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INTERNATIONAL

EPRA

European Platform of Regulatory Authorities: 19th Meeting in Stockholm

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The 19th meeting of the European Platform of Regulatory Authorities (EPRA) took place on 3 and 4 June 2004, organised jointly by the Swedish Broadcasting Commission and the Swedish Radio and TV Authority.

One theme discussed at the meeting was the dividing line between the need to protect privacy and the right to information deemed to be in the public interest, including the difficulties associated with the protection of privacy in the context of information published on the Internet. A number of points were raised, including the question of who is responsible for privacy protection and in respect of which media (press, television, Internet). Responsibility lies either with self-regulating bodies, such as the press council, or state regulatory authorities. In some cases, there are separate bodies for different media.

The EPRA pilot group on "Digital Terrestrial Television" presented its report on the state of DTT development across Europe. The group was directed by the Italian regulatory authority, the *Autorità per le Garanzie nelle Comunicazioni* (AGCOM). Using data supplied by 29 EPRA members, it focused its study on (1) digital transmission capacities already allocated in the different countries, (2) financial resources, (3) the leading role of broadcasters, and (4) restrictions and obligations connected with the introduction of DTT. The study led to the following conclusions:

- The existence of digital television has a positive impact on the introduction of DTT.
- In most countries, public service broadcasters have a key role to play in the development of DTT.
- Transition solutions tend to be "free-to-view" or subject to a basic charge.
- The most effective way of promoting DTT is to set a date when analogue television will be switched off.
- National regulatory authorities play an important role in the switch to DTT.
- Countries that have involved their public service broadcasters in the process have had positive results. The same goes for countries where broadcasters have shown a willingness to shoulder the responsibilities involved.
- Terrestrial broadcasters are becoming network operators and as such are subject to EU Communications Law.
- Converged regulators cope better with the switch to DTT than the more traditional regulatory authorities.

Two other working groups discussed aspects relating to the protection of young people in connection with the rating of TV content and – for the first time ever – regulation in the radio sphere. In particular, the second working group looked at the preservation of local radio programmes and the crossover to digital radio. ■

• EPRA press release on the 19th meeting, available at:
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EN-FR

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COUNCIL OF EUROPE

Parliamentary Assembly: New Resolution Critical of Media Concentration in Italy

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On 24 June 2004, the Parliamentary Assembly of the Council of Europe (PACE) adopted its Resolution 1387 (2004) entitled "Monopolisation of the electronic media and possible abuse of power in Italy".

The Resolution's point of departure is that the "concentration of political, commercial and media power" in the hands of the Italian Prime Minister, Silvio Berlusconi, is jeopardising media pluralism, as guaranteed by Article 10 of the European Convention on Human Rights. It is critical of the failure of successive Italian governments to effectively grapple with persistent conflicts between political and media (ownership) interests by legislative or other means.

More specifically, it posits that one of the core proposals of the Frattini Bill (a current piece of draft legislation), *viz*. that responsibility should attach only to [company] managers and not to owners, will not satisfactorily resolve the much-publicised conflict of interests involving the Italian Prime Minister. It points out that the Italian television market has in effect become a duopoly as Mediaset, a company owned by the Prime Minister, along with RAI, the public service broadcaster, "command together about 90% of the television audience and over three quarters of resources in the sector"; a situation which gives rise to anti-trust concerns. Further details of how this duopoly is compounded are provided in para. 5 of the Resolution and in the extensive, identically-titled report on which the Resolution is based.

The PACE is sceptical of the prediction that the recently adopted Gasparri Law (see IRIS 2004-6: 12) will succeed in guaranteeing enhanced pluralism "simply through the multiplication of TV channels in the course of digitalisation". It notes with disapproval that the new Law "manifestly allows Mediaset to expand even further as it leaves the possibility of market players to have monopoly in a given sector without ever reaching the anti-trust limit in the overall Integrated System of Communications (SIC)".

Furthermore, the PACE takes the view that the present situation of the RAI does not measure up to the principles of independence set out in its Recommendation 1641 (2004) on "Public service broadcasting" (see IRIS 2004-3: 3), and that this state of affairs should accordingly be redressed.

The Resolution calls on the Italian Parliament, *inter alia*, to expeditiously resolve the already-flagged conflicts of interests by introducing appropriate legislation to that end, and to ensure – through legislative and other regulatory means – the insulation of the media from political interference along the lines of the Committee of Ministers' Declaration on freedom of political debate in the media (see IRIS 2004-3: 3). In addition, the Resolution urges the Italian Parliament to amend the Gasparri Law in order to reflect the principles embodied in the Committee of Ministers' Recommendation No. R (99) 1 on measures to promote media pluralism (see IRIS 1999-2: 5), especially by: (a) "avoiding the emergence of dominant positions in the relevant markets within the SIC"; (b) "including specific measures to bring an end to the current RAI-Mediaset duopoly"; (c) "including specific measure [sic] to ensure that digitalisation will guarantee pluralism of content."

The PACE Resolution seeks an opinion from the European Commission for democracy through law of the Council of Europe (the Venice Commission) on the compatibility of the Gasparri Law and the Frattini Bill with Council of Europe standards (especially the jurisprudence of the European Court of Human Rights) regarding freedom of expression and media pluralism.

The Resolution also notes that other international bodies, including the European Parliament (see IRIS 2004-6: 6) and the OSCE Representative on Freedom of the Media, have recently voiced their concerns about media pluralism in Italy as well. ■

● Monopolisation of the electronic media and possible abuse of power in Italy, Resolution 1387 (2004) (Provisional Edition), Parliamentary Assembly of the Council of Europe, 24 June 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9182

● Monopolisation of the electronic media and possible abuse of power in Italy, Report of the Committee on Culture, Science and Education (Rapporteur: Mr. Paschal Mooney), Parliamentary Assembly of the Council of Europe, 3 June 2004, Doc. 10195 (see also the Opinion of the Committee on Legal Affairs and Human Rights, (Rapporteur: Mr. Abdülkadir Ates), 22 June 2004, Doc. 10228), available at:
http://merlin.obs.coe.int/redirect.php?id=9184

EN-FR

EUROPEAN UNION

Council of the European Union: Agreement on Unfair Commercial Practices Directive

The Council of the European Union has reached political agreement on its common position on the draft Unfair Commercial Practices Directive, proposed by the Commission in June 2003 (see IRIS 2003-8: 5). This Directive provides for full harmonisation concerning unfair business-to-consumer commercial practices in the Internal Market. The aim of the Directive is to lay down standard EU-wide criteria for determining whether a commercial practice is unfair. It therefore defines a limited range of "sharp practices" which are prohibited EU-wide. This should leave room for businesses to be innovative in developing new fair commercial practices. The Directive thus contributes to the benefits of the Internal Market by clarifying consumers' rights and facilitating cross-border trade.

In order to determine whether a practice is unfair, the Directive establishes two general criteria. A practice is unfair if the practice is contrary to the requirements of professional diligence or if it materially distorts consumers' behaviour. The Council agreed that the benchmark consumer to be considered in assessing the impact of this practice is generally the "average consumer". The Directive also defines in more detail two specific types of unfair commercial practices, namely aggressive and misleading practices. The relevant provisions of the Misleading Advertising Directive (Directive 84/450/EEC as amended by Directive 97/55/EC) are therefore incorporated into this Directive. Finally, an Annex to the Directive lists some specific types of unfair commercial practices that are banned in all circumstances.

Under this Directive, the Member States will have a duty to ensure that these rules on unfair commercial practices are enforced and that traders in their jurisdiction who break them are punished.

The Council has deleted the country of origin clause from the Directive (see IRIS 2003-8: 5), on the understanding that other provisions of the Directive ensure maximum harmonisation.

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The Directive will be submitted to the European Parliament for a second reading, once it has been formally adopted by the Council.

The Council also endorsed the Regulation on Consumer Protection Cooperation, proposed by the Commission in July 2003 (see IRIS 2003-8: 5). This Regulation will provide for an EU-wide network of national enforcement authorities capable of taking co-ordinated action against rogue traders. It will help prevent unscrupulous traders from evading consumer protection authorities by targeting consumers in other EU countries. The network will start work in 2006. The necessary procedures are underway to allow the Council and the European Parliament to adopt the text as soon as possible. ■

● **"Commission applauds Council agreement on unfair commercial practices: EU to ban pressure selling", Press Release of the European Commission of 18 May 2004, IP/04/658, available at:**
http://merlin.obs.coe.int/redirect.php?id=9154

● **"Commission welcomes agreement to crack down on rogue traders: EU-wide enforcement network to be created", Press Release of the European Commission of 18 May 2004, IP/04/655, available at:**
http://merlin.obs.coe.int/redirect.php?id=9157

DE-EN-FR

European Commission: TV2 Has to Pay Back Excess State Compensation

On 5 April 2000, the Danish commercial television broadcasting company TvDanmark brought a complaint before the EU Commission alleging that the financing scheme of the Danish State, applied during the period 1995-2002, in favour of the Danish public company TV2 had to be regarded as State aid contrary to Article 87(1) of the Amsterdam EC Treaty, not subject to the derogations laid down in Articles 87(2) and (3) of the Treaty.

The Danish broadcaster TV2 is a State-owned limited company, operating on national level under the name "TV2/DANMARK A/S". The company assumes public service obligations. In exchange, TV2 is entitled to be compensated by the State for carrying out these activities. The broadcaster has been converted into a limited company according to the Act no. 438 of 10 June 2003 on TV2/DANMARK A/S adopted pursuant to the Media Agreement 2002-06 (see IRIS 2003-7: 8). This broadcasting company has the authority according to the *radio- og fjernsynsloven* (Radio- and TV Broadcasting Act) no. 1052 of 17 December 2002 section 38a (see IRIS 2003-2: 7) to exercise public service activities.

The complainant alleged that the measures for financing TV2 had given this broadcasting company certain advantages that relieved it from charges normally borne from its budget. As the competitors, the commercial broadcasters, did not receive the same funds, the measures distorted competition. Furthermore, trade between Member States seemed to be affected as TvDanmark – which did not receive the same funds but had to assume certain public service obligations on Danish territory – and TV2/DANMARK A/S were competitors in the EU internal market and on the international markets.

On 21 January 2003, the Commission notified Denmark of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty concerning the measures by which the State had financed the activities of TV2, and invited the Danish State to comment thereon (see OJ C 59/2 of 14 March 2003, Aid C 2/03 (ex NN 22/02) (2003/C 59/02) and IRIS 2003-2: 3).

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These measures concerned licence fee resources, transfers of funds, corporation tax exemption, interest and instalment-free loans, State guarantee for operating loans, free transmission frequency with national coverage and the benefit of must-carry status. Having carried out its investigation, the Commission on 19 May 2004 ordered TV2/DANMARK A/S to reimburse approximately DKK 628.2 million (EUR 84.4 million) plus interest of the State aid on the grounds mentioned below.

The licence fee – with reference to judgment C-83/98 France/Ladbroke Racing v. Commission, European Court Reports (ECR) 2000 I, p. 3271 – as well as the transfers of funds, the corporation tax exemption, the interest and instalment-free loans and the State guarantee for operating loans were regarded as State resources.

The advertising and similar activities, which TV2 had permission to engage in under section 38c of the Radio- and TV Broadcasting Act, could not be considered as part of the public service activities according to the opinion of the Commission. However, the must-carry status of TV2 and the free transmission frequency with national coverage were not found to be unduly advantageous.

The Commission considered the State aid measures as selective and as distorting competition contrary to the rules laid down in Article 87(1) EC Treaty. They did not compensate the net surplus costs for services of general economic interest and did not fulfil all the conditions for exemption established by the EC Court Altmark judgment (C 280/00, ECR 2003 I, p. 7747).

Furthermore, the Commission considered that trade between Member States was affected as television advertising crosses national borders and as TV2 itself operated on the international market through the European Broadcasting Union and the Eurovision system. Even though the public service activities were duly entrusted to TV2, the State aid measures were also considered contrary to Article 86(2) EC Treaty as the net costs of the public service obligations were overcompensated and the market was distorted by measures which were unnecessary for the accomplishment of the public service obligations, such as measures depressing advertising prices. It was also found that the Danish State did not behave like a market investor when it decided to reinvest the annual amounts of the excess compensation into TV2.

Therefore, the Order laid down that TV2/DANMARK A/S had to pay back the State aid in the amount of DKK 628.2 million (EUR 84.4 million) as the formal investigation had shown that the amount received by TV2/DANMARK A/S during the period 1995-2002 had exceeded the cost of fulfilling its public service mission and was not necessary for the accomplishment of TV2's public service obligations. ■

● ***Kommissionens beslutning af 19.5.2004 C 2/2003 (ex NN 22/2002) om Danmarks foranstaltninger til fordel for TV2/DANMARK* (Commission decision of 19 May 2004 C 2/2003 (ex NN 22/2002) on the measures of Denmark in favour of TV2/DANMARK), available at:**
http://merlin.obs.coe.int/redirect.php?id=9136

DA

● **"Commission orders Danish public broadcaster TV2 to pay back excess compensation for public service tasks", Press Release of the European Commission IP/04/666 of 19 May 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9137

DA-DE-EN-FR

NATIONAL

AT – Electronic Media to Be Taken into Account in Media Act

On 8 June 2004 the media department of the Austrian federal chancellery tabled a comprehensive bill amending the Media Act currently in force in Austria.

The 1981 Media Act applies to all mass media, irrespective of the dissemination technology used. In principle, therefore, it already applied to all forms of electronic media, even though there were no provisions relating specifically to individual media. This meant it was unclear, however, whether all the provisions of the Act actually applied to information available on the Internet, and since the specific features of the Internet were not taken into account in the Act extra rules applied to minor publications on the Internet and, conversely, some provisions of the Media Act could not apply in the case of the Internet or there was no objective justification for applying them.

The bill is intended to overcome the shortcomings of the Act by making sure the new media are explicitly taken into account. It contains many new definitions of important concepts and introduces other concepts that are completely new. For example, it identifies a new category of "periodical electronic media" covering broadcast programmes, websites, and electronic media that are disseminated in similar format at least four times a year. The intention of the federal chancellery is that, like other periodical media owners, the owners of these media should be required to publish data about themselves, as well as the names of any of their members, in the case of companies, whose stake or original share exceeds 25 %. In the case of broadcasters, it will be sufficient for this information to be published in teletext form. Website operators will have to ensure such data are permanently and easily available. Copyright rules are to be extended to include electronic newsletters but not mass emailings.

The bill provides for more lenient rules in the case of websites used exclusively to express personal views, on account of their relative insignificance in journalistic terms. For example, the rules relating to the right of reply and the obligation to announce the outcome of criminal proceedings will not apply in their case, and operators of websites such as these will also be exempt from the obligation to publish their basic orientation and disclose any stakes they might have in other media companies.

Until now, people claiming compensation for media violations of their personality rights have been required to submit their claims within a six-month period commencing on the day the information about them was first disseminated. The problem has been that in the case of rights violated as a result of information published on a website, respondents have often been able to argue that the information had been available on the Internet for more than six months and that the deadline for compensation claims had therefore expired. In such cases it has been virtually impossible for the claimants to prove otherwise. The planned amendment should make it much easier to enforce compensation claims by providing that any precise point in time when the information is available on the website can trigger the start of the six-month claims period. The right of reply in respect of information posted on a website will still be subject to a six-month time-limit, but commencing, however, on the day the information first appeared on the website.

For the first time, the bill expressly defines the right of reply in respect of information posted on a website. The intention is that it should be possible to insert a link to the reply on the home page, so that the whole text of the reply does not have to be published on the home page. It should be possible to consult the reply for at least as long as the information to which it refers. Once the offending information has been taken off the site, the federal chancellery wants the reply to remain available for the same length of time the offending information was posted on the site, but for no more than a month.

The bill also amends the provisions governing the execution of court decisions relating to media law. In keeping with the withdrawal or seizure of media products, it will be possible in future for the courts to shut down any websites that contain the offending products. It is unlikely that the bill will adopted by parliament before the autumn. ■

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● ***Entwurf eines Bundesgesetzes mit dem das Bundesgesetz über die Presse und andere publizistische Medien (Mediengesetz) geändert wird*** **(Bill amending the Press and Other Journalistic Media Act (Media Act)),available at:**
http://merlin.obs.coe.int/redirect.php?id=9166

DE

AT – Arbitration Agreement with ORF Revoked

On 16 June 2003 the Austrian public service broadcaster, *Österreichische Rundfunk* (ORF), and the *Verband Österreichischer Zeitungen* (Association of Austrian Newspapers) signed an agreement on advertising via the ORF's television channels under which the ORF pledged to comply with special rules defining the statutory restrictions applicable to the ORF in the sphere of television advertising (ORF advertising guidelines) and, in return, the Association of Austrian Newspapers agreed to go to arbitration before bringing any disputes before the court under the Unfair Competition Act and before lodging any complaints with the supervisory body, the *Bundeskommunikationssenat* (Federal Communications Office), under the ORF Act. A similar agreement was signed in 2003 by ATV+, the only other nationwide private terrestrial television broadcaster in Austria.

At the end of May, both the Association of Austrian Newspapers and ATV+ renounced the arbitration agreements, claiming in a public announcement that the ORF advertising guidelines were not effective enough. The Association of Austrian Newspapers added that in future it would have more recourse to legal action in cases where it considered the ORF to be in breach of the statutory advertising restrictions.

The federal chancellery's media department intends to make it possible for *KommAustria*, the body that oversees private broadcasters, to report certain infringements by the ORF to the *Bundeskommunikationssenat* (see IRIS 2004-5: 5). After initially objecting to this tightening of the supervision rules, the ORF has since qualified its position. ■

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● **Press release by the Association of Austrian Newspapers, 24 May 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9167

DE

AT – Decisions of the ORF Foundation Board

At its plenary meeting on 17 June 2004, the *Stiftungsrat* (Foundation Board) of the public service broadcaster *Österreichische Rundfunk* (ORF) took some important decisions.

In a majority decision, the *Stiftungsrat* approved the creation of *Österreichische Rundfunksender GmbH*. Through

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this new company, ORF hopes to divide up its broadcasting network, separating its broadcasting infrastructure activities from those linked to content provision.

The Board also approved the annual TV broadcasting plan for 2005. This continues on from the 2004 broadcasting plan, fixing TV programme quotas for minority languages. According to para. 5 of the *ORF-Gesetz* (ORF Act), ORF must, as part of its radio and television programmes as well as its Internet and teletext services, provide material aimed at each of the six ethnic minorities which have a so-called minority advisory council. Under para. 1 of the Government Decree on minority advisory councils, such bodies should exist for the Burgenland-Croatian, Slovakian, Slovenian, Czech, Hungarian and Roma minorities. ■

● ***ORF* press release, 17 June 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9168

DE

BA – RAK to enforce the Watershed Principle

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In May 2004, the *Regulatorna agnecija za komunikacije* (Communications Regulatory Agency – RAK) reminded all broadcasting stations and cable distributors of broadcasting programmes to comply with RAK's Code of Practice, especially with Article 1.3 regarding the so-called "watershed-principle". As to this norm, all items of programme services which are likely to impair the physical, mental or moral development of children and adolescents shall not be scheduled at periods during which they are likely to watch those programmes because of the time of transmission and reception. Such programmes to be broadcast after the watershed include, but are not limited to, contents that include the strongest acceptable sexual material, violence or topics (such as child abuse or the use of drugs) treated in a way likely to harm children's development. Such programmes shall be broadcast in the period from 22:00 to 06:00.

The RAK has submitted the amended Broadcasting Code of Practice to all of its users and warned them to comply with it. The RAK, however, has noticed that the majority of broadcasters do not comply with the aforementioned Article of the Broadcasting Code of Practice, and continue to broadcast certain programmes, such as advertisements for telephone hotlines and similar programmes at inappropriate times. The RAK has announced its intention to take appropriate measures in accordance with its mandate and in line with relevant procedures, unless such broadcasting ceases. ■

● **Press release of the RAK of 4 May 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9135

EN

CH – Completion of Second Round of Bilateral Negotiations Will Enable Switzerland to Rejoin the MEDIA Programme

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On 19 May 2004 Switzerland and the European Union (EU) reached a political agreement on the second round of their bilateral negotiations. The agreement covers nine topics, including extension of the agreement on the free movement of people to the new EU member States, taxation on savings and combating fraud in indirect taxation (Customs duty, VAT, etc). Completion of these negotiations will also enable Switzerland to rejoin the MEDIA programme for encouraging the cinema industry. Professionals in Switzerland's cinematographic sector will once again be able to participate fully in all elements of the MEDIA Plus and MEDIA Training programmes.

Swiss participation in the MEDIA programme will make it easier for co-productions of films between Switzerland and EU countries through support from Community funds. For distribution, MEDIA will firstly make it easier for Swiss audiovisual productions to gain access to the European market and secondly will support the distribution of European films in Switzerland. MEDIA will thereby contribute to the diversity of the cinematographic offer on the Swiss market. Swiss professionals – subject to the same conditions as their EU counterparts – will also once more have the benefit of easier access to cinema training schools supported by the MEDIA programme. Lastly, the Swiss cinematographic industry will also be able to take part in the cinema festivals organised within the EU and thereby contribute to the promotion of European audiovisual production.

Switzerland's participation in the MEDIA Programme is conditional on its legislation in the field of television being compatible with EU rules. This harmonisation already exists to a large extent, as Switzerland is a party to the European Convention on Transfrontier Television. In the course of the bilateral negotiations, the discussions covered requirements in terms of minimum quotas for European audiovisual works (50%) and independent productions (10%) broadcast on television. According to the agreement reached with the EU, Switzerland has undertaken to transpose these requirements into its national legislation, although in practice these quotas are generally already achieved by Swiss broadcasters.

Switzerland is to contribute EUR 3.75 million per year to financing the MEDIA programme. This amount represents an annual cost of approximately CHF 3 million more than the amount allocated by the Swiss Federal Council (CHF 2.758 million in 2004) in order to finance the compensatory measures intended to attenuate the negative effects of excluding Switzerland from the MEDIA programme (see IRIS 2002-9: 12). The nine bilateral agreements should be signed by the end of summer 2004. Eight of them will then be submitted separately to the Federal Parliament for approval. In view of the time required for holding a referendum, the agreements will not however enter into force before the start of 2005 at the earliest. ■

● **Final document on the Switzerland-EU summit – Overview of the solutions adopted during negotiations on pending matters, available at:**
http://merlin.obs.coe.int/redirect.php?id=9125 (FR)
http://merlin.obs.coe.int/redirect.php?id=9126 (DE)

● **Dossier on the second round of bilateral negotiations between Switzerland and the EU, available at:**
http://merlin.obs.coe.int/redirect.php?id=9127 (FR)
http://merlin.obs.coe.int/redirect.php?id=9128 (DE)

DE-FR

CH – New Rules on Parallel Importing of Videogrammes Come into Force

Since 1 April 2004, the parallel importing of DVDs and videocassettes into Switzerland is authorised as soon as the film in question is no longer being shown as a current film in cinema theatres. Thus the entry into force of the new Article 12(1)(a) of the Federal Act of 9 October 1992 on copyright and neighbouring rights (Copyright Act – LDA) marks the end of a lively controversy pro-

duced by the introduction of the previous version of this statutory provision when the Federal Cinema Act of 14 December 2001 was adopted. The old version of Article 12(1)(a) of the LDA prohibited the parallel importing of videogrammes without the authorisation of the author or his beneficiary, and this caused a wave of protest on the part of importers and distributors of DVDs and videos (see IRIS 2002-8: 14 and IRIS 2003-8: 14).

The ban on parallel importing while a new film is still being shown in cinema theatres applies irrespective of the language version of the videogrammes imported into Switzerland. Thus, for example, a film may not be sold or rented out as a DVD or video in an original English version during the protected period. However, the new Article 12(1)(a) of the LDA only protects the first showing of a film in cinema theatres; the provision therefore does not apply to, for example, re-showings of old cinematographic works or the premieres of films shown in cinema clubs.

Lastly, Article 12(1)(a) of the LDA allows for differentiated exploitation of audiovisual works in the various language regions of Switzerland (German-, French-, Italian- and Romansch-speaking areas). The new regulations take into consideration the fact that films are generally shown on different timescales in cinema theatres in the different language regions. Thus the parallel importing of DVDs and video cassettes was possible in a language region as soon as the first commercial showing of the film was over in that region. This means that the opening of the videogramme market can be controlled independently and gradually, according to the staggering of cinematographic exploitation in the country's different language regions. Thus Article 12(1)(a) of the LDA preserves the principle of the serial exploitation of cinematographic works without necessarily hindering competition on the market for DVDs and videos by a total ban on parallel importing. ■

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● Federal Act of 9 October 1992 on copyright and neighbouring rights, published in the gazette of Federal legislation, available at:
http://merlin.obs.coe.int/redirect.php?id=9144 (FR)
http://merlin.obs.coe.int/redirect.php?id=9145 (DE)

DE-FR-IT

DE – Automatic Advertising Blocker Legitimate

In a ruling of 24 June 2004, the *Bundesgerichtshof* (Federal Supreme Court - BGH) confirmed that a so-called television advertising blocker was admissible under competition law (see IRIS 1999-10: 7).

The dispute between a private TV broadcaster funded through commercial advertising and the defendant concerned a device produced and sold by the latter, which could be connected to a TV or video recorder. This device automatically switches to a channel without advertisements whenever there is a commercial break on the selected channel. At the end of the advertisements, the device switches back to the original channel.

The TV broadcaster argued that the production and sale of the device breached Art. 1 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - UWG). It accused the defendant of causing an obstruction and "general interference with the market". The court of first instance upheld the broadcaster's complaint, but the appeal court rejected it.

The BGH agreed with the appeal court's decision. It held that there was indeed a competitive relationship between the parties, since the defendant and the appellant both targeted TV consumers, albeit with different products.

However, the defendant was not guilty of breaching competition law. There was no apparent obstruction of the appellant's business, since the defendant did not directly influence the appellant's broadcasts, including advertisements. The advertising blocker merely provided viewers who wished to avoid advertisements with the technical means of doing so. The viewer therefore dictated whether the advertising should be switched off. Neither did the device affect the appellant's programming freedom, a key element of freedom of broadcasting. Freedom of broadcasting, as well as the defendant's basic right to engage in unhindered commercial activity, had therefore been taken into account by the appeal court in the necessary weighing up of interests.

Therefore, the appeal court had rightly dismissed the notion that the device caused unlawful interference with the market. Although the appellant's commercial activity was impeded by the sale of the advertising blocker, its actual existence was not under serious threat. ■

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● Ruling of the *Bundesgerichtshof* (Federal Supreme Court - BGH), 24 June 2004, case no. I ZR 26/02

DE

DE – Navigator Standards

In May 2004, the *Gemeinsame Stelle Digitaler Zugang* (Joint Digital Access Office - GSDZ) of the *Landesmedienanstalten* (*Land* media authorities) published a paper on the navigator standards set out in Art. 53 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement).

The Agreement defines navigators as "systems … which control the selection of television programmes and which are used as user interfaces for all services offered via that system". According to the GSDZ document, they therefore include all navigation systems which act as user interfaces once the viewer has switched on their receiver or called up the relevant function using their remote control. The determining factor is what the viewer sees on the screen rather than what systems or services are available via the receiver or the transmission network. Examples given include portals used as the home page of a platform operator. Such a home page controls access to the different services available on the platform, eg broadcast services, Internet, Video-on-Demand, etc. Another example is the EPG-Navigator, which analyses the data sent via DVB and converts it into graphics and content. In the GSDZ's view, the wording of the provision suggests that its scope should be understood to be all-encompassing from a technological point of view. This particularly applies to the devices and networks through which these navigation systems are distributed. The standards therefore also apply if signals are received via a TV card on a PC or on a mobile reception device. They cover all transmission systems, including satellite, cable and terrestrial, and even the telephone network if it used to transmit a TV broadcast (via DSL, for example).

The whole purpose of this provision is to protect diversity of opinion. According to the GSDZ's interpretation of Art. 53.1, providers of navigators should, in principle, offer all broadcasters services under equal, suitable and non-discriminatory conditions, so that all television services offered by those broadcasters are covered by the navigator and can thus be selected and accessed by the viewer. Therefore, all available channels must be included and made accessible in a non-discriminatory manner. Similar services must therefore be treated equally. Under Art.

14.1.2 of the *Satzung über die Zugangsfreiheit zu digitalen Diensten* (Rules on freedom of access to digital services - *Zugangssatzung*), which according to Art. 53 para. 7 of the *Rundfunkstaatsvertrag* lays down the detailed content-related and procedural arrangements for Art. 53, access to programmes must be provided in a way that does not make it more difficult to find and access certain content, particularly the must-carry and can-carry programmes. In addition, Art. 14.2.2 of the *Zugangssatzung* states that users themselves should at least be given the option of determining the order in which programmes are listed.

Under the terms of Art. 53.2 of the *Rundfunkstaatsvertrag*, navigators must, in accordance with current technology, give equal precedence to public service and private channels. However, it is considered acceptable if, when the set-top box is switched on, the channel that was last selected is shown. In such cases, the requirement set out in Art. 53.2 can therefore only apply to the initial step taken by the user after switching the navigator on. This entails pressing the corresponding button on the remote control, which brings up the navigation window to which the provision applies. According to the GSDZ, it is not a problem if the list of channels is sorted into different categories (eg general, sports or news channels) or if, as well as (analogue) free channels, further specialist channels, pay-TV channels or other services are mentioned at this initial navigation stage. The rules are merely designed to protect the existing balance within the dual public/private system.

Navigators must also enable users to switch directly to individual channels. In the GSDZ's opinion, this means that the user should be able to switch directly back from a channel to the navigator.

The paper has been distributed to interested parties and will be gradually revised on the basis of their opinions and suggestions. In the meantime, it will be used as a basis for the decisions of the *Landesmedienanstalten* in accordance with Art. 53.4 of the *Rundfunkstaatsvertrag* in connection with Art. 5 of the *Zugangssatzung* on the compatibility of navigators with Art. 53.2 of the *Rundfunkstaatsvertrag*. ■

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● **Navigator standards – GSDZ discussion paper, version of 4 May 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9172**

DE

ES – Decrees on Creation of Regional Public Television Channels in Extremadura, the Balearic Islands and Asturias

In 2004, the Spanish Government has approved three Decrees authorising the Government of the Autonomous Communities of Extremadura, the Balearic Islands and Asturias to operate a regional analogue terrestrial television channel. According to this Decree and to Act 46/1983 (the "Third TV Channel Act"), only a company wholly owned by the corresponding regional public authorities may operate these channels.

The Decree also stresses that the creation of this new regional public television channel has to be made in accordance with the 1998 National Technical Plan on Digital Terrestrial Television (DTTV), which fixes a deadline for analogue switch-off. In order to facilitate the change over from analogue to digital, and in accordance with the precedent established by the Supreme Court judgment of 24 May 2001 (see IRIS 2001-8: 6), the Governments of these Autonomous Communities have been authorised to operate two DTTV programme services in the regional multiplexes mentioned in Annex II of the 1998 National Technical Plan on DTTV.

Eleven of the seventeen Autonomous Communities in Spain have been authorized by the Spanish Government to broadcast regional public television channels. ■

Alberto Pérez Gómez
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● ***Real Decreto 437/2004, de 12 de marzo, por el que se concede a la Comunidad Autónoma de Extremadura la gestión directa del tercer canal de televisión, Boletín Oficial del Estado n. 86, de 09.04.2004*** **(Decree 437/2004 of 12 March authorising the Government of the Autonomous Community of Extremadura to provide the public service of regional television, Official Gazette no. 86 of 9 April 2004), available at: http://merlin.obs.coe.int/redirect.php?id=9141**

● ***Real Decreto 438/2004, de 12 de marzo, por el que se concede a la Comunidad Autónoma de las Illes Balears la gestión directa del tercer canal de televisión, Boletín Oficial del Estado n. 86, de 09.04.2004*** **(Decree 438/2004 of 12 March authorising the Government of the Autonomous Community of the Balearic Islands to provide the public service of regional television, Official Gazette no. 86 of 9 April 2004), available at: http://merlin.obs.coe.int/redirect.php?id=9142**

● ***Real Decreto 1319/2004, de 28 de mayo, por el que se concede a la Comunidad Autónoma de Asturias la gestión directa del tercer canal de televisión, Boletín Oficial del Estado n. 146, de 17.06.2004*** **(Decree 1319/2004 of 28 May authorising the Government of the Autonomous Community of Asturias to provide the public service of regional television, Official Gazette no. 146 of 17 June 2004), available at: http://merlin.obs.coe.int/redirect.php?id=9143**

ES

ES – New Decree on the National Technical Plan for Local Terrestrial TV

By approving a new Decree on the National Technical Plan for local terrestrial TV, the Spanish Government has taken a new step in its attempt to regularize the situation of the local terrestrial TV market.

Local terrestrial TV was not regulated in Spain until 1995, when the Parliament approved the Act 41/1995, on Local Terrestrial TV. This Act established that local terrestrial TV is a public service that could be provided by up to two operators in each municipality. The concessions for the provision of this service were to be awarded by the Autonomous Communities, once the Spanish Government had approved a National Technical Plan allocating the frequencies required. As regards the local operators that were broadcasting before this Act was passed, a Transitional Provision established that they could keep providing their services until a call for a tender to award the concession in their area was announced, and then, if they were not awarded the concession, they could keep operating for an additional period of eight months.

This Act was supposed to bring an end to the establishment of unauthorised local broadcasters, but the Government did not approve a National Technical Plan on Local Terrestrial TV, and this prevented the Autonomous Communities from calling for tenders to award the concessions. In the meantime, more local broadcasters kept entering the market (now the total number of local terrestrial TV stations might be between 500 and 900) and some operators created networks of local TV stations (which is expressly forbidden by article 7 of Act 41/1995).

In order to solve these problems, in 2002 the Spanish Parliament decided to amend Act 41/1995, and established that Local Terrestrial TV shall be broadcast using only digital technology (see IRIS 2003-2: 8). This decision has been quite controversial, as national digital terrestrial television has not been successful so far, and almost no household has as yet the necessary equipment to receive this kind of signals. In order to minimize this problem, the Act has established that those entities which are awarded a concession for the provision of local digital terrestrial TV services could ask for a moratorium

on the use of digital technology. The initial term of the moratorium was two years, although, after a new amendment of the Act in 2003, it is up to the Government to modify the term of the moratorium, so it can duly take into account the pace of the implementation of digital TV in Spain (see IRIS 2004-2: 10).

According to this new legislation, only those cities or groupings of cities that meet certain population thresholds can be allowed to have local digital terrestrial TV stations, in accordance with the conditions established in a National Technical Plan on Local Terrestrial TV that had to be approved by the Government.

By means of this Plan, the Government, after consulting the Autonomous Communities, had to determine, among other things, which multiplexes would be available in each area (each multiplex being able to carry at least four digital terrestrial TV programmes).

Now that the Government has finally approved this Plan, the Autonomous Communities are expected to award the concessions for the provision of this service in less than 8 months. The new Plan also includes provisions on technical coordination; on the fee to be paid for the use of the spectrum; or on the conditions for the joint management of the multiplexes by the concessionaires that shall share them. Additionally, the Plan introduces a new Transitional Provision in the 1998 National Technical Plan for Digital Terrestrial Television (see IRIS 1998-10: 11). This new Provision affects the new national DTT concessionaires which do not provide analogue TV services and which, therefore, broadcast their services using digital technology only. ■

Alberto Pérez Gómez
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● ***Real Decreto 439/2004, de 12 de marzo, por el que se aprueba el Plan técnico nacional de la televisión digital local, Boletín Oficial del Estado n. 85, de 08.04.2004*** **(Decree 439/2004, on the National Technical Plan on Local Terrestrial Television, Official Gazette no. 85 of 8 April 2004), available at:**
http://merlin.obs.coe.int/redirect.php?id=9176

ES

ES – Audiovisual Policy of the New Government

In March 2004, there was a general election in Spain, which was won by the *Partido Socialista Obrero Español* (the Socialist Party – PSOE), which was previously the main opposition party.

The new Government has re-structured the Ministries. The Ministry that was in charge of the implementation, at national level, of most of the provisions related to the audiovisual sector, was the *Ministerio de Ciencia y Tecnología* (Ministry for Science and Technology), which acted mainly through its *Secretaría de Estado de Telecomunicaciones y para la Sociedad de la Información* (State Department for Telecommunications and Information Society – SETSI). Since April 2004, the Ministry for Science and Technology has ceased to exist, and the SETSI is now part of the new *Ministerio de Industria, Turismo y Comercio* (Ministry for Industry, Tourism and Trade).

The new Minister for Industry, Tourism and Trade, Mr. Montilla, recently appeared before the Congress to outline the main points of the audiovisual policy of the new Government. It intends to approve a new Audiovisual Act (a bill might be sent to Parliament by the end of the year). This Act should provide, *inter alia*, for the creation of a new independent national audiovisual authority. The new Government will also promote the implementation of digital terrestrial broadcasting, and, in the next few weeks, it will approve a Decree implementing the Spanish legislation which obliges TV broadcasters established in Spain to allocate at least 5% of their annual income towards the financing of European films (see IRIS 2001-8: 13).

One of the main problems in the Spanish audiovisual sector is that of the definition and the financing of public service broadcasting. The new Government has decided to create an *ad-hoc* Council for the Reform of State-owned Media. This Council, whose members are five prestigious academics and experts, has the mandate to provide the Government, within nine months, with a report about the programming, financing and managing structure of the state-owned media. The Government, following the proposals made by this Council, will then present a bill on these issues. ■

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● ***Real Decreto 553/2004, de 17 de abril, por el que se reestructuran los departamentos ministeriales, Boletín Oficial del Estado n. 94, de 18.04.2004*** **(Decree 553/2004, on the restructuring of the Ministries), available at:**
http://merlin.obs.coe.int/redirect.php?id=9177

● ***Real Decreto 562/2004, de 19 de abril, por el que se aprueba la estructura orgánica básica de los departamentos ministeriales, Boletín Oficial del Estado n. 96, de 20.04.2004*** **(Decree 562/2004, on the basic structure of the Ministries), available at:**
http://merlin.obs.coe.int/redirect.php?id=9178

● ***Real Decreto 744/2004, de 23 de abril, por el que se crea el Consejo para la reforma de los medios de comunicación de titularidad del Estado, Boletín Oficial del Estado n. 100, de 24.04.2004*** **(Decree 744/2004, on the creation of the Council for the Reform of State-owned Media), available at:**
http://merlin.obs.coe.int/redirect.php?id=9179

● ***Comparecencia del Ministro de Industria, Turismo y Comercio en el Congreso de los Diputados, en la que expone las líneas generales de la política que desde su Ministerio se llevará a cabo durante esta legislatura en Telecomunicaciones y Sociedad de la Información, 25 de mayo de 2004*** **(Appearance of the Minister for Industry, Tourism and Trade before the Spanish Congress, in which he outlines the policy of this Ministry regarding Telecommunications and Information Society for this Parliamentary Session), available at:**
http://merlin.obs.coe.int/redirect.php?id=9180

ES

FR – Anti-copying Device on DVDs Challenged by Consumers

The Regional Court in Paris has, for the first time to our knowledge, spoken out on the balancing of the right to making a private copy and the right to use technical means of protecting works. In the present case, a consumer, backed by a national consumer group (*Union Fédérale des Consommateurs* – UFC), complained that he had not been able to make a copy of the DVD of the film "Mulholland Drive" because the digital medium included technical protective devices which were not mentioned at all on the box. In support of their case, the applicants claimed that this constituted an infringement of the right to make a private copy contained in Articles L. 122-5 and L. 211-3 of the Intellectual Property Code, and of Article L. 111-1 of the Consumer Code, which obliged the vendor to inform the consumer of the essential features of the goods or service in question.

The Court held that, in order to respond to their application and to appreciate the scope of Articles L. 122-5 and L. 211-3 of the Intellectual Property Code concerning private copying, reference should be made to the provisions of the Berne Convention. The Act of 3 July 1985 that introduced lump-sum remuneration in respect of private copying levied, save in exceptional cases, on all blank recording media (Article L. 311-4 of the Intellectual Property Code) had been adopted in compliance with this Convention. According to Article 9-2 of the Convention, the possibility of allowing the reproduction of works was subject to three cumulative conditions – they must constitute special cases and the permitted reproduction must not infringe the normal exploitation of the work or prejudice without justification the author's legitimate interests.

In their defence, the companies producing and distributing the disputed DVD invoked the protection afforded by the Directive of 22 May 2001 on copyright and neighbouring rights. Although this Directive has not yet been transposed into national law, the Court said it should be used to shed light on the interpretation of the national provisions. In this respect, "the Directive does not have the effect of acknowledging, much less introducing, a general entitlement to private copying". Therefore, "since it allows exception subject to the same cumulative conditions as the Berne Convention, it does not affect the solution to the present dispute".

Applying these principles to the present case, the judges stated that the commercial exploitation of a film in the form of a DVD, since it constituted an exploitation mode for many audiovisual works, was included in the normal exploitation of such works. Thus copying a film produced on a digital medium could not but prejudice the normal exploitation of the work. The infringement was necessarily serious, within the meaning of the criteria used for the Berne Convention, as it affected an essential mode of exploiting the said work that was vital for amortising the cost of its production. The Court therefore held that the protective device attached to the disputed DVD did not infringe the applicants' right to private copying. Lastly, the alleged infringement of Article L. 111-1 of the Consumer Code was also rejected, as the Court held that the possibility of reproducing a DVD, particularly as it did not have the benefit of exception for the purpose of private copying, did not constitute an essential characteristic of the product. ■

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● **Regional Court of Paris (3rd chamber, 2nd section), 30 April 2004, UFC, Que choisir et al. v. Universal Picture Vidéo France et al**

FR

FR – Legality of the Decree Laying Down the Conditions for Applying "Must-carry" Rules to Terrestrially Broadcast Digital Television on Cable Networks

The Decree of 31 January 2002 lays down the practical must-carry conditions for terrestrially broadcast digital television on cable networks; this requires carriage of the terrestrially broadcast channels normally received in the area. Called on by the cable operators to cancel this Decree, the *Conseil d'Etat* rejected all the applications submitted.

Thus the disputed Decree did not violate Article 34 of the Act of 30 September 1986 (that lays down the principle of the obligation to broadcast) by detailing the nature of the services covered by this obligation, as no rule or principle requires this competence to be exercised by the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory authority – CSA). Nor did the *Conseil d'Etat* believe that the disputed Decree was contrary to the right of ownership of the distributors of services by cable – the "must-carry" obligation imposed on them did indeed deprive those that owned the network they exploited of freely disposing of a part of its bandwidth, but such a limitation concerned an activity subjected by law to a scheme of authorisation and had been imposed with a view to the general interest of promoting the development of television services broadcast terrestrially in digital mode and, as a result, greater pluralism in currents of socio-cultural expression.

Nor did the disputed Decree flout the principle of equality – it did not create a difference in treatment manifestly out of proportion to the different situations existing between the distributors of television services by cable and by satellite. With regard to the general interest pursued by the legislation, the disputed Decree did not excessively restrict the freedom of enterprise and the freedom of trade and industry. The argument that the Decree violated Community rules on competition was also rejected; it did not place the television services broadcast terrestrially in digital mode in a dominant position that they would be able to abuse in economic terms. Nor were the disputed provisions contrary to the principles of non-discrimination and free circulation since they did not provide that only French operators were authorised to broadcast television services terrestrially in digital mode, nor that only French television services would be broadcast by this means.

Unfortunately the Act on electronic communications and audiovisual communication services (Telecoms Package, see IRIS 2004-3: 8), adopted on 3 June and currently under examination by the Constitutional Council, will include in the Act of 30 September 1986 the general broadcasting ("must-carry") obligations, thereby rendering the provisions of the Decree criticised before the *Conseil d'État* totally inapplicable… ■

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● ***Conseil d'État* (5th and 4th sub-sections combined), 26 March 2004, Sociétés UPC France, Aform et al**

FR

FR – Constitutional Council Publishes its Decision on the Act on Confidence in the Digital Economy

On 10 June the Constitutional Council published its decision on the provisions of the Act on Confidence in the Digital Economy (LCEN) which had been referred to it three weeks earlier (see IRIS 2004-6: 11). The first dispute concerned e-mail, defined in Article 1(IV) of the Act as "any message in the form of text, voice, sound or image sent via a public communication network and stored in a network server or in the addressee's hardware until it is recovered by the addressee". The Council held that this provision merely defined a technical process and could not affect the legal scheme covering private correspondence, contrary to the claims of the Members of Parliament who had referred the matter. Therefore there was no foundation for the claim that such a definition would infringe respect for privacy. The Constitutional Council was also asked to look into the provisions concerning the liability of technical service providers (Art. 6(1), (2) and (3)). These excluded civil and criminal liability on the part of hosts in two cases – no knowledge of the disputed content or of its unlawful nature, and withdrawal of such content. The Council held that these provisions could not impose liability on the host merely because it had not withdrawn information reported by a third party as being unlawful; for liability to be imposed it was also necessary for the unlawful nature of the reported information to be manifest or for a judge to have ordered its withdrawal. Subject to interpretation in this way, the Council felt that the criticised provisions merely drew the necessary consequences of the unconditional and specific prescriptions contained in Article 14 of the Directive of 8 June 2000 on e-commerce and could not be claimed to be unconstitutional. Lastly, concerning the scheme for prescription of remedies for on-line communication (Art. 6(V)), the applicants felt that these provisions flouted the principle of equality before the law

as they provided for the period during which the right to reply on-line could be exercised and for calculation of the deadline for prescription starting on the date on which the message ceased to be available on-line for messages communicated exclusively on-line, whereas for other messages this period started on the date of first publication. The Council, in view of the different conditions for receiving a communication as a written document and as an on-line document, held that the legislator was entitled to make non-identical arrangements for the prescription of remedies for these two types of press infringement. However, in this specific case the choice made did indeed flout the principle of equality. The law made provision for civil and criminal action during periods of time that were manifestly too different depending on the medium used and the disputed provisions were therefore invalidated. The same applies to the starting point for the period of time for exercising the right to reply provided for in Article 6(IV). Subject to this reservation and these censures, the Council has therefore validated the LCEN; the 58 articles it contains will therefore form the foundation for legislation on the Internet in France (e-commerce, advertising by electronic means, obligations incumbent on editors of on-line content, technical service providers, electronic voting, etc). After eighteen months of discussion and more than two years after the deadline for transposing the Directive on e-commerce into national legislation, the Act finally came into force on 23 June. ■

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- **Decision no. 2004-496 DC of 10 June 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9147**
- **Act No. 2004-575 of 21 June 2004 on confidence in the digital economy, published in the *Journal Officiel* of 22 June and available at: http://merlin.obs.coe.int/redirect.php?id=9148**

FR

FR – CSA's Response to Definition of an Audiovisual Work

On 2 June the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory authority – CSA) published the text of its response to the proposals made by the *direction du développement des médias* (directorate of media development – DDM) and the *Centre national de la cinématographie* (national cinematographic centre – CNC) on changes in the definition of what constitutes an audiovisual work. The case of "Popstars" had pointed to the need for a reform, and the DDM and the CNC had submitted four areas for consideration to the CSA last March (see IRIS 2004-5: 12). After carrying out a thorough analysis and evaluating the figures corresponding to these proposals, supplemented by hearing all the players concerned (broadcasters, producers and authors), the CSA has confirmed that a change in the arrangements for production quotas is badly needed. It is indeed necessary to remedy the circumventing of the spirit of the regulations by certain broadcasters making the most of the present definition of an audiovisual work, and return to its initial purpose – encouragement for the constitution of an audiovisual heritage. The CSA's conclusion is unambiguous – "None of the four hypotheses put forward appears to be wholly satisfactory."

In fact there are three major disadvantages. Firstly, emphasis is placed on the risk that creating further subquotas in addition to the existing quotas would make the regulations more complex. Moreover, some of the hypotheses put forward would only add to the current legal uncertainty, as for example the proposal to calculate investments in works according to diminishing scales proposed and regularly reviewed by a committee, or the proposal that programmes including elements belonging to an excluded genre would not qualify, which would give rise to much dispute. In the end, the CSA felt that all the hypotheses would affect the broadcasters' editorial policy as they would introduce a degree of rigidity in drawing up programme schedules and could carry the risk of standardising the offer available to television viewers. The third hypothesis, however, which consists of not including studio footage in the calculation of audiovisual works used for production quotas, would appear to be the least contested, even though a number of broadcasters state that they are totally opposed to it. Nevertheless, the CSA emphasises that this hypothesis, apart from the fact that it does not constitute a direct response to the question as to whether or not the "Popstars" broadcast constitutes an audiovisual work, would require an amendment to the framework of regulations. This could not come into force before 2006, in view of the time needed to change the programme offer, and could not be made to apply to the cable and satellite channels as no further burden could be placed on their current obligations.

In its response, the CSA therefore proposes that the DDM and the CNC combine forces in order to consider other possible ways of changing the regulations.

Reactions have been quick in coming. The *Société civile des auteurs multimédias* (association of multimedia authors) and the *Société des auteurs et compositeurs dramatiques* (society of dramatic authors and composers – SACD) have both deplored the fact that the CSA does not put forward any definite proposal that could put an end to the situation. The SACD has therefore called on the Minister for Culture to "propose an overall plan to remedy the under-financing of audiovisual creation in France". The *Union syndicale de la production audiovisuelle* (sector's syndicate) has said that "the CSA should lift its technical reservations to allow the Minister for Culture's action to be conclusive and at last give the obligation of production the cultural and economic scope it should have". ■

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- **Response by the CSA to the DDM and the CNC on the definition of an audiovisual work, available at: http://merlin.obs.coe.int/redirect.php?id=9146**

FR

GB – Regulator Issues Guidance on the Public Interest Test for Media Mergers

The Communications Act 2003 (see IRIS 2003-8: 10) contains a "plurality test" under which the minister may refer certain media mergers to the communications regulator, the Office of Communications (Ofcom), for advice on public interest considerations. This precedes the decision of the minister whether or not to refer the merger to the competition authorities on the grounds that it may be against the public interest, to negotiate undertakings in place of a reference, or to clear the merger. Ofcom has now issued guidance on the public interest test to be adopted in its advice.

The guidance stresses that Ofcom can only act when requested to do so by the minister through the latter issuing an "intervention notice"; the regulator will not advise the minister on the issue of such a notice. Moreover, where Ofcom has been asked to intervene, its advice will merely inform the minister's decision whether or not to refer the merger to the competition authorities; that decision lies solely with the minister who is not bound by the advice.

In broadcasting, the public interest test assesses whether the following are relevant to a merger: the need for a sufficient plurality of persons controlling the media enterprises in the UK or locally; the need for the availability of broadcasting of high quality calculated to appeal to a wide variety of tastes and interests; and the need for broadcasters to have a genuine commitment to the standards set out in the Act, including due impartiality of news and taste and decency. In newspaper mergers, the relevant issues are accurate presentation of news, the need for free expression of opinion and the need for a sufficient plurality of views.

The guidance also contains procedural advice. Although there is no statutory requirement to notify mergers to any of the authorities, advance notice is desirable and provides the right to a decision on whether to refer within four weeks (in some circumstances extendable up to eight weeks). Ofcom will provide confidential, non-binding advice in advance to the merging parties on the likelihood of its advising a reference to the competition authorities or the negotiation of undertakings. It will also provide more detailed confidential guidance to the parties where the minister is minded to intervene on public interest grounds. Where Ofcom is asked for its advice by the minister, it will seek comments from third parties and will hold a meeting with the merging parties and their advisers. Details are also provided in the guidance of the information which will be required from them. ■

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- **Ofcom, "Ofcom Guidance for the Public Interest Test for Media Mergers", (2004), available at:**
http://merlin.obs.coe.int/redirect.php?id=9120

GB – System for Regulating Broadcast Advertising Content Changed

In October 2003, the Office of Communications (OFCOM) initiated a consultation regarding "contracting out its broadcast advertising regulatory functions to a self-regulator in a co-regulatory partnership…"

The proposal was that a new body – under the "banner" of the existing Advertising Standards Authority – be established to draw up, review and enforce an advertising content code for broadcast television and radio. The code-setting body would be the Broadcasting Committee of Advertising Practice and the enforcement body would be the Advertising Standards Authority (Broadcasting). OFCOM would retain "back stop powers over the new system and would monitor its effectiveness".

Around 78 responses to the consultation were received.

On 17 May, OFCOM published its decision, which establishes the basis for a new system for regulating broadcast advertising content. It will be launched in November 2004 – but only after Parliament has given its approval under the Deregulation and Contracting Out Act 1994.

Under the general responsibility of the existing Advertising Standards Authority, several new agencies will be set up:

- the Advertising Standards Authority (Broadcast) (ASA(B)) – to deal with complaints;
- the Broadcast Committee of Advertising Practice (BCAP) – to deal with the codes; also within BCAP, the Advertising Advisory Committee (AAC) to offer BCAP "independent advice on advertising policy and code-setting issues". The AAC is to have an independent Chairman and "expert and lay citizen-consumer representatives";
- the Broadcast Advertising Standards Board of Finance (BASBOF) – to deal with the funding for the new system.

OFCOM will have powers to "insist on changes being made to the broadcast advertising Codes" and also have a "right of veto on any proposed changes." ■

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- **The Advertising Association's special website for information on the new co-regulatory system is available at:**
http://merlin.obs.coe.int/redirect.php?id=9121
- **Ofcom's consultation document, available at:**
http://merlin.obs.coe.int/redirect.php?id=9122
- **Ofcom's decision paper, "The Future Regulation of Broadcast Advertising", available at:**
http://merlin.obs.coe.int/redirect.php?id=9123

HR – Media Law without Restrictions on Ownership Concentration?

The Ministry of Culture has prepared a draft law to amend the Law on Media. The amendments concern *inter alia* the removal of a provision restricting media ownership concentration. Besides this provision, the draft law contains mostly the same regulations as the present Law on the Media. The latter was adopted by the Parliament in October 2003. In early 2004, the Constitutional Court abolished the Law because it was not passed by the required majority vote of all delegates. Despite that decision, the Media Law has nevertheless been applied as from 1 May 2004 on, as the Parliament had not passed superseding legislation in a parliamentary procedure being in compliance with Article 82 item 2 of the Republic of Croatia Constitution by that time.

Under Article 33 of this present law, a concentration is considered inadmissible in the area of the press if the publisher of one or more news dailies or general information weeklies achieves a dominant position in the market by selling in excess of 40 percent of all copies of dailies or weeklies sold in the relevant market.

As regards the draft law, the Ministry follows a more general approach taking into account other forms of media. Therefore the Law on Market Competition shall form the legal basis for the restriction of media ownership concentration. As regards the Ministry, this solution shall strengthen control in a more efficient way, as the ownership concentration will be measured not only by the numbers of readers, listeners or viewers but also by the share of the advertising market. ■

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- **Law on media, Official Gazette No. 163/03 of 16 October 2003, available at:**
http://merlin.obs.coe.int/redirect.php?id=9153
- **Resolution of Constitutional court of Republic of Croatia No. U-I-3438/2003, Official Gazette No 15 of 4 February 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9153

HR

HU – Amendment of the Penal Code Annulled by Constitutional Court

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The amendment of the Penal Code concerning hate speech is unconstitutional according to the *Alkotmánybíróság* (Constitutional Court - AB).

The bill, which was adopted by the Parliament in December 2003, stipulated that anyone "who publicly incites hatred toward any nation, or national, ethnic, racial or religious groups or calls for violence against them, shall be liable to imprisonment for up to three years for such a crime". In addition, "anyone who publicly insults the dignity of a person because of his/her national, racial, ethnic or religious affiliation could be found guilty of a misdemeanour and sentenced to up to two years of imprisonment".

The President – making use of his right for a constitutional veto – refused to sign the bill. He asked the Court to review the legislation's coherence with the right to freedom of expression guaranteed by the Constitution.

The AB annulled the new bill and justified the decision by pointing out that it expands the punishable types of behaviour to an extent that is unconstitutional and restricts freedom of speech needlessly and disproportionately. The decision emphasizes that the "battle of opinions, views and ideas is a particular feature of a democracy. Repressing opinions or preventing them from coming out does not make those opinions non existent, and also will not stop their being spread. In a truly free society the proclaming of extreme views does not in itself cause public disturbance, but contributes to forming public order, and raising the level of tolerance. Freedom of expression also protects those opinions which are insulting, astounding or disquieting."

"As the existing legal means are more efficient for protecting one's personal rights – and less restrictive of freedom of speech than this new law" - AB found disproportionate the restriction that would hold out the prospect of this kind of penal sanction. ■

● **Constitutional Court Decision 18/2004 (V.25.), available at:**
http://merlin.obs.coe.int/redirect.php?id=9140

HU

IT – Decree in Support of the Italian Film Industry Becomes Law

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On 18 May, the *Decreto Legge* (statutory instrument) containing budgetary and non-budgetary measures aimed at supporting and stimulating the Italian film and entertainment industry was converted into law (see IRIS 2004-4: 12). The text of the law contains some modifications to the prior *Decreto Legge*, which, among other provisions, stipulates the criminal nature of the unauthorised distribution of copyrighted films via electronic means (including P2P networks) not only when this takes place for "commercial purposes" but also when it takes place "to derive (any) benefit". From the very beginning, the *Decreto Legge* has encountered strong criticism from Italian consumers and service provider organisations as well as other parties. One of the most notable modifications to the original *Decreto Legge* concerns the provision regarding the administrative sanction imposed on users downloading from a file-sharing website for personal use, which has now been eliminated. The law entitles law courts to issue orders to service providers to cooperate with police forces in order to locate and identify possible copyright infringers. When failing to comply, providers will be liable to a fine ranging from EUR 50.000,00 up to EUR 250.000,00. The law also provides for the introduction of a levy on every blank digital support (such as DVDs and CDs as well as flash memories and similar) sold to the public. Given the strong opposition still encountered, the Minister for Innovation and Technologies, Mr. Stanca, has already made public his intention to put forward a new *Decreto Legge* to further modify some aspects of the law. In particular, he intends to restrict criminal prosecution for file-sharing solely to when this takes place for the sake of economic gain. ■

● ***Legge 21 maggio 2004, n.128 "Conversione in legge, con modificazioni, del decreto-legge 22 marzo 2004, n. 72, recante interventi per contrastare la diffusione telematica abusiva di materiale audiovisivo, nonché a sostegno delle attività cinematografiche e dello spettacolo"* (Law of 21 May 2004, n.128 – Conversion into law, with modifications, of the Statutory Instrument of 22 March 2004, n. 72), Official Journal n.119 of 22 May 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9124

IT

IT – Co-regulation to Ensure Pluralism in Local Broadcasting

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Since 8 April 2004, political communication on local radio and television has been regulated by a co-regulatory code. The Political Communication Act no. 28/2000 (see IRIS 2000-3: 9) was amended in November 2003 by Act no. 313/2003 in order to entitle local broadcasters' associations to adopt a code on political communication. The Code has been revised according to the opinion of the Communications Authority (AGCOM) and adopted by a ministerial decree.

The concept is the same as the main Act, but softer in its application. Any political body ("*soggetto politico*") must be granted equal access to programmes on radio and television broadcasting containing political opinions, such as party political broadcasts, debates, round tables, public discussions, interviews and other programmes where the exposition of political views appears to be relevant. Political parties, coalitions and candidates are entitled to broadcast fee-paying political advertisements ("*messaggi autogestiti a pagamento*"), the price of which may not exceed 70% of what is normally charged by the broadcaster concerned for commercial advertising slots. There is no time limit for fee-paying messages, while free political advertisements are subject to the ordinary time limit of between one and three minutes established for national broadcasters. News programmes must present any information in an impartial way and it is forbidden to influence the public even indirectly.

AGCOM is charged with ensuring the correct application of the Code and the sanctions are identical to those that are applicable to national broadcasters under the Political Communication Act, ie. of compensatory nature, giving access to the injured party to future air-time of the same nature and duration. ■

● **Decree of the Minister of Communications of 8 April 2004, "*Codice di autoregolamentazione in materia di attuazione del principio del pluralismo, sottoscritto dalle organizzazioni rappresentative delle emittenti radiofoniche e televisive locali, ai sensi dell'art. 11-quater, comma 2, della legge 22 febbraio 2000, n. 28, come introdotto dalla legge 6 novembre 2003, n. 313*", published in the Official Journal of 15 April 2004 no. 88, available at:**
http://merlin.obs.coe.int/redirect.php?id=9131

● **Law of 6 November 2003, no. 313/2003, "*Disposizioni per l' attuazione del principio del pluralismo nella programmazione delle emittenti radiofoniche e televisive locali*", published in the Official Journal of 18 November 2003 no. 268, available at:**
http://merlin.obs.coe.int/redirect.php?id=9132

● **AGCOM deliberation no. 43/2004/CONS, available at:**
http://merlin.obs.coe.int/redirect.php?id=9133

IT

NO – VAT on Cinema Tickets Strengthens Producer Cash Flow

Against the votes of the minority centre-right government coalition parties, the Norwegian Parliament's Committee on Family, Cultural and Administrative Affairs on 5 June voted to repeal the 35-year-old Value-Added Tax (VAT) exemption on cinema tickets. The decision comes as part of the Committee's response to the government's Green Paper on film support schemes (see IRIS 2004-4: 14). It is seen less as a fiscal measure than as a step to strengthen the funding of national film production. Following concrete proposals for its implementation in the state budget for 2005, the new VAT regime is due to come into effect on 1 January 2005.

VAT on cinema tickets will be set at a reduced rate of 6 per cent. It will nevertheless allow film production companies to claim refunds on their up-stream expenses at the full 24 per cent rate. The concept of such reduced "cultural" VAT has been bandied about for some time in Norway. Since VAT was introduced in 1969, a number of cultural products, from books and newspapers to tickets for museums, opera, theatre and cinema, have been exempt from VAT (see also IRIS 2004-1: 6). While helping to keep prices down (and thus to stimulate consumption) on these products, the exemption has prevented cultural institutions from claiming refunds on VAT paid on up-stream costs. The issue became topical when the public service broadcaster NRK in 2003 was allowed to charge 6 per cent VAT on its licence fee, thus improving its cash flow.

The government had indicated its willingness to examine the effects of introducing reduced-rate VAT on all cultural products, but the Parliamentary majority did not want to wait and carried a motion calling for VAT on cinema tickets to be enforced from the next fiscal year. Film production lobbying groups have been pressing for a change in the VAT regime for several years, estimating that the reform would release NOK 1 to 2 million per feature film production. Estimates show that the VAT reform may present Norwegian fiscal authorities with a loss of some NOK 40 million from the film production side per year, but that this will be off-set by a similar amount generated from cinema exhibition.

Cinema exhibitors, too, are generally welcoming the new VAT regime, as it will allow them to claim refunds on a number of goods and services. In particular, hopes have been rising that next year's reform may spark investment in the construction of new cinema complexes, in a country which is generally considered to be under-screened. Cinema ticket prices, currently (2003 average price) at NOK 62,48 (approx. EUR 7,60), will increase in correspondence with the tax.

Some doubts over the new tax regime still linger, however. Potential investments in cinema construction have not been estimated, and the impact of new cinemas on Norway's predominantly municipal cinema system is uncertain. It is also feared that cinema owners may use the introduction of the tax to hike ticket prices beyond the 6 per cent justified by the introduction of VAT. And no assurances have been given that the Ministry of Finances will not seek compensation from any shortfall in over-all VAT volume by reducing appropriations for film production support correspondingly. ■

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• Proposal of the Parliamentary Committee on Family, Cultural and Administrative Affairs in relation to St.mld. nr. 25 (2003-2004) *Økonomiske rammebetingelser for filmproduksjon* (Green Paper on national film support schemes), available at: http://merlin.obs.coe.int/redirect.php?id=9189

NO

RO – Public Information and Pluralism

In its Resolution no. 40 of 9 March 2004, the *Consiliului National al Audiovizualului* (National Audiovisual Council, the supervisory body for electronic media in Romania – CNA) has issued new regulations governing public information and pluralism.

By introducing the new provisions, the CNA, as the "only guarantor of the public interest in the audiovisual field", primarily intended to guarantee balanced, unbiased treatment of political, economic, social and cultural information in the public interest in broadcasting, thereby protecting freedom of opinion. For example, according to Article 1 of the Resolution, where important issues of public debate are concerned, several opposing opinions should, if possible, be expressed within the same programme. Facts and opinions should be clearly distinguished from one another. Any form of discrimination based on race, religion, nationality, ethnic origin, gender or sexual orientation should also be prohibited.

In addition, broadcasters in the sense of Art. 3 of the *Legea audiovizualului nr. 504/2003* (Audiovisual Act No. 504/2003) and Art. 1 of the CNA Resolution may not broadcast programmes which are made or presented by MPs, representatives of national or local public administration or members of the President's administrative staff. The same applies to officials and spokespersons of political parties and people who have publicly announced their intention to stand in local, parliamentary or presidential elections.

Resolution No. 40 also requires compliance with the so-called "*Regula celor trei părți*" ("three part rule"), which states that one-third of "all air-time set aside for the expression of the views of the government and opposition" should be allocated to representatives of the parliamentary opposition (senators, MPs, party leaders, mayors, members of local and district councils). One-third should be offered to representatives of national and local public administration (Prime Minister, Ministers, State Secretaries, District Presidents and their spokespersons), while the remaining third should be allocated to the parties that form the government majority (same functions as above). The three part rule does not include airtime allocated to the Prime Minister when he represents Romania at official events at home or abroad.

According to Art. 5 of the Resolution, government and opposition representatives should always be given equal opportunities to express their views in televised debates, talk shows and entertainment programmes. In any programme addressing issues concerning ethnic, religious or sexual minorities, representatives of those groups should be invited to give their opinions. The Resolution also mentions the structuring of news programmes, the precise verification of sources and the need to refer to those sources. If tragic events are reported, speculation about the possible consequences of disasters, transmission of

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shocking images and the dissemination of unconfirmed information should be avoided where possible. Under Article 12, official information and communications concerning specific emergencies or crises should be broadcast as a matter of priority.

The Resolution also obliges TV companies to show their logo (*sigla*) on the screen at all times (except during advertisements). Likewise, live broadcasts must be denoted by the words *"transmisiune în direct"* or *"direct"*. When programmes are repeated, this should also be indicated (*"reluare"*). Clips from the archives should always be denoted as such (*"arhivă"*).

Following its publication in the Romanian Official Gazette on 17 March 2004, Resolution No. 40 replaced CNA Resolution No. 274/2003 of 6 October 2003 (see IRIS 2004-3: 14). ■

● ***Decizia CNA nr. 274/2003 privind asigurarea informării corecte a opiniei publice*, (CNA Resolution No. 274/2003 of 6 October 2003), *Monitorul Oficial al României, Partea I, nr. 699 din 6 octombrie 2003***

● ***Decizia Nr. 40 din 9 martie 2004 privind asigurarea informării corecte și a pluralismului*, (CNA Resolution No. 40 of 9 March 2004), *Monitorul Oficial nr. 234 din 17 martie 2004***

RO

SK – Common Regulator for Electronic Communications?

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The Telecommunications Authority of the Slovak Republic, the Posts Administration and the Council for Broadcasting and Retransmission (CBR) plan to become the unified National Regulatory Authority (NRA) as of June 2005.

The idea of the Slovak Government to establish one common regulator for electronic communications came about in March 2003. The reason for the intended replacement of the existing three completely different bodies (the first- and second-mentioned are state bodies while the CBR is organised in a structure *sui generis* as it is subordinate to the Slovak Parliament only) by one single authority is based on the intention to save public monies.

In 2003, the CBR rejected the idea of merging with the Telecommunications Authority and Posts Administration. Although the 84th meeting of Slovak Government held on 5 May 2004 has interrupted the debate on a final decision concerning a common NRA, it seems certain that the NRA will be established. After calling for comments by the Government, almost every submission agreed more or less with the concept to merge posts and telecommunications services with the so-called content regulator.

The establishment of the new regulatory framework of the NRA would necessitate preparing and adopting completely new legal rules, which will replace the Act on Broadcasting and Retransmission of 2000, the Act on Electronic Communications (adopted in 2003 aimed at implementing the new EC telecommunications regulatory framework) and the Act on Posts Service of 2001. ■

● ***Stanovisko ku konvergovanému orgánu – odmietnutie* (Rejection of the Government's plan by the CBR), available at: http://merlin.obs.coe.int/redirect.php?id=9151**

● ***Návrh na vytvorenie spoločného regulačného orgánu pre oblasť elektronických komunikácií - nové znenie* (Item 14 of agenda of the 84th meeting of Slovak Government), Number of document /UV-10169/2004 – submitted by Ministry of Transport, Post and Telecommunication, available at: http://merlin.obs.coe.int/redirect.php?id=9152**

SK

US – Senate and Circuit Court of Appeals Block FCC Liberalization of Common Ownership and Cross Ownership Rules

On 22 and 24 June 2004 respectively, the United States Senate and the federal Court of Appeals for the Third Circuit (Third Circuit) in Philadelphia separately acted to invalidate the liberalization of limitations on both common and cross ownership adopted by the Federal Communications Commission (FCC) on 2 June 2003 (Report and Order, 68 Federal Register 46286 (5 August 2003)). The FCC had increased not only the amount of the US audience which an individual television broadcaster could serve from 35 to 45 percent – later limited by Congress to 39 percent – but also had allowed local television stations to own radio stations, cable systems, and newspapers.

Senators Dorgan, Reid and Snowe introduced an amendment "suspending" the FCC's June 2003 rules and declaring them to be "invalid and without legal effect". The Senate approved the measure by a 99-1 vote. The action was the result of highly complex and unusual legislative procedures; the senators introduced Senate Amendment 3465, which amended pending Senate Amendment 3235, which in turn amended a Department of Defense appropriations bill. The amendment now must go to the House of Representatives and ultimately to the President for signature. Although the House may pass the measure, presidential approval seems unlikely since the current Administration has gone on record as favouring the relaxation of the limitations.

Senator Dorgan stated that the legislation was necessary to insure that the June 2003 relaxation did not become effective, if the Third Circuit ultimately upheld the FCC.

On 24 June 2004 the Third Circuit clarified the situation by handing down a 218-page decision in Prometheus Radio Project v. Federal Communications Commission, invalidating the FCC's June 2003 relaxation of the ownership rules. The court held that the FCC's finding of facts had used "several irrational assumptions and inconsistencies", primarily in its method of measuring current diversity of voices in radio, television, and print outlets. It thus remanded the rules to the FCC, "to justify or modify its approach to setting numerical limits".

Realistically, it seems unlikely that there will be any further action on the rules in the foreseeable future. The full Third Circuit bench probably will not reconsider the decision in banc, since apparently too many judges own stock in the companies primarily affected by the relaxation – i.e., Viacom and Fox – and already have disqualified themselves from the case. It seems an appeal to the

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Supreme Court probably would not be granted, since the Court has tried to avoid media ownership controversies for the last two decades. Finally, the FCC itself is unlikely to attempt clarifying the rules. Current Chairman Michael Powell – the major supporter of the relaxation – is rumoured to be leaving the agency in the near future. Moreover, formulating new rules in line with the court's requirements would require lengthy and substantial factfinding and analysis.

Finally, it should be noted that both the Senate and the Third Circuit action came in the context of Congressional action last year, which by way of compromise set the television station common ownership at 39 percent – just enough to allow Viacom and Fox to keep their present holdings. ■

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