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OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

2003 - 2

INTERNATIONAL

COUNCIL OF EUROPE

EUROPEAN UNION

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BROADCASTING

FILM

NEW MEDIA/TECHNOLOGIES

RELATED FIELDS OF LAW

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IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

Dear IRIS subscribers,

Susanne Nikoltchev
IRIS coordinator

The name Tarlach McGonagle has been closely linked with the production of IRIS for almost two full years. As a representative of our partner institution, IViR, Tarlach McGonagle has been the focal point for part of the IRIS network, revising the content and language used in many IRIS articles before forwarding them to the Observatory. He has also written numerous news items for IRIS as well as three IRIS *plus* articles.

On 1 February 2003, Tarlach handed over his IRIS-related responsibilities to a new colleague at the IViR, Sabina Gorini. Tarlach McGonagle, who will continue to work for the IViR, will now be concentrating mainly on his research. We hope that he will also remain part of the IRIS network.

The whole IRIS team would like to thank Tarlach for his excellent work and amiable co-operation over the last two years. We wish him well for the future. ■

INTERNATIONAL

COUNCIL OF EUROPE

Parliamentary Assembly: New Recommendation on Freedom of Expression in the Media in Europe

On 28 January 2003, the Parliamentary Assembly of the Council of Europe (PACE) adopted Recommendation 1589 (2003), entitled "Freedom of expression in the media in Europe".

The Recommendation catalogues a number of problems jeopardising freedom of expression/the media in Europe today. The exposition of each of these problems includes actual examples of the problems in individual Member States of the Council of Europe. Among the most pressing problems are: violence (at times fatal) from various quarters targeting (especially investigative) journalists, which constitutes the gravest, most extreme form of censorship; criminal prosecution and the imprisonment of journalists; other legal forms of harassment, including defamation actions or other financial sanctions which can have the effect of imposing crippling costs on proponents of freedom of expression; State interference in the operation of the media in general, and of natio-

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nal/public broadcasters in particular; inadequate public service broadcasting structures; insufficient legal protection for journalistic sources; outdated media legislation; spawning media concentrations; insufficient checks and balances to prevent conflicts of interest arising between the holding of political office and media involvement, and recourse to heavy-handed legislative and other measures affecting the media which are introduced under the guise of anti-terrorist strategies.

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Through the medium of this Recommendation, PACE therefore calls for renewed commitment to the freedom of expression goals of the Council of Europe and asks the Committee of Ministers to render public the results of its monitoring exercises in this domain. It requests the Committee of Ministers to urge Member States (where appropriate) to actively address the problems outlined above. The Recommendation also asks the Committee of Ministers to prompt States to revise their media legislation, thereby bringing it into harmony with relevant Council of Europe standards and recommendations; incorporating the Article 10-related jurisprudence of the European Court of Human Rights; ensuring the proper implementation of the foregoing and providing appropriate training for the judiciary in this regard.

The Recommendation was built on an identically-titled report prepared by the PACE's Committee on Culture, Science and Education under the rapporteurship of Mrs. Tytti Isohookana-Asunmaa. The Report outlines key problems concerning freedom of expression that have persisted since the adoption by the Parliamentary Assembly of Recommendation 1506 (2001) on freedom of expression and information in the media in Europe. Problems are identified and illustrated by concrete examples drawn from a miscellany of Council of Europe Member States (as in the Recommendation, but in greater detail here). The Report then embarks on a country-by-country review, highlighting issues of concern in respect of freedom of expression/the media in each of the countries included in the review. ■

- **Freedom of expression in the media in Europe, Recommendation 1589 (Provisional Edition), Parliamentary Assembly of the Council of Europe, 28 January 2003, available at: http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2FTA03%2FEREC1589.htm**
- **Freedom of expression in the media in Europe, Report of the Committee on Culture, Science and Education (Rapporteur: Mrs. Tytti Isohookana-Asunmaa), Parliamentary Assembly of the Council of Europe, 14 January 2003, Doc. 9640 revised, available at: http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorkingDocs%2Fdoc03%2FEDOC9640.htm**
- **Freedom of expression and information in the media in Europe, Recommendation 1506 (2001), Parliamentary Assembly of the Council of Europe, 24 April 2001, all available at: http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FAdoptedText%2FTA01%2FEREC1506.htm**

EN

Media Division: Consultation on Media's Role in Promoting Democracy and Participation in Information Society

On 19 December 2002, the Group of Specialists on on-line services and democracy of the Council of Europe published an outline position paper on the role of the media in promoting democracy and participation in the information society. The Group has invited European media professionals and other interested parties to comment on the document in order to collect information on what they perceive the changing role of the media to be and on how the media are responding to the changes.

The Group highlights five areas where the role of the media has changed. The first is informing the public about the activities of public authorities. The Group signals that more and more, this kind of information is directly available to the public on official websites. The importance of the role of the media has therefore changed from providing the public with this information to interpreting and highlighting the most important information.

The second area is the collection of the views of the public. Due to technological progress, the media can now collect the views of the public more directly than before, for example, by on-line voting. The Group would like to ascertain whether the media have guidelines on how to process and present the results of on-line voting.

Thirdly, due to new technologies, there are more possibilities for the public to engage in discussions about public affairs, for example in on-line chat sessions and discussion fora. This raises a number of questions, for example, whether participants should be allowed to conceal their identity; whether someone has been assigned responsibility for the content of the input by the public; whether there should be guidelines for participating in these debates and chat sessions and whether such on-line discussions should be moderated in certain circumstances (and if so, how).

The fourth area of attention is the promotion of democratic practices. In the information society, the media can publicise elections and encourage the public to participate in them. They can also suggest ways for public authorities to secure greater public involvement in their own activities.

Finally, the Group points out that the media should be drawing attention to excluded sections of society. In the information society, people who do not have access to the Internet could be excluded from participation in societal affairs. It is an important role of the media to give consideration to the views of these people, their concerns and their general situation. ■

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- **Outline position paper on the role of the media in promoting democracy and participation in the information society, Group of Specialists on on-line services and democracy (MM-S-OD), Council of Europe, 19 December 2002, available at: http://www.humanrights.coe.int/media/documents/Media-and-e-governance(EN).doc**

EN-FR

EUROPEAN UNION

European Commission: State Aid Probe Concerning Danish Public Service Broadcaster TV2

The Danish public service broadcaster, TV2, is one of two Danish public service broadcasters; the other is *Danmarks Radio* (DR). DR only undertakes public service activities and is entirely financed by the Danish State. TV2, however, only has to pursue a certain number of public service activities and, consequently, has a mixed financial basis consisting partly of State financing and partly of commercial financing through the sale of advertisements, etc. The State's financial support to TV2 is expressed by different means, including the distribution of licence fees payable by television-set owners; exemptions

from corporate taxes; non-reimbursable and interest-free founding loans and state guarantees for operating loans.

Following a complaint by commercial Danish broadcasting operators, the European Commission decided on 21 January 2003 to launch a State aid probe into possible over-compensation for TV2 by the Danish State. The probe will cover the period 1995-2002. The legal basis for the probe can be found in the principles set forth in the Communication from the Commission on the application of State aid rules to public service broadcasting (see IRIS 2001-10: 4). Pursuant to these principles, which are based, *inter alia*, on decisions of the European Courts of Justice and of First Instance, the State aid ban can only be derogated from when all of the following conditions are met: a) the service is a service of general economic interest; b) the undertaking must be explicitly entrusted by the Member State with the provision of that service, and c) the application of the ban on State aid must obstruct the performance of the particular tasks assigned by the State to the undertaking, and the exemption from the ban on State aid must not affect the development on trade to an extent that would be contrary to the interests of the Community.

Subject to these principles, the Commission has come to the preliminary conclusion that the Danish State over-compensated the net public service costs of TV2, thereby creating the risk that TV2 could cross-subsidise its commercial activities, including its commercial Internet activities, and thereby distort competition in the market. Further, based *inter alia* on an assessment of TV2's rebate policy, the Commission has doubts as to whether the prices TV2 charges for broadcasting advertisements on its channels would undercut those that a competing and efficient commercial operator would have to charge in order to cover its stand-alone costs. If such is the case, it cannot be ruled out that TV2's advertising activities are cross-subsidised by public resources. ■

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● **"State aid probe into possible overcompensation of Danish public service broadcaster TV2", Press Release of the European Commission of 21 January 2003, IP/03/91, available at:**
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/91|0|RAPID&lg=EN&display=

DA-EN-FR

European Commission: Eighth Report on Implementation of Telecommunications Regulatory Package

The European Commission's Eighth Report on the Implementation of the Telecommunications Regulatory Package of 3 December 2002 analyses the state of development of the European telecommunications market and gives an overview of the implementation of current regulation in all Member States. Due to the global economic downturn, the over-investment in "backbone capacity", and the high debts of operators in relation to the acquisition of third generation mobile licences, the market is not as stable as it has been over the last few years. In the Report, the Commission expresses its concern that this situation will strengthen market consolidation following liberalisation. This will possibly drive operators out of the market and will be a barrier for new operators wishing to enter the market. Despite the current difficult financial market situation, it was estimated that the telecommunications market would grow between 5% and 7% in 2002, compared to 9.5% in the previous year.

The Report's main conclusions on market development are that demand for services is still growing, that new entrants continued to increase their market share in terms of revenue growth, and that for consumers, there has been an overall fall in prices for national and international calls. The main regulatory conclusion is that regulation in Member States is "very substantially compliant" with the current EU legal framework. The only area of concern remains pricing and access issues with regard to unbundling of the local loop. In this respect, the principles of cost-orientation and non-discrimination should be fully implemented, and should extend to interconnection and the provision of leased lines.

According to the Commission, the present situation provides a solid base for the transition to the new regulatory framework, in which national regulatory authorities (NRAs), together with the national competition authorities, will play a key role. In the new framework, the NRAs will assess the level of effective competition in relevant markets and will decide which regulatory obligations are to be imposed on operators with significant market power. The Commission stresses the importance of a timely transition to the new regulatory framework, which has to be implemented in national law by 24 July 2003 at the latest.

The Report contains four annexes, which provide extensive and detailed market and regulatory data, and comprehensive assessments of the implementation of regulation in each Member State. ■

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● **Eighth Report from the Commission on the Implementation of the Telecommunications Regulatory Package, 3 December 2002, COM(2002) 695 final, available at:**
http://europa.eu.int/information_society/topics/telecoms/implementation/annual_report/8threport/index_en.htm

DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

European Commission: Report on the Question of Authorship of Films

When adopting Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, the Council and the Commission agreed that the Commission should draw up a report on the question of authorship of cinematographic or audiovisual works in the Community. More specifically, this agreement was based on the stipulation of Article 2(2) of the Directive, which reads: "[F]or the purposes of this Directive the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors."

In Article 1(5) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, the stipulation of Article 2(2) of Directive 92/100/EEC has been taken up for the purposes of that Directive. In addition, Article 2(1) of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights stipulated for the first time that, in general, the principal

director of a cinematographic or audiovisual work should be considered as its author or one of its authors, that means without restricting this definition to "the purposes of this Directive".

When adopting Directive 92/100/EEC, a few Member States that did not acknowledge authors' rights for film directors were opposed to this stipulation and they feared that it would cause difficulties for the exploitation of films in their territories. Therefore, a commitment was given to draw up a report on the question of the authorship of films.

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The report signals that this legislation has not resulted in complete harmonisation with respect to the authorship of films. What has been achieved is that all Member States now consider the principal director of a film to be one of its authors. With respect to the question of who are to be considered as co-authors, there are still differences of opinion between the Member States.

Contrary to the fears of a few Member States, the report concludes that there is no evidence that the partial harmonisation of the notion of authorship has caused difficulties in the exploitation of films. In practice, potential difficulties in the exploitation of the works are overcome by contractual arrangements and there is no sign of obstacles to the effective exploitation of rights across Member States.

However, in some Member States, when a cinematographic work is made by an employee in the course of his/her employment, the employer is the first owner of copyright. These provisions concerning works made in the course of employment seem to exclude the principal director from having copyright if the principal director is working as an employee. The Commission will examine this issue of the first ownership of rights further, as well as the issues relating to the management of rights in general and will also analyse further developments in these fields. ■

● **Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community, COM(2002) 691 final of 6 December 2002, available at:**
http://europa.eu.int/comm/internal_market/en/intprop/docs/report-authorship_en.pdf?REQUEST=Seek-Deliver&COLLECTION=com&SERVICE=all&LANGUAGE=en&DOCID=502PC0502

ES-DA-DE-EL-EN-FR-IT-NL-PT-FI-SV

European Commission: Objections to Joint-Selling of Premier League Media Rights

The European Commission has raised objections with the English Football Association Premier League (FAPL) about the joint-selling of media rights to Premier League matches. The Commission considers at this stage that the current regulations for the joint-selling of media rights could be inconsistent with European competition law, although the sending of a Statement of Objections does not prejudge the final outcome of such an investigation.

The FAPL sells bundles of media rights to broadcasting companies in Great Britain and Ireland on behalf of the Premier League clubs on an exclusive basis. The exclusive nature of the regulations can lead to higher prices, with the result that only the large broadcasting companies are able to purchase the bundle of media rights. The current regulations could appear to be anti-competitive because they can lead to a decrease in media coverage of football matches and the closing-off of the market for other broadcasting companies. In practice, only 25% of Premier League matches are actually transmitted live on television. Lack of competition could also limit the bundles of rights available for exploitation by the new media, especially the third generation of mobile telephones, which could slow down their introduction and widespread adoption.

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The European Commission had similar objections to the regulations of the Union of European Football Associations (UEFA) for the joint-selling of media rights to the Champions League. However, in June 2002, the Commission came to an agreement with UEFA about their regulations. In that case, the Commission has accepted a limited joint-selling agreement as a result of which more football matches will be broadcast live and the clubs will have more possibilities to sell their rights individually (see IRIS 2002-7: 5).

The Commission has given the FAPL two and a-half months to react to its Statement of Objections. ■

● **"Commission opens proceedings into joint selling of media rights to the English Premier League", Press Release of the European Commission of 20 December 2002, IP/02/1951, available at:**
http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1951|0|RAPID&lg=EN&display=

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

European Commission: Fourth Report on Application of TWF Directive

At the beginning of 2003, the European Commission published its Fourth Report on the Application of the "Television without Frontiers" Directive. The main part of the Report provides a comprehensive *mise au point* of the implementation of the Directive and of the central principles enshrined therein. The Annex to the Report sets out the details of the projected work for the review of the Directive, along with the time-frame within which this work is to be carried out.

The Report affirms a healthy diagnosis of the development of the television market in Europe for the period 2000-2002. The implementation of the Directive in Member States is examined before the focus becomes thematically specific, with a consideration of the practical application of the Directive's provisions concerning jurisdiction, events of major importance for society, the promotion and distribution of television programmes, advertising rules and the protection of minors and public order. Treatment is also given to issues such as coordination between national authorities and the Commission; audiovisual law in the context of EU-enlargement and cooperation with the Council of Europe.

According to the work programme for the review of the Directive, the review process will involve an examination of "the specific instruments of European audiovisual policy" in the context of other relevant Community policies and regulatory measures (such as the Directive on the harmonisation of certain aspects of copyright and related rights in the information society and the Directive on electronic commerce). One of the programme's main vectors will be a series of public consultations, which will be inclusive of parties from EU candidate countries; these consultative exercises will centre on whether recent technological and market developments in the audiovisual sector should influence existing regulations. The work programme is expected to culminate in the adoption of a Communication on the results of the public consultations and possible proposals at the end of 2003/beginning of 2004.

For each of the principal themes identified in the Report, the Commission "will examine whether the pro-

visions of the Directive have fully met the target objectives and whether it is necessary to take measures at Community level. If so, it will examine whether it would be preferable to review the provisions currently contained in the Directive, to amend them or to draft other measures for achieving the objectives of the Directive". The work programme countenances the possibility of achieving certain of the relevant aims of the Directive through a variety of regulatory models: traditional regulation, (complementary) co- or even self-regulation.

In substantive terms, the Commission is not seeking to extend the provisions on access to events of major importance to society, but to improve their implementation. The Commission's thinking on the application of Chapter III of the Directive (Promotion of distribution and production of television programmes) will be guided, *inter alia*, by commissioned studies and consultations. The legal implications of new advertising techniques will be scrutinised, as will the impact of increased technological sophistication in the context of the protection of minors and public order, paying particular attention to the right of derogation from the country-of-origin principle in this connection. The Commission will assess the provisions on the right of reply in the broadcast media as well as a new issue that currently falls outside the scope of the Directive, i.e. access to short extracts of events subject to exclusive rights. The Contact Committee will be heavily involved in the implementation of this work programme and its some of its own powers may even ultimately be strengthened as part of the review process. ■

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● Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC "Television without Frontiers", COM (2002) 778 final, 6 January 2003, available at:
http://europa.eu.int/comm/avpolicy/regul/twf/applica/ap-int-e.htm#app_tvwf_4rapp

DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

NATIONAL

BROADCASTING

CH – Communiqué Concerning the complete Revision of the Radio and Television Act

On 18 December 2002, the *Bundesrat* (Council of Ministers) submitted to Parliament a Communiqué concerning the complete revision of the *Radio- und Fernsehgesetz* (Radio and Television Act - *RTVG*). The key objectives of this document are to guarantee a strong public broadcasting service (required by constitutional law) and, at the same time, to relax the rules for private broadcasters.

The new Radio and Television Act makes particular provision for an independent Swiss broadcasting service that serves all the language regions equally and is able to compete with wealthier broadcasters from neighbouring countries. Competition has become much fiercer, particularly in the television sector, where foreign channels now account for more than 50% of Swiss viewing figures, higher than anywhere else in Europe. Limited Swiss resources therefore need to be concentrated on the *SRG*, which continues to receive the majority of TV licence fee revenue (this totalled around CHF 1.1 billion in 2001) to enable it to fulfil its public service remit.

In connection with its broadcasting remit and licence fee income, the *SRG* will be answerable to an independent professional body, which will monitor whether the *SRG* is actually fulfilling its remit. This body, which aroused controversy at the discussion stage, will observe the *SRG*'s programming activities and publish reports on the subject. The *Bundesrat* believes that this will stimulate public debate concerning the public service.

Specific journalistic projects at local/regional level will be fostered through the allocation of a share of licence fee revenue to private radio and TV broadcasters. In order to ensure that these funds are used as efficiently as possible, the *Bundesrat* intends to offer this financial support to only a small number of private broadcasters, who will be responsible for implementing these projects. In the TV sector, for example, this funding will go to no more than ten broadcasters in Switzerland, or twelve at the absolute limit. The Bill proposes that the funds allocated in this way to private radio and TV broadcasters should total a maximum of 4% of the licence fee revenue (ie CHF 44 million based on the 2001 total of CHF 1.1 billion). The *Bundesrat* will determine the exact figure. At present, local/regional broadcasters receive around CHF 12 million of licence fee revenue each year.

The Bill also improves conditions for private broadcasters in general. In particular, it removes certain provisions that put Swiss providers at a disadvantage compared to their foreign competitors. Rules governing commercial breaks and the advertising of alcohol, for example, are relaxed. In future, private broadcasters will be allowed to advertise beverages with a lower alcohol content (such as wines and beers), but not spirits. In addition, market access will be less restricted for commercial broadcasters, who will only require a licence for channels benefiting from priority access to frequencies or a share of licence fee revenue.

In order to allow commercial broadcasters to develop, the Bill seeks to redress the balance between the *SRG*, which is largely funded through the licence fee, and the other Swiss broadcasters: advertising restrictions will be tighter for the *SRG* than for private broadcasters, while the *SRG*'s programming must primarily be aimed at national or linguistic-regional audiences. The *SRG* is also limited in terms of producing channels aimed at certain groups, special interest channels and non-programming activities.

A large section of the Bill is devoted to the technical aspects of radio and TV broadcasting, particularly the impact of digitisation. For example, it takes into account the increasing convergence of the previously separate fields of broadcasting and telecommunications. In this context, the Bill stipulates that a sufficient range of frequencies should be made available to broadcasters in the future.

The convergence of broadcasting and telecommunications is also reflected in the restructuring of the regulatory authorities. In future, both sectors will be regulated by a single, independent commission, which will also assume the functions currently performed by the *Kommunikationskommission* (Communications Commission - *ComCom*) and the *Unabhängige Beschwerdeinstanz für Radio und Fernsehen* (Independent Radio and TV Complaints Authority - *UBI*). A separate body with independent decision-making powers will be set up within the new commission to take over the *UBI's* programme monitoring duties and to deal with complaints about trans-

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Medialex

mitted programmes. The *Bundesamt für Kommunikation* (Federal Communications Office - *Bakom*) will be detached from the federal administration and will take charge of the new commission. This structure is based on the model of the *Wettbewerbskommission* (Competition Commission).

The Bill includes many other reforms. For example, it creates instruments to combat media concentration, amends monitoring procedures (for example, by introducing administrative sanctions) and strengthens the legal protection of broadcasters. It also contains new provisions on the protection of minors, the provision of programmes for the partially sighted and hard of hearing, support for the Swiss music and film industries by the *SRG*, audience research, support for the transmission of radio programmes in mountainous regions, the collection of licence fees and access for broadcasters (and thus the public) to public events.

The Bill will now be considered by Parliament. The next stage of the legislative process is consultation by the relevant parliamentary commission. The revised Act is unlikely to enter into force before 2005. ■

- ***Bundesgesetz (Entwurf) über Radio und Fernsehen*** **(Draft Federal Act on Radio and Televison - RTVG) (as at 18 December 2002), available at:**
http://www.bakom.ch/imperia/md/content/deutsch/aktuel/rtvg_kav_20_12_2002.pdf (DE)
http://www.bakom.ch/imperia/md/content/francais/rtvg-revision/12.pdf (FR)
- **Communiqué concerning the complete revision of the *Bundesgesetz über Radio und Fernsehen* (Federal Act on Radio and Televison - RTVG), 18 December 2002, available at:**
http://www.bakom.ch/imperia/md/content/deutsch/aktuel/14.pdf (DE)
http://www.bakom.ch/imperia/md/content/francais/rtvg-revision/11.pdf (FR)

DE-FR-IT

DE – Digital Cable Transmission Needs Broadcaster's Consent

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At the end of 2002, the *Oberlandesgericht Dresden* (Dresden Appeals Court) ruled on a dispute between cable network operator *PrimaCom* and TV broadcaster *ProSieben*. The Court upheld all aspects of the broadcaster's claim that *PrimaCom* should be prohibited from feeding the programmes of private broadcaster *ProSieben* into its Leipzig cable network and transmitting them only digitally without the broadcaster's consent.

In September 2000, *PrimaCom* (which operates a broadband cable network in Leipzig) decided to carry *ProSieben's* programmes only as part of a digital pay-TV package. *ProSieben* could therefore only be received via a special digital decoder, which *PrimaCom* rented out to its customers for an additional fee. *PrimaCom* had neither informed the broadcaster of this decision, nor sought to negotiate with *ProSieben* before implementing it.

ProSieben therefore applied to the *Landgericht Leipzig* (Leipzig District Court) for an injunction prohibiting the digital retransmission of its programmes, basing its claim on sections 97.1, 87.1.1, 87.4, and 20b.1.2 of the *Gesetz über Urheberrecht und verwandte Schutzrechte* (Act on Copyright and Related Rights - *UrhG*). The broadcaster claimed that the defendant was not entitled to digitally retransmit its programmes, since there was no agreement between the parties; such agreement was required by section 87.4 of the Act. *ProSieben* had merely tolerated the analogue retransmission of its programmes, but this did not mean that it approved of digital retransmission, as *PrimaCom* was claiming. In any case, *ProSieben* was also entitled to refuse to conclude a contract in accordance with Section 87.4, since digital retransmission restricted the channel's potential audience, which affected the broadcaster's advertising revenue. In addition, *ProSieben* only had limited pay-TV rights over its programmes.

After the Leipzig District Court had dismissed the complaint as inadmissible through lack of jurisdiction, *ProSieben* appealed to the Dresden Appeals Court.

The Appeals Court declared the appeal admissible and well-founded. In principle, cable retransmission required a contract according to section 87.4. The need for a contract enshrined in this provision did not give *PrimaCom* retransmission rights as described in section 20 of the *UrhG*, but merely the right to conclude a contract for retransmission under reasonable conditions. However, the Appeals Court did not answer the question of whether the broadcaster was entitled to refuse to enter into such an agreement, referring instead to the jurisdiction of the arbitration tribunal mentioned in section 16.1 of the *Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten* (Act on the Administration of Copyright and Related Rights), since it thought specialist knowledge was required to deal with this question. ■

- **Ruling of the *Oberlandesgericht Dresden*** **(Dresden Appeals Court), 29 October 2002, case no. 14 U 2179/01**

DE

DK – New Radio and Television Broadcasting Act

On 1 January 2003, a new *Lov om radio- og fjernsynsvirksomhed* (Danish Act on radio and television broadcasting, Act no. 1052 of 17 December 2002) came into force. The Act represents a significant liberalisation compared to the previous Act.

Pursuant to Chapters 1 and 8, the right to broadcast, i.e. to provide programme services to the general public, can be obtained in three ways:

1) by specific authorisation in accordance with the Act, which is given only to the national public service broadcasters (DR and TV2, including the regional TV2 enterprises);

2) by a licence granted by the Radio and Television Board (such a licence is required under the new Act only when the broadcast is carried out by means of scarce frequency resources) and

3) by registration with the Radio and Television Board.

The Act distinguishes between the broadcasting and the distribution of programmes (Chapter 2). Distribution by means of cable network systems does not require a licence from, or even registration with, the Radio and Television Board. Cable-network distribution must, however, only take place unchanged and simultaneously with the actual broadcasting or transmission. Furthermore, owners of cable-network systems are obliged to ensure that the radio and television programmes of the public service broadcasters are distributed via the cable system ("must-carry" obligations).

The new Act also covers the overall regulatory framework for distribution via a planned future digital terrestrial network. Under the Act, the distribution of programmes via the future digital platform requires a licence from the Radio and Television Board. The licence will be given on the basis of a public tender to be held in the spring of 2003.

Chapters 3-6 concern public service activities, the structure of the public service institutions (DR, TV2 and the regional TV2 companies) and certain public service obligations incumbent on the holders of the fourth and fifth national radio stations (which are allocated on the basis of a public tender). The national public service institutions must supply public service content to the entire

Danish population via radio and television, the Internet, or similar electronic platforms. Public service content must aim at quality, versatility and diversity. In the planning of programmes, freedom of information and of expression shall be primary concerns. Under the new Act, more detailed provisions regarding the content of the public service obligations will be laid down in annual public service contracts between the respective public service institutions and the Government. In addition, the new Act implements certain organisational changes in the management of the public service institutions and specifies that the overall programme responsibility lies with the Board of Governors.

According to Chapter 7, the Radio and Television Board, set up by the Minister of Culture, handles a number of administrative tasks, including the consideration of applications for authorisation to provide programme services; decision-making and supervision in matters concerning the Act (these decisions are final administrative decisions) and advising the Minister of Culture.

The new Act implements a substantial liberalisation regarding access to the provision of local radio and television services (Chapter 9). The requirements for the local radio and television stations regarding geographical and organisational attachment to the local area are repealed. Likewise, the existing restrictions regarding networking (i.e. programmes transmitted simultaneously by different local broadcasters) are also repealed.

As under the previous Act, public service activities are financed by annual licence fees payable for radio receivers and television sets (Chapter 10). The licence fees are collected by DR.

Under Chapter 11, the restrictions regarding advertising and programme sponsorship have been eased in order to harmonise the Danish rules with the minimum requirements set forth in the EC "Television without Frontiers" Directive. Thus, under the new Act, it is permitted to interrupt a programme with advertising breaks provided the programme is a sports programme, a theatre show being broadcast or similar programmes with "natural" breaks before a live audience. Further, the former prohibitions on advertisements for pharmaceutical products and alcoholic beverages are repealed. ■

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● ***Lov om radio- og fjernsynsvirksomhed - Lov nr. 1052 af 17/12 2002*** **(Act no. 1052 of 17 December 2002 on radio and television broadcasting), available at: http://www.kum.dk/sw5345.asp**

DK

ES – Judgment of Supreme Court on Use of Catalan by Public Broadcasters

A Catalan association for the protection of the Spanish language recently appealed to the Spanish Supreme Court, asking that it be declared unconstitutional that the Catalan public television broadcasts almost all of its programmes in Catalan. The appellant argued that Spanish is the official language in all of the national territory and that those persons living in Catalonia who do not speak Catalan were being discriminated against by the Catalan Administration.

The Supreme Court dismissed this appeal, stressing that most of the television channels that are received in Catalonia are broadcast in Spanish, and that given this circumstance, it was reasonable and proportionate that the Catalan authorities adopt measures intended to promote the use of Catalan. The Spanish Constitution declares that the other languages spoken in Spain (Catalan, Galician and Basque) are also official in the respective autonomous communities, and therefore Catalan is the official language of the Autonomous Community of Catalonia together with Spanish. The Supreme Court stressed that the Spanish Constitution clearly mandates the public authorities to promote the use of all of the official languages of Spain. ■

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● ***Sentencia del Tribunal Supremo, Sala 3ª, Sección 7ª, de 7 de octubre de 2002*** **(Judgment of the Supreme Court, Third Chamber, Seventh Section, of 7 October 2002)**

ES

ES – Amendment of Several Provisions Relating to Media Law

In December 2002, the Spanish authorities approved several provisions that partially amend some existing norms relating to the country's media law. On 30 December 2002, the Spanish Parliament approved the *Ley de Medidas fiscales, administrativas y del orden social* (Act 53/2002 on Taxation, Administrative Provisions and Social Affairs).

An Act on taxation, administrative provisions and social affairs ("Special Measures Act") is approved each year, together with the Budget Act. The main object of the Special Measures Act is to introduce amendments to existing provisions, thus acting as a "container" of amendments. For example, this year's Special Measures Act amends more than forty different Acts, including the following:

1) Act 41/1995 on Local Terrestrial Television

According to the new amendments of this Act, local terrestrial television shall be broadcast using digital technology only. This decision has been quite controversial, as national digital terrestrial television has not been successful so far, and almost no households have the necessary equipment to receive this kind of signal. Local terrestrial television is financed by advertising revenue so, taking into account that in the near future local DTTV will have almost no potential viewers, the new legislation has been heavily contested by the existing local television broadcasters. However, it must be said that these broadcasters are operating without a licence and that the few that are broadcasting legally have only been allowed to do so temporarily, until such time as a new framework would be established.

According to this new legislation, only those cities or groups of cities that meet certain population thresholds will be allowed to have local digital terrestrial television stations. The Government has to approve a Technical Plan on Local Terrestrial Television, which will determine which multiplexes will be available. Each of these multiplexes will be able to carry at least four digital terrestrial television programmes. Once this Technical Plan has been approved, the Autonomous Communities will have to award the concessions for the provision of this service in less than eight months. Some Autonomous Communities have complained that the new national legislation sets too many limits on their powers to regulate this service. However, the Government considers that all of these measures are necessary to foster the transition from analogue to digital terrestrial television.

2) Act 10/1988 on Private Television

The new amendments mainly deal with limits on ownership of terrestrial television concessionaires. Now, it is no longer forbidden to have holdings exceeding 49%

of the share-capital of one licence-holder. However, the undertakings that hold shares in national terrestrial television concessionaires are not allowed to have holdings in any other television concessionaire, regardless of its coverage. This means that an undertaking will no longer be able to concurrently have holdings in a national television concessionaire and in regional or local television concessionaires.

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Entidad Pública Empresarial RED.ES

● ***Artículos 107 [modificación de la Ley 12/1997, de Liberalización de las Telecomunicaciones], 109 [modificación de la Ley 41/1995, de Televisión Local Por Ondas Terrestres], 110 [modificación del artículo 19 de la Ley 10/1988, de Televisión Privada], 111 [modificación de la Ley 10/1988, de Televisión Privada - régimen transitorio de aplicación de incompatibilidades], 112 [modificación del artículo 17.1.b de la Ley 10/1988, de Televisión Privada], 113 [modificación del artículo 24.2 de la Ley 10/1988, de Televisión Privada] y 114 [modificación de la Ley 31/1987, de Ordenación de las Telecomunicaciones, en relación con la radiodifusión sonora] de la Ley 53/2002, de 30 de diciembre, de medidas fiscales, administrativas y del orden social, B.O.E. n. 313, 31.12.1999, pp. 46169 y ss.*** **(Articles 107 [amendment of Act 12/1997 on the Liberalisation of Telecommunications], 108 [amendment of Act 41/1995 on Local Terrestrial Television], 109, 110, 111, 112 and 113 [amendments of Act 10/1988 on Private Television] and 114 [amendment of Act 31/1987 on Telecommunications] of Act 53/2002 on Taxation, Administrative Provisions and Social Affairs of 30 December 2002, B.O.E. n. 313, 31 December 2002, pp. 46169 and ff.), available at: http://noticias.juridicas.com/base_datos/Admin/l53-2002.html**

● ***Artículo 92 [modificación de la Ley 2/2000, de 4 de mayo, del Consejo Audiovisual de Cataluña] de la Ley de Cataluña 31/2002, de 30 de diciembre, de medidas fiscales y administrativas, Diario Oficial de la Generalitat de Cataluña n. 3791, de 31.12.2002, p. 23187*** **(Article 92 [amendment of Act 2/2000 on the Catalan Audiovisual Council] of Act 31/2002 on Taxation and Administrative Provisions of 30 December 2002, Catalan Official Journal of 31 December 2002, p. 23187), available at: http://www.gencat.es/diari_c/3791/02358100.htm**

ES

As regards undertakings that have holdings in regional or local television concessionaires, they will not be able to participate in other television concessionaires in an overlapping area. Those undertakings may have holdings in concessionaires that provide their services in areas that do not overlap, as long as the population covered by their services does not exceed the limits that will be set by means of a regulation.

The new provisions include a transitional clause, which establishes that the undertakings that do not comply with the new ownership limits will have a period of one year to remedy their infringements.

The 2003 Special Measures Act also amends, *inter alia*, Article 1 of Act 12/1997 on the Liberalisation of Telecommunications (which sets out the powers of the Telecommunications Market Commission, which has some responsibilities regarding the audiovisual market – see IRIS 1997-8: 11) and Act 31/1987 on Telecommunications (which regulates radio broadcasting).

The Catalan Government has also used a Special Measures Act to introduce an amendment to Catalan Act 2/2000, which regulates the *Consell Audiovisual de Catalunya* (Catalan Audiovisual Council, CAC – see IRIS 2000-6: 7). This new amendment expressly empowers the CAC to sanction broadcasters that do not adequately answer its requests for information.

The Special Measures Acts, which have been used since the mid-1990s by socialist and conservative Governments alike, have been severely criticised by many experts because of their heterogeneity and lack of transparency and because of the insufficient debate which precedes the approval of these Acts: each year the Special Measures Bill is usually presented in September/October, together with the Budget Bill, and both Bills are usually approved before the end of the year. ■

FR – Fair Competition Board Suspends Allocation of TV Rights for Premier Football to Canal+

The *Conseil de la concurrence* (Fair Competition Board) issued a decision on 23 January 2003 that temporarily suspends the allocation to Canal+ of the rights to broadcast matches in the premier league football championship for the season 2004-2007 on television. The decision follows on from the complaint of abuse of a dominant position brought by its satellite competitor TPS against the French professional football league (*Ligue de football professionnelle* – LFP) and the company Canal+ after the league had granted exclusive rights to Canal+ on 14 December last year for the record sum of EUR 480 million per year.

In examining TPS' application for the adoption of protective measures, the board began by acknowledging the admissibility of the application on the merits and noted the presence of elements that justified the continuation of its investigations. Thus it noted that the regular football competitions differed in their ability to attract and keep viewers loyal in the long term. The broadcasting rights concerning them could therefore be considered a separate market. In view of the specific characteristics of the French premier league championship, indeed it could not be ruled out that there might be an even narrower market, restricted to broadcasting rights for the matches in this championship. Nor could it be ruled out that the LFP was in a dominant position on these markets for football broadcasting rights, nor that Canal+ was in a dominant position as regards pay television (cf. case law: Canal+ v. TPS and Multivision, ending in the decision of the Court of Cassation delivered on 30 May 2000 – see IRIS 1999-2: 7; IRIS 1999-7: 8 and IRIS 2000-6: 7).

Amélie Blocman
Légipresse

● ***Conseil de la concurrence*** **(Fair Competition Board), decision no. 03-MC-01 of 23 January 2003 on the referral to the Board and the application for the adoption of protective measures submitted by the company TPS, available at: http://www.finances.gouv.fr/reglementation/avis/conseilconcurrence/03mc01.htm**

FR

Nor could the board rule out the possibility, given the state of the case and the stage reached in the investigations, of the fees for broadcasting premier league football championship matches being crucial for the development of pay television and of exclusive allocation to Canal+, as the dominant operator in the pay television market, having a restricting effect on competition. In the same way, the fact that the offer made by Canal+, which occupies a dominant position on the pay television market, combines low values per lot with a very high exclusivity premium could be considered as constituting an eviction offer in respect of TPS. These elements will therefore be assessed when the merits of the case are being examined.

For the time being, the announcement of the award of exclusive rights for the premier league championship to Canal+, once the general public considers it final, would have an immediate effect on the conditions for marketing subscriptions to TPS. Moreover, the financing for the exclusivity proposed by Canal+ could result in an increase in the price of subscriptions. Protective measures were therefore justified by the serious and immediate effect on the plaintiff company, on the sector and on the interests of the consumer. Pending a decision on the merits, which will not be forthcoming for at least six months, the board has therefore suspended the allocation to Canal+ of the rights to broadcast matches in the premier league football championship for the season 2004-2007 on television. Canal+ must also refrain from presenting the decision to allocate the LFP rights as being definitive and from making any advertising or commercial use of the decision in their search for new subscribers. Canal+ immediately lodged an appeal, although this does not have the effect of suspending the decision. The LNF for its part was to meet on 31 January to propose a new call for tenders. ■

FR – Repeated Rescheduling – Intervention by the CSA

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The CSA has had to call the television channels to order following a wave of successive rescheduling by M6, France 2 and TF1 in the past few days. The movement was started by M6 and France 2, both of which had decided to broadcast at 8.55 pm on 1 February their new programmes intended to test viewers' knowledge of the highway code – *"Permis de conduire: le grand test"* and *"Code de la route: le grand examen"*. M6 decided on 15 January to bring forward the broadcasting of its programme to Friday, 31 January. Keen to be first in line, France 2 then immediately scheduled its programme for 28 January – the date on which TF1 was planning to broadcast its special evening of *"Qui veut gagner des millions"*. The broadcast was therefore deferred to 4 February. The following day, M6 brought its *«Grand test»* forward again, to Saturday, 15 January. This put the channel outside the period of notice required for rescheduling as set out in its agreement with the CSA, Article 28 of which states that the company is to make known its programmes no later than 18 days prior to the first day of broadcasting the programmes for the week in question; it undertakes to refrain from amending them within 14 days of the day of broadcasting, including the day of the broadcast itself, except in response to the demands of sports events and exceptional circumstances – a news event in connection with an item of current affairs, a problem connected with the rights protected under the Intellectual Property Code, a court decision, a technical incident, manifest public interest – decided after discussion among the channels concerned; a significant lack of interest in the first broadcasts of a programme or episodes of a series of programmes. M6 indeed refers to this in justifying its latest rescheduling by claiming the need to protect its intellectual property rights in respect of the new broadcast, whereas France 2 appealed to the CSA. Having examined the matter at its plenary session on 21 January, the CSA recalled the need for fair competition among broadcasters and for reliable information for viewers. It therefore wrote to both channels asking them to return to their original scheduling as announced for the month of January. Nevertheless, as regards the evening of 1 February, which had sparked off the problem, the CSA reminded the channels of the possibility of amending their original scheduling for that day, which had resulted in offering two broadcasts with closely related themes, by reaching a decision together and with respect for the public in mind. M6 refused to compromise and had France 2 summoned to answer a charge of infringement of copyright, accusing it of having plagiarised its *"Grand test"* and claiming EUR 1.5 million in damages. ■

● Communiqué no. 520 by the CSA on 21 January 2003, available at:
http://www.csa.fr/actualite/communiques/communiques_detail.php?id=11078

FR

GB – BSkyB Cleared of Breach of Competition Law in Supply of Premium Sports and Film Channels

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A year ago, the Office of Fair Trading (the UK competition authority) announced preliminary findings that it was likely to find BSkyB in breach of the 1998 Competition Act (see IRIS 2002-2: 11). The Office has now taken its final decision, which clears BSkyB of any breach of the Act.

Chapter II of the Act prohibits abuse of a dominant position, in terms almost identical to those of Article 82 of the EC Treaty. The investigation had been based on fears that BSkyB was abusing its dominance over premium pay-TV channels to distort competition against rival distributors and in favour of its own satellite distribution system. The Office concluded that BSkyB was dominant in the markets for the wholesale supply of premium sports and film channels. Competitors had complained that this dominant position had been abused through a "margin squeeze", i.e. selling the product to distributors at a price that allowed them an insufficient margin to make a profit, even if they were as efficient as BSkyB's own vertically-integrated business. The result of the Office's analysis was borderline, leading to the conclusion that there were insufficient grounds to find a breach of the Act.

Complaints were also made that BSkyB was abusing its dominant position through the "mixed bundling" of channels, i.e. offering different products together at a discount. The Office found no evidence of pricing below incremental cost or of the foreclosure of markets to competitors, so this allegation was also rejected.

Finally, complaints had been made that BSkyB had offered anti-competitive discounts based on the amount of sales of the channels by distributors to final consumers. The Office concluded that it was unlikely that discounts distorted competition or foreclosed the market to other channel suppliers. Thus the overall decision was that there had been no breach of competition law by BSkyB. ■

● "BSkyB: The outcome of the OFT's Competition Act investigation", Office of Fair Trading, OFT 623, December 2002, available at:
http://www.oft.gov.uk/NR/rdonlyres/eccbuc6zrd63s6blscvcf7ggaeyrl3lhvajdl6o4dtzap4ffxlcng5jaxvgszt7prv5fufhfgkfn5lthpqmrg2kc37a/oft623.pdf

● The full non-confidential text of the approved decision will be published later and will be available at:
http://www.oft.gov.uk/Business/Competition+Act/Decisions/index.htm

HR – The Final Draft of the Law on Croatian Radio Television Proposed to the Croatian Parliament

The Croatian Government adopted the final draft of the new Law on *Hrvatska Radiotelevizija* (Croatian Radio-Television – HRT) on 23 January 2003 and passed it to the Croatian Parliament (regarding the description of the organisational structures see in detail IRIS 2003-1: 10).

HRT will be obliged to fill its programming with more than 55% of documentaries and other programmes in the Croatian language, while at least 50% of the remaining programme material must be of European origin. HRT shall also receive at least 10% of the total broadcast television programme from independent producers. The amount of advertising spots in any HRT programme shall not exceed 9 minutes within a one-hour period, while two or more advertising spots («advertising block») shall be broadcast uninterruptedly only between programmes. HTV shall not interrupt feature films with advertisements. Every household owning radio and TV receivers in the Republic of Croatia shall be obliged to pay a licence fee to the HRT amounting to 1.5 % of the average

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monthly net salary of the employees in the Republic of Croatia, calculated on the basis of the statistical data for the previous year. Out of the overall licence fee, 3% should be entrusted to the Fund for the stipulation of pluralism and diversity of media founded by this Law, which shall allocate the financial means according to its special legal basis which is to be enshrined in law.

The Law on Croatian Radio Television is expected to be passed in the second week of February, and within 15 days of its enactment the existing HRT Council should make a public announcement for the election of the new Council members. In the transition period the current HRT General Manager will act as interim HRT General Manager with full authority according to the new law and will appoint interim managers and editors to senior positions. ■

● ***Nacrt konačnog prijedloga Zakona o Hrvatskoj radioteleviziji*** **(final draft of the Law on Croatian Radio Television) of 23 January 2003, available at: http://www.vlada.hr/Download/2003/01/23/NACRT_KONACNOG_PRIJEDLOGA_ZAKONA_O_HRT.htm**

HR

IE – Religious Advertising

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The issue of religious advertising on radio and television arose again in Ireland towards the end of 2002. Ironically, it happened at a time when a hearing was pending before the European Court of Human Rights in the Roy Murphy case (see IRIS 1998-1: 6 and IRIS 1998-7: 9). The hearing in that case, which involved an advertisement for the showing of a video about the Resurrection, took place in November 2002, and the decision of the European Court of Human Rights is expected in February 2003. The ban on religious advertising had formed part of earlier broadcasting legislation but was modified slightly in the Broadcasting Act, 2001 (see IRIS 2001-4: 9 and IRIS 2001-7: 9). The modification resulted from the Roy Murphy case and another incident involving the rejection of an advertisement for the Irish Catholic newspaper. Section 65 of the 2001 Act provides that nothing in the existing provisions (s.20((4) of the Broadcasting Authority Act, 1960 and s.10(3) of the Radio and Television Act, 1988) "shall be construed as preventing the broadcasting of a notice of the fact - (a) that a particular religious newspaper, magazine or periodical is available for sale or supply, or (b) that any event or ceremony associated with any particular religion will take place, if the contents of the notice do not address the issue of the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organisation".

On foot of that amendment, *Radio Telefís Éireann* (the national public service broadcaster, RTÉ) initially accepted advertisements for a campaign, called "Power to Change", which was backed by prominent business figures. The campaign was interdenominational and endorsed by the four main Christian churches in Ireland. The advertisements were described as spiritual in content, rather than religious. They featured a number of well-known figures, national and international, promoting religion. RTÉ, on legal advice, subsequently withdrew its acceptance. It was believed that the advertisements breached s.65 of the Broadcasting Act, 2001, in that they were not just notices of a religious event (or newspaper, magazine or periodical), but involved an element of persuasion. The advertisements invited viewers to call for a free book and CD. Zion Trust, the group behind the campaign, sought an injunction restraining RTÉ from breaching its contract and directing it to broadcast the advertisements. In September 2002, the High Court refused the injunction on the grounds that to do so would effectively be disposing of the issues set down for determination by the Court at a full trial. However, following negotiations between RTÉ and Zion Trust, a revised version of the advertisements was accepted and broadcast from the beginning of October. The original advertisements had already been accepted and broadcast by UTV in Northern Ireland and by Sky Television and Channel 4 in the UK; all of these channels are available in Ireland. ■

● **"Broadcasters advised not to air adverts", "RTE refuses to show adverts for religious group", *The Irish Times*, 20 September 2002**

● **"RTE not compelled to run trust ads", "Religious campaign refused order on TV adverts", *The Irish Times*, 24 September 2002, all available in the subscription-based archives of *The Irish Times* at: http://www.ireland.com**

● **The Broadcasting Act, 2001, available at: http://193.120.124.98/ZZA4Y2001.html**

LT – Developments at the Latvian Public Television

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As the new Director General of public Latvian television introduced some changes to the organisational structure and programme taking effect in 2003, the discussion on the financing of the public service broadcasting raises again.

The Latvian public television operates two channels which have been renamed (LTV 1 and LTV7) and which – after the reform – shall integrally supplement each other by defining their programmes more clearly. LTV1 shall be the national channel, while LTV7 shall be dedicated to sports and minorities. Bearing in mind the large Russian-speaking minority in Latvia, a regular slot has been introduced on LTV7 every day from 20:15 – 22:15 with current affairs programmes and films in Russian. Changes also apply to broadcasting times, as LTV1 broadcasts 16 hours per day every day at an average (without a break in the middle of the day as previously), LTV7 from now onwards 7.5 hours on weekdays and 16 hours at weekends.

These changes may cause – according to an announcement by LTV's Director General – the necessity of additional financing. As to the *status quo*, the budget of the LTV comprises approximately EUR 12 million (around 7 million from the state budget and around 5 million commercial income). According to the announcement it is estimated that Latvia Television urgently needs additional EUR 3 – 4 million. Therefore its planning offers two options: LTV takes a loan of LVL 1 million (around EUR 1.61 million) to invest in the production of programme to increase the income from selling commercial air time (the advertising market – amounting to LVL 20 million, approximately EUR 33 million – is split between the aforementioned public channels and three private ones); another option is to introduce a new tax on the sale of new TV sets – LTV estimates EUR 12.5 (LVL 7.77) from every TV set sold to total the sum of LVL 1 million.

The Chairman of the *Nacionálá Radio un Televízijas Padome* (National Radio and TV Council, the regulatory body under the supervision of Parliament – NRTP) stated that the discussion regarding the introduction of broadcasting fees will go on even if the political scene has been sceptical and the mechanism of collecting these fees would be very costly. Thus, he favours an increased share in the Gross National Product. ■

MT – Code of Practice on Disability and its Portrayal in the Broadcasting Media

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On 6 December 2002, the Malta Broadcasting Authority published a Code of Practice on Disability and its Portrayal in the Broadcasting Media on its website. The document contains an analysis of the situation of disabled persons and their portrayal in the media, as well as recommendations for broadcasters and the Broadcasting Authority itself.

The Preamble addresses overarching issues, such as the right of disabled persons to be treated with dignity and respect; stereotyping and designations. The Preamble concludes by rejecting the so-called "medical model" of disability, which "holds disabled persons themselves responsible for any difficulties they may encounter during the course of their daily lives" and which at the same time "totally ignores the restrictive environments and disabling barriers created, not by the disabled persons, but by society in general".

The section, "Misrepresentation of Disabled People", addresses the issue of negative terms and the resulting negative images of disabled persons. It describes the "hero" or "victim" approach and criticises a patronising attitude towards disabled persons for reinforcing stereotypes, even when they are presented positively, for example, when disabled persons "are praised for achieving something that would be unremarkable if done by others". More than just criticising particular forms of portrayal of disabled persons in the media, this section highlights the lack of consultation with disabled persons and their organisations about issues affecting their lives.

Broadcasters are called upon to be sensitive to the problems outlined and to avoid them. The Code calls for positive steps to ensure a more inclusive representation of disabled persons in programming. It is interesting to note that the document lists the inclusion of disabled persons among broadcasting staff and acting casts, as well as physical access to broadcasting facilities, before it makes policy recommendations regarding programme content.

The Code prescribes a number of measures to be taken by the Broadcasting Authority. A key feature is the inclusion of the National Commission Persons with Disability in the process of raising awareness about disability issues. Specific measures include the preparation of a handbook containing all the main elements of the Code, along with a glossary, which is to guide broadcasters.

The concern behind this Code is obviously to heighten public awareness of persons with disabilities. Reporting is to follow acceptable standards; disabled persons should first and foremost be included in the broadcasting process, or at least be consulted. The tone of the Preamble and of the subsequent sections is fairly strong and they read very much like a manifesto. Activism by this group of citizens is a relatively recent phenomenon in Malta and reports about disabled persons' concerns are still rare in a society in which charitable activity is held in high regard and events such as a recent telethon raise impressive amounts of donations. The practical issues affecting persons with disabilities, however, are sometimes forgotten. Practically speaking, much needs to be done to improve access to buildings and government departments. It is for this reason that these practical considerations have found such a prominent place in the Code. ■

● Code of Practice on Disability and its Portrayal in the Broadcasting Media, Broadcasting Authority of Malta, 6 December 2002, available at: http://www.ba-malta.org

EN-MT

● The website of the National Commission Persons with Disability is: http://www.knpd.org

RO – Important Events List Adopted

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At the proposal of the *Consiliul Național al Audiovizualului* (National Audiovisual Council), the Government adopted the *Evenimentele de importanță majoră* (list of events of particular significance) at its session on 16 January. The list includes the George Enescu international music festival, the Olympic Summer and Winter Games, football's European Championships and World Cup and the Romanian football team's qualification matches for those tournaments.

These important events may be broadcast exclusively, provided a majority of TV viewers (at least 70% of the population, based on the results of the most recent census) are able to receive live or delayed broadcasts via a freely-accessible electronic signal. Most of the events are broadcast live. On the basis of agreements between the organisers and broadcasters, certain elements of these events may also be recorded and broadcast in part or in full at a later time.

According to Article 21 of the *Legea Audiovizualului* (Audiovisual Act no. 504/2002), the list of important events is to be adopted by the Government following a proposal by the National Audiovisual Council and submission to the European Commission. Should any amendments subsequently be necessary, the same procedure is to be followed. Until Romania accedes to the European Union, the list will become valid as soon as the Government's decision is published in the Official Gazette. The decision also stipulates the proportion of the population that should be able to receive the broadcasts and the type of transmission for every event, ie live or delayed broadcast of all or part of the event. ■

● Press release II of the Ministry of Public Information, 16 January 2003

RO

FILM

DE – New Guidelines on Screenplay Grants

At the end of 2002, the Federal Government representative for culture and the media issued a new set of guidelines on screenplay grants in Germany. The most significant change compared to the previous guidelines is that screenplay authors themselves are now entitled to apply for a grant. Previously, authors could only submit applications jointly with a film producer.

Basic grants of up to EUR 15,000 are available for the initial production of a draft film script, with a further EUR 15,000 (or in special cases up to EUR 35,000) avai-

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lable for further development. However, the second instalment of aid is only granted if a film production company is interested in using the screenplay and is itself prepared to contribute EUR 10,000 to the project. All grants are also subject to the author co-operating with a «drama department» approved by the Federal Government representative for culture and the media. This department is meant to supervise the author's work and suggest ways in which it might be improved, such as collaboration with a special drama consultant or participation in a workshop. By increasing the supervision and support of screenplays until they are marketable commodities, it is hoped that in future more high-quality screenplays will be produced, with a higher proportion ultimately being used in film production. ■

● Guidelines on screenplay grants, issued by the Federal Government representative for culture and the media, available at www.bkm-filmfoerderung.de

DE

LV – Government Questions National Film Support

Lelda Ozola
MEDIA Desk, Latvia

While revising the budget for the year 2003, the recently elected Cabinet of Ministers questioned the necessity to finance the production of Latvian films from the national budget. As background information it noted that the majority of already-financed films has not been seen by the audience of Latvia and only a few films received financial support from the national budget in 2002.

The National Film Centre (the government body overseeing the film sector and acting under the Ministry of Culture) explained that its overall strategy has firstly been to create platforms to help producers to attract foreign finance for film production. These aims have been achieved by Latvia's joining the EURIMAGES foundation in 2001 and the MEDIA Plus programme in 2002. The next step shall be to secure an optimised distribution throughout Latvia. Although most of the films are broadcast on television and screened in cinemas, a closer co-operation between television stations and the film production sector should be initiated.

After compiling a detailed account on the application of funds (LVL 600 000 – around EUR 1 000 000) in 2002 and on the general organisation of the financing system, the National Film Centre together with the Ministry of Culture stated that the financial means for film production would not be subject to reductions. Furthermore, the Ministry of Culture has announced that the film sector will be granted priority in the case of another budget revision in the middle of this year. ■

● Press release of the Ministry of Culture of 3 December 2002, available at: http://www.km.gov.lv/UI/Main.asp?id=921

EN

RO – New Film Act

Mariana Stoican
Radio Romania International, Bucharest

On 27 November 2002, *Legea cinematografiei Nr. 630 din 27 noiembrie 2002*, a new Film Act, was adopted. The Act aims "to regulate the organisation, financing and implementation of activities in the cinematographic sector and in the management of related cultural assets" (Art. 1 of the Act). The term "cinematography" refers in the Act to the preparation, production, financing, marketing and screening of films as well as to the cinema sector. The Act's objectives include: to support Romanian film producers, to encourage private initiative in the field of domestic film production and co-productions involving Romanian players, to protect the national cultural identity and the identity of national minorities in Romania, and to improve publicity for domestic film productions so that they are more successful in the international market. The Act makes provision for the creation of a *Centrul Național al Cinematografiei* (National Cinematography Centre) within 60 days of its publication. The Centre will act as the specialist body of the national public film administration and will be directly answerable to the Government. It will take the form of an independent corporation funded by the general State budget. The Government will appoint the Centre's President and Vice-President, whose positions will be equivalent to those of Secretary and Undersecretary of State respectively.

An "Advisory Film Board" comprising nine highly-respected personalities from the Romanian film industry will also be set up within the framework of the new Centre.

Originally, a draft version of the Act had proposed that "additional funding for domestic film production", should be raised by means of a 2% tax on the income of cable TV operators in Romania. However, following protests by the association of network operators, who feared that the number of subscribers could fall sharply as a consequence of the resulting increase in subscription fees, the introduction of this system was omitted from the final version of the Act. ■

● *Legea cinematografiei (Film Act)* Nr. 630 of 27 November 2002, *Monitorul Oficial al României*, 9 December 2002

RO

NEW MEDIA/TECHNOLOGIES

FR – Government Bill on Confidence in the Digital Economy Submitted, and the CSA's Opinion

Nicole Fontaine, the Minister for Industry, submitted her Bill on confidence in the digital economy to the Council of Ministers on 14 January. The purpose of this text is to lay down specific rules that more particularly clarify the obligations of Internet service providers and the extent of protection for users. It is divided in to four main sections: the responsibility of technical providers in respect of the content they pass on, transposition of Directive 2000/31/EC on e-commerce, provisions concerning encryption and computer crime, and satellite systems.

If the Bill is passed as it stands, the responsibility of Internet site hosts in respect of the content they host could only be invoked, in either civil or criminal terms, if they had actual knowledge of an unlawful activity or information and refrained from taking prompt action to withdraw the information or block access to it. Hosts

and access providers would not be subject to a general obligation to supervise the information they pass on or store, or to actively seek out facts that would reveal unlawful activities. As regards connection data, however, they would be required to hold and keep data allowing the identification of any person concerned.

As regards spamming, the Bill includes a general scheme in the Post and Telecommunications Code that would prohibit canvassing any person who had not expressed consent in advance to receiving such electronic messages. There would be exceptions to this principle, including the case of addressees who supplied address details directly on the occasion of a sale, that of addressees who had had the opportunity to object to such use of their address details, and where canvassing refers exclusively to goods or services similar to those previously provided.

Furthermore, on-line information to consumers would be reinforced by the compulsory indication of the identity of persons making sales offers by electronic means (name, address, listing in the Register of Commerce and Companies, company capital). The electronic contract would be included in the Civil Code, with new articles (Article 1369-1 et seq.) setting out the conditions for forming a contract concluded in this way. More particularly, a contract would be deemed accepted by an exchange of confirmations and notices of receipt. Penalties for computer crime would become stiffer; sentences for attacks on computer systems would be almost doubled, and new articles (Articles 230-1 et seq.) would be added to the Code of Criminal Procedure (concerning the decryption of encrypted data in the context of an investigation. Lastly, the use of encryption would be liberalised, as would the supply and import from Member States of the European Union of means of encryption with the sole function of authenticating data or checking its integrity.

The Minister of Culture asked the CSA for its opinion on the Bill, and this was submitted on 17 December 2002. In its report, recalling that the convergence of services and networks should encourage the legislator to incline towards technological neutrality and therefore towards equality of treatment between audiovisual communication services with similar content accessible on different supports, the CSA regrets that the Bill does not include a more radical reworking of the Act of 30 September 1986. It also feels it is necessary for the new Act to define clearly the criteria for classifying television and sound broadcasts and their corresponding legal schemes, whatever the support used by the service. For public on-line communication, it should be possible to apply this definition equally to the full simultaneous broadcasting of radio and television services already broadcast on other supports and to the broadcasting of original services that the general public assimilate to such services.

The Bill will be submitted to the National Assembly in February, and then to the Senate. ■

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● **Communiqué no. 518 by the CSA on 17 December 2002**

FR

GB – Government Publishes Good Practice Models and Guidance for Child Protection on Internet

The UK Home Office (the equivalent of a Ministry of the Interior) includes a task force on child protection on the Internet; this is a co-regulatory body including, in addition to as government officials, representatives of opposition parties, child welfare organisations, the Internet industry, the police and others. It was established in 2001 after fears of abuse of the Internet by paedophiles. The task force has published a set of good practice models and guidance for the Internet industry applying to chat services, instant messaging and web-based services. The models and guidance are voluntary and so depend on industry co-operation; their adoption will also depend on the nature of the service and whether it is a small, closed group, or an open community environment.

The model on chat services recommends the provision of (i) clear information on the kind of service offered, for example whether it is moderated, and (ii) clear, prominent and accessible safety advice with links to online safety guides. Only limited personal information should be gathered and posted, and safety tools such as ignore buttons and language filters should be provided. A reporting system for incidents should be provided and, in moderated chat aimed at children, a panic/help button.

In the case of instant messaging services, clear information should be made available about the nature of the product, for example whether it is an open community environment or a personal one-to-one environment for communicating with friends. Information should be provided on how to keep safe online and there should be clear facilities for reporting abuse. Clear guidance on privacy policy should also be made available.

For Web-based services, particular attention should be paid to hyper-linking to third-party sites from sites aimed at children, and the content of the third-party sites should be checked for suitability. Data protection legislation should be complied with and a privacy statement provided by websites that collect personal data with special protection for children's privacy. Special rules apply to children's advertising and safety advice should be provided on sites aimed at children. Third-party content via bulletin boards may also be moderated. Providers of adult content have special responsibilities for child protection, for example through opt-in lists. Further guidance is given for connectivity providers (who provide access to the Internet) and for hosting providers (who provide web space).

In addition to these co-regulatory measures, the Government is to legislate to strengthen the criminal law applying to sexual offences. ■

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● **"Good practice models and guidance for the internet industry on: Chat Services, Instant Messaging (IM) and Web Based Services", Home Office Task Force on Child Protection on the Internet, Home Office, January 2003, available at:**
http://www.wiseuptothenet.co.uk/ho_model.pdf

RELATED FIELDS OF LAW

DE – Copyright Taxes for Data Carriers

In a press release dated 9 January 2003, the *Gesellschaft für musikalische Aufführungs- und mechanische Verwertungsrechte* (Musical Performance and Mechanical Exploitation Rights Company - *GEMA*) announced that the collecting societies that form the *Zentralstelle für Überspielrechte* (Central Office for Reproduction Rights - *ZPÜ*) had reached an agreement with the *Informationskreis AufnahmeMedien* (Recording Media Information

Unit - *IM*) concerning copyright taxes for DVDs. The agreement covers blank DVD-R/RW, DVD+R/RW and DVD-RAM disks and stipulates that, with effect from 1 January 2003, manufacturers should pay a tax of EUR 0.174 on the sale of each of these data carriers that has a memory capacity of 4.7 Gigabytes (the equivalent of 120 minutes of video recording capacity). An agreement dating back to 2000 between the collecting societies and data carrier manufacturers concerning the tax on blank CDs has also been extended. According to that agreement, manufacturers are obliged to publish data concerning the total number of blank CD-Rs and CD-RWs sold in Germany and, for 30% of that number, to pay a tax of EUR 0.072 for every hour of playing time on disks sold after 1 January 2003.

These agreements are based firstly on Article 53 of the German *Gesetz über Urheberrecht und verwandte Schutzrechte* (Act on Copyright and Related Rights - *UrhG*), which states that users may make copies of protected works for private use, and secondly on Articles 54 ff. of the *UrhG* which, for certain types of reproduction, provide for remuneration to be paid to the author by manufacturers or dealers of reproduction media and appliances (eg data carriers, copying devices). According to these provisions, a table of charges set out in the Annex to Article 54 (d) 1 of the *UrhG* should be used to ensure that rightsholders receive equitable remuneration for private copying.

However, these across-the-board copyright taxes have been repeatedly criticised by electronics companies, who claim that they reduce their profit margins and restrict innovation. Consequently, in mid-January 2003, a number of leading electronics firms wrote to the President of the European Commission, calling for copyright taxes to be abolished throughout Europe. ■

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● ***GEMA*** **press release of 9 January 2003, available at:**
http://www.gema.de/kommunikation/pressemitteilungen/pm20030109_02.shtml
DE

NO – Verdict in DVD Case

A verdict has finally come in the so-called "DVD-case" in Norway. The case concerned the actions of (at the time of the act) a 15-year-old Norwegian, Jon Johansen. He was indicted for having gained unlawful access to movies and player keys contained on region 1-encoded DVD-discs by breaking the DVD protective device, CSS. The question was whether this was a punishable offence in accordance with Section 145(2) of the Norwegian Penal Code.

The indictment also included contribution to similar offences by users of his program utility, DeCSS. DeCSS is a software tool that circumvents the CSS protective device, allowing access to the data on a DVD-disc. The program consists of two main algorithms that were given to Johansen by two persons over the Internet. The original player key used was obtained through the reverse engineering of a software player. Johansen fused the code for these two algorithms and added a graphical user interface. DeCSS enables copying of copyrighted material on the DVD and playback on unlicensed DVD-players. Johansen finally distributed DeCSS on the Internet.

The application of Section 145(2) has two requirements. First, that a protective device has been breached, and second, that the resulting access to data has been unlawful. On 7 January of this year, Oslo City Court found that Johansen's own access to the movies was justified by his right to view the movies on his own legitimately purchased DVDs. Therefore, he could not be convicted for having used DeCSS to gain access to the contents of the DVDs.

The Court also came to the conclusion that since DeCSS is a tool that can be used both for legal and illegal purposes, Johansen could only be made subject to contributory liability for others' use of DeCSS if his intent in distributing the program was solely for illegally purposes. The Court found the evidentiary value of IRC-statements (IRC stands for Internet Relay Chat) to be little, and cited reasonable doubt in concluding that Johansen had not intended DeCSS to be used only for unlawful purposes. As to the reverse engineering in relation to Section 145(2), the Court also held that no protective device could be said to have been breached when accessing this player key. The software player in question had no protection of the player key aside from being distributed solely in object code. This, the Court said, would be enough for a protective device to be present, had it only been proven which was not the case here – that the developer had intended it to act as a protection.

The Court also found that the access to the rest of the player keys had been lawful, and cited the user's right to view the movies.

As a result, Johansen was acquitted of all charges. The case has been appealed by the district attorney. Moreover, it is difficult to estimate the precedential value of the case due to the implementation of Directive 2001/29/EC (on the harmonisation of certain aspects of copyright and related rights in the information society) and its rules on circumvention devices. There have also been changes in the legislation since the acts committed by Johansen, aiming for more protection in a digital environment. Thus, it is not certain that the outcome of the case would have been the same under existing legislation. ■

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● **Decision of *Oslo Tingrett* (Oslo City Court – First Instance) of 7 January 2003, available at: http://www.domstol.no/archive/Oslotingrett/Nye%20avgjorelser/DVD-jon.doc**
NO

● ***Almindelig borgerlig Straffelov (Straffeloven) § 145*** **(Norwegian General Civil Penal Code (Section 145)), available at**
http://www.lovdata.no/all/tl-19020522-010-017.html#145 (NO)
http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.doc (EN)
EN-NO

RO – New Criminal Code

The fourth *Codul Penal* (Romanian Criminal Code), currently in draft form, will be the subject of a public debate in the next few weeks.

The draft has been criticised because, amongst other things, it puts slander, an offence usually committed by the media, on an equal footing with libel, even though libel is a more serious crime. The Romanian Minister of Justice explained that the Justice Ministry was not trying to restrict media freedoms or to punish journalists more severely by amending the Criminal Code in this way. Therefore, as an amendment to the current draft, fines for libel will be fixed in proportion to the perpetrator's income, for example. In order to clear up possible confusion, there are also plans to review provisions regarding the punishment of publishers, the legal entities on whose behalf journalists carry out their work. ■

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● **Draft Criminal Code, available at:**
http://www.just.ro/bin/cod_penal.htm
RO

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

US – Supreme Court Upholds Copyright Term Extension Act

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On 15 January 2003, in a 7-2 decision in Eldred v. Ashcroft, the U.S. Supreme Court ruled that Congress acted constitutionally in 1998 when it extended copyright protection for most works from 50 years after the author's death to 70 years after the author's death.

Opponents of the extension included online publishers and others who sought to break copyright protection and place more materials in the public domain. The extension's detractors maintained that many of the most lucrative U.S. copyrights on works of the imagination are held not by creative people or their descendents, but by giant entertainment conglomerates waging a war to protect their properties. For example, the rights to "Happy Birthday," which was copyrighted in 1934, are currently owned by AOL Time Warner, for which it earns USD 2 million a year in royalties for public usage.

"Happy Birthday" was due to come into the public domain after 75 years in 2010 until Congress passed what has been satirically referred to as the Mickey Mouse Copyright Extension Act in 1998. The nickname for the term extension refers to Disney's creation which as a result of the extension is protected until 2024.

Stanford Law Professor Lawrence Lessig argued against the term extension on behalf of Eric Eldred, a publisher of public domain material online. Professor Lessig pointed to a possible violation of two parts of the U.S. Constitution. First, the Copyright Clause gives Congress the power to grant copyright protection for "limited times," and second, the First Amendment's guarantee of free expression.

Professor Lessig argued that the extension does not serve the public interest. His view is that "creativity is always about the opportunity to build upon the past, critique it, study it, use it. The longer copyright survives the harder it is to build upon our past. The 1998 extension effectively cuts out 100 years from our culture that's not available to build on."

Justice Ginsburg wrote for the majority, holding that the extension was a rational use of congressional power which will, among other things, bring U.S. copyright law into line with that of the European Union which similarly extends copyright for original works to the life of the author plus 70 years. Dismissing the plaintiff's arguments Justice Ginsburg stated that, "Beneath the façade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy. The wisdom of Congress' action, however, is not within our province to second guess."

Professor Lessig said that he will continue pushing for change, but through building support for new legislation, not through the courts. He states that, "the Court is saying that the framers of the Constitution didn't solve this for us. Instead, we're going to need to use smart legislation and sensible contracts to protect the public domain." ■

● **Eldred v. Ashcroft, 123 S. Ct. 769, available at: http://www.copyright.gov/pr/eldred.html**

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