the Civil Code that has been adopted as "Lex Répássy" by Parliament on 29 May 2001.

The Amendment, in addition to other legal remedies that are specified in the Civil Code, was intended to grant a right to reply when opinions and comments are expressed that violate a person's honour and good reputation. According to the Amendment, in the cases of such violations, the Courts are obliged to impose a public interest fine on the media up to an unlimited amount. When the Amendment was adopted, the President of the State of the Hungarian Republic did not sign it, but instead forwarded it to the Constitutional Court for constitutional review. He argued that the existing legal remedies provide sufficient legal protection for those whose dignity and good reputation have been violated. As a result, he regarded the Amendment as unnecessary and disproportionate, and therefore unconstitutional. The President also requested the Court to rule on the constitutionality of the public interest fine as it is laid down in the Amendment.

All of the eleven members of the Court agreed that the Amendment is unconstitutional in its current form. The majority opinion of the Court argued that the Amendment grants an additional right to the rectification right, which is already laid down in the Civil Code. As a result, the Amendment in its current form does not create a proportionate relationship between the interest in protecting honour and good reputation by means of the right to reply, and the harm that the limitation of the freedom of the press and media and the freedom of expression may cause. Because the Amendment does not specify any limitation of the right to reply and at the same time also prescribes mandatory public interest fines on the press, it limits the freedom of the press and the freedom of expression to an extent that is not justified by the protection of honour and good reputation. However, according to the resolution of the Court, the lack of limitation on the amount of the public interest fine is not on its own unconstitutional. ■

Gabriella Cseh
Squire, Sanders & Dempsey Budapest

Resolution No. 57/2001 (XII. 4) AB, Hungarian Gazette No. 2001/137

HU

UA – New Statute on Elections

On 18 November 2001 President of Ukraine Leonid Kuchma signed the Statute on elections of the people's deputies in Ukraine (hereinafter "the Statute"). This Act deals comprehensively with the issue of media coverage of the electoral process. It obliges the media organizations to "impartially cover the course of the preparatory period and the conduct of elections" (Art.20). The Statute guarantees specific rights for "media representatives" in regard to access to the activities of the governmental and other official bodies involved in the electoral process. Designated state officials are responsible for providing information to the media.

A special chapter of the Statute is devoted to electoral campaigning in the media as providing an essential opportunity for Ukrainian citizens to "discuss freely the candidates' (parties') programs" and canvass for or against candidates. The Central Election Commission (CEC) is empowered to issue "explanatory notes" on the application of the Statute which are binding for subordinate commissions. In particular it establishes the detailed regulations for the media's participation in campaigning. The CEC oversees the media organizations' adherence to the Statute (Art. 22).

The Statute permits campaigning in all forms including dissemination of information through the mass media provided such activity does not violate the Constitution and other laws and adheres strictly to the electoral legislation. According to the latter the media campaign period is confined to 50 days before the election day (Art. 50). The Statute does not regulate such campaign materials as official statements (without comments) on the candidates' activities in fulfilling their professional duties/functions.

The Statute establishes specific rules for campaigning in the state and municipal electronic and print media, paid for out of the state budget. A candidate or a party could also campaign in the media using money from its own electoral fund, provided the campaign follows the general equal opportunity requirement of the Law. This implies equality of access to the media and equal payment for using airtime or print space.

All the broadcasting companies shall publish their election advertising tariffs 70 days in advance of the election day, provided the price per minute does not exceed the usual price for commercial advertising during the same period of the day. The price cannot be changed during the campaign (Art. 53).

The state and municipal broadcasters are obliged to provide airtime for budgetary-financed campaign spots between 7 and 10 p.m. The budget financing should be allocated by the CEC. Its amount should provide for at least 30 minutes on national channels and 20 minutes on regional channels.

Expression of any comments or analysis of the campaign statements made by the candidates shall be prohibited for a period of at least 20 minutes before and after broadcasting of the campaign spots where such statements were made. The same prohibition concerns distribution of any information on a party or a candidate 20 minutes before and after broadcasting of their spots.

The schedule for the provision of the budgetary-financed (free) airtime on the state and municipal channels shall be compiled in accordance with the lottery among the candidates and officially published in government newspapers 3 days after the respective election commission approves it.

The CEC and district electoral commissions will reimburse the expenses of the state national and regional broadcasters respectively in accordance with estimates drawn up by the CEC.

The broadcasting organizations may provide airtime to candidates only in accordance with a written agreement on the pre-payment basis.

The broadcasting organizations are obliged to keep records of all the elections broadcasts for 30 days after the announcement of the election results and provide them as well as related documentation to the governmental bodies for inspection (Art. 55).

The Statute introduces restrictions on participation in the electoral campaign (e.g. on military or penitentiary property, setting out special procedures for candidates' visits to such places). It outlaws participation in such activity for non-Ukrainian citizens, civil servants and members of the election commissions.

In broadcasts that are not considered electoral spots, the state and municipal broadcasters shall not comment or express their views on the political positions of the candidates. The Central Election Commission shall be entitled to apply to court to suspend the activities of those media outlets that violate this prohibition.

If a media organization distributes any information considered defamatory by the candidate or a party concerned the former shall provide an opportunity for response or refutation (Art. 56) not later than 3 days after dissemination of the original story.

The governmental regulatory body in the broadcasting field is obliged to provide that the budgetary-financed electoral broadcasts on the two national channels do not coincide.

The Statute prohibits insertion of political advertisements into information and news programs, prescribing that such spots should be distinguishable and be separated from other programming.

Ukrainian media are not permitted to publish any public opinion polls for a period of 15 days before the election date. All campaigning activity in the mass media is prohibited from midnight the day before the election day. Any activity hindering the election campaign or any violation of the campaign rules is punishable under the law. ■

Yana Sklyarova
Moscow Media Law and Policy Center

***Zakon Pro vybory narodnyh deputatov Ukrainy* (Statute on elections of the people's deputies of Ukraine) adopted 18 October 2001, officially published in *Uryadoviy Kurier* newspaper on 2 November 2001.**

RU

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AGENDA

Digital Right Management
19 - 20 March 2002
Organiser: Euroforum France
Venue: Paris
Information & Registration:
Tel.: +33 (0) 1 44 88 14 88
Fax: +33 (0) 1 44 88 16 99
E-mail: inscription@euroforum.fr