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European Court of Human Rights: Case of Abdullah Aydin v. Turkey

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The European Court of Human Rights, in its judgment of 9 March 2004, has come to the conclusion that Turkey has violated the freedom of expression guaranteed by Article 10 of the European Convention.

In the case of Abdullah Aydin v. Turkey, the applicant was convicted for making a speech during a meeting of the Ankara Democracy Forum criticising the Government's policy towards citizens of Kurdish origin and accusing the authorities of breaching human rights. The Ankara National Security Court in 1997 found Abdullah Aydin guilty of incitement to hatred and hostility on social, ethnic and regional differences, as he had drawn a distinction between the Turkish people and the Kurdish people and had not referred to the damage caused by the PKK (Workers' Party of Kurdistan). He was sentenced to one year's imprisonment and a fine.

Although the interference in the applicant's right to freedom of expression was prescribed by law (art. 312 paras. 1 and 2 Criminal Code) and pursued the legitimate aims of prevention of disorder and crime and the preservation of national security and territorial integrity, the European Court could not be convinced that the interference was necessary in a democratic society. The Court noted that the applicant indeed sharply criticised the Government's action and policy, but that his speech also contained repeated calls for peace, equality and freedom. For the European Court it is important that the speech at issue was political, was presented by a player on the Turkish political scene, during a meeting of a democratic platform, and especially that it did not encourage violence, armed resistance or insurrection. The Court also expressed the opinion that the applicant had been convicted not so much for his comments as for not referring to or denouncing the PKK's activities in south-east Turkey. Hence, the conviction was based especially on what the applicant had not said. The Court considered this an insufficient justification for the interference. Taking into account also the nature and severity of the penalties imposed, the Court unanimously reached the conclusion that the applicant's conviction had not been necessary in a democratic society and that there had been a violation of Article 10. In the same judgment, the Court also found a violation of Article 6 para. 1 of the Convention (right to a fair trial), referring to its standard opinion that civilians standing trial for offences under the Criminal Code had legitimate reason to fear that a national security court which included a military judge among its members might not be independent and impartial. The Court awarded the applicant EUR 10,000 for non-pecuniary damage and EUR 3,000 for costs and expenses. ■

● **Judgment by the European Court of Human Rights (Fourth Section), Case of Abdullah Aydin v. Turkey, Application no. 42435/98 of 9 March 2004, available at: http://merlin.obs.coe.int/redirect.php?id=32**

FR

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EUROPEAN UNION

Court of Justice of the European Communities: Opinion of First Advocate General in Cases C-262/02 and C-429/02

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In his Opinion dated 11 March 2004, Advocate General Tizzano concluded in favour of the compatibility with Community law of the French legislation on tobacco and alcohol addiction ("the *Loi Evin*") and of the code of conduct drawn up by the *Conseil Supérieur de l'Audiovisuel* (the French audiovisual regulatory body – CSA). The latter lays down detailed rules for the implementation of the Law.

The *Loi Evin* prohibits, in France, direct and indirect television advertising of alcoholic beverages. Infringement of that provision is an offence punishable by a fine. The Code distinguishes between international sporting events, whose images are broadcast in a large number of countries and which are therefore not considered to concern mainly French viewers, from other events, the broadcast of which is specifically aimed at the French viewing public. It requires that, where the latter events take place abroad, French broadcasters make use of available means in order to prevent advertising for alcoholic beverages from appearing on television screens.

This law came to the attention of the Court in two distinct cases: in an infringement proceeding (C-262/02), the Commission asked the Court to declare the French legislation incompatible with the freedom to provide services because of the obstacles which the *Loi Evin* places in the way of the broadcasting in France of foreign sporting events. In the proceedings for a preliminary ruling (C-429/02), the French television channel TF1 required of the companies responsible for negotiating television broadcasting rights for football matches to ensure that the brand names of alcoholic beverages did not appear on television screens. Consequently, a number of foreign football clubs refused to let Bacardi France, which produces and markets many alcoholic beverages, to rent advertising hoarding space around the pitch. The French Court of Cassation's reference to the Court aimed at clarifying whether the French rules are contrary to Community law, in particular to the freedom to provide services and to the "Television Without Frontiers" Community directive.

The Advocate General first considers that the directive is not applicable in that case, mainly since the definition of "advertising" included in the Directive does not cover advertising messages present at the stadium with no economic relationship between advertisers and broadcaster.

As to the rules on free movement of services, he considers that the measures adopted by the *Conseil Supérieur de l'Audiovisuel*, requiring the negotiators of television rights to use every "means available" to prevent advertising for alcoholic beverages from appearing on French television screens, effectively constitutes a restriction on that freedom. But nevertheless he concludes that the restriction is justified, since the purpose of the *Loi Evin* is the protection of public health, which is one of the justifications under the EC Treaty for restricting the freedom to provide services. In addition, he considers the French legislation proportionate to the objective pursued: the choice of the French Government not to ban completely all advertising of alcoholic beverages in stadiums falls within the freedom which the Member States have to decide the degree to which and the way in which public health is protected. According to the Advocate General, it is reasonable to consider that the French measures limiting advertising for alcoholic beverages may also reduce instances in which television viewers consume alcoholic beverages in response to the blandishments of advertising. Furthermore, the distinction between international events and other events makes it easier to reconcile the objective of protection of public health with the principle of the freedom to provide services in that it reduces the number of cases in which the broadcasting in France of sporting events abroad is prohibited. ■

● **Opinion of Advocate General Tizzano, delivered on 11 March 2004, Case C262/02 Commission of the European Communities v. France and Case C-429/02 Bacardi France v. Télévision Française TFI and Others, available at:**
http://merlin.obs.coe.int/redirect.php?id=9024

DE-EN-FI-FR-IT-PT-SV

European Commission: Launch of Sector Inquiry into the Sale of Sport Rights to New Media and 3G Mobile Operators

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The European Commission has launched a broad sector investigation regarding the sale in Europe of sports rights to Internet and other new media operators and to providers of 3G (third generation) mobile services.

The availability of sports rights, and in particular football rights, represents a key element for the successful development of new media markets, such as enhanced Internet and 3G services (as regards the latter it is expected that 40 new networks will be launched in Europe in the next 12 months). The Commission therefore wishes to ensure that access to such content remains open and non-discriminatory and is aiming, with the present investigation, to determine whether current commercial practices in the sector infringe EC competition rules (in particular Articles 81 and 82 EC Treaty).

Indeed, the Commission notes that so far its experience in this field "has highlighted possible anti-competitive commercial arrangements and conduct across the whole industry", *inter alia*, in the form of refusals to supply, bundling of television rights with new media/UMTS rights or the sale of new media/UMTS rights on an exclusive basis. The Commission has come across these types of practices in its investigations regarding the sale of media rights to the European Champions League (see IRIS 2003-8: 5) and to the English and German Premier Leagues (see IRIS 2004-2: 4) and has, in all these cases, taken steps to solve the problems raised by such practices. It now however believes that "there is a need for a sector-wide approach which would clarify the application of competition rules and provide guidance to both the owners of the rights and those willing to buy them". ■

● **"Commission launches sector inquiry into the sale of sports rights to Internet and 3G mobile operators", Press Release of the European Commission IP/04/134 of 30 January 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9012

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

European Commission: Clearance *of RTL's* Acquisition of Sole Control over French TV Channel M6

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The European Commission has decided to clear, under EC competition rules, the acquisition by the Luxembourg-based broadcasting and media group *RTL* of sole control over the French television channel *M6*.

M6 runs a national terrestrial free-to-air television channel in France and is also active in the pay-TV market (owning a stake in the French pay-TV operator *TPS*), as well as in a number of other sectors of the audiovisual industry. *RTL* is active in free-to-air television, television production and radio broadcasting and is controlled by the large media group *Bertelsmann AG*.

M6 was up until recently jointly controlled by *RTL* and the *Suez Group*, with *RTL* holding 48.4% and *Suez* holding 37.6% of the equity rights in the company, but with the voting rights of both being limited to 34% each. At the beginning of February 2003, *Suez* sold most of its shares in *M6* (29.2%) on the market and as a result of this operation *RTL* passively acquired sole control of *M6* (even without acquiring any new shares in the company).

Before the operation could go ahead, the *Conseil Superieur de l'Audiovisuel* (the French audiovisual regulatory body – CSA) had to give its approval to the new resulting shareholding structure of *M6*. To this end, a number of amendments were made to the agreement authorising *M6* to broadcast in France, some of which will be included in the by-laws of *M6* (e.g. the continued limitation of 34% on RTL's voting rights, the commitment by *Suez* to continue to hold 5% of *M6* shares for at least 3 years and the composition and powers of the Supervisory Board of *M6*).

The Commission has come to the conclusion that the change in control raises no competition concerns, given that both *RTL* and *M6* occupy relatively limited positions in the markets in which they operate and that the two companies had links with each other even before the transaction took place. ■

● **"Commission clears RTL's acquisition of sole control over M6", Press Release of the European Commission IP/04/337 of 15 March 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9015**

DE-EN-FR-NL

European Commission: Probe into State Financing of Dutch Public Service Broadcasters

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The European Commission has recently opened a formal investigation into the financing by the Dutch State of eight Dutch public service broadcasting associations and their umbrella organisation (NOS). The broadcasters in question receive both annual payments from the State and additional State funding which can take the form of "ad-hoc funding, subsidies for co-production and free services from a public media facilities provider". The present investigation only relates to this additional funding (as the Commission believes that the annual payments may constitute a measure which pre-dates the entry into force of the Treaty of Rome and may therefore be subject to a separate procedure – see also IRIS 2003-10: 4 and IRIS 2004-2: 4).

After a preliminary investigation, the Commission believes that "the Dutch State has provided the public service broadcasters with more funding than necessary to finance their public service" and has doubts as to the additional funding's compatibility with EU State aid rules. Specifically, the Commission believes that certain new media activities performed by the broadcasters, such as SMS services, are purely commercial activities outside the remit of their public interest tasks and that, as such, they should not be financed by the State. Also, the Commission intends to investigate whether the broadcasters concerned used the excess funding to cross-subsidise their activities in the commercial markets for advertising and the acquisition of sports transmission rights.

The Commission provisionally estimates that the excess funding amounts to EUR 110 million, for the period from 1992 onwards. ■

● **"Commission launches aid probe into Dutch public service broadcasters", Press release of the European Commission IP/04/146 of 3 February 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9005**

DE-EN-FR-NL

European Commission: New Communication on European Cinema

On 16 March 2004, the European Commission adopted a follow-up Communication to its Communication of 26 September 2001 on certain legal aspects relating to cinematographic and other audiovisual works (see IRIS 2001-9: 6). The new Communication focuses on two central issues, which had been addressed in the earlier Cinema Communication, namely State aids to cinema and TV production and the protection of heritage.

The 2001 Cinema Communication set out the criteria to be followed by the Commission in assessing the compatibility of State aid schemes for cinema and TV production with the rules of the EC Treaty. These criteria consist of:

- Respect for the general legality principle, i.e. the scheme must not contain clauses which would be contrary to EC Treaty provisions in fields other than State aid;
- Fulfillment by the scheme of the specific compatibility criteria for aid to cinema and TV production, as set out by the Commission in its decision of June 1998 on the French aid scheme.

These assessment criteria were to remain valid until June 2004, but given the unanimous support for the existing rules by both Members States and professionals, the new Communication now extends their validity for another three years, up to June 2007. During this three-year period, however, the Commission will carry out a study on the cultural and economic impact of the existing aid schemes. In particular, the Commission intends to examine the effects of the "territorialisation clauses" of certain aid schemes (which make aid conditional upon a certain amount of the film's budget being spent in a particular Member State), analysing for instance their impact on co-productions.

As regards the protection of heritage, the new Communication contains a proposal by the Commission for a Parliament and Council recommendation on film heritage and the competitiveness of related industrial

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activities. The proposed recommendation follows extensive consultations with Member States and professionals, including a stocktaking exercise carried out by the Commission of the current situation regarding deposit of cinema works in the Member States (see IRIS 2004-1: 5). The results of the consultations show that four-fifths of Member States already have a system of compulsory deposit for all - or at least for publicly financed - works, and that there is agreement on the need for systematic deposit systems to ensure preservation of film heritage.

The proposal only relates to cinematographic works and covers: the systematic collection of works; cataloguing and creation of databases; preservation; restoration; making deposited works available for educational, academic, research and cultural purposes and co-operation between the relevant institutions. For audiovisual works other than cinema works, voluntary deposit is suggested. ■

● Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the follow-up to the Commission communication on certain legal aspects relating to cinematographic and other audiovisual works (Cinema Communication) of 26 September 2001 and Proposal for a Recommendation of the European Parliament and of the Council on film heritage and the competitiveness of related industrial activities, COM (2004) 171 final, 16 March 2003, available at:
http://merlin.obs.coe.int/redirect.php?id=9008
DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

European Parliament: Intellectual Property Rights Enforcement Directive Adopted

On 9 March 2004, the European Parliament approved (at first reading) the Directive on the enforcement of intellectual property rights (see IRIS 2003-3: 8), with 330 votes in favour and 151 votes against, after having reached an agreement on a compromise text with the Council and the Commission. The objective of this directive is to harmonise national legislative systems in order to ensure a high, equivalent and homogeneous level of protection in the Internal Market.

One of the most debated aspects of the directive relates to its scope. The Commission's original proposal limited the scope of the directive to infringements committed for commercial purposes or causing significant harm to the rightsholder. This provision (which appeared in the main body of the directive) was deleted in the text adopted by Parliament and an amendment was instead introduced in the preamble stating that certain of the measures provided for in the directive (e.g. freezing of bank accounts) need to be applied only in respect of acts committed on a commercial scale. These are then defined as acts "carried out for direct or indirect economic or commercial advantage" and it is specified that "this would normally exclude acts done by end-consumers acting in good faith". An official Parliament press release explains that "this means that consumers acting in good faith will be excluded from the Directive – for example individuals copying music recordings for their own use would not normally be penalised". Commenting on the adopted text, Commissioner Bolkestein also stated that Parliament has kept the emphasis "on catching the "big fish" rather than the "tiddlers" who commit relatively harmless acts like downloading a couple of tracks off the Internet for their own use". A number of criticisms however have been directed at the Parliament's amendment. Critics argue, *inter alia*, that the limitation to "commercial scale" acts now only applies to certain of the measures in the directive and that the definition given of "commercial" is too vague, so that there is a risk of private consumers being exposed under the directive.

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Another important amendment made by the Parliament relates to criminal sanctions. These were provided for in the Commission's proposal, but the Parliament voted against including them in the directive (Member States however remain free to apply criminal sanctions for IPR infringement if they wish). Commenting on this omission, Commissioner Bolkenstein re-emphasised the importance of criminal sanctions for serious and intentional infringements committed for commercial purposes and indicated that the Commission will examine the possibility of proposing further measures providing for criminal sanctions in this field.

The directive will now have to be adopted by the Council. After this, Member States will have two years to implement the directive. ■

● European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights (COM(2003) 46-C5-0055/2003-2003/0024(COD)), 9 March 2003, provisional text available at:
http://merlin.obs.coe.int/redirect.php?id=8997
DA-DE-EL-EN-ES-FI-FR-IT-NL-PT-SV

NATIONAL

AL – RTI Sues Top Channel

The Net of Italian Television Channels (R.T.I.), an organization defending the rights of electronic media in Italy, has filed a lawsuit at an Albanian court to cease the comedy show *Fiks fare* of the Albanian private TV station Top Channel.

The show has been broadcast via satellite since December 2002 and has managed to secure a broad audience that reaches beyond the borders of Albania. The R.T.I. claims that the exclusive copyright of such a program in Italy, entitled *Striscia la notizia*, belongs to the private Italian Television channel Canale 5 of the Mediaset corporation. The broadcasting of *Fiks fare* without permission therefore constitutes an infringement of copyright. The case was brought to court after several attempts by R.T.I. to request Top Channel to voluntarily stop broadcasting the program. Mediaset now demands that broadcasting of the show on Top Channel or any other Albanian television station should cease. Additionally, damages are claimed against Top Channel. ■

Hamdi Jupe
Albanian Parliament

● Lawsuit of the Net of Italian Television Channels (R.T.I.) against the Albanian media channel "Top channel"

AL – NCRT Report Approved

Hamdi Jupe
Albanian Parliament

On 19 March 2003 the Parliament of the Republic of Albania approved the "Annual Report on the Activities of the *Keshilli Kombetar i Radiotelevizioneve* (National Council for Radio and Television – NCRT) for 2003". The Report, which provides information on the development of the licensing and monitoring of Albanian electronic media by the NCRT, is discussed at the beginning of each year in Parliament. In order to put the work of the NCRT on a firmer basis, the Albanian Parliament passed an amendment to the Law No. 8410 "On public and private television and radio stations in the Republic of Albania" in February 2003, according to which the Annual Report can be passed with a simple majority of votes. The previous provision had stipulated that the Annual Report had to be passed by two thirds of votes in the Parliament, which e.g. blocked the passage of the Council's Report for 2001.

The 2003 Report highlights *inter alia* the infringements of Copyright law by the Albanian electronic media, resulting from a change of the relevant law in October 2003 (see IRIS 2003-7: 13) and the financial situation of private broadcasting stations. ■

- **Decision of 19 March 2003 of the Parliament of the Republic of Albania to pass the "Annual Report on the Activities of the National Council of Radio and Television (NCRT) for 2003"**
- **Annual Report "On the Activities of the National Council of Radio and Television (NCRT) for 2003**

SQ

AT – Importance of Diversity of Opinion in Licensing Decision

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In its judgment of 17 December 2003, the *Verwaltungsgerichtshof* (Administrative Court) ruled on a complaint about the appeal decision made by the *Bundeskommunikationssenat* (Federal Communications Office) concerning a radio licence.

The Court gave its views for the first time on key issues concerning the granting of licences and frequency allocation in accordance with the *Privatradiogesetz* (Commercial Radio Act - *PrR-G*), issues which may also be important for the television sector.

As part of a legal procedure, the relevant regulatory body, *Kommunikationsbehörde Austria* (Austrian Communications Authority - *KommAustria*), had granted the claimant a licence for the provision of a radio service. Following an invitation for tenders for frequencies in an adjacent coverage area, an application by the claimant to extend its own coverage area by adding this adjacent area was rejected on the grounds of diversity of opinion. The frequencies were allocated to another broadcaster.

In the Court's view, *KommAustria* had to decide whether free transmission capacity was being used to extend an existing coverage area or to create a new one. The choice between these two fundamentally similar ways of using free transmission capacity should, in accordance with Art. 10.1.4 of the *PrR-G*, take into account diversity of opinion in the coverage area, population density, the profitability of the radio broadcaster as well as political, social and cultural aspects. The Court, however, stressed in particular how the creation of a new coverage area would affect diversity of opinion, as well as strengthening the economic position of a broadcaster already operating in another coverage area. ■

- **Judgment of the *Verwaltungsgerichtshof* (Administrative Court), 17 December 2003, case no. 2003/04/0136, available at: http://merlin.obs.coe.int/redirect.php?id=9003**

DE

AT – First Commercial Terrestrial TV Broadcaster *ATV+* Achieves Required Coverage

Robert Rittler
Lawyer
Vienna

ATV+ is the only terrestrial TV operator providing programmes throughout Austria. After a few years as a cable channel, it has also been broadcasting terrestrially since June 2003 (see IRIS 2002-4: 5). This commercial broadcaster offers (almost) a full programme service, showing a large proportion of light entertainment. The licensing authority, *Kommunikationsbehörde Austria* (Austrian Communications Authority - *KommAustria*) stated that *ATV+* should be accessible to at least 75% of the Austrian population either by terrestrial means or via cable within a year of the licence being granted. The *Rundfunk- und Telekommunikations-Regulierungsbehörde* (Broadcasting and Telecommunications Regulatory Authority - *RTR GmbH*) recently announced that this condition had been met, with 78.4% of the population able to receive *ATV+*: 73.3% terrestrially and a further 5.1% via cable. ■

- ***RTR GmbH* Newsletter No. 2/2004, 5 March 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9002**

DE

CA – Motion to Seek Disclosure from ISPs Dismissed

On 31 March 2004, the Federal Court (Canada's national trial court) denied a motion to seek disclosure from five Canadian internet service providers (ISPs), of the identity of certain customers who allegedly infringed copyright laws by sharing music through P2P networks. The plaintiffs, members of Canadian Recording Industry Association (CRIA), could not identify the infringers but affirmed that these individuals used Internet Protocol addresses (IP addresses) registered with the ISPs which are the respondents to this motion.

The court established that the test applicable to this case involved five criteria:

a) the applicant must establish a *prima facie* case against the unknown alleged wrongdoer;
b) the person from whom discovery is sought must be in some way involved in the matter under dispute, he must be more than an innocent bystander;
c) the person from whom discovery is sought must be the only practical source of information available to the applicants;
d) the person from whom discovery is sought must be reasonably compensated for his expenses arising out of compliance with the discovery order in addition to his legal costs;
e) the public interests in favour of disclosure must outweigh the legitimate privacy concerns.

The court concluded that plaintiffs did not meet the test as regards criteria a, c, and e. Concerning the first criterion, the judge affirmed that the plaintiffs' affidavit evidence was deficient, since it relied on information

based on belief and that the grounds for the belief were not stated. Therefore there was no evidence before the court as to whether or not the files offered for downloading were actually copyrighted files belonging to the plaintiffs. The court also found no evidence of connection between the pseudonyms used by the alleged infringers and the IP addresses. More importantly, the court found no evidence of infringement of copyright. Plaintiffs had argued that the activities pursued by the alleged infringers amounted to infringement of the Canadian Copyright Act on the grounds of reproduction, authorisation, distribution and possesion of unauthorised copies for the purpose of distribution. Here, the court followed a recent decision of the Copyright Board of Canada on private copying, and considered that the act of downloading songs from the Internet for personal use does not amount to copyright infringement.

Francisco Javier Cabrera Blázquez
European Audiovisual Observatory

The Court also found no evidence that the alleged infringers either distributed or authorized the reproduction of sound recordings. In the view of the court, merely placing personal copies into their shared directories and making them accessible by other computer users via a P2P service would not amount to distribution or to authorising infringement. Here the court compared this situation to a library that places a photocopy machine in a room full of copyrighted material, considering that in both cases the preconditions to copying and infringement are set up but the element of authorization is missing. It is important to know that Canada has not yet implemented the WIPO Performances and Phonograms Treaty (WPPT, see IRIS 1997-1: 5), and therefore the exclusive right of making available included therein is not part of the Canadian Copyright Law. Finally, the court also dismissed the accusation of secondary infringement by the unknown P2P users given that the evidence of knowledge on the part of the infringer was not proved.

Besides, according to the court the plaintiffs neither succeeded in establishing that the ISPs are the only practical source for the identity of the P2P pseudonyms (criterion c) nor established that the public interest for disclosure outweighs the privacy concerns in light of the age of the data, its unreliability and the possibility of an innocent account holder being identified (criterion e).

On 13 April 2004, the CRIA filed an appeal of the Federal Court decision. ■

- **Decision of the Federal Court of Canada, BMG Canada Inc. et al v. Jane Doe et al, 2004 FC 488, 31 March 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9029**
- **Copyright Board of Canada, Private Copying 2003-2004 decision, 12 December 2003, available at: http://merlin.obs.coe.int/redirect.php?id=9028**

CH – Boundary of Responsibility Between *BAKOM* and *UBI* Regarding Political Advertising

In its decision of 11 January 2004, the *Eidg. Departement für Umwelt, Verkehr, Energie und Kommunikation* (Federal Department for Environment, Transport, Energy and Communication - *UVEK*) clarified certain issues concerning the boundary between the responsibility of the programme supervisory body and the licensing authority. The *UVEK* ruled that the *Unabhängige Beschwerdeinstanz für Radio und Fernsehen* (Independent Broadcasting Complaints Authority - *UBI*) was responsible for examining the compatibility of advertising spots with the ban on political advertising, since this question affected key aspects of the freedom to form public opinion. However, the *Bundesamt für Kommunikation* (Federal Communications Office - *BAKOM*), as the licensing authority intended by the legislator to be an administrative body, was not suitable for this task, especially since the impression of state manipulation or censorship could easily be given in this sensitive area. Once a breach of the ban on political advertising had been established by the *UBI*, the *BAKOM* could impose the necessary financial sanctions (eg confiscation of income). "This is therefore the notion of double responsibility mentioned in the established case-law of the *Bundesgericht* (Federal Appeal Court): the *UBI* and *BAKOM* are responsible for the same case, but not for dealing with the same issues. […] Double responsibility is therefore not to be understood as parallel, but as supplementary, additional responsibility." ■

Oliver Sidler
Medialex

- **Decision of the *UVEK*, 11 January 2004 (519.1-177)**

DE-FR

CZ – Constitutional Court Decision on Freedom of Information

The Ombudsman of the Czech Republic has asked the Constitutional Court to rule on the compatibility with the Constitution of the Decree implementing the Secrecy Act. It is claimed that the Decree is not consistent with the constitutional law principles of legal certainty and the predictability of state action.

The protection of classified information is organised on two levels in the Czech Republic. General regulations are set out in the Secrecy Act, which defines matters that should be kept secret as "matters which, if known to the public, could jeopardise the interests of the Czech Republic or interests which the Czech Republic is obliged to protect". In order to implement the Act, the government has to issue a Decree listing matters that must be kept secret. A list of 18 such matters was appended to the Decree that was subsequently issued. Of these, 17 refer to actual files, while the final one covers "sensitive economic and security information linked to international relations".

In the Ombudsman's view, such a general provision is open to abuse and arbitrariness on the part of the authorities, particularly in relation to the transmission of information to the media. The list of secret matters should be worded in precise terms.

However, the Constitutional Court dismissed the Ombudsman's application on the grounds that if all secret matters had to be worded in precise terms, the objectives of the Act could not be met. Secret information might therefore have to be revealed. Predictability and legal certainty should not be considered absolute objectives. The Constitution also protected the legitimate interests of the Czech Republic and the legislator had to take all of these elements into account. Furthermore, citizens already had sufficient legal protection against any abuse and arbitrariness in the way these provisions were applied. ■

Jan Fučík
Broadcasting Council Prague

- ***Nález Ústavního soudu České republiky* (Ruling of the Constitutional Court of the Czech Republic), 23 February 2004, No. Pl. ÚS 31/03, available at: http://merlin.obs.coe.int/redirect.php?id=9004**

CS

DE – Unauthorised Production of Audio CDs for Foreign Customers Punishable Under German Copyright Law

In its judgment of 3 March 2004, the *Bundesgerichtshof* (Federal Supreme Court -*BGH*) ruled that the manager of a company that burns CDs is punishable under German copyright law if he participates in the unauthorised manufacture and exportation of audio CDs for a foreign customer.

The proceedings concerned a judgment by the *Landgericht Frankfurt* (Frankfurt District Court), sentencing the manager of a German limited company to 15 months in prison with probation for violating Section 85 of the *Gesetz über das Urheberrecht und verwandte Schutzrechte* (Act on Copyright and Related Rights - *UrhG*). On behalf of a Bulgarian firm, the company had manufactured and sent a total of 268,090 audio CDs by air freight to Bulgaria between May 1994 and January 1996.

The *BGH* dismissed the defendant's appeal against the first instance ruling of the *Landgericht Frankfurt* as unfounded. It accepted that the following facts were true: the copied CDs were recordings of internationally renowned pop singers. However, neither the Bulgarian customer nor the defendant had obtained from the relevant rightsholders for the Federal Republic of Germany the necessary permission to produce the CDs in question. In the Court's opinion, the defendant, who was aware that he did not have the necessary permission, knowingly accepted that the rights of foreign manufacturers were being infringed. The *BGH* therefore agreed with the opinion of the court of first instance that the defendant had, by his conduct, breached Section 108.1.5 *UrhG*. The law provides for sanctions for persons who manufacture or distribute phonograms without the permission of the rightsholder. The Court also held that the performance protection rights of phonogram manufacturers also applied to foreign rightsholders under the terms of Section 126 *UrhG* in connection with the 1973 Geneva Phonograms Convention. However, in the *BGH's* view, only actions carried out in Germany were relevant under criminal law. The defendant had committed criminal offences by manufacturing phonograms without permission and also by sending them abroad, which represented a form of marketing that breached German copyright law.

Through this ruling, the *BGH* has for the first time imported legal principles that have been generally recognised in patent and trademark law for many years into the domain of criminal law protection for phonogram manufacturers. ■

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● Judgment of the *Bundesgerichtshof* (Federal Supreme Court - BGH), 3 March 2004, case no. 2 StR 109/03

DE

DE – Licence Fees for Live Horse Racing Broadcasts

On 10 February 2004, the *Bundesgerichtshof* (Federal Supreme Court - *BGH*) quashed a decision of the *Oberlandesgericht Düsseldorf* (Düsseldorf Regional Appeal Court - *OLG Düsseldorf*) and referred the matter back to the *OLG*.

The proceedings concerned the following facts: more than 20 bookmakers had lodged a complaint against the provider of live audiovisual transmissions. The defendant had acquired from the German horse racing associations exclusive rights to commercially exploit audiovisual transmissions of horse races organised in Germany. The dispute concerned the extent of the fees which the plaintiffs had to pay under the terms of contractual agreements with the defendant in order to broadcast TV pictures of domestic horse racing in their respective betting offices. The plaintiffs' first claim was for equal treatment with two companies, which under similar agreements with the defendant had to pay much lower fees. In contrast to the plaintiffs, whose business mainly involved customers betting directly against them, the two aforementioned companies ran betting offices under a franchise system in bars and amusement arcades. The latter were only involved with tote betting (where customers bet against each other and the bookmaker or betting office keeps back a certain percentage), acting on a commission basis on behalf of the racing associations.

The *OLG Düsseldorf* had essentially granted the request that the defendant should not be allowed to charge the plaintiffs more than double the fee paid by the two other companies. The defendant appealed against this verdict.

This appeal was upheld. The *BGH* agreed with the *OLG Düsseldorf's* view that the defendant was a company with a dominant market position in the sense of Article 19.2.1 of the *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restrictions of Competition - *GWB*), since it was the only provider of live broadcasts of German horse racing. The live broadcasting of horse races held at German race courses was an independent market, since coverage of foreign races was a separate product, with which the bookmakers could not achieve their business aim of encouraging customers to bet on horse races in Germany. On account of its dominant market position, the defendant therefore had to observe the ban on discrimination enshrined in Art. 20.1.2 *GWB*. Like the *OLG Düsseldorf*, the *BGH* considered that the defendant had discriminated against some customers by charging different fees. However, in contrast to the *OLG*, the *BGH* thought that the defendant's claim that it had charged the lower fees purely in order to promote competition and that the fees charged to the bookmakers who were complaining actually only covered its costs could be an objective reason for the discriminatory treatment. The *OLG Düsseldorf* had not examined this aspect sufficiently in its decision and had failed to take it into account in weighing up the parties' interests. Therefore, the assumption that the lower fees represented the benchmark figure for the pricing structure did not stand up to examination in the appeals procedure. ■

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● Judgment of the *Bundesgerichtshof* (Federal Supreme Court - BGH), 10 February 2004, case no.: KZR 14/02, available at: http://merlin.obs.coe.int/redirect.php?id=8723

DE

DE – No Right to Music Broadcasts

On 15 December 2003, the *Bundesverfassungsgericht* (Federal Constitutional Court) dismissed a complaint concerning the transmission of music by public service broadcasters.

The plaintiff, a musician, had already failed in proceedings before the *Verwaltungsgericht Köln* (Cologne Administrative Court) and *Oberverwaltungsgericht Köln* (Cologne Administrative Court of Appeal) in her request that a public service broadcaster should be obliged to play her music (see IRIS 2004–2: 8). The plaintiff had, on her own initiative, sent the broadcaster pieces of music which she had recorded and now wanted to force the defendant to broadcast her music 100 times a year on the radio. The Constitutional Court dismissed the appeals against the earlier rejections under the terms of Art. 93a para. 2 of the *Gesetz über das Bundesverfas-*

sungsgericht (Federal Constitutional Court Act). Art. 93a para. 2 of the Federal Constitutional Court Act defines the Court's obligation to rule on complaints regarding infringements of the Constitution. The complaint had no fundamental relevance under constitutional law. In the Court's opinion, it did not raise any questions that could not already be answered by reference to the *Grundgesetz* (Basic Law - *GG*) or the case-law of the Constitutional Court. This particularly applied to the right to artistic freedom enshrined in Art. 5.3.1 *GG*. Therefore, the Court held that the complaint of a breach of the right to artistic freedom, which protected not only artistic activity, but also the exhibition and dissemination of art, was unfounded. All persons and organisations involved in art had a general right not to be excluded from state supportive measures. However, this did not mean that every single supportive measure should apply equally to all areas of artistic creativity. Instead, the state had extensive freedom in providing such measures. The contested decisions taken by the defendant and its selection procedures described therein fulfilled these conditions. On the one hand, as a public service broadcaster with legal capacity, the defendant was bound by basic rights, since it was indirectly controlled by the state administration and could therefore, in principle, be the recipient of a claim by the plaintiff under Art. 5.3.1 *GG* to access to its programmes. On the other hand, however, the broadcaster itself enjoyed the basic right to freedom of broadcasting, particularly freedom of programming. In the Court's opinion, further legal examination would therefore have dealt with a possible breach of freedom of programming. The Constitutional Court also confirmed that the lower instance courts would have been wrong to rule that, under the broadcaster's selection procedures, the plaintiff had been treated in an arbitrary manner. ■

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● **Judgment of the *Bundesverfassungsgericht* (Federal Constitutional Court), 15 December 2003, case no. 1 BvR 2378/03**

DE

FR – CSA Recommendation to the *Conseil d'Etat* on Surcharged Telephone Services

Under Article 1 of the Act of 30 September 1986 (as amended), the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body - CSA) is authorised to make recommendations to the editors and distributors of audiovisual communications services regarding compliance with the principles set out in the Act. On the basis of this, having observed that a number of television channels were increasingly promoting the calling of surcharged telephone services or telematic services that could not be classified as advertising, particularly in order to take part in games, to vote or to contribute to a programme, the CSA adopted a recommendation on 5 March 2002 reminding all the television services of the principles to which they are legally bound. According to these principles, such practices must not contravene the Decree of 27 March 1992 prohibiting unlawful advertising; the CSA recommends that where a reference to a telephone service is not related to the programme being broadcast, it must be made during an advertising slot. The CSA also reiterates in its recommendation the obligations concerning the indication of the cost of the services and the possibilities provided by legislation on games to have the cost of communication refunded. The private nation-wide channel TF1, a large-scale user of the surcharged telephone services referred to, took the matter before the *Conseil d'Etat*, calling for the recommendation to be cancelled. The *Conseil d'Etat*, in a decision of 9 February 2004, found that the CSA had not overstepped its area of competence. It was indeed one of its duties to reiterate the rules incumbent on operators, not only in terms of the ban on unlawful advertising, but also as regards information to the public and the legislation banning games of chance. Moreover, by stating that the television services may, outside advertising slots, refer to their own services or Audiotel, Teletel and Internet sites as long as the reference constitutes a direct continuation of the programme being broadcast and does not result in connexions with services unrelated to that programme or in competition with services of the same kind offered by third-party companies, the CSA's interpretation of Article 8 of the Decree of 27 March was neither wrong nor made outside its sphere of competence to make a new rule. Thus TF1 was deemed unfounded in calling for the CSA's recommendation to be cancelled. ■

Amélie Blocman
Légipresse

● ***Conseil d'Etat*, 9 February 2004, *Société télévision française* TF1**

● **CSA Recommendation of 5 March 2002, *Journal officiel* (official journal) of 5 April 2002, available at: http://merlin.obs.coe.int/redirect.php?id=8885**

FR

FR – CSA Bans Airtime before 10.30 pm for Radio Programmes that Could Shock Young People

According to Article 15 of the Act of 30 September 1986 (as amended), the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body - CSA) guarantees the protection of children and young people and ensures that programmes likely to be damaging to the physical, mental or moral development of minors are not made available to the public by a sound broadcasting service unless it is assured, because of the broadcasting time chosen, that minors would not normally be likely to hear them. Under this Article, the CSA adopted a deliberation on 10 February prohibiting any sound broadcasting service from broadcasting programmes likely to be offensive to listeners under the age of 16 between 6 am and 10.30 pm. The recommendation is addressed more particularly to music stations directed at young people; these mainly offer morning programmes between 6 and 9 am, and phone-in programmes in the evening, two types of programme that are particularly prone to veering out of control. Last November, for instance, the station NRJ decided to stop broadcasting its programme by Maurad after receiving formal notice from the CSA referring to "insulting and pornographic comments". Pornographic or extremely violent broadcasts are banned altogether by the CSA's deliberation, precisely because there is no technical means available for sound broadcasting services to ensure that only adults are able to access the programmes. A number of questions nevertheless remain unanswered. Thus the chairman of Skyrock, which broadcasts a phone-in programme during the week from 9 pm to midnight, commented that the time when there were most young people listening to the radio was in fact after 10.30 pm! Moreover, the Chairman of the *Syndicat interprofessionnel des télévisions et radio indépendantes* (syndicate of independent radio and television stations) wondered whether the mere fact of talking about sexuality was likely to offend the sensibilities of under-16s; he concluded that the CSA needed to make the deliberation more precise. ■

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● **Deliberation by the CSA on the protection of children and young people in sound radio broadcasting services, official gazette (*Journal officiel*) of 26 February 2004. Available at: http://merlin.obs.coe.int/redirect.php?id=8885**

FR

FR – CSA Standard Agreement for Channels outside the European Community

Amélie Blocman
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The *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body - CSA) is facing difficulties concerning the channels in countries outside the European Community broadcasting on Eutelsat, of which more than 150, despite theoretically being subject to French authority, are broadcast without being approved either in France or in any other country of the European Union. The CSA cannot sanction them or take proceedings against the satellite operators or the bodies that allocate space on the satellite broadcasting these channels. Thus on 13 January, the CSA applied to the office of the Public Prosecutor in application of Article 40 of the Code of Criminal Procedure and Article 42-11 of the amended Act of 30 September 1986 in respect of the broadcasting by the Lebanese channel Al-Manar TV of a thirty-episode series likely to be considered as anti-Semitic and the absence of any approval granted to the channel, in contravention of Article 33-1 of the Act of 30 September 1986 (as amended). On 15 February, when the bill on electronic communications was adopted at its first reading, the National Assembly validated the Government amendments intended to amend the Act of 30 September 1986, in order to give the CSA the means of supervising extra-European channels broadcasting to Europe by satellite and, where appropriate, to impose penalties (see IRIS 2004-3: 8). The CSA also adopted the draft of a standard agreement, valid for either two or five years, for extra-Community channels broadcasting in a non-European language that fall within France's jurisdiction. Basically, this category includes the channels broadcast by the satellite operator Eutelsat, the satellite operator's uplink being provided from France. Under the terms of this draft, the editor is responsible for the broadcasts it transmits and must in all circumstances retain control over what is being broadcast. It therefore undertakes to abide by the general principles of audiovisual law and more particularly to ensure that there is no incitement to practices and types of behaviour that are deemed criminal in France, to respect the various political, cultural and religions sensibilities of the people, and to refrain from encouraging hate, violence or discrimination on the grounds of race, gender, religion or nationality. It also commits itself in respect of the rights of the individual, honesty of information and programmes, and the protection of children and young people. Lastly, the channels would be required to keep the broadcasts they transmit and the programme cue sheets for at least eight weeks, and provide the CSA with whatever information the latter may deem of use. Concerning sanctions, the standard agreement provides that the next stage after service formal notice is suspension of distribution of either the service or part of the programme for one month or more, plus monetary penalties. ■

● Decision of the CSA, extra-Community channels falling within the jurisdiction of France: standard agreement adopted, available at:
http://merlin.obs.coe.int/redirect.php?id=9000

● Illegal satellite broadcasts: the powers of the CSA are to be reinforced, CSA newssheet no. 170 of 27 February 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9001

FR

GB – Official Inquiry Leads to Resignation of Chairman and Director-General of the BBC

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The UK has had a major crisis in public service broadcasting as a result of the publication of the Hutton Report dealing with the death of Dr. David Kelly, the expert on weapons of mass destruction in Iraq (see also IRIS 2003-9: 8). He had been interviewed by Andrew Gilligan, a BBC reporter, in relation to Government claims that such weapons were available for use within 45 minutes. The BBC had then broadcast the allegation that the dossier prepared for Government by the security services had been doctored to make the threat seem more immediate than it had originally appeared; the Government spokesman vigorously denied that this had taken place.

The Hutton Report comprehensively cleared the Government of allegations that it had "sexed-up" the dossier. Thus "the allegation reported by Mr Gilligan on 29 May 2003 that the Government probably knew that the 45 minutes claim was wrong before the Government decided to put it in the dossier, was an allegation which was unfounded." The Government had merely made drafting suggestions, which were accepted by the security services.

According to the Report, "the right to communicate [information on matters of public interest] is subject to the qualification (which itself exists for the benefit of a democratic society) that false allegations of fact impugning the integrity of others, including politicians, should not be made by the media." An editorial system should be in place to give careful consideration to such allegations before they are broadcast, and, given the gravity of the allegations, the BBC was at fault in permitting them to be broadcast without editors having seen and approved a script in advance.

The BBC's management was also at fault for failing to investigate properly the Government's complaints about the broadcast, for example by examining Andrew Gilligan's notes. The BBC Board of Governors was correct to consider it their duty to protect the independence of the BBC against attacks by the Government, but should have recognised that this was not incompatible with giving proper consideration to the validity of the Government's complaints. In particular, they should have undertaken an independent investigation into the complaints, for example examining the reporter's notes, rather than relying on assurances from BBC management.

Shortly after the report was published the Chairman of the Governors, Gavyn Davies, resigned, followed the next day by the Director-General, Greg Dyke and shortly afterwards by Andrew Gilligan. The future governance of the BBC is one of the issues currently being examined by the Charter Review, which is due to result in a new Charter in 2006. This may propose fundamental changes in the role of the Board of Governors and suggest that some more independent system of regulation is established. ■

● "Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly, CMG" by Lord Hutton, available at:
http://merlin.obs.coe.int/redirect.php?id=8982

● See also the BBC Charter Review at:
http://merlin.obs.coe.int/redirect.php?id=8983

GB – Chancellor Announces New Relief on Expenditure for Film Production

Currently, relief for expenditure on production and acquisition of films is covered by the Finance Act (No 2) 1997, Section 48. However, this is due to expire in July 2005.

In the Budget Speech in the UK Parliament recently, the Chancellor said: "Since 1997 support for the British

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film industry has been worth GBP 2 billion and the number of films made here in Britain has doubled. I now propose to transfer the available reliefs for British-made films with budgets below GBP 15 million from the third parties, a minority of whom have abused them, and to pay reliefs directly to the film-makers themselves. The new relief will be set at a new and higher level of 20 per cent."

The UK Film Council has stated that several recent British film successes were made using the Section 48 relief, e.g., "Calendar Girls", "Bend it like Beckham" and "Gosford Park".

Apart from changing the subject of the relief from third-parties to film-makers as such, consideration is also to be given to expanding the scope of the relief to film distribution. ■

- **Finance Act (No. 2) 1997 Section 48, available at: http://merlin.obs.coe.int/redirect.php?id=8993**
- **"UK Film Council welcomes announcement of new tax credit to support future film production following expiry of section 48", UK Film Council Press Release of 17 March 2004, available at: http://merlin.obs.coe.int/redirect.php?id=8994**
- **Chancellor's Budget Speech, available at: http://merlin.obs.coe.int/redirect.php?id=8995**

HU – Plans on Launching a New TV Channel in Romania

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The Hungarian Information Technology Ministry and the Prime Minister's Office have provided financing (EUR 1.2 million) to launch a new Hungarian-language television channel in Transylvania. At this preparatory stage, the channel has three potential titles: Karpatia Television, Transylvanian Hungarian Television or Bartok Television (hereinafter Channel).

According to plans, the Channel may be launched at the end of 2004. In accordance with Romanian law, the Channel may not be considered as a public service channel as it will not receive Romanian government funding. It is intended that the Channel shall receive Hungarian public money for about two or three years, and shall be financially self-sustaining afterwards.

The Channel's programming will be produced and edited exclusively in Romania by ethnic Hungarians. ■

IE – Supply and Connection of Cable Taxable as Separate Services

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The Supreme Court has decided that the supply of cable signal and the connection of viewers to cable are distinct services for the purposes of value added tax (VAT). The respondents, who were suppliers of cable television and radio services providing multi-channel viewing or listening, charged householders under separate headings for the connection of the service and the service itself (an initial fee to obtain the connection and then an annual fee for supply of the signal). VAT should therefore have been paid at a lower rate than in the case of a single supply. An EC Directive of 1977 requires Member States to subject to VAT all supplies of goods and services, but allows for certain exemptions. The detailed list of taxable goods and services is left to national laws. The Court found the approach of the European Court of Justice (ECJ) persuasive. The ECJ had said that regard must first be had to all the circumstances in which the transaction takes place, and it attached particular weight to the economic character of the supply of services. A single economic service should not be artificially divided; a single price may not be decisive but may be indicative of a single service, just as separate prices may suggest separable supplies, in the opinion of the Supreme Court. The Supreme Court listed several features of the entire service supplied by the respondents that in the Court's view warranted treating the connection as a distinct supply from delivery of the signal itself. ■

- **D.A. Mac Carthaigh, Inspector of Taxes (appellant) v Cablelink Ltd, Cablelink Waterford Ltd and Galway Cable Vision (respondents), Supreme Court 19 December 2003, Fennelly, J., nem.diss., available at: http://merlin.obs.coe.int/redirect.php?id=8989**

IE – Copyright Issues

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The Joyce estate, which holds the copyright in the works of James Joyce, has warned that it will sue for any breach of copyright occurring during the Bloomsday centenary festival, "ReJoyce Dublin 2004", to be held in June. The warnings have been given to the organisers of the festival, the Government, which is involved in organising some of the events, and RTÉ, the national broadcasting station, among others. The estate has taken legal action on previous occasions, for example in relation to a webcast celebration of Bloomsday and the publication of an anthology of twentieth century Irish writing (see IRIS 2001-10: 15). The warnings in respect of the 2004 festival are likely to curtail a number of events including public readings and a theatre production. Records released under the Freedom of Information Act 1997 reveal that the Government has sought advice on the matter from the Chief State Solicitor's office. All of the main events will be vetted by lawyers to ensure that there is no breach of copyright involved.

Meanwhile, the Government has made regulations to implement certain provisions of Directive 2001/29/EC of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (see IRIS 2001-5: 3). The Regulations complete the transposition of the Directive into Irish law. They amend the Copyright and Related Rights Act 2000 (see IRIS 2000-8: 13) to give effect to Article 5.1 and Article 6.4 of the Directive. The former requires a mandatory exception for incidental copies of works. The latter imposes an obligation on Member States to secure access to protected material for beneficiaries who are legally entitled to access it. A minor adjustment is also made in the Regulations to exclude sheet music from the "fair dealing" exception that the Act provides for research and private study. ■

- **"Joyce estate warns festival over copyright issues", The Irish Times, 9 February 2004**
- **European Communities Copyright and Related Rights Regulations 2004, S.I. 16 of 2004, announced in *Iris Oifigiúil* (the official journal of the State) on 6 February 2004, available at: http://merlin.obs.coe.int/redirect.php?id=8990**

IE – Competition Authority Clears Radio Merger with Conditions

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The Competition Authority has cleared, subject to certain conditions, a proposed acquisition by Scottish Radio Holdings (SRH) of a Dublin local radio station, FM 104. SRH already own Today FM, the sole national commercial radio station. The acquisition had already been cleared by the Broadcasting Commission of Ireland, the regulator of the commercial broadcasting sector. However, media mergers are now subject also to specific requirements included in section 22 of the Competition Act 2002. Under that section the Competition Authority makes a determination on the proposed merger based on competition issues. Its determination is then referred to the Minister for Enterprise, Trade and Employment for an independent review on other non-competition criteria. If the Minister makes no order within 30 days, the Competition Authority's determination becomes final. In the case of SRH, the Authority determined that the proposed acquisition would not substantially lessen competition in the market. The conditions set by the Authority included a requirement for SRH to divest all ownership in Newstalk 106FM (another Dublin-based commercial station) to a buyer agreeable to both parties and to the Authority by 31 December 2004. SRH is not to participate in Newstalk's board, or vote or participate in its business operations. If SRH does not divest itself of the station by the set date, ownership interests will be transferred to a trustee. FM 104 may not renew current sales and advertising contracts. ■

● **"The Competition Authority attaches conditions to the purchase of FM 104 by Scottish Radio Holdings", 5 February 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=8984

IT – New Actions in Favour of the Italian Film Industry

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On 22 March, the Italian Council of Ministers approved a *Decreto-Legge* (statutory instrument), containing budgetary and non-budgetary measures aimed at supporting and stimulating the Italian film industry and, more generally, the whole field of entertainment. On the basis of the new legislation, the *Ministero per i beni e le attività culturali* (Ministry of Culture) will be able to set aside part of its own budget for 2004 for the development not only of the film industry, but also of theatre and opera productions, concerts and sport events. *Cinecittà Holding S.p.a.* – a (predominantly) state-owned institution coordinating public contributions towards Italian cinematography and promoting the distribution of Italian-made films – will receive a yearly grant of EUR 3.500.000, while this same year another EUR 31.000.000 will be assigned for the financing of activities in the fields of culture and sport. The *Decreto-Legge* also sets out implementing provisions for the operation of the newly-created limited company *ARCUS S.p.a.*, which will carry out activities aimed at the development of cultural events, art, performing arts and entertainment in general. *ARCUS* will receive a share of 3 % of the total budget assigned by the Government to infrastructure projects and culture. Further, the new legislation contains sanctions for copyright infringements. The unauthorised distribution of copyrighted films for commercial purposes via electronic means (including P2P networks) will be punishable as a criminal offence, involving up to 3 years imprisonment, while file sharing of copyrighted films for personal use will be subject to an administrative sanction in the form of a fine of up to EUR 1.500. Service and access providers will be obliged to cooperate with police authorities in providing all the necessary information in order to locate and identify the infringers. If expressly requested to do so, providers are also under the obligation to actively prevent access to websites containing infringing material and if necessary to remove the content itself.

The *Decreto Legge* follows the adoption of another piece of legislation on the same subject, dating from 22 January 2004, which contains some very relevant innovations for the Italian film industry *(Decreto legislativo 22 gennaio 2004 "Riforma della disciplina in materia di attività cinematografiche"*, see IRIS 2004-3: 12). Among the innovations introduced, the Decree of 22 January simplifies the rules concerning financing of film and institutes a *Consulta Nazionale* (National Council) for cinematographic activities to advise government. ■

● ***Decreto-Legge 22 marzo 2004, n.72 Interventi per contrastare la diffusione telematica abusiva di materiale audiovisivo, nonche' a sostegno delle attivita' cinematografiche e dello spettacolo.* (*GU n. 69 del 23-3-2004*) (Statutory instrument of 22 March 2004, n. 72), Official Journal n. 69 of 23 March 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9036

IT

NL – Decision in the Dispute between Canal+ and UPC about Access to Cable

The Dutch *College van Beroep voor het Bedrijfsleven* (Trade and Industry Appeals Tribunal – CBB) took the next step towards the solution of the dispute between Canal+ and UPC over Canal+' s access to the cable network of UPC. In its decision of 3 December 2003, the CBB partly annulled a decision of the Dutch Court of Rotterdam of 26 February 2003 (see IRIS 2003-4: 10) concerning disputes between the *Onafhankelijke Post en Telecommunicatie Autoriteit* (Dutch Regulatory Authority for the telecommunications sector– OPTA), UPC and Canal+. At the heart of this proceeding lies the interpretation of Article 8.7 of the *Telecommunicatiewet* (Dutch Telecommunications Act – Tw) and the powers it entrusts to OPTA. Article 8.7 Tw provides rules for access of programme providers to cable networks. In the case that both the operator of the cable network and the programme provider cannot reach an agreement, OPTA is authorised to impose, at the request of the programme provider, binding orders on the operator of the cable network. On the basis of this provision, OPTA issued an order determining the preliminarily tariffs that UPC could charge Canal+ for the re-transmis-

sion of its programmes. In so doing, OPTA applied the principle of cost-orientation. This principle has so far been applied in the context of the regulation of access to telecommunications networks (the former ONP framework, did not cover questions of access to cable networks, but see the remark below). The CBB did not share the opinion of the Rotterdam Court that OPTA's order was in conflict with Article 8.7 Tw. The Rotterdam Court argued that OPTA was not entitled to apply the principle of cost-orientation also in the context of cable networks as long as there was no formal statutory basis that would authorise it to do so. The CBB did not follow this line of argument. With reference to the history of Article 8.7 Tw, the CBB decided that Article 8.7 Tw is formulated as an open provision and that the legislator did not intend to exclude the possibility to interpret this provision in the light of the ONP provisions. However, as the CBB also postulated, in the case of a lack of explicit legal rules, OPTA was required to thoroughly motivate a decision to interfere on the basis of Article 8.7, and also to take into account the legitimate interests of UPC. According to the CBB, OPTA complied with this obligation. In particular, OTPA was entitled to commission an external account in preparation of its order, provided it took care that the advice was the result of a careful and sound proceeding. Large parts of the decision of the CBB deal with a discussion of when the advice of an external consultant can be considered in conformity with the requirement of a careful and sound proceeding.

The decision is also interesting insofar as it provides insight into how the CBB defines the notion of "programme provider". UPC argued that Canal+ was not entitled to claim access under Article 8.7 Tw because Canal+ did not act as a programme provider but as an operator of conditional access. By contrast, the *College* defended the view that the fact that programmes are provided on the basis of conditional access does not change their qualification as programmes in the sense of this provision.

It also should be noted that the former ONP framework was replaced by a new framework for the regulation of the communications market (see IRIS 2002-3: 4). The new framework no longer excludes cable networks from the regulation of access. Also, in Article 13 of the Access Directive it is stated explicitly that a national regulatory authority can be entitled to impose obligations to apply principles of cost-orientation. The new framework has not yet been implemented in the Netherlands. ■

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● ***College van Beroep voor het Bedrijfsleven 3 december 2003*** **(Decision of the Dutch Trade and Industry Appeals Tribunal of 3 December 2003), Case no. AWB 03/406,03/418 and 03/452, 3 December 2003, *15300 Telecommunicatiewet*, LJN-no. AO1112, available at: http://merlin.obs.coe.int/redirect.php?id=9027**

NL

NL – Governmental Control over Provision of Cable Services Restricted

UPC (a Dutch cable operator) exploits the cable television network in Wageningen and is bound by a contract with the municipality that was set up by its legal predecessor. The contract provided for the municipality of Wageningen to have a certain degree of control over the provision of cable services in the municipality.

Since 1997, the *Mediawet* (Dutch Media Act) states that the minimum set of programmes offered by a cable provider must include a must-carry package of programmes that is defined in the Media Act and an additional may-carry package. In principle, the cable provider is free to transmit more programmes on top of this statutory minimum set. The 1997 *Mediawet* also provides for municipalities to set up a council in charge of advising on the composition of the statutory may-carry package. The municipality of Wageningen and *UPC* agree on the fact that their contract has to be adjusted to the new *Mediawet*, but the municipality also wishes to maintain its right to have influence over the additional non-statutory package, as well as over the price of a cable subscription. This led to legal action, in which the municipality demanded changes to the contract, to enter into force with retroactive effect. A striking verdict followed.

The Court ruled that Article 7 subsection 2 of the *Grondwet* (the Dutch Constitution), which regulates the fundamental right of freedom of broadcasting, requires a determined basis in an Act of Parliament if the government wants to impose restrictions on the transmission of television channels on cable. According to the Court, on the basis of this article, any form of governmental interference with the regulation of television requires a determined basis in an Act of Parliament. The municipality is of a different opinion, and claims that this only applies to regulation of the content of television programmes.

The contract between UPC and Wageningen sets restrictions to a fundamental right and given the lack of a statutory provision as a basis for this at the time that the parties entered into the contract, the District Court declared that the municipality's interference with *UPC*'s channels' offer is incompatible with public order. The municipality was not authorized to stipulate provisions relating to the exploitation of cable and the Court therefore declared the contract between the parties void (based on article 3:40 subsection 1, of the *BW* (Dutch Civil Code)).

Up until this verdict, municipalities have always had control over cable operators. If this verdict is upheld on appeal, it could have far-reaching implications. A consequence of this verdict would be that municipalities would not be authorised to exercise control over the selection of programmes in the cable package in any way. Municipalities would not be able to control directly or indirectly (via the subscription tariff) what is being transmitted as part of the standard cable subscription. Currently, several municipalities are engaged in civil law procedures, because cable providers have unilaterally announced their intention to raise cable subscription tariffs in violation of their existing contractual obligations. Since most municipalities have similar contracts with cable providers, these contracts would follow the same fate. ■

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● **Decision of the District Court of Amsterdam of 28 January 2004, LJN no. AO2528, Case no. H 02.0678, available at: http://merlin.obs.coe.int/redirect.php?id=8996**

NL

NL – Netherlands: Evaluation of Classification System

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In reaction to a press release from a national parents' association, the State Secretary for Education, Culture and Science has evaluated the functioning of the Dutch classification system for audiovisual media, *Kijkwijzer* (see also IRIS Plus 2003-10). The association, *Ouders en Coo*, publicly cast doubt upon the classification system, stating that ten films had been rated too low.

Kijkwijzer was introduced on 22 February 2001 by NICAM (Dutch Institute for the Classification of Audiovisual Media), the organization responsible for the development and implementation of *Kijkwijzer* on behalf of the film and video sectors and the public and commercial broadcasters.

The State Secretary sets out her conclusions in a letter of 16 February 2004. She notes that *Ouders en Coo* rightly claim that accurate classification of films which are broadcast late in the evening is important, because the same film could be re-run some other time in the early evening. However, contrary to what *Ouders en Coo* claimed, the State Secretary finds no indication that there has been any inaccuracy with regard to the rating of the films. She also points out that, according to an analysis of complaints cases, the complaints procedure has added greatly to the current, sharpened classification system. Nevertheless, international comparison of data is necessary to find the potential weak spots in the system, in order to improve the quality control of *Kijkwijzer*. ■

● **Letter of the State Secretary of 16 February 2004, *Kamerstukken II* (Parliamentary documents of the Lower House) 2003/04, 29 326, nr.2, available at: http://merlin.obs.coe.int/redirect.php?id=8992**

NL

NO – Court of Appeal Decision in the napster.no Case

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On 3 March 2003, the Norwegian *Eidsivating* Court of Appeal gave its decision in the napster.no case (civil lawsuit). Finding for the defendant, the court overruled the first instance decision, which was reported in a previous IRIS article (see IRIS 2003-3: 16).

In brief, the defendant had maintained a website (napster.no) containing hyperlinks to illegal MP3 files on the web. The napster.no site did not itself contain any MP3 files, only links to such files elsewhere on the web. Clicking on the links published on napster.no led users directly to the chosen MP3 file and, through a popup menu, they were offered the options of playing the song or saving the file on their own computer (a third option was that of aborting the operation). The question before the Court of Appeal was whether the acts of the defendant were infringing the copyrights held by the creators and performers of the musical works concerned.

According to the Norwegian Copyright Act section 2, the exclusive rights of a copyright holder are defined as the right to exploit the work by producing copies thereof and by making it available to the public.

The court stated that persons uploading the illegal MP3 files to the web undoubtedly were infringing the rights of the copyright holders, since such uploading both involves producing unauthorised copies of the works and making them available to the public.

The question in this case, however, was whether the act of publishing hyperlinks to such already uploaded files also was a copyright infringement. This was seen as a question of whether linking involved making the works available to the public. According to the Norwegian Copyright Act section 2, a work is made available to the public (i) when it is performed outside private premises (public performance), or (ii) when copies of the work are offered for sale, rental or lending, or otherwise distributed or displayed outside such premises. Between these two alternative ways of making a work available to the public, the plaintiffs had argued that the acts of the defendant fell within the public performance criterion.

However, despite two prior Swedish and Danish court decisions considered by the Court of Appeal, both indicating that linking to a work involves making it available to the public, the court found to the contrary. It concluded that, under Norwegian copyright law, the mere act of linking does not involve making the works available to the public.

The court then went on to discuss whether the defendant had contributed to the infringements committed by the uploaders of illegal MP3 files. It found that the infringing act of the uploader (the main infringement) was concluded as soon as the file had been successfully uploaded. As the acts of the defendant were subsequent to the actual uploading, the court could not establish any causality between the defendant's acts and the main infringements. On this ground it concluded that the defendant was not guilty of contributory infringement.

Further, there was no contributory infringement related to the downloading of files performed by the users of napster.no, as these acts involved the making of copies for private use, therefore it was outside the exclusive rights of the copyright holders. ■

● **Judgment by the *Eidsivating* Court of Appeal of 3 March 2004, available at: http://merlin.obs.coe.int/redirect.php?id=8981**

NO

NO – Government Tightens Film Support Regime

In a Green Paper on national film support schemes published on 12 March, the Norwegian Ministry for Cultural and Church Affairs argues for a tightening of the support measures currently in force for Norwegian film production. Observing that some current support schemes "may seem unduly generous", the Ministry would like to see tighter maximum limits on aid accrued through the automatic Box Office Bonuses system, and a stepped-up repayment scale on soft-loan production support. The proposals come after Parliament during last December's state budget debate forced the minority centre-right government to produce a report on the general economic conditions of Norway's film industry, which has seen a dramatic upturn in film production volume and admissions since the (then-Labour) government overhauled national film support policies in 2001. Following the lead of film industry lobbying groups, the Parliamentary majority pressed for the government to introduce measures that would encourage private investment in film production (i.e.

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some form of tax incentive funding) and for relieving film producers of paying end-stage VAT (there is no VAT on cinema tickets in Norway, and hence no deduction of VAT for the film production sector). Both these measures would, in effect, institute further state support for a growing industry, but indirectly and at the expense of state tax and levy income. It therefore came as no (political) surprise that the government's reply was to show that Norwegian film production already enjoys generous benefits through direct support schemes, and that the Ministry's counter-proposal consisted in schemes for the redistribution of currently available support appropriations. The Green Paper should come up for debate before Parliament adjourns for its summer break, and there is another milestone further down the road, in 2005, when the government is committed to a full review and audit of its 2001 film policies. ■

- ***St.meld. nr. 25 (2003-2004) Økonomiske rammebetingelser for filmproduksjon*** **(Green Paper on national film support schemes), 12 March 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=8985

NO

- ***Forskrift for tilskudd til audiovisuelle produksjoner*** **(Norwegian Film Support Regulations), available at:**
http://merlin.obs.coe.int/redirect.php?id=8986 (NO)
http://merlin.obs.coe.int/redirect.php?id=8987 (EN)

EN-NO

SK – New Rules for Slovak Public Service Radio and Television in Force

Amendments to the legislation on Slovak Television and Slovak Radio, which had been expected since 1999, were passed by Parliament in December 2003 and came into force on 1 January 2004 (Act on Slovak Radio) and on 1 February 2004 (Act on Slovak Television) respectively.

The *zákon o Slovenskom rozhlase* (Act on Slovak Radio) and the *zákon o Slovenskej televízii* (Act on Slovak Television) replace the rules of 1991, the Act on Slovak Television No. 254/1991 Zb and Act on Slovak Radio No. 255/1991 Zb, which previously were the legal tools dealing with the transition from state media to public service institutions.

The goal of these completely new acts on Slovak Radio and Slovak Television is identical, namely to strengthen control and to make the financial management of the stations more effective. Slovak Television (hereafter STV) and Slovak Radio (hereafter SR) respectively will have a new control and supervisory structure. There are three key elements:

1. the Board,
2. the Supervisory Board and
3. the Director General.

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The procedure for establishing the Board has been completely changed and the number of members increased to 15 (formerly it was nine). Members of the STV Board are to be appointed by the Parliament for a six year term of office, however every two years one-third of the members (5) will rotate.

Legal persons dealing with audiovisual, media, culture, science, education, national heritage of cultural values and human rights areas, as well as NGOs representing national minorities, ethnic groups, registered churches and religious associations and environmental and health protection are entitled to submit their proposals for new members of *e.g.* STV Board. The Board of STV is competent to appoint or remove the Director General of STV (in the past this was done by the Parliament) and has to be involved in decisions on increasing financial investments. The General Director is to be elected by at least two-thirds of STV Board members in a secret ballot. His/her term of office will be five years and is renewable.

The new Supervisory Board of STV will consist of three members, the President, the Government and the Parliament will each appoint one member. The Supervisory Body is charged with the control and supervision of the financial management of STV/SR.

Unlike before, when the property rights before allocated to the State and were only administered by STV and SR, the broadcasting stations now are competent to manage them as their own property, e.g. to rent or sell buildings or technical equipment. Both shall be able to receive financial support/gifts from private entities and grants from different sources including EC structural funds (see IRIS 2004-1: 15), STV and SR respectively are bound by the framework of their public service mission. Income shall be generated from the following sources: television/radio fees, sale of advertising time and sponsorship. While STV will be financed without state contribution, SR will still be funded from the state budget.

A problematic provision of the Act on Slovak Television 1991, the requirement to allot 20% of television fees to the production of domestic audiovisual cultural programmes, has been abolished. ■

- ***Zákon č.619/2003 Z.z. o Slovenskom rozhlase*** **(Act on Slovak Radio No 619/2003) published in *Zbierka zákonov* (Official Journal) of 2003, section 252, p. 5975 available at:**
http://merlin.obs.coe.int/redirect.php?id=8980
- ***Zákon č.16/2004 Z.z. o Slovenskej televízii*** **(Act on Slovak television No.16/2004) published in *Zbierka Zákonov* (Official Journal) of 2004 section 7, p. 119 available at:**
http://merlin.obs.coe.int/redirect.php?id=8980

SK

US – FCC's New Indecency Rule

On 18 March 2004, the Federal Communications Commission (FCC) adopted a new ban on "indecent" material on broadcast television. Its action came after political outrage over a mid-January "Super Bowl" broadcast – the most viewed US football game – which included singer/actress Janet Jackson's baring a breast for about 5 seconds. The Commission's actions followed the House of Representatives' adoption of a severe anti-indecency bill.

In Golden Globe Awards Program, the Commission established new definitions of "indecency" and "profanity" on broadcast television. At issue were well-known singer Bono's remarks on an NBC televison network program, after he received the 2003 Foreign Press Association's Golden Globe award for Best Popular Song: "This is fucking brilliant."

In an opinion by Chairman Michael Powell, the Commission reiterated its traditional two-part test for indecency: (1) a description of "sexual or excretory organs or activities" which (2) is "patently offensive... by [broadcast] community standards."

The majority opinion held that Bono's words were a "depiction," because they had a "sexual connotation." It found them "patently offensive" for several reasons. First, "fucking" was "one of the most vulgar, graphic and explicit descriptions of sexual activities in the English language." Second, "children were expected to be in the audience." Third, NBC was "on notice" of Bono's

proclivity for indecency – based upon quotations from 1994 found on an entertainment news website. The Chairman also relied upon a website's reports that Cher, another popular singer, had said "fucking" in a different context – the Billboard Awards Ceremony of 2002. Recognizing that the Commission previously had refused to impose liability upon "isolated or fleeting" uses of indecency, Powell overruled this entire line of cases – dating back more than 15 years. The agency did not make clear what words were within the new ban, referring only to "the F-word and those words (or variants)." This leaves unclear the status of language such as: "shit, piss, cunt, cock."

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The majority also announced a new interpretation of the statutory prohibition on "profane" broadcasting – which had not been enforced in more than fifty years. Powell held that "fucking" was profane because it was "vulgar and coarse material."

In the end, the Commission did not fine NBC for the broadcast, on the ground that it had not had sufficient notice of the change in the law. But Commissioners Copps and Martin would have imposed a fine, on the grounds that NBC should have known the material's indecency and did not make sufficient efforts to censor it – eg, by means of a five-minute delay if need be. They were not concerned that the technology necessary to establish this long a delay costs hundreds of thousand of dollars per station.

In overruling more than 15 years of prior administrative decisions, the FCC took a very strong position – presumably because of not only private pressure, but also severe interrogation in appearances before Congressional committees. Moreover, the passage of the House indecency bill and the possibility of Senate approval – no matter how small – may be a major influence. ■

● **Golden Globe Awards Program, FCC 04-43,18 March 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9011**

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AGENDA

18th ICC Conference on International Audiovisual Law -
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