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# INTERNATIONAL

## OSCE

### Amsterdam Recommendations on Freedom of Media and Internet

**Tarlach McGonagle**
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The Amsterdam Recommendations on Freedom of the Media and the Internet were launched by the OSCE Representative on Freedom of the Media at a conference in the city on 14 June 2003.

The Recommendations stress the importance of eliminating "[b]arriers at all levels, be they technical, structural or educational", to digital networks and the Internet. Likewise, the importance of access to the public domain for "technical and cultural innovation" is also stressed, and it is added that the adoption of new provisions relating to copyright and patent law should not jeopardise this access.

The Recommendations insist that any type of censorship that is unacceptable *vis-à-vis* the "classic media", must not be applied to online media, nor should any new types of censorship be developed. All [imposed] mechanisms for filtering or blocking content are similarly frowned upon. Prosecutions relating to illegal content available online should target only that illegal content, and not the infrastructure of the Internet itself, according to the Recommendations. While existing laws regarding criminal content must also be observed online, the principle of freedom of expression "must not be confined".

Educational initiatives aimed at improving computer and Internet literacy (in schools, adult education schemes and specialised training for journalists) are encouraged.

The final section of the Recommendations, entitled "Professional Journalism", takes cognisance of the changing nature of journalism in "the digital era" and seeks to draw attention to the need for relevant regulatory authorities to be aware of the many usages of the Internet. It points out that the right to privacy of communication between individuals, traditional journalistic responsibilities and values, and the need for protection of new types of media (as well as "classic media") remain. ■

**● Amsterdam Recommendations on Freedom of the Media and the Internet, Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media, 14 June 2003, available at:**
**http://www.osce.org/documents/rfm/2003/06/215_en.pdf**

**● OSCE Representative on Freedom of the Media, Conference on Freedom of the Media and the Internet, Amsterdam 13-14 June, Conference Website:**
**http://www.osce.org/events/fom/amsterdam**

**EN**

## COUNCIL OF EUROPE

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

In a judgment of 6 May 2003, the Grand Chamber of the European Court of Human Rights has overruled the judgment of 25 July 2001 of the Second Section of the Court in the case of Perna v. Italy (see IRIS 2001-8: 3). While the Strasbourg Court in 2001 had come to the conclusion that the conviction of the Italian journalist Giancarlo Perna violated Article 10 of the Convention,

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the Grand Chamber has now reached the conclusion that the conviction of the journalist for defamation was in accordance with the European Convention on Human Rights.

The case goes back to an article published in the newspaper *Il Giornale* in which Perna sharply criticised the communist militancy of a judicial officer, Mr. G. Caselli, who was at that time the public prosecutor in Palermo. The article raised in substance two separate issues. Firstly, Perna questioned Caselli's independence and impartiality because of his political militancy as a member of the Communist Party (PCI). Secondly, Caselli was accused of a strategy of gaining control of the public prosecutors' offices in a number of cities and of the manipulative use of a *pentito* (criminal-turned-informer) against Mr. Andreotti (a former Italian prime minister). After a complaint by Caselli, Perna was convicted for defamation in application of Articles 595 and 61 paragraph 10 of the Italian Criminal Code and Section 13 of the Italian Press Act. Throughout the defamation proceedings before the domestic courts, the journalist was refused admittance of the evidence he sought to adduce. In 1999 Perna alleged a violation of Article 6 and Article 10 of the European Convention.

The refusal to allow the journalist to prove the truth of his statements before the Italian Courts was not considered by the Strasbourg Court to be a breach of Article 6 paragraphs 1 and 3 (d) of the Convention, which guarantee everyone charged with a criminal offence the right to examine witnesses or to have witnesses examined on their behalf. The Court, in its judgment of 25 July 2001, was of the opinion that there were no indications that the evidence concerned could have contributed any new information whatsoever to the proceedings. The Grand Chamber has now confirmed this decision, emphasizing that it was not established that Perna's request to produce evidence would have been helpful in proving that the specific conduct imputed to Caselli had actually occurred.

With regard to Article 10 of the Convention, the Second Section of the European Court, in its judgment of 25 July 2001, argued that the criticism directed at Caselli had a factual basis which was not disputed, namely Caselli's political militancy as a member of the Communist Party. The Court agreed that the terms chosen by Perna and the use of the symbolic image of the "oath of obedience" to the Communist Party was hard-hitting, but it also emphasized that journalistic freedom covers possible recourse to a degree of exaggeration or even provocation. According to the Court, the conviction of Perna was a violation of Article 10 of the Convention, as the punishment of a journalist for such kinds of criticism of a member of the judiciary was considered not to be necessary in a democratic society. With regard, however, to Perna's speculative allegations about the alleged strategy of gaining control over the public prosecutors' offices in a number of cities and especially the use of the *pentito* Buscetta in order to prosecute Mr. Andreotti, the Court came to the conclusion that the conviction of Perna was not in breach of Article 10 of the Convention.

The Grand Chamber, in its judgment of 6 May 2003, has now come to the overall decision that the conviction of Perna did not violate Article 10 at all. The Court focuses on the article's overall content and its very essence, of which the unambiguous message was that Caselli had knowingly committed an abuse of authority, notably connected with the indictment of Mr. Andreotti, in furtherance of the alleged PCI strategy of gaining control of public prosecutors' offices in Italy. The Court is of the opinion that Perna at no time tried to prove that the specific conduct imputed to Caselli had actually occurred and that in his defence he argued, on the contrary, that he had expressed critical judgments that there were no need to prove. According to the Grand Chamber of the Court, the interference in Perna's freedom of expression could therefore be regarded as necessary in a democratic society to protect the reputation of others within the meaning of Article 10 paragraph 2 of the Convention. ■

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● **Judgment by the European Court of Human Rights (Grand Chamber), Case of Perna v. Italy, Application no. 48898/99 of 6 May 2003, available at: http://www.echr.coe.int**

**EN-FR**

## Committee of Ministers: Conditional Access Convention Enters Into Force

The Council of Europe Convention on the legal protection of services based on, or consisting of, conditional access (see IRIS 2000-9: 3) entered into force on 1 July 2003 after it was ratified by three states (Cyprus on 27 November 2002, Romania on 26 August 2002 and Moldova on 26 March 2003).

This Convention, which was adopted by the Committee of Ministers of the Council of Europe in October 2000 and opened for signature in January 2001, aims to combat piracy of radio, television and Information Society services based on, or consisting of, conditional access and provided against remuneration. To this end, the Convention describes a number of activities that are considered illegal, ranging from the manufacture to the possession for commercial purposes of illicit access devices, and including the importation, distribution, sale, rental and installation of such devices. Parties to the Convention are obliged to take measures to make these unlawful activities punishable by criminal, administrative or other sanctions, and to adopt measures to enable them to seize and confiscate illicit devices, as well as any profits or financial gains resulting from such unlawful activities. The Convention also requires the Parties to adopt measures to permit the providers of protected services to bring actions for damages against those who engage in unlawful activities.

Since entering into force, the Convention, which is similar to a European Union Directive on the same subject (Directive 98/84/EC of 20 November 1998), has been ratified by a fourth state, Bulgaria, on 17 July 2003. The Convention will enter into force in that country on 1 November 2003. It has also been signed by six other countries to date (France, Luxembourg, Netherlands, Norway, Russia and Switzerland). ■

**Christophe Poirel,**
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● **Press release of the Council of Europe Media Division, 12 August 2003, available at: http://www.coe.int/T/F/Droits_de_l'Homme/Media/**

**EN-FR**

## Committee of Ministers: Adoption of Two Texts on Media and Criminal Proceedings

In Europe, as in other continents, the question of media coverage of criminal proceedings is a constant subject of debate between those who advocate maximum freedom of information on such proceedings and those who, in contrast, believe that this freedom should be restricted on account of the right to be presumed innocent, the right to a fair trial and the right to privacy. Numerous examples of abuses of various kinds reported in recent years in different European countries, some of

which have had dramatic consequences for the parties to such proceedings or their families, prove that this is a highly topical and complex subject that is universally relevant.

It was with these questions and concerns in mind that, on 10 July, the Committee of Ministers of the Council of Europe adopted a Recommendation to the governments of its Member States on the provision of information through the media in relation to criminal proceedings. This text, the result of more than two years' work by the Steering Committee on the Mass Media (CDMM), lists a number of principles which public authorities (police services and judicial authorities) involved in criminal proceedings should implement, concerning, for example, access to courtrooms and judgments, in order that the media may report such proceedings to the public while respecting the rights of the parties involved.

The Recommendation was drafted in the light of the case-law of the European Court of Human Rights concerning Articles 6 (right to a fair trial), 8 (right to respect for private and family life) and 10 (freedom of expression and information) of the European Convention on Human Rights. It is complemented by a Declaration designed to remind the media and their professional organisations about certain principles that should govern their investigations and reporting of criminal proceedings. These principles concern, for example, respect for the dignity and security and the right to privacy of victims, suspects, accused persons and their families. ■

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**● Declaration on the provision of information through the media in relation to criminal proceedings (adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies), available at:**
**http://www.coe.int/T/E/Human_Rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Declaration%20provision%20of%20information%20criminal%20proceedings.asp#TopOfPage**

**● Recommendation Rec(2003)13 of the Committee of Ministers to the member states on the provision of information through the media in relation to criminal proceedings (adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies), available at:**
**http://www.coe.int/T/E/Human_Rights/media/5_Documentary_Resources/1_Basic_Texts/2_Committee_of_Ministers'_texts/Rec(2003)13%20(A)%20provision%20of%20information%20criminal%20proceedings.asp#TopOfPage**

**EN-FR**

# EUROPEAN UNION

## Council of the European Union: Regulation on Customs Action against Counterfeiting and Piracy Adopted

The Council adopted a new Regulation on 22 July 2003 that concerns "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". It aims at improving the existing system of Regulation 3295/94/EC concerning the entry into the Community and the export and re-export from the Community of goods infringing intellectual property rights. The new Regulation is part of a series of measures intended to strengthen the fight against counterfeiting and piracy in the European Union (see IRIS 2003-3: 8).

The scope of the new Regulation has been extended. It covers "goods infringing an intellectual property right" meaning counterfeit goods, pirated goods, goods that infringe a patent, and (newly added) a plant variety right, geographical indications or designations of origin. A rightsholder can apply to the customs department for action by the customs authorities when goods are found to be infringing. This application has been made simpler and no costs are required.

Customs authorities may now also suspend the release of goods or detain them when they have sufficient grounds for suspecting that goods infringe an intellectual property right. This enables the rightsholder to actually submit an application for action. The procedure for destruction of infringing goods has been made faster and simpler than in the existing Regulation and the destruction itself is facilitated in some cases.

With this new enforcement instrument customs authorities should be able to improve inspections at external Community borders and protect consumers and the EU economic area more effectively. ■

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**● "Counterfeiting: the Commission welcomes the adoption of a new regulation to strengthen customs action", Press release of the European Commission, IP/03/1059, 22 July 2003, available at:**
**http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1059|0|RAPID&lg=EN&display=**

**DE-EN-FR**

**● Council Regulation of 22 July 2003 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, available at:**
**http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003R1383&model=guichett**

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

## European Commission: Complaint Against Germany Concerning Granting of Broadcasting Licences

On 24 July 2003, the European Commission announced its decision to refer Germany to the European Court of Justice in accordance with the infringement procedure provided for under Art. 226 of the EC Treaty over the granting of terrestrial broadcasting licences in Rheinland-Pfalz. In the Commission's view, the *Landesrundfunkgesetz* (Regional Broadcasting Act) and the way it is applied by the *Landeszentrale für private Rundfunkveranstalter Rheinland-Pfalz* (Regional Office for Private Broadcasters in Rheinland-Pfalz - *LPR*) infringe the principle of freedom of establishment and discriminate against broadcasters from other EU countries. As part of an informal preliminary procedure, the Commission first wrote to the German authorities on 14 January 1998, before sending a reasoned opinion in July 2000.

The Commission believes that the provisions of Articles 6.3.1, 11.2.6 and 12.1 of the *Landesrundfunkgesetz* of 17 December 1998 infringe the principle of freedom of establishment enshrined in Art. 43 of the EC Treaty as well as the principles of non-discrimination, necessity and proportionality. In its opinion, these provisions breach EU law because they give preference to broadcasters established in Rheinland-Pfalz in the granting of licences. The *LPR* openly admits that it deliberately favours broadcasters linked to the local community. The problem is aggravated by the fact that only three licences have so far been granted for terrestrial radio broadcasting in Rheinland-Pfalz; the length of validity of these licences was increased via an amendment to the broadcasting legislation in 1996. The operator holding the first

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two licences also has a direct stake in the capital of the third licence-holder and has strong links with that operator. Moreover, the law requires that, for the granting of the second and third licences, applicants should offer different programmes from those of the operator that received the first licence.

The German authorities claim that these measures are necessary to protect media pluralism, adding that the extension of the validity of licences is not automatic and applies to both foreign and German operators. They therefore dispute the allegation of discrimination. Similarly, they argue that the measure restricting the type of programming offered by further licence-holders is purely meant to protect pluralism and is therefore not discriminatory.

Since the German authorities had failed to provide a timetable for the necessary legislative amendments and since their arguments were not sufficient to convince it to change its analysis, the Commission decided to refer the matter to the Court of Justice. ■

- **Commission press release, 11 July 2003, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/03/1103|0|RAPID&lg=EN&type=PDF**
- **Commission press release, 28 July 2000, available at: http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=IP/00/880|0|AGED&lg=EN&type=PDF**

**DE-EN-FR**

## European Commission: Proposal for Directive on Unfair Commercial Practices

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The Commission adopted on 18 June 2003 a proposal for a Directive on Unfair Commercial Practices. Recent studies made clear that cross-border business-to-consumer sales do not reach a satisfactory level given the potential benefits the Internal Market provides. According to the studies an important reason for this problem is regulatory differences in national consumer protection. When businesses want to sell throughout the EU they have to comply with a maze of different national rules and case law. Consumers, on their part, worry about the possibility of being treated unfairly by businesses and being exposed to different (lower) levels of protection in other countries. The proposed Directive is designed to decrease these barriers to the Internal Market and to achieve the same level of consumer protection in the EU so that consumer confidence will improve.

Only when no specific rules on unfair commercial practices are available in other sectoral legislation will the Directive apply. If such specific provisions exist they have priority over the provisions of the Directive. Since the Directive provides for a convergence of the different national rules, an Internal Market provision introduces the concept of mutual recognition into the Directive. This means that traders have to comply only with the rules of their country of origin and it prohibits other Member States from imposing additional requirements on those traders.

The scope of the Directive is limited to commercial practices undertaken by businesses that harm consumers' economic interests. The Directive sets out criteria to determine what constitutes an unfair practice and includes a "blacklist" of misleading or aggressive practices that are considered to be unfair in all circumstances.

Commercial practices include commercial communication and advertising. The Directive also incorporates the business-to-consumer (B2C) provisions of the Misleading Advertising Directive (Directive 84/450/EEC as amended by Directive 97/55/EC). The scope of the existing Misleading Advertising Directive is thereby limited to business-to-business advertising and comparative advertising that may harm a competitor but where there is no consumer detriment.

A proposed Regulation will provide for an EU-wide network of national enforcement authorities that will take coordinated action against rogue traders. The Regulation will bring together national enforcement authorities and enable them to exchange information and cooperate in order to improve the enforcement of the consumer protection rules in cross-border cases. ■

- **Proposal for a Directive of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the Internal Market and amending directives 84/450/ECC, 97/7/EC and 98/27/EC (the Unfair Commercial Practices Directive), 18 June 2003, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52003PC0356&model=guichett**
- **Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the regulation on consumer protection cooperation"), 18 July 2003, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52003PC0443&model=guichett**

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

## European Commission: Approval of UEFA's New System for the Sale of Media Rights to the Champions League

The European Commission has recently adopted a final decision exempting from EU competition rules, under Art 81(3) EC Treaty, the new joint selling arrangements of the Union of European Football Associations (UEFA) for the media rights to the Champions League.

The Commission commenced its investigation into this matter in 1999 when UEFA notified its joint selling system, requesting clearance under EU competition rules. UEFA's policy, as notified, was to sell all Champions League television rights in a single package to a single broadcaster per Member State on an exclusive basis for up to four years. No access to the rights was afforded to Internet or telephone operators.

The Commission initially objected to these arrangements on the grounds that they restricted competition between broadcasters, encouraged media concentration and hindered the development of sport services on the Internet and of new generation mobile phones, which was in the interests of neither broadcasters, consumers nor clubs (see IRIS 2001-8: 5). Effectively, only the large incumbent broadcasters had the resources to secure the rights, leaving competing broadcasters without access to what constitutes "must-have" content for the success of both pay-TV and free-to-air TV (and is expected to be key for the development of new media services).

UEFA has now proposed a new joint selling system, which solves the concerns raised by the Commission and meets the conditions for an exemption under Art 81(3) EC Treaty (pursuant to which the Commission can exempt restrictive agreements if they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit). The Commission notes that this new system represents an improvement on the preliminary compromise reached with UEFA in July 2002 (see IRIS 2002-7: 5).

Under the new system, UEFA will continue to sell centrally the rights to live TV transmission of the matches but these will now be split into separate rights packages (the Gold, Silver and Bronze packages). If UEFA does not

succeed in selling the rights to the Bronze package within a specified amount of time, the individual clubs will be allowed to sell the rights to these matches themselves. Also, both UEFA and the clubs will be able to offer Champions League content for exploitation via Internet and UMTS (Universal Mobile Telecommunications System). Individual clubs will also be in a position to improve their offer to fans as they will have the possibility to exploit television rights on a deferred basis and to use archive content. UEFA will award the rights for a period not exceeding three years, through a public tender procedure allowing all broadcasters to bid. The new selling arrangements, which will apply from the 2003-2004 football season, are expected to lead to a broader and more varied TV coverage of matches and to give an impetus to new media services.

Competition Commissioner Mario Monti noted that the positive outcome in this matter "shows that the marketing of football rights can be made compatible with EU competition rules without calling into question their sale by a central body to the benefit of all stakeholders in the game".

The Commission is currently also examining the joint selling arrangements to a number of national football leagues. It has announced that it intends to exempt the new marketing system for the German *Bundesliga* broadcasting rights. ■

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- **"Commission clears UEFA's new policy regarding the sale of the media rights to the Champions League", Press Release of the European Commission, IP/03/1105, 24 July 2003, available at:**
**http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1105|0|RAPID&lg=EN&display=**
- **Background note: The UEFA Champions league, Press Release of the European Commission, MEMO/03/156, 24 July 2003, available at:**
**http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/156|0|RAPID&lg=EN&display=**

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

## European Commission: Infringement Proceedings Against 11 Member States for Failure to Implement the Directive on Copyright in the Information Society

The European Commission has sent reasoned opinions (representing the second stage of the infringement procedure under Article 226 of the EC Treaty) to 11 Member States requesting them to implement Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the Information Society ("the Directive" – see IRIS 2001-5: 3). The Directive, which was adopted in May 2001, was to be implemented into national law before 22 December 2002, but only Greece and Denmark met this deadline (see IRIS 2003-4: 13 and 15). Italy and Austria followed, implementing the Directive respectively in April (see IRIS 2003-6: 13) and in June 2003. The Member States to which a reasoned opinion has been sent are therefore: Belgium, Finland, France, Germany, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK.

The Directive aims to harmonise and update the Member States' copyright legislation so as to take account of the digital environment. It is also the means by which the EU and its Member States are implementing the 1996 WIPO Copyright Treaty and 1996 WIPO Performances and Phonograms Treaty (see IRIS 2000-5: 3 and IRIS 1998-7: 5), which makes implementation of the Directive particularly urgent.

The Commission notes that most of the infringing Member States have indicated that they will implement the Directive during 2003; on its part, it will "pursue infringement procedures until all Member States have written the Directive into national law". At this stage, if the Member States concerned fail to provide a satisfactory reply to the Commission's reasoned opinion within the two-month deadline, the Commission may refer the matter to the European Court of Justice. ■

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- **"Internal Market: Commission moves against 13 Member States for failure to implement EU legislation", Press Release of the European Commission IP/03/1005 of 14 July 2003, available at:**
**http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1005|0|RAPID&lg=EN&display=**

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

## European Commission: Request to Ireland to Ratify the Paris Act 1971

The European Commission has sent a reasoned opinion to Ireland (under Article 228 of the EC Treaty) requesting it to comply with the judgment of the European Court of Justice of 19 March 2002, regarding its failure to ratify the Berne Convention for the Protection of Literary and Artistic Works (Paris Act 1971).

EU and EEA Member States undertook to adhere to the Paris Act by January 1995. Ireland, however, failed to do so and the Commission opened infringement proceedings against it. The matter was referred to the European Court of Justice, which ruled that by failing to adhere to the Paris Act by the prescribed date, Ireland had failed to fulfil its obligations under the EC Treaty. As Ireland has still not ratified the Paris Act, the Commission is requesting it to do so in order to comply with the Court's judgment, failing which the Commission could ask the Court to impose a fine. ■

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- **"Internal Market: Commission moves against 13 Member States for failure to implement EU legislation", Press Release of the European Commission IP/03/1005 of 14 July 2003, available at:**
**http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1005|0|RAPID&lg=EN&display=**
- **Case C-13/00, Commission v. Ireland, Judgment of the European Court of Justice of 19 March 2002, available at:**
**http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&numaff=&datefs=&datefe=&nomusuel=&domaine=&mots=Ireland+Berne+Convention&resmax=100**

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

## European Commission: Regulatory Co-ordination in Electronic Communications Ensured

On 23 July 2003, the European Commission adopted a Recommendation on notifications, time limits and consultations as laid down in Article 7 of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("Framework Directive", see IRIS 2002-3: 4). One of the objectives of the regulatory framework for electronic communications networks and services is to streamline

the regulatory process by limiting *ex ante* regulation to a strictly necessary level and by making the regulatory procedure as transparent as possible. The regulatory framework gives the Commission powers to examine the national regulatory regimes through the Article 7 consultation mechanism. This article sets out consultation and co-operation procedures between NRAs (National Regulatory Authorities) and the Commission. These procedures are key features of the regulatory framework, in which NRAs have more flexibility to choose the appropriate tools to deal with regulatory issues.

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In order to ensure that decisions of Member States do not have an adverse effect on the single market or the objectives of the regulatory framework, National Regulatory Authorities must notify the Commission and other NRAs of certain draft measures. These are identified in Article 7(3) of the Framework Directive. It concerns measures such as: the definition and analysis of relevant markets; obligations with regard to access and interconnection; obligations on operators with significant market power relating to retail tariffs for the provision of access to and use of the public telephone network, carrier selection or pre-selection and leased lines; and measures which would affect trade between Member States.

The adoption of this Recommendation will ensure an effective co-operation and consultation mechanism between NRAs and the Commission and will enhance legal certainty. Its main objective is to create a framework within which the Commission can efficiently exercise its tasks under Article 7. To this end, the Recommendation contains the necessary rules for the notification process and the examination by the Commission of a notification. These rules specify, *inter alia*, the minimum elements that a notification must contain, registration and publication issues, calculation of binding time limits for the consideration of notifications under Article 7, and the use of a summary notification form.

The Commission has consulted NRAs, the European Regulators Group and Member States on this Recommendation. ■

- **"Commission ready to ensure regulatory co-ordination in electronic communications" Press Release of the European Commission IP/03/1089 of 23 July 2003, available at: http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1089|0|RAPID&lg=EN&display=**

**DE-EN-FR**

- **Commission Recommendation of 23 July 2003 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, available at: http://europa.eu.int/information_society/topics/telecoms/news/documents/recommendation_art7/Rec%20EN.PDF**

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

## European Commission: Communication on Open Platforms in Digital Television and Third Generation Mobile Communications

On 9 July 2003, the European Commission adopted a Communication "on Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications". The Communication's aim is to examine and report on the remaining obstacles to extensive access to Information Society services through open delivery platforms. In particular digital television and third generation (3G) mobile communications are examined, but the Communication is not limited to just these two platforms. Multi-platforms will be the reality in the market, therefore the Communication also deals with more generic issues common to all digital platforms.

**Annemarie Jansen**
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*University of Amsterdam*

According to the Communication "multiple access platforms will become available, using different access methods for delivery of services to a wide variety of end user terminals". Before this desired multi-platform environment will flourish, the Commission underlines that the rules in these areas will have to be beneficial to "technologically neutral conditions for competition, without giving preference to one platform over others".

Full inter-operable services are another important issue the Communication wants to put forward. Interoperability is considered to be highly desirable by the Commission because it will benefit consumer choice and may lead to lower prices for consumers. Standardization will be needed for this interoperability. The process of standardization will in principle be left to the industry, but the Commission reserves the right to take action.

The Communication also stresses that governments will have an important role to play, in their role as legislators, regulators, promoters and public procurement agencies; public authorities could, for instance, have a substantial impact on the creation of the Information Society by offering their own services online.

The aim for an open platform environment is just one of the important (commercial) factors that influences access to Information Society services according to the Communication. Other issues that will need attention are for example the development of attractive consumer services and the creation of an environment of regulatory clarity for new electronic services. ■

- **"Open platforms in digital television and 3G: Commission assesses state of play and charts way forward", Press Release of the European Commission of 9 July 2003, IP/03/978, available at: http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/978|0|RAPID&lg=EN&display**

**DE-EN-FR**

- **"Barriers to widespread access to new services and applications of the information society through open platforms in digital television and third generation mobile communications", Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2003)410 final, 9 July 2003, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52003DC0410&model=guichett**

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

# NATIONAL

## BROADCASTING

### AT – Broadcasting Laws Amended

On 20 August 2003, a law was published amending the *Privatfernsehgesetz* (Private Television Act) and authorising the use of terrestrial digital transmission capacities.

The new law entitles the holders of terrestrial analogue broadcasting licences to transmit their programmes digitally on a trial basis "in order to test out digital broadcasting techniques". The regulatory body is required to allow the public service broadcaster *ORF* and

**Peter Strothmann**
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private TV companies as defined in the *Privatfernsehgesetz* to test digital broadcasting techniques and programme-related developments in accordance with available transmission capacities. According to Section 54.3 of the *Telekommunikationsgesetz* (Telecommunications Act - *TKG 2003*) published on 19 August 2003, which is designed to transpose new EU communications legislation, *KommAustria* is responsible for allocating broadcasting frequencies (see IRIS 2001-3: 8 and IRIS *plus* 2002-2: 3). Such permission is to be limited to one year at most, although it may extended by a year on request. Content and advertising on these digital channels are to be regulated in accordance with the *ORF-Gesetz* (*ORF* Act) and *Privatfernsehgesetz*.

In order to promote digital transmission techniques (eg by carrying out academic studies, developing programming and funding the purchase of the necessary terminal equipment), a digitisation fund has been created through an amendment to the *KommAustria-Gesetz* (*KommAustria* Act), published within the framework of the law of 20 August 2003 (see IRIS 2003-6: 7). A TV film support fund has also been set up; like the digitisation fund, it will be financed through the licence fee (see IRIS 2003-6: 7).

In June 2003, the *ORF-Stiftungsrat* (*ORF* Foundation Committee) approved a licence fee increase. Some of the funds generated by this 8.2% increase will be used to finance the unencrypted digital transmission of *ORF 2* via satellite. ■

- ***Budgetbegleitgesetz 2003* (Budget Act 2003), Federal Gazette Part I No. 71 of 20 August 2003, p. 1041**
- ***Bundesgesetz, mit dem ein Telekommunikationsgesetz erlassen wird und das Bundesgesetz über die Verkehrs-Arbeitsinspektion und das KommAustria-Gesetz geändert werden* (Federal Act passing a Telecommunications Act and amending the Federal Act on Communications Supervision and the KommAustria Act), Federal Gazette Part I No. 70 of 19 August 2003, p. 983**
- ***ORF* press release, 16 June 2003, available at: http://www.orf-gis.at/news_16_06_03.htm**

**DE**

## CH – *SRG* Granted Digital TV Licence

On 25 June, the *SRG* (Swiss public service broadcaster) was granted permission by the *Bundesrat* (Council of Ministers) to launch terrestrial digital television (DVB-T) in Switzerland. Work to set up the digital network will begin in areas with no or inadequate cable provision. The first broadcasters to use the DVB-T network will launch a service in Tessin this summer; in 2004, large areas of French-speaking Switzerland will be able to receive DVB-T signals and a countrywide network should be up and running by 2009.

**Oliver Sidler**
*Medialex*

The new licence will enable the *SRG* to create an initial network transmitting four of its own channels. Each language region will receive both channels produced in the relevant language plus one *SRG* channel from each of the other language regions. The channels will also still be broadcast in analogue form in the corresponding language regions. The date when analogue signals are switched off will be determined by developments in the digital TV market. The *Bundesrat* turned down the *SRG's* request that the additional costs of broadcasting both analogue and digital channels during the transition period be funded through a temporary increase in licence fees.

Private broadcasters will also be able to transmit via the first digital network, as long as the technical transmission quality of the four *SRG* channels is not compromised and the private broadcasters contribute to the transmission costs. Once all the work is completed, ie when four or five networks are established, households in Switzerland will be able to receive up to 20 digital TV channels via roof or indoor aerials. ■

- **"*SRG* granted licence to create DVB-T network", press release of the Swiss *Bundesrat* (Council of Ministers), 25 June 2003, available at: http://www.bakom.ch/de/radio_tv/dvb/dvb_t/srg_gesuch/index.html**

**DE-FR**

- **Licence for *Schweizerische Radio- und Fernsehgesellschaft SRG*, 25 June 2003, available at: http://www.bakom.ch/imperia/md/content/deutsch/radiotv2/digital/konzession_d.pdf**

**DE-FR**

## CZ – Czech Television Code Approved

On 2 July 2003, the First Chamber of the Czech Parliament approved a code for the public service broadcaster *Ceská televize* (Czech Television - CT), which, in accordance with Article 8 (1c) of the Czech Television Act, had been drawn up by the CT Director General and approved by the CT Council.

The code is designed to set out and establish the principles for the operation of public service television and thus become an effective instrument for ensuring that the objectives of public service television are fulfilled. The code's provisions apply to CT and its employees, including those recruited on a contractual basis. Breaches of the code are treated as disciplinary offences and may result in dismissal.

According to the law and the code, CT plays a part in the process of the free formation of opinion and is thus under an obligation to the general public. Its programmes must, in accordance with the relevant programme category, help to provide comprehensive information and contribute to the free formation of individual and collective opinions. They must provide education, advice and entertainment and fulfil the cultural remit of television. They should contribute to social cohesion and take into account in an appropriate manner the whole spectrum of views present in society. They should therefore include programmes of interest to society which, under purely economic considerations, would not normally be broadcast. CT must also lay down quality standards. This part of the remit of public service television is developed further in the code, which is to serve as a reference point for decisions taken in relation to practical questions and problems.

The code also establishes a CT ethics committee, the members of which will be appointed by the CT Director General. Its tasks are to protect freedom of opinion and independence and to draft reports on programming issues. ■

**Jan Fučík**
*Broadcasting Council Prague*

- **Decision of the First Chamber of the Czech Parliament on the CT Code, available at: http://www.psp.cz/sqw/text/text2.sqw?C=371&T=k2002psp4u&A=589**

**CS**

## CZ – Complaint of Dismissed Members of the Czech Radio and Television Broadcasting Council

Six ousted members of the Czech Radio and Television Broadcasting Council have lodged a complaint with the Constitutional Court of the Czech Republic and filed a joint lawsuit in Prague over their dismissal by the Chamber of Deputies and by the Prime Minister of the Czech Republic in early April. The Council was dismissed because of repeated and serious infringements of its obligations laid down by the Broadcasting Act. The six claim that the lower house and the Premier ignored provisions of the Charter of Fundamental Rights and Freedoms, since only one of those dismissed, the Council's Chairman, was allowed to defend himself. They also argue that proper procedure was ignored in their collective dismissal. The

Chamber of Deputies elected a new council in May, so the case potentially threatens decisions made since then.

The Constitutional Court of the Czech Republic rejected the complaint of the six Council members by its decision of 1 June 2003. The main reason was that not all procedures have been exhausted so far. A constitutional complaint is inadmissible if the complainant failed to exhaust all remedial procedures afforded him by law for the protection of his rights. A constitutional complaint may be submitted *inter alia* pursuant to Article 87 para. 1, lit. d) of the Constitution, by a natural or legal person, if he alleges that his fundamental rights and basic freedoms guaranteed by a constitutional act ("constitutionally guaranteed fundamental rights and basic freedoms") have been infringed as a result of the final decision in a proceeding to which he was a party, of a measure, or of some other encroachment by a public authority (hereinafter "action by a public authority"). A petition for permission to reopen a proceeding is not considered to be such a procedure. In this case no final decision was taken and the lawsuit before the Prague regional court continues. ■

**Jan Fučík**
*Broadcasting Council Prague*

● **Decision of the Constitutional Court of the Czech Republic Nr. IV. ÚS 306/03 of 1 June 2003**

**CS**

## DE – Premiere Introduces New Youth Protection Measure for Pornographic Films

Under an agreement between pay-TV broadcaster *Premiere* and the *Hamburgische Anstalt für neue Medien* (Hamburg New Media Authority - *HAM*), the supervisory body, *Premiere* will introduce a new measure to protect minors from the pornographic films it shows after 1 August 2003. In view of the constant availability of films on demand (through the pay-per-view system), the regional media authorities had decided that additional precautions were necessary under the terms of Art. 9.2 of the *Jugendmedienschutz-Staatsvertrag* (Inter-State Agreement on Protection of Minors in the Media - *JMStV*) (Art. 3.5 of the old *RStV* - Inter-State Agreement on Broadcasting) to prevent children and teenagers from watching these programmes. Under the new system, not only will the subscriber's PIN number be required at the booking stage, but a code will also have to be typed in on the screen before a pornographic film can be viewed. Once access is granted, the programme can be watched for 90 minutes. If the decoder is switched off or a different channel is selected for more than 15 minutes, the code has to be re-entered. In connection with the report published on 28 February 2002 by the *Institut für Medienpädagogik in Forschung und Praxis* (Institute for Media Education in Research and Practice - *JFF*), entitled "*Jugendmedienschutz und Akzeptanz*" (youth media protection and acceptance), which formed part of the first report on the implementation of youth protection provisions in broadcasting, it had already been stressed that, if two PIN numbers were required, parents were less likely to give the second number to their children if they had to pay extra for programmes selected by their children. ■

**Stephanie Homburger**
*Institute of European Media Law (EMR) Saarbrücken / Brussels*

## FR – *CSA* Publishes Opinion on Lifting of Ban on TV Advertising for Certain Sectors

On 22 July 2003, the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body - *CSA*) published its opinion on the two draft decrees amending Article 8 of the Decree of 27 March 1992. The latter decree in particular prohibits television advertising for the following products and economic sectors: literary publishing, cinema, press and large-scale distribution.

Both draft decrees were written in response to the European Commission's order, issued on 7 May 2002, that France should repeal these provisions (see IRIS 2002–9: 10).

In its opinion, the *CSA* analyses the government's proposals for each of the sectors concerned and studies the economic impact of allowing such advertising.

As stated in the document, the *CSA* aims to reconcile the principle of equal treatment of operators with the demands of pluralism and competition in the television and TV advertising markets.

For each sector, the decrees describe a specific procedure under which advertising would be allowed.

With regard to the press sector, the government has proposed that the ban should be totally lifted. However, the *CSA* believes this would create certain problems:

Article 14 of the Audiovisual Communication Act of 30 September 1986 prohibits all political advertising. An advertisement for a newspaper could easily be contentious if the front cover was devoted to a particular person, particularly a politician. The *CSA* therefore suggests that the government should implement certain procedures. Furthermore, if the ban were totally lifted, newspapers independent of the main media groups would probably not be able to afford TV advertising.

With regard to TV advertising for large-scale distribution, the *CSA* proposes that advertising on national terrestrial analogue channels should not be allowed until 2008 rather than 2006. This is because it fears an imbalance in the advertising market. On the other hand, the *CSA* shares the government's view that advertising on local cable, satellite and terrestrial digital television should be permitted from January 2004.

Regarding the literary publishing sector, the draft decree advocated the lifting of the advertising ban on national terrestrial analogue channels that are also distributed via cable or satellite. The *CSA* proposes that such advertising should only be allowed on channels exclusively distributed via cable or satellite and on local and terrestrial digital television services, but not on national terrestrial analogue channels.

Finally, the *CSA* agrees with the government's decision to maintain the ban on advertising for cinema, except during encrypted slots transmitted by film channels via cable, satellite or terrestrial digital services. This rule also covers advertising for videocassettes and DVDs of cinematographic works. ■

**Clélia Zerah,**
*Légipresse*

● **Opinion no. 2003-5 of 22 July 2003 on the two draft decrees concerning advertising, sponsorship and teleshopping, available at http://www.csa.fr/infos/textes/textes_detail.php?id=13336**

**FR**

## FR – *Conseil d'Etat* Determines Legal Status of Popstars Programme

The decision issued by the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body - *CSA*) on 15 November 2001, classifying the televised reality show Popstars, broadcast on *M6*, as an audiovisual work provoked strong reactions from the main professional organisations, including collective management companies (see IRIS 2002–1: 8). Following this decision, the

*Etats généraux de la création audiovisuelle*, an organisation representing several copyright collecting companies, appealed to the *Conseil d'Etat* against the decision on the grounds that the *CSA* exceeded its powers.

The *Conseil d'Etat* announced that it was rejecting the appeal on 30 July 2003. It considered that the disputed programme was an audiovisual work in the sense of Article 4 of the Decree of 17 January 1990. It took this decision in spite of the conclusions drawn by the government commissioner, who urged it to overturn the *CSA's* decision on the grounds that certain important elements of the programme suggested it was partly a game and partly variety entertainment, both of which are excluded from the definition of an audiovisual work (see IRIS 2002-2: 10).

**Clélia Zerah,**
*Légipresse*

The *Conseil d'Etat* based its decision on the view that the game elements present in the disputed programme "are only of secondary importance and are not such that this programme should be regarded primarily as a game or variety entertainment". It also did not think the programme in question fell under the self-promotion category, since it did not comprise a set of advertisements having the sole purpose of promoting the television channel that broadcast it.

On the contrary, the *Conseil d'Etat* ruled that the disputed programme, "whose main objective is to present to the public the coaching, training and progress of the selected singers and to portray the early stages of their career in show business, contains elements of a screenplay and is both staged and edited", which means it may be classified as an audiovisual work.

The Popstars programme is currently the subject of a second procedure, in which the plaintiffs are asking the *Conseil d'Etat* to annul a decision taken by the *CNC* in August 2001. The *CNC* also classified the disputed programme as an audiovisual work, this time on the basis of Decree no. 95-110 of 2 February 1995 (see IRIS 2002-2: 10), by virtue of which it was eligible for financial assistance under the support scheme. ■

● ***Conseil d'Etat*, 30 July 2003, no. 241520, SACD**

**FR**

## FR – *Conseil d'Etat* Rules on Transmission of *Titanic* in Two Parts

Following the decision by the channel *TF1* to broadcast the film *Titanic* in two parts on 19 and 20 November 2002, the *ARP* (association of authors, producers and directors) submitted an urgent application to suspend the execution of the decision of the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body - *CSA*) to allow the broadcast (see IRIS 2002–1: 7). The application was rejected by the President of the Litigation Division of the *Conseil d'Etat*.

The *ARP*, the association of film directors (*SRF*) and the association of authors and film-makers (*SACD*) had also submitted to the *Conseil d'Etat* an application on the merits of the case to have the *CSA's* decision of 14 November 2001 quashed on the grounds of the *CSA* exceeding its powers. Under that decision, the TV channel had been allowed to broadcast a second commercial break during the film *Titanic* and the *CSA* had seen no objection to the film being broadcast in two parts on consecutive evenings.

**Clélia Zerah,**
*Légipresse*

In a decision of 12 May 2003, the *Conseil d'Etat,* ruling on the dispute, concluded that the *CSA's* consent was not required for a cinematographic work to be broadcast on television in two parts. No legislative or regulatory provision required an audiovisual communication service to obtain the *CSA's* prior authorisation to broadcast a cinematographic work either in one or several parts. In pursuance of Article 73 of the law of 30 September 1986, the only restriction concerned the number of commercial breaks allowed during such a broadcast, whatever format it took; although only one such break was allowed under normal circumstances, the *CSA* could, by special dispensation, allow one or more additional breaks, especially if the film was particularly long, as it was in this case.

The *Conseil d'Etat* therefore ruled that, since the applications had been brought against a measure that did not constitute a decision, they were inadmissible. ■

● ***Conseil d'Etat* (5th and 7th divisions combined), 12 May 2003, no. 240085, *ARP*, *SRF* and *SACD***

**FR**

## GB – New Communications Act Becomes Law

The Communications Act 2003 has now finished its passage through Parliament and became law on 17 July 2003 (see IRIS 2002-6: 9, IRIS 2002-7: 12 and IRIS 2002-8: 7). The Act is long and complex and makes major changes both to regulatory institutions and to the law relating to broadcasting; the main themes of the legislation are as follows.

First, the Act gives regulatory powers to a new institution, the Office of Communications (Ofcom), to replace five earlier ones, including the Independent Television Commission and the Radio Authority (the Office had already been established in preliminary form by the Office of Communications Act 2002). Ofcom will regulate broadcasting and telecommunications and will be responsible for licensing spectrum management. Its primary duties will be to further the interests of citizens in relation to communications markets, and to further the interests of consumers, where appropriate by promoting competition. It is also subject to a number of secondary duties, both procedural (for example, to have regard to the principles that regulation should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed) and substantive (for example, to promote media literacy). It will take over the work of the existing regulators at the end of 2003.

Ofcom takes over responsibility for telecommunications regulation from the existing Office of Telecommunications; this regulation is now mainly in the form of implementing the new European Union regulatory package for electronic communications (see IRIS 2002-3: 4), but it does have some implications for broadcasting, for example permitting the new regulator to establish must-carry rules to ensure universal availability of the public service broadcasters. The provisions relating to spectrum management permit future auctions and trading in spectrum rights.

The broadcasting provisions are important both for changing the rules on media ownership and for re-casting the regulation of public service broadcasting. In relation to the former, the Act abolishes the former restriction that prevented persons or companies from outside the EEA from holding broadcasting licences. It also lifts the current restriction preventing ownership of Channel 5, the newest public service channel, by a concern holding

more than 20% of the newspaper market; this restriction is however maintained for the longer-established Channel 3. It will become possible for a single company to own all the Channel 3 licences, thus ending its status as a network of regional broadcasters, and joint holding of Channel 3 and Channel 5 licences will be permitted. These provisions clearly increase substantially the scope for broadcasting mergers; at the last minute, provisions were inserted into the Bill to permit the Secretary of State for Trade and Industry to refer such mergers for Ofcom to consider the public interest implications.

In relation to broadcasting regulation, the Act makes provision for the licensing of all "television licensable content services", defined with the intention of excluding from the requirement the Internet and web-casting.

**Tony Prosser**
*School of Law*
*The University of Bristol*

Special provision is made for public service broadcasting (applying to Channels 3, 4, and 5 and in part to the BBC). This requires compliance with minimum content standards and rules on advertising and sponsorship (the first tier); observance of quantitative public service requirements such as quotas for independent productions (the second tier); and qualitative public service obligations (the third tier). In relation to the last, the Act sets out the "public service remit" of the broadcasters. Ofcom is to report on the extent to which the overall remit is met; the definition of public service broadcasting is set out in detail for the first time in section 264 of the Act. Each broadcaster is to produce an annual "statement of programme policy" setting out its plans for meeting its remit and reviewing its own performance against them. If Ofcom concludes that the remit has not been met, it may direct the broadcaster to correct the failure; if the direction is not complied with, it may then replace this system of self-regulation with formal regulation through amending the broadcaster's licence. Controversially, this third tier of regulation does not apply to the BBC, which continues to be regulated in this respect by its Board of Governors under the provisions of its Royal Charter and Agreement with the Secretary of State; these are however due for review by 2006 and this may result in new regulatory arrangements. ■

**● Communications Act 2003, available at:**
**http://www.legislation.hmso.gov.uk/acts/acts2003/20030021.htm**

**● Explanatory notes to Communications Act 2003, available at**
**http://www.legislation.hmso.gov.uk/acts/en/2003en21.htm**

## GR – New Law on Greek Audiovisual System

Several additions and amendments have been made to the legal framework for media and the written press by virtue of a law dealing primarily with the Press and Communication Departments of the Ministry of the Press and the Mass Media.

Among the provisions concerning the financial transparency of audiovisual companies, the new law establishes control mechanisms governing, on the one hand, contracts of pledge concerning stakes in audiovisual companies that include the right to vote at their annual general meetings (placing them under the control of the independent regulatory authority – NRTC, see IRIS 2002-8: 8) and, on the other, any changes to the share capital of press companies (to be supervised by the departments of the Ministry of the Press and the Mass Media).

With regard to provisions directly affecting the audiovisual landscape, the duration of national television broadcasting licences has been increased from four to five years. Meanwhile, the public service broadcaster *ERT* has been forced to give up the frequencies necessary for the terrestrial broadcast of the parliamentary channel, and the former incompatibility between the status of media producer and owner has been abolished.

A new procedure has also been introduced for the granting of licences for radio or television channels that are freely available via satellite or cable. This procedure is to be managed by the National Radio and Television Council (NRTC) and it will function in the same way as that which operates for radio and television services provided against remuneration.

Before the final parliamentary debate on the text, two significant provisions were omitted for the time being. These concerned the possibility of creating a national or regional radio station and simplifying the procedure for the issue of radio and television broadcasting licences.

The first initiative was opposed by local radio stations (the only type of radio in Greece), which feared that it would strengthen the position of radio stations in the Athens region. Furthermore, the draft law failed to mention the role of the independent regulatory authority (NRTC) in the preparation of frequency plans; this task remains the government's responsibility.

Under the second aborted initiative, control of the technical elements of licence applications would, like the rest of the procedure, have been the responsibility of the NRTC rather than the Ministry of Transport and Communications. The current regulations illustrate a certain disregard for the independent regulatory authority (recently recognised by the Constitution as having exclusive supervisory powers in the field of radio and television) and threaten to delay the procedure for granting television and radio licences. The vast majority of television and radio stations still do not hold the licences required by Act 2328/1995 (see IRIS 1995–8: 11), although the procedure for granting them is expected to be in place (permanently this time) by the beginning of autumn. ■

**Alexandros Economou**
*Barrister, National Radio and Television Council*

**● Act No 3166/2003 "Organisation and functioning of the Press and Communication Departments of the Ministry of the Press and the Mass Media and provisions for the media sector", Official Gazette A-178, 2 July 2003**

**EL**

## IT – Information in News and Current Affairs Programmes Has to Be Impartial and Pluralistic

Pursuant to the *Istituzione dell'Autorità per le Garanzie nelle Comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo* (Communications Act of 31 July 1997, no. 249, see IRIS 1997-8: 10), the *Disciplina del sistema radiotelevisivo pubblico e privato*, (Broadcasting Act of 6 August 1990, no. 223) and the *Disposizioni per la parità di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica* (Political Pluralism Act, Act of 22 February 2000, no. 28) and following claims from some Italian political parties, both majority and minority parties, on 15 May 2003 the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications Authority – *AGCOM*) adopted Decisions no. 90/03/CSP, 91/03/CSP and 92/03/CSP declaring that two current affairs talk shows (*Sciuscià* and *Excalibur*), transmitted by the public service broadcasting channel *RAI2*, and a news programme (*TG4*), broadcast by the *Mediaset* owned channel *Rete4*, did not ensure sufficient conditions of impartiality and pluralism.

The named programmes were broadcast during different periods: *Excalibur* during the local elections campaign

and *Sciuscià* and *TG4* outside this period. Consequently, the applicable provisions were different. According to Article 2, paragraph 1, of the Broadcasting Act all broadcasters must always respect the principles of pluralism, objectivity, completeness and impartiality in all transmitted programmes; the Act does not give any further criteria in order to indicate which types of behaviour could fall under this provision. Additionally, pursuant to the regulations on political pluralism, during election campaigns, all programmes of the public broadcaster *RAI* are subject to a number of obligations which, in the case of private broadcasters, only apply to political communication broadcasts.

With reference to the talk show *Excalibur*, considering that the show was transmitted during the period devoted to the local elections campaign and that all participants involved had not been granted equal time on the programme, the *AGCOM* applied the Political Pluralism Act and obliged *RAI* to transmit a compensatory edition of the programme.

With regard to *Sciuscià* and *TG4*, in order to give a concrete application to Article 2, paragraph 1 of the Broadcasting Act, the *AGCOM* analysed the programmes, according to three main terms of reference:
- a temporal term: the programme has to be observed during a consistent period of time and account has to be taken of its periodical character, if applicable;
- a content term: the topic of the programme has to be the basis for the evaluation of the equal access conditions of the participants in the programme;
- a subjective term: the topic of the programme has to be evaluated with reference to the qualifications of the subjects participating in the discussion.

Once the programme has been classified according to these terms, it has to be analysed according to the following:
- quantitative criteria:
  - all subjects involved have to be equally involved;
  - all participants have to be granted approximately equal time;
- qualitative criteria:
  - the conduct of the programme:
  - the information has to be presented correctly and in good faith;
  - all participants have to be granted a right of reply and equal treatment;
- the construction of the programme:
  - the format and the editing have to present all views in a well balanced way;
  - the participation of other external elements, e.g. public clapping, experts, surveys etc. has to ensure objective and impartial information.

In light of the above-mentioned criteria, the *AGCOM* held that these two programmes had not ensured impartial information, because of the unequal distribution of the time and the conduct of the anchormen. ■

**Maja Cappello**
*Autorità per le Garanzie nelle Comunicazioni*

**● Decision of the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications Authority) of 15 May 2003, no. 90/03/CSP, available at: http://www.agcom.it/provv/del_90_03_CSP.pdf**

**● Decision of the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications Authority) of 15 May 2003, no. 91/03/CSP, available at: http://www.agcom.it/provv/del_91_03_CSP.pdf**

**● Decision of the *Autorità per le Garanzie nelle Comunicazioni* (Italian Communications Authority) of 15 May 2003, no. 92/03/CSP, available at: http://www.agcom.it/provv/del_92_03_CSP.pdf**

**IT**

## NL – Dutch Regulator Cannot Claim Jurisdiction over RTL4 and RTL5

On 6 August 2003, the *Afdeling Bestuursrechtspraak Raad van State* (Dutch Supreme Court in administrative proceedings – *ABRvS*) overruled the judgment of the *Rechtbank Amsterdam* (the Court of Amsterdam) of 20 June 2002, and annulled the decision of the *Commissariaat voor de Media* (Media Authority – *CvdM*) of 5 February 2002, in which it claimed jurisdiction over the television channels RTL4 and RTL5.

Since the beginning of the 1990s, RTL4 and RTL5 have been broadcast by a daughter company of the Luxembourg broadcasting organisation CLT under the latter's broadcasting licence. In 1995, the aforementioned daughter company started a joint venture with the former Dutch public broadcasting company Veronica. The *Holland Media Groep* (Holland Media Group – *HMG*), as this joint venture was called, broadcast three channels: RTL4, RTL5 and Veronica. Although the official seat of HMG was in Luxembourg, the editorial policy decisions of the board of directors concerning the channels were taken in Luxembourg, and RTL4 and RTL5 were being broadcast under the CLT-Ufa licence, in 1997 the Dutch Media Authority decided that it had jurisdiction over the channels RTL4 and RTL5, on the basis of Article 2 of the Television without Frontiers Directive ("the Directive"). According to the Media Authority, HMG was the broadcasting organisation responsible for the broadcasting of the channels. Because HMG had its centre of activities in the Netherlands – the actual editorial decisions were taken in the Netherlands and most of the HMG personnel involved in the pursuit of television activities were based in the Netherlands, according to the Media Authority – the provisions of the Dutch Media Act would apply to *RTL4* and *RTL5* (see IRIS 1998-1: 13).

CLT-Ufa and HMG disagreed with the Media Authority on the identity of the broadcasting organisation responsible and the meaning and scope of Article 2 of the Directive. Because the programmes were being broadcast under a Luxembourg licence, this claim of jurisdiction would bring about a situation of double jurisdiction, which did not seem to agree with the provisions of the Directive.

HMG and CLT raised objections to the aforementioned decision. In appeal, the Court of Amsterdam confirmed the Media Authority's decision (see IRIS 2000-9: 11 and IRIS 2001-1: 10). On 10 April 2001, the Supreme Court, however, overruled the Media Authority's decision, on the grounds that it had not made a sufficient effort to avoid the possibility of double jurisdiction. In its judgment, the Supreme Court concluded that in principle the Media Authority had rightly assumed its competence on the basis of the Directive, but that it should have taken action to prevent double jurisdiction, such as raising the topic in the Contact Committee established under Article 23bis of the Directive.

On 5 February 2002, the Media Authority, after having discussed the topic in the Contact Committee, made a new decision, in which it again claimed jurisdiction on virtually the same grounds as before. HMG and CLT-Ufa started administrative proceedings. Since the first decision in 1997, there had been a few important developments. Luxembourg had made clear that it did not intend to give up its jurisdiction, a position that was supported by the European Commission. Also, several major changes in the organisational structure of HMG and CLT-Ufa had taken place. According to HMG and CLT-Ufa, because of these developments the Media Authority could not claim jurisdiction, even if its interpretation of the jurisdiction clauses in the Directive should prove to be correct.

On 20 June 2002, the Court of Amsterdam upheld the Media Authority's decision. The case was brought before the Supreme Court once again. HMG and CLT-Ufa requested the Supreme Court to refer questions to the European Court of Justice for a preliminary ruling, because of the differing views of the Netherlands and Luxembourg (the latter supported by the European Com-

**Wilfred Steenbruggen**
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mission) on the meaning and scope of Article 2 of the Directive.

On 6 August 2003, the Supreme Court delivered its judgment. Although the Court materially agreed with the Media Authority's interpretation of the Directive, it annulled its decision. According to the Supreme Court the decision would bring into being a situation that would most certainly be a violation of the goals, system and aim of the Directive and therefore would be a violation of Article 10 EC. The Supreme Court does not judge it necessary to refer questions for a preliminary ruling, because it does not find itself confronted with questions concerning validity or interpretation of Community law, which would have to be answered before a decision in this case could be made. ■

● ***Afdeling Bestuursrechtspraak Raad van State*** **(Dutch Supreme Court in administrative proceedings), Judgment of 6 August 2003, Case No 200203476/1, available at: http://www.raadvanstate.nl/verdicts/verdict_details.asp?verdict_id=4477**

**NL**

## RO – Licence Fee Dispute

**Mariana Stoican,**
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At the beginning of this year, the Romanian government adopted Decree No. 18/2003, amending Article 40 of *Legea Nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune (*Act No. 41/1994 on the organisation and functioning of public service broadcasting in Romania). The Decree amended the licence fees and the way they were collected (see IRIS 2003–4: 11).

Shortly after the Decree entered into force, the expert committees and subsequently both houses of parliament began to debate a law which was supposed to form the legal basis for this amendment. The Decree also entitled certain groups of people and institutions to a reduction in the licence fee.

On 5 June 2003, the Amendment adopting Government Decree No. 18/2003 was adopted. On 1 July 2003, after the act had been passed, a group of MPs filed a complaint with the *Curtea Constituţională* (Constitutional Court), alleging that the act was unconstitutional. In particular, they thought it breached Article 114 para. 1 of the Romanian Constitution, which states that so-called "organic acts" (a specific type of statute to regulate only certain matters and with stricter requirements as to their approval, modification or repeal) may not be amended by government decrees (*"Parlamentul poate adopta o lege specială de abilitare a Guvernului pentru a emite ordonanţe în domenii care nu fac obiectul legilor organice", Constituţia României, art. 114, alin.(1))*. Therefore, the new rules governing the amount and collection of licence fees should not have been introduced via a government decree that was subsequently adopted by Parliament. Rather, the law should have been adopted through a two-thirds majority vote of MPs. "Organic laws" require a two-thirds majority in order to be adopted. The Constitutional Court examined the complaint and upheld it in Decision No. 300 of 9 July 2003.

At its meeting on 22 August 2003, the government adopted a new decision (*"Hotararea privind taxa pe serviciul public de televiziune si radioteleviziune din 22 august 2003"*), reintroducing the possibility for citizens to declare that they do not own a radio or television set and thus to be exempted from the automatic collection of the licence fee as part of their monthly electricity bill. Following this decision, the radio licence fee was immediately increased from ROL 15,000 to ROL 25,000 ROL, although the television licence fee was frozen at ROL 40,000 (official exchange rate on 27 August 2003: EUR 1 = ROL 36,680). This decision replaces Government Decision HG No. 185/2003, which dealt with the implementation of Decree No. 18/2003 (amount of fees, etc.). ■

● ***Monitorul Oficial al României, Partea I, Nr. 520/18.VII.2003: Decizia Nr. 300 din 9 iulie 2003 asupra sesizării de neconstituţionalitate a Legii privind aprobrobarea Ordonanţei Guvernului nr. 18/2003 pentru modificarea art. 40 din Legea nr. 41/1994 privind organizarea şi funcţionarea Societăţii Române de Radiodifuziune şi Societăţii Române de Televiziune*** **(Constitutional Court Decision No. 300 of 9 July 2003, Monitorul Oficial al României, Partea I, No. 520, 18 July 2003)**

● ***Comunicat de presa al guvernului Romaniei din 22 august 2003*** **(Romanian government press release, 22 August 2003)**

**RO**

# FILM

## DE – Amendment of Media Decree on Film and TV Fund Taxation

**Caroline Hilger**
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After it was announced early in the year that the provisions of the *Medienerlass* (Media Decree) of 23 February 2001 were to be examined and revised (see IRIS 2003–6: 11), the *Bundesministerium der Finanzen* (Ministry of Finance) issued a communication on 5 August 2003, finally stating its position on the taxation of the profits of film and TV support funds and in particular the question of whether investors in these funds should be treated as producers. According to Section 5.2 of the *Einkommensteuergesetz* (Income Tax Act), investors, as long as they are treated as "film producers", can designate all expenditure on film production as losses from a taxation point of view. According to this provision, newly created intangible economic goods, such as the film rights acquired through ownership of these funds, are non-taxable.

The communication clearly establishes that investors in film and TV support funds should not be treated as film producers, but as purchasers of film rights if the fund initiator (eg film distribution or marketing companies, investment advisers, leasing companies) issues a standard contract and if shareholders have no influence over its content. Furthermore, in order for investors to be treated as producers, the fund must bear the economic risk inherent in the production; it must also have and actually exercise "significant influence" over the production process from beginning to end. It is pointed out that this "significant influence" does not automatically result from the fund initiator acting as a shareholder or managing director of the fund, but rather that the shareholders themselves must hold such influence. Representation by specially appointed third parties is not sufficient for this, but rather the shareholders should elect such representatives from their own midst; neither the fund initiator nor other associated persons may belong to such a body. According to the Finance Ministry, a crucial factor in deciding whether such influence exists is the extent to which the shareholders are legally and actually in a position to take decisions themselves and at their own responsibility concerning all contractual negotiations and stages of the production process (eg selection of the screenplay, casting, calculation of costs, filming schedule, etc).

These principles are now applicable in all cases where no current tax assessment exists. However, they do not apply to investments made before 1 January 2004 in funds that were set up before 1 September 2002 if such application would result in higher taxation than under the previous fiscal arrangements. ■

● ***Medienerlass*** **(Media Decree), 23 February 2001, No. IV A 6 – S 2241 – 8/01, available at: http://www.bundesfinanzministerium.de/Aktuelles/BMF-Schreiben-.745.2087/Artikel/.htm**

● **Communication by the *Bundesministerium der Finanzen* (Ministry of Finance), No. IV A 6 – S 2241 – 81/03, available at: http://www.bundesfinanzministerium.de/Anlage19766/BMF-Schreiben-vom-5.-August-2003-IV-A-6-S-2241-81/03-Adobe-Acrobat-5.0.pdf**

**DE**

## DE – *Bundesrat* Issues Opinion on New Film Support Act

At its meeting on 11 July 2003, the *Bundesrat* (upper house of parliament) adopted its position on the *Gesetzesentwurf für ein neues Filmförderungsgesetz* (Draft Revised Film Support Act - *FFG-E*), which was tabled in April by the Federal Government Minister for Culture and Media (see IRIS 2003–5: 14).

The *Bundesrat* welcomes, in principle, the attempt to adapt the current Act to the changing economic climate in the film sector and to give new impetus to film aid in Germany. However, it also criticises certain provisions. For example, with regard to the proposed establishment of a new German Film Council (para. 2a *FFG-E*), an additional advisory body responsible for discussing film policy issues and public support of the German film industry and evaluating the film support system, it argues that the *FFA* board, thanks to its pluralistic composition, is already a suitable body capable of advising the government on important film policy issues. For that reason, the *Bundesrat* believes there is no need for another advisory body which would not only be expensive and time-consuming to set up but which would also be inconsistent with current efforts to reduce the number of such bodies.

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The *Bundesrat* also criticises the proposed arrangements for reference film aid (see paras. 22 and 23 *FFG-E*). This form of support is awarded to producers of full-length films to help fund a subsequent film project and is dependent on the success of the initial film; success is evaluated using certain criteria, such as the number of cinema admissions or prizes awarded. Contrary to current support arrangements, the government draft abandons the system whereby a film's evaluation by the *Filmbewertungsstelle Wiesbaden* (Wiesbaden film assessment board - *FBW*) is used as a reference point for the award of financial support. The *FBW* is a film aid authority used by the *Bundesländer* to assess the artistic merit of films and award the national stamp of quality by rating them as "valuable" or "particularly valuable". The *Bundesrat* fears that the decision not to use the *FBW's* assessment as a criterion for the award of financial support will force producers to submit new films more often to international film festivals in order to have any chance of receiving reference film aid. Consequently, German aid would almost exclusively be granted on the basis of the assessments of foreign festival organisers and juries. The *Bundesrat* also thinks that support should not be awarded on the basis of a film's participation in an international competition, since there is no way of objectively verifying the decisions made at such an event. These decisions, for example, are not always based on qualitative criteria, so to link the award of German film aid to such selection procedures and decisions cannot be justified.

Concerning project film aid, the *Bundesrat* believes that additional funding raised via the new Film Support Act should be made available, *inter alia*, to producers of short films. Short films need an appropriate level of support, firstly because this film category is very important for the development of new talent and secondly because it is starting to be recognised as an art form in itself. ■

● **BR- Drs. 376/03, available at: http://www.parlamentsspiegel.de/cgi-bin/hyperdoc/show_dok.pl?pl=BB&part=D&pnr=376/03&quelle=parla**

**DE**

# NEW MEDIA/TECHNOLOGIES

## DE – Illicit Decoding of Conditional Access Services

According to Art. 3.1 of the *Zugangskontrolldienstegesetz* (Conditional Access Services Act -*ZKDSG*), which transposes Directive 1998/84/EC of the European Parliament and of the Council on the legal protection of services based on, or consisting of, conditional access of 20 November 1998, the manufacture, import and distribution for commercial purposes of illicit devices, ie technical procedures and devices designed or specially adapted to facilitate unauthorised access to protected services, are prohibited.

The *Oberlandesgericht Frankfurt a.M.* (Frankfurt Regional Appeals Court) recently decided that suppliers of such devices could not bypass this provision by claiming that they were to be used for purposes other than illicit decoding.

The dispute in question concerned a device which, despite contrary instructions from the manufacturer, was being recommended by dealers and Internet users and actually used for the decoding of pay-TV signals. However, in the court's view, the decision as to whether a device was illicit did not depend on the purpose for which the manufacturer intended it to be used, but on that for which the average user intended to use it. Although the manufacturer's instructions were an important indication, the purpose for which it was used by customers could be determined by other circumstances, such as the technical knowledge of potential users, existing practices or advice from third parties. The court held that, in individual cases, these circumstances could even eclipse unlawful directions for use given by the manufacturer; manufacturers should not be allowed to evade liability by providing bogus instructions. The determining factor should always be whether the potential user of the device ultimately regarded the possible use for the purposes set out in Art. 2.3 of the *ZKDSG* as being the use intended by the manufacturer, or as a form of misuse that was not consistent with the manufacturer's intentions. The more obvious the possible illegal uses were, the more likely it was that the average user would intend to use a device for the illicit purposes described in Art. 2.3 of the *ZKDSG*. ■

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● **Decision of the *Oberlandesgericht Frankfurt a.M.* (Frankfurt Regional Appeals Court), 5 June 2003, case no. 6 U 7/03**

**DE**

# RELATED FIELDS OF LAW

## CH – Parallel Import of Audiovisual Works Authorised Again

Introduced when the new Federal Law on cinematographic culture and production (Cinema Act - *LCin*) entered into force, Article 12 (1 bis) of the Federal Law on copyright and neighbouring rights (Copyright Act - *LDA*) of 9 October 1992 looks like being very short-lived. Indeed, it will have taken the Federal Assembly (Swiss Parliament) less than a year to reverse its position and considerably relax the restrictions imposed by this provision (see IRIS 2002–8: 14).

The current Article 12 (1 bis) of the *LDA*, which entered into force on 1 August 2002, stipulates that copies of an audiovisual work may not be re-sold or circulated in any other way unless the originator either sells it in Switzerland or has authorised its sale in Switzerland. In other words, the parallel import of audiovisual works is prohibited unless the holder of the rights for the work concerned has authorised it in advance. Article 12 (1 bis) of the *LDA* attracted a wave of protests and heavy criticism from Swiss importers and distributors of videos and DVDs, who thought this rule endangered their businesses.

Taking into account the arguments put forward against this provision, the Federal Assembly has taken the opportunity offered by the revision of the Federal Law on cartels and other restrictions on competition (Cartels Act - *LCart*) to amend substantially Article 12 (1 bis) of the *LDA*. The new text adopted by the Swiss Parliament states, for example, that copies of an audiovisual work may only be re-sold or rented in Switzerland if the originator's performing rights are not infringed. This provision refers to Article 10 (2c) of the *LDA*, under which the originator has, in particular, the exclusive right to recite, perform or execute his work, directly or by some other process, and to allow it to be seen or heard in locations other than where it is presented. Consequently, the parallel import and sale of videos and DVDs in Switzerland will henceforth be authorised only when the film concerned is no longer being shown in cinemas in any of the country's language regions.

The amendments to the Cartels Act are subject to a possible referendum. If no request for a referendum is filed before 9 October 2003, the Federal Council could fix a date sometime in spring 2004 for the entry into force of the new legal provisions. ■

**Patrice Aubry**
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● **Amendment of 20 June 2003 to the Federal Law on cartels and other restrictions to competition of 6 October 1995. Federal Gazette no. 25 of 1 July 2003, available at:**
**http://www.admin.ch/ch/f/ff/2003/4061.pdf (FR)**
**http://www.admin.ch/ch/d/ff/2003/4517.pdf (DE)**

**FR-DE**

## DE – Character's Removal from TV Series Can Justify Termination of Employment Contract

In a ruling of 2 July 2003, the *Bundesarbeitsgericht* (Federal Employment Court - *BAG*) decided that an actor's employment may be terminated if the character they play is written out of a TV series, even if their contract of employment covers a longer period.

The plaintiff had been a cast member in the *RTL* series "*Gute Zeiten, schlechte Zeiten*", produced by the defendant, *Grundy-UFA TV*, until early 2001. Her contract of employment had been due to expire on 20 July 2001, when production work on episode 2310 was due to be completed. According to the contract's provisions, the contract could be terminated with four weeks' notice, particularly if the character played by the plaintiff "was no longer part of the series". Viewing figures for the series dropped at the end of 2000. The defendant decided to remove the plaintiff's character and gave notice on 3 January 2001 that her contract would be terminated on 2 March 2001. The plaintiff instigated proceedings against her dismissal, arguing that her contract had been terminated for a reason other than that set out in the contract. She also claimed her salary for the period from 3 March to 20 July 2001. The first instance employment court upheld the complaint, except for part of the compensation claim. However, following appeals by both parties, the complaint was dismissed in its entirety by the *Landesarbeitsgericht Brandenburg* (Brandenburg Regional Employment Court). The appeal lodged by the plaintiff with the 7th Chamber of the *BAG* was also rejected. The Court concluded that the employment relationship between both parties did in fact end on 2 March 2001 as a result of the condition set out in the contract. Such a condition, laid down in a contract, was justified if its purpose was to promote the free expression of artistic creativity. According to the *BAG*, the defendant's decision to discontinue the plaintiff's role was taken largely for artistic reasons. ■

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● **Ruling of 2 July 2003, case no.: 7 AZR 612/02, see BAG press release no. 49/2003**

**DE**

## DE – No Copyright Protection for TV Show Formats

In a ruling of 26 June 2003, the *Bundesgerichtshof* (Federal Supreme Court - *BGH*) established that TV show formats are not protected by copyright. In the corresponding dispute, a French TV company had filed for an injunction against the broadcaster *Südwestrundfunk (SWR)* concerning the transmission of the *SWR* series "*Kinderquatsch mit Michael*". The plaintiff owns the rights to the series *"L'école des fans"*, which has been broadcast in France since 1977, and claimed that the *SWR* series was based without permission on the format of its own series. In both series, children aged between 4 and 6 are introduced by a presenter, asked a few questions and finally sing songs they have learned by heart.

The *BGH* understands a TV show format to be a concept comprising all the characteristic features of a show which, although the content is different, are sufficient to characterise subsequent shows in such a way that the public can recognise immediately that they form part of a particular series. These include, for example, the title, logo, basic idea, length and structure of the programme, the way it is presented and recorded, signature tunes, etc.

However, despite its individuality, such a concept is not protected by copyright, since it does not constitute a work in the sense of Art. 2 of the *Gesetz über den Urheberschutz und verwandte Schutzrechte* (Act on Copyright and Related Rights - *UrhG*). In order to be protected by copyright, a work must be the result of the original creation of specific content or physical material, rather than just a pattern for the similar creation of further material. In regard to television programmes, a work under the terms of the Copyright Act is therefore the programme itself, but not the concept or format of the programme. The *BGH* also points out that copyright only protects works from unauthorised exploitation in their original or unlawfully altered form, but not from being used as a model that is imitated. ■

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● **Ruling of the Bundesgerichtshof (Federal Supreme Court), 26 June 2003, case no. I ZR 176/01, available at:**
**http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Sort=3&sid=656f85bd943baddffd74e798e251f7a3&Art=en&client=8&anz=1&pos=0&nr=26713&id=1062058059.98**

**DE**

## DE – Internet Search Engine for Press Articles and Use of "Deep Links" Given Green Light

On 17 July 2003, the 1st Civil Chamber of the *Bundesgerichtshof* (Federal Supreme Court - *BGH*) issued a verdict following a claim by the publishing group *Handelsblatt GmbH* for an injunction concerning "*Paperboy*", an Internet search engine for press articles. It decided that the plaintiff's copyright had not been infringed and that the use of so-called "deep links" was not anticompetitive.

The plaintiff publishes the "*Handelsblatt*" and "*DM*" newspapers. It also publishes individual articles from these newspapers on its Internet site. The defendant operates a so-called meta-search engine for current press articles, which searches numerous websites. Internet users can use this search engine free of charge to call up a list of all articles containing a certain word or to receive daily e-mails listing all articles containing that word published each day. For each article listed, a hyperlink is provided in the first line, offering direct access to the web page containing the actual article and bypassing the home page of the particular Internet site (known as

a "deep link"). Further information is given below the hyperlink, including the headline, parts of sentences and key words, to enable the user to evaluate the relevance of each article.

The plaintiff considered that, by reproducing article excerpts and providing links that bypassed its home page, the defendant had infringed its copyright as well as competition law. However, the *BGH* disagreed. Firstly, the rightsholder made it possible for the defendant to use its work by making it publicly available on the Internet without any technical protection mechanisms. Secondly, the use of hyperlinks was not a process that should be reserved only for rightsholders or the originators of the databases used by the search engine. Users who knew the URL (Uniform Resource Locator), ie the address of the page on the World Wide Web, could also go directly to such a page without a hyperlink. A hyperlink was merely a technical facility, since clicking on it had the same effect as typing in the URL in the address field of the browser. The *BGH* did not address the question of "deep links", which bypass technical barriers to pages that can normally be accessed only via the rightsholder's home page.

There was also no breach of competition law just because the plaintiff lost advertising revenue on account of its home page being bypassed. The plaintiff could not expect hyperlink technology, which was extremely useful for all Internet users, to remain unused, especially since the source of the articles was not disguised by the use of hyperlinks. Without search engines and hyperlinks providing direct access to web pages, it would be virtually impossible to make any meaningful use of the vast wealth of information available on the World Wide Web. The plaintiff should therefore accept the drawbacks inherent in publishing its articles on the Internet, since its own interests were secondary to the general interest served by the functionality of the Internet. ■

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● **Ruling of the Bundesgerichtshof (Federal Supreme Court), 17 July 2003, case no. I ZR 259/00**

**DE**

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## AGENDA

**Mediensammlungen in Deutschland im internationalen Vergleich – Bestände und Zugänge**
7–8 October 2003
Organiser: Stiftung Haus der Geschichte der Bundesrepublik Deutschland - Venue: Bonn
Information & Registration:
Tel.: +49 (0)228 91 65 0
Fax.: +49 (0)228 91 65 333
http://www.netzwerk-mediatheken.de/

**Le droit de la communication à l'épreuve de l'Europe : Construction et résistance**
2 October 2003
Organiser: Légipresse - Venue: Paris
Information & Registration:
Tel.: +33 (0)1 53 45 89 15
Fax.: +33 (0)1 53 45 91 85
E-Mail: contact@legipresse.com
http://www.victoires-editions.fr/