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INTERNATIONAL

ARTICLE 19

Broadcasting Principles Devised by International Human Rights Organisation

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

The international human rights organisation, ARTICLE 19, Global Campaign for Free Expression, recently elaborated and issued a set of principles entitled "Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation". The Principles are the latest thematic focus of ARTICLE 19's International Standards Series. Previous sets of principles to appear in this series include: "The Public's Right to Know: Principles on Freedom of Information Legislation" (June 1999) and "Defining Defamation: Principles on Freedom of Expression and Protection of Reputation" (July 2000).

The first section of "Access to the Airwaves" comprises general principles. As such, the right to freedom of expression and information is reaffirmed and the importance of editorial independence and the promotion of diversity are stressed. The issues of emergency measures affecting broadcasting and the liability of broadcasters for the statements of others are then addressed. The second section of the document deals largely with structural considerations: the need for States to promote "universal and affordable access to the means of communication and reception of broadcasting services" and, in this connection, to give due consideration to the likely impact of prevailing economic conditions. Section 3 focuses on the equitable allocation of frequency spectrum.

Regulatory and complaints bodies are examined in detail in the fourth section. The need for their *de jure* and *de facto* independence is underscored, as is the need for a clear statement of the policy objectives that underlie broadcasting regulation. Such a statement of intent should guide the *modus operandi* of regulatory bodies at all times. Furthermore, the precise remit of regulatory bodies should also be a model of clarity. Criteria for membership of such bodies are elaborated in detail in order to prevent conflicts of interest and related difficulties from arising. The importance of the accountability of regulatory bodies to the public is also stressed. In addition, these bodies should be adequately funded in a manner that would not compromise their independence and all decisions taken by these bodies should be subject to judicial review.

Licensing is examined at length in Section 5. This comprises an examination of issues such as licence requirement, responsibility for licensing, eligibility, licensing processes and licence conditions. An array of other major themes is also dealt with in "Access to the Airwaves": content matters; sanctions (procedure and proportionality); access to State resources; election coverage (adequate public information, voter education, direct access political broadcasts, commercial political advertisements and rapid redress) and public service broadcasting (independence, funding, remit).

As stated in the Preface to the Principles, it is intended that they will be used by "campaigners, broadcasters, lawyers, judges, elected representatives and public officials in their efforts to promote a vibrant, independent broadcasting sector that serves all regions and groups in society". ■

"Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation", International Standards Series, ARTICLE 19, Global Campaign for Free Expression, March 2002, available (soon) at: http://www.article19.org. All of ARTICLE 19's public documents, including the organisation's Virtual Freedom of Expression Handbook, are also available on this web site.

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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

• **Editorial Board:** Susanne Nikoltchev, Co-ordinator – Michael Botein, Communications Media Center at the New York Law School (USA) – Harald Trettenbrein, Directorate General EAC-C-1 (Audiovisual Policy Unit) of the European Commission, Brussels (Belgium) – Alexander Scheuer, Institute of European Media Law (EMR), Saarbrücken (Germany) – Bernt Hugenholtz, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Christophe Poirel, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) Andrei Richter, Moscow Media Law and Policy Center (MMLPC) (Russian Federation)

• **Council to the Editorial Board:**
Amélie Blocman, Charlotte Vier,
Victoires Éditions

• **Documentation:** Edwige Seguenny

• **Translations:** Michelle Ganter (co-ordination) – France Courrèges – Paul Green – Isabelle Herold-Vieuxblé – Bernard Ludewig – Marco Polo Sàrl – Katherine Parsons – Stefan Pooth – Patricia Priss – Erwin Rohwer

• **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: Three Violations of Article 10 by Austria

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

In three judgments of 26 February 2002, all against Austria, the European Court of Human Rights found a breach of Article 10 of the European Convention on Human Rights.

The first case (*Unabhängige Initiative Informationsvielfalt v. Austria*) concerned the publication in the periodical *TATblatt* of a leaflet referring to "racist agitation" by the *Freiheitliche Partei Österreichs* (Austrian Freedom Party, FPÖ). The text criticised the racist policy proposals of the FPÖ and was followed by a list of addresses and telephone numbers of FPÖ members and offices, with an invitation to the readers of *TATblatt* to call the FPÖ politicians and tell them what they thought of them and their policy. The Austrian courts, following civil proceedings initiated by the FPÖ leader, Jörg Haider, were of the opinion that the statement concerning racial agitation was to be considered as an insult and went beyond the limits of acceptable criticism by reproaching the plaintiff with a criminal offence. An injunction not to repeat the statement was granted against the publisher of the magazine. The European Court, however, in its judgment of 26 February 2002, was of the opinion that the statement was to be situated in the context of a political debate and that it contributed to a discussion on subject matters of general interest, such as immigration and the legal status of aliens in Austria. The Court did not accept the qualification of the statement on "racist agitation" as an untrue statement of fact and considered the comment to be a value judgment, the truth of which is not susceptible of proof. In sum, the Court unanimously concluded that it could not find sufficient reasons to prevent the publisher from repeating the critical statement in question. For these reasons, the Court held that there had been a violation of Article 10 of the Convention.

In a second case (*Dichand and others v. Austria*), the Austrian courts had issued an order to retract and not to repeat some critical statements published in the *Neue Kronen Zeitung*. These statements firmly criticised the strategies and interests of a politician-lawyer, Mr. Graff, who was the defence lawyer of another media group. The European Court again disagreed with the Austrian courts: according to the European Court, the impugned statements were value judgments which had an adequate factual basis and represented a fair comment on issues of general public interest. The Court accepted the criticism of Mr. Graff as a politician who was in a situation where his business and political activities overlapped. It was recognised by the Court that the statement contained harsh criticism in strong, polemical language. However, the Court recalled its standard jurisprudence that Article 10 also protects information and ideas that offend, shock or disturb. The Court unanimously came to the conclusion that the interference by the Austrian authorities had violated Article 10 of the Convention.

In the third case (*Krone Verlag GmbH & Co. KG v. Austria*), the European Court of Human Rights found that the Austrian courts had failed to take into account the essential function fulfilled by the press in a democratic society and its duty to impart information and ideas on matters of public interest. The case concerned the publication of an article, accompanied by photographs of a politician who had allegedly received unlawful salaries. A permanent injunction was granted by an Austrian court prohibiting the applicant company from publishing the politician's picture in connection with the article in question or similar articles. According to the Strasbourg Court, there was no valid reason why the newspaper should have been prevented from publishing the picture, especially as the photographs did not disclose any details of the private life of the politician concerned. The Court also referred to the fact that the picture of the politician as a member of the Austrian Parliament was included on the Austrian Parliament's Internet site. The interference with the newspaper's right to freedom of expression was therefore not necessary in a democratic society. Accordingly, the Court held unanimously that there had been a violation of Article 10 of the Convention. ■

Judgment by the European Court of Human Rights of 26 February 2002 (Former Third Section) in the case of *Unabhängige Initiative Informationsvielfalt v. Austria*, Application No. 28525/95;
Judgment by the European Court of Human Rights of 26 February 2002 (Former Third Section) in the case of *Dichand and others v. Austria*, Application No. 29271/95;
Judgment by the European Court of Human Rights of 26 February 2002 (Former Third Section) in the case of *Krone Verlag GmbH & Co. KG v. Austria*, Application No. 34315/96; all available at: http://www.echr.coe.int

EN

EUROPEAN UNION

European Commission Urges Unbundling of Local Loop

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

The European Commission started infringement proceedings on 20 March 2002 against France, Germany, Ireland, the Netherlands and Portugal for failure to comply with Regulation 2887/2000 regarding the unbundling of the local loop. These Member States are to respond to the Commission's request for information within two months.

Regulation 2887/2000 obliges operators with significant market power to publish and update a reference offer for unbundled access to their local loops and related facilities (see IRIS 2001-2: 3). The same principle applies to the local sub-loop. The Annex to the Regulation sets out the minimum list of items to be included in the reference offer. In sum, the reference offer by the incumbent should be complete and sufficiently detailed in order to make sure that the beneficiary does not pay for network elements that it does not need.

The local loop refers to the cable connecting the subscriber's premises to the main distribution frame or equivalent facility. The local sub-loop refers to a partial local loop connecting the subscriber's premises with an intermediate access point in the network. Access to the local sub-loop is essential for offering broadband technologies, such as VDSL, the high-speed version of ADSL. The local access network has been identified by the Commission as one of the least competitive areas of telecommunications. This view has been confirmed in a sector inquiry report on the unbundling of the local loop prepared for the Commission and published on 1 March 2002. The Commission already took action against Portugal, Greece and Germany in December. These proceedings have since been closed, however, after effective remedies were taken by the Member States in question. ■

"Telecommunications: Commission takes further action on unbundling infringement proceedings against five Member States", Press Release of the European Commission of 20 March 2002, IP/02/445, available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/445|0|RAPID&lg=EN&display= (EN)

DE-EL-EN-FR-NL-PT

Legal Study on Part II of the Local Loop Sectoral Inquiry, Contract Number Comp. IV/37.640, Squire Sanders Legal Counsel Worldwide, February/March 2002, available at:
http://europa.eu.int/comm/competition/antitrust/others/sector_inquiries/local_loop/

EN

European Commission: Proposal for Council Framework Decision against Racism and Xenophobia

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

A Proposal for a Council Framework Decision on combating racism and xenophobia was presented by the European Commission at the end of November 2001 and is currently under consideration by the European Parliament. The purpose of the Framework Decision will be, according to its draft first article, to lay down "provisions for approximation of laws and regulations of the Member States and for closer co-operation between judicial and other authorities of the Member States regarding offences involving racism and xenophobia." It goes on to define the terms "racism" and "xenophobia" in draft Article 3: "the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor determining aversion to individuals or groups". The key article of the Framework Decision, however, will be Article 4 – Offences concerning racism and xenophobia. In its draft form, it reads:

"Member States shall ensure that the following intentional conduct committed by any means is punishable as a criminal offence:

(a) public incitement to violence or hatred for a racist or xenophobic purpose or to any other racist or xenophobic behaviour which may cause substantial damage to individuals or groups concerned;

(b) public insults or threats towards individuals or groups for a racist or xenophobic purpose;

(c) public condoning for a racist or xenophobic purpose of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court;

(d) public denial or trivialisation of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 in a manner liable to disturb the public peace;

(e) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;

(f) directing, supporting of or participating in the activities of a racist or xenophobic group, with the intention of contributing to the organisation's criminal activities."

Draft Article 5 enjoins Member States to ensure that "instigating, aiding, abetting or attempting to commit an offence referred to in Article 4 is punishable." Also of note is that draft Article 7 provides for aggravated sentencing when the perpetrator is acting in the exercise of a professional activity and the victim is dependent on that activity. Draft Article 8, then, stipulates that racist and xenophobic motivation may be regarded as an aggravating circumstance for the determination of penalties for offences.

When adopted, this Proposal is likely to become a mainstay of future anti-racism action emanating from the EU. Of particular importance for the media is the draft preambular assurance that "[T]his Framework Decision respects the fundamental rights and observes the principles recognised in particular by the European Convention on Human Rights, in particular Articles 10 and 11 thereof, and by the Charter of Fundamental Rights of the European Union, and notably Chapters II and VI thereof" (see IRIS 2000-9: 4). ■

Proposal for a Council Framework Decision on combating racism and xenophobia (presented by the Commission), COM (2001) 664 final, Brussels, 28 November 2001 (not yet published in the Official Journal of the European Communities). For background, see: http://europa.eu.int/scadplus/leg/en/lvb/l33178.htm (EN)

DA-EL-EN-ES-FR-IT-NL-PT

European Commission: Extension of Safer Internet Action Plan

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

The European Commission has decided to accord the Safer Internet Action Plan a two-year extension. This means that the present Action Plan (1999-2002), which has been central to the European Union's efforts against illegal and harmful content on the Internet, will now continue until the end of 2004. In financial terms, the Action Plan will benefit from an additional budget of 13.3 million EUR (*i.e.*, a total budget of 38.3 million EUR).

The objectives of the Safer Internet Action Plan are to: create a safer online environment by establishing a network of hotlines in Europe and by promoting self-regulation; develop content-filtering and rating systems; and encourage European transnational awareness initiatives.

It is anticipated that the extended Action Plan will play a role in the realisation of the goals of the eEurope Action Plan. It is also expected to focus on measures aiming to stimulate information-exchange and other cooperative actions between Member States and also candidate countries. Furthermore, it should convene all parties involved in self-regulatory practices in a suitable forum; address different types of illegal content or conduct, including racist material, and search for enhanced means of protecting children from the approaches of paedophiles through online communications. ■

"Commission adopts extension of Action Plan to Make the Internet a Safer Place", Press Release of the European Commission of 25 March 2002, Doc. No. IP/02/465, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/465|0|RAPID&lg=EN&display= (EN)

NATIONAL

BROADCASTING

AL – Annual Report on Broadcasters Rejected

The Parliament of the Republic of Albania rejected the Annual Report of the National Council of Radio-Television, the state authority for the licensing and monitoring of private radio and television in Albania, regarding the activity that occurred in 2001.

The Annual Report of the National Council, according to law no. 8410 of 30 September 1998 "On private and public radio and television in the Republic of Albania" is presented to the Parliament every year and has to be approved by 2/3 of the votes of all the Members of Par-

liament. This qualified majority of votes, required by law, is intended to protect the activities of the Council from arbitrary political interventions by the political parties in the Parliament. The National Council of Radio-Television is an independent body. The seven members of the Council are elected by the Parliament for a 5-year-period, no more than twice in succession. It communicates only with the Parliament through the annual report. The Council is composed of well-known intellectuals from different fields of culture.

The rejection of the report is linked to the conflict between the Council and a section of Albanian private radio and television over the Council's reproach that part of the private electronic media do not observe some of the obligations provided by the aforementioned law no. 8410. If the Parliament does not approve the report in the coming year, the Council has to be dissolved. ■

Hamdi Jupe
Albanian Parliament

Decision No.19 of 28 February 2002 of the Parliament of the Republic of Albania on the Disapproval of the Annual Report 2001 of the National Council of Radio and Television.

AL – Licences of 50 Private Radio and Television Broadcasters Suspended

The National Council of Radio-Television, the state authority that licenses and monitors the activities of private radio and television broadcasters in the Republic of Albania, decided on 15 March 2002 to declare invalid the licenses of 30 private broadcasters, and temporarily suspended the licenses of 20 other private broadcasters.

The Council took these measures because the radio and television broadcasters thus penalised had not paid their fees as provided for by law no. 8410 of 30 September 1998 "On private radio and television in the Republic of Albania". (see also IRIS 2002–2: 13) According to Article 33 point 3 ("Invalidity of license") of this law "the license is invalid when the applicant withdraws the license or does not pay the financial obligations envisioned by law 90 days after the time of official notification of its approval"

Before this decision was taken, there were 97 private radio and television broadcasters licensed for national and local transmission in Albania. According to the above-mentioned Albanian law, private radio and television broadcasters should pay an annual fee for their broadcasting license, as well as another annual levy on all their other business activities (Article 137 point 3). The National Council of Radio-Television had issued warnings to the radio and television broadcasters that had not made these payments.

Private broadcasters, since they began transmitting in 1997, have constantly been complaining about financial difficulties and their inability to pay the money due. The Parliament of the Republic of Albania reduced by a considerable amount the financial obligations of private electronic media (Law no. 8794 of 10 May 2001 "On some amendments to law no. 8410 of 30 September 1998 On private and public radio and television in the Republic of Albania").

The Council was determined to implement the law in an effective manner. A number of radio and television broadcasters that have paid regularly have continually complained about the unfair competition from the Media that did not pay their share. The Council granted an extra 15 days to the suspended radio and television broadcasters to enable them still to fulfil their financial obligation. ■

Hamdi Jupe
Albanian Parliament

Decision of the National Council of Radio-Television of 15 March 2002, available in Albanian at http://www.kkrt.gov.al/informacion/deklarate_per_shtyp.htm

SQ

AT – First Licence for National Terrestrial Private TV Channel

In a decision announced on 31 January 2002, the *Kommunikationsbehörde Austria* (Austrian Communications Authority - *KommAustria*) issued the first licence for national analogue terrestrial television. The decision was based on the *Privatfernsehgesetz* (Private Television Act), which came into force on 1 August 2001. The first licence, valid for ten years, was awarded to *ATV Privatfernseh-GmbH (ATV)*. In the same decision, which does not yet have legal force, three other applications were rejected.

The licence was awarded, *inter alia*, on the following conditions: using the allocated transmission capacities and including cable transmission, *ATV* must be accessible to at least 70% of the population by 1 February 2003 and at least 75% by 1 February 2004 and for the remaining duration of the licence; at least 20% of the channel's programming must be made up of its own productions.

Whilst one other applicant, *Kanal 1 Fernsehbetriebsgesellschaft m.b.H.*, was defeated in the selection procedure, which was unofficially dubbed a *Beauty Contest*, the other two (*Ganymedia Network GmbH* and *Andreas Sattler*) were ruled out before the procedure began because they failed to meet financial requirements.

According to the selection criteria laid down in the *Privatfernsehgesetz, KommAustria* must give precedence to the applicant which, *inter alia*, is expected to provide greater diversity of opinion, to broadcast the largest proportion of own programmes, to reach the greatest percentage of the population and to offer the service most relevant to Austria. These criteria should be applied as part of a flexible selection system.

Appeals against *KommAustria's* decision may be lodged with the *Bundeskommunikationssenat* (Federal Communications Senate); however, the decision stipulates that such an appeal would not delay its entry into force. ■

Albrecht Haller
University of Vienna

***Bescheid der Kommunikationsbehörde Austria vom 31. Januar 2002, Aktenzeichen KOA 3.005/02-24* (Decision of the Austrian Communications Authority - *KommAustria*, 31 January 2002, case no. KOA 3.005/02-24), available at http://www.rtr.at/web.nsf/lookuid/E037D05DEDD57C05C1256B6E002A6297/$file/Bundesweites%20Privatfernsehen.pdf**

DE

DE – Saarland Media Act Enters into Force

On 14 March 2002 the new *Saarländische Mediengesetz* (Saarland Media Act) entered into force. This Act contains regulations on the press, the organisation and distribution of broadcasting and media services, the allocation of transmission frequencies and the implementation of trials with new broadcasting techniques and media services (for details on the regulations, see IRIS 2001-6: 4).

This Act replaces the *Landesrundfunkgesetz* (Saarland

Yvonne Wildschütz
Institute of European Media Law (EMR), Saarbrücken/Brussels

Broadcasting Act – *LRG*) and the *Saarländische Pressegesetz* (Saarland Press Act - *SPresseG*).

***Saarländisches Mediengesetz* (Saarland Media Act - *SMG*), 27 February 2002, published in Saarland Official Gazette No. 12 of 13 March 2002, p. 498**

DE

DE – Digital Terrestrial TV in Berlin, Saxony, Saxony-Anhalt and Thuringia

Jan Peter Müßig
Institute of European Media Law (EMR) Saarbrücken/Brussels

On 13 February 2002, TV broadcasters *ARD, ORB, SFB, ZDF, ProSiebenSat.1* and *RTL* and the broadcasting regulator in Berlin, *Medienanstalt Berlin-Brandenburg (MABB)*, agreed that all terrestrial television channels received by means of standard aerials should use the digital DVB-T (Digital Video Broadcasting - Terrestrial) format by mid-2003.

DVB-T programmes can be received by means of conventional aerials as long as a decoder (set-top box) is fitted. DVB technology enables viewers to receive a much larger number of channels. Another advantage is the possibility of mobile reception. Apart from the cost of the decoder, the service is free to viewers. However, the changeover to DVB-T means that analogue terrestrial signals will have to be switched off.

The change will also require new provisions to be added to the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - *RStV*). Under para. 52a (2) of the *6. Rundfunkänderungsstaatsvertrag* (6th Agreement Amending the *RStV*, see IRIS 2002–2: 5), public service broadcasters are allowed to fulfil their duty to provide a universal broadcasting service using the whole range of transmission techniques. In particular, para. 52a expressly endorses the abolition of analogue terrestrial broadcasting. The *6. Rundfunkänderungsstaatsvertrag* will enter into force on 1 July 2002.

On 18 February 2002, the broadcasting regulators in Saxony (*Sächsische Landesanstalt für privaten Rundfunk und neue Medien – SLM*), Saxony-Anhalt (*Medienanstalt Sachsen-Anhalt – MSA*) and Thuringia (*Thüringer Landesmedienanstalt – TLM*) agreed to move forward together in support of digital television (DVB-T).

The switchover to DVB-T is also planned in other population centres, such as Cologne/Bonn from 2003 and the Ruhr area from 2004. According to a Federal Cabinet decision of 24 August 1998, DVB-T must be introduced nationwide by 2010. ■

***MABB* press release, 13 February 2002, on the digitisation of terrestrial television in Berlin, available at: http://www.mabb.de/aktuell/pm020213.html**
***Entwurf des 6. Rundfunkänderungsstaatsvertrag* (Draft 6th Agreement Amending the Inter-State Broadcasting Agreement), version of 12 November 2001, available at: http://www.artikel5.de/gesetze/EntwurfMDSTV6.pdf**
***MSA* press release, 18 February 2002 on DVB-T planning in Saxony, Saxony-Anhalt and Thuringia, available at: http://www.lra.de/news/news_detail.htm?id=260**

DE

DE – *ARD* Digital Broadcasting Strategy

Alexander Scheuer
Institute of European Media Law (EMR), Saarbrücken/Brussels

At their meeting in mid-March 2002, the Directors of the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (union of German public service broadcasters - *ARD*) decided on their strategy for digital broadcasting. Of particular significance is their intention to use all the different transmission methods in such a way as to ensure that all viewers and listeners can be reached in an appropriate way.

The *ARD's* broadcasting and telecommunications board (*RUTE*), chaired by the Director of *Saarländischer Rundfunk* (Saarland broadcasting corporation - *SR*), had drawn up a corresponding plan. Even after the full switch-over to digital technology, which is due to take place in the short to medium term, depending on the type of transmission, all users within a certain broadcasting area would have to be reached. Digital terrestrial television (DVB-T) would be particularly important as it would be the only totally independent means of transmission. This transition would require both private and public broadcasters to make high-performance frequencies previously used for analogue broadcasting available for the new system.

The Directors stressed that, as technology, media policy and media law developed, public broadcasters would be given fair and free access to digital platforms. In this connection, they urged the cable network regulators, under the principle of the freedom to broadcast, to ensure that broadcasting services were included. Public service channels could only be marketed by network operators with the broadcasters' consent. Network operators would not be permitted to unbundle or re-package public service channels. The strategy document assumes that the Multimedia Home Platform (MHP) DVB standard will be used as the basis for programme feeding. ■

DE – *ARD* and *ZDF* Support "Signal Solution" for 2002 World Cup

In early February 2002, broadcasters *ARD* and *ZDF* expressed their joint endorsement of the so-called "signal solution" for the digital satellite transmission of the 2002 football World Cup.

ARD and *ZDF* acquired the rights to broadcast the World Cup in Germany from the *Kirch* group. However, satellite broadcasts can also be received in other European countries. In its contract with *ARD* and *ZDF*, *Kirch* had insisted that the licensees should only be allowed to broadcast the event digitally via satellite provided they did not breach the exclusive transmission rights of licensees in other countries. There was a disagreement between the German rightsholders and the Spanish licensee *Via Digital* in relation to the broadcasting of the World Cup draw on 1 December 2001.

ARD proposed that the digital transmission should be altered so that programmes could only be received in Germany. World Cup matches would be broadcast via spe-

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

cial signals which could not be processed by foreign pay-TV decoders. Unfortunately, this would mean that German viewers would have to search for a new channel on their digital receivers. For this reason, *ZDF* had initially opposed this idea, proposing instead that the World Cup should not be broadcast digitally via satellite at all.

Tests have shown that programmes broadcast using the special signals suggested by *ARD* cannot be received by viewers in Spain and Poland using the standard pay-TV decoders available in those countries.

The *Kirch* group has so far rejected this plan, preferring encryption of the signals transmitted digitally via satellite.

The *Kirch* group and *Via Digital* are still arguing over whether their contract authorises German broadcasting of the World Cup using analogue satellite signals. Analogue broadcasting has always involved discrepancies between the territory covered by a licence and that in which signals can actually be received - a problem which has so far been tolerated. ■

Statement by Dr. Norbert Schneider, Chairman of the *Direktorenkonferenz der Landesmedienanstalten* (Conference of *Land* Media Authority Directors) on the consequences of satellite encryption, available at:
http://www.alm.de/aktuelles/presse/p190401.htm

DE

GB – Pro-life Party's Election Video Should Have Been Broadcast

David Goldberg
DeeJgee Research Consultancy

The Pro-Life Alliance, which is registered as a political party under the Political Parties, Elections and Referendums Act 2000, contested seats at the last UK general election.

It submitted a video to the BBC, ITV, Channel 4 and Channel 5 for transmission during its party election broadcast. The video contained images of the products of a suction abortion and some pictures of the results of an abortion at later stages. There was no sound and some text (including the text of Articles 2, 3 and 14 of the European Convention on Human Rights).

The broadcasters met several times to consider the video – the original and three further versions. It was decided that only the last version, which did not contain any visual images, could be approved for transmission. The justification was that transmitting any of the earlier versions would have conflicted with obligations in respect of taste and decency, even if the transmissions had been after 22.00 h and prefaced with a warning.

The obligations derive from the BBC Agreement (and Producers' Guidelines) and the Broadcasting Act 1990 (and the Independent Television Commission's Programme Code).

The Court of Appeal reversed the decision which had denied an application for a judicial review of the broadcasters' position. The highest test for denying a registered political party's freedom of political speech had not been met. Therefore, the broadcasters' decision was unlawful and was described by the Court as an act of censorship. Any refusal to transmit a political message, which was also part of a general election campaign, would only be sanctioned in the most extreme of cases, involving factors such as dishonesty or gratuitous sensationalism. ■

Regina (Quintavalle) v. British Broadcasting Corporation, Judgment of the Court of Appeal of 14 March 2002, reported in *The Times* Law Reports on 19 March 2002, available at:
http://www.thetimes.co.uk/article/0,,12-240599,00.html

GB – BBC Announces Reforms of its Governance

Tony Prosser
School of Law The University of Glasgow

The UK Government announced plans at the end of 2000 for a fundamental reform of communications regulation, creating a single new regulator to cover both telecommunications and broadcasting (see IRIS 2001-1: 8). A Bill is expected shortly that will implement the proposals. However, a controversial question has been the future regulation of the BBC. The new regulator will be responsible for regulating the BBC's basic standards of taste and decency; the application to it of quotas for matters such as regional and independent productions and the economic regulation of matters such as fair-trading. However, regulation of the BBC's qualitative public service remit will remain with its own Board of Governors, as will regulation to ensure impartiality. The proposals have been heavily criticised, notably by the BBC's commercial competitors, on the ground that the Board of Governors is not independent of BBC management and has not always operated in a transparent manner.

The Chairman of the Governors has now announced reforms to the system of governance. There will be a clearer delineation of the respective responsibilities of the Governors and of the BBC's Executive Committee. Key objectives will be published in Statements of Programme Policy and individual Governors will be given the responsibility to monitor performance against specific objectives each year, supported by a special administrative unit and the BBC's Broadcasting Councils in Scotland, Wales and Northern Ireland. Fair-trading advice will be provided directly by auditors to the Governors, and there will be a clearer separation of responsibilities for handling complaints about programmes, with the Governors being responsible for monitoring complaints-handling by management and the hearing of appeals. A new department of Governance and Accountability will be created to support the Governors, divided into units for Objectives and Compliance, Public Accountability and Business Administration.

The aim is thus to keep the existing self-regulatory system of governance whilst clarifying and defining responsibilities more clearly. The question of whether this is sufficient to justify the BBC's exclusion from Ofcom's remit in relation to its main public service broadcasting remit is, however, likely to remain controversial during the passing of the forthcoming Communications Bill and in the period leading up to the renewal of the BBC's Charter in 2006. ■

"BBC Governance in the Ofcom Age", the British Broadcasting Corporation (BBC), 26 February 2002, available at:
http://www.bbc.co.uk/info/bbc/pdf/bbcgovernancebooklet.pdf

For a summary, see "BBC Chairman unveils modern governance for the Ofcom age", BBC News Release, 26 February 2002, available at:
http://www.bbc.co.uk/info/news/news385.shtml

IE – Digital Television

The Broadcasting Act, 2001 (see IRIS 2001-4: 9) made provision for the introduction of digital television in Ireland. Under the Act, *Radio Telefís Éireann* (the national public service broadcaster, RTÉ) was accorded one full multiplex and had already signalled its intention to establish additional digital channels at an estimated run-

ning cost of EUR 50 million per year (see IRIS 2001-8: 11). However, RTÉ did not receive from the Government the size of increase in the licence fee that it had requested in order to fund the new channels.

In November 2001, RTÉ announced that it planned to offer its television and radio channels on the Sky platform in the Republic and Northern Ireland from April 2002. UK broadcasters were believed to have paid very large sums of money to Sky for carriage rights on its satellite platform. However, records obtained under the Freedom of Information Act in Ireland revealed that RTÉ had agreed carriage terms similar to those it already had with cable operators throughout the country. Cable operators in Ireland must carry RTÉ's programmes without charge. The deal would give Sky a strong foothold in the Irish market well in advance of a planned rival digital terrestrial network. RTÉ has been granted planning permission to build a satellite dish for the purpose.

The Broadcasting Commission of Ireland (BCI), the overarching regulatory authority for broadcasting in the state, contended that RTÉ required a satellite content contract under s.36 of the 2001 Act in order to enter into the deal with Sky. The BCI formerly regulated only the independent sector but acquired a role in relation to all broadcasting, including digital, under the 2001 Act. The present issue is therefore the first instance in which the BCI has assumed a role in relation to RTÉ. The issue of a satellite content contract normally involves payment of a fee.

It has now been confirmed that RTÉ requires such a contract. RTÉ has made an application to the BCI, as has TV3, the national commercial broadcaster. The BCI has agreed to grant RTÉ and TV3 permission in principle to join the satellite platform. The BCI has categorised it as a satellite retransmission contract, since it involves the unaltered, unabridged and simultaneous transmission of existing services. The RTÉ stations will be available on Sky free of charge for an initial period. TV3 is still in negotiations with Sky. ■

Marie McGonagle
Faculty of Law
National University of Ireland, Galway

"Sky deal similar to others in State, says RTE", *The Irish Times*, 5 January 2002, available at: http://www.ireland.com/newspaper/finance/2002/0105/555505092BZRTE.html
"Government digital TV plan in trouble", *The Irish Times*, 11 January 2002, available at: http://www.ireland.com/newspaper/finance/2002/0111/674444010BWDTTPLAN.html
"New dish will allow RTE broadcast on Sky system", *The Irish Times*, 11 January 2002, available at: http://www.ireland.com/newspaper/finance/2002/0111/799913146BWSKYTV.html
"RTE plan for Sky digital link on hold", *The Irish Times*, 24 January 2002, available at: http://www.ireland.com/newspaper/finance/2002/0124/1370807679BZRTE.html
"RTE applies for Sky satellite licence", *The Irish Times*, 20 February 2002, available at: http://www.ireland.com/newspaper/finance/2002/0220/3629473380BZRTE.html
"TV3 to join RTE on Sky Digital platform", *The Irish Independent*, 1 March 2002, available at: http://www.unison.ie/irish_independent/stories.php3?ca=184&si=699358&issue_id=6976

LT – Legal Developments concerning the Public Broadcaster

As one of the major legal developments of the year 2001, a draft law on a licence fee for the public broadcaster, the Lithuanian Radio and Television ("LRT"), was introduced in the *Siemas* (Parliament). Like the Bulgarian and Greek laws concerning license fee collection, the draft law suggests the use of electricity meters to enforce the fee.

At present the LRT Law states: "The LRT shall be funded from an allocation of the state budget, and from income obtained from general taxes for LRT's public services for transmission of radio and television broadcasts, advertisements, publications and films, and from sponsorship and revenues obtained from commercial activities. With the increase of LRT revenues derived from general taxes, LRT funding from the state budget shall be reduced accordingly".

However, the present wording "general taxes" was rejected by the Government and it was decided that the notion "license fee" would be introduced instead.

In December 2001, the *Siemas* decided that in accordance with the draft law the procedure for funding the LRT should come into effect from 1 January 2003 onwards. This timing appears at best to be only a vague possibility because it is unlikely that the law itself will be adopted before the December 2002 Presidential elections.

Other important developments in 2001 concerned the reduction of LRT staff from 1180 on 1 January 2001 to 720 on 1 January 2002 and the closure of the third Lithuanian radio programme. The audience share of Lithuanian public television has risen from 8 percent on 1 January 2001 to 12 percent on 1 January 2002. ■

Nerijus Maliukevicius
Executive Director
Lithuanian Radio and Television Commission

Declaration of the Radio and Television Commission of Lithuania of 2 April 2002 concerning the Draft Law Amending the Law on Telecommunications
LT

LV – Public Broadcasting under Discussion Again

Public service broadcasting was the subject of heated debates in Latvia in mid-February this year when the National Broadcasting Council (NBC) dismissed the Director General of Latvia Television. The NBC is an independent administrative authority established in September 1995 in accordance with the Radio and Television Law. Its responsibilities comprise the regulation of public service broadcasters and commercial broadcasters, the administration of the state's capital share in public radio and television, as well as the approval of the public broadcasters' statutes, and the appointment of their Directors-General. The NBC consists of nine members who are elected by the Parliament and represent political organisations in Latvia. Not more than three members of the Council may come from the same political organisation.

Latvia Television is a public service broadcaster as defined by the Radio and Television Law and operates on two national terrestrial frequencies, covering the whole territory of Latvia and providing 18 hours of programming per day. It is financed by state subsidies. However, the subsidies cover only 60% of the expenditures. The remainder has to come from revenue derived from sponsorship and the sale of airtime for commercials.

The Director General was dismissed because Latvia Television has a three-sided contract by which it sold 12% of the commercial airtime at dumping prices to two advertising agencies. In order to finance the purchase of airtime, the advertising agencies each had to take out a bank loan; these were guaranteed by Latvia Television. The management of Latvia Television justified this step by the necessity to finish the budgetary year 2001 without financial losses.

The NBC classified the contract as an unlawful deed and asked the Director General to resign from his position.

Staff members of Latvia Television, especially journalists from the News Department, used the dismissal of their Director General to revive the debate on introducing licence fees for public broadcasting. Currently, state subsidies for Latvia Television merely cover the costs of the News Department and a couple of other programmes, the maintenance of the TV building, and the expenses of

Lelda Ozola
International Relations Manager, National Film Centre of Latvia, Ministry of Culture MEDIA Desk Latvia

actual broadcasting incurred by the Radio and TV Centre (which is a separate state institution). Producers are obliged to seek additional financing for their programmes and together with journalists they demand more support from the NBC in this regard. According to the NBC, however, politicians are very reluctant to introduce another levy, particularly before the election. Nevertheless, the NBC has requested Parliament to review the possibility of introducing a licence fee for public service broadcasting in Latvia. The incumbent Government has expressed its opinion that increasing the state subsidy is preferable to introducing a mechanism for collecting licence fees, because the latter is a costly enterprise by definition.

In the meantime the competition for the post of Director General of Latvia Television has been announced. Due to the present position of Latvia Television producers and journalists, the NBC is going to organise discussions between the most promising candidates and Latvia Television staff. The decision will be announced on 3 May 2002. ■

NEW MEDIA/TECHNOLOGIES

DE – *Premiere* and *Arcor* Launch Video-on-Demand Pilot Project

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

On 6 March 2002, German pay-TV provider *Premiere* and *Arcor Online*, which operates an extensive national telephone and data exchange network, signed an agreement concerning a video-on-demand pilot project.

Arcor Online has been offering a video-on-demand service from its online platform www.arcor.de since December 2001. *Premiere* is now planning to use this platform to offer an extensive package of feature films, which it will market jointly with *Arcor*. The package will be available under the "*Premiere*" brand name from summer 2002 at the latest.

Users will need a Digital Subscriber Line (DSL) and free registration with *Arcor*. DSL technology uses the spectrum in telephone copper wire that is not needed for normal telephone calls. DSLs currently available have a maximum transmission rate of 768 Kb/s. The Very High Rate Digital Subscriber Line (VDSL) exhibited at the CeBIT trade fair in Hanover in March 2002 can transmit data at up to 10 Mb/s.

A film ordered from *Arcor* can be viewed on a computer screen as many times as the customer likes within a 24-hour period. If appropriate additional equipment is available, it may also be shown on a television set. The data is encoded and films can be paid for individually. The pilot project will initially run for a six-month period.

Since 13 March, German Internet access provider *T-Online* has been operating a broadband portal known as *T-Vision*, which can be used to its full extent by *T-Online* customers only. Users with a DSL who subscribe to *T-Vision* can download concerts, music videos and feature films, for example. Content providers include public service broadcaster *ZDF's* news programme "*heute*" and *RTL*. Paid content, such as television programme previews, is charged to the user's telephone bill. ■

***Premiere* press release of 6 March 2002, available at: http://www.premiereworld.de/cgi-bin/WebObjects/PWPortal.woa/42/wo/ip3fl0YHh8lb2lTYYeB1cj5Ob2d/6.0.8.3.3.3.0.2.0.0.PWEdiWOTextLinkNC**
***Arcor Online* press release of 6 March 2002, available at: http://www.presse.arcor.net/presse/pm/2002/01313/**
A general description of the *T-Vision* service offered by *T-Online* is available at: http://www.vision.t-online.de/visi/star/spec/uebe/CP/cc-ueber-t-vision.html

ES – Bill on E-Commerce

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

In February 2002, the Spanish Government presented a Bill on Information Society Services and E-Commerce. The main goal of this Bill is to implement into Spanish Law EC Directive 2000/31 ("Directive on electronic commerce"). This Bill includes definitions of Information Society Services and of the place of establishment of operators. It also deals with transparency obligations for operators; transparency requirements for commercial communications; the conclusion and validity of electronic contracts; liability of Internet intermediaries ("caching", "hosting"); on-line dispute settlement and the role of national authorities.

The presentation of the Bill was preceded by an open consultation, which allowed interested parties to submit their views. Some of the amendments that they proposed have been incorporated by the Government into the final version of the Bill. The two issues which still stir up the most controversy are the regulation of unsolicited commercial communications and the role that the *Ministerio de Ciencia y Tecnología* (Ministry of Science and Technology) would play in the enforcement of these provisions. ■

***Proyecto de Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico* (Bill on Information Society Services and E-Commerce), 8 February 2002, available at: http://www.setsi.mcyt.es/lssi/pdf/anteproyecto_lssice.pdf**
ES

IE – New Consultation on Communications Framework

On 6 March, the Office of the Director of Telecommunications Regulation (ODTR) issued a Consultation Paper in relation to the new regulatory framework for communication networks and services, recently adopted by the European Union (EU) (see IRIS 2002-1: 5 and 2002-3: 4). There has been little public comment in Ireland on the package which includes the Framework, Access, Universal Service and Authorisation Directives already adopted by the EU, and the Decision on Spectrum Management and Directive on Data Protection to be adopted separately.

The ODTR believes that Ireland is well-placed at present in respect of the liberalisation of the key elements involved in the internal market, *i.e.*, intra-community trade. For regulators, the relevant issues are international telecoms retail traffic, international interconnect/leased lines and international mobile roaming. For all but the last of these elements, the current ODTR view is that there is competition in the market, and provided this continues to be the case, the ODTR would assume that no new regulatory measures would arise in the new regime. The remaining element is international mobile roaming, which is a matter of concern generally in the EU and on which the ODTR and Oftel, its British counterpart, are currently engaged in a joint project. The ODTR takes the view that special national measures such as the 1999-

Marie McGonagle
Faculty of Law National University of Ireland, Galway

2002 programme in respect of leased line delivery to bring Irish performance up to the best international standards should continue to get priority. At present, telecommunications licensing is subject to the Postal and Telecommunications Act, 1983, amended to give effect to EU requirements for the sector. In contrast, broadcasting transmission is based on the Broadcasting Acts and the Radio and Television Act. Broadcasting retransmission services are subject to regulations made under the Wireless Telegraphy Acts while other services are also subject to regulations made under the Wireless Telegraphy Acts. As a result, while some licence conditions are common across the range of licences, different procedures and requirements apply to many of the services. The new EU framework requires that all of these various services be subject to technology-neutral common rules defined in the Directives.

The ODTR intends to issue a number of consultations and information notes over the next fifteen months with the aim of addressing all of the key issues and providing greater degrees of certainty as the implementation date draws near. ■

"Future Regulation of Electronic Communications Networks and Services: Future Authorisations, Consultation Paper", Doc. No. ODTR 02/22 of 6 March 2002, available at: http://www.odtr.ie/docs/odtr0222.doc

IE – Results of Consultation on Future of Internet

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

The Office of the Director of Telecommunications Regulation (ODTR) recently published the results of a consultation exercise which it initiated in July 2001 on the future development of the Internet in Ireland.

Since its creation in 1997, the ODTR's primary task has been to act as the Irish National Regulatory Authority (NRA) for the telecommunications sector. As such, the main focus of the consultation exercise was its own responsibility for the regulation of the communications networks underpinning the Internet.

The two most substantive sections of the document deal with the current state of the Internet in Ireland on the one hand, and likely future developments on the other. The first includes issues such as the leased line market, local loop unbundling, dial-up access, Internet Service Provider (ISP) payment for Internet services, as well as interconnection issues. The second, for its part, treats Internet developments, barriers to development, Public Switched Telephone Network (PSTN) congestion, flat-rate interconnection (dial-up market), Internet Protocol-based networks and new access mechanisms and models. Thirteen responses to the original consultation document (Doc. No. 01/47) were received by the ODTR and these reflect a variety of interests and preoccupations.

It is expected that the responses to this consultation exercise will exert considerable influence on the formulation of the ODTR's future Internet-related policies. They will also help to fill in a broader, emerging picture created by the responses to other consultation exercises on germane topics (the allocation of additional access codes and number ranges for dial-up Internet access (concluded); leased lines and wireless local loop (both forthcoming)). ■

"Response to Consultation: The Internet in Ireland – Communication Transmission and Delivery Issues", Office of the Director of Telecommunications Regulation, Doc. No. ODTR 02/20 of 19 February 2002, available at: http://www.odtr.ie/docs/odtr0220.doc

IE – Code of Practice and Ethics for the Internet

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

In January 2002, The Internet Service Providers Association of Ireland (ISPAI) published its first Code of Practice and Ethics. This is part of a largely self-regulatory approach aimed at eliminating and preventing harmful content on the Internet. The Code was drawn up in association with the Internet Advisory Board established by the Irish Government.

The Code is aimed at encouraging members of the industry to take responsibility for issues relating to enforcement, obligations and control. It sets out minimum practice guidelines for its members. For example, each member must: have an Acceptable Use Policy to which customers must adhere; provide information to customers about filtering tools; offer filtering software or filtering services to customers in accordance with best industry practices; include on their websites links to the ISPAI website and to the website of the child pornography hotline, <www.hotline.ie>. Members are also required to register with the hotline.

The Code recommends adherence to best practices, wherever reasonably possible, in relation to: respecting caching directions or restrictions upon the advice of their customers; providing information to their customers on software tools designed to protect customers' privacy; use of anti-spamming software; and investigation and prevention of hacking.

In regard to advertisements and promotions, members must endeavour to adhere to the standards of the relevant codes of practice for advertising and sponsorship (advertising and sponsorship are largely governed by self-regulation in Ireland).

Members must also comply with the Data Protection Act, 1988, and should have a privacy statement on their main website. There are also provisions regarding the transfer of domain names.

The Code set out a complaints procedure: initially the complainant and the member concerned must try to resolve the compliant themselves, but if this is not successful, the ISPAI may set up a Complaints Panel to investigate the matter. If a member is found to have breached the Code, the Board of Directors of ISPAI may impose sanctions. These range from requiring the member to remedy the breach of the Code, to suspending or expelling the member from the ISPAI. ■

Internet Service Providers Association of Ireland: Code of Practice and Ethics, 11 January 2002, available at: http://www.iab.ie/Publications/Reports/d33.PDF

IE – Child Pornography Hotline Issues First Report

In November 1999 the Internet Service Providers of Ireland set up a hotline service, www.hotline.ie, to combat child pornography on the Internet. This is one of a number of self-regulatory measures that have been taken by the Internet service provider industry. The hotline service works closely with various domestic bodies including *An Garda Síochána* (the Irish police force), and with the INHOPE Association, an international associa-

tion of hotlines in twelve countries (<www.inhope.org>).

The www.hotline.ie has just published its First Report, covering the period November 1999 - June 2001. It states that in that period, more than 600 reports of alleged child pornography (as well as a much smaller number of reports of other types of objectionable material) were received. Not all of the reports received resulted in actionable cases of child pornography, and in many other instances the offending material was outside the jurisdiction.

Once a report is received, the hotline service attempts to trace the material. If successful, the service will then assess it to see if it is potentially illegal under The Child Trafficking and Pornography Act, 1998. The Act makes it an offence for anyone to knowingly produce, distribute, print, publish, import, export, sell, show or possess any child pornography. If the material is located on a server based in Ireland, the hotline service issues a notice to the Internet Service Provider to remove the potentially illegal material, and *An Garda Síochána* may decide to begin a criminal investigation. If the material is located on a server based in another State that is a member of the INHOPE Association, the hotline service then hands the investigation over to the service in that State.

The First Report deals with a number of issues that have given rise to difficulties in the course of its work. These include: investigating complicated websites, some of which may be protected by passwords or viruses; tracking and managing reports, as there is no standard software package available that will do this in a secure, reliable and flexible manner; archiving reports and material – at present the INHOPE Association best practices state that the hotline service should not archive material, since in most jurisdictions it is illegal for hotlines to store or possess any child pornography; recruiting suitable staff – INHOPE best practices state that offers of help from members of the public should not be accepted; developing protocol with *An Garda Síochána*, the Data Protection Commissioner and Internet Service Providers; the rate of change in the Internet industry; handling reports relating to material from countries outside the European Union where no hotlines exist; and marketing and public relations issues. Although many of these issues have now been resolved with the assistance of more-experienced members of INHOPE, this took longer than anticipated.

The Report also contains some sample reports received from members of the public. It concludes with advice and guidelines to parents based on the EU Safer Internet Action Plan. ■

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

First Report of www.hotline.ie, available at:
https://www.hotline.ie/news/hotline_first_report.pdf

NL – First Spam Case in the Netherlands

An Internet Provider can refuse the sender of unsolicited commercial e-mail (also known as spam) the use of its transport facilities, because it does not have a universal service-connected legal duty to deliver. This was the judgment of the President of the Court of Amsterdam in the first-ever spam case in the Netherlands on 7 March 2002. XS4All, a Dutch Internet Provider, had applied for a temporary injunction.

The injunction was sought against AbFab, a Dutch marketing company, which had sent unsolicited commercial e-mail messages to a number of XS4All subscribers. After receiving complaints from several subscribers, XS4All requested AbFab to stop sending XS4All subscribers unsolicited e-mail. AbFab refused to stop, stating that the sending of unsolicited commercial e-mail was permitted under Dutch law. Furthermore, AbFab was acting in accordance with the Industry's Code of Conduct. Subscribers who did not want to receive commercial e-mail could opt out.

Matters were brought before the Court. Under debate was the question of whether unsolicited commercial e-mail is forbidden by European law, notably Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, and the Dutch implementation thereof in the *Telecommunicatiewet 1998* (Telecommunications Act 1998 – *Tw)*. Furthermore, it was a matter of discussion whether the sending of unsolicited e-mail and the way in which AbFab gathered the required e-mail addresses was an intrusion of privacy, forbidden by Article 10 of the Dutch Constitution and Article 8 of the European Convention on Human Rights, as well as the *Wet bescherming persoonsgegevens 2001* (Act on the Protection of Personal Data 2001 – *Wbp)*.

According to XS4All, the use of XS4All e-mail addresses by AbFab was also a violation of the trademark XS4All. Finally, using the XS4All facilities for unsolicited commercial e-mail was in breach of XS4All's code of practice. XS4All has no legal duty to deliver and can therefore determine its own conditions for providing services. However, XS4All forbids its own customers to send spam and is contractually obliged to protect its customers against spam. AbFab was therefore acting unlawfully by using the XS4All Internet facilities for the transport of spam.

The judge considered that while XS4All has no legal duty to transport, it has imposed a contractual duty on itself to do so. However, because XS4All has forbidden its customers to send spam, it can also prohibit third parties from using its facilities to send unsolicited e-mail messages to its customers, especially since XS4All has no legal duty to transport. It was on these grounds that the requested injunction could be granted. The other issues were not addressed in the judgment. AbFab is now forbidden to send unwanted commercial e-mail to XS4All subscribers who use an XS4All e-mail address. ■

Wilfred Steenbruggen
Institute for Information Law (IViR)
University of Amsterdam

Judgment of the President of the Court of Amsterdam of 7 March 2002 (XS4All v. AbFab), LJNno. AD9917 Caseno.: KG 02/183 P, available at:
http://www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=31892
NL

RELATED FIELDS OF LAW

CZ – Amendment of the Act on the Regulation of Advertising

The Parliament of the Czech Republic passed the Act Amending the Act on the Regulation of Advertising and on the Amendment to the Act on Radio and Television Broadcasting ('the Act"). The aim of the Act is to implement into Czech law the provisions of the European Directives concerning advertising. The Act defines advertising as an announcement disseminated by communica-

tions media, intended to promote business, including, but not limited to the production, consumption or sale of goods, construction, lease or sale of property, assignment or use of rights or obligations, support for the provision of services, promotion of trade marks or brand names, unless otherwise provided. The communications media, by which advertising is disseminated, are described as facilities making it possible to convey advertising, including, but not limited to the periodical press and non periodical publications, radio and television broadcasting, audio-visual performances, computer networks, carriers of audiovisual works, posters and leaflets. The amended law imposes restrictions on the advertising of different products and services and on different types of advertising. The advertising of products, services and any other means of supply or any other assets, the sale, provision or spreading of which would be in contravention of legal regulations shall be prohibited. Subliminal advertising, surreptitious advertising and misleading advertising are prohibited. Advertising of tobacco and tobacco products, human therapeutic preparations, medical products, firearms and ammunition is restricted. Comparative advertising is permitted if certain conditions are met as set out in a special law (Commercial Codex). Advertising for food and baby food is regulated in compliance with the relevant European directives. Advertising concerning special offers shall clearly and unequivocally indicate the dates on which the offer starts and terminates. The amended Law also regulates sponsorship.

The bodies responsible for supervising compliance with the Act shall be

- the Council on Radio and Television Broadcasting in respect of advertising disseminated via radio and television broadcasting,
- The State Institute for Drugs Inspection in respect of advertising of human therapeutic preparations,
- The Ministry of Health in respect of advertising of medical products,
- in all others cases the District Business Registration and Licensing Offices.

By administrative procedure the supervisory bodies may impose a penalty on any advertiser, advertising producer or disseminator, depending on how serious the breach of their duties is, and may do so repeatedly. The supervisory body may order any advertising that contravenes the law to be removed or terminated within a reasonable period of time.

The advertising producer shall keep a copy of each piece of advertising for at least 12 months starting from the date on which the advertising was last disseminated. In the event that legal proceedings are instituted before the expiry of the period referred to, the advertising producer shall keep the copy of the piece of advertising that is the subject of the proceedings until a decision is made in the matter concerned.

The Act shall come into effect on 1 July 2002. ■

Jan Fučík
Broadcasting Council Praha

***Zákon, kterým se mění zákon č. 40/1995 Sb., o regulaci reklamy* (Act Amending the Act Nr. 40/1995 Coll. on the Regulation of Advertising)**

CS

DE – *T-Online* and *bild.de* Joint Venture Authorised by Cartels Office

T-Online International AG (T-Online), which holds a dominant position in the German Internet access market, is to acquire a 37% share in *Bild.de AG*, a company owned by the *Axel-Springer-Verlag* and operator of the *Bild* newspaper's Internet portal. The joint venture, which will trade under the name *Bild.T-Online.de AG (Bild.T-Online)*, will operate an entertainment and news portal on the Internet.

On 8 March 2002, the *Bundeskartellamt* (Federal Cartels Office) authorised the venture subject to three conditions being met. Contrary to the original plans, the joint venture itself may not market Internet access as, according to the Cartels Office, this would strengthen the dominant position held by *T-Online*. Secondly, Internet users must be able to access the portal and view and download paid content via access providers other than *T-Online*. Furthermore, billing for paid content exclusively through *T-Online* is prohibited; users must be offered at least one alternative billing system of other providers. Therefore, access to content provided by the joint venture, including paid content, should be available to users who are not *T-Online* customers. Users would not therefore be obliged to subscribe to *T-Online* merely on account of attractive content offered by *Bild.T-Online*. In the opinion of the Cartels Office, the merger would not lead to the creation or strengthening of a dominant position in the paid content market (which is still in the development stage) if these conditions were met.

Should the practical implementation of the project deviate from these preconditions, the authorisation will not be effective. Consequently, putting the merger into effect would be a violation of the original prohibition. Moreover, such an administrative offence could be punished by an administrative fine. ■

Carmen Palzer
Institute of European Media Law (EMR), Saarbrücken/Brussels

Press release of the *Bundeskartellamt* (Federal Cartels Office), available at: http://www.bundeskartellamt.de/08_03_2002.html

DE – Patent Office in Legal Dispute with *Presse-Monitor Deutschland GmbH & Co. KG*

On 4 March 2002, the *Deutsche Patent- und Markenamt* (German Patent and Trade Mark Office - *DPMA*) issued an order against the *Presse-Monitor-Gesellschaft* (press monitoring company - *PMG*), instructing it to cease its business operations with immediate effect. *PMG* is run by the *Verband Deutscher Zeitschriftenverleger* (Union of German magazine publishers - *VDZ*) and the *Bundesverband Deutscher Zeitungsverleger* (Union of German newspaper publishers - *BDZV*), in partnership with several publishing companies. *PMG* constructs electronic press databases from over 90 newspapers and magazines and sells them to companies, authorities and other institutions. The publishers transfer their rights in their articles to *PMG* which, in return, distributes among the publishers the profit it makes from the databases. The German Patent and Trade Mark Office considers that the *PMG* is therefore acting as a copyright fees collecting company and should be licensed to do so. However, since it began this activity, *PMG* has not applied for such authorisation.

PMG immediately appealed against the Patent Office's decision and took its case to the *Verwaltungsgericht München* (Munich Administrative Court) when the Patent Office refused to withdraw its order that operations should cease immediately. The Patent Office then said

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

it was prepared to postpone enforcement of the order until the Court decided whether it should be lifted, enabling the company to continue operating for the time being.

At the request of *PMG*, a temporary order was also issued against the German Patent and Trade Mark Office. The Munich Administrative Court found that the press release of 8 March 2002, in which the *DPMA* informed the public about the issuing of the order, amounted to an illegal breach of *PMG's* business activities, insofar as the court of first instance had yet to decide on the appeal and related legal petitions. ■

See press release of the *Deutsche Patent- und Markenamt* (German Patent and Trade Mark Office) of 21 March 2002, available on the Internet at http://www.dpma.de/infos/pressedienst/pm022321, and press releases of the *Presse-Monitor-Gesellschaft* (press monitoring company), available on the Internet at www.pressemonitor.de/content/news/news.html

ES – Manufacturer of Blank Data CD-R Ordered to Pay Levy to Copyright Management Society

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

On 2 January 2002, a Spanish Court of First Instance held that Traxdata, a company which manufactures and distributes audio and data CD-R (CD-Recordable), had to pay a levy to the *Sociedad General de Autores y Editores* (SGAE), a copyright management society which administers the rights relating to music and audiovisual authors and editors.

According to Spanish copyright law, in certain cases a levy on the distribution and selling of storage means can be collected in order to compensate the music industry for losses due to copying. It was widely accepted that this levy was due in the case of audio CD-R and audio CD-RW (CD-Rewritable), as they have been designed to record music on them. However, Traxdata considered that no levy should be paid for the distribution of blank CD-R used to record data, as they were not intended to be used to record phonograms.

The Judge dismissed that argument, holding that the evidence provided by the SGAE had proved that data CD-R are suited to be used to record phonograms and are widely used for this purpose. Therefore, the Judge upheld the SGAE's claims, and ordered Traxdata, as a distributor of data CD-R, to pay an equitable compensatory remuneration to the SGAE in accordance with the terms established by article 25 of the 1996 Spanish Copyright Act. This judgment has been widely contested by some consumer groups and by Traxdata, which has appealed it before the *Audiencia Provincial* (Provincial Court). ■

***Sentencia del Juzgado de Primera Instancia n. 22 de Barcelona de 02.01.2002, Traxdata/SGAE*, available at: http://www1.sgae.es/html/asesjuri/jurisprudencia/pdf/st_traxdata.pdf**

ES

FR – The Advertisement Board Presents its "Child" Recommendation

Amélie Blocman
Légipresse

In the context of the thorough re-examination of the ethics of advertising and following the recommendation "on the image of the human person" last October, the *Bureau de Vérification de la Publicité* (Advertisement Board – BVP) – a professional self-regulatory institution involving both advertisers and agencies – presented its new "Child" recommendation on 14 March. The previous recommendation in this area dates back to 1975, and some of its provisions have been supplemented and updated, particularly as regards the provisions concerning decency and dignity, which now go beyond merely preventing child nudity in advertisements. Advertisers are required to make every effort not to propagate images that infringe the dignity and decency of children, and to avoid situations likely to belittle children or create a feeling of anxiety or discomfort. They must also refrain from portraying violence or ill treatment, so as not to encourage children to copy aggressive or violent behaviour. Article 2 covers "social responsibility" and prescribes that anti-social acts, behaviour contrary to the principles of citizenship or to health or the environment should not be presented in a favourable light. Moreover, advertising directed at children should take account of their level of maturity and experience, should not be misleading, and should in no circumstances arouse a feeling of urgency to make a purchase or suggest the indispensable nature of the purchase. Article 8 on "interactive advertising" is completely new. It covers all types of interactive advertising, whether the message is disseminated by telephone, Minitel or Internet; it must be clearly recognisable as advertising and, where it appeals directly to children and involves expenditure, the invitation to take part must specifically involve parents. Although the BVP readily admits that it intervenes infrequently as regards children, as the attention given to them is broadly integrated in the behaviour of all those involved in the profession, this recommendation is an expression of its desire to participate in and anticipate future developments. ■

"Child" recommendation adopted by the board of management of the BVP on 14 March 2002

FR

FR – First Opinions of the Intellectual Property Board (CSPLA)

Set up in May 2001 (see IRIS 2001-6: 14), the *Conseil supérieur de la propriété intellectuelle* (Intellectual Property Board – CSPLA) – the mediation body responsible for matters involving intellectual property – has adopted a number of opinions recently and its progress deserves a mention here. The CSPLA comprises four committees: "copyright of private-law salaried creators", "copyright of creators with the status of public agents", "private digital copying" and "joint copyright office". The purpose of the first committee is to seek means of ensuring the effective implementation of the copyright of salaried creators while at the same time giving employers the necessary legal security for exploiting the works created by salaried creators. Despite a considerable amount of work, it has not yet been able to draft a consensus opinion, as the logic of copyright comes up against that of employment law. As the committee's work has been extended, this opinion is now expected in time for the next plenary session of the CSPLA, to be held in April.

The CSPLA was also called on to consider means of facilitating the management and the acquisition of copyright and neighbouring rights for works – particularly multimedia works – requiring the agreement of a number of rightsholders. The committee responsible for this delivered an opinion on 7 March that proposed support for the setting up of an information and guidance platform common to all the societies collecting and distributing copyright fees, ensuring the identification in a single consultation of protected works sought, the hol-

ders of rights and the nature of those rights by networking their databases. This does not, however, appear to be worthwhile at present, since some societies for collecting copyright fees have already embarked on setting up a joint tool of this kind under the European Commission's "e-content" programme. A three-year deadline has therefore been set for completing the entire project, the objectives of which are also set out in the opinion.

On the same day, the committee on "digital copying for private purposes" delivered an opinion setting out the scope of beneficiaries of remuneration for private copying, particularly since the Act of 17 July 2001 which extended its scope to include creators and editors in respect of the reproduction of works on a digital recording support. It does not cover software and electronic databases, with the exception of copying for private purposes. The CSPLA indeed suggests that the legislator should adapt the method of calculating remuneration to match the digital environment by amending Article L. 311-4 of the CPI, in order to add the recording capacity of the support to the current criteria for liability, which is based on the duration of the recording. The CSPLA also feels it is important to amend the composition of the Brun-Buisson Committee responsible for implementing remuneration for private copying. Lastly, the CSPLA delivered an opinion on 20 December last year on the copyright of creators with the status of public agents, recommending that the CPI be supplemented in such a way as to give the administration the benefit of a mechanism for the legal transfer of rights in respect of a work created by a public agent as part of his work; thus if the administration wished to make commercial use of the work, it would be entitled to exercise an option. In addition to its continuing work on the rights of private-law salaried creators, the CSPLA is now actively considering transposition of the Directive of 22 May 2001. ■

Amélie Blocman
Légipresse

Opinion 2001-1 of the CSPLA on the creation of public agents; Opinion 2001-2 on the composition of the Committee provided for in Article L. 311-5 of the Intellectual Property Code (CPI); Opinion 2002-1 on remuneration for private copying; Opinion 2002-2 on setting up a joint office.
http://www.culture.fr/culture/cspla/avis.htm

FR

GB – Court Decision Tests Balance between Privacy, Confidentiality and Expression

A man, who happens to be a TV presenter, went out for an evening of drinking with friends. He ended up in a brothel. A prostitute performed a sex act on him. Photographs were taken of him, drunk and partially undressed. The prostitute offered the story and photographs to the media (in this case a newspaper). The newspaper asked for his reaction. He sought an injunction against publication, on the ground that his right to privacy, *inter alia*, under Article 8 of the European Convention, would be breached.

The High Court (Queen's Bench Division) upheld the claimant's application that publication of the photograph should not be permitted, but allowed the publication of the prostitute's story.

The Court said that, in deciding on the scope of the application of the claimant's privacy right(s), it had to have regard to Section 12 of the Human Rights Act, which concerns giving effect to the right to freedom of expression.

In this case, there were two parties' rights to consider: the media's right to freedom of expression and, also, interestingly, the prostitute's Article 10 right to impart information of a newsworthy nature.

The Court said that publication of the fact that the man had visited a brothel and details of what transpired would be unlikely to be restrained: the media's and the prostitute's freedom of expression should be given greater weight than the degree of intrusion into the claimant's privacy.

However, the publication of photographs of sexual activity - taken without the man's consent - would be likely to be restrained. Such photographs were particularly intrusive and there was no public interest in publication.

As regards confidentiality, the Court acknowledged that in law, confidentiality is afforded to sexual relations in a relationship. However, the Court said that confidentiality did not extend to "any" physical intimacy. The sexual relationship in question in this case was hardly a "relationship" in the ordinary meaning of the word. Further, a brothel was not a "private" place and it was not a place where all and anything attracted the protection of confidentiality. The relationship between a prostitute and a customer was also not, in its nature, confidential. ■

David Goldberg
deeJgee Research/ Consultancy

Theakston v. MGN Ltd., the High Court (Queen's Bench Division), Judgment of 14 February 2002

IE – Data Protection Regulations

Ireland's current Data Protection Act was passed in 1988, when the Internet and international data transfers were much more limited than today. At the end of 2001, the Minister for Justice signed the European Communities (Data Protection) Regulations, 2001. The regulations implement certain provisions of the EU Data Protection Directive (95/46/EC) and are due to come into effect on 1 April 2002. Under the new regulations, transfers of data to countries outside the European Economic Area (EEA) cannot take place unless one of a number of clear conditions designed to protect people's privacy rights are met. These include: approved contractual safeguards, the clear consent of data subjects, or the approval of such a country for such purposes by the EU. The Data Protection Commissioner has said that the new regulations should make life a lot easier for responsible organisations whose business involves the transfer of personal data overseas.

In addition to the Regulations, the Minister published the Data Protection (Amendment) Bill 2002 on 25 February. The Bill, when enacted, will amend the 1988 Act and will implement the EC Directive of 1995. The main changes to the 1988 Act relate to definitions, new rights for data subjects, new responsibilities for data controllers, new rules regulating the registration process and new powers and functions of the Data Protection Commissioner. The Bill includes both automated and manual data. It also contains the right to be informed, improved rights of access, employment rights, the right to object, to block certain uses of data and freedom from automated decision-making. It clarifies or makes firmer the responsibilities related to the handling of personal data and contains special exemptions for journalistic, artistic and literary processing. ■

Marie McGonagle
Faculty of Law National University of Ireland, Galway

The Data Protection (Amendment) Bill, 2002 & Explanatory Memorandum, available at:
http://www.dataprivacy.ie/images/dpbill2002.pdf
Detailed information on both the Bill and the European Communities (Data Protection) Regulations is available on the website of the Data Protection Commissioner:
http://www.dataprivacy.ie
"Regulations to modify laws on personal data protection", *The Irish Times*, 11 January 2002, available at:
http://www.ireland.com/newspaper/finance/2002/0111/2270254110BWDATA.html
"Data Protection Regulations", Letter from the Data Protection Commissioner, *The Irish Times*, 16 January 2002, available at:
http://www.ireland.com/newspaper/letters/2002/0116/index.html#1008956451944

RO – Advertising Act Amended

Mariana Stoican
Radio Romania International

On 21 February 2002, the *Consiliul Național al Audiovizualului* (CNA), which monitors the electronic media in Romania, published a Decision "on the amendment and completion of Audiovisual Council Decision no. 65/2000 on the application of rules on advertising, teleshopping and sponsorship in the electronic media". The proposed amendments mainly deal with self-promotion and teleshopping:

"Self-promotion is not profitable and is strictly limited to the publicising of certain programmes to be shown by the broadcaster concerned or by any other broadcaster owned by the same licence-holder. It is not included in the maximum time allowed for advertising.

[…]

Teleshopping slots are uninterrupted periods of at least 15 minutes during which the purchase or hire of goods and/or performance of services, in return for payment, are advertised directly to the public.

[…]

Teleshopping slots may be broadcast between the hours of 12 midnight and 11 am and between 2 pm and 5 pm, except on Sundays and public holidays. They may be broadcast between 12 midnight and 9 am on public holidays.

No more than eight teleshopping slots, totalling a maximum of three hours, may be broadcast in any one day. If a channel broadcasts for less than 24 hours per day, these figures decrease in direct proportion to the number of hours broadcast." ■

***Decizie pentru modificarea si completarea Deciziei Consiliului National al Audiovizualului nr. 65/2000 privind adoptarea Normelor obligatorii pentru publicitate, teleshopping si sponsorizare în domeniul audiovizualului* (Decision on the amendment and completion of Audiovisual Council Decision no. 65/2000 on the application of rules on advertising, teleshopping and sponsorship in the electronic media), *Monitorul Oficial al Romaniei, Partea* I, No. 169 / 11 March 2002**

RO

RO – Information Law Extended

Mariana Stoican
Radio Romania International

On 8 March, the "Decision on the approval of methodologies for the application of Act No. 544/2001 on free access to information of public interest" was published.

Under the provisions of this Act, which was only passed last year, public institutions must communicate information of public interest to the press within 24 hours. Accreditations must be issued within 48 hours of applications being submitted. Ministries and local public administrative bodies are obliged to set up their own press offices. Premises must be set aside for this purpose within 30 days of the rules being published. The necessary staff must be recruited and trained within 60 days. The Ministry of Public Information will create ten regional offices, which will offer advice on the establishment of local structures and monitor how the Act is enforced. By the end of the year, evaluation reports will be drawn up and, where necessary, current rules will be improved. ■

***Hotărâre pentru aprobarea Normelor metodologice de aplicare a Legii* nr. 544/2001 *privind liberul acces la informațiile de interes public, Monitorul Oficial al României, Anul* XIV Nr. 167 (Decision on the approval of methodologies for the application of Act No. 544/2001 on free access to information of public interest)**

RO

US – Supreme Court Rules that Federal Regulators Can Limit Rates for Utility Pole Use

Melissa Beck
Media Center New York Law School

On 16 January 2002, the U.S. Supreme Court handed the cable industry a clear victory in NCTA v. Gulf Power Company. The Court upheld the FCC's authority to regulate rates for utility—power, telephone—pole use, regardless of the type of service offered. Under the Pole Attachments Act of 1978, the FCC is required to regulate just and reasonable rates for pole attachments.

The 1978 Act's definition of a pole attachment is "any attachment by a cable television system … owned or controlled by a utility." The Telecommunications Act of 1996 expanded the definition of pole attachment to include "any attachment by a … provider of telecommunications service." The pole attachments at issue in this case were ones providing commingled cable and Internet (broadband) service, and ones providing wireless communications service.

First, the Court examined commingled cable and Internet service. The Court's analysis focused on the definitions of pole attachment in both the 1978 and the 1996 Acts. The majority concluded that the word "by" limits the regulation of pole attachments by who is doing the attaching, not by what is attached. Using this interpretation, an attachment of commingled services is still an attachment "by" a cable company even if it includes services in addition to cable.

The Court's dissent argued that the FCC must first classify broadband as a "cable service," a "telecommunications service," or some other form of service before it can have authority to regulate rates and to determine a just and reasonable rate.

Second, the Court examined the issue of wireless communications service and came to a similar conclusion. The Court read the 1996 Act to include any "attachment" of telecommunications equipment "by" a telecommunications service provider, regardless of whether attachments were of wireline facilities or of distinctively wireless equipment.

Respondents argued that there is a distinction between wire-based and wireless equipment because for wire-based equipment utility poles constitute a bottleneck facility. Yet most distinctively wireless equipment can be located anywhere sufficiently high. The statute does not make a distinction, however, and defines telecommunications service as the offering of telecommunications service to the public for a fee, "regardless of the facilities used."

The Court stated that the FCC has the authority to fill gaps where the statute is silent because agencies, as a general rule, have that authority when the subject matter is technical and complex.

The Supreme Court's decision overruled the Eleventh Circuit Court of Appeals (Florida) ruling that because the Internet has not been defined as a cable service, the FCC could not regulate prices. The Court of Appeals also ruled that the FCC lacked the authority to regulate the placement of wireless equipment on utility poles. ■

National Cable and Telecommunications Association, Inc. v. Gulf Power Co., Nos. 00-832, 00-843 (January 16, 2002).

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AGENDA

Creating eEurope with Broadband Cable
27 & 28 May 2002
Organiser: European Cable Communications Association
Venue: Brussels
Information & Registration:
Tel.: +44 (0) 1932 893 883
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E-Mail: ecca@informa.com
http://www.ebc-conference.com

4. Medienrechts-Kolloquium: Das Recht des Zugangs zur Satellitenübertragung im Zeichen der Digitalisierung
20 June 2002
Organiser: Institute of European Media Law (EMR), Landesanstalt für Rundfunk (LfR) Nordrhein-Westfalen
Venue: medienforum nrw, Köln
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http://www.emr-sb.de

EU Telecommunications Regulations & Law
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