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European Court of Human Rights: New Violations of Freedom of Political Expression in Turkey

In two recent judgments, the European Court of Human Rights has come to the conclusion that freedom of political expression has been violated in Turkey.

In the case of Yalçin Küçük v. Turkey, the Court was of the opinion that the confiscation of copies of a book and the applicant's sentence to one year's imprisonment and a fine of TRL 100 million was an illegitimate infringement by the authorities of the right to freedom of expression. Küçük was convicted for separatist propaganda as the book he had published contained an interview with Abdullah Öcalan, the PKK leader. The book referred to the Kurdish separatist movement and to the programme for Kurdish cultural autonomy. In its judgment of 5 December 2002, the European Court of Human Rights recognised the need for the authorities to be alert to acts capable of fuelling additional violence in the region of south-east Turkey, but the Court found at the same time that the book did not constitute an incitement to violence, armed resistance or an uprising. The Court was also of the opinion that by confiscating copies of the book and convicting its author, the Turkish judicial authorities had failed to have sufficient regard to the general public's right to receive alternative forms of information and to assess the situation in south-east Turkey. Taking into account as well the nature and severity of the sentences imposed on the applicant, the interference with the applicant's right to freedom of expression was regarded as a breach of Article 10 of the European Convention on Human Rights.

In the case of Dicle on behalf of the Democratic Party (DEP) v. Turkey, the Court was asked to decide on an alleged breach of Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) of the European Convention. The applicant alleged that the order of the Turkish Constitutional Court to dissolve the DEP, on the ground that its activities were liable to undermine the territorial integrity of the State and the unity of the nation, was a breach of several articles of the Convention. In its judgment of 10 December 2002, the European Court of Human Rights noted that the written declarations and the speeches of the leaders of the DEP that had led to the dissolution of the party were indeed fiercely critical of government policy towards citizens of Kurdish origin. However, the Court did not find those declarations and speeches to be contrary to fundamental principles, nor had the Constitutional Court established in accordance with the requisite standard that the DEP was seeking to undermine democracy in Turkey. Although one declaration made by the former president of the DEP in Iraq amounted to approval of the use of vio-

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lence as a political tool, the Court was of the opinion that a single speech by a former leader of the party that had been made in another country, in a language other than Turkish and to an audience that was not directly concerned, could not be considered a sufficient reason to dissolve a political party. Consequently, the Court held that the dissolution of the DEP could not be regarded as "necessary in a democratic society" and therefore there had been a violation of Article 11. The Court considered it unnecessary to examine the case from the perspective of Articles 9 and 10, as the complaints concerned the same matters as those examined under Article 11. ■

● Judgment by the European Court of Human Rights (Third Section), case of Yalçin Küçük v. Turkey, Application no. 28493/95 of 5 December 2002;

● Judgment by the European Court of Human Rights (Fourth Section), Case of Dicle on behalf of the DEP (Democratic Party) v. Turkey, Application no. 25141/94 of 10 December 2002, both available at: http://www.echr.coe.int

FR

European Court of Human Rights: Case of A. v. United Kingdom

Although the case of A. v. United Kingdom is not an Article 10 case, the judgment of the European Court of Human Rights of 17 December 2002 can be considered as an important confirmation of the principle of freedom of speech and political debate. The case concerns the question of whether the statements of a Member of Parliament (MP) in the House of Commons are protected by parliamentary privilege under Article 9 of the Bill of Rights 1689. During a parliamentary debate on housing policy in 1996, an MP made offensive and derogatory remarks about the behaviour of A. and her children. The MP called the family of A. "neighbours from hell", a phrase which was also quoted in the newspapers. Following the MP's speech and hostile reports in the press, A. received hate-mail addressed to her and she was also stopped in the street and subjected to offensive language. A. was re-housed by the housing association as a matter of urgency and her children were obliged to change schools. A letter of complaint to the relevant MP (which was forwarded to the Office of the Parliamentary Speaker) and a letter to the then Prime Minister, Mr. John Major, did not result in effective measures being taken against the MP. A. was informed about the absolute character of parliamentary privilege.

In Strasbourg, the applicant complained that the absolute nature of the privilege that protected statements about her made by the MP in Parliament violated, in particular, her right of access to the courts under Article 6 para. 1 of the European Convention. The European Court of Human Rights recognised the legitimate aim of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. The Court emphasised that in a democracy, Parliament or such comparable bodies are the essential fora for political debate. The Court was of the opinion that the absolute immunity enjoyed by MPs is designed to protect the interests of Parliament as a whole, as opposed to those of individual MPs: "in all the circumstances of this case, the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to court" (para. 87). The Court emphasised, however, that no immunity attaches to statements made outside of Parliament, or to an MP's press releases, even if their content repeats statements made during the parliamentary debate itself.

The judgment reads: "[T]he Court agrees with the applicant's submissions to the effect that the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP's repeated reference to the applicant's name and address was particularly regrettable. The Court considers that the unfortunate consequences of the MP's comments for the lives of the applicant and her children were entirely foreseeable. However, these factors cannot alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue [...]. There has, accordingly, been no violation of Article 6 para. 1 of the Convention as regards the parliamentary immunity enjoyed by the MP" (paras. 88 and 89). The absence of legal aid for defamation proceedings in the United Kingdom was not considered to be a violation of Article 6 para. 1 of the Convention either. The applicant was deemed to have had sufficient possibilities to bring defamation proceedings in respect of the non-privileged press releases.

The Court also took into consideration the domestic law of the eight States that have made a third-party intervention in the case. Each of these laws makes provision for such an immunity, although the precise details of the immunities concerned vary. The Court believed that the rule of parliamentary immunity, which is consistent with - and reflects – generally-recognised rules within the signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to the courts, as embodied in Article 6 para. 1. The Court found no violation of Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) or Article 14 (prohibition of discrimination). ■

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● Judgment by the European Court of Human Rights (Second Section), Case of A v. United Kingdom, Application no. 35373/97 of 17 December 2002, available at: http://www.echr.coe.int

EN

Committee of Ministers: Under-use of Minority Languages in Broadcasting Highlighted

The issue of minority-language broadcasting features in a number of texts recently adopted by the Committee of Ministers of the Council of Europe and in texts recently rendered public by the Advisory Committee on the Framework Convention for the Protection of National Minorities. Article 9 of the Framework Convention deals with freedom of expression and (access to and use of) the media, while Article 10 deals with the right of members of national minorities to use their own language.

The Committee of Ministers addresses minority-language broadcasting and other issues in its Resolutions on the implementation of the Framework Convention for the Protection of National Minorities by Armenia, Germany, Moldova and Ukraine (ResCMN(2003) 2 to 5), all adopted

in January and February 2003. The Resolution on Armenia (ResCMN(2003)2) calls for further legislative and practical efforts to improve national minorities' access to, and presence in, the media. It favours an increase in the amount of airtime devoted to minority-language programming by public broadcasting services (especially television) and greater State support for the establishment of private media by members of national minorities. For its part, the Resolution on Germany (ResCMN(2003)3) identifies particular "scope for improvement" regarding the development of radio and television programmes for the Danish and Frisian minorities. A "substantial imbalance" is noted "between the various national minorities in the matter of their access to and presence in the media" in the Resolution on Moldova (ResCMN(2003)4). In this connection, the importance of redoubling governmental support for the disadvantaged national minorities (especially the Ukrainians) is therefore stressed.

While the Committee of Ministers' Resolution on Ukraine (ResCMN(2003)5) merely refers to the continued existence of "certain shortcomings" and the observation of "some setbacks" in relation to the electronic media, a recent Opinion on Ukraine by the Advisory Committee on the Framework Convention (ACFC/INF/OP/I(2002)010) expresses concern about how existing broadcasting legislation is curtailing "the use of the languages of national minorities in the nation-wide public service and private broadcasting sectors [...]". The Advisory Committee favours greater efforts by the authorities to facilitate minorities' access to the media, particularly in Crimea.

A recurrent point in the Advisory Committee's Opinion on Norway (ACFC/INF/OP/I(2003)003) is that additional measures should be taken in order to support and improve radio broadcasting for the Kven minority. The Opinion on Albania (ACFC/INF/OP/I(2003)004) advocates the introduction of "supplementary measures" to improve access to broadcasting for persons belonging to national minorities. The need to increase the coverage in broadcasting of issues that are of interest to national minorities, including those in various minority languages, is also dwelt upon. The Opinion on Armenia (ACFC/INF/OP/I(2003)001) goes further than the aforementioned Resolution ResCMN(2003)2 of the Committee of Ministers. For instance, the Advisory Committee on the Framework Convention finds the existing broadcasting legislation in the country too restrictive as regards the use of minority languages in the public electronic media, especially on public television. It also describes the current support for national minorities to establish private broadcasting outlets as "insufficient".

Under the Framework Convention, the Committee of Ministers of the Council of Europe is responsible for assessing the adequacy of the implementation of the Convention by State Parties. It is assisted in this task by the Advisory Committee. A central feature of the monitoring procedure for the Framework Convention is the submission of State reports, which are rendered public and examined by the Advisory Committee. An Opinion on the reporting State is then elaborated upon by the Advisory Committee and is then forwarded to the Committee of Ministers for its consideration (along with the subsequent comments of the State in question). It is customary practice for the Committee of Ministers to then adopt conclusions and recommendations on the relevant State's implementation of the Framework Convention. ■

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- **Resolutions on the implementation of the Framework Convention for the Protection of National Minorities by Armenia, Germany, Moldova and Ukraine (ResCMN(2003) 2 to 5), available at: http://cm.coe.int/site2/ref/dynamic/resolutions_cmn.asp**

EN-FR

- **Opinions on Ukraine (ACFC/INF/OP/I(2002)010), Norway (ACFC/INF/OP/I(2003)003), Albania (ACFC/INF/OP/I(2003)004) and Armenia (ACFC/INF/OP/I(2003)001) by the Advisory Committee on the Framework Convention for the Protection of National Minorities, available at: http://www.coe.int/T/e/human_rights/Minorities/2._FRAMEWORK_CONVENTION_(MONITORING)/2._Monitoring_mechanism/**

EN-FR

- **The Framework Convention for the Protection of National Minorities, 1995, ETS No. 157, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm**

EN-FR

Secretariat: Contribution to World Summit on Information Society

In December 2002, the Council of Europe submitted its Contribution to the 2nd Preparatory Committee for the World Summit on the Information Society.

The Contribution sets out the Council's priorities vis-à-vis the future development of the Information Society, in the hope that they will inform the preparations for the World Summit, and ultimately the Summit itself. As regards human rights protection, these priorities include: guaranteeing freedom of expression and information in the online environment; combating cybercrime; ensuring the protection of personal data; establishing self- and co-regulatory frameworks ("as opposed to outright state regulation") and balancing intellectual property rights with society's need for access to information and culture. Priority objectives for improving communication between public authorities and citizens include: multi-channel access to official information, social services and justice; public institutions that are transparent and accountable; the participation of citizens in public affairs, including voting and the formulation of public policy; the enhancement of democratic structures and practices at the regional and local levels. E-inclusion, for its part, should involve efforts to bridge the digital divide by educational initiatives, such as the promotion of media and Internet literacy. It should also involve harnessing the full potential of ICT for the benefit of the elderly, people with disabilities and the seriously ill. These priorities largely reflect existing (legal) standards of the Council of Europe and ongoing deliberations within the organisation.

The World Summit on the Information Society is an initiative that is being spearheaded by the International Telecommunication Union (in a leading organisational role) and the United Nations. It will take place in two phases, the first in Switzerland at the end of 2003 and the second in Tunisia in 2005. Both phases of the Summit itself and the preparatory processes will involve the participation of, inter alia, intergovernmental bodies, NGOs, civil society and the private sector. Among the tasks of the 2nd Preparatory Committee for the World Summit, which is due to meet in Geneva in February 2003, is the consideration of a draft Declaration of Principles and Action Plan. The intention is to submit these drafts to Heads of States for their approval at the Summit in December 2003. ■

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- **Democracy, human rights and the rule of law in the Information Society, Contribution by the Council of Europe to the 2nd Preparatory Committee for the World Summit on the Information Society, Doc. WSIS/PC-2/CONTR/32-E of 9 December 2002, available at: http://www.itu.int/dms_pub/itu-s/md/03/wsispc2/c/S03-WSISPC2-C-0032!!PDF-E.pdf**

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- **For further information about the World Summit on the Information Society, see: http://www.itu.int/wsis/index.html**

EN-ES-FR

Advisory Panel on Media Diversity: Report on Media Diversity in Europe

In December 2002, the Council of Europe Advisory Panel on media diversity (AP-MD) adopted a report entitled "Media diversity in Europe". The report deals with different ways to promote and ensure diversity in the media, focusing in particular on the broadcasting sector, and complements previous Council of Europe instruments in this area, for example the Committee of Ministers Recommendation No. R (99) 1 on measures to guarantee media pluralism.

The report summarises media ownership regulations in seven European countries (France, United Kingdom, Germany, Italy, Spain, Norway and Croatia) and describes the measurements/criteria used in these to determine dominance and unacceptable market concentration. Although a particular regulatory model for all Council of Europe member states is not recommended, it is nevertheless recalled that the audience share approach is a widely used model, which gives the advantage of reflecting the real influence of a broadcaster in a given market and which, at the same time, is neutral on the number of licences which the broadcaster can hold and allows its international development. In any event, whichever the indicator employed, there seems to be a general European understanding that controlling one third of the market is tolerable, but that going beyond that level could infringe upon freedom of expression and information (thus permissible thresholds are usually fixed at around 1/3 of the audience, 1/3 of revenues, 1/3 of the network capacity, etc).

The report stresses that over and above legislative measures on media ownership for the private television sector, it is equally important to strengthen and support the role of public service broadcasting. In the context of increasing concentration in the media, accelerated by digital developments, the role of public service broadcasters is said to be crucial, as a counter-balancing factor and as an element for social and democratic cohesion.

As regards the challenges and opportunities for pluralism resulting from digital technology, the report highlights the negative effects of proprietary systems and recommends the use of interoperable technical standards by operators. It then goes on to mention that Digital Terrestrial Television (DTT) can be an important means of transmission in terms of ensuring diversity, since DTT will make digital TV accessible to a larger part of the population, minimising the number of persons who cannot access television when switch-over takes place.

Several parts of the report deal with cultural diversity in the media, and the attempts within the World Trade Organisation (WTO) to treat culture as ordinary commercial goods or services. It is noted that should such efforts succeed, there would be a danger of narrowing cultural diversity down to one or a small number of dominant cultures that would serve global audiences through the global dominant media. The idea of an international convention for the protection of cultural diversity, such as the one being prepared by the International Network on Cultural Policy (INCP), is considered as an opportunity to elevate cultural diversity as a policy aim both within national cultural and media policies and as a protected global value. The report therefore recommends that the Member States of the Council of Europe should follow closely the developments of this debate and the consequences for the protection of, and support for, media pluralism.

Finally, the report considers that Article 10 of the European Convention on Human Rights is the basic framework for media pluralism at the European level. Under its provisions, States are under a "duty to protect" and, when necessary, to take positive measures to ensure diversity of opinion in the media (when for practical reasons such variety is not in fact achieved). The more recent judgments of the European Court of Human Rights show that Strasbourg still regards freedom of the media and diversity as part of the individual's right to freedom of expression as enshrined in Article 10 para. 1 of the Convention. ■

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● Media diversity in Europe, report prepared by the AP-MD (Advisory Panel to the CDMM on media concentrations, pluralism and diversity questions), Media Division, Directorate General of Human Rights, Strasbourg, December 2002, available at: http://www.humanrights.coe.int/media/documents/ReportMediadiversity.doc

EN-FR

Media Division: Preliminary Draft Recommendation on Right of Reply in Online Environment

On 23 January, the Council of Europe's Group of Specialists on on-line services and democracy invited the public to make submissions on its Preliminary draft Recommendation on the right of reply in the on-line environment.

The preliminary draft Recommendation seeks to guarantee a more modern application of the principles enshrined in the Committee of Ministers' Resolution (74)26 on the right of reply – position of the individual in relation to the press. The definitional kernel of Resolution (74)26 is that the right of reply affords individuals affected by information published in any medium "an effective possibility for the correction, without undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication". The Resolution holds that such a right of reply should apply to all media, notwithstanding the possibility of differential application to certain media, to the extent that is necessary or is justified by their particular nature.

The preliminary draft Recommendation would first and foremost ensure that professional on-line media would be brought within the ambit of the principles of the earlier Resolution. "Professional on-line media" are defined as "any natural or legal person or other entity whose main professional activity is to engage in the collection, dissemination and/or editing of information to the public on a regular basis via the Internet". For its part, "information" is taken to embrace statements of fact, opinions or ideas in the form of text, sound and/or picture.

Given the technological specificities of the on-line media, a number of new approaches to the right of reply are deemed appropriate. A greater number of possibilities exist for honouring the commitment to give replies the same prominence as was given to the contested information (involving eg. linking, posting on home-pages and/or on specially designated sections of websites, and in the case of on-line newsletters, sending the reply through the usual channels of distribution). The reply should also be posted prominently for a period of time "which is at least equal to the period of time during which the contested information was publicly available, but in any case no less than 24 hours". In the absence of the temporal and spatial constraints that affect the more traditional media, there should be a certain amount of

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flexibility as regards the length of on-line replies. For as long as contested information is available online, it should also be clearly linked to the relevant reply. Professional on-line media ought to designate a specific person who would have responsibility for handling requests for replies and ensure that this person can be contacted easily by members of the public. The preliminary draft Recommendation also favours the keeping by professional on-line media of copies of information made publicly available for stated periods of time. ■

● Preliminary draft Recommendation on the right of reply in the on-line environment, Group of Specialists on on-line services and democracy, Council of Europe, 23 January 2003, available at:
http://www.humanrights.coe.int/media/events/2003/Preliminary%20draft%20Recommendation%20on%20the%20right%20of%20reply%20in%20the%20on.htm

● Committee of Ministers' Resolution (74)26 on the right of reply – position of the individual in relation to the press, 2 July 1974, available at:
http://cm.coe.int/ta/res/1974/74x26.htm

EN-FR

EUROPEAN UNION

Court of Justice of the European Communities: Equitable Remuneration for Performers is a Community Concept

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After a reference by the *Hoge Raad* (the Dutch Supreme Court) for a preliminary ruling (see IRIS 2000-7: 14), the European Court of Justice (ECJ) found that the concept of equitable remuneration in Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on the rental right and the lending right and on certain rights related to copyright in the field of intellectual property, is a Community concept. Article 8(2) of Directive 92/100/EEC states, *inter alia,* that Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for any communication to the public. In the Netherlands, this article is implemented in Article 7 of the *Wet op de naburige rechten* (the Law on related rights – *WNR*).

The issue arose in proceedings between the *Stichting ter Exploitatie van Naburige Rechten* (the Association for the Exploitation of Related Rights – *SENA*) and the *Nederlandse Omroep Stichting* (the Dutch Broadcasting Association – *NOS*). Pursuant to Article 15 *WNR, SENA* was designated to collect and distribute the equitable remuneration. *NOS* and *SENA,* however, could not come to an agreement with respect to the amount of equitable remuneration. *SENA* consequently brought an action before the *Rechtbank 's-Gravenhage* (the District Court of The Hague), which determined the amount of remuneration to be paid. On appeal, the *Gerechtshof te 's-Gravenhage* (the Court of Appeal in The Hague) stated, *inter alia*, that Directive 92/100/EEC does not harmonise the method for calculating the equitable remuneration and that it is up to the parties themselves to endeavour to produce in the first instance a calculation model that should be based on a number of factors, such as the number of hours of phonograms broadcast.

SENA brought an appeal in cassation and the Dutch Supreme Court then referred questions on the interpretation of Article 8(2) for a preliminary ruling. The ECJ's reply to the first question was that the term equitable remuneration is indeed a Community concept that must be interpreted and applied uniformly in all Member States. To the question of what criteria must be used in determining the equitable remuneration, the ECJ replied that Article 8(2) does not preclude a model for calculating what constitutes equitable remuneration that operates by reference to variable and fixed factors, such as the number of hours of phonograms broadcast, the viewing and listening densities achieved by the radio and television broadcasters and the tariffs fixed by agreement in the field of performance rights and broadcast rights in respect of musical works protected by copyright. The ECJ concluded that such a model, however, must enable a proper balance to be achieved between the interests of performing artists and producers, as to remuneration, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable. ■

● Case C-245/00, *Stichting ter Exploitatie van Naburige Rechten* (SENA) v. *Nederlandse Omroep Stichting* (NOS), Judgment of the European Court of Justice of 6 February 2003, available at:
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62000J0245

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

European Commission: Adoption of *e*Europe 2002 Final Report

On 12 February 2003, the European Commission adopted its Final Report on the *e*Europe 2002 Action Plan (see IRIS 2000-6: 5 and IRIS 2001-7: 4). This Action Plan, which was launched at the Feira European Council in June 2000 as part of the Lisbon strategy to make the European Union the most competitive and dynamic knowledge-based economy in the world, was aimed at increasing Internet connectivity throughout Europe. Specifically, 64 targets were identified in the Action Plan, all of which were to be achieved before the end of 2002.

The Report stresses that eEurope 2002 has been a major success in "citizens and businesses online and establishing a framework within which the knowledge economy can grow", with most of the 64 targets having been attained. Figures for 2002 show that 43% of households (compared to 18% in 2000) and more than 90% of schools and businesses are now connected and that more than half of all Europeans are regular Internet users. Attention is drawn to the fact that, with the creation of GEANT, Europe now has the fastest research network infrastructure in the world. These positive results are, however, qualified by the indication that significant differences in connectivity remain between Member States.

The Report also recalls the adoption of the new regulatory framework for electronic communications (see IRIS 2002-1: 5, IRIS 2002-3: 4 and *infra*) and for e-commerce (see IRIS 2000-1: 5, IRIS 2000-3: 4, IRIS 2000-5: 3 and

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IRIS 2001-5: 3) and stresses the important role that the implementation of these measures will play for the development of the Internet and of new services in Europe.

An analysis is given of the progress achieved with regard to a number of the Action Plan's targets concerning, *inter alia*, the use of the Internet in schools and at work, the provision of government and health care online services and action to guarantee Internet accessibility for all.

Increasing the effective use of the Internet is identified as the next objective to be attained. This is already the focus of the *e*Europe 2005 Action Plan (see IRIS 2002-7: 4 and IRIS 2003-1: 5) that has succeeded *e*Europe 2002. Examples given of future goals include: extending the availability of broadband connections; ensuring that all Europeans have the opportunity to take advantage of digital technologies; more firms to use e-commerce; schools to make full use of the Internet in the classroom and further development of government and health online services.

A Commission Staff Working Paper accompanies the Report and describes the progress made on each of the 64 targets of *e*Europe 2002. ■

- **"The eEurope 2002 Action Plan has been a success in bringing Europe online", Press release of the European Commission of 12 February 2003, IP/03/220, available at: http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/220|0|RAPID&lg=EN&display=**

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- **eEurope 2002 Final Report, Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, adopted on 12 February 2003, available at: http://europa.eu.int/information_society/eeurope/news_library/documents/acte_eEurope_2002_en.doc**

DE-EN-FR

European Commission: Recommendation on Relevant Product and Service Markets

Article 15(1) of the Directive on a common regulatory framework for electronic communication networks and services, the "Framework Directive" (see IRIS 2002-3: 4), requires the adoption of a Commission Recommendation on Relevant Product and Service Markets. This Recommendation was issued on 11 February 2003. In the Recommendation, the European Commission defines – in accordance with the principles of competition law – 18 product and service markets within the electronic communications sector, which national regulatory authorities (NRAs) will have to investigate in order to assess the need for sector-specific regulation on these markets. The Commission distinguishes between markets for products or services provided to end-users (retail markets), and markets for facilities necessary for operators to provide such products and services to end-users (wholesale markets). Further market categories may be identified within these two types of markets on the basis of demand and supply side characteristics.

NRAs will take the relevant markets identified by the Commission as a basis for their own market analyses. The following, cumulatively applicable, criteria should be followed by NRAs in identifying relevant markets. Firstly, it will take into account the presence of high and non-transitory structural or regulatory entry barriers. Structural barriers are based on economic conditions that impede or prevent the market entry of new operators. Regulatory barriers result from legislative, administrative or other state measures that directly affect the market entry conditions and/or the positioning of operators on the relevant market. Secondly, the dynamic state of competitiveness (the possibilities to overcome entry barriers within a relevant time horizon) will have to be taken into consideration. This criterion admits only those markets, of which the characteristics are such that they will not tend towards effective competition over time without sector specific regulation. Thirdly, whether the application of competition law by itself would not be sufficient to address the market failure.

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NRAs should follow the same criteria and principles when they identify relevant markets other than those listed in the Recommendation. New and emerging markets, in which market power may exist due to first mover advantages, should not, in principle, be subject to sector-specific regulation.

This Recommendation should be considered in combination with the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services of 11 July 2002 (see IRIS 2002-9: 7), referred to in article 15(2) of the Framework Directive.

While waiting for the first market analyses by NRAs under the new regulatory framework, existing obligations imposed under the previous regulatory framework remain in force. The Commission will review the Recommendation no later than 30 June 2004 on the basis of market developments. ■

- **Commission Recommendation of 11 February 2003 on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, available at: http://europa.eu.int/information_society/topics/telecoms/regulatory/maindocs/documents/recomen.pdf**

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

European Commission: Communication on the State of the Electronic Communications Sector

In its recent Communication on "Electronic Communications: the Road to the Knowledge Economy", the European Commission stresses the need to overcome the current difficulties in the electronic communications sector in order to restart growth, create new employment and accelerate innovation through the deployment of broadband and third generation mobile services ("3G services"). The high costs associated with acquiring third generation mobile communications licenses contributed to the difficult financial situation for operators. As a result, the decrease in investment is having a negative effect on the rollout of new broadband and 3G services. To stimulate the demand and supply of these services it is important that the right conditions are created, such as the development of attractive content, services and applications, and investment in secure multi-platform broadband infrastructures.

The Commission highlights that Member States should commit themselves to a comprehensive broadband strategy by the end of this year. By 2005, all public administrations should have broadband connections and half of all Internet connections in Europe should be broadband connections. In accordance with this perspective, the Commission calls on Member States to undertake full and effective implementation of the new regulatory fra-

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mework for electronic communications (see IRIS 2002-3: 4 and *infra*) no later than 24 July 2003. Member States must also aim to stimulate the development and use of broadband services. This will constitute an important source of revenue growth for fixed line operators and cable operators, who have witnessed a decline in the demand for other services. The roll-out of 3G networks is also expected to generate considerable revenue streams to operators, service providers and equipment manufacturers. However, Member States must encourage the roll-out of these networks. The Commission emphasizes that interoperable, open and secure platforms will facilitate widespread access to next generation services. This will be the basis of a knowledge-based society. In addition, Member States should support and strengthen research efforts at national and EU level.

The Commission urges the Council and the European Parliament to give their support to these actions. ■

● "Commission urges Europe to move to Broadband", Press Release of the European Commission of 12 February 2003, IP/03/219, available at:
http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/219|0|RAPID&lg=EN&display=

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● "Electronic Communications: the Road to the Knowledge Economy", Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, available at:
http://europa.eu.int/information_society/eeurope/news_library/documents/acte_sector_en.doc

EN-FR

European Commission: Proposal for Directive on Enforcement of Intellectual Property Rights

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The European Commission has recently drawn up a proposal for a Directive on measures and procedures to ensure the enforcement of intellectual property rights. The main objectives of the proposal are to harmonise national laws on the enforcement of intellectual property rights and to create a general framework for the exchange of information between the responsible national authorities. At the moment, there are considerable differences in the legislation of the Member States, which counterfeiters and pirates take advantage of, by operating from countries that provide the lowest level of protection. The harmonisation should reduce this problem to a minimum.

The background to the proposal is that in 1998 the Commission launched a consultation with a Green Paper on combating counterfeiting and piracy in the single market (see IRIS 1998-10: 6). As a result of the reactions to this Green Paper, the Commission adopted a Communication on 17 November 2000, announcing a series of practical measures intended to strengthen the fight against counterfeiting and piracy in the single market. The most important element in the Communication was the announcement that the Commission was going to submit a proposal for a Directive on the enforcement of intellectual property rights. The Commission has recently published another proposal on this subject, namely a proposal for a Regulation on the conditions for customs action against counterfeit or pirated goods.

The proposed Directive follows a "TRIPs plus" approach. The TRIPs Agreement, concluded by the World Trade Organisation, is applicable in all the Member States of the EU. It provides for minimum provisions on the enforcement of intellectual property rights. The proposed Directive goes beyond those minimum provisions, basing its proposed provisions on best practice found in the various legislations of the Member States. Examples of the proposed provisions include: the publication of judicial decisions; the recall of the infringing goods at the infringer's own expense; the precautionary seizure of the infringer's bank account and other assets to ensure the recovery of damages, and interlocutory injunctions to prevent any infringements or to prevent the continuation of alleged infringements.

The scope of the proposal covers infringements of all intellectual property rights that have been harmonised at European level (as set out in the Annex to the proposal). It focuses particularly on infringements committed for commercial purposes and those that cause significant harm to rightsholders. Therefore it does not introduce tougher sanctions against individuals downloading music or videos via P2P networks for non-commercial purposes, although it would not prevent Member States' authorities from introducing and applying tougher laws in that sense. The proposal will be sent to the European Parliament and to the Council for the adoption procedure. ■

● "Intellectual property: Commission proposes Directive to bolster the fight against piracy and counterfeiting", Press Release of the European Commission of 30 January 2003, IP/03/144, available at:
http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/144|0|RAPID&lg=EN&display=

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● Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights, 30 January 2003, provisional text available at:
http://www.europa.eu.int/comm/internal_market/en/intprop/docs/index.htm#proposals

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● Proposal for a Council Regulation concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, of 20 January 2003, available at:
http://europa.eu.int/comm/taxation_customs/customs/counterfeit_piracy/files/com2003_0020en01.pdf

EN-FR

European Parliament: Resolution on the *e*Europe 2005 Action Plan

The European Parliament has recently adopted a Resolution on the Commission's Communication on the Action Plan "*e*Europe 2005: An information society for all" (see IRIS 2002-7: 4). Endorsed at the Seville European Council in June 2002 as the continuation of eEurope 2002 (see *supra*), the eEurope 2005 Action Plan focuses on promoting the widespread availability and take up of broadband connections and the development of secure Internet services, applications and content in Europe.

After noting the Parliament's satisfaction with the Commission's Action Plan, the Resolution focuses on a number of points. The Parliament stresses that decisive action by the Member States is needed to guarantee broadband connections at affordable prices. It is noted that Member States should take action to promote the adoption of both digital television and third generation mobile communications as well as the deployment of complementary broadband infrastructures (such as cable and satellite DSL). The Resolution emphasises that the success of these initiatives is largely dependent on the effective implementation in Member States of the new regulatory framework for electronic communications (see

IRIS 2002-3: 4 and *supra*), which is expected to foster investment in infrastructure and promote innovation and sustainable competition.

The Resolution also stresses the concurrent need for new applications and content services to be made available and calls on the Commission to encourage the use of open platforms in order to ensure that consumers are not restricted in their choice of services. Secure access for all to the public electronic services of administrations in Europe and the further development of such services is advocated. Also, Member States are encouraged to facilitate the use of online services, for example by offering citizens free Internet time to familiarise them with the services offered.

Much emphasis is placed on the need to improve access and participation for all to the information society and to avoid certain social groups being excluded from it. In this regard, the Parliament calls on the Commission, the Member States and national authorities to promote the development of technical solutions (*e.g.:* voice-driven services) to enable people with disabilities to make use of the Internet. Member States are furthermore invited to guarantee that the inhabitants of rural and remote areas in Europe benefit from conditions of Internet access equivalent to those available in the rest of the European territory. The Resolution also calls for the increased participation of women to the information society, urging Member States to redress the existing gender divide in IT education and advocating the integration of women in IT research and management.

Further issues raised in the Resolution include a call on Member States to explore possibilities of promoting the development of broadband services through tax concession and a call on the Commission to encourage the development of European-specific operating systems and software. ■

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● **European Parliament resolution on the Commission Communication entitled "eEurope 2005: An information society for all – An Action Plan to be presented in view of the Seville European Council, 21/22 June 2002" (2002/2242(INI)), adopted on 12 February 2003, provisional text available at: http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=030212&LANGUE=EN&TPV=PROV&LASTCHAP=15&SDOCTA=14&TXTLST=1&Type_Doc=FIRST&POS=1**

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

NATIONAL

BROADCASTING

AL – Licensing of Foreign Radio and Television

The process of licensing of private broadcasting stations has been reopened in March 2003 as it was stopped in November 2002 while a national map of frequencies was being developed (see IRIS 2003–1: 7).

All legal persons (Albanian and foreign), who are registered at the Albanian High Court, will therefore have the right to apply for a license. BBC, Deutsche Welle and French television TV5 had already been licensed before the suspension in November 2002, while the decision on the application of Italian RAI will be taken after the reopening in March. ■

Hamdi Jupe
Albanian Parliament

AL – New Managing Council of Public Radio and Television to Be Elected

The Albanian Parliament decided on 20 February 2003 to elect a new *Keshilli Drejtues i Radiotelevizionit Publik* (Managing Council of the Public Radio and Television). The decision came after the approval of amendments to Law No. 8410 of 30. September 1998 on public and private radio and television in the Republic of Albania.

The Managing Council of the Public Radio and Television is an independent body of 15 members elected by the Parliament. It is responsible for all the activity of Public Radio and Television and therefore elects the main directors of the Radio and Television, approves the policies and the programs of broadcasting for and controls the financial aspects of the Public Radio and Television.

As to the Law No. 8410, 6 out of 15 members of the Council were elected according to proposals of the political parties in the Parliament and the other members were elected from the representatives of civil associations and the academic institutions. According to the new amendments passed by the Parliament, only 5 members of the Council will be elected from the civil associations and the remaining 10 will be elected by the representatives of the political parties.

According to further amendments, the new Managing Council of Public Radio and Television will be elected 30 days after the new amendments will enter into force. ■

Hamdi Jupe
Albanian Parliament

● **Law No. 8410 of 30. September 1998 on public and private radio and television in the Republic of Albania**

● **Law of 20 February 2003 on the amendment of Law No. 8410**

SQ

AZ – Broadcasting Statute Adopted

The Statute "On Television and Radio Broadcasting" was adopted in Azerbaijan, thus making the country the 8th Republic of the former Soviet Union to have a separate broadcasting act.

The statute is based on principles of freedom of broadcasting in Azerbaijan; inadmissibility of censorship and/or interference by government bodies with the editorial activity of broadcasters; as well as protection of the professional independence of broadcasters.

Under the present Statute, no broadcaster may own more than two TV and three radio channels (or programmes). Broadcasting in Azerbaijan shall be carried out by state, municipal, private, and public broadcasters. The Statute describes the functions of the state body responsible for monitoring broadcasting, the licensing process (based on competition), the terms of a license (to be issued for a maximum term of 6 years), as well as limitations on advertising and sponsorship. It introduces a limit on fair use: broadcasters are allowed to show excerpts of copyright works up to a limit of 20 seconds per programme, or 5 minutes per film (movies) broadcast on TV without having to ask for the rightsholder's permission. The Statute also contains special norms on the protection of minors. ■

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● ***Zakon Azerbaijana "O teleradioveshchanii"* (Statute of Azerbaijan "On Television and Radio Broadcasting", N 345-IIQ) signed by President of Azerbaijan Geidar Aliev on 25 June 2002, available at: http://www.medialaw.ru/exussrlaw/l/az/tv.htm**

RU

DE – Compulsory Digitisation

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A new *Landesmediengesetz* (Regional Media Act - *ThürLMG*) for the Thuringia *Bundesland* entered into force on 14 January 2003. Under the Act, the transition from analogue to digital broadcasting is to be accelerated. According to Article 3.8 of the *ThürLMG*, only digital terrestrial frequencies will be allocated in Thuringia after 1 January 2004. Analogue frequencies will continue to be available in exceptional cases if, on account of national, regional or local circumstances in the supply area, this is necessary to guarantee sufficient diversity of programming and opinion, or if the broadcaster also provides a digital terrestrial service in the same supply area. In the latter case, analogue frequencies will only be allocated for a maximum of five years and only if it is technically feasible.

The switch to digital broadcasting has been coordinated nationwide since 1997 under the "*Initiative Digitaler Rundfunk*" (Digital Broadcasting Initiative - *IDR*). The Initiative, which aims to complete the transition to digital broadcasting by 2010, is being jointly run by the Federal Ministry for the Economy and Employment and the *Bundesländer*. ■

- ***Erstes Gesetz zur Änderung des Thüringer Rundfunkgesetzes*** **(First Act Amending the Thuringian Broadcasting Act), 6 January 2003, Thuringian Official Gazette No.1, 13 January 2003, p.1**
- **Information from the *Bundesministerium für Wirtschaft und Arbeit* (Federal Ministry for the Economy and Employment) on the introduction of digital television in the Federal Republic of Germany, available at:**
http://www.bmwi.de/Homepage/Politikfelder/Telekommunikation%20&%20Post/Telekommunikationspolitik/digitaler_rundfunk.jsp

DE

ES – Government's Conditional Approval of Merger of Leading Digital-TV Platforms

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On 29 November 2002, the Spanish Council of Ministers decided to approve the proposed merger between *Sogecable* and *Via Digital*, the companies that manage the two leading Spanish digital pay-TV platforms. The case had been referred to the Spanish authorities by the European Commission at their request in August 2002 (see IRIS 2002-9: 8).

The company resulting from the merger will be controlled by the two main partners of *Sogecable*, *Canal Plus* (a subsidiary of *Vivendi Universal*) and *PRISA* (the main Spanish multimedia group), and by the main stakeholder of *Via Digital*, the Spanish telecommunications incumbent, *Telefónica*, which is also active in several media markets. Figures from 2002 indicate that the new *Sogecable* will serve 2.5 million digital homes and more than 80% of pay-TV subscribers. The companies had argued that the merger was justified given the tough conditions facing all European television operators and the heavy losses incurred by both *Sogecable* and *Via Digital*.

The Government adopted its decision after having received the non-binding opinion of the competition authority, the *Tribunal de Defensa de la Competencia* (Office for the Protection of Competition, TDC). Following partly the advice of the TDC, the Council of Ministers approved the merger after imposing a list of 34 conditions to the deal.

Some of the most stringent conditions prevent the cost of the merger from being passed on to current subscribers; impose price controls on the new platform for the next four years; restrict the length of the contracts that *Sogecable* may sign with Hollywood Majors or with Spanish soccer clubs; and prohibit *Sogecable* from acquiring exclusive rights for the transmission of premium content via UMTS or ADSL. It is also prohibited for *Sogecable* to reach strategic agreements with *Telefonica*'s subsidiaries or to benefit them when selling content, in order not to strengthen the dominant position of the latter in neighbouring electronic communications markets.

Sogecable must also allow third parties to distribute its theme-specific channels. It will not be permitted to have exclusive rights to channels produced by the largest US studios or international producers and will be obliged to grant independent programmers access to its platform under reasonable, transparent and non-discriminatory conditions.

In principle, the conditions imposed upon the parties shall apply for a period of five years. The *Servicio de Defensa de la Competencia* (Protection of Competition Unit, SDC) of the Ministry for Economy will oversee the implementation of the Decision adopted by the Council of Ministers, while the independent electronic communications regulator, the *Comisión del Mercado de las Telecomunicaciones* (Telecommunications Market Commission, CMT) will publish annual reports on the compliance of these conditions by the merged company, and will have responsibility for solving some conflicts which may arise between the new *Sogecable* and third parties.

The parties to the merger must also comply with sector-specific media ownership limits. According to Article 19 of Act 10/1988 on Private Television, an undertaking which holds shares in a national terrestrial television concessionaire is not allowed to have holdings in any other television concessionaire. *Telefonica* will now have holdings in the national terrestrial television concessionaire *Sogecable* and in the national free-to-air terrestrial television concessionaire, *Antena 3 TV*, so it will have to divest itself of one of these stakes within a year.

The decision of the Council of Ministers has received a mixed response: the free-to-air television concessionaire, *Telecinco* and the cable operators considered that the Government had allowed the creation of a pay-TV monopoly, while the parties to the merger claimed that the conditions were too stringent. The latter had two months to present a revised business plan, informing the SDC about how they intended to implement these conditions. On 29 January 2003, they finally decided to go ahead with the merger and gave the SDC the information required, but they have said that they will challenge five of the conditions imposed by the Government before the Supreme Court. ■

- ***Acuerdo del Consejo de Ministros de 29 de noviembre de 2002, por el que, conforme a lo dispuesto en la letra b) del apartado 1 del artículo 17 de la Ley 16/1989, de 17 de julio de 1989, de Defensa de la Competencia, se decide subordinar a la observancia de condiciones la operación de concentración económica consistente en la integración de DTS Distribuidora de Televisión por Satélite, S.A. (Vía Digital) en Sogecable, S.A.(Sogecable).*** **(Decision of the Council of Ministers of 29 November 2002, by means of which some conditions are imposed upon the merger agreement between Via Digital and Sogecable), available at:**
http://www.mineco.es/dgpedc/new/Acuerdos%20Consejo%20Ministros/N-280_1_ACM.htm
- ***Acuerdo del Consejo de Ministros de 29 de noviembre de 2002 por el que, conforme a lo dispuesto en la letra b) del apartado 1 del artículo 17 de la Ley 16/1989, de 17 de julio, de Defensa de la Competencia, se decide subordinar a la observancia de condiciones relativas al mercado de derechos de retransmisión de acontecimientos futbolísticos la operación de concentracion económica consistente en la integración de DTS Distribuidora de Televisión por Satélite, S.A. (Vía Digital) en Sogecable, S.A. (Sogecable)*** **(Decision of the Council of Ministers of 29 November 2002, by means of which some conditions relating to the market of acquisition of soccer television rights are imposed upon the merger agreement between Via Digital and Sogecable), available at:**
http://www.mineco.es/dgpedc/new/Acuerdos%20Consejo%20Ministros/N-280_2_ACM.htm
- ***Informe del Tribunal de Defensa de la Competencia sobre el asunto N-280, Sogecable/Via Digital*** **(Report of the Office for the Defence of Competition on Case N-280 Sogecable/Via Digital), 13 November 2002, available at:**
http://www.mineco.es/tdc/Concen.Economicas/tdccoec74.htm

ES

FR – The CSA Adopts a Code of Ethics

Almost a year after the situation that discredited two of its members, the CSA (*Conseil supérieur de l'audiovisuel* – audiovisual regulatory body) has adopted a code of ethics. As members of an independent administrative authority, the members of the CSA have had a specific status conferred on them by the Audiovisual Communication Act. They cannot be either dismissed or re-appointed. During their term of office and for one year thereafter, they must refrain from adopting any public position on matters that the CSA has had to deal with or that may be submitted to them in the exercise of their duties; they are bound by professional secrecy. Lastly, the function is subject to certain incompatibilities. Thus, according to Article 5 of the Act of 30 September 1986 (as amended), the functions of a member of the CSA are incompatible with any elected mandate, any public post or any professional activity. Moreover, its members may not directly or indirectly exercise functions or receive professional fees except for services rendered before taking up their post, and they may not hold an interest in a company in the audiovisual sector, the cinema, publishing, the press, advertising or telecommunications.

In March 2001 Pierre Wiehn, one of the nine members of the CSA, was put in an awkward position when a confidential pre-report by the Court of Auditors expressed doubts as to the compatibility of the prescriptions of the law with Mr Wiehn's holding of SOFICAS (financial instruments intended to finance projects in the film industry). A few days previously, Jeanine Langlois-Glandier, a shareholder in Vivendi-Universal, resigned her post, leaving unresolved the question of the independence of the members of the audiovisual sector's regulatory body.

The CSA has reacted to this by adopting a code of ethics. In addition to referring to a duty of professional discretion and an obligation of transparency and prudence in respect of gifts received from third parties in the exercise of their duties, the text lists all the duties and obligations incumbent on members of the Council under the 1986 Act, and explains them. Thus it is stated that the scope of the ban contained in Article 5, mentioned above, is vast, since it covers all the sectors of communication and all companies – public or private – of any kind. "Holding an interest" usually means no more than owning a number of shares in these companies, regardless of whether the securities are managed personally or by a financial institution. Shares in investment funds or unit trusts are not included in the ban unless they are specifically stated in one of the sectors covered by Article 5. On the other hand, holding shares in a SOFICAS is, according to the text, deemed by the Court of Auditors as constituting an indirect holding of an interest in these companies and is therefore not permitted. The code states that offenders may be removed from office by their peers and sentenced to up to five years' imprisonment and fined up to EUR 75 000. ■

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● Deliberation of the CSA *(Conseil supérieur de l'audiovisuel)* of 4 February 2003 approving a code of ethics applicable to its members, official journal no. 46 of 23 February 2003, available at:
http://www.legifrance.gouv.fr/WAspad/Visu?cid=321914&indice=29&table=JORF&ligneDeb=1

FR

FR – The CSA Gives its Opinion on the Draft Decree Amending the Scheme of Cable and Satellite Channels

At its plenary session on 28 January 2003, the CSA (*Conseil supérieur de l'audiovisuel* – audiovisual regulatory body) issued its opinion on the draft decree amending Decree No. 2002-140 of 4 February 2002 determining the scheme applicable to television services distributed by cable or broadcast by satellite. In general, it favours presentation of the text, as it reduces the burden of the obligations regarding audiovisual production incumbent on the channels, taking into account their specific features and their current economic difficulties. Nevertheless, it considers that if it were allowed a greater margin of negotiation, the CSA would be able to take greater account of the particularities of the sector and of each company without needing to make the regulations any more rigid.

For first showings of productions, the CSA understands the aim to encourage channels to invest in this by making it possible for sums spent to be counted as double during the cost build-up period. Nevertheless, the CSA feels that the present arrangements, under which the proportion of first showings and the scheme for the cost build-up period are laid down in the conventions, already guarantee a satisfactory level of investment in new production during the cost build-up period, which alone is affected by the changes. It would therefore like to see this measure withdrawn from the draft decree. It also hopes that the possibility of calculating expenditure on safeguarding heritage works extended to all channels would not include the cost of financing first showings of studio broadcasts devoted to this heritage that were not in themselves works.

The CSA is moreover in favour of increasing the number of broadcasts used in the definition of a production's independence in the case of pre-purchasing, and of extending the concept of multi-broadcasting. It wonders, however, about the relevance of the new distinction drawn between the scheme for fiction works and documentaries, which makes the arrangements more complex by creating three separate schemes where currently there are only two (animation on the one hand, and fiction and documentaries on the other).

Finally, the CSA is in favour of extending the possibility of allowing cost build-up periods of five years in agreements to all the channels, as this would give it an extra margin for negotiating audiovisual production obligations. An amendment that would enable services broadcast in a non-European language to escape the quotas for the broadcast of European works and works originally made in the French language was also greeted favourably by the CSA, on condition that reference was made to only those non-European languages listed in the service's convention. Lastly, the CSA called the Government's attention to the fact that certain services distributed by cable or by satellite only partly constituted a simultaneous re-broadcast of an analogue terrestrially broadcast service or of a future digital terrestrially broadcast service such as *La Cinquième*, for example. The CSA considers that these service editors should not be subject to more than one text for all of their programming; the future decree should therefore specifically exclude these service editors from its scope so that their entire operation can be subject to the analogue or digital terrestrially broadcast scheme. ■

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● Opinion of the CSA (*Conseil supérieur de l'audiovisuel* – audiovisual regulatory body) delivered on 28 January 2002 on the draft decree amending Decree No. 2002-140 on the scheme applicable to cable and satellite channels, available at:
http://www.csa.fr/infos/textes/textes_detail.php?id=11161

FR

GB – Minister Sets Out New Rules on Relations Between Broadcasters and Independent Production Companies

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The British Culture Secretary has announced new rules relating to the independent production sector in the UK. The background to the rules is that the joint committee of the two Houses of Parliament, in examining the Communications Bill, recommended that the proposed lifting of the ban on non-EEA broadcasters be postponed until after the new regulator, the Office of Communications (OFCOM), had the opportunity to review the programme supply market (see IRIS 2002-8: 7). Instead of waiting for the new regulator to be established, the minister commissioned a review from the existing regulator, the Independent Television Commission. A further reason for establishing the review was that complaints had been made by independent production companies that they were being disadvantaged in their treatment by broadcasters.

The minister has now announced that she has accepted the vast majority of the review's recommendations, and some of them will be introduced into the Communications Bill during its passage through Parliament. Key new requirements will be that binding codes of practice will govern the relations between the major broadcasters (including both the BBC and commercial broadcasters) and the independent producers. The codes will need the approval of OFCOM, and will aim to ensure fair terms of trade between broadcasters and the producers and to foster an economically sound independent production industry. The codes will be enforced by fines and other sanctions.

The current quotas requiring 25% of programmes broadcast on the major channels to be purchased from independent producers will be developed in various ways, for example by permitting OFCOM to measure the quota by value as well as by volume, and by applying it separately to BBC1 and BBC2. OFCOM will also have to consider the effect on independent producers of changes in control of the major private broadcasters. New targets will be set for regional production and investment for Channel 5 and a new regional investment target for Channel 4. However, OFCOM will not be able to set investment targets for independent production as this is covered by quotas already in the Bill. ■

- **"Tessa Jowell Responds to ITC Programme Supply Review", Department for Culture, Media and Sport, Press Release 8/03 of 15 January 2002, available at: http://www.culture.gov.uk/creative/search.asp?Name=/pressreleases/creative/2003/dcms16**
- **"A Review of the UK Programme Supply Market" by the Independent Television Commission, available at: http://www.itc.org.uk/latest_news/press_releases/release.asp?release_id=656**

EN

GB – Minister Approves New BBC Digital Education Service Subject to Strict Conditions

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The BBC has recently developed several new digital channels, which require approval to be given by the Secretary of State for Culture, Media and Sport (see IRIS 2001-9:10, IRIS 2002-9: 10). There has been strong opposition from private broadcasters who have claimed that these channels, publicly funded by the BBC licence fee, represent unfair competition to them and prevent the development of private sector services.

The minister has now approved a further service, the BBC Digital Curriculum, a new digital learning resource aimed at schools, teachers, students and individual learners. Opposition from the private sector was particularly strong in this case, and a total of eighteen conditions have been attached to the approval to try to ensure that the service is distinct from, and complementary to, services provided by the commercial sector. The conditions include requirements to innovate and promote educational and technological experimentation, to maintain high standards of content, quality and editorial integrity and to publish annual plans of content covering the following five years. The BBC is required to report annually on the service's performance and a review of the service will be held after two years to establish whether the BBC is meeting the conditions. This review will include an independent element and public consultation, and will also examine the impact of the BBC Digital Curriculum on the educational software market. The BBC has also promised to spend half of the GBP 90 million budget for content on commissioning services from the private sector.

Despite the conditions, private sector competitors were unhappy with the minister's decision and threatened to seek judicial review; this threat was later withdrawn, although a possible complaint to the European Commission on breach of the state aid rules is still being considered. ■

- **Department for Culture, Media and Sport Press Release 4/03, 9 January 2003, 'Tessa Jowell Gives Approval to BBC Digital Curriculum', available at: http://www.culture.gov.uk/creative/search.asp?Name=/pressreleases/creative/2003/dcms04**

HU – Experimental Interactive TV Services Launched

Márk Lengyel
Legal Analyst

Antenna Hungária Rt. (AH), the Hungarian national television and radio network operator, has introduced its first interactive TV services in co-operation with Sofia Digital, a provider of interactive TV solutions.

The new services are currently at an experimental stage, and are available in the area around Budapest via the digital terrestrial transmitter operated by AH. According to the company's press release it is intended to extend the services to the whole territory of Hungary and to satellite broadcasts as well.

The introduction of such new technologies raises questions about the applicability of the instruments of the existing Hungarian regulatory framework.

In the present case the newly-introduced digital superteletext service falls under the scope of Act No 1 of 1996 on Radio and Television Services, which qualifies this activity as a value added service and not as broadcasting. Accordingly this classification in the Act only specifies the requirements and circumstances of providing such services and does not stipulate content rules that are only applicable to radio an television broadcasting in the traditional sense of the notion. In the absence of specific rules the content of the new superteletext service is governed by Act No 2 of 1986 on the Press. ■

- **Press Release of *Antenna Hungária*, available at: www.ahrt.hu/hirek.html**

HU

- **Press Release of Sofia digital, available at: www.sofiadigital.com/02122002.html**

EN

IT – Communications Act Declared Partly Unconstitutional

On 20 November 2002, the *Corte costituzionale* (Constitutional Court) decided in a preliminary ruling on questions raised on 31 January 2001 by the *Tribunale amministrativo regionale del Lazio* (Regional Administrative Tribunal of Lazio) concerning article 3 para. 7, of law no. 249/1997 adopting the Communications Act. This provision states that, considering the consistent and effective development in the number of viewers of cable and satellite television, the *Autorità per le garanzie nelle comunicazioni* (Italian Communications Authority) has to establish the date, on which channels that are only allowed as a transitional measure to provide terrestrial analogue broadcasting, will have to leave terrestrial frequencies.

Pursuant to the new frequency plan adopted in 1998 (see IRIS 1998-10: 12 and IRIS 1999-8: 8), the number of releasable concessions has been reduced from 12 to 11. As a consequence, two already active television channels (namely *Retequattro* owned by Mediaset and *Telepiù Nero* owned by Groupe Canal Plus) now exceed the antitrust limits imposed by the Communications Act of a maximum of 20% of concentration of available frequencies in the hands of the same operator (see IRIS Special "Television and Media Concentration" 2001, page 47). At the same time that the new concessions were released (28 July 1999), these two channels were allowed to continue to transmit on their formerly assigned frequencies on the basis of an interim ministerial authorisation. As the so-called "exceeding channels" employ frequencies that should be granted to the new concessionaires, the Communications Act allows them only as a transitional measure to transmit (on their existing frequencies) and provided that they do this in *simulcast* both on analogue terrestrial and on cable or satellite frequencies, while awaiting the development of alternative technical means of transmission.

The transitory period as envisaged by article 3 para 7 of the Act has been considered acceptable by the Court, due to the fact that at the time that the Act was adopted – 1997 – alternative means of transmission in Italy could not yet be considered competitive when compared to traditional analogue broadcasting. Hence the need for a transitional period in order to let digital broadcasting develop properly. What has been declared unconstitutional is the lack of a certain and defined date for the expiry of the transitional period. With reference to the technical outcome of decision no. 346/2001 of the Communications Authority, which had analysed the number of cable and satellite television viewers in Italy, the Constitutional Court has held 31 December 2003 to be a reasonable date for the expiry of the transitional period. In the meantime, the Parliament has been requested to define how the two broadcasters will have to leave the terrestrial frequencies. ■

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

● ***Corte costituzionale, sentenza*** **(Constitutional Court, judgement) no. 466, of 20 November 2002, available at:**
http://www.cortecostituzionale.it/ita/attivitacorte/pronunceemassime/pronunce/schedaDec.asp?Comando=LET&NoDec=466&AnnoDec=2002&TrmD=&TrmM=

● ***Delibera*** **no. 346 of 6 August 2001, *Termini e criteri di attuazione delle disposizioni di cui all'art. 3, commi 6, 7, 9, 11, della legge 31 luglio 1997, n. 249***
(Decision no. 346 of 6 August 2001, Criteria for the implementation of the provisions at article 3, paragraphs 6, 7, 9, 11, of the law of 31 July 1997, no. 249) available at:
http://www.agcom.it/provv/d_346_01_CONS.htm

IT

LV – Digital Future for the Television in Latvia

The *Digitālais Latvijas radio un televīzijas centrs* (the Digital Latvian Radio and Television Centre – DLRTC), concerned with the introduction of digital television in Latvia, published an announcement in February 2003 stating that it is planned to secure the coverage of digital television throughout the Republic of Latvia by the year 2005. The Centre's plan envisages that digital television will begin to operate in Riga-Capital as well as in the Riga Region already by autumn this year. Thus, the broadcasting stations' expenses for the use of the channels would – according to the plan – decrease by 30%, enabling them to invest more means in the production of content. Additional costs for viewers shall be restricted to those relating to acquiring receivers, whereby these technical elements are implemented in the most up-to-date TV-sets already available. The DLRTC plans to subsidise the acquisition of the receivers by the dividends the Centre has received from the shares in the mobile communications operator "*Latvijas Mobilais Telefons*". Thus the Centre will not require additional financing from the state budget.

As the introduction of digital television will incur high costs, the Centre predicts that the transition period from analogue to digital television shall be quite long. The plan envisages a switch-over region-by-region and aims to introduce the digital television gradually while analogue television remains operational in parallel. In addition to the argument about costs, it will also take time for people to grasp the advantages of digital television as being able to receive several TV and radio stations through one channel, as well as making use of the wide range of interactive services similar to those on the Internet. ■

Lelda Ozola
MEDIA Desk, Latvia

● **Press release of the *Digitālais Latvijas radio un televīzijas centrs*** **(the Digital Latvian Radio and Television Centre – DLRTC), available at:**
http://www.dlrtc.lv/pressroom.php?nid=35&full=1&id=3

LV

US – Court Rules that FCC is Not Authorized to Enact Video Description Rules

The District of Columbia U.S. Circuit Court of Appeals recently held that the 1996 Telecommunications Act does not authorize the FCC to enact video description rules. The court found that the FCC exceeded its authority because the rules have the effect of regulating programming content, which invariably raises First Amendment issues.

The regulations in question mandated commercial television broadcasters and multichannel video programming distributors to provide at least 50 hours of video description per quarter. Video description is the insertion of audio-narrated descriptions of a television program's key visual elements into natural pauses in the program's dialogue. Its purpose is to make a program more accessible to individuals with visual disabilities. Video description scriptwriters must fill in pauses, which were not creatively intended to be filled, and to describe subtleties in movements and mood.

The FCC argued that its authority to promulgate the regulations derived from Section 1 of the Communications Act, which authorized the FCC to make available to all Americans a radio and wire communication service. The D.C. Circuit disagreed, stating that while Section 1 authorizes the FCC to make the communications services available geographically, it does not authorize the FCC to regulate program content.

Video description ultimately changes programming content, as opposed to captioning, which solely transcripts speech. Thus, the regulations challenge television's creativity, thereby raising a freedom of speech issues.

The court rejected the FCC's argument that the adoption of rules mandating video description is permissible because Congress did not expressly foreclose the possibility. The court concluded that it could not presume a delegation of power absent an express withholding of power. ■

Anna Abrigo
Media Center
New York Law School

● **Motion Picture Ass'n of America Inc. v. F.C.C., 309 F. 3d 796 (D.C. Cir. 2002)**

FILM

CH – Order on Promoting the Cinema Comes into Force

New federal legislation on cinematographic culture and production (Cinema Act – LCin) came into force on 1 August 2002 (see IRIS 2002-8: 12); the *Département fédéral de l'intérieur* (Swiss Home Office) has now adopted the order laying down the conditions and procedure for granting both public financial aid for the selective promotion of the cinema and success-related aid. The order on promoting the cinema (OECin) came into force on 1 January 2003 and replaces the former arrangements laid down by the DFI on 13 December 1996.

The selective aid is intended to support projects that contribute to maintaining the variety of films on offer, maintaining the quality of films on the Swiss cinematographic market, providing vocational training at a high level and ensuring a lively cinematographic culture. In considering the projects, particular attention is paid to their artistic quality and creative originality, the professionalism of their production and the contribution they make to achieving the cultural policy objectives defined by the LCin (diversity of what is on offer, communication between the regions of the country where different languages are spoken and collaboration among the various sectors of the Swiss film industry). More particularly, the selective aid makes it possible to finance the development, production and distribution of Swiss films and co-productions.

The success-related aid rewards the box-office success of a cinematographic work. The bonuses awarded by the State in the form of success-related aid are calculated according to cinema attendance figures and are paid to the film's producer, distributor, director and screenwriter and to the projection company, in proportions laid down in the OECin. The bonuses must be reinvested directly in new cinematographic projects.

The objectives and the guidelines for promoting the cinema are determined by the DFI in promotion schemes. These schemes define the basic direction of Swiss policy concerning the cinema in the various areas supported by the State, namely screenwriting, project development, producing and distributing Swiss films and co-productions, the promotion of cinematographic culture and the diversity of what is on offer in cinemas, vocational training and awards presented to Swiss films. They govern the objectives, instruments of promotion and the criteria for granting financial aid in each of these fields. The promotion schemes are set out in detail in an appendix to the OECin. They are to function for an initial three-year period, ending on 31 December 2005. They are intended to define and guide measures for promotion according to circumstances, specific requirements and the evolution of the Swiss cinematographic market, and regular evaluations will be carried out on their relevance to objectives and their effectiveness. ■

Patrice Aubry
Lawyer
(Geneva)

● **Order by the *Département fédéral de l'intérieur* (Swiss Home Office) on promoting the cinema (OECin), published in the full collection of federal legislation *(Recueil systématique du droit fédéral)* and available on the federal administration's Internet site at www.admin.ch**

FR-DE

FR – Report on France's Arrangements for Support for Cinematographic Production

On 3 February Jean-Pierre Leclerc, member of the *Conseil d'État* and administrator of *France Télévision*, submitted to the Minister for Culture and Communication his report on the necessary development in the system of support for cinematographic production. His analysis of the current situation indicates that the problem of financing is still that of its distribution among the various categories of film rather than the overall amount, although this is threatened in coming years by uncertainties in the advertising market and the unfavourable development of Canal+.

The report proposes defining more closely the contribution obligations of the television channels, more particularly by putting forward the idea of requiring the channels to spread their investments over a number of films that should not be less than a minimum determined by their convention or terms of reference, once the CNC (*Centre national de la cinématographie* – national film centre) has given its opinion. In the same line of thought, Mr Leclerc feels that, for the sake of clarifying the channels' obligations, it is desirable to exclude them from receiving aid from the support fund when they co-produce works, except where these are qualified by the regulations on "cinema channels" and Arte; their specific objectives probably justify the maintenance of cinematographic co-production. Thus the report clearly questions the production activity of the major general-interest channels. These have been quick to react, complaining that it is the channels that contribute much to the support funds that are the first to be left out when the public subsidies are allocated (France 2 Cinéma). "If the resource constituted by the support fund ceases, we would give preference to films that could boost viewer figures and not those likely to be a success in cinema theatres." (M6)

The report also proposes basing the contributions of channels on their sponsorship resources, which are developing faster than income from conventional advertising. Thus it proposes amending the law in such a way as to include all of this revenue (in the order of EUR 23 million) in the basis for calculating the channels' contributions, which would provide the support fund with an extra EUR 8 million. Mr Leclerc also suggests levying a tax, as of 1 July 2003, on the purchase or rental of video cassettes based on the retail price, which would represent a gain for production of EUR 5 to 7 million on average.

The professional cinema organisations, such as the ARP and the UPF, consider these proposals "stop where there should be the start of an analysis of the regulation of the entire cinematographic sector with a view to the interdependence of the parties involved". Thus the "unbalanced report delays the commencement of essential thinking that is needed among the professional organisations and all the parties concerned, under the auspices of the public authorities".

The Minister has asked David Kessler, the Director General of the CNC, to analyse the proposals contained in the report and to gather the reactions of the professionals concerned in order to draw up a summary that would enable the Minister to reach decisions on the measures he is to put to the Government. ■

Amélie Blocman
Légipresse

● **Jean-Pierre Leclerc, Consideration of France's arrangements for providing support for cinematographic production, available at:**
http://www.culture.gouv.fr/culture/actualites/rapports/leclerc/rapportleclerc.pdf

FR

RELATED FIELDS OF LAW

DE – Supreme Court Decision on Transfer of Unknown Exploitation Rights

In a judgement published on 4 February 2003, the *Bundesgerichtshof* (Federal Supreme Court - *BGH*) decided that the holders of performance rights also own the rights for forms of exploitation that were still unknown at the time when the relevant contract was concluded.

In both cases being heard, performing artists had, in 1972 and 1979 respectively, granted to record companies the right to exploit music recordings "in all possible ways". CDs were not expressly mentioned in either

contract. In the 1980s, the record companies published recordings of the musicians' work on CD. The musicians applied for an injunction against them.

Under German law, the granting by an author of exploitation rights for as yet unknown types of use has no legal effect according to Article 31.4 of the *Gesetz über Urheberrecht und verwandte Schutzrechte* (Act on Copyright and Related Rights - *UrhG*). An author is defined as the creator of a work (see Articles 7 and 2). Under Article 31.4, it must be ensured that authors are equitably remunerated for the exploitation of their works and do not, in advance, voluntarily give up their exploitation rights, at a time when their economic value is not yet clear. In the Court's view, however, this rule does not apply to the holders of performance rights. Performance rights exist for cultural performances of third-party (sometimes in the public domain) works and are protected by Articles 70 ff. of the *UrhG*. These include performances by performing artists and phonogram manufacturers.

In this case, the *BGH* ruled that the contracts should be interpreted as including the transfer of CD rights to the record companies.

Since the *BGH* considers that Article 31.4 of the *UrhG* does not apply to performance rights, it did not need to decide whether publication on CD rather than record represents an unknown type of use. ■

Jan Peter Müßig
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Saarbrücken / Brussels

● Judgment of the *Bundesgerichtshof* (Federal Supreme Court) of 10 October 2002, published on 4 February 2003, in relation to case nos. I ZR 16/00 and I ZR 180/00, available at: http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Sort=3&sid=89b98d432fb747f538bcfdc5e6ef6c08&Art=en&anz=1&pos=0&nr=25075&id=1046276377.26

DE

DE – Decision on Form of Joint Agreement

On 30 January 2003, the *Oberlandesgericht München* (Munich Court of Appeal - *OLG München*) published a verdict in a dispute that had been dragging on for years concerning the form of a joint agreement between the *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH* (Performing Rights Collecting Society - *GVL*) on the one hand and the *Verband Privater Rundfunk und Telekommunikation e.V.* (Union of Private Broadcasters and Telecommunications Companies - *VPRT*) and *Arbeitsgemeinschaft Privater Rundfunk* (Association of Private Broadcasters - *APR*) on the other.

The *GVL* is a collecting company which, as provided by copyright law, protects, *inter alia*, the rights of performers and phonogram manufacturers in accordance with Articles 76.2 and 86 of the *Gesetz über das Urheberrecht und verwandte Schutzrechte* (Act on Copyright and Related Rights - *UrhG*). Arbitration proceedings between the parties, conducted in 1996 by the *Deutsche Patent- und Markenamt* (German Patents and Trademarks Office - *DPMA*), were unsuccessful because the award was rejected by all the parties. The *GVL* subsequently appealed to the *OLG München*, demanding that an administration agreement be laid down in accordance with Article 12 of the *Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten* (Act on the Administration of Copyright and Related Rights - *UrhWG*). Such an agreement determines the level of remuneration that companies have to pay to collecting societies, for example - as in this case - for using pieces of music. The original agreement between the parties was terminated on 31 December 1993 by the *GVL*, which wanted to amend some of its provisions. However, when negotiations between the parties failed to produce a consensus, an interim agreement was concluded early in 1994, under which the original agreement would remain in force until the legal dispute was finally resolved. The *GVL* argued that the agreement needed amending because, over the years, there had been a steady increase in the amount of music private broadcasters were using and music now accounted for a larger proportion of transmission time. The *GVL's* principal claim was for either an increase in remuneration levels or the abolition of the 20% rebate proposed by the *DPMA*. The *OLG* upheld the claim as far as it could, leaving the 20% rebate untouched, but increasing the average rate of remuneration from 4.52% to 5,65% of income. The Court decided that the income figure should be calculated by taking the gross revenue from advertising and/or sponsorship and deducting rebates, discounts and agency fees. However, marketing costs (expenditure on commercial representatives or marketing companies) can, in future, only be included up to a maximum of 5%.

The *OLG München* has refused to allow any appeal against its decision. However, the *VPRT* and *APR* have already appealed against this refusal. They fear that a large proportion of their members face serious financial difficulties if the *GVL* actually implements the new arrangements laid down by the Court. ■

Caroline Hilger
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● Ruling of the *Oberlandesgericht München* (Munich Court of Appeal - *OLG München*), 30 January 2003, case no. 6 AR 1/97

● *VPRT* press release, 31 January 2003, available at: http://www.vprt.de/db/presse/pm_310103_gvl_verfahren.pdf

DE

IT – Criminal Prosecution Reintroduced for Counterfeiting of Satellite Television Access Cards

On 7 February 2003, the Italian Parliament modified certain provisions of *Decreto Legge* no. 373/2000 (Decree Law no. 373 of 15 November 2000, implementing European Union Directive 98/84 on conditional access, see IRIS 2001-1: 14) which, since it entered into force in 2000, had decriminalised a whole set of actions formerly deemed to constitute an illicit act under article 171*octies* of the Italian Copyright Act. The new amendment expressly defines the counterfeiting of satellite cards as an illicit act, punishable by imprisonment.

Modified satellite television access cards illegally allow users free access to all satellite programming, including pay-per-view programming. Satellite piracy adversely affects a broad spectrum of the entertainment industry. The lost revenue for all of Europe's satellite providers in 1999 is estimated to be about EUR 190 million, according to a study conducted by the European anti-piracy association, AEPOC. On the basis of these figures, it is estimated that between 10 and 20 percent of European satellite television viewers are pirating.

In the last couple of years in Italy, the placing on the market, for direct or indirect financial gain, of illicit devices enabling or facilitating the circumvention of technological measures designed to protect the remuneration of a legally provided service, was not indictable. Under the increasing pressure of this phenomenon, the Italian Parliament changed the rule back to where it used to be before the Decree Law of the year 2000 and therefore back to the provisions of the Italian Copyright Act. As a result of this modification, if a person is found making, distributing, selling or modifying equipment to pirate satellite television, including access cards, that individual may now be subject to a criminal conviction up to a maximum of 3 years imprisonment and fines up to EUR 25,000. A second, not less important, direct consequence of the reintroduction of the criminal aspect of this kind of counterfeiting is that those convicted of piracy are now subject to the seizure of all illegal satellite equipment/cards, which can be forfeited or destroyed. Such persons can, of course, also be subject to civil actions for damages. ■

Marina Benassi
Lawyer
Studio legale Benassi, Venice

● *Modifica al decreto legislativo 15 novembre 2000, n. 373, in tema di tutela del diritto d'autore* (Amendment to Decree Law no. 373 of 15 November 2000, on copyright protection) of 7 February 2003, available at: http://www.parlamento.it/parlam/leggi/elelenum.htm

IT

NO – Norwegian Music Piracy Case: napster.no Fined

Peter Lenda
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On 22 January 2003, *Sør-Gubrandsdal tingrett* (the Court of Sør-Gudbrandsdal) rendered its decision in the case between the copyright-holder organisations and the owner of the website, napster.no. Napster.no was a website offering links directly to music that was illegally uploaded on the Internet. The Court had to address whether this linking was illegal as regards the Norwegian Copyright Act.

The Court's point of departure was the exclusive right that the copyright-holder has according to Section 2 of the Norwegian Copyright Act (NCA) to make the copyrighted work available to the public and to make copies. The Court came to the conclusion that any uploading on the Internet, even to web-addresses only using an IP-number and not a domain name, is to be considered an act of making a copy available and is thus not covered by Section 12 of the NCA that gives individuals the right to make private copies.

The Court then addressed whether a direct link to the illegal music on the Internet could be considered a performance of the music and thus a breach of the copyright-holder's exclusive right according to Section 2 of the NCA. After a lengthy discussion, where the Court also referred to other Nordic judgments and Nordic unity in this field of law, the Court came to the conclusion that the performance requirement included any method whereby the public was made aware of the work.

The Court concluded that the owner of napster.no had acted in violation of Section 2 of the NCA and had violated the copyright-holder's exclusive right to make the copyrighted work available to the public.

The most interesting part of the judgment by far,is the question of whether the owner of napster.no also was an accomplice to the illegal copying of music. The Court had to address whether the users of the website had acted in violation of the right to make copies for private use according to Section 12 of the NCA. The Court found that the downloading of music has the same effect as when other physical copies are made within the private sphere and therefore, the users had only acted within their rights under Section 12. The owner of napster.no could not be held liable for this use.

Finally, the Court addressed the question of damages. It considered that of all hits on the website, only 20% led to downloading, but that it could not be presumed that everyone who downloaded would be willing to buy a CD, had they not downloaded the music. As a result, the Court did not apply such percentages and awarded the copyright-holders NOK 75,000 in compensation for losses relating to the sale of records. The copyright-holders were also awarded an additional NOK 25,000 for other losses.

The judgment may yet be appealed. ■

● **Decision of *Sør-Gudbrandsdal tingrett* (Sør-Gudbrandsdal City Court – First Instance) of 22 January 2003, available at:**
http://www.lovdata.no/nyhet/dok/napster.html

NO

● ***Lov om opphavsrett til åndsverk m.v. (åndsverkloven)* (Norwegian Copyright Act 1961 (as amended)), Sections 2 and 12, available at:**
http://www.lovdata.no/all/nl-19610512-002.html (NO) and at
http://www.unesco.org/culture/copy/copyright/norway/fr_sommaire.html (EN)

NO-EN

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AGENDA

IViR International Copyright Law Summer Course - 7 – 12 July 2003
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