iris
LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

2004 - 8

INTERNATIONAL

COUNCIL OF EUROPE

EUROPEAN UNION

NATIONAL

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSSTELLE

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

Dear *IRIS* subscribers,

Susanne Nikoltchev
IRIS Coordinator

Here we are, back after our summer break, with lots of new information for you in this edition of *IRIS* and a new *IRIS plus*. In particular in the weeks ahead we shall be eagerly watching and observing as the new European Commission of the 25-member EU takes its first steps.

We must also take a glance over our shoulder, however, as we bid farewell to one of our loyal companions on *IRIS*, Peter Strohmann, who has left our partner organisation, the EMR in Saarbrücken, to take up a fresh challenge at the *Bundesversicherungsamt* (federal insurance office) in Bonn. For more than two years Peter was our contact person at the EMR for all matters concerning the *IRIS newsletter*. He also fathered several *IRIS* contributions himself including some *IRIS plus* issues. We should like to take this opportunity to thank him for his efficient and friendly support and to wish him all the best in his new job.

On behalf of the *IRIS* editorial team, we would also like to extend a warm welcome to Kathrin Berger, who replaces Peter at the EMR and has worked with us on this issue. ■

INTERNATIONAL

COUNCIL OF EUROPE

European Court of Human Rights: Case of von Hannover v. Germany

The European Court of Human Rights in a judgment of 24 June 2004 has come to the conclusion that Germany has not awarded a sufficient level of protection to the right of privacy of Princess Caroline von Hannover. On several occasions Caroline von Hannover, the daughter of Prince Rainier III of Monaco, applied to the German courts for an injunction to prevent any further publication of a series of photographs which had appeared in the German magazines *Bunte, Freizeit Revue* and *Neue Post*. As Caroline von Hannover was undeniably to be considered as a contemporary public figure "*par excellence*", the German courts were of the opinion that she had to tolerate the publication of the photographs, except those in which she appeared with her children or with a friend in a secluded place in a restaurant. Other photos however showing Caroline von Hannover on horseback, shopping, cycling or skiing were to be considered as falling under the right of the press to inform the public on events and public persons in contemporary society, just like a series of photographs showing the Princess in the *Monte Carlo Beach Club*.

In its judgment of 24 June, the Strasbourg Court agreed with Caroline von Hannover that the decisions of the German courts infringed her right to respect for her private life as guaranteed by Article 8 of the Convention. The Court recognizes that "the protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention", emphasizing at the same time that "the present case does not

The objective of IRIS is to publish information on all legal and law related policy developments that are relevant to the European audiovisual sector. Despite our efforts to ensure the accuracy of the content of IRIS, the ultimate responsibility for the truthfulness of the facts on which we report is with the authors of the articles. Any opinions expressed in the articles are personal and should in no way be interpreted as to represent the views of any organizations participating in its editorial board.

• **Publisher:**
European Audiovisual Observatory
76, allée de la Robertsau
F-67000 STRASBOURG
Tel.: +33 (0)3 88 14 44 00
Fax: +33 (0)3 88 14 44 19
E-mail: obs@obs.coe.int
http://www.obs.coe.int/

• **Comments and Contributions to:**
IRIS@obs.coe.int

• **Executive Director:** Wolfgang Closs

Editorial Board: Susanne Nikoltchev, Co-ordinator – Michael Botein, The Media Center at the New York Law School (USA) – Harald Trettenbrein, Directorate General EAC-C-1 (Audiovisual Policy Unit) of the European Commission, Brussels (Belgium) – Alexander Scheuer, Institute of European Media Law (EMR), Saarbrücken (Germany) – Bernt Hugenholtz, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Christophe Poirel, Media Division of the Directorate of Human Rights of the Council of Europe, Strasbourg (France) – Andrei Richter, Moscow Media Law and Policy Center (MMLPC) (Russian Federation)

Council to the Editorial Board:
Amélie Blocman, *Victoires Éditions*

Documentation: Alison Hindhaugh

Translations: Michelle Ganter (co-ordination) – Brigitte Auel – Véronique Campillo – Bernard Ludewig – Marco Polo Sàrl – Britta Probol – Katherine Parsons – Erwin Rohwer – Catherine Vacherat – Gillian Wakenhut – Sandra Wetzel

Corrections: Michelle Ganter, European Audiovisual Observatory (co-ordination) – Francisco Javier Cabrera Blázquez & Susanne Nikoltchev, European Audiovisual Observatory – Florence Lapérou & Géraldine Pilard-Murray, post graduate diploma in *Droit du Multimédia et des Systèmes d'Information*, University R. Schuman, Strasbourg (France) – Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland) – Sabina Gorini, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Natali Helberger, Institute for Information Law (IViR) at the University of Amsterdam (The Netherlands) – Kathrin Berger, Institute of European Media Law (EMR), Saarbrücken (Germany)

Marketing manager: Markus Booms

Typesetting: Pointillés, Hoenheim (France)

Print: Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestraße 3-5, 76350 Baden-Baden (Germany)

Layout: Victoires Éditions

ISSN 1023-8565

concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution". In such circumstances, priority has to be given to respect for the right to privacy. As a matter of fact "a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "imparting information and ideas on matters of public interest", it does not do so in the latter case". According to the Court, the sole purpose of the publication of the photos was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life. In these conditions freedom of expression requires a narrower interpretation. The Court also stated that "increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data. This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public". In the Court's view, merely classifying the applicant as a figure of contemporary society "*par excellence*", does not suffice to justify an intrusion into her private life. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to ensure the effective protection of the applicant's private life and that she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life. The Court unanimously reached the conclusion that the German courts did not strike a fair balance between the competing rights and that there was a violation of Article 8 of the Convention. ■

Dirk Voorhoof
Media Law Section of the Communication Sciences Department Ghent University, Belgium

● **Judgment by the European Court of Human Rights (Third Section), case of von Hannover v. Germany, Application no. 59320/00 of 24 June 2004, available at: http://merlin.obs.coe.int/redirect.php?id=32**

EN-FR

EUROPEAN UNION

Court of First Instance: TV 2 Brings Commission Decision Before the Court of First Instance

By a decision of 19 May 2004, the European Commission ordered the Danish State-owned limited broadcasting company *TV 2* to pay back excess State compensation of DKK 628.2 million, received during the period 1995-2002 (see IRIS 2004-7: 4). In July 2004, first the Danish Government and thereafter *TV 2*, decided to bring the Commission's decision before the EC Court of First Instance. The plaintiffs invoke the Protocol on the System of Public Broadcasting in the Member States annexed to the Amsterdam Treaty, which provides that "[t]he Treaty provisions shall be without prejudice to the competence of the Member States to provide for the funding of public service broadcasting insofar as such funding […] does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest". This means that it is left to the Member States to determine in which way public service broadcasting is financed as long as the financing is in compliance with EC rules. The Danish Government and *TV 2* assert that the Danish system of mixed financing composed by advertising fees and State support is a national matter, not subject to interference from the EC authorities as it does not – according to their opinion – offend EC rules.

Also the commercial broadcasting company *TV DANMARK A/S* – which originally started the conflict by bringing the complaint before the Commission asserting that the Danish State's support to the broadcaster *TV 2* was incompatible with EC rules as it distorted competition between Member States – has decided to appeal the Commission's decision to the Court of First Instance. Through the appeal, *TV Danmark* is broadening its claim to cover, in addition to the period 1995-2002 (for which the Commission has already decided that *TV 2* received excessive State support), the years 2003 and 2004, in which *TV 2* also allegedly received excess State support. By enlarging the period of reference for the State support granted, the original claim of DKK 628.2 million (EUR 84.4 million) has been augmented by a further DKK 220 million of excess State support for the years 2003 and 2004. Furthermore, the commercial broadcasting company *TV 3/Viasat* has decided to bring a claim before the Court of First Instance alleging that *TV 2* has been able to sell television advertising for dumping prices because of the State support, to the detriment of *TV 3*.

The Minister of Culture has opened negotiations with the European Commission regarding the permission to refinance *TV 2* in order to avoid bankruptcy of the broadcaster as the Danish Government intends to sell the State's shares in *TV 2* for the purpose of making the company an entirely privatised, commercial broadcaster. Now, the case brought before the Court is expected to postpone and complicate the plans of the government. ■

Elisabeth Thuesen
Law Department Copenhagen Business School

● **Press release of the Ministry of Culture of 1 July 2004 *"Regeringen indbringer TV2 – afgørelsen for EF-Domstolen"* (The Government brings the TV 2 – decision before the EC Court of Justice), available at: http://merlin.obs.coe.int/redirect.php?id=9277**

● ***TV 2 / medienyt* (*TV 2* / medianews) of 30 July 2004 p. 1 - 2: *TV 2 går til EF-Domstolen* (*TV 2* goes to the EC Court of Justice), and *TV Danmark udvider EU-sagen* (*TV Danmark* enlarges the EU-case), available at: http://merlin.obs.coe.int/redirect.php?id=9278**

● **See *Tv 2 /om TV 2* article: *Parbo: Konkurrenter frygter TV 2* (Competitors fear *TV 2*), available at: http://merlin.obs.coe.int/redirect.php?id=9279**

DK

European Commission: 6th Communication on the Application of Articles 4 and 5 of the TVWF Directive

The European Commission has recently adopted its Sixth Communication on the application of Articles 4 and 5 of the "Television without Frontiers" Directive, which lay down rules on the broadcasting of European works, including independent productions, by European television broadcasters. Specifically, Article 4 requires Member States to ensure, where practicable and by appropriate means, that broadcasters under their jurisdiction reserve a majority proportion of their transmission time for European works. In addition, Article 5 requires Member States to ensure, where practical and by appropriate means, that broadcasters reserve at least 10% of their transmission time or of their programming budget for European works (in particular recent ones) by independent producers. The relevant transmission time

does not include the time appointed to news, sports events, games, advertising and teletext services.

Pursuant to Article 4(3) of the Directive, an evaluation of the implementation of these provisions is published every two years by the Commission on the basis of national reports submitted by the Member States. The present report covers the period 2001-2002 (for the earlier reports see IRIS 1996-9: 8, IRIS 1998-5: 4, IRIS 2000-9: 5 and IRIS 2003-1: 5) and shows that the objectives of Articles 4 and 5 have generally been met, both in relation to the report's reference period and also compared with the previous reference period (1999-2000).

As regards the application of Article 4, the report presents generally positive results. The average transmission time reserved for European works in all Member States was 66.95% in 2001 and 66.10% in 2002, with a 5.42 point increase being registered over the four-year period 1999-2002, representing a medium-term overall upward trend. The report also notes that for the majority of Member States there has been constant progress at national level since 1999 (although the average transmission time of European works varies significantly between Member States: e.g. 46.98% for Portugal and 87% for the Netherlands in 2001). The average compliance rate for all channels in all Member States also increased over the reference period and over the 1999-2002 four-year period.

The trend is less positive as regards the application of Article 5. Indeed, the report records a decrease in the average transmission time reserved for European works by independent producers both over the reference period and also compared with the previous reference period. Having said this, the report notes that the average transmission time of these works remained constantly well above the 10% minimum proportion set by Article 5, stabilizing over the four year period at above 1/3 of total qualifying transmission time, corresponding to more than half of European works overall (in this case too, the average transmission time varied significantly depending on the Member State concerned, e.g. 21.33% for Italy and 68.92% for the Netherlands in 2001). Furthermore, the results were generally positive as regards the transmission of recent European works by independent producers: these remained over four years constantly above 1/5 of total qualifying transmission time, corresponding to about 2/3 of the independent productions broadcast. In light of this, the Commission's assessment is that the objectives of Article 5 have broadly been met (although it also notes that the results presented for Article 5 should be qualified by the fact that some States did not present comprehensive information).

The present report only covers the EU-15, while the 10 new Member States will be included for the first time in the next implementation report (for the period 2003-2004).

Additional detailed information on the application of Articles 4 and 5 for 2001-2002 is contained in an annex to the communication. ■

Sabina Gorini
Institute for Information Law (IViR)
University of Amsterdam

- **Sixth Communication from the Commission to the Council and the European Parliament on the application of Articles 4 and 5 of Directive 89/552/EEC "Television without Frontiers", as amended by Directive 97/36/EC, for the period 2001-2002, COM (2004) 524, 28 July 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9255

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

- **Annex to the Communication, SEC (2004) 1016, 28 July 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9258

EN

European Commission: Consultation on the Review of EU Copyright Legislation

In 2002, at the Conference on "European Copyright Revisited" in Santiago de Compostela, the European Commission initiated a review of the Community legal framework in the field of copyright and related rights. This review has two objectives. Its first objective is to improve the operation of the existing body of Community law in this field, by simplifying it and increasing its consistency. Secondly, the review aims to analyse whether the existing framework (in the field of substantive copyright law) still contains shortcomings which have a negative impact on the proper functioning of the Internal Market and whether therefore further harmonisation is needed.

Within the framework of the review, the Commission has now launched a consultation based on a working paper, which takes stock of the discussions so far on the topic with a view to focusing the debate. The results of the consultation will be taken into account before any necessary legislative amendments are proposed in the course of 2005. The consultation is open until 31 October 2004.

As to the first aspect of the review, the working paper assesses whether any inconsistencies between the existing Directives in this field hamper the operation of Community copyright law or have a harmful impact on the fair balance of interests of the parties concerned (rightsholders, users, consumers). Adaptations to the early copyright Directives are considered with a view to increasing their consistency with one another and with the 2001 Directive on Copyright in the Information Society (the review and the working paper cover the Software Directive, the Rental Right Directive, the Term Directive and the Database Directive, while the Cable and Satellite Directive is subject to a separate revision process – see IRIS 2002-9: 6). The working paper concludes that for the purposes of consistency, only minor adjustments appear to be necessary at present. Specifically, the paper envisages the following amendments: aligning the definition of the right of reproduction throughout the Directives; clarifying the definition of the right of communication to the public with regard to computer programmes; extending the exception for temporary acts of reproduction to computer programmes and databases; harmonising the criteria for calculating the term of protection for co-written musical works and incorporating a new exception for the benefit of people with disabilities for databases.

As regards the second objective of the review, the working paper analyses a number of aspects which are at present not harmonised (the notion of originality, initial ownership of rights, the definition of the term public, moral rights, points of attachment) to determine whether this lack of harmonisation has had a negative impact on the Internal Market. In this respect, the working paper concludes that there is not at present a need for further legislative action, except as regards the criteria used for determining the entitlement to protection in the EU of phonogram producers and broadcasting organisations from outside the EU (i.e. nationality, place of business, place of first fixation or first publication – these criteria are know as "points of attachment"). On such points of attachment, the working paper considers it necessary to adopt a harmonised approach. ■

Sabina Gorini
Institute for Information Law (IViR)
University of Amsterdam

- **Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, SEC (2004) 995, 19 July 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9260

EN

- **"Copyright: Commission launches consultations on fine-tuning of legislation", Press Release of the European Commission IP/04/955 of 19 July 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9264

DE-EN-FR

- **Information on the review is available at:**
http://merlin.obs.coe.int/redirect.php?id=9261

DE-EN-FR

European Commission: Commission Clears Acquisition of Cable Operator PrimaCom by Apollo and JP Morgan

Carmen Palzer
Institute of European Media Law (EMR) Saarbrücken/Brussels

The European Commission has approved the proposed acquisition of joint control over PrimaCom AG by investment companies Apollo Europe V (Apollo) and JP Morgan Chase & Co (JP Morgan) in accordance with Art. 6 para. 1 lit. b of the Merger Regulation.

PrimaCom operates broadband cable networks in the Netherlands and Germany at the so-called net level 4 (household connections) and owns a cable "head-end" in Leipzig. A "head-end" is where broadband signals are received from satellites and fed into the cable network. In other regions, in which PrimaCom does not own such a "head-end", it receives signals from net level 3 cable operators (all of which may soon be owned by *KDG*, see IRIS 2004-8: 5). PrimaCom also offers Internet access via TV cable. Apollo and JP Morgan manage investment funds and hold substantial parts of the debt of PrimaCom. The plan is to transfer PrimaCom's assets and operating subsidiaries in exchange for the elimination of the debt and a cash payment to BK Breitband Kabelnetz Holding, which is owned by Apollo and JP Morgan. Although in the Hessen region Apollo holds a stake in iesy, a net level 3 broadband cable operator, the Commission believes the overlaps created by the transaction are so minimal that they do not raise competition concerns.

Whether the takeover will actually materialise is questionable, despite the European Commission's approval, since the PrimaCom shareholders have not given their consent. ■

● **European Commission press release, 16 June 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9173**

EN-FR-DE

European Commission: Planned Acquisition of Cable Network Operator Referred to Federal Cartel Office

Carmen Palzer
Institute of European Media Law (EMR) Saarbrücken/Brussels

According to a press release of 8 June 2004, the European Commission has referred the examination of the planned acquisition of cable network operator *ish* by cable network operator *Kabel Deutschland GmbH (KDG)* to the *Bundeskartellamt* (Federal Cartel Office) in accordance with Art. 9 of the Merger Regulation. It granted the Cartel Office's request for referral because it thought the Cartel Office was best placed to analyse the competition concerns raised, which required the examination of local markets and specific national circumstances.

KDG operates the so-called net level 3 broadband cable network throughout Germany except in North Rhine-Westphalia (where the cable network is operated by *ish*), Hessen and Baden-Württemberg. It also plans to take over the networks in Hessen and Baden-Württemberg. However, the latter two concentrations do not fall under the jurisdiction of the European Commission. The plans were therefore notified to the Federal Cartel Office, which will now decide on all the proposed concentrations at the Commission's request. If they are approved, *KDG* will control the whole net level 3 broadband cable network in Germany. In its request for referral, the Federal Cartel Office expressed concern that the merger could lead to the strengthening of a dominant position in the market for the feeding-in of broadcast signals, the market for services for digital pay-TV, the signal delivery market and the market for the supply of signals to end customers. ■

● **European Commission press release, 8 June 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9170**

EN-FR-DE

NATIONAL

AT – No Automatic Right to Take Part in a Televised Debate

Robert Rittler
Freshfields Bruckhaus Deringer / Vienna

Since 2001 responsibility for ruling on the legality of decisions taken by the *Bundeskommunikationssenat* (Federal Communications Office), the supervisory body for the Austrian public service broadcaster, *Österreichische Rundfunk* (*ORF*), has rested with the *Verwaltungsgerichtshof* (Administrative Court). The Court has been called upon to decide important cases concerning the legality of the *ORF*'s remit on three occasions since then, including twice in April 2004. In all three cases it confirmed the decisions taken by the Federal Communications Office, which followed the same principles as those applied ever since the 1970s by the body that preceded the Federal Communications Office, the *Rundfunkkommission* (Broadcasting Commission).

In the first case decided in April 2004 (VwGH 21 April 2004, 2004/04/0240), the *Freiheitliche Partei Österreichs* (Austrian Freedom Party - FPÖ) claimed that the ORF had violated the Broadcasting Act, and in particular its objectivity and plurality requirement, by failing to invite a representative of the senior citizen members of the Freedom Party to take part in a televised debate involving senior citizen members from the *Sozialdemokratische Partei* (Social Democratic Party – SPÖ) and the *Volkspartei* (People's Party – OVP). The Federal Communications Office dismissed the complaint, and the appeal before the Administrative Court was also thrown out: The Court found there is no requirement for interests to be represented in a given broadcast and no obligation under the Broadcasting Act for all of the main political parties to be granted an opportunity to present their views on a general political topic in a televised debate.

The second case (VwGH 21 April 2004, 2004/04/0009) concerned the legality of the decision taken to stop broadcasting "Kunst-Stücke", a late-night programme used for many years by the ORF as a way of presenting highbrow television programmes of little appeal to mass viewers. The applicant claimed that as a result of having taken this programme off the air the ORF was no longer carrying out part of its cultural remit. The Federal Communications Office dismissed this claim on the ground that the ORF could also fulfil its cultural remit with other programmes. The Administrative Court confirmed this finding. The ORF's mission statement does not require it to offer programmes containing the same broadcast content as that previously shown in "Kunst-Stücke". ■

● **Decision of the Austrian Administrative Court of 21 April 2004, 2004/04/0240**

● **Decision of the Austrian Administrative Court of 21 April 2004, 2004/04/0009**

DE

CS – Amendment on the Broadcasting Act Adopted

Miloš Živković
Assistant Professor, Belgrade University School of Law
Legal counsel, Živković & Samardžić

The Government of Serbia adopted the proposition of the amendments to the 2002 Act on Broadcasting of Serbia (see IRIS 2002-8: 11) at its session held on 8 July 2004, and passed it on to the Parliament to be adopted in an urgent procedure. The aim of the proposed amendments is to release the deadlock in the implementation of the 2002 Act on Broadcasting. The proceedings have been stopped for over two years now, following breaches of the rule of law in appointing the members of the Council of the Broadcasting Agency (see IRIS 2003-6: 10 and IRIS 2003-9: 7).

The essence of the proposed amendments, that will not change the Law completely, is the dissolving of the current Council and the appointment of a completely new one. Moreover, the list of authorised nominators has changed. Instead of the Government of Serbia, the Executive Council (i.e. Government) of the Autonomous Province of Vojvodina and the National Assembly (i.e. Parliament) of Serbia, that were authorised to nominate one Council member each, the parliamentary Committee on Culture and Information is going to nominate candidates for three Council members. Furthermore, the restriction on consecutive mandates shall not pertain to the current Council members, who shall thus be able to be nominated and appointed in the new Council. Apart from that, another important amendment relates to the change in the required majority for appointing and removing the Council members (the original text required a simple majority of all MPs, i.e. 126 votes, and the amendment proposes a simple majority of all MPs present, provided that there is a quorum, i.e. 64 votes). Other proposed amendments are less important (extension of deadlines, change of terminology due to the transformation of FR Yugoslavia to the State Union of Serbia and Montenegro etc).

The reactions to the proposed amendments were mixed. Almost all broadcasters supported enabling the implementation of the Law on Broadcasting. Some warned that the dismissal of the Council by amendments of the Law would be a dangerous precedent that would undermine the necessary independence of the Council members. Others suggested that these amendments were a good opportunity to re-compose the structure of the Council in a way that will leave less room for state interference. The current structure, which will not be changed in the proposed amendments, would have been the core reason for problems in the implementation of the 2002 Law on Broadcasting. Another group of broadcasters also suggested their own version of the amendments, which would have changed the structure of proposed nominators. Currently there are 4 nominations from the state, 3 from the civil sector, 1 from the interested associations and the last one from Kosovo (to be nominated by the previous 8). They would prefer 3 nominations from the state, 3 from the civil sector and 3 from the interested associations.

On 14 August 2004, the National Assembly of Serbia adopted the amendments, so that the new Council can be constituted by the end of September. ■

● Amendments proposed by the Government, available at:
http://merlin.obs.coe.int/redirect.php?id=9273

SR

CZ – Amendment of Broadcasting Law

Jan Fučík
Broadcasting Council Praha

The Parliament of the Czech Republic passed an amendment to the Broadcasting Act aimed at the transposition of European Community law.

The amendment clarifies some terms of the broadcasting law in compliance with the "Television Without Frontiers" Directive.

The amendment contains specific criteria to identify the jurisdiction over broadcasting as provided in the Directive. A chain of criteria is set out to determine whether a television broadcasting organization is to be regarded as being established in the Czech Republic. The objective of these cascading criteria is to ensure that the subject of the Czech legislation are only television organisations that carry out their activities of television broadcasting in the Czech Republic. In the case that the cascading criteria do not render it possible to determine that a television broadcasting organisation is established in the Czech Republic, the decision has to be made, based on the means used for the transmission of the programme service of the television broadcasting organisation. Indicative factors may be the use of a frequency granted by the Czech Republic, or failing this, the use of a satellite capacity appertaining to the Czech Republic or the use of satellite uplink situated in the Czech Republic.

The amendment states that the limitations on advertising have to be applied to teleshopping spots also. The aim of this amendment is to make the Czech Broadcasting Law fully compatible with European Community Law. ■

● Act Nr. 341 Collection of May 2004 amending the Broadcasting Act

CS

DE – Agreement with Canada concerning Audiovisual Relations

On 22 June 2004 an agreement was signed between Germany and Canada concerning audiovisual relations between the two countries. A similar agreement signed in 1978 is no longer in force.

The aim of the new agreement is to create the necessary environment for German/Canadian co-productions in the film, television and video sectors, with a view to promoting the German and Canadian film industries and encouraging cultural and economic exchanges. The German and Canadian governments are also convinced the agreement will strengthen relations between the two countries.

The agreement itself contains several different provisions designed to make it easier for film producers to work together. For example, every co-production produced under the agreement is to be considered to be a national production for all purposes in both countries (Article 1). This is so that the film producers can take advantage of measures to promote film production in both countries at once. The agreement also stipulates that, within the framework of their prevailing laws, both countries must allow film producers from the other country to enter their territory and take up temporary resi-

Kathrin Berger
Institute of European Media Law (EMR) Saarbrücken/Brussels

dence there and must grant them work permits. However, the promotion of co-productions is not without certain conditions. According to Article 4, for example, all participants in the making of the production must be either German or Canadian nationals, although in relation to Germany "nationals" also means nationals of another EU Member State or another Contracting State to the agreement on the European Economic Area. Studio shooting and location shooting must also take place in one of the two countries. The competent authorities may, however, grant certain exceptions to these rules. Projects must also qualify as co-productions before shooting begins. The application process involves extensive documentation that must be addressed to the German Federal Office of Economics and Export Control, or Telefilm Canada in the case of Canada.

A Joint Commission of representatives from the government and the film, television and video industries in both countries has been set up to oversee implementation of the agreement on a regular basis and to monitor its development. ■

● **German-Canadian Agreement on Audiovisual Relations, available at: http://merlin.obs.coe.int/redirect.php?id=9272**

EN

ES – Regulation on Broadcasters' Financing of European and Spanish Films

Enric Enrich
Enrich Advocats Barcelona

The Royal Decree 1652/2004 of 9 July sets out a Regulation that provides for the mandatory investment by television programmers in the pre-financing of European and Spanish cinematographic and television films. This obligation was already included in Law 22/1999 (which amended Law 25/1994 that incorporated into Spanish law the "Television Without Frontiers" Directive – see IRIS 1999-7: 10 and also IRIS 2001-8: 13), but was difficult to apply in practice.

The newly-approved regulation, which is applicable to television operators that include in their programming feature films of current production, i.e. not older than seven years, aims to clarify the obligation and facilitate the application of the existing rules, which have up to now not been applied. It specifies how to calculate the 5% of the television broadcaster's operating income obtained in the previous year, which is the amount that broadcasters are obliged to invest in financing the film industry. The income to be taken into account for the purposes of calculation is all kinds of income obtained from the programming and exploitation of the TV channels which give rise to the obligation to invest (including advertising income, membership fees and public subsidies, if any). The regulation sets out detailed procedures on information and control to render the said obligation effective. The amount to be invested can fund fiction films, documentaries or animation, long and short films and television films (those audiovisual works of similar characteristics to cinematographic feature films, i.e. works of a duration exceeding 60 minutes, whose commercial exploitation does not include theatrical exhibition), but not TV series. 60% of the investment shall be dedicated to Spanish cinema.

The new regulation has satisfied producers, directors and actors, as well as distributors and exhibitors, but it has been criticized by television broadcasters, because TV series are excluded from the benefits of such funding, and because the sanction for not complying with the rules may, in some cases, result in the loss of the broadcaster's license. ■

● ***Real Decreto 1652/2004, de 9 de julio, por el que se aprueba el Reglamento que regula la inversión obligatoria para la financiación anticipada de largometrajes y cortometrajes cinematográficos y películas para televisión, europeos y españoles* (Statutory Instrument 1652/2004 of 9 July 2004 regulating the mandatory investment by television programmers in the pre-financing of European and Spanish cinematographic and television films), available at: http://merlin.obs.coe.int/redirect.php?id=9268**

ES

FR – Film Screenplay Infringes Copyright

Amélie Blocman
Légipresse

On 4 June the Court of Appeal found Claude Zidi, co-author of the screenplay of the film "La Totale", and James Cameron, author of its American adaptation "True Lies", guilty of infringing copyright. The original proceedings had been brought on the grounds of infringement of copyright by Lucien Lambert, author of a scenario entitled "Émilie", completed in 1981, which was adapted for the theatre then translated and published in an American version, who noted a number of similarities between the screenplays of the films in question and his own scenario.

In the initial proceedings, the Court had rejected all the claims brought by the applicant on the grounds of lack of proof that his scenario pre-dated the screenplays. He then appealed against the judgment, submitting further proof to the Court which then overturned its judgment on this point and acknowledged that the scenario for "Émilie" pre-dated the screenplays and hence upheld Mr Lambert's rights. It then considered the matter of infringement of copyright; this was denied by the defendants, who claimed the scenario for "Émilie" contained no original features and pointed to substantial differences between the disputed screenplays and the scenario.

The Court held that even though the similarities noted (the heroine's credulousness, the husband's jealousy, the husband's professional collaboration with a friend who is his confidant, the husband's involvement in his work, the shadowing scene, the character's use of a telephone for spying or for passing himself off as a spy) corresponded to a sequence of events in everyday life or ancillary elements that were essential in view of the nature of the subject matter, ie espionage, the fact nevertheless remained that the creation of the character of the person passing himself off as a spy in order to seduce a woman – in this case the heroine – was original. In consequence, the Court held that the appellant's scenario was indeed a work that bore the stamp of its author's personality.

Furthermore, the Court noted that the character of the person who passes himself off as a spy in order to seduce the heroine and the ensuing events constituted the driving force of the plot in both cases. Their removal would result in the story losing its entire raison d'être. In the present case, there was therefore a striking and undeniable resemblance in the composition of the screenplays and the scenario, reinforced by the similarities noted. Infringement of the copyright enjoyed by the appellant's scenario by the screenplays of the defendants' films was thus established. The Court therefore appointed a legal expert specialising in cinematographic matters to evaluate the amount of the prejudice suffered. ■

● **Paris Court of Appeal (4th chamber, section B), 4 June 2004, L. Lambert v. C. Zidi and J. Cameron**

FR

FR – Television Licence Fee to Be Combined with the Housing Tax in 2005

Last December, when his Ministry's budget was adopted, the Minister for Communications announced that a working party was to be set up to look into redefining the methods for establishing and collecting this fee, which is the main source of financing for public-sector audiovisual services (see IRIS 2003-7: 8). The aim is to improve on its yield, increasing the EUR 2 billion it produces and combating fraud.

On 25 July, the Government adopted the principle of combining collection of the television licence fee with that of the housing tax, starting next year. Housing does indeed correlate to some extent with possession of a television set, although even this has its limits. Starting in 2005, households that do not have a television set will be required to mark a special box on their income tax return, declaring this to be so "on their honour"; otherwise they will have to pay (EUR 116.50 for a colour television set in 2003). The practicalities of the system still need to be clarified, particularly concerning the exemptions that could, at the present stage, be extended to people receiving "minimum government benefit" and to television sets in second homes. Reactions have not been slow in coming. The French society of dramatic authors and composers (*Société des Auteurs et Compositeurs Dramatiques* – SACD) welcomed the Government's decision as being "useful in combating fraud and improving the yield from collecting the licence fee". The trade unions, on the other hand, have not concealed their hostility towards the draft reform that "threatens the financing of the audiovisual sector. The Government, under cover of taking action against those who avoid paying the fee, is making use of this to justify a cutback in the number of employees." It is true that the reform provides for keeping on just 400 members of staff in the supervision department of the 1 400 employed at present in the licence fee department. The rate of non-payment, currently estimated at 8.57%, is average for Europe, and its opponents believe that the reform would cost considerably more than initially anticipated, particularly as regards the planned exemptions. ■

Amélie Blocman
Légipresse

FR – Decree Lays Down Details for Commercialising Rights for the Audiovisual Exploitation of Sports Competitions

The ownership of audiovisual rights for sports events and competitions is regulated in France by Article 181 of the Act of 16 July 1984 as amended by the Act of 1 August 2003, according to which "The federations [...] and the organisers [...] own the right to exploit the sports events or competitions they organise."

The Decree of 15 July 2004 has now laid down the procedure for the professional leagues to commercialise their audiovisual rights. The text gives them exclusive rights for the commercialisation of all the rights for audiovisual exploitation and broadcasting, either live or recorded moments earlier, in full or as extracts, for all the matches and competitions they organise. In its opinion delivered on 28 May on the draft of the Decree, the *Conseil de la concurrence* (national competition board) felt that giving the leagues this exclusivity "was not contrary to the rules of competition and could be justified from an economic point of view". Moreover, the possibility of a single operator, by making the highest bid for each lot, being allocated all the rights "could not be considered a prohibited practice". Furthermore, according to the recommendations issued by the national competition board, the Decree provides that rights other than those commercialised by the leagues (rights covering the broadcasting of recordings of competitions) lie with the clubs, under a written agreement laying down the relevant terms.

In order to reduce the risks to competition that could be generated by the exclusivity given to the leagues to commercialise most of the audiovisual rights, Article 3 of the Decree requires the call for tenders to be open to all editors and distributors of services. The rights are to be offered in a number of separate lots, the number and constitution of which must take account of the characteristics of the markets on which they are offered for sale. The purpose of this provision is to prevent the constitution of a lot or a number of lots on such a large scale that they could only be acquired by the most powerful operators. The choice of the successful applicant making the best offer is to be made on the basis of criteria defined in advance in the regulations governing the call for tenders. Contracts may not be concluded for a period of more than three years, and the league in question must turn down any global or joint offers and any offers that include price supplements. These new provisions will be implemented next October, when the French football championships for the period 2005-2008 are put out to tender. ■

Amélie Blocman
Légipresse

● Opinion no. 04-A-09 of 28 May 2004 of the national competition board (*Conseil de la concurrence*) concerning a draft Decree on the commercialisation by the professional leagues of the rights to the audiovisual exploitation of sports competitions and events, available at the following address:
http://merlin.obs.coe.int/redirect.php?id=9239

● Decree No. 2004-699 of 15 July 2004 made to allow application of Article 18-1 of Act No. 84610 of 16 July 1984 concerning the commercialisation by the professional leagues of the rights to the audiovisual exploitation of sports competitions and events, gazetted (published in the *Journal Officiel*) on 16 July 2004; available at the following address:
http://merlin.obs.coe.int/redirect.php?id=9240

FR

FR – Law on Electronic Communications and Audiovisual Communication Services Promulgated

On 1 July the French Constitutional Council validated all the provisions of the law on electronic communications and audiovisual communication services with no reservations on their interpretation (see IRIS 2004-3: 8). The text transposes into French national law the six Community Directives of the "Telecoms Package". In addition to many changes made to the Post and Telecommunications Code, which is now to be called the "Post and Electronic Communications Code", the law largely amends the Act of 30 September 1986 on audiovisual communication.

The missions of the *Conseil supérieur de l'audiovisuel* (audiovisual regulatory body - CSA) are set out in greater detail and its powers strengthened. The new law lays down the details of the CSA's relationship with the *Conseil de la concurrence* (national competition board) on economic supervision, more particularly with a view to settling disputes between editors of services and distributors. Worthwhile changes have also been made to the sanction procedures; the CSA will now be able to decide on pecuniary sanctions for acts that constitute criminal offences, eg inciting racial hatred. In this respect the CSA has new powers in respect of non-European channels broadcast on satellites under French control.

The new law also lays down the rules for the CSA allocating frequencies and defines the various procedures for issuing authorisations for terrestrial broadcasting in analog and digital modes, and authorisations for services

other than terrestrial broadcasting. The scope of the CSA's work is thus extended to the media of Internet and ADSL. A further wide-ranging area of the new law relaxes the anti-concentration scheme applicable to television services broadcast terrestrially and changes the anti-concentration provisions applicable to radio and television services broadcast terrestrially in analog mode and in digital mode. The ceiling for holdings in local terrestrially-broadcast television channels is also abolished. On this point the Constitutional Council felt that such a relaxation "did not deprive the constitutional objective of diversity in currents of ideas and opinions of its legal guarantees; this remained a condition for the CSA issuing authorisations". For radio, the new wording of Article 423 of the 1986 law allowed the CSA the possibility of authorising changes in the holders of authorisations, accompanied as necessary by a change in the radio category, without having to use the procedure of calling for applicants. Such changes waiving the call for applicants should, however, remain the exception and strictly supervised, as the CSA stated in its Communiqué No. 565 of 29 July devoted specially to this subject. The new law on digital radio also makes provision for a permanent legal framework. ■

Amélie Blocman
Légipresse

- **Act No. 2004-669 of 9 July 2004 on electronic communications and audiovisual communication services, gazetted (published in the *Journal Officiel*) on 10 July 2004**
http://merlin.obs.coe.int/redirect.php?id=9240
- **Decision No. 2004-497 DC of 1 July of the French Constitutional Council, gazetted (published in the *Journal Officiel*) on 10 July 2004**
http://merlin.obs.coe.int/redirect.php?id=9240

FR

GB – Broadcasters Required to Offer Enhanced Services for Blind and/or Deaf People

The UK's Communications Act 2003 (Sections 303, 305) requires the Office of Communications (Ofcom) to "to draw up, and from time to time to review and revise, a code giving guidance" as to how broadcasters should ensure the "understanding and enjoyment" of programmes by persons who are deaf or hard of hearing; blind or partially-sighted; and persons with a dual sensory impairment (i.e. both). Such an undertaking will be fulfilled by the provision of adequate "Television Access Services".

Examples of such services are: subtitling, signing and audio description.

Additionally, under Section 310 of the Act, Ofcom is obliged to draw up a Code giving guidance regarding practices involved in the provision of electronic programme guides. Such practices must also include the appropriate incorporation of such features in electronic programme guides so that persons with "disabilities affecting their sight or hearing or both" can "make use of such guides for all the same purposes as persons without such disabilities" and "are informed about, and are able to make use of, whatever assistance for disabled people is provided in relation to the programmes listed or promoted".

Ofcom published draft proposals in December 2003. The Advisory Committee on Older and Disabled People assisted in the input to the drafting of the Codes. Ofcom published the two Codes on 26 July 2004. ■

David Goldberg
deeJgee Research/ Consultancy

- **Code on Television Access Services, available at:**
http://merlin.obs.coe.int/redirect.php?id=9251
- **Code on Electronic Programme Guides, available at: http://merlin.obs.coe.int/redirect.php?id=9252**
- **Information on The Advisory Committee on Older and Disabled People, available at:**
http://merlin.obs.coe.int/redirect.php?id=9253

GB – Review of BBC Online Services

The minister for Culture, Media and Sport commissioned a review of BBC online services, originally authorised in 1988, to contribute to the current review of the BBC's Royal Charter; it was carried out by Philip Graf, former chief executive of the newspaper publishers group Trinity Mirror.

The report considered the services in considerable detail and found that BBC Online delivers high quality material in an effective and user-friendly manner. However, some sites such as fantasy football, games sites and "what's on" listings are not sufficiently distinct from commercial alternatives or are inadequately associated with public service purposes. BBC Online may also have had an adverse effect on competition by deterring investment by commercial operators.

The report recommended that the remit and the strategic objectives which guide BBC Online should be clearly defined around public purposes and should be communicated to the public and the wider market. A "precautionary approach" to investment should be taken, so that if there is a "close call" between the public service benefits of a proposed BBC Online service and the costs, it should not be taken forward. The regulation by the Board of Governors of online services should be strengthened by the appointment of two new governors, one with specific new media expertise and one with specific competition law expertise. The Governors should also have access to independent analytical advice on issues such as market impact. At least 25% of online content (excluding news) should be supplied by external or independent suppliers by the end of 2006. BBC Online should prioritise news, current affairs, education and information which is of value to the citizen, and, within those areas, should prioritise innovative, rich interactive content.

The minister gave the BBC's Board of Governors until the end of October 2004 to respond to the review; the response is to include a redrafted remit for BBC Online and a statement of how the BBC intends to involve the private sector. On receiving the response, she will decide whether further conditions need to be imposed on BBC Online's remit. ■

Tony Prosser
School of Law
The University of Bristol

- **Department for Culture, Media and Sport, "Report of the Independent Review of BBC Online", available at:**
http://merlin.obs.coe.int/redirect.php?id=9241
- **For a summary and the minister's response see Press Release 085/04 of 5 July 2004, "Tessa Jowell Publishes BBC Online Review", available at:**
http://merlin.obs.coe.int/redirect.php?id=9242

GB – Regulator Publishes Criteria for Promoting Effective Co- and Self-regulation

The Office of Communications (Ofcom) is required by the Communications Act 2003 to promote the development of effective forms of co- and self- regulation (for the Act see IRIS 2003-8: 10). After consultation, Ofcom has now published its approach and the criteria that will be used for promoting co- and self- regulation. The criteria in fact mainly cover co-regulation rather than self-

regulation where it is noted that there is an absence of regulatory oversight; examples given of co-regulation are the regulation of telecommunications premium-rate services, arrangements for dispute resolution and broadcast advertising (the subject of a separate consultation – see IRIS 2004-7: 12).

The criteria are that co-regulation should be more beneficial to consumers than would be regulation solely by Ofcom, and that there should be a clear division of responsibilities between the co-regulatory body and Ofcom. Thus there should be published terms of reference or a memorandum of guidance, and approval by Ofcom of codes and guidance issued by the co-regulatory body. The co-regulatory scheme's procedures should be open, transparent and easy to use. Half to three-quarters of a co-regulatory organisation's governing body should be made up of independent representatives and it should be structurally separate from any existing industry bodies such as companies or trade associations. It should be adequately funded and staffed, and there should be near-universal participation by the parties to be regulated. The organisation should also have effective and credible sanctions which can be imposed promptly, although removal of a regulated company's ability to function must remain with Ofcom. Ofcom will need to audit the performance of co-regulatory organisations regularly and may need to agree standards of performance with them. Such organisations should be transparent and accountable, at a minimum publishing an annual report, and should act consistently with other types of regulation. There should be a genuinely independent appeals mechanism complying with the Human Rights Act 1998, for example through independent arbitrators from outside the industry appointed on fixed contracts.

Where the criteria are not applied in full, Ofcom will explain fully and publicly the rationale for a different approach. ■

Tony Prosser
School of Law
The University of Bristol

● **Office of Communications, "Criteria for Promoting Effective Co and Self-Regulation", available at:**
http://merlin.obs.coe.int/redirect.php?id=9244

GR – Institutional Changes

The institution of a General Secretariat for Communications with responsibility for audiovisual matters in place of the present Ministry for the Press and the Mass Media, which is now abolished, constitutes a significant structural change made by the Greek Government put in place by the legislative elections held on 7 March.

According to Article 2, paragraph 2 of Act No. 3242/2004 (voted last May by the Greek Parliament), the new body will be one of the Prime Minister's offices and he may appoint a person to be responsible for supervising its operation.

The Prime Minister has taken up this option and has appointed the present Minister and Government spokesman Mr Theodoros Roussopoulos, a former journalist on the Mega Channel private television channel.

When he first spoke before the Parliament (on 6 May 2004), Mr Roussopoulos said that the Government was currently looking into new provisions to promote the transparency of companies in the audiovisual sector, but had not forgotten several other provisions of the current Act No. 2328/1995 that were still not being applied.

The procedure for granting television licences operated by the ESR (the independent authority for audiovisual matters) (see IRIS 2004-1: 14) is currently in difficulty because some companies are unable to comply with the legal scheme in force. Moreover, the *Symvoulio tis Epikratias* (the highest administrative court in Greece) will soon be pronouncing on several of the provisions contained in the Presidential Decree, on the basis of which this procedure has been organised. ■

Alexandros Economou
Lawyer,
National Audiovisual Council

● **Act No. 3242/2004, *Efimerida tis Kyvernisews* (Official Journal) A' 102/24 May 2004, available at:**
http://merlin.obs.coe.int/redirect.php?id=9276
EL

HR – Journalists Sanctioned for Defamation

A feature that mentioned the business activities of a local businessman from Split was broadcast on a talk show on the main television station in Croatia (Croatian Television) in March 2002. The businessman felt defamed by this feature, and filed a suit at the Municipal Court in Split against a journalist and the editor of the show. The court accepted the claim and passed in 2004 a suspended sentence of two months with a probation period of one year. It was decided that the journalist had to pay all legal fees, while the editor of the TV show was acquitted. The court established that the journalist stated untrue allegations considering the business activities of the complainant. So for the first time in Croatia a prison sentence was imposed upon a journalist, although in summer 2003 the Croatian Parliament had passed the alterations and amendments of Criminal law according to which journalists are not criminally liable for defamation. Those who are successful in defamation proceedings will have to initiate civil proceedings for damages.

This situation caused negative reactions in Croatia and also in other parts of the world considering the fact that such a sentence is mostly unknown or highly disputed in democratic countries.

Also another journalist, ex editor-in-chief of "*Novi brodski list*", is serving a prison sentence since 19 July 2004. The municipal court in Slavonski Brod found him guilty of defamation because he published an article from "*Imperijal*" in "*Novi brodski list*" where the subject matter was the corrupt activities of the plaintiff. The court imposed the fine of HRK 12.600,00 on the journalist. Because he refused to pay, as he did not consider himself guilty, the court decided to send him to prison for 70 days. The journalist emphasized that going to prison was a protest against the court's decision and that this was his way of fighting for freedom of the media. This case has caused a lot of negative reactions as well, so that the Minister of Justice offered to pay the fine, which the journalist refused.

Finally, the Minister of Justice settled the fine, which again caused numerous and negative reactions, and she was blamed of infringing the main principles of the Constitution. ■

Nives Zvonaric
Croatian Radio-Television

HU – Decision on European Audiovisual Works

Gabriella Raskó
Legal analyst
Körmendy-Ékes & Lengyel Consulting
Budapest

Since 1 May 2004 – the day of Hungary's admission to the European Union – the requirements of The European Convention on Transfrontier Television and the Directive 89/552/EEC (as amended by Directive 97/36/EC) for a minimum quota of European audiovisual works have become effective in Hungary. This implementation has been achieved through the Hungarian Broadcasting Act.

Article 7 of the Broadcasting Act obliges broadcasters to reserve more than 50% of their annual transmission time for European works. In addition, 10 % of this time should be kept for European works created by producers independent of broadcasters, or obtained from producers of works that are not more than five years old. The law also includes an obligatory ratio concerning Hungarian works: one third of the annual transmission time should be reserved for them (7 % should be independent). If a broadcasting company fails to attain the above-mentioned proportions, it has to prove that its practice had been lawful.

On 5 May 2004, the National Radio and Television Commission (ORTT) published a Decision (627/2004) on the details of these programme-making requirements.

First of all, the document contains a list of those programme services which are exempted from this obligation:
- news, sports events, games, advertising, teletext services and teleshopping;
- television broadcasts that are intended for local audiences and do not form part of a national network;
- television broadcasts using other languages than the official ones of the European Union, the Member States of the Convention or the European Economic Area;
- television broadcasts which are receivable only in third countries and cannot be received neither directly nor indirectly in any Member State of the EU, or the Convention or the EEA.

In addition, Pay-TV-channels could also be exempted from the obligation at their request.

The ORTT is competent to exempt from the obligation's area of application partially or entirely specialized channels and also channels broadcasting through satellite. The decision depends on whether the broadcaster is, under the given circumstances of the market, able to fulfil the quotas - having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public.

ORTT may accept excuses for failing to meet the quotas in particular in the first three years after the foundation of a new channel – however the channel shall fulfill at least the half of the quotas in this introductory period also.

From the year 2005 on all broadcasters – except the ones exempt from the obligation – shall report annually on the fulfillment of the quotas.

ORTT will work out the principles of exemption until 31 December 2004, based on practical experiences and data provided by the broadcasters. ■

● *ORTT* Decision 627/2004 on European audiovisual works, available at: http://merlin.obs.coe.int/redirect.php?id=9267

HU

IE – Ban on Political Advertisements and Pre-election News Reports

Marie McGonagle
Faculty of Law
National University of Ireland
Galway

The BCI, which is the regulatory authority for the commercial broadcasting sector, has acted in recent months to prevent certain advertisements and news items being broadcast.

With regard to advertisements, the BCI in June 2004 banned advertisements for an anti-war concert. It did so on the basis that they contravened the Radio and Television Act 1988, which prohibits political and religious advertising and advertising in relation to a trade dispute (see IRIS 2001-7: 9, IRIS 2003-2: 11, IRIS 2004-3: 10). The concert was planned to take place in advance of the visit to Ireland of President Bush. The anti-war movement, which was promoting the concert, had recently registered its "Stop Bush Campaign" as a political party. Separate radio advertisements urging the public to attend protests against Mr. Bush were also refused by the BCI.

The BCI also banned news reports of criticisms by a leading Trade Union, SIPTU, of the Government's decentralisation plans. The reports were being broadcast by a number of commercial radio stations on the day before the European and local elections. The BCI's election guidelines (see IRIS 2002-7: 12), issued further to s.9 of the Radio and Television Act 1988, require stations not to broadcast anything in the 24 hours before polling which might reasonably be considered likely to influence the outcome of the poll. The decision to stop the reports followed a complaint by *Fianna Fáil*, the major party in government. RTÉ, which, as the public service broadcaster, was not affected by the BCI's ban, continued to broadcast the reports, in accordance with its own voluntary code.

In a separate incident, RTÉ asked the Christian Solidarity Party to remove references to the citizenship referendum from their party political broadcasts. The referendum was held in June 2004 on the same day as the European and local elections. The request followed a number of court rulings in recent years (see IRIS 1998-6: 7, IRIS 2000-2: 7 and IRIS 2001-7: 9) regarding balance in referendum broadcasts. ■

● BCI Election Guidelines, available at: http://merlin.obs.coe.int/redirect.php?id=9245

● BCI bans: The Irish Times 11,12,13 and 18,19 June 2004

● RTÉ request: The Irish Times 4 June 2004

PL – New Telecommucations Law Adopted

The legal framework for broadcasting activities consists of more than only the Broadcasting Act. There are e.g. regulations issued by the National Broadcasting Council, the Press Law, and some other specific provisions. Also the Telecommunications Law contains regulations relevant for broadcasters.

The Telecommunications Act of 16 July 2004, which entered into force on 2 September 2004, provides a completely new legal framework for telecommucations activities. It implements the EC framework on electronic communications of 2002.

The Act specifies that the term "telecommunications activity" includes the provision of telecommunication services, telecommunication networks and associated facilities.

Furthermore it describes the principles of performing telecommunication activities and their supervision, rights and obligations of telecommunications business operators, end users, rules for regulation of telecommunications markets and for universal service provision, the regime for the use of frequencies and satellite capacity (including reservation of radio and television frequencies for broadcasting purposes), the conditions of processing of personal data in the telecommunication sector, requirements for technical equipment, etc.

Among the provisions particularly important for the audiovisual sector are those referring to the reservation of frequencies for broadcasting purposes, the bill stipulated that frequency reservations for broadcasting purposes - regardless of their being used for analogue or digital transmissions - as well as its alterations and revocations are made by the Chairman of the National Broadcasting Council, in agreement with the President of the Telecommunications and Post Regulatory Office. The distribution of frequencies for digital broadcasting purposes has to be carried out on the basis of a competition conducted by the National Broadcasting Council. The Act defines the requirements and procedures for this competition, as well as the issues to be considered in the decision on frequency reservation.

Another important set of provisions refers to the registration requirements of the telecommunication activity (as defined above); so, for example, exploitation of the telecommunications network used for transmission or retransmission of radio or television programme services is subject to registration. According to the previous law, a telecommunications permission was required.

Nevertheless, according to the Broadcasting Act the broadcasting of a programme service still requires a broadcasting licence awarded by the Chairman of the National Broadcasting Council. In most cases the registering authority will be the President of the Telecommunications and Post Regulatory Office, but with regard to conditional access systems, electronic programme guides and digital signal multiplexing the registering authority will be the Chairman of the National Broadcasting Council.

One separate part of the new act is devoted to digital radio and television transmissions; it contains provisions relating to interoperability of the digital radio and television transmissions, open API, CA and EPG systems.

Interoperability of digital radio and television transmission services shall be ensured in respect to networks and devices used for the reception of digital radio and television transmissions, in particular by using an open application programme interface. More detailed requirements regarding interoperability will be included in a regulation issued by the Ministry of Infrastructure.

Telecommunications business operators providing conditional access systems are obliged to offer the broadcasters, on equal and non-discriminating terms, technical services enabling reception of digital radio and television transmissions by the means of decoders installed in their networks as well as possessed by the subscribers. More detailed conditions regarding this obligation may be set out in a regulation issued by the Ministry of Infrastructure, in agreement with the National Broadcasting Council.

Moreover, regarding conditional access services, rightsholders of industrial property rights to CA systems are obliged to conclude licence agreements with producers of consumer devices for reception of the digital radio and television transmissions, on equal and non-discriminatory terms. In particular, provisions of those agreements shall not prohibit, restrict or discourage the inclusion in such a device of a common interface, which enables connection with other conditional access systems as well as with elements of other conditional access systems (providing that conditions guaranteeing safety of transactions done by CA systems' operators are observed).

In addition, the Chairman of the National Broadcasting Council may, by virtue of the decision, impose on a telecommunications business operator an obligation to ensure access to API and electronic programme guides, in order to make digital radio and television transmission services accessible to end users. ■

Małgorzata Pęk
National Broadcasting Council
Warsaw

● ***Ustawa z dnia 16 lipca 2004 r. Prawo Telekomunikacyjne*** **(Telecommunications Act of 16 July 2004), Official Journal "Dziennik Ustaw" of 2004 No 171, item 1800**

PL

RO – Regulations for the Protection of Minors Amended Again

15 August 2004 saw the entry into force in Romania of new regulations to protect minors with respect to broadcast programmes. One of the most important new provisions introduced by Decision No. 249 of the National Audiovisual Council (CNA) (*Decizia CNA Nr. 249 privind protecţia copiilor în cadrul serviciilor de programe*) is that in the evening slot between 8 and 10 pm the only feature films that can be shown are those in which there are no violent scenes or only a few such scenes. The Decision also imposes a ban on all commercials containing scenes of violence, sexual innuendeo or bad language between 6 o'clock in the morning and 10 o'clock at night.

Horror films and thrillers featuring very violent scenes may only be shown between 11 at night at 6 in the morning. The same applies to entertainment programmes involving sex scenes and to the transmission of full-contact fights.

The new Decision shows that, as Romania's only regulatory body for electronic media, the CNA is taking its responsibility to defend public interests seriously. Children are in particular need of protection and need to be raised in accordance with the democratic values and ideals enshrined in the UN Convention on the Rights of the Child and the European Convention on Human Rights. This is a responsibility also entrusted to the CNA by regulations stemming from the Audiovisual Act No. 504/2002 (*Legea audiovizualului*) and the Protection and Rights of the Child Act No. 272/2004 (*Legea Nr. 272/2004*). Insofar as minors are recognised as having a right to protection of their own appearance in public and to protection of their own private and family life, the publication of compromising pictures, photographs, interviews and statements involving minors is prohibited, along with the publication of any pictures, photographs, interviews and statements that could endanger them in any way. There is also a ban on publishing any reports that could be damaging to the personalities of children under 14 who in the past have been the victims of physical, mental or sexual abuse or any other crime with the exception of kidnapping. Similarly, it is against the law to include under-14 year-olds in television programmes involving reconstructions of crimes or tragic events. The broadcasting of pictures and photographs of juvenile delinquents without prior notification to the youngsters concerned, their parents or legal guardians is also prohibited.

The new regulations that came into force on 15 August 2004 prohibit all television programmes whose main theme is the physical exploitation of young people or that show young people in situations incompatible with their age. Other regulations for the protection of minors continue to apply. For example, it is still illegal to broadcast children's programmes that make any reference to tobacco products or alcoholic beverages, include offensive behaviour, bad language, or sexual innuendo, or make fun of physical disabilities of any sort.

According to Decision No. 249 of the CNA of 1 July 2004, it is also forbidden to give detailed descriptions of suicide methods in news bulletins and broadcast debates. The CNA has also amended the criteria used to classify TV content by rating programmes according to how many scenes of violence and how many nude scenes they contain, the nature of such scenes, who the main characters are and what they are trying to achieve, the nature of any scenes where women are portrayed in degrading situations, and, lastly, the vocabulary used by the main characters or programme producers. ■

Mariana Stoican
Radio Romania International, Bucharest

● ***Decizia CNA Nr. 249 privind protecţia copiilor în cadrul serviciilor de programe*** **(Decision No. 249 of the National Audiovisual Council - CNA), published in the *Monitorul Oficial al României, Partea I*, No. 668/26.VII.2004**

RO

RU – New Statute on Referenda Adopted

On 11 June 2004 the State Duma of the Federal Assembly (Parliament) of the Russian Federation adopted the new Federal Constitutional Statute "On Referendum of the Russian Federation". President Vladimir Putin signed it into law on 28 June 2004. The Statute, which aims to make the system of electoral and referendum legislation uniform, repealed the Act with the same name of 10 October 1995.

The Statute provides for the procedure of initiating a nationwide referendum, formation of referendum commissions, balloting and vote tabulation. It guarantees access by observers to the voting process, sets up the list of questions that may not be brought in referendum, establishes the procedure for funding referenda campaigns. Along with general provisions, the Statute contains specific ones regulating media coverage of a referendum campaign; the relationship between the mass media entities, referendum commissions, and initiative groups; and the use of the new media technologies in referenda campaigns.

Chapter 9 of the Statute is devoted to the informational coverage of a referendum. Coverage shall include information and campaigning.

The term "information" had not been used in the previous Statute on Referendum. Information includes both equal and impartial coverage of the activities of referendum groups and political parties without any comments by the mass media, and publication of opinion polls. According to paragraph 1 Article 55 of the Statute the mass media are free to inform the public about referendum campaigns. At the same time journalists or other members of staff of mass media entities are not allowed to campaign for or against any referendum issues (sub-para.7 para.5 Art.60). The only exemption from the above-mentioned rules is in reference to those mass media entities established by political parties or referendum initiative groups (para.3 Art.55).

Dmitry Golovanov
Moscow Media Law and Policy Center

● **Federal Constitutional Statute *"O referendume Rossiiskoi Federatsii"* ("On Referendum of the Russian Federation") published in *Rossiiskaya gazeta* (official daily) on 30 July 2004, N 137-d, available at:**
http://merlin.obs.coe.int/redirect.php?id=9238
RU

For the purposes of the Statute, campaigning shall be considered as "activities that are performed in the course of a referendum campaign and are aimed at inducing or prompting participants of a referendum, either to support an initiative of carrying out a referendum by means of signing the subscription list, by other means, or to refuse to support such initiative, either to vote or refuse to vote, either to sustain or refuse to sustain a question(s) related to a referendum" (sub-para.1 para.2 Art.4). The only admissible means of participation of the mass media in the campaign process shall be by offering airtime or printed space for referendum groups. All state broadcasters shall be obliged to provide a certain amount of airtime free of charge for referendum campaigns. According to paragraph 2 Article 59 a broadcasting company shall be considered as a "state broadcaster" if it fulfils any of the following conditions: it has a state body as a founder or a co-founder; or it has state share in its capital stock; or it had received any funding from the federal or regional budgets in the course of the year prior to registration of the group that initiated a referendum. Both state and non-state mass-media companies are allowed to provide "initiative campaign groups" with paid airtime or printed space provided that such companies publish in advance the tariffs and the conditions of placement of the campaign on an equal basis for all participants of the campaign process (para.9, 10 Art. 59).

The relations between the mass media and referendum commissions shall be based on the principle of openness. Persons representing mass media shall be allowed to attend all sessions of the referendum commissions. The Statute establishes the duty of the Central Election Commission and the referendum commissions to impart to the mass media information concerning the polling date, the funding of the campaign, and the results of polling. The state mass media shall be obliged to publish a number of acts in regard to referendum commissions. Moreover, nationwide state broadcasters shall provide the Central Election Commission with at least 15 minutes of airtime per week free of charge in order for the Commission to inform the public about the rights of voters and the voting procedure. Regional state broadcasters shall be provided by regional referendum commissions with at least 10 minutes of free airtime per week for the same purposes.

One of the innovations of the Statute is the establishment of the duty of a governmental body to disseminate information via the Internet. The Central Election Commission of the Russian Federation shall be obliged to place well-defined information in the World Wide Web (for instance, texts of laws that shall be submitted for referendum, the ballot results, etc.). ■

RU – Administrative Reform Makes New Turn

The administrative reform which began shortly before the last Presidential elections (see IRIS 2004-5: 15) goes on. On 17 June 2004 the Government of the Russian Federation approved an Ordinance regulating the authority of the new Federal Service on Supervision over the Legality in the Sphere of Mass Communications and on Protection of Cultural Heritage (hereinafter - Federal Service on Supervision). Two other Ordinances of the same date regulate in detail the authority of the Ministry of Culture and Mass Communications and the Federal Agency on Press and Mass Communications.

The Ministry of Culture and Mass Communications shall be the federal executive body that elaborates governmental policy and enacts normative acts in the sphere of mass media and mass communications. A special provision in the Ordinance imposes on the Ministry the duty to draw up and approve an act regulating functioning of the Federal Competition Commission, the licensing body for the broadcasting. The Ministry co-ordinates and controls the activities of the Federal Service on Supervision and the Federal Agency on Press and Mass Communications

Subordinate to the Ministry of Culture and Mass Communications, the new Federal Service on Supervision shall have extensive powers in the sphere of mass media. It shall supervise the compliance of mass media and mass communication entities with the mass media law, compliance with copyright and neighbouring rights, it will license television and radio broadcasting and exhibition of audiovisual works in cinemas. The Federal Service on Supervision shall organise and provide for the functioning of the Federal Competition Commission. It is also empowered to register mass media entities. Earlier it was decided that all functions concerning registration (of mass media entities, as well as political parties and public organisations) should be concentrated in the competence of the united Federal Registration Service, part of the Ministry of Justice. However, because of the specific character of mass media activities the registration function was delegated to the Federal Service on Supervision.

Dmitry Golovanov
Moscow Media Law and Policy Center

In order to realize its powers the Federal Service on Supervision shall have jurisdiction over the territorial offices of the former Ministry of Press, Television and Radio Broadcasting and Mass Communications.

The Ordinance of the Government of 8 April 2004 (see IRIS 2004-5: 15) gave the Federal Agency on Press and Mass Communications the responsibility to list mass media and mass communications entities, television and radio broadcasters, and producers of audio and video in the federal state registers, to provide state services, to manage state property and to enforce the law in the sphere of mass media and mass communications. The Ordinance of 17 June 2004 specifies the above-mentioned responsibilities. The Agency shall arrange competitions for creation of socially-oriented television and radio programs, cinema and animation movies, supervise economic efficiency of subordinate state companies, keep an archive of obligatory copies of periodicals and manage the fund of television and radio programs, phonograms and other audiovisual works (except movies) which are in the federal property. One of the directions of the Agency's activities shall be co-operation with foreign states' authorities and international organisations.

On 29 June 2004 President Vladimir Putin signed into law the Federal Statute which amended a number of Acts including the Statute of the Russian Federation on Mass Media of 27 December 1991 (Article 6 of the 2004 Federal Statute).■

- **Federal Statute *"O vnesenii izmenenii v nekotorye zakonodatelnye akty Rossiiskoi Federatsii i priznanii utratívshimi silu nekotoryh zakonodatelnyh aktov Rossiiskoi Federatsii v svyazi s osuschestvleniem mer po sovershenstvovaniu gosudarstvennogo upravleniya"* ("On amendments to some legislative acts of the Russian Federation and annulment of some legislative acts of the Russian Federation in connection with realization of measures providing development of state government"), published in *Rossiyskaya gazeta* (official daily) on 1 July 2004, N 138, available at:
http://merlin.obs.coe.int/redirect.php?id=9246**
- **Ordinance of the Government of the Russian Federation *"O Federalnoi slujbe po nadzoru za sobludeniem zakonodatelstva v sfere massovyh kommunikatsii i ohrane kulturnogo nasledia"* ("On Federal Service on Supervision over the Legality in the Sphere of Mass Communications and on Protection of Cultural Heritage"), published in *Rossiyskaya gazeta* (official daily) on 24 June 2004, N 132, available at:
http://merlin.obs.coe.int/redirect.php?id=9247**
- **Ordinance of the Government of the Russian Federation *"O Ministerstve kultury i massovyh kommunikatsii Rossiiskoi Federatsii"* ("On Ministry of Culture and Mass Communications of the Russian Federation"), published in *Rossiyskaya gazeta* (official daily) on 22 June 2004, N 130, available at:
http://merlin.obs.coe.int/redirect.php?id=9248**
- **Ordinance of the Government of the Russian Federation *"O Federalnom agentstsve po pechati i massovym kommunikatsiyam"* ("On Federal Agency on Press and Mass Communications"), published in *Rossiyskaya gazeta* (official daily) on 22 June 2004, N 130, available at:
http://merlin.obs.coe.int/redirect.php?id=9249**

RU

RU – Statute on Copyright and Neighbouring Rights Amended

Dmitry Golovanov
Moscow Media Law and Policy Center

On 25 June 2004 the State Duma (parliament) of the Russian Federation enacted the Federal Statute amending the Statute of the Russian Federation On Copyright and Neighbouring Rights of 9 July 1993. On 20 July 2004 the President of the Russian Federation signed the statute into law, which entered into force on 8 August 2004 except for several provisions that will enter into force on 1 September 2006.

The Statute excludes that the subjects (constituent entities) of the Russian Federation may legislate on copyright and neighbouring rights. Only the federal legislature shall be authorized to enact laws concerning the given subject. This provision was introduced in the law in order that the statute complies with the 1993 Constitution of the Russian Federation. According to Article 71 of the Constitution regulation of civil law and intellectual property law shall fall within the competence of federal authorities.

The Statute extends the term of copyright protection of authors, co-authors, and also of those authors who died before their works were published, from 50 to 70 years after the author's death. These provisions shall be applicable both to works created after the Statute enters into force and to those works, whose 50-years term of protection had not expired until 1 January 1993. It means that the scope of works protected by law has increased considerably.

Another important innovation of the Statute is the strengthening of the protection of authors' rights. In case of infringement, any rightsholder shall have the right to claim for compensation either in a fixed sum of money from RUR 10,000 to 5 million (approximately from EUR 300 to 140,000), or in a twofold amount of the cost of copies of works, or in a twofold amount of the cost of rights to use similar intellectual property. Copyright infringement shall be sufficient grounds to claim and recover compensation while the fact of causing damages shall not be taken in consideration.

A new article introduces legal protection for technical means enabling the protection of copyright and neighbouring rights. According to Article 48(1) it shall not be permitted to perform actions aimed at removing limitations for the use of artistic works, as well as objects of neighbouring rights that are imposed by technical means. It also shall be prohibited to manufacture, disseminate, rent, use, import, and advertise any equipment or its components if such actions cause either the impossibility of using technical means of protection of the above-mentioned rights or ineffectiveness of the use of such means.

The Statute stipulates that an author shall have exclusive right to make public, to grant permission or to forbid the publishing of his work in the way providing the possibility of interactive access of any person from any location to this publication (e.g., via Internet). Both performers in regard to their performances and producers in regard to their phonograms shall have the same exclusive rights. These provisions regulating what is called "Internet copyright and neighbouring rights" will enter into legal force on 1 September 2006. ■

- **Federalnyi Zakon *"O vnesenii izmenenii v Zakon Rossiiskoi Federatsii "Ob avtorskom prave i smejnyh pravah"* (Federal Statute "On amendments to the Statute of the Russian Federation on Copyright and Neighboring Rights") published in *Rossiiskaya gazeta* (official daily) on 28 July 2004, available at:
http://merlin.obs.coe.int/redirect.php?id=9275**

RU

RU – Beer Advertising Restricted

On 20 August 2004 President Putin signed the Statute amending the Statute On Advertising of 18 July 1995. The new Statute, adopted earlier by the State Duma, entered into legal force 10 days after the date of its publication.

The new Statute imposes a number of restrictions on advertising of beer and beer-based products. The Statute regulates both the content and rules of placement of beer and beer-based product advertisements in the mass media. Such advertisements shall not contain information assuring viewers that the drinking of these beverages is harmless and (or) healthy, thirst-quenching,

Dmitry Golovanov
Moscow Media Law and Policy Center

important for the achievement of social, physical, or personal success. The Statute bans the use of images of people and animals in the advertising of beer and beer-based products. This last provision shall enter into legal force on 1 January 2005.

It shall not be permitted to broadcast television commercials promoting these beverages from 7 a.m. to 10 p.m. Mass media targeting special audiences, namely, minors, those focused on educational, environmental and medical issues shall not be allowed to carry such advertising.

Advertisements of beer and such products shall go be accompanied by the warning about possible health damage which may be caused by drinking. The warning shall take not less than 10 per cent of the time of any TV commercial promoting beer and beer-based products. ■

● ***Federalnyi Zakon "O vnesenii izmeneniya v statiyu 16 Federalnogo zakona "O reklame"*** **(Federal Statute On amending Article 16 of the Federal Statute "On Advertising"), published in *Rossiiskaya gazeta* (official daily) on 25 August 2004, N 3558, available at:**
http://merlin.obs.coe.int/redirect.php?id=9274

RO

SE – Overruns of Advertising Time in TV Broadcasts Allowed

Anna Månsson
The Swedish Broadcasting Commission

Sweden has made amendments to the Radio and Television Act to the effect that short overruns of the permitted advertising time per hour can be accepted if they were unforeseen.

Sweden has stricter rules on the amount of permitted advertising than is stipulated in the "Television Without Frontiers" Directive. According to the Swedish Radio and Television Act, advertising may be broadcast for not more than 8 minutes in each clock hour. In television broadcasts this amount may be extended to not more than 10 minutes during broadcasting hours between7.00 p.m. and midnight. The amount of advertising in television broadcasts may never exceed 10% of the total transmission time per day.

Since 1 May 2004, the Swedish law allows broadcasters to run over the limit for the amount of advertising normally permitted. The new provision (inserted at Chapter 7 Section 5 of the Act) shall however only be considered an exception. Overruns are only allowed if the broadcaster can show that the overrun is due to a recent event that the broadcaster did not reasonably have cause to take into consideration in programme scheduling and that the event was outside the broadcaster's control. It is never allowed to broadcast more than 12 minutes of advertising during a clock hour.

The idea behind the new provision is not to increase the amount of advertising but to increase flexibility, i.e. already scheduled advertising breaks can be moved to a different time. The new provision applies for example to live sports broadcasts where it does not suit to break for commercials during the game and to live galas and similar programmes that the broadcasting company does not produce itself. The exception can also be applicable to broadcasts of live news of great interest to the general public. ■

● ***Radio och TV-lag (1996:844)*** **(The Radio and Television Act (1996:844)), as last amended by Law 2004:147, available at:**
http://merlin.obs.coe.int/redirect.php?id=9250

SV

US – P2P Networks not Liable for Copyright Infringement

On 19 August 2004, the Ninth Circuit Court of Appeals unanimously affirmed the decision of the district court, which held the distributors of Grokster and Streamcast, software for the peer-to-peer exchange of computer files, not liable for copyright infringement (see IRIS 2003-6: 14).

The parameters of the analysis were set out in Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984). In that case, the Supreme Court held that the manufacturers of VCRs were not liable for copyright infringement by users of their machines. The court analyzed the case in terms of contributory infringement and vicarious liability. The first doctrine required the plaintiff to prove (1) direct infringement by a primary infringer, (2) knowledge of the infringement by the defendant, and (3) defendant's material contribution to the infringement. The doctrine of vicarious liability required proof of (1) direct infringement by a primary party, (2) a direct financial benefit to the defendant, and (3) defendant's right and ability to supervise the infringers.

Meticulously considering each of the elements in the above tests, the district and circuit courts easily found that Grokster and Streamcast were not liable under either theory. The primary factor in the Sony case was the finding that a VCR is capable of substantial noninfringing uses, particularly the time shifting of programs, which the Court concluded was a fair use. In the Grokster case, the plaintiffs had alleged that 90% of the files exchanged through peer-to-peer file-sharing infringed upon copyrights in music, about 70% of which was allegedly owned by the plaintiffs. In granting partial summary judgment to the defendants, the Ninth Circuit Court effectively recognized that even a small amount of noninfringing use will insulate distributors of peer-to-peer software from lawsuits against them, if the other factors weigh in favor of the distributors.

In reaching its decision, the Ninth Circuit distinguished three different methods of indexing used in peer-to-peer distribution systems. (1) A centralized indexing system maintains a list of available files in a central location. This was the method employed by Napster. The Ninth Circuit, in A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001) (see IRIS 2001-4: 13 and IRIS 2000-9:13; for a detailed explanation of the Napster case, see IRIS 2000-8:14 or IRIS FOCUS pp.21-27), found that, with such a centralized indexing system, the suppliers of the software were subject to copyright liability. Napster was effectively shut down by the court. (2) At the other extreme is a completely decentralized indexing system, as employed by Grokster and Streamcast in the instant case. It is this decentralized system that allowed the courts in this case to distinguish the Napster case, and reach the opposite conclusion. Some commentators read In re Aimster, 334 F.3d 643 (7th Cir. 2003) as reaching a conclusion inconsistent with the holding of the Grokster case. However, the Aimster decision had less to do with the merits of the case than it did with the burden of proof. The Grokster case may be explained by the court's willingness to accept the existence of substantial noninfringing use without requiring specific proof on the subject. (3) Some peer-to-peer software, such as that used by KaZaa, employ a "supernode" system, in which a select number of computers act as indexing servers. The par-

Edward Samuels
New York

tial summary judgment granted by the district court in the Grokster case was specifically limited to the Grokster and Streamcast defendants; the district court reserved judgment about the super-node systems, and the circuit court case therefore does not resolve the legal status of such hybrid systems.

Although each technology has to be weighed on its own merits, it is clear that at least some peer-to-peer distribution systems do not subject the distributors to copyright liability under current U.S. copyright law. We can expect that the record companies will shift their focus, as they have already begun to do, from the distributors of peer-to-peer software to (1) the users who actually make infringing copies of copyrighted works, and (2) technological protection systems, such as those authorized by the Digital Millennium Copyright Act. ■

● Metro-Goldwyn-Mayer v. Grokster, No. 03-56236 D.C. No. CV-01-08541-SVW, 19 August 2004, available at: http://merlin.obs.coe.int/redirect.php?id=9280

PUBLICATIONS

Van Eechoud, M.,
Choice of Law in Copyright and Related Rights:
Alternatives to the Lex Protectionis
NL: The Hague
2003, Kluwer Law International
ISBN 90 411 2071 8

Aharonian, G.,
Stim, R.
Patenting Art & Entertainment:
New Strategies for Protecting Creative Ideas
Publisher: Nolo Press
ISBN 1413300324

Greffe, P. et F.
La Publicité et la loi
FR: Paris
2004, Litec (Juris Classeur)
ISBN : 2-7110-0359-0

Tricot-Chamard, I.
Contribution à l'étude des droits de la personnalité –
L'influence de la télévision sur la conception juridique de la personnalité
PUAM-IREDIC
ISBN: 2731403381

Rehbinder, M., (Hrsg.)
Die Psychologische Dimension des Urheberrechts
Schriftenreihe des Archivs für Urheber- und Medienrecht
DE: Baden Baden
2003, Nomos Verlagsgesellschaft
ISBN 3-8329-0312-7

Delp, L.,
Das Recht des geistigen Schaffens in der Informationsgesellschaft
DE: München
2003, Verlag C.H. Beck
ISBN 3-406-49927-9

González, A.,
Der digitale Film im Urheberrecht
Urheberrechtliche Aspekte der Computeranimation und der Digitalen Filmnachbearbeitung.
Schriftenreihe des Archivs für Urheber- und Medienrecht
DE: Baden Baden
2002, Nomos Verlagsgesellschaft
ISBN 3-7890-8140-X

Gudera, L.,
Fernsehkabelnetze zwischen Wettbewerb und Regulierung
DE: Baden Baden
2004, Nomos Verlagsgesellschaft
ISBN 3-8329-0716-5

Meister, J.,
Das telekommunikationsrechtliche Frequenzplanungsrecht im System des allgemeinen Planungsrechts
DE: Baden Baden
2004, Nomos Verlagsgesellschaft
ISBN 3-8329-0801-3

AGENDA

Internet: Act II
24 – 26 November 2004
Organiser: IDATE
Venue: Montpellier
Information & Registration:
Tel.: +33(0)467 14 44 08
Fax: +33(0)467 14 44 00
E-mail: n.sulmoni@idate.org
http://www.idate.org/jii04/accueil_a.htm