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INTERNATIONAL

EFTA

Surveillance Authority: Moving against Liechtenstein for Failure to Implement the Conditional Access Directive

Frank Büchel
EFTA Surveillance Authority

On 17 July 2003, the EFTA Surveillance Authority delivered a reasoned opinion to Liechtenstein for that country's failure to implement the Conditional Access Directive (Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access – see IRIS 2003-6: 4 and IRIS 1998-10: 6).

The Conditional Access Directive seeks to combat the use of illicit devices which give unauthorised access to protected services, such as premium rate television (pay-TV), radio and information society services. The Directive requires that EEA States take the necessary measures to prohibit, *inter alia*, the manufacture, sale, installation and marketing of equipment or software that provides access to pay-TV services without the authorisation of the service provider. The Directive also requires that the measures taken against such illegal activities be backed by effective and dissuasive sanctions.

Due to delays encountered with the incorporation of the Act into the EEA Agreement, the original compliance date provided for by the Directive was deferred for the EEA EFTA States. Liechtenstein was under an obligation to implement the provisions of the Directive into its national legal order by 1 October 2001, but has hitherto failed to take the necessary measures to ensure compliance with the Act. The EFTA Surveillance Authority had commenced formal infringement procedures against that state at the beginning of 2002.

The purpose of a reasoned opinion is to give the State concerned a last chance to take corrective measures before the Authority decides whether to bring the matter before the EFTA Court. The EFTA Surveillance Authority requested the Government of Liechtenstein to take the necessary measures to comply with the reasoned opinion within three months. ■

● **"Liechtenstein fails to implement the Parental Leave Directive and the Conditional Access Directive", Press Release of the EFTA Surveillance Authority PR(03)20, 22 July 2003, available at:**
http://www.eftasurv.int/information/pressreleases/2003pr/dbaFile4258.html

EN

COUNCIL OF EUROPE

European Court of Human Rights: Case of Pedersen and Baadsgaard v. Denmark

In Strasbourg, two journalists of *Danmarks Radio* (Danish national television) complained about their conviction for defamation of a Chief Superintendent. The journalists, Pedersen and Baadsgaard, had produced two programmes about a murder trial in which they criticised the police's handling of the investigation. At the end of one of the programmes, the question was raised if it was the

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Chief Superintendent who had decided that a report should not be included in the case or who concealed a witness's statement from the defence, the judges and the jury. Both journalists were charged with defamation and convicted. They were sentenced to 20 day-fines of DKK 400 (EUR 53) and ordered to pay DKK 100.000 (EUR 13.400) compensation.

The European Court of Human Rights has now decided that this conviction breached neither Article 6 nor Article 10 of the European Convention. In its judgment of 19 June 2003, the Court, *inter alia*, emphasized that "[p]ublic prosecutors and superior police officers are civil servants whose task it is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term. It is in the general interest that they, like judicial officers, should enjoy public confidence. It may therefore be necessary for the State to protect them from accusations that are unfounded".

The Court is of the opinion that the television programme left the viewers with the impression that the named Chief Superintendent had taken part in the suppression of a report in a murder case, and thus committed a serious criminal offence. The Court accepts that journalists divulge information on issues of general interest, provided however "that they are acting in good faith and on accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism". The Court is of the opinion that it is doubtful, having regard to the nature and degree of the accusation, that the applicants' research was adequate or sufficient to substantiate their concluding allegation that the Chief Superintendent had deliberately suppressed a vital fact in a murder case. The Court also takes into consideration that the programme was broadcast at peak viewing time on a national TV station devoted to objectivity and pluralism, and accordingly, was seen by a wide public. The Court reiterates that the audio-visual media often have a much more immediate and powerful effect than the print media. The Court reaches the conclusion that the interference with the applicants' freedom of expression did not violate Article 10 of the Convention, as the conviction was necessary for the protection of the reputation and the rights of others. Three of the seven judges of the Court dissented, emphasizing the vital role of the press as public watchdog in imparting information of serious public concern. ■

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● Judgment by the European Court of Human Rights (First Section), Case of Pedersen and Baadsgaard v. Denmark, Application no. 49017/99 of 19 June 2003, available at http://www.echr.coe.int

EN

European Court of Human Rights: Case of Murphy v. Ireland

In a judgment of 10 July 2003 the European Court of Human Rights unanimously held that the applicant's exclusion from broadcasting an advertisement announcing a religious event, was considered to be prescribed by law, had a legitimate goal and was necessary in a democratic society. The decision by the Irish Radio and Television Commission (IRTC) to stop the broadcast of the advertisement was taken in application of Section 10(3) of the Irish Radio and Television Act, which stipulates that no advertisement shall be broadcast which is directed towards any religious or political end (see IRIS 1998-1: 6, IRIS 1998-7: 9 and IRIS 2003-2: 11). The Court accepted that the impugned provision sought to ensure respect for the religious doctrines and beliefs of others so that the aims of the prohibition were the protection of public order and safety together with the protection of the rights and freedoms of others. Recognising that a wide margin of appreciation is available to the Member States when regulating freedom of expression in the sphere of religion, referring to the fact that religion has been a divisive issue and that religious advertising might be considered offensive and open to the interpretation of proselytism in Ireland, the Court was of the opinion that the prohibition on broadcasting the advertisement was not an irrelevant nor a disproportionate restriction on the applicant's freedom of expression. While there is not a clear consensus, nor a uniform conception of the legislative regulation of the broadcasting of religious advertising in Europe, reference was made to the existence in other countries of similar prohibitions on the broadcasting of religious advertising, as well as to Article 12 of Directive 89/552/EEC of 3 October 1989 (Television without Frontiers Directive) according to which television advertising shall not prejudice respect for human dignity nor be offensive to religious or political beliefs. The Court also emphasized that the prohibition concerned only the audio-visual media, which have a more immediate, invasive and powerful impact, including on the passive recipient, and also the fact that advertising time is purchased and that this would lean in favour of unbalanced usage by religious groups with larger resources and advertising. For the Court it is important that the applicant, a pastor attached to the Irish Faith Centre, a bible based Christian ministry in Dublin, remained free to advertise in any of the print media or to participate as any other citizen in programmes on religious matters and to have services of his church broadcast in the audio-visual media. The Court indeed accepts that a total ban on religious advertising on radio and television is a proportionate measure: even a limited freedom to advertise would benefit a dominant religion more than those religions with significantly less adherents and resources. This would jar with the objective of promoting neutrality in broadcasting, and in particular, of ensuring a "level playing field" for all religions in the medium considered to have the most powerful impact. The Court reached the conclusion that the interference with the applicant's freedom of expression did not violate Article 10 of the Convention. ■

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● Judgment by the European Court of Human Rights (Third Section), Case of Murphy v. Ireland, Application no. 44179/98 of 10 July 2003, available at: http://www.echr.coe.int

EN

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

Four Belgian journalists applied to the European Court of Human Rights, alleging (among other complaints) that searches and seizures by the judicial authorities at their newspaper's offices, their homes and the head office of the French speaking public broadcasting organisation *RTBF* constituted a breach of their freedom of expression under Article 10 and a violation of their right to privacy under Article 8 of the European Convention on Human Rights.

In 1995 searches were performed in connection with the prosecution of members of the police and the judiciary for breach of professional confidence following leaks in some highly sensitive criminal cases (the murder of the leader of the socialist party; investigations regarding industrial, financial and political corruption). The complaint lodged by the journalists against the searches and seizures at their places of work and homes was declared inadmissible by the Court of Cassation and the journalists were informed that no further action would be taken on their complaint.

The European Court, in its judgment of 15 July 2003, has come to the conclusion that the searches and seizures violated the protection of journalistic sources guaranteed by the right to freedom of expression and the right to privacy. The Court agreed that the interferences by the Belgian judicial authorities were prescribed by law and were intended to prevent the disclosure of information received in confidence and to maintain the authority and impartiality of the judiciary. The Court considered that the searches and seizures, which were intended to gather information that could lead to the identification of police officers or members of the judiciary who were leaking confidential information, came within the sphere of the protection of journalistic sources, an issue which called for the most careful scrutiny by the Court (see also ECourtHR 27 March 1996, Goodwin v. United Kingdom – see IRIS 1996-4: 5 – and ECourtHR 25 February 2003, Roemen and Schmit v. Luxembourg – see IRIS 2003-5: 3). The Court emphasized the wide scale of the searches that had been performed, while at no stage had it been alleged that the applicants had written articles containing secret information about the cases. The Court also questioned whether other means could not have been employed to identify those responsible for the breaches of confidence, and in particular took into consideration the fact that the police officers involved in the operation of the searches had very wide investigative powers. The Court found that the Belgian authorities had not shown that searches and seizures on such a wide scale had been reasonably proportionate to the legitimate aims pursued and therefore came to the conclusion that there had been a violation of Article 10 of the Convention. The Court, for analogous reasons, also found a violation of the right to privacy protected by Article 8 of the Convention. ■

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● **Judgment by the European Court of Human Rights (Second Section), case of Ernst and others v. Belgium, Application no. 33400/96 of 15 July 2003, available at: http://www.echr.coe.int**

FR

EUROPEAN UNION

European Commission: Communication Concerning an International Instrument on Cultural Diversity

The European Commission adopted on 27 August 2003 a Communication concerning an international instrument on cultural diversity. The growing concerns of civil society and governments regarding the preservation of cultural diversity as well as the promotion of living cultures and creative capacity have become a major issue in the international debate.

In 2001 UNESCO adopted a Universal Declaration on Cultural Diversity and supporting Action Plan. Implementing this Declaration and Action Plan, UNESCO's Executive Board recommended that the organisation's General Conference "take a decision to continue action aimed at drawing up a new standard-setting instrument on cultural diversity and to determine the nature of that instrument" at its forthcoming meeting early this Autumn. The Communication sets out the European Union's position concerning the future instrument. As indicated in the Communication, preservation and promotion of cultural diversity are among the founding principles of the European model and can be found in the EC Treaty (art. 151), in the Charter of Fundamental Rights of the European Union (art. 22) and in the future European Constitution.

According to the Communication, the legally binding instrument, the shape and content of which have not yet been addressed, should be based on human rights and on a balanced understanding of both the opportunities offered and the threats posed by globalisation and the development of ICTs. The instrument should have the overall objective of promoting cultural diversity, contributing to the dialogue between cultures and fostering mutual understanding, respect, peace, security and stability at global level. These aims should be implemented by *inter alia*: consolidating certain cultural rights; committing the parties to international co-operation; creating a forum for debate on cultural policies and establishing a global monitoring on the state of cultural diversity worldwide. ■

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● **"Towards an international instrument on cultural diversity", Communication from the Commission to the Council and the European Parliament, COM(2003) 520 final, 27 August 2003, available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=52003DC0520&model=guichett**

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

European Parliament: Resolutions on Human Rights and Fundamental Rights Adopted

The European Parliament adopted two resolutions on 4 September 2003. One concerns human rights in the world (in 2002) and the European Union's human rights policy; the other concerns the situation as regards fundamental rights in the European Union (in 2002). Both resolutions deal with several aspects of human rights and fundamental rights.

In the resolution on fundamental rights in the European Union, the Parliament deplores the fact that no legislative solution has yet been found in the EU to the problem of the concentration of media power in the hands of a few mega groups. The Parliament recalls its resolution of 20 November 2002 on media concentration in which it insisted that a European media market should be established to counteract a growing disparity in national rules and safeguard the freedom and diversity of information (see also article *infra*). It especially deplores the fact that in Italy a situation is continuing in which media power is concentrated in the hands of the Prime Minister, without any rules on conflict of interest having been adopted.

Violence, intimidation or threats interfering with the free exercise of the journalistic profession are explicitly

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condemned and the Parliament calls on all states to uphold and protect freedom of opinion and expression.

The Parliament calls on the Commission to guarantee that public and private media provide citizens with accurate information, avoiding discrimination and guaranteeing access to various groups, cultures and opinions, in particular by ensuring equal access to the media during elections or referendums.

The resolution on human rights in the world includes considerations about media and freedom of thought, conscience and religion. The Parliament states that the media can play an important role in disseminating knowledge and adequate information on beliefs and cultures, and in promoting mutual understanding between people from different religious backgrounds and that they therefore should avoid creating stereotyped images of other beliefs, whilst recognising their obligation to report truthfully where religious intolerance exists. ■

● European Parliament resolution on human rights in the world in 2002 and European Union's human rights policy, adopted on 4 September 2003, provisional text available at: http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=20030904&LANGUE=EN&TPV=PROV&LASTCHAP=18&SDOCTA=5&TXTLST=1&Type_Doc=FIRST&POS=1

● European Parliament resolution on the situation as regards fundamental rights in the European Union (2002), adopted on 4 September 2003, provisional text available at: http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=20030904&LANGUE=EN&TPV=PROV&LASTCHAP=18&SDOCTA=6&TXTLST=1&Type_Doc=FIRST&POS=1

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

European Parliament: Resolution on the Television Without Frontiers Directive

On 4 September 2003, the European Parliament adopted a Resolution on the "Television without Frontiers" Directive (Directive 89/552/EEC as amended by Directive 97/36/EC), following the Commission's Fourth Report on the application of the Directive (see IRIS 2003-2: 5), in which the current process of review of the Directive was launched.

In the Resolution, the European Parliament restates its belief that a complete review of the Directive is needed in order to take account of technological developments and changes in the structure of the audiovisual market (although the current approach of the Directive of setting minimum rules should be maintained). In addition, the Parliament calls for Community law in the audiovisual field to be consolidated in a "Content Framework Package", bringing together the Television without Frontiers Directive, the e-Commerce Directive (Directive 2000/31/EC – see IRIS 2000-5: 3) and the Directive on copyright related to satellite broadcasting and cable retransmission (Directive 93/83/EEC – see IRIS 2002-9: 6). This package should be based on the principles underlying the current Television without Frontiers Directive and would provide "an overarching framework" for the audiovisual sector.

More specifically, as regards advertising and consumer protection, the Parliament notes that the regulation of the application of new technologies requires a more flexible and less prescriptive approach towards advertising than that adopted under the current Directive. The Resolution thus welcomes the intention of the Commission to investigate the possibility of structuring certain quantitative restrictions on advertising in a more flexible way (taking user choice and control options into account). Existing qualitative advertising rules however should be retained.

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As regards access-related issues, the Resolution addresses, *inter alia*, the provisions relating to access to events of major importance for society (Article 3a). In this regard, the Parliament, *inter alia*, invites the Commission to consider whether legal certainty would be improved by the introduction of a brief European minimum list of events, which could be complemented by national lists. The Commission is also asked to consider whether measures should be introduced at Community level to guarantee access to short extracts of events subject to exclusive rights. Furthermore, the Parliament reiterates its call on the Commission to address the problem of improving access to the broadcast media for people with disabilities.

The Resolution also addresses the provisions in the Directive relating to the broadcasting of European works and works by independent producers. It calls on the Commission, *inter alia*, to establish a clearer definition of the terms "European work" and "independent producer" in order to ensure the proper application of Articles 4 and 5 of the Directive. Also, the Commission should clearly establish the categories of specialist channels which would "merit a reduction or elimination of requirements for compliance" with these provisions (on the grounds that it would not be "practicable" for them to comply).

Particular emphasis is placed on the need to preserve pluralism in broadcasting and the concern is expressed that this may be threatened by growing concentration in the media sector. The Parliament had already called on the Commission to take action in this respect in a Resolution of 20 November 2002 (see *supra*). It now advocates that any future Directive include rules on ownership of television media that will ensure pluralism in the field of information and culture. In addition, it calls on the Commission to draw up an updated Green Paper on this issue by the beginning of 2004 in order to lay the foundations for a Directive in this field (as advocated in the resolution of 20 November 2002).

In general, the Parliament underlines that regulation of content should be carried out as closely as possible to the activities being regulated and stresses the need for flexibility in the Directive. The Commission is asked to publish a full picture of the self-regulatory measures taken to date and to support the establishment of a working group of national regulators for the exchange of best practice in all forms of regulation. ■

● European Parliament resolution on Television without Frontiers, adopted on 4 September 2004, provisional text available at: http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=20030904&LANGUE=EN&TPV=PROV&LASTCHAP=18&SDOCTA=11&TXTLST=1&Type_Doc=FIRST&POS=1

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

European Parliament: Resolution on Cultural Industries

The European Parliament has recently adopted a Resolution on the cultural industry in Europe. The focus of the Resolution is on the need to promote European cultural and creative industries with a view to strengthening their competitiveness as well as their role in the promotion of cultural diversity. This is particularly important in the context of an enlarged Europe in which culture will be an essential element for European integration.

In light of this objective, the Parliament calls on the Commission, the Member States and the regions (each within their respective competencies) to take action, *inter alia,* to: improve the circulation of and access to European cultural products both within and outside the EU; promote the establishment and growth of SMEs and independent bodies and actors in the field of culture so as to preserve diversity of creativity; support the development of cultural industries in peripheral and rural areas (for instance through EU Structural Funds and by ensuring broadband Internet access in such areas); increase the co-ordination of cultural policies and promote effective systems for the protection of intellectual property rights.

The Commission in particular is asked to submit: a Communication seeking to define "cultural and creative industries" (indicating which sectors and types of organisations fall within this definition); an in-depth study on a European map of cultural industries, which should focus on cultural, economic, legal, technological and educational aspects, with particular attention to the implications of enlargement; a Green Paper on European culture "with the aim of supporting and disseminating cultural wealth and respecting regional particularities and the special cultural characteristics of different people".

In the context of the current review of the "Television without Frontiers" Directive (see article *supra*), the Parliament asks that consideration be given to the advisability of putting in place mechanisms to improve the circulation of non-national European works.

The Resolution also advocates the removal of discrimination amongst cultural products as regards VAT, by extending reduced VAT rates to music products (by placing them in Annex H of the Sixth VAT Directive, which contains the list of goods and services eligible for a reduced VAT rate in the Member States). The Commission has recently proposed a rationalisation of the list of goods and services in Annex H, which does not however envisage the application of reduced rates to sound and audiovisual media. The Commission's proposal on the other hand provides for the maintenance of reduced rates on books, newspapers and periodicals. ■

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- **European Parliament Resolution on Cultural Industries, adopted on 4 September 2003, available at:**
http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&LANGUE=EN&SDOCTA=12&TXTLST=1&POS=1&Type_Doc=RESOL&TPV=PROV&DATE=040903&PrgPrev=PRG@TITRE|APP@PV2|TYPEF@TITRE|YEAR@03|Find@%63%75%6c%74%75%72%61%6c%20%69%6e%64%75%73%74%72%69%65%73|FILE@BIBLIO03|PLAGE@1&TYPEF=TITRE&NUMB=1&DATEF=030904
- **"Reduced rates of VAT: frequently asked questions", Press release of the European Commission MEMO/03/149, 16 July 2003, available at:**
http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/03/149|0|RAPID&lg=EN&display=

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

NATIONAL

BROADCASTING

AT – Consultation on Markets for Broadcasting Transmission

The Austrian communications authority (*KommAustria*) initiated a consultation procedure in late August with regard to the definition of the relevant national markets subject to its sector-specific regulation. In accordance with Art. 36 [3] in combination with Art. 128 of the Austrian telecommunications law of 2003 (TKG 2003), interested parties have the opportunity to state their position on the authority's intention to issue an ordinance defining the relevant markets for terrestrial broadcasting transmission in a way that differs from the Recommendation of the European Commission.

In the Recommendation of 11 February 2003 (2003/311/EC, OJ L 114, 8 May 2003, p. 45, see IRIS 2003-3: 7), which was issued in accordance with Directive 2002/21/EC (7 March 2002) of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (Framework Directive, see IRIS 2002-3: 4), point 18 of the Annex makes reference to the (single) market for "Broadcasting transmission services, to deliver broadcast content to end users". The market involved here is a type of wholesale market, since it relates to the inputs that are necessary for operators to provide services and products to end users. This market may, subject to the results of the market analysis to be undertaken by the national regulation authorities, become the object of preliminary regulation measures.

KommAustria believes that conditions in Austria are such as to justify a separation of the market in terms of broadcast content (radio and television) and in terms of the three transmission platforms satellite transmission, cable networks and terrestrial transmission, with only the last of these presenting serious hurdles to market entry. *KommAustria* accordingly defines two relevant markets susceptible to *ex ante* regulation, viz. the market for terrestrial FM radio transmission and the market for terrestrial TV transmission. The hearing phase is to conclude at the end of September, after which a consultation procedure in accordance with article 7 of the Framework Directive will be initiated. ■

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- **Consultation paper of the *KommAustria* (Austrian communications authority) available at:**
http://www.rtr.at/web.nsf/deutsch/Portfolio_Konsultationen_bisherige_bisherige Konsultationen_KonsultationMVO-RF?OpenDocument

DE

BE – Modifications to the Broadcasting Act regarding the Competences of the Media Authority and the Right of Reply

By its Decree of 4 June 2003, the Flemish Parliament has retransferred the competence on licensing of radio broadcasters to the Flemish Government. The licensing of private radio stations in the Flemish Community was transferred in 1998 to the *Vlaams Commissariaat voor de Media* (Flemish Media Authority) as a depoliticization of the procedures of radio licensing, which until 1998 were decided upon by the Flemish Government and the Minister responsible (see IRIS 1998-9: 9). Recent practice however and new developments in policy are the bases of the decision to retransfer the decision making role on private radio licensing back to the political level of the Government. The Media Authority only has a preparatory and advisory role with regard to the licensing of local, regional and commercial radio stations in the Flemish Community, as the final decision lies from now on with the Flemish Government. The Media Authority no longer has the competence to suspend or revoke the radio licenses awarded by the Flemish Government. The licensing of private television broadcasters however is still under the full competence of the Flemish Media Authority.

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Another innovation in the Flemish Broadcasting Act of 1995 is the integration of the provisions on the right of reply. A federal law of 23 June 1961, amended in 1977, guarantees the right of reply both in the print media and on radio and television in Belgium. By its Decree of 18 July 2003 the Flemish Parliament has decided to integrate the legal framework on the right of reply on Flemish radio and television into the Flemish Broadcasting Act, modifying at the same time some of the provisions on the audiovisual right of reply. Any natural person or legal person whose reputation is damaged by inaccurate statements in a broadcasting programme has a right of reply ("*recht van antwoord*") according to Articles 116 *vicies semel*-116 *doudetricies* of the Broadcasting Act. The request for a right of reply can be sent, within a period of a month, by letter, fax or email to the editor-in-chief or any other person who has the authority to decide on the broadcasting of the reply. The president of the Court of First Instance, in a summary proceeding, can decide if a request for a right of reply is in accordance with the law and can order a broadcasting organisation to issue a reply it refused. The Decree also introduces a right of announcement ("*recht van mededeling*") which gives every person whose name is mentioned or picture is shown as a suspect or accused in a criminal case, the right to an announcement referring to his or her acquittal ("*vrijspraak*") or decision of non-prosecution ("*buitenvervolgingstelling*"). This special right of reply *sui generis* is to be considered as strengthening respect for the presumption of innocence. ■

● ***Decreet Vl. Parl. 4 juni 2003 houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 25 januari 1995, wat de erkenning van particuliere radio-omroepen betreft, B.S. 19 juni 2003*** **(Decree of the Flemish Parliament of 4 June 2003 amending some provisions of the Broadcasting Act 1995, on the licensing of private radio broadcasters, *Moniteur* 19 June 2003), available at: http://www.juridat.be/cgi_loi/loi_a1.pl?imgcn.x=89&imgcn.y=12&DETAIL=2003060434%2FF&caller=list&row_id=1&numero=4&rech=15&cn=2003060434&la=F&chercher=t&language=fr&trier=promulgation&choix1=ET&choix2=ET&tri=dd+AS+RANK+&fr=f&pdda=2003&pdfa=2003&set1=SET+TERM_GENERATOR+%27word%21ftelp%2Flang%3Dfrench%2Fbase%2Froot%2Fderive%2Finflect%27&set3=set+character_variant+%27french.ftl%27&pddj=19&pdfj=19&pddm=6&pdfm=6&fromtab=loi&sql=pd+between+date%272003-6-19%27+and+date%272003-6-19%27+**

● ***Decreet Vl. Parl. 18 juli 2003 houdende wijziging van sommige bepalingen van de decreten betreffende de radio-omroep en de televisie, gecoördineerd op 25 januari 1995, wat de invoering betreft van het recht op informatie via radio en televisie en houdende instelling van een recht van antwoord en een recht van mededeling ten aanzien van radio en televisie, B.S. 3 september 2003*** **(Decree of the Flemish Parliament of 18 July 2003 amending some provisions of the Broadcasting Act 1995, on the right of reply and the right of announcement, *Moniteur* 3 September 2003), available at: http://www.moniteur.be/**

FR-NL

CS – Delays in Implementation of Audiovisual Sector Regulations

Despite the appointment of the members of the Council of the Broadcasting Agency of Serbia in April 2003 (see IRIS 2003-6: 10) and adoption of the Law on Telecommunications (see IRIS 2003-6: 15), the implementation of new regulations in the audiovisual sector in Serbia remains at a standstill.

The procedural problems and debates that cast a shadow on some of the Broadcasting Council members led to further problems relating to this body. On the first session of the Council held on 4 May 2003 one Council member (nominated to the Council by the Government), whose appointment has been criticised, was nominated by another criticised member (nominated to the Council by the National Assembly) and was elected President of the Council. After that, a person allegedly affiliated with the biggest commercial broadcaster was nominated for the role of the ninth member of the Council and subsequently appointed on 27 May 2003. This resulted in the resignations of two other Council members, originally nominated by journalists' associations and broadcasting organizations, who declared political influences as the reason for their departure. The ensuing discussion on the legitimacy of the Broadcasting Council as a whole, ended up in a new discussion in the National Assembly, which on 14 July 2003 refused to remove the two aforementioned criticised Council members. Furthermore, on 27 August 2003, the European Commission announced that it is suspending the financial aid of some EUR 300,000, previously designated as an aid to the development of an independent regulatory authority for broadcasting in Serbia, because of the irregularities in the appointment of the Council members. The Government of Serbia subsequently stated that it shall fund the Broadcasting Agency itself and that no foreign aid is needed, leaving the whole situation in a kind of a stand-off. The Council adopted some recommendations for the broadcasters on 4 September and on 9 September 2003 requested the National Assembly to appoint two extra members of the Broadcasting Council as well as the Telecommunications Agency Governing Board, so as to enable the Broadcasting Agency to perform its duties. The President of the Broadcasting Council also urged a quick adoption of the frequency assignment plan, or even a part of it, so that the licenses for national coverage might be issued by the end of the year.

On the other hand, there are delays with the implementation of the new Law on Telecommunications of Serbia as well. Under Art. 114 of the Law on Telecommunications, that act shall only come into force 3 months after the official election of the President and the members of the Governing Board of the Telecommunications Agency, and that election has not yet taken place. Given the fact that the Telecom Agency is the competent body for adopting the frequency assignment plan, in accordance with which the Broadcasting Agency shall issue broadcasting licenses, it is highly unlikely that licenses for national coverage can be issued by the end of the year.

For now the only certain fact is that the implementation of new laws is going to be postponed until 2004. ■

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● **"OSCE CiO disappointed by outcome of Serbian Parliamentary vote on Broadcasting Agency Council", OSCE Press Release of 16 July 2003, avaliable at: http://www.osce.org/news/show_news.php?id=3427**

EN

DE – New KEK Annual Report Published

The *Kommission zur Ermittlung der Konzentration im Medienbereich* (Media Concentration Commission, KEK) is an institution established on the basis of Art. 35 of the *Rundfunkstaatsvertrag* (German Inter-State Broadcasting Agreement, RfStV). It assists the *Landesmedienanstalten* (regional regulatory authorities) in fulfilling their responsibilities in relation to ensuring pluralism in private broadcasting. It has the task of making a final judgment on issues associated with ensuring pluralism in connection with the nationwide broadcasting of television programmes (Art. 36 [(1.)] RfStV).

On 9 September 2003 the KEK published its 6th annual report, documenting its activities over the period from 1 July 2002 to 31 June 2003.

Special mention should be made of the publication of an expert opinion commissioned by the KEK in the area of comparative law; it examines the situation and regulation of television in broadband cable networks, and

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covers the EU member countries Belgium, the Netherlands, and the United Kingdom, as well as the United States. Of particular interest is the description of the structural provisions made by these countries to enable their regulatory authorities to deal with an increased vertical concentration involving infrastructure- and content-providers. The report concludes with a discussion of how far these differing approaches could be applied in the German context and what measures in terms of national broadcasting law seem necessary and appropriate for facilitating early action to combat threats to pluralism.

The annual report also discusses the effects that current stipulations of the RfStV concerning media concentration have - and the effects that planned amendments to the stipulations will have - on the effective performance of the KEK's duties. ■

● **KEK Press Release of 9 September 2003 available at:**
http://www.kek-online.de/cgi-bin/resi/i-presse/232.html

DE

DE – Coordinated Introduction of DVB-T and Digital Radio Necessary

Peter Strothmann
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The *Direktorenkonferenz der Landesmedienanstalten* (Directors' Conference of the regional regulatory authorities, DLM), meeting on 17-18 September 2003, has emphasized the necessity of a coordinated introduction of DVB-T and digital radio.

The *Landesmedienanstalten* view DVB-T as providing an opportunity to ensure pluralism on the terrestrial platform as well, if a range of regional programmes is offered in addition to nationwide ones. They welcome the intention to follow up the introduction of DVB-T in the Berlin-Brandenburg region (see IRIS 2002-4: 6) with its introduction in the state of North Rhine-Westphalia and in the northern part of Germany. The *Landesmedienanstalten* said they were also prepared to support the isolated introduction of DVB-T in additional population centres if public-service and private television broadcasters express interest and funds are also available for the establishment and operation of transmission infrastructure by private broadcasters as well. Serving these population centres on the basis of three multiplexes for private broadcasters would involve financial assistance amounting to approx. EUR 20 million annually. In addition to northern Germany and North Rhine-Westphalia, further expansion would also require political backing and adequate funding.

The DLM expects that an impetus towards greater acceptance of digital radio will be generated by a wider choice of nationwide programmes. It will therefore be calling for the prompt provision of additional nationwide transmission capacity in band III. The introduction of digital radio would also require long-term financial assistance, with the funding needed just to support the provision of additional transmission capacity in band III amounting to EUR 8 million annually. ■

● **DLM press release of 18 September 2003 available at:**
http://www.alm.de/aktuelles/presse/p180903.htm

DE

FR – France Submitts to the European Commission Its List of Events of Major Importance

Clélia Zérah
Légipresse

France has just notified Brussels of its draft decree on the conditions for broadcasting events of major importance, in compliance with Article 3a of the "Television Without Frontiers" Directive, which provides that each Member State may draw up a list of events – national or otherwise – that it considers to be of major importance, and adopt measures to ensure that broadcasters do not exercise their exclusive rights "in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television".

The text had been sent in early August to the Directorate-General for Audiovisual Policy and is currently under examination by the DGs for Competition and Internal Markets, and by the Legal Affairs Department, which is to check that it raises no problems in respect of Community law.

Once the list is adopted, France could send it to the government of another Member State so that the latter could require rightsholders within its jurisdiction to offer access to these rights to one or more French broadcasters.

The draft decree provides that "on French territory, no television service editor may exercise the exclusive rights it has acquired in respect of an event of major importance in such a way as to prevent the full live broadcasting of the event by a free television service".

The list of proposed events, 21 in number, covers exclusively the broadcasting of sporting events, including the summer and winter Olympic Games, the opening match, semi-final and final match in the football World Cup, the athletics world championships, etc.

It would not be possible, however, to broadcast certain events, such as the Tour de France men's cycling race, the Olympic Games and the athletics world championships, in their entirety. All these events could, however, be pre-recorded and broadcast subsequently.

Lastly, the draft decree provides that a television service editor who has acquired exclusive broadcasting rights in respect of all or part of an event of major importance may only broadcast this in encrypted form if, after having within a "reasonable" period of time publicly manifested its desire to sell on its rights under market conditions that are "equitable, reasonable and non-discriminatory", it has not received any proposals that meet its criteria; these characteristics are to be appreciated more particularly in terms of the fees paid, the time of the live broadcasting and the anticipated revenue. ■

● **Draft decree on the conditions for television broadcasting of events of major importance, available at:**
http://www.ddm.gouv.fr/dossiers_thematiques/documents/droitssportifs6.html

FR

GB – Hutton Inquiry Judge Rules against Televising Witnesses Giving Evidence

The "Hutton Inquiry" is a judicial hearing into "the circumstances surrounding the death of Dr. Kelly" (UK civil servant and weapons inspector).

On 24 July 2003, a Press Notice was issued, stating that "the public hearings of the Inquiry will, of course, be open to the media. The press and other sections of the media will be able to report the entirety of the public hearings save that it is Lord Hutton's present intention that the evidence of witnesses to the Inquiry and

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deeJgee
Research/Consultancy

applications in the course of the Inquiry will not be filmed or broadcast. However, TV filming and radio broadcasting of opening and closing statements may take place."

An application was made by ITN, BSkyB, Channel 4, Channel 5 and ITV to televise and broadcast all or part of the Inquiry, including the evidence of witnesses, in news programmes and news documentaries.

Lord Hutton, the inquiry judge, decided against the application. He offered two reasons. Firstly, "the additional strain which would be placed on a witness giving evidence to the Inquiry if his or her evidence were televised". Secondly, the judge said that he was satisfied that "the absence of television filming of the witnesses giving evidence would not mean that the Inquiry would not be a public one as required by the fundamental concept of open justice." ■

- **Department for Constitutional Affairs, Press Notice of 24 July 2003, available at: http://www.gnn.gov.uk/gnn/national.nsf/CF/3B562EA57F67274080256D6D00413516?opendocument**
- **In the matter of applications by ITN, BSkyB, Channel 4, Channel 5, ITV and IRN Radio, Ruling by Lord Hutton, 5 August 2003, available at: http://www.the-hutton-inquiry.org.uk/content/rulings/ruling01.htm**

GB – Definition of "Independent Producer" Amended

The UK has amended the definition of "independent producer" for the purposes of section 16 of the Broadcasting Act 1990, which requires that independent productions form at least 25% of programmes broadcast by the major broadcasters. This in turn implements the requirements on independent productions of the "Television Without Frontiers" Directive.

The new amending order makes two important changes to the definition of "independent producer". The first is to provide that the previous exclusion of any producer in which a broadcaster owned more than 15% of shares applies only to UK broadcasters. The effect is that any producer owned by a foreign broadcaster will still be treated as an independent producer in the UK. This resolves a controversial problem concerning *Endemol*, the major UK producer that devised "Big Brother". The company was bought by *Telefonica*, the Spanish broadcaster, and so according to the previous law no longer qualified as an independent producer. The order also provides a new definition of a UK broadcaster for this purpose; this is any broadcaster who provides a television service intended for reception in, or in any area in, the UK, whether or not the service is also intended for reception elsewhere.

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The second change relates to the time at which an independent producer must qualify as such. According to the previous law, this had been the time at which the programme was made, which was interpreted as the date on which it was transmitted. This interpretation caused problems if a programme was commissioned from an independent producer who was subsequently taken over by a broadcaster. Under the new law, the relevant date becomes the date at which the programme is commissioned, so long as the commissioning is in good faith in the expectation that the producer will still be independent when the programme is made, and that the programme is made within two years of the commission.

The order came into effect on 3 July 2003. ■

- **The Broadcasting (Independent Productions) (Amendment) Order 2003, Statutory Instrument 2003 No. 1672, available at: http://www.hmso.gov.uk/si/si2003/20031672.htm**

HR – HRTL Wins the Bid for the Third National TV Concession

The HRTL company, consisting of the German RTL company and Croatia's Agrokor, Podravka, Atlantic Group, HVB/Splitska Bank, and Pinta TV3, has been given a 10-year concession for nation-wide television broadcasting in Croatia.

HRTL was selected from among seven candidates by the Croatian Radio and Television Council, which chose HRTL's bid at a session on 16 September 2003. The selected concession-holder won five out of nine votes from the Council in the second round, when it competed with TV Moslavina, which mustered two votes. Another two votes were blank. HRTL beat, among others, the Rovita company, whose backer was Rupert Murdoch, one of the biggest media magnates in Britain, and Fina-Mur company, backed by Scandinavian SBS. The annual fee for the concession for Croatian Television's third channel will be HRK 300,000, plus HRK 100,000 for the use of the frequency (total EUR 50,000). HRTL announced that it plans to start broadcasting an "entertaining and pleasant programme" in six months' time, with plenty of domestic production. The Head of the OSCE mission to Croatia expressed his satisfaction "with the openness of the selection procedure" and his conviction that this decision "will hopefully contribute to the pluralism of the television market in Croatia". The Council for Radio and Television on 3 June 2003 opened bids submitted through the public tender and organized a public presentation by all bidders with each bidder having 20 minutes for presentation on 12 June 2003. The concession for the third television network – currently operated by Croatian public broadcaster *Hrvatska radiotelevizija* (Croatian Radio-Television - HRT) – was assigned according to the provisions of the Chapter XII, Radio and Television of the Law on Telecommunications ("Official Gazette" number 76/99, 128/99, 68/01 and 109/01) on which basis the tender was placed, although the new Law on Electronic Media has entered into force on 7 August 2003 and is being applied as of 1 September 2003 (see article *infra*). ■

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Zagreb

- **OSCE Press release of 17 September 2003, available at: http://www.osce.org/news/show_news.php?id=3534**

EN

HR – Law on Electronic Media Enters into Force

In its session held on 15 July 2003 the Croatian Parliament passed the Law on Electronic Media, which defines the position of legal entities and physical persons that perform the activities of production and publishing of programs and program services through electronic media, and the terms for performing such activities.

Before this Law was passed several other laws already regulated the field of electronic media – the special law defines the work and activities of Croatian Radio-television, while provisions of the Law on Telecommunications and Law on Public Announcements define the activities of other electronic media. These regulations did not provide transparency of ownership of electronic media nor did they effectively prevent or restrict concentrations of

entrepreneurs that might lead to achieving a monopoly in electronic media or other media. At present, in addition to the public broadcaster *Hrvatska radiotelevizija* (Croatian Radio-Television), 14 television and 133 radio concessionaires are active within the territory of the Republic of Croatia, with the new private TV national concessionaire to be determined in September (see article *supra*). The above-mentioned situation as well as the ratification of the Convention on Transfrontier Television by the Republic of Croatia and the need to comply with the *acquis communautaire* of the European Union have increased the need to pass a special law that shall define the activities of the electronic media in one act.

While working on this Law, it had to be taken in consideration that it should contain provisions that have to comply with the principle of freedom of media and the promotion of the public interest while performing activities, as well as on the development of modern technology. The Law on Electronic Media stipulates principles and terms for performing the activities of electronic media and the activities of radio and television, program conditions for publishing the activities of radio and television, radio and television programs for special purposes, and terms for legal and physical entities for publishing electronic publications. Furthermore, the protection of pluralism and diversity of electronic media is determined, including matters of publicity and transparency of ownership and limitations on ownership due to protection from concentrations that are not allowed. The regulatory body, the Council for Electronic Media, is founded according to European laws, whose primary goal is to undertake surveillance of program content in application of the law. Regarding program terms for performing radio and television activities, it should be emphasised that the provisions of the law determine program content and services, their classification into separate groups, as well as quotas regarding certain content, maximum amount of advertising content, minimum amount of own production and share of Croatian and audio-visual works.

By the passing of this law and its implementation, the activities of radio and television and the publishing of electronic publications are co-ordinated with European standards, and the laying down of minimum terms and conditions for performing these activities shall increase the quality of program contents. Taking into consideration the above mentioned, standards of equality for all that perform these activities shall be introduced, which is a basic guarantee for further development, and complies with the requirements of citizens in the realisation of their rights in regard to public information and announcements.

The new Law on Electronic Media has entered into force on 7 August 2003 and is being applied from 1 September 2003. ■

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● ***Zakon o elektroničkim medijima*** **(The Law on Electronic Media),** ***Narodne novine*** **(Official Gazette) No. 122/03 July 2003, available at:**
http://www.nn.hr/clanci/sluzbeno/2003/1729.htm

HR

HU – Government Approved the Communications Authority's Annual Report

On 1 September 2003, the Hungarian Communications Authority *Hírközlési Felügyelet* (CA), the body which has a mandate equivalent to a National Regulatory Authority (NRA) according to European Union terminology, announced that the Hungarian Government approved the CA's annual report on its activities and management applicable to the year 2002 (Report).

The Report consists of four main parts: (i) The Activities and Management of the Communications Authority; (ii) The Situation of the Communications Market; (iii) The Experiences related to the Operation of the Communications Market; (iv) The Opinion of the Advisory Committee of Service Providers about the Communications Arbitration Committee.

The CA – regarding part one of its Report – *inter alia* identified the following most important tasks for its work in 2003:

– Continuing the CA's preparation accession to the European Union;
– Assisting the Ministry of Informatics and Communications with regard to European legal harmonisation;
– Rationalising finance issues;
– Promoting the development of the communications market;
– Strengthening the development of service providers' user-friendly services;
– Strengthening the market supervisory role of the organisation;
– Increasing the productivity of supported areas by the organisation;
– Ensuring qualified staff by effective human resource policy. ■

Gabriella Cseh
Budapest

● **Press release of the** ***Hírközlési Felügyelet*** **of 1 September 2003 available at:**
http://www.hif.hu/menu6/m6_4.htm

HU

IT – Italian Main Broadcasters are Dominant on the Market

Pursuant to Article 2, paragraph 7, of the Act no. 249/97, *Istituzione dell'Autorità per le Garanzie nelle Comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo* (Communications Act of 31 July 1997, hereinafter "the Act" – see IRIS 1997-8: 10) and to the Regulation no. 26/99, *Regolamento in materia di costituzione e mantenimento di posizioni dominanti nel settore delle comunicazioni* (Dominant Positions Regulation – see IRIS 1999-7: 11), on 26 June 2003 the *Autorità per le Garanzie nelle Comunicazioni*, (Italian Communications Authority – *AGCOM*) adopted Decision no. 226/03/CONS and established that *RAI*, *RTI* and *Publitalia* exceeded the concentration thresholds envisaged by the Act and occupied a dominant position on the Italian television broadcasting market.

According to Article 2, paragraph 8, *lit* a) of the Act, a dominant position is presumed when a broadcaster receives more than 30% of the economic resources of the broadcasting sector. The first application of this provision led to decision no. 365/00/CONS (*Accertamento della sussistenza di posizioni dominanti ai sensi dell'articolo 2, comma 9, della legge n. 249/97* – see IRIS 2000-7: 7) in which *AGCOM* ascertained that two economic entities - *RAI & Sipra* and *RTI & Publitalia*, i.e. the two main Italian broadcasters and their advertising agencies - had both exceeded the thresholds in 1997, but that their positions on the market, though dominant, had been reached by means of a spontaneous growth of their undertakings without restricting competition or pluralism.

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Autorità per le Garanzie nelle Comunicazioni

In accordance with decision no. 212/02/CONS of 3 July 2002 (see IRIS 2002-8: 9), *AGCOM* started proceedings in order to analyse the distribution of economic resources in the broadcasting sector in the three-year period 1998-2000. Decision no. 13/03/CONS, adopted on 9 January 2003, concluded these proceedings and stated that the two economic entities composed by *RAI-Sipra* and *RTI-Publitalia*, both exceeded the thresholds established by the mentioned provision of the Act. On the same day, *AGCOM* adopted decision no. 14/03/CONS opening proceedings in order to verify, within 4 months, the effective existence of prohibited dominant positions on the market, which might impair pluralism.

Decision no. 226/03/CONS concluded the analysis, confirmed that *RAI*, *RTI* and *Publitalia* were dominant on the market and warned them to avoid unlawful acts or behaviour. A new market analysis will be concluded by 30 April 2004 on the three-year period 2001-2003 and, should the situation persist and the conclusions of the judgment of the Constitutional Court declaring the Communications Act partly unconstitutional (see IRIS 2003-3: 13) not be respected, *AGCOM* is also deputed to impose sanctions on the broadcasters concerned, which may consist in an order to split the undertakings or assets composing the economic entities. ■

● **Decision of the *AGCOM* of 26 June 2003, no. 226/03/CONS, *Procedimento finalizzato alla verifica della sussistenza delle posizioni dominanti nel settore televisivo ai sensi dell'art. 2, comma 7, della legge n. 249/97* (Proceedings to verify the existence of dominant positions in the television sector pursuant to art. 2, paragraph 7 of Law no. 249/97), published in the *Gazzetta ufficiale* (Official Gazette) of 2 August 2003, no. 178, ordinary supplement no. 126, available at:**
http://www.agcom.it/provv/d_226_03_CONS.htm

IT

LT – Developments in Audiovisual Legislation

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During summer and autumn 2003, several draft instruments affecting audiovisual legislation have been released.

The draft amendments to the Code of administrative offences allow the imposition of financial sanctions on broadcasters. The application of the Code is regulated by the Law on the Provision of Information to the Public, which states that "for broadcasters who violate the requirements set forth in this Law or who do not comply with the decisions adopted by the Commission, the latter shall impose the following penalties: warnings, fines, in the manner prescribed by the Code of Administrative Offences of the Republic of Lithuania, suspension of the validity of the licence for a period of up to 3 months, or revocation of the licence". The attempts to introduce the possibility of fines into the existing Code have taken several years as the Code of Administrative offences is to be amended in line with the law on the Provision of Information to the public, which was revised in 2001. The draft includes financial sanctions that the Radio and Television Commission could impose on broadcasters for not complying with its decisions, laws regulating advertising, for not archiving radio and television programs, for broadcasting programs that could harm minors, etc. On 31 July 2003 the government approved the draft proposed by the Ministry of Culture and submitted it to the *Seimas,* the Parliament, for deliberation as a matter of urgency. The draft was presented to the Parliament on 2 September. The discussions should have been held on 14 September 2003, however the Parliamentary Committee of Law and Legislation decided to launch an open hearing of all parties involved. After this hearing, which was held on 18 September 2003, the Committee is to present the draft to Parliament at the plenary session in the beginning of October.

Although it is an important decision in the field of audiovisual legislation, the aforementioned amendment will be not the sole legislation relevant for the audiovisual sphere to be discussed by the Parliament during this year. In November / December the adoption of a new Law on Electronic Communication is planned which shall replace the Law on Telecommunications and the amendments of the Law on Provision of Information to the Public. The bill was drafted by the Radio and Television Commission in collaboration with the Ministry of Culture. The Ministry had circulated the draft for comments to the institutions concerned with the audiovisual sector and will present it to the Government for its approval. ■

NL – Refusal of Dutch Broadcasting Organisation to License its Broadcasting Schedules is an Abuse of a Dominant Position

On 6 June 2003 the Dutch Broadcasting Organisation (*NOS*) lost an appeal before the Supreme Court in its case against the daily newspaper *Telegraaf*. *NOS* tried for years to prevent the *Telegraaf* from using and publishing *NOS*'s broadcasting schedules in a weekly magazine, claiming this infringed its intellectual property rights.

Although the Supreme Court accepts that the broadcasting schedules are protected by the Dutch pseudo-copyright for non-original works, the Court states that the competition law aspects of the case will be decisive (see also IRIS 1998-4: 12) and that these set aside the intellectual property aspects. Referring to the Magill (see IRIS 1995-5: 5) and Bronner cases of the European Court of Justice, the Supreme Court declares that the broadcasting schedules must be considered to be an essential facility and therefore *NOS*'s refusal to grant or license the schedules constitutes an abuse of a dominant position under the Dutch Competition Act.

NOS complained in its appeal that the Court of Appeal wrongly concluded that no objective justification had been established for *NOS*'s refusal. The Supreme Court declares, referring to Magill and Bronner, that the Court of Appeal was right in looking for an objective justification, considering that the Court of Appeal had already stated that *NOS*'s approach excluded any competition. The Court of Appeal could not find sufficient grounds for the refusal in *NOS*'s propositions and, according to the Supreme Court, concluded therefore correctly that no justification was established.

NOS also complained that the Court of Appeal had not followed an appropriate reasoning in determining whether an exceptional circumstance, found in Magill and Bronner, was established. *NOS* claimed that for this purpose the Court of Appeal should have concluded that there was a lack of a real or potential substitute for the product of the *Telegraaf*. The Supreme Court declares that the Court of Appeal did determine that there was a demand for the product of the *Telegraaf* "on the side of consumers" and that this continuous and regular demand implies a lack of a substitute (in the

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Magill case, the European Court of Justice, in addition to requiring a lack of a substitute, also required that the product be new. This is however not mentioned by either the *NOS* or the Supreme Court and thus the judgment does not entirely follow the reasoning of the Magill case).

The Supreme Court decides that the Court of Appeal rightly included in its judgment, as cumulative conditions, the real need for the product, the exclusion or distortion of competition as well as the lack of an objective justification. The appeal fails; the Court of Appeal's decision is upheld. *NOS* abuses its dominant position. ■

● **Judgment of the *Hoge Raad* (Dutch Supreme Court) of 6 June 2003 (*NOS v. Telegraaf*), LJN-no. AF5100, available at: http://www.rechtspraak.nl/flashed.asp**

NL

PL – Planning of Digital Terrestrial Television

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On 12 June 2003 the Chairperson of the National Broadcasting Council (NBC) sent a constitutive document entitled "Introductory assumptions of the development for digital terrestrial radio and television in Poland" to the Commission for Culture and Mass Media of the Polish Parliament.

The document stresses the importance of taking decisive steps towards the development of digital terrestrial broadcasting in Poland. According to the report, the Polish broadcasting sector has reached a level that requires the switch-over to digital technology with the aim of obtaining new programming and market possibilities and to accelerate the process of developing the information society. The introduction of digital terrestrial broadcasting would also fulfil some of the aims of the "e-Poland" programme and would follow the EU Lisbon Strategy. The changeover has to be a long-term and carefully prepared project, which therefore will need extensive consultations with administrative and regulatory authorities (regarding, for example, such issues as frequency allocation), broadcasters, providers of additional services, providers of transmission networks, as well as producers and distributors of consumer equipment (particularly set-top-boxes). Considering the substantial cost of the switch-over to digital technology, the public interest must be taken into account.

Currently in Poland only satellite digital broadcasting is available; programme services in digital form are transmitted by satellite to the recipients either via individual satellite decoders or via analogue cable networks. The two only digital satellite platforms, Cyfra+ and Polsat 2, provide access to more than 300 programme services, including 19 Polish ones. The number of individual subscribers – based on a rough estimate for 2003 – of Cyfra+ in June was 650,000, while Polsat has sold around 380,000 of its decoders so far.

Based on the experiences of other European countries, the document indicates various elements that should be taken into account before choosing the method for introducing digital technology. It describes the different costs related to analogue-digital transformation, various possible obstacles, etc. It is estimated that during the first stage of introducing digital terrestrial television it will be possible to broadcast 8 or 10 national programme services and 8 or 10 cross-regional programme services, within two national and two cross-regional networks. Limitations regarding the introduction of the digital terrestrial radio are of a different nature. ■

● ***Krajowa Rada Radiofonii i Telewizji* (National Broadcasting Council - NBC) *Wstępne założenia strategii rozwoju naziemnej radiofonii I telewizji cyfrowej w Polsce* (Introductory assumptions of the development for digital terrestrial radio and television in Poland), 12 June 2003, available at: http://www.krrit.gov.pl/stronykrrit/oprtechcyfra.doc**

PL

SK – Increased Licence Fees for Public Service Broadcasting

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Since 1 August 2003 the amount of radio and television licence fees, which is to be paid monthly by the owner of a TV and / or radio set and which are revenues of public service Slovak television and Slovak radio collected by Slovak Post from 1,165,542 TV-households, was increased automatically as the amendment of the *zákon o koncesionárskych poplatkoch* (Act on Licence Fees of 1995) has come into power.

The new legal provision, Act no 241/2003 on the amendment of the Act on licence fees and on the amendment of the Act no. 468/1991 on radio and television broadcasting, set the monthly fee for one TV set at SKK 100 (previously SKK 75, EUR 1 = SKK 42,239 based on the rate of the National bank of Slovakia on 22 September 2003) and for a radio set to SKK 40 (previously SKK 30) for both natural and legal persons. Natural persons have to pay just for one radio / TV receiver, regardless of the number of further receivers in their households. In contrast, legal persons and sole traders have to pay for each TV / radio set that features in their bookkeeping.

Retired persons who have received an exemption from fees so far, have lost this benefit and are required to register as fee payers and to pay half of the monthly fees, that is to say SKK 50 for TV set and SKK 20 for radio set. However, the following categories are still exempt from the requirement to pay for radio and TV licences: persons who are officially recognised as people with a severe handicap, foreigners living in Slovakia without the status of permanent stay, representatives and diplomatic missions, international governmental organisations, institutions providing social care and humanitarian services, daily care establishments for pre-school children, schools, hospitals and detention centres. Moreover the Act no. 241/2003 has charged broadcasters of public radio service and public television service both to use the revenues from licence fees "to cover only the costs of production and distribution of programmes in accordance with a programme scheme approved by relevant supervisory body - Slovak Radio Board, Slovak Television Board."

The rise in licence fees in 2003 is one of the important steps the State declared through the Director General of STV towards stabilizing financial control of public service television. The second step is to settle old debts of STV amounting to SKK 600 Millions. The last element in the relevant legal framework will be to adopt legislation, either as an individual instrument or as part of the Act on Slovak television, allowing Slovak television to control its own business affairs (sale of advertising time, establishing joint ventures, etc). Eventually in 2004 Slovak television shall be financed only by revenue generated from licence fees and commercial revenues without any further direct contribution from the State. ■

● **Annual Financial report of STV for 2002 available at: http://www.stv.sk/**

● ***Zákon č.241/2003 Z.z. o zmene zákona 212/1995 Z.z. o koncesionárskych poplatkoch a o zmene zákona č.468/1991 Zb. o prevádzkovaní rozhlasového a televízneho vysielania v znení neskorších predpisov* (Act No 241/2003 on the amendment of the Act on Licence fees and on the amendment of the Act No. 468/1991 on radio and television broadcasting), *Zbierka zákonov*, part 122, 19 July 2003, available at: http://www.zbierka.sk/ciastka.asp?ro=2003&cc=122#**

SK

RELATED FIELDS OF LAW

DE – New Copyright Law Enacted

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Following the decision by the lower house of the German parliament (*Bundestag*) on 3 July 2003 to accept the compromise proposal worked out by its mediation committee on the *Gesetz zur Regulierung des Urheberrechts in der Informationsgesellschaft* (Law Regulating Copyright in the Information Society), the upper house (*Bundesrat*) added its consent to the proposal on 11 July 2003. The law was officially published on 12 September, and substantially entered into force on 13 September.

The two houses have thus agreed that, with respect to the controversial privileging of private copies in accordance with Art. 53 [(1.)] of the *Gesetz über das Urheberrecht und verwandte Schutzrechte* (Law on Copyright and Related Rights, UrhG), the making of copies for private use shall in future only be permissible "provided that for the making of copies no obviously illegally-produced original is used". This formulation reflects the reservations expressed by the *Bundestag* in the face of the demand by the Bundesrat that only private copies from originals that are legal be permitted. The *Bundestag* had objected that it is often impossible for the user to ascertain the legality or otherwise of the source medium. The solution now reached, which prohibits private copies from "obviously" illegal sources, is intended to prevent the duplication of pirate copies. This means that the privileged status extended by copyright law to private copies has undergone a further restriction, in addition to that imposed by the provisions which – pursuant to the terms of reference of Directive 2001/29/EC on the protection of copyright and related rights in the information society, which the new law serves to implement (see IRIS 2001-5: 3, IRIS 2001-3: 3, IRIS 2000-7: 3, IRIS 2000-2: 15, IRIS 1999-6: 4 and IRIS 1998-1: 4) - oppose the circumvention of anti-copying devices (Art. 95a [(1.)] UrhG) and sanction the latter (Art. 108b [(1.) 1.] UrhG). ■

● ***Gesetz zur Regulierung des Urheberrechts in der Informationsgesellschaft*** **(Law Regulating Copyright in the Information Society (10 September 2003), BGBl. I no. 46 of 12 September 2003, p. 1774**

DE

FR – Audiovisual Communication Act Applies to Offences Committed on the Internet against Legislation concerning the Press

Clélia Zérah
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The criminal section of the *Court de cassation* (the highest court of appeal) delivered a much remarked-upon decision on 6 May 2003, in which it stated that the Audiovisual Communication Act of 29 July 1982 applies to offences committed on the Internet against legislation concerning the press. This was the first time the Court had spoken out on the subject of knock-on criminal liability as applied to the Internet.

The case involved the broadcasting of defamatory statements on an Internet site. The Court of Appeal in Versailles, applying Article 42 of the Press Act of 29 July 1881, had maintained that the defendant could not be considered the principal author as he was not the owner of the site in question. However, as author of the statements in question, he should be declared liable as an accomplice on the basis of Article 43 of the same Act. The *Court de cassation* held on the contrary that "the provisions (…) of the Act of 29 July 1982 alone are applicable", thereby dismissing the application of common law in the determination of persons responsible for offences committed on the Internet against legislation concerning the press, in favour of the provisions applicable to audiovisual communication.

Although in the case at issue it makes no difference to the defendant whether his complicity as the author of the statements is established on the basis of one or the other of the texts, this is an important decision since it means that, according to the *Court de cassation*, an Internet site constitutes a means of audiovisual communication. Quite apart from the matter of liability in respect of offences committed against legislation concerning the press, the point raised concerns the qualification of public communications on the Internet, and hence the method of regulation that should be applied to them in the future. The matter is all the more topical in that voting is imminent on legislation expressing confidence in the digital economy. ■

● ***Tribunal de grande instance de Paris*** **(Regional court of Paris) (order in an urgent matter), 12 May 2003, Miss Laure Pester ("Lorie") v. Mr Géraume Schweitzer**

FR

FR – Bill Intended to Reconcile Protection from Unacceptable Use of One's Image with Freedom of Expression

Clélia Zérah
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A bill "intended to give a legal framework to protection from the unacceptable use of one's image and to reconcile this with freedom of expression" was tabled this summer by two Members of Parliament. It has been sent to the legal committee for examination. The aim of the text, which covers protection of the image of objects as well as people, is to make it impossible for anyone to "take legal action claiming protection from unacceptable use of an image without furnishing proof of malicious intent and actual prejudice", according to the wording of the explanatory memorandum of the bill.

This text is therefore intended above all as a compromise in order to prevent court action being brought vexatiously by the subjects of images, thereby hampering freedom of expression. The authors of the text take as their starting point the observation that thousands of court orders have been made against photographers, organisers of exhibitions and press and book editors in recent years. This illustrates the fact that the mere use of the image of a person – and more recently, the image of an object – without any prejudice being caused, has become objectionable.

The purpose of the bill is therefore both to acknowledge recognition of the entitlement to protection from the unacceptable use of one's image in current case law and to render admissible applications to the courts dependent on prejudice, which is not the case at present. Thus the text proposes inserting an Article 9-2 in the Civil Code, to read as follows: "Everyone is entitled to protection from the unacceptable use of his/her image. This entitlement is the right that each person has in respect of the reproduction or use of his/her own image. The image of a person may nevertheless be reproduced or used if the person suffers no real, serious prejudice as a result", and an Article 544-1, to read as follows: "Everyone is entitled to protection from the unacceptable use of the image of his/her property. The liability of the user of the image of another person's property may not be sought, however, in the absence of disturbance caused to the owner of the property by such use". ■

● **Bill of 16 July 2003 intended to give a legal framework to protection from the unacceptable use of an image and to reconcile this with freedom of expression, available at: http://www.assemblee-nationale.fr/12/propositions/pion1029.asp**

FR

IE – Developments concerning Freedom of Information

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A number of recent legislative and other developments in Ireland are likely to affect the implementation of the country's freedom of information (FOI) legislation (see IRIS 1997-10: 8). On 11 April 2003, the Freedom of Information (Amendment) Act was promulgated into law. One of the most significant amendments introduced by the Amendment Act was a considerable broadening of the definition of "Government" (for the purposes of determining exempt records – see further, Section 19 of the original 1997 FOI Act). This concept already included committees of Government, but Section 14 of the Amendment Act has now extended it to include committees of "officials" (i.e., two or more of the following persons: civil servants, special advisers or members of any of such other classes of person "as may be prescribed") as well. The widened embrace of the definition of "Government" means that an increased volume of documents can now be precluded from discovery.

As a result of the Freedom of Information Act 1997 (Fees) Regulations 2003, Statutory Instrument No. 264 of 2003, mandatory charges for requests for non-personal information and subsequent appeals were introduced as of 7 July 2003. The details of these charges are as follows: EUR 15 for a request for access to records other than records containing only personal information relating to oneself; EUR 75 for an application for the internal review of a decision by a public body to refuse to grant a request for access to records and EUR 150 for an application for the review of such a decision by the Information Commissioner. Thus, to pursue a request for access to records all the way through the existing appeals mechanisms will now ordinarily cost a total of EUR 240. This means that in practice, the charges attaching to requests for appeals in Ireland now appear to be higher than those payable in other jurisdictions and it is feared that they may prove a significant deterrent to individuals, NGOs and journalists wishing to acquire information under the FOI legislation. This fear has been articulated, *inter alia*, by the Information Commissioner, who has criticised the introduction and scale of these charges.

Under an initiative by the Department of Communications, Marine and Natural Resources, the names of requesters of information from the Department under the FOI Act are now being published on the Department's website. This has been styled as part of the quest for greater governmental transparency, but it is feared in some quarters that the initiative may yet prove a significant disincentive to individuals and journalists seeking to obtain information from the Department through FOI channels. ■

- **Freedom of Information Act, 1997 (No. 13 of 1997), enacted on 21 April 1997, available at: http://www.oic.gov.ie/2132/FREEACT.PDF**
- **Freedom of Information (Amendment) Act 2003 (No. 9 of 2003), enacted on 11 April 2003, available at: http://www.oic.gov.ie/2546/FOIAmAct.pdf**
- **Freedom of Information Act 1997 (Fees) Regulations 2003, Statutory Instrument No. 264 of 2003, issued on 30 June 2003, available at: http://www.oic.gov.ie/257a_3c2.htm**
- **Information Commissioner's Press Release of 1 July 2003, available at: http://www.oic.gov.ie/2576_3c2.htm**
- **Department of Communications, Marine and Natural Resources Freedom of Information Requests Log, available at: http://www.dcmnr.gov.ie/display.asp/pg=915**

NL – Court of Appeal Ruling in Scientology Case

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On 4 September 2003, the *Den Haag* Court of Appeal ruled that Dutch journalist Karin Spaink did not act unlawfully by publishing on her website parts of works owned by the Church of Scientology. The present decision reverses the judgment of the *Den Haag* District Court of 9 June 1999 (see IRIS 1999-7: 3), which is widely regarded as a landmark decision on Internet Service Provider (ISP) liability for copyright infringement. The District Court ruling set the standard that ISPs should remove hosted material if they receive a notification that hosted material is infringing and they cannot doubt the reasonableness of the notification. The Court of Appeal ruling does not address the question of ISP liability in full.

The copyrighted works, "Operating Thetan I to VII", describe part of the organisation and principles of Scientology. Spaink posted parts of these works on her website as an illustration to her story about Scientology. Scientology requested the Court to order, *inter alia*, that the ISPs hosting Spaink's website remove the allegedly infringing works.

The Court of Appeal dismissed the ISPs' assertion of the right to quote, noting that the works had not been lawfully made available to the public previously. A right to quote is only granted if this is the case.

However, the Court of Appeal then noted that under these circumstances enforcement of the copyright violates Article 10 of the European Convention on Human Rights (ECHR), which protects the right to freedom of speech. The Court noted that Scientology does not fear undermining democratic values and that the quoted parts of the works substantiate Spaink's article about Scientology. Therefore, the public interest in freedom of information about Scientology is more important than the interest of Scientology in enforcing their copyright, and Spaink does not infringe on the copyright of Scientology.

The Court, referring to the Agreed Statement on Article 8 of the WIPO Copyright Treaty, in *obiter dicta* notes that the ISPs, by providing physical facilities for enabling or making a communication, do not themselves make available to the public or reproduce.

The Court reversed the decision of the District Court and dismissed the claims of Scientology. ■

- **Judgment of the Den Haag Court of Appeal of 4 September 2003, LJN-no. AI5638, available at: http://www.rechtspraak.nl/**

NL

RU – Changes in the Mass-media Law

On 4 July 2003 a federal statute "On amendments and additions to some acts of the Russian Federation" was adopted in connection with the adoption of the federal statute "On basic guarantees of electoral rights of citizens of the Russian Federation and their right to participate in a referendum". The first article of this statute makes changes in the 1991 statute "On the mass media".

Article 60 ("Responsibility for other violations of mass media law") of the statute "On the mass media" now introduces responsibility for violation of restrictions relating to canvassing on questions regarding referendums and elections.

A provision was introduced that provides for keeping "audio or video records which have been on radio or video programs containing pre-election agitation or propaganda on questions of a referendum" for 12 months (previously it was 1 month).

But the most important modification in the statute is the possibility for suspension of the activities of a mass media outlet by a court. Article 16.1 (which is introduced by the statute of 4 July 2003) establishes such measure of responsibility as suspension of broadcasting by a mass media outlet for a repeated violation of the legislation on elections.

A mass media outlet can be held responsible for any violation of legal provisions for the carrying out pre-election canvassing, or regarding questions of a referendum. The procedure shall consist of three stages. Upon the first violation (which should be established by the election commission), a report on the fact of the violation should be made. The report shall go to court. Fines and other sanctions are to be applied only by a decision of the court. At the second violation of the election provisions during the same election campaign, the election commission can appeal to the Ministry of the Press. The Ministry can petition the court requesting that the broadcasts of the mass media outlet should be suspended, or send the appeal back to the commission explaining its reasons for refusing to proceed with the case.

But at third violation of these provisions during a single election campaign by the same mass media outlet the Ministry of the Press shall have no option but to take this case to court and ask the court to suspend the activity of that mass media outlet. ■

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● ***Federalnii zakon "O vnesenii izmenenii i dopolnenii v nekotorie zakonodatelnie akty Rossiiskoi Federatsii v sviazi s prinyatiem Federalnogo zakona "Ob osnovnyh garantiyah izbiratelnyh prav i prava na uchastie v referendume grazhdan Rossiiskoi Federatsii"*** **(federal statute "On amendments and additions to some acts of the Russian Federation") #94-FZ of 4 July 2003, *Rossiyskaya gazeta* governmental daily of 8 July 2003, available at: http://www.rg.ru/oficial/doc/federal_zak/94-03.shtm**

RU

TR – Implementation of the Harmonization Packages

With the enactment of several harmonization packages, much progress has been achieved in the process of fulfilling the Copenhagen Political Criteria and involve efforts on the process of harmonization with the *acquis communautaire* that is currently underway in Turkey.

To strengthen the exercise of the right of freedom of thought and expression, amendments have taken place as regards several acts and regulations such as the Turkish Penal Code and the Broadcasting Act. Some examples of this are as follows:

The amendment to Article 159 of the Turkish Penal Code reduces the minimum penalty for those who "openly insult and deride 'Turkishness' (Being Turkish), the Republic, the Grand National Assembly, the dignity of the Government, the Ministries, the military or security forces of the State, or the dignity of the Judiciary from one year to six months.

The second amendment to the same article ensures that expressions of thought undertaken solely for the purpose of criticism do not incur any penalties.

The amendments to Articles 426 and 427 of the Turkish Penal Code exclude scientific and artistic works and works of literary value from the scope of criminal offences related to published or unpublished works that are offensive to morality or of such a nature as to provoke or exploit sexual desires. The term "destroy" is deleted from the text of the article, ensuring that the destruction of these works is no longer to be undertaken as part of the sanctions imposed on offences of this kind.

In order to meet the criteria laid down by the European Court of Human Rights in this area, the expression "incitement to violence" has been incorporated into the text of article 7 of the Anti-Terrorism Act, which deals with aiding and abetting terrorist organizations as such; propaganda that incites to terrorism and other forms of violence continues to be a criminal offence.

In the context of Cultural Rights and Freedoms, Article 2 of the Act on Foreign Language Education and the learning of different languages and dialects by Turkish citizens has been amended so that the learning of different languages and dialects used traditionally by Turkish citizens in their daily lives may be undertaken at the facilities of existing centres for language courses. Previously, such courses could only be initiated in new premises. For the functioning of the executive, the provision on obtaining the views of the National Security Council when determining which foreign languages will be taught and learned in Turkey, was deleted from the text of the article, leaving the Council of Ministers as the sole relevant authority.

In this context of the right of freedom of thought and expression, the Sixth European Union Harmonization Package came into effect after being published in the Official Gazette. The amendment states that public and private radio and television channels will be able to broadcast in languages and dialects used traditionally in the daily life of Turkish citizens. This amendment also agrees with the Seventh Harmonization Package in saying that the *Radyo ve Televizyon Üst Kurulu* (Radio and Television Supreme Council - RTÜK) will prepare the regulations and principles regarding these broadcasts. The RTÜK is currently working on the preparations for this, so this amendment will enter into practice in the near future. ■

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● **Analysis of the Seventh Harmonization Package of the Office of the Prime Minister, Directorate General of Press and Information, available at: http://www.byegm.gov.tr/on-sayfa/uyum/AB-7paket-analiz.htm**

EN

US – Prevention of Posting Encryption Software is Not an Infringement of Free Speech

The California Supreme Court recently held that the free speech rights of a website operator, Andrew Bunner, were not violated by a preliminary injunction barring posting of DeCSS software used to decrypt the content scrambling systems on movie DVDs. The court, however, did not decide on whether the code posted by Mr. Bunner was still a trade secret and remanded that issue for a lower court to decide.

The suit was brought by DVD Copy Control Associa-

tion, a movie industry trade group that controls the rights to the "content-scramble system" used to encrypt movie DVDs (see IRIS Plus 2002-4). The trade secret at issue in the Association's lawsuit is a piece of code known as a "master key" that is used by properly-licensed DVD players to decrypt movie DVDs. The DeCSS software posted on Bunner's website revealed the "master key."

The trial court granted the Association's request for a preliminary injunction barring Bunner from continuing to distribute DeCSS. Although the California Court of Appeals assumed that Bunner had violated California's trade secrets law, it went on to hold, however, that the injunction violated Bunner's First Amendment free speech rights.

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● Copy Control Association v. Bunner, Calif. Supreme Ct. No. 102588, 25 August 2003, available at:
http://www.courtinfo.ca.gov/opinions/documents/S102588.DOC

The California Supreme Court reversed the Court of Appeals. Justice Janice Brown wrote the opinion and agreed with the defendant's argument that "restrictions on the dissemination of computer codes in the form of DeCSS are subject to scrutiny under the First Amendment." On the other hand, the Justice held that the preliminary injunction was content neutral, because the purpose of the injunction was "to protect the Association's statutorily created property interest in information—and not to suppress the content of Bunner's communications."

The standard of review of a content-neutral injunction is that such a regulation is permissible, so long as it burdens no more speech than necessary in order to serve a significant government interest. Justice Brown ruled that California's trade secret law does serve the significant interest of "encouraging innovation and development."

Justice Brown concluded that the court's decision was "limited" and that the Court of Appeal should determine whether the trial court properly issued the injunction under California's trade secret law.

In a similar suit, Paramount Pictures Corp. and Twentieth Century Fox Film Corp. recently sued Tritton Technologies in Manhattan federal court, seeking a court order to stop Irvine-based Tritton from distributing the software called "DVD CopyWare." ■

AGENDA

Film Financing in Europe: policy, strategy and effect
20 November 2003
Organiser: European Audiovisual Observatory in collaboration with the European Investment Bank
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http://www.eccompetitionlaw.com/brussels2003/

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