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OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

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European Court of Human Rights: Recent Judgment on the Freedom of Expression and Information and the Publication of Photographs of a Suspect

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

On 11 January 2000 the European Court of Human Rights delivered judgment in the case News *Verlags GmbH & CoKG* v. Austria. The case concerns an injunction by the Vienna Court of Appeal prohibiting a magazine to publish photographs of a person (B) in the context of its court reporting. B was suspected of being responsible for a letter-bomb campaign in 1993. According to the Court, the prohibition on publishing such photographs in connection with reports on the criminal proceedings is to be considered as an interference with the applicant's freedom of expression and information. The Court agrees that the interference was prescribed by Austrian law and pursued a legitimate aim, as the injunction had the aim of protecting the reputation or rights of B as well as the authority and impartiality of the judiciary. The Court decided however that the injunction was disproportionate and hence violated article 10 of the Convention.

The Court recalled that "it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists". Furthermore the media have not only the right, but even the duty, according to the Court to impart - in a manner consistent with their obligations and responsibilities – information and ideas on all matters of public concern, including reporting and commenting on court proceedings. The Court emphasised that the criminal case relating to the letter-bombs was a news item of major public concern at the time and that B was arrested as the main suspect. Although the injunction in no way restricted the applicant company's right to publish comments on the criminal proceedings against B, it was underlined, however, that it restricted the applicant's choice as to the presentation of its report, while undisputedly other media were free to continue to publish B's picture throughout the criminal proceedings against him. An absolute prohibition on publishing pictures of B in the press reports of the magazine "News" was considered by the Court to be a disproportionate measure. As the Court underlines: "The absolute prohibition on the publication of B's picture went further than was necessary to protect B against defamation or against violations of the presumption of innocence". It followed from these conclusions by the Court that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society" and accordingly violated Article 10 of the Convention. ■

Judgment by the European Court of Human Rights of 11 January 2000, application no. 31457/96, News Verlags GmbH & CoKG v. Austria. Available in English and French on the ECHR's website at http://www.echr.coe.int

EN-FR

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• **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
URL http://www.obs.coe.int
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• **Comments and Contributions to:**
IRIS@obs.coe.int

• **Executive Director:** Nils A. Klevjer Aas

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• **Documentation:** Edwige Seguenny

• **Translations:** Michelle Ganter (co-ordination) – Brigitte Auel – Amanda Beddows-Larivière – Véronique Campillo – Paul Green – Martine Müller – Katherine Parsons – Patricia Priss – Erwin Rohwer – Stella Traductions – Nathalie-Anne Sturlèse – Catherine Vacherat

• **Corrections:** Michelle Ganter, European Audiovisual Observatory (co-ordination) – Géraldine Pilard-Murray (Frankreich) – Christophe Poirel, (Frankreich) – Susanne Nikoltchev, European Audiovisual Observatory – Candelaria van Strien-Reney, Law Faculty, National University of Ireland, Galway (Ireland)

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EUROPEAN UNION

European Council: Protection of Minors in the Light of the Digital Developments

Annemique de Kroon
Institute for Information Law University of Amsterdam

On 17 December 1999, the Council of the European Union made public its conclusions regarding the protection of minors in the framework of the developments in the digital audiovisual services. The Council recognises the need to adapt and complement current systems for protecting minors from harmful audiovisual content. The development of new technical means for parental control must not reduce the responsibilities of the various categories of operators, such as broadcasters and providers.

Member States are called on to:

- keep the effectiveness of current systems for protecting minors under review and to intensify their efforts with regard to educational and awareness measures;
- bring together the industries and parties concerned in order to examine ways to achieve more clarity in the way audiovisual content is evaluated and rated, both within and between the various sectors concerned;
- continue their work to further implement Council Recommendation 98/560/EC on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity.

In addition, the Council asks the Commission to:

- bring together the industries and parties concerned at European level for the examination mentioned above and to support the exchange of information and best practice regarding the protection of minors;
- encourage the industry to develop user-friendly products for parents and educators that enable them to benefit from the technological means to protect minors;
- examine possible Community actions to support and supplement Member State activities aimed at protecting minors from harmful audiovisual content through improved levels of media literacy and through measures to raise awareness. ■

Council Conclusions of 17 December 1999 on the protection of minors in the light of the development of digital audiovisual services, OJ C 8/9, 12 January 2000

DE-EN-FR

European Commission: Greater Transparency in Public Undertakings

Alexander Scheuer
Institute of European Media Law (EMR)

The European Commission has approved a draft Directive amending Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings.

The draft Directive describes in detail the problems that the Commission has faced in using the competences assigned to it under Article 86 of the EC Treaty. Under this provision, Member States are fundamentally forbidden from enacting or maintaining in force any measure contrary to the EC Treaty either for or in relation to public undertakings to which they grant special or exclusive rights. According to Article 86.2 of the Treaty, undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules contained in the Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community. The Commission can ensure the application of the provisions by means of decisions or directives (Art. 86.3).

In the Commission's opinion, the current level of liberalisation in the Member States, the range of different activities carried out by the undertakings in question, together with the existence of diverse forms of such undertakings mean that, in order that competition rules might be enforced, detailed data about the internal organisation of such undertakings should be made available, in particular separate and reliable accounts relating to different activities. Transparency is particularly needed with regard to the costs and revenues associated with the fulfilment of tasks for which special or exclusive rights have been granted, separate from the financing of other activities.

The impact of the proposed Directive on the audiovisual sector is likely mainly to affect the financing of public broadcasting in the Member States (see also IRIS 1999-3: 4,5). The cases still pending, in which the Commission is investigating the compatibility of relevant national provisions on the function of public service broadcasting and the nature and extent of its financing (see IRIS 1999-3: 4), are being investigated largely on a case by case basis. The proposal made in 1998 by the Competition Commissioner, whereby established criteria would be used to determine whether subsidies granted through licence fees or other State funding were compatible with the EU Treaty's rules on aid, was rejected by the Member States (see IRIS 1998-10: 7). Under this proposal, a broadcaster's need for State funding of tasks other than those relating to the provision of a public service was to be assessed in relation to the funds available to enable it to fulfil the public service remit. Under the approach that has now been adopted, the Commission is in fact heading in this direction, since this appears to be the only way it can utilise the competences assigned to it.

The Directive does not affect special regulations such as those set out in Directive 95/51/EC on the organisation of telecommunications and cable television networks. ■

Notice by the Commission concerning a draft Directive amending Commission Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings, OJ 1999 C 377, p.2

EN-FR-DE

IRIS LEGAL OBSERVATIONS
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NATIONAL

BROADCASTING

BA – Coverage of Violence in the Broadcast Media

Dusan Babic
Independent Media Commission

The Independent Media Commission (IMC), which is the sole licensing and broadcast regulatory authority in Bosnia and Herzegovina, on 13 December 1999 issued the decision to fine the Banjaluka-based *Nezavisna Radio i Televizija* (NRTV) for coverage of violence. The violation concerned scenes of slaughter from the Chechnya war, among which was a close-up sequence showing the death of an unknown person. The IMC Enforcement Panel found that the broadcast of these scenes by NRTV was in breach of the IMC General Terms and Conditions of License and of the IMC Broadcasting Code of Practice, Article 1.2 "Decency and Civility".

This decision has been criticized by the Vienna-based International Press Centre, which questioned the implied holding that the coverage of events in Chechnya, no matter how indecent, could incite a violent or unlawful act in B-H.

Nevertheless, the IMC sees the respective provisions contained in the Code of Conduct as being in line with the Council of Europe Recommendation No. R (97) 19 on the portrayal of violence in electronic media. ■

Decision of the Independent Media Commission dated 13 December 1999
EN

BA – *EROTEL* Dispute still Unresolved

Klaus Weyand
Institute of European Media Law (EMR)

On 15 November last year, Bosnia-Herzegovina's Independent Media Commission (IMC) ordered that the broadcaster *EROTEL* be shut down after it refused to stop the unauthorised retransmission of Croatian State Television (*HRT*) programmes on its frequencies.

The Bosnia-Herzegovina IMC was set up by the High Representative in order to regulate broadcasting activities and distribution. The IMC's main tasks are to award licences, draw up codes of conduct for broadcasters and monitor compliance with licensing conditions (see *Decision of the High Representative on the Independent Media Commission* of 11 June 1998, Articles 2, 5.1, 5.2 and 5.4). Measures to reorganise and restructure broadcasting include the founding, in accordance with the Broadcasting Act for Bosnia-Herzegovina (see IRIS 1999-8: 12), of broadcasting company *RTV*, whose programmes should be received throughout the country. *RTV* is supposed to guarantee national, cultural and linguistic diversity and development of the population of Bosnia-Herzegovina.

To this end, the High Representative had decided that *HRT* should cease its activities in Bosnia-Herzegovina by 1 October 1999. Frequencies previously used for the retransmission of *HRT* programmes are now available for the IMC to allocate as it sees fit. From now on, the IMC should allocate frequencies in such a way as to achieve the aforementioned goals and create a multicultural society.

HRT is the majority shareholder in *EROTEL*, a local broadcaster based in Bosnia-Herzegovina. *EROTEL* and Croatian Television broadcast their programmes on a total of more than 157 different frequencies, although they have valid licences for only 11 of those frequencies. Those licences were granted on condition that they only be used to broadcast federal television. In November last year, the IMC had proposed to *EROTEL* that it continue broadcasting for a limited period of 180 days. However, *EROTEL* was required to cease using unlicensed frequencies. The IMC also pointed out that the broadcast of *HRT* programmes was in breach of the code of conduct it had drawn up. Nevertheless, *EROTEL* refused to follow the IMC's instructions.

The IMC objects to the fact that the broadcaster is illegally transmitting *HRT* programmes from western Mostar. In the IMC's view, the ability to receive *HRT* in Bosnia-Herzegovina is a clear breach of international relations. Moreover, it hinders the establishment and development of new broadcasters. Adamant that *EROTEL* should only use authorised frequencies and should not broadcast any *HRT* programmes, the IMC ordered on 15 November that the broadcaster be closed down and asked the SFOR for its help to enforce the closure. ■

CH – Go-Ahead for Revision of the Radio and Television Act

The *Bundesrat* (Swiss Federal Council), meeting in cabinet on 19 January 2000, has laid down the principles governing revision of the *Radio- und Fernsehgesetzes* (Radio and Television Act – RTVG).

The new broadcasting arrangements will operate on the basis of a dual system. On the one hand, media enterprises are to be subject to market forces, with government influence reduced to a minimum and advertising and sponsoring rules relaxed in line with European standards. The objective therefore is one of the deregulation of the private sector. On the other hand, there is a strong public service sector from which the Federal Council demands high quality. The Swiss Broadcasting Corporation (SRG), for example, is subject to more stringent advertising and sponsoring rules than are commercial operators. Programmes targeting specific audiences cannot in principle be funded by license fee revenue. An independent SRG Council (*Beirat*) is to serve as a forum for the public monitoring and debate of the public service mandate. An independent, quasi-judicial body will continue to be responsible for the enforcement of programming policy.

Private radio and television operators are no longer to be bound by programming requirements. In future, license fees are only exceptionally to be used to offset topographical location disadvantages and are to benefit radio operators only. Broadcasting-like communication services with scant influence on the shaping of public opinion, such as teletext, will in future no longer fall under the RTVG. The Internet, however, is considered a separate case, whose content will only come under the RTVG in respect of broadcasting programmes whose ability to influence public opinion is comparable to that of radio or television.

Oliver Sidler
Medialex

The new law is also intended to take account of the fact that in future the same infrastructure will be used to transmit radio and television programmes and telecommunication services. Today's single license covering programming and transmission is to be replaced by separate licenses to be issued for programming and transmission infrastructure (frequencies, satellite, cable network, etc). Network operators will be obliged to ensure that programme providers have effective access to transmission networks.

The *eidgenössische Departement für Umwelt, Verkehr, Energie und Kommunikation* (Federal Department for the Environment, Transport, Energy and Communication – UVEK) now has the task of drafting a new radio and television bill. It is expected that the new bill will be submitted for consultation in the Autumn and presented to Parliament in the second half of the year 2001, entering into force at the beginning of 2004 at the earliest. ■

Discussion paper on the revision of the Radio and Television Act (RTVG) of 19 January 2000 available at http://www.uvek.admin.ch/doku/presse/2000/d/00012002.pdf

DE

DE – Agreement on Television Warning to Protect Minors

Wolfgang Closs
Institute of European Media Law (EMR)

The provisions on the protection of minors contained in Article 22 of the EC "Television without Frontiers" Directive (97/36/EC) are to be transposed into German law through the corresponding regulations of §3 of the *Rundfunkstaatsvertrag* (Agreement between the Federal States on Broadcasting – *RfStV*) as set out in the *4. Rundfunkänderungsstaatsvertrag* (4th Agreement to Amend the Agreement between the Federal States on Broadcasting), due to enter into force on 1 April 2000 (see IRIS 1999-5: 11).

Paragraph 3.4 of the Agreement states that programmes which, in accordance with sub-paragraphs 1-3, may only be broadcast between 10 pm and 6 am, must either be preceded by an acoustic warning or identified by the presence of a visual symbol throughout their duration. This provision applies in particular to films with a 16 or 18 certificate.

At the end of January, following extensive discussions, representatives of public and private television broadcasters agreed on a standard wording for the acoustic warning.

In future, therefore, programmes considered harmful to minors are to be preceded by the following spoken warning: "The following programme is unsuitable for viewers under 16 (or 18)". There will be no visual symbol during these programmes. ■

FR – Change in Terms of Reference for France 2 and France 3

Amélie Blocman
Légipresse

Article 48 of the Act of 30 September 1986 (as amended) provides that terms of reference fixed by decree should define the legal framework for the operations and obligations of the two national television companies. A decree of 31 December 1999 has now approved the amendments to the terms of reference for France 2 and France 3, originally defined in 1994 and already amended in 1996 and 1998 (see IRIS 1998-6: 10). On 15 December the official audiovisual monitoring body (*Conseil supérieur de l'audiovisuel* – CSA), to which the matter was referred in application of Article 48 of the 1986 act (as amended), delivered its opinion on the proposed decree. The changes made cover three areas: programme ethics, less advertising, and a greater contribution from the channels to audiovisual production.

Concerning programme ethics, there is to be a new provision, inspired by the agreements which the CSA has concluded with TF1 and M6, aimed at ensuring protection of the identity of minors in difficult situations. Thus the channels must "refrain from asking minors in difficult conditions in their private lives to give information, unless there is assurance of the total protection of their identity by an appropriate technical process and the assent of the minor and of at least one of the persons exercising parental authority". The CSA congratulated itself on this new provision; on the other hand, it deplored that there was no reference to representation on the air of the various elements of which the national community is comprised.

In accordance with the bill on the audiovisual sector voted last January by the Senate, the duration of advertising on France 2 and France 3 has been cut. Thus the amount of time devoted to broadcasting advertising on these channels may not now exceed six minutes per hour of broadcasting time as an overall daily average, and may not exceed ten minutes in any one hour, with each spot being limited to a maximum of four minutes. The CSA, in favour of reducing the public-sector channels' dependency on advertising, approved this two-minute reduction in the maximum duration of advertising in any one hour. On the other hand, it criticised the new provision relating to the broadcasting of promotional messages for the channels, the duration of which could not exceed the limit "fixed by the board of directors". Indeed, the CSA considers it inappropriate to involve the boards of directors in this matter, as it felt this was the task of the channels' managements.

Lastly, France 2 and France 3 are now required to invest 17 and 17.5 % respectively (compared with 16 and 17 % previously) of their net turnover for the previous financial year in orders for audiovisual works produced in the French language. ■

Decree no.99-1229 of 31 December 1999 approving the lists of tasks and terms of reference for the companies France 2 and France 3, and opinion no.99-5 of 15 December 1999 by the official audiovisual monitoring body (CSA) on the proposed decree approving the lists of tasks and terms of reference for the companies France 2 and France 3, published in the official gazette on 1 January 2000

FR

FR – Interim Report on Terrestrial Digital Television

On 17 January Raphael Hadas-Lebel, a member of the *Conseil d'État*, submitted the report of the working party on "terrestrial digital television" of which he was chairman to Catherine Trautmann, Minister for Culture and Communication. The working party had been set up in October 1999 with the brief of analysing and summarising the many contributions received in response to a wide-ranging consultation of the profes-

sionals concerned. These recommendations are to be used by the Government in drawing up various provisions on terrestrial digital broadcasting for integration in the Audiovisual Act, which is to have its second reading in Parliament in March.

The rapporteur stresses that plans for terrestrial digital television must nowadays form part of a project led by the operators themselves since the main feature at stake is content. The legal framework that the public authorities need to determine must therefore restrict itself to laying down a few essential rules and thereby allow for adaptation in the inevitable evolution that will ensue, both technically and economically. Indeed the working party affirms that although analogue technologies are on the way out, the transfer from analogue to digital will last at least a decade. During this period almost all those involved agree in wanting simultaneous digital broadcasting for the existing terrestrially broadcast channels.

These existing channels, in both the public and private sectors, want to benefit from digital broadcasting to strengthen their positions in the market. They are therefore proposing to enrich their current offer by introducing services associated with current programmes, offering the main programme or new channels in unencrypted form or on pay-television. Few new editors seem to be appearing on this market compared with the present audiovisual scene.

Public-sector television is covered in detail in the report. While the existence of a strong public sector is desirable, the rapporteur nevertheless considers that legislation should redefine the tasks of the public-sector service in the new context.

Another important point raised by the working party concerns the development of local and regional channels. Digital technology is an important factor in the success of these channels, but what is really important is still their financing, and this obviously has to involve advertising. The working party therefore regards as essential a revision of a number of the rules on the broadcasting of advertising (for example, prohibiting advertising on television for major retailers or the cinema sector).

Another very important feature of the report is that is reaffirms the regulatory role of the CSA in terms of both content and supports. Some adaptation would nevertheless appear to be necessary, concerning – in particular – the methods of allocating resources. Two approaches are considered on this point, by the broadcasters on the one hand, and by the CSA on the other. Mr Hadas-Lebel attempts to summarise these proposals, and his solutions highlight the multiplex operator on the one hand and the editor on the other. The report also proposes different procedures for allocating resources to the public and private sectors.

Lastly, the working party draws the Government's attention to the need to adapt the anti-concentration provisions to this new environment. It proposes abandoning the present ceiling, which prevents an operator holding more than 49% of the capital of a channel. ■

Charlotte Vier
Légipresse

***La télévision numérique : Propositions pour une stratégie de développement* (Digital Television: Proposal for a Development Strategy), Raphaël Hadas-Lebel, January 2000. Available at: http://www.culture.gouv.fr/culture/actualités/**

FR

HU – New issues for the IRISZ TV case?

On 22 February 1999, the Hungarian Supreme Court ruled in summary that the Hungarian National Radio and Television Commission (NRTC) did not act in accordance with law when it did not disqualify CLT-UFA's MAGYAR RTL's application for national terrestrial broadcast licences, awarded by NRTC in June 1997 after a public bid (Supreme Court judgement number Gf. VI.31. 856/1998/19, see IRIS 1999-3: 8; 1998-4: 9). In April 1999, NRTC filed a protest against this judgement in the Supreme Court. According to Article 270 of Act III of 1952 on Civil Procedure, unless otherwise prescribed by law, the parties to a case or third persons who have rights and legitimate interests related to it may submit a protest to the Supreme Court against any final decision passed in a civil case, claiming that the decision is unlawful or unfounded.

Basing its protest on legal grounds, the NRTC requested that the Supreme Court confirm the judgement of first instance, which had been favourable to NRTC and that the Supreme Court dismiss the plaintiff's appeal against the judgement of first instance including the refusal of IRISZ TV's modification to the claim.

On 24 November 1999, the Supreme Court issued an order, in which it referred to the Supreme Court's earlier judgement (see above Gf. VI.31. 856/1998/19 by another panel of the Supreme Court), in which it refused to decide on the merit of NRTC's protest. The Court referred to Article 29 of Act LXVI of 1997 on the Organisation and Management of Court (Act), which allows the suspension of the review of the IRISZ TV case until the decision in the "procedure of unity of law" in another case concerning bids for privatisation of state enterprises already pending before the Supreme Court has been rendered. The "unity of law procedure" is applied when one of the panels of the Supreme Court wishes to overrule the judgement of another panel of the Supreme Court concerning an issue of law (Article 29 Section 1 point b of the Act).

Now, on 7 December 1999, the privatisation of state enterprises unity of law procedure was completed with the following conclusions of the Supreme Court (Resolution Number 4/1999. PJE):

The court can address the allegations concerning violation of rules governing public bids for privatisation contracts.

The claims of the participants in public bids for privatisation related to the annulment of the contract concluded between the announcer and the winner of a privatisation bid could not be refused on the ground that the plaintiff lacked legal standing to sue.

The Supreme Court reasoned that the participants in public bids for privatisation contracts have a legitimate legal interest related to the outcome of the bids and therefore have legal standing to sue. The SupremeCourt also pointed out that even if the plaintiff is successful in his litigation, he may not be placed in the position of the original winner of the bid. The Supreme Court argued that because of the freedom of contract stipulated in the Constitution, courts can conclude contracts between parties only in exceptional circumstances, i.e. in instances explicitly foreseen by law. However,

Gabriella Cseh
Attorney at Squire, Sanders & Demsey

according to the Supreme Court this does not mean that the bidders for privatisation contracts can not seek legal remedies through the courts because of the damage caused to them as result of the bids. Furthermore, the Supreme Court pointed out that in cases where the announcer of such a bid does not select the winner in accordance with the relevant rules, the applicant suffers injury because he loses the chance of winning and lacks equal competition opportunities with other bidders.

The law of unity judgement discussed above does not contain direct reference to the IRISZ TV versus NRTC case. However, the Supreme Court announced that the final decision on this matter will be reached in 23 February 2000. Until that time at least one question remains open. How this judgement of unity will be interpreted by the panel of the Supreme Court finally ruling on the IRISZ case? ■

Hungarian Supreme Court, Resolution Number 4/1999. PJE, 7 December 1999

HU

IE – Broadcasts Regarding Referendums

Candelaria van Strien-Reney,
Law Faculty, National University of Ireland, Galway

The Irish Supreme Court has upheld a decision of the High Court (see IRIS 1998-6: 7) in a case concerning radio and television broadcasts in relation to constitutional referendums.

Under the Irish Constitution, there must be a referendum before any amendment to the Constitution can be made. In 1995 a referendum to remove the constitutional ban on divorce gave rise to much litigation regarding the conduct of referendum campaigns. Just before the referendum, the Supreme Court held that the government had acted unconstitutionally – inter alia by offending the constitutional guarantee of equality – in spending public money on a one-sided information and advertising campaign which sought to promote a Yes vote. However, a subsequent challenge, again in the Supreme Court, to the result of the referendum – in which the amendment was passed by a majority of less than one per cent – failed because it could not be proven that the one-sided campaign had materially affected the outcome of the referendum.

In the recent Supreme Court action, the Court decided that RTE (the national broadcasting service) had acted unlawfully in its allocation of free air time in relation to the divorce referendum. Under section 18 of the Broadcasting Authority Act 1960 (as amended), RTE is obliged, in broadcasting matters of public controversy or public debate, to present such matters objectively and impartially and without any expression of RTE's own views, while preserving RTE's right to transmit party political broadcasts. In the divorce referendum campaign, RTE had limited free air time to certain established political parties, and thus had allocated more than four times as much free broadcasting time to the arguments in favour of removing the constitutional ban on divorce as to the anti-divorce campaign. The Court said that this gave an advantage to the Yes side in the referendum, as party political broadcasts were "at least capable" of influencing the outcome of a referendum. RTE was not obliged to transmit party political broadcasts, but if it did, it must have regard to fair procedures and the Constitution. As the power to amend the Constitution lay with the people, no interference with the process could be permitted.

The Court noted that the decision might pose difficulties for RTE, as RTE might now be in a position where it "cannot safely transmit party political broadcasts during the course of referendum campaigns, as distinct from other campaigns". However, this was a matter for the legislature, rather than the courts, to resolve. ■

RTE, the Broadcasting Complaints Commission and the Attorney General v Coughlan, Supreme Court, 26 January 2000, 27 January 2000

EN

IT – Renewal of Concessions for Local Television Broadcasting

Maja Cappello
Autorità per le Garanzie nelle Comunicazioni

On 14 January 2000, the Italian Parliament converted into law the *decree-law* no. 433 of 18 November 1999 containing urgent provisions on local radio and television broadcasting (*Gazz. Uff.* no. 1999/273). Article one postpones the deadlines for concessions already granted to local television broadcasters according to law no. 78/99 (see IRIS 1999-4: 8) until their renewal under the new frequency plan (see IRIS 1998-10: 2 and 1999-8: 8) and in any event not later than 31 January 2001. Applications must be made before 30 June 2000. Article two of the Act defines the relevant areas for local broadcasting according to Italy's geographic division into regions and provinces, whereas the actual number of broadcasters will be fixed by the *Autorità per le garanzie nelle comunicazioni* (Italian regulatory authority in the communications sector) before 29 February next. Pursuant to the above-mentioned law no. 78/99 the national radio frequency plan will be adopted before 30 November 2000. Meanwhile, the *Autorità* is allowed to assign frequencies only to so-called *radio comunitarie* (radios with social purpose). In order to avoid dominant positions in the local broadcasting sector it is not permitted to apply for more than one concession in the same region or province. Two concessions are allowed only in the case of neighbouring local areas or where the same broadcaster already has been assigned two concessions at the time of the approval of the Act. ■

Law 14 January 2000, no. 5, *Conversione in legge, con modificazioni, del decreto-legge 18 novembre 1999, n. 15 recante disposizioni urgenti in materia di esercizio dell'attività radiotelevisiva locale e di termini di rilascio delle concessioni per la radiodiffusione televisiva privata su frequenze terrestri in ambito locale* (Gazz. Uff. 19 January 2000, Serie generale no. 75).
Relevant site: http://193.207.119.193/MV/gazzette_ufficiali/2000/14/11.htm

IT

NL – TV-Journalism Has its Limits

In a judgment of 28 January 2000, the President of the District Court of Amsterdam ruled that in some circumstances the right to not be damaged in one's honour or reputation by being exposed harshly to insinuations with possible harmful results, can be more important than the right of freedom of speech.

The case was as follows: a certain Mr. Van Dijk had a car crash. In his eyes his insurance agent had made not

enough effort to look after his interests in relation to the settlement of the costs caused by this crash. As a response to Van Dijk's lack of trust, the insurance agent ended their business relationship. Van Dijk sought the help of a television program called *Breekijzer* ("crowbar"). In this program complaints from consumers are given exposure by interviewing the relevant persons or companies in front of the camera without any prior warning. The TV-journalist from this program together with a camera crew visited the premises of the insurance agent. An employee who was present was only willing to talk without being filmed and asked the camera crew to leave the building. It is only when the police arrived, that the TV-journalist and his crew finally leave.

Fiona Vening
Institute for information Law University of Amsterdam

After this incident, the insurance agent wanted to prevent the broadcasting of the film made of his building and the employee. The insurance agency started summary proceedings against the TV-journalist and his team. The insurance agency argued that if the film were broadcast, the reputation of his company and the employees would be affected. The TV-crew defends itself on grounds of freedom of speech. They say that they exposed an abuse in a proper way.

The President decided that the conduct of the insurance agent towards Van Dijk was correct.

The film made by the TV-crew created the impression that the insurance agent had made not enough effort, and that impression was not justified. The employee who was filmed had a personal interest in seeking to prevent the broadcast. He had the right to forbid the exposure of his portrait in public without his permission, according to article 21 of the Dutch Copyright Act. The President decided that the broadcast would be harmful to the plaintiffs' reputation. An explicit ban on broadcasting the film was imposed on the TV-crew, and they were ordered to pay damages to the plaintiffs. ■

Pres. Rb.* Amsterdam, 28 January 2000, *Van Tuijl c.s.* vs. *Storms c.s.
NL

UK – Review of BSkyB's Position in Pay Television

The Office of Fair Trading, the main UK competition authority, is to undertake a competition review of BSkyB's position in pay television. This has been prompted by consolidation in the cable industry and the launch of digital TV. BSkyB both supplies satellite television programmes directly to viewers in the UK and grants to the operators of cable television the right to receive its Channels from satellites for onward transmission to viewers.

An earlier review had been carried out by the Office in 1996. As an outcome, BSkyB had given informal undertakings to meet competition concerns. These had committed the company not to bundle certain channels, and to publish a ratecard showing its wholesale prices for cable companies. The discount structure has to be approved in advance by the Director General of Fair Trading, although absolute levels of prices do not require approval. The undertakings also regulate BSkyB's conduct as holder of proprietary rights in the UK industry-standard encryption technology for analogue satellite TV. They further require the Company to submit to the Director General separate accounts for its wholesale and retail businesses (Broadco and Disco). These must include a notional charge for the supply of its channels to its own retail business, in order to allow the Director General to determine whether the retail business makes a reasonable profit when "purchasing" channels from the wholesale business. The undertakings were amended in February 1999 to permit the withdrawal from the wholesale ratecard of four of BSkyB's basic channels that were considered to lack market power, and the ratecard itself has been amended several times. ■

Tony Prosser
IMPS School of Law University of Glasgow

OFT to Review BSkyB Undertakings, Office of Fair Trading Press Release PN 01/00, 11 January 2000, available at:
http://www.oft.gov.uk/html/rsearch/press-no/pn01-00.htm

FILM

IE - The Banning and Unbanning of Films

Ireland's film censorship, notorious for the banning or cutting of thousands of films until the early 1970s, has been much less rigorous and therefore less contentious in recent years. The banning of films like "Natural Born Killers" in 1994 and "Showgirls" in 1995 became the exception. At the end of 1999, release on video of the Danish film, "The Idiots" was banned on the grounds that it included obscene or indecent matter that would tend to deprave or corrupt persons who might view it (Video Recordings Act 1989, s.3).

However, in 1999 also, the film, "A Clockwork Orange", was passed for cinema release after a period of 26 years. The film, which had been banned in 1973, was passed without cuts and given an 18s certificate. In accordance with the Censorship of Films Acts, it could have been resubmitted to the film censor's office as far back as 1980, a period of 7 years following the ban. By that time, however, the director, Stanley Kubrick, had imposed his own ban on it, following years of controversy in the U.K. and claims that it had triggered copycat crimes. Since Britain and Ireland form a single market for film distribution, Kubrick's self-imposed ban extended to Ireland. Following his death last year, the film's distributors, Warner Brothers, negotiated its re-release.

A few months earlier, the British gangster film, "Get Carter", banned in Ireland in 1971, had its first cinema release, although it had been released on video some time earlier and indeed had been shown on British television, which is available in Ireland.

Meanwhile, one of the recommendations of the Film Industry Strategic Review Group, which reported in August 1999 (IRIS 1999-8: 12), that the government impose a levy on cinema-goers to assist the Irish film industry, has been rejected. However, the tax incentives for investing in films (Section 481 of the Taxes Consolidation Act 1997) (IRIS 1999-8: 12), which had been under threat, have been secured in the Budget for another 5 years. ■

Marie McGonagle
Faculty of Law, National University of Ireland Galway

MT-Film Commission Officially Launched

Klaus Schmitz
Consultant
Malta

The Malta Film Commission (MFC), set up in 1999 under the auspices of the Ministry for Economic services was officially launched on 3 February 2000. Winston Azzopardi, nominated last year, has now been appointed Film Commissioner. MFC defines itself as a non-profit making organisation offering its services free of charge to foreign film and television productions. As well as helping to raise awareness of Malta as a film location, it also serves to facilitate and assist film crews before and during their stay on the island, by dealing with issues ranging from permits to organising hotels accommodation to providing local crew.

The promotion of Malta as a film location is backed by a number of political initiatives. Government officials have been quoted saying that a policy for the film industry should be incorporated in the Film Act, currently in preparation. At present the question of if and how incentives under the Industrial Development Act (IDA) can be extended to the film industry as a whole is being examined. Under the current legislation only support services to the film industry qualify for receiving benefits.

Another important item on the agenda is the furtherance of co-operation with other countries. Malta is looking at how to co-operate with countries offering financial assistance as an incentive to film companies to use services and locations available in Malta. In the light of Malta's renewed application for EU membership, the country also aims at obtaining funds under the Media+ programme starting next year. ■

NEW MEDIA/TECHNOLOGIES

BE – Racism and the Internet

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

On 22 December 1999, the regional criminal court in Brussels applied for the first time the act of 30 July 1981 that makes it a criminal offence to include racist or xenophobic comments in texts circulated on the Internet. W.E., a civil servant, was held to be the person behind a number of manifestly racist messages circulating within a particular newsgroup (soc.culture.belgium). The court found that analysis of these messages clearly indicated the deliberate intention by the person writing them to encourage segregation, hate or violence in respect of the Moroccan and African communities in Belgium, thereby meeting the conditions of publicity required by the law on discrimination. The communication of racist messages in an Internet newsgroup is thus considered to be a form of publicity covered by the act of 30 July 1981. According to the court, it is only necessary for it to be possible to read the messages for the condition of publicity to be satisfied. The court sentenced the accused to six months' imprisonment (with three years' suspension) and ordered a fine of BEF 100 000 and payment of the sum of BEF 100 000 to the complainant, the *Centre pour l'Egalité des Chances et la Lutte contre le Racisme*. The court took into account the serious nature of the facts established against the accused, which it found all the more unacceptable since their author was "a police officer whose vocation should be to respect and pursue execution of the law rather than break it ".

It is interesting to note that the court declared itself territorially competent to deal with the offence, as the libel, racist slander and insults had been proffered wherever their circulation was likely to have been received or heard. In the case in question, the court took into account that it was an established fact that the reception of messages and participation in a newsgroup was possible anywhere in Belgium and more particularly within the legal district of Brussels.

Although the racist texts circulating or accessible on the Internet could constitute offences under legislation on the press, which are normally dealt with exclusively by the assize court, the regional criminal court was nevertheless empowered since May 1999 to deliberate on the criminal nature of racist texts circulated by means of the press (or by Internet). Indeed, since the amendment of Article 150 of the Constitution on 7 May 1999, offences under legislation on the press inspired by racism or xenophobia are no longer referred to the people's jury of the assize court, the regional criminal court is competent to deal with such cases. ■

Case law in application of the act of 30 July 1981 making certain acts inspired by racism or xenophobia criminal offences, available on the following website: http://www.antiracisme.be/fr/cadre fr.htm

FR

DE – Liability of an Internet Service Provider

Wolfram Schnur
Institute for European Media Law (EMR)

In a judgment of 4 November 1999, the Hamburg Regional Court of Appeal (*Oberlandesgericht* - OLG) ordered an Internet service provider (ISP) to desist from further co-operation in the unlawful competition activities of a website operator.

Acting on behalf of the website operator, the ISP arranged registration of a ".com" domain, registering itself under "tech-c", "zone-c" and "billing-c", and citing the website operator as an administrative contact under "admin-c". As is normal practice in respect of a domain name registration, the ISP also provided one of the two nameservers required for incorporation into the domain name of the lettering required for website address purposes (e.g. http://www.xyz.com).

The website operator, a company with its headquarters outside Germany, ran worldwide gambling activities via the website in question without obtaining the necessary authorisation in Germany. The Court held that illegal gambling constituted a ground for declaring a violation *contra bonos mores* of § 1 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - UWG).

The Court considered the ISP's supporting role as constituting a separate infringement of competition law, thus contesting the view that technical services cannot be held liable in accordance with § 5 para. 3 of the *Teledienstegesetz* (Teleservices Act - TDG). Unlike access providers, who merely provide access to the Internet and have no influence over the content on offer, and who are therefore exempt from liability, the registration of a domain name and the resulting offer of a nameservice amounted to a contractual relationship between the content provider and the technical service provider. Nevertheless, even in the case of the registration of a domain, the Court considered the assumption of liability to depend on knowledge of the website operator's breach of competition. In the present case, the continued use of the nameservice and/or continuation of activities under tech-c, zone-c and billing-c in the knowledge of the content provider's breach of competition were considered to constitute the quality of distortion required to invoke § 1 UWG. ■

Judgment of the *Oberlandesgericht* Hamburg (Regional Court of Appeal) of 4 November 1999; file No. 3 U 274/98

DE

DE – Transmission of Electronic Press Reviews via E-Mail

Klaus Weyand
Institute for European Media Law (EMR)

The *Oberlandesgericht* Cologne (Regional Court of Appeal – OLG) has granted a temporary injunction against the transmission of electronic press reviews via E-Mail on the grounds that it is incompatible with copyright law.

The defendant collecting society "Wort" had concluded an agreement with a company using an electronic press review on its in-house communication system for the payment of copyright dues. The collecting society was prohibited from concluding agreements with third parties providing for the scanning and storage of press reviews and their dissemination via E-Mail as it was deemed to infringe copyright law. The OLG found a violation of § 97 para. 1 of the *Urhebergesetz* (Copyright Act – UrhG) that could not be justified under § 49 of the same. As an exception, § 49 of the UrhG had to be narrowly defined and was found not to apply in the present case as electronic press reviews entailed a far greater infringement of user rights than is the case of press archives in paper form. Computers were deemed to provide general access to stored information and thus permitted a different and more rapid use of articles when compared with press reviews in paper form. In particular, individual contributions when placed on line could be freely used by anyone in unlimited numbers. The circle of users could not be said to be limited as is the case in respect of traditional press reviews. For these reasons, reference to the traditional newspaper was largely rejected. Furthermore, any possible re-use of the texts could not be excluded in the light of modern technology, which was also a violation of the Copyright Act. The primary aim and function of the Copyright Act was to permit a critical discussion of already published articles. Electronic transmission via E-Mail, however, sought merely to inform readers and as such was considered to fall outside the Act's protective provisions. ■

Judgment of the *Oberlandesgericht Köln* (Regional Court of Appeal) of 30 December 1999, file No. 6 U 151/99

DE

DE – Generic and otherwise Unqualified Domain Names Breach Competition Law

Karina Griese
Institute for European Media Law (EMR)

The *Oberlandesgericht* Hamburg (Regional Court of Appeal – OLG) in a judgment of 13 June 1999 dismissed an appeal against a ruling of the Hamburg District Court (*Landesgericht* -LG) obliging the defendant to desist from using his Internet domain name "www.mitwohnzentrale.de" without further qualification for commercial purposes. The plaintiff was a competitor in the commercial short-term rented property market.

The OLG deemed use of the domain name to amount to unfair competition within the meaning of § 1 of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act - UWG). In the Court's view, the registered name at issue led to a channelling of custom that breached competition rules and to an effective monopoly of the generic term Mitwohnzentrale. Since a substantial proportion of Internet users sought access to a homepage by keying in an Internet website address rather than using a search engine, use of the word Mitwohnzentrale led users, who had no further cause to search for other service providers, directly to the defendant's homepage. The defendant was considered to have profited from this user behaviour in breach of competition law.

A further decisive element was the fact that the domain name did not refer to a given structure, but was a generic trade description. Even from a trademark point of view, the term Mitwohnzentrale was a purely descriptive, unqualified generic denomination that by its very nature could not be protected. The use of generic denominations that of necessity were unprotected by trademark law was not intended to denote individual service providers outside the sphere of protection enjoyed by registered or established trademarks.

In conclusion, the Court did however state that the defendant's unfair conduct did not require him to renounce his domain name entirely; it would be enough to oblige the defendant to qualify it sufficiently.

The defendant has appealed this decision. ■

Judgment of the *Oberlandesgericht Hamburg* (Regional Court of Appeal) of 13 July 1999; file No. 3 U 58/98

DE

FR – Recommendation by the BVP on Advertising on Internet

Charlotte Vier
Légipresse

The advertising standards board (BVP), the self-regulatory body of the advertising professions, has just published a recommendation on advertising on Internet. The recommendation refers at length to the revised guidelines drawn up by the International Chamber of Commerce (ICC) in 1998. The rules laid down by this text are aimed at both defining the limits of advertising activity and guaranteeing the legality of the content of messages circulating on the Internet.

Thus the first point concerns the identification of the advertiser originating an advertising message; the identity must be clear and easy to access by all Internet users. Beyond that, advertising, as for the printed press or the audiovisual media, must be distinguished from other types of information. The same applies to advertising messages circulated by e-mail.

The charges for access to a message or a service must also be transparent. If these are more than the basic price, the user must be informed clearly and in advance. Lastly, advertisers are required to respect the right of Internet users to refuse the proposals made to them on-line.

The other provisions concern the content of the advertising circulated in this way; the principles are set out here in the classic manner – advertising must be decent, honest and truthful. The text requires marketing professionals to be particularly careful that no message may be perceived as being pornographic, violent, racist or sexist. In the same way, the BVP refers to the ICC texts and to its own recommendation concerning children, and recalls that advertising aimed at children must respect ethical rules.

Lastly, the text devotes a considerable amount of space to the protection of privacy; professionals are invited to inform consumers of the use to which the data concerning them could be put and to give them the possibility of indicating that they do not wish such information to be divulged. ■

***Recommandation "la publicité sur Internet" du Bureau de vérification de la publicité* (Recommendation "Advertisement on Internet" of the BVP, January 2000**

FR

IE – Hotline on Child Pornography

Marie McGonagle
Faculty of Law, National University of Ireland Galway

At the end of November 1999, the Internet Service Providers Association (ISPA) launched a hotline service aimed at rooting out child pornography on the Internet in Ireland, either by removing it or by referring it to the *gardai* (police). The hotline will be available to receive complaints from the public about any child pornography found on the Net in Ireland. The intention is not to block web sites but rather to remove harmful material and, where the material is hosted outside the country, to pass the information on to the relevant organisation and co-ordinate removal of the material, if appropriate.

The hotline, which is financed by the ISPA, EU and the Irish Government, follows from the recommendations of the government's working group on illegal and harmful use of the Internet. The group, which reported in 1998, recommended the establishment of a system of self-regulation. As well as a complaints hotline, it would include common codes of practice and common acceptable usage conditions, an advisory body to co-ordinate measures to ensure a safe Internet environment and the development of an awareness programme to empower users to protect themselves or others in their care. In 1998 also, the Child Trafficking and Pornography Act was passed, which provided wide-ranging definitions and penalties (see IRIS 1998-10: 10).

Initially, the hotline will concentrate on child pornography but it is believed that the system and procedures being put in place could in the longer term be applied to other illegal uses of the Internet, such as copyright infringement or piracy. ■

NL – Damages for Electronic Rights Infringement

Bernt Hugenholtz
Institute for Information Law University of Amsterdam

On 22 December 1999, the Amsterdam Court awarded damages to three freelance journalists whose newspaper articles had been republished in electronic form without their permission. For several years, newspaper publisher *De Volkskrant* had posted a selection of articles from its printed version on its Internet web site, and had produced quarterly CD-ROM compilations containing all newspaper copy in full-text. *De Volkskrant* was ordered to pay 3 % of the journalists' annual honorarium for each initial year of web site republication, and 1,5 % for each subsequent year. For CD-ROM uses the percentages were set at 4 % and 2 % respectively.

In an earlier decision (see IRIS 1997-10: 6), the Court had ruled that the unauthorised republication of articles on CD-ROM and via the World Wide Web amounted to copyright infringement. According to the Court, such electronic uses constitute restricted acts, subject to the right holders' authorisation. The Court rejected the argument put forward by *De Volkskrant*, that the journalists had tacitly granted permission for electronic uses by submitting their articles for publication in the journal. ■

***Rechtbank Amsterdam* 22 December 1999, no. H99.1468 (*Heg c.s.* v. *De Volkskrant*)**
NL

UK – New Digital Law Promised

David Goldberg
IMPS-School of Law University of Glasgow

A joint announcement has recently been made by the Secretary of State for Culture Media and Sport and the Trade and Industry Secretary, signaling the publication later this year of another White Paper, proposing a new law to "take account of the convergence of the communications industries." On June 17 1999, an earlier White Paper, "Regulating Communications: The Way Ahead" was published. The aim of the new White Paper will be to take into account the proposals that have emerged from the European Union, namely "Towards a New Framework for Electronic Communications Infrastructure and Associated Services". The Government intends not just to take account of convergence in the telecommunications, broadcasting, computer and information technologies industries, but also to make and keep the UK as "a world leader in providing communications services." A "joint Communications Reform Team" has been established; it will welcome comments and suggestions and publish comments and statements on new legislation. There is a direct email address for the Team: comms-reform@ culture.gov.uk ■

"New Legislation for the Digital Age", Press Release P/2000/72 (jointly by DT and DCMS), Telephone: 020 7215 2345 (DTI); 020 7211 6267 (DCMS)

RELATED FIELDS OF LAW

AZ – New Media Law Changes Principles of Media Regulation

Pavel Surkov
The Moscow Media Law and Policy Center (MMLPC)

On 9 December 1999 the Azerbaijani Parliament adopted in the third hearing the new Mass Media Statute containing several changes to the structure of relations between media and government.

First, all news media of Azerbaijan shall now be registered with the Ministry of Justice and not any longer with the Ministry of Press and Information.

Second, the process of licensing has been altered. The new act stipulates the creation of a government agency, though without naming it, that shall control the process of broadcasting licensing. The agency will have the power to withdraw broadcasting licenses that it finds violate broadcasting regulations.

Third, new rules concerning the accreditation of journalists have been introduced. According to Article 50 of the Statute, accreditation can be withdrawn without a decision of the court if in the opinion of the accrediting offices accreditation rules are violated by either journalists or editorial staff, or if derogatory information, perverted news or false facts are published by journalists.

Finally, the Statute introduces the new right of government officials to bring lawsuits against journalists whose work, in their view, "insults the honor and dignity of the state and the Azerbaijani people" or is "contrary to the national interest".

The Statute shall enter into force within 70 days of the third hearing by a separate Decree of the President of Azerbaijan that brings into force any statute of the parliament. ■

The Statute "On Mass Media of Azerbaijan", published in Azerbaijani in *Baku Istiglalyat* on 21 December 1999

DE – Right to Privacy in Relation to Portrayals of Parents with their Children

Klaus Weyand
Institute for European Media Law (EMR)

The *Bundesverfassungsgericht* (Federal Constitutional Court - BVerfG) in its judgment of 15 December 1999 has reinforced the protection afforded parents under the general right to privacy enshrined in Art 6 paras. 1 and 2 of the *Grundgesetz* (Basic Law - GG) with regard to the publication of portrayals of parents bestowing their attentions on their children.

The complaint lodged by Caroline of Monaco concerned a ruling of the *Bundesgerichtshof* (Federal Supreme Court) of 19 December 1995 (file No. VI ZR 15/95). In proceedings before the latter against a newspaper publisher, the plaintiff and appellant sought an injunction to stop publication of photographs of her private life. Three out of a total of eight photographs showed her during leisure-time activities with her children, while the other five featured the appellant alone or with other adults in her everyday private life (see IRIS 1999-10: 7).

Judgment of the *Bundesverfassungsgericht* (Federal Constitutional Court) of 15 December 1999; file No. 1 BvR 653/96

DE

The BVerfG dismissed the appeal. The BVerfG declared the appeal admissible and found in favour of the plaintiff in respect of the photographs in which she was featured together with her children. The BverfG held that private life, as protected by the general right to privacy in accordance with Art 2 para. 1 together with Art 1 para. 1 GG, could not be restricted to the domestic sphere. Individuals needed areas to which they could retreat and in which they could move freely out of the public eye. Where children were concerned, the areas in which they could move freely out of the public eye needed greater protection than that required by adults. Children needed special protection as they could not yet be expected to assume responsibility in their own right. As it is parents who are primarily responsible for the child's personal development, the specific parent-child relationship in principle also came under the protective provisions of the law.

The substance of the general right to privacy was reinforced in such circumstances by Art 6 paras. 1 and 2 GG, in which the state is obliged to ensure the conditions required for the healthy development of children. Such an obligation would in principle also apply when circumstances did not permit physical seclusion.

The BVerfG further held that the press freedom enshrined in Art 5 para. 1 second indent GG in principle also included publications and supplements as well as their illustrations. This also applied to the publication of photographs featuring public figures in everyday or private contexts. Only in respect of the greater degree of protection necessitated by the parent-child relationship was there a need to derogate from the usual principles. ■

DE – Bill to Extend Media Employees' Right of Refusal to Give Evidence

Karina Griese
Institute of European Media Law (EMR)

The Federal Government has presented a draft Bill to amend the *Strafprozessordnung* (German Code of Criminal Procedure – *StPO*). The Bill aims to address the problems of guaranteeing freedom of the press and broadcasting, as set out in the Basic Law, on the one hand, whilst providing a functional criminal justice system capable of establishing the truth on the other.

In the Government's opinion, it is unsatisfactory that the right of refusal to give evidence should apply only to periodicals, broadcasts and statements made by third parties. Currently, a journalist's right to refuse to disclose material he has prepared himself is only granted in isolated cases, not by the *StPO* but by Article 5.1.2 of the *Grundgesetz* (Basic Law – *GG*) (see also IRIS 1999-10: 7).

Under the new Bill, non-periodical publications, communications and information services designed to provide public information or promote the formation of opinions, together with television reports, are to be covered by the right of refusal to give evidence. Material prepared by journalists and, – for the first time – information gathered in connection with their employment, are also to be protected.

Federal Government Draft Bill to amend the Code of Criminal Procedure; http://www.bmj.bund.de/inhalt.htm

DE

The Bill requires that, in a broad range of areas, freedom of the press, broadcasting and film should take precedence over the interests of criminal justice, unless the evidence concerned would help solve a serious crime. German law defines a "serious crime" as any offence for which a prison sentence of at least one year may be imposed. On the other hand, the interests of criminal justice are secondary if disclosures relating to prepared material or information would jeopardise the anonymity of informants and their evidence.

Against the wishes of the German Union of Journalists and the Federal Union of German Newspaper Publishers, the reasons given for the Bill state that loss of the right of refusal to give evidence will not be dependent on there being a strong suspicion that a particular person has committed a crime. Rather, any degree of suspicion will suffice. Current law, according to the Bill, does not state that the admissibility of bringing or using evidence in a main hearing should depend on the degree of suspicion. Otherwise the admissibility of evidence would have to be constantly assessed, for which there is no provision in the current Code of Criminal Procedure.

The provisions of the ban on search and seizure are also amended by the Bill. The precise meaning of the proportionality principle in the weighing up procedure is expressly mentioned in the Bill. Powers of seizure may only be used in exceptional circumstances, ie if the investigation would otherwise be pointless or significantly impeded. ■

ES – New Act on the Protection of Personal Data

The Spanish Parliament has approved a new Act dealing with data protection. This new Act abrogates and supersedes the *Ley Orgánica 5/1992, de Tratamiento Automatizado de datos de carácter personal* (Organic Act 5/1992, on the regulation of the automatic processing of personal data). The new Act has been passed in order to incorporate into Spanish Law the EC Directive 95/46/EC of the European Parliament and of the

Alberto Pérez Gómez
Dirección Audiovisual Comisión del Mercado de las Telecomunicaciones

Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. According to Art. 32 of this Directive, Member States had to bring into force the provisions necessary to comply with the Directive no later than three years after the date of its adoption, i.e., before 24 October 1998. Although that deadline was not met, the necessary implementing measures have finally been adopted.

According to Art. 1 of the new Act, the principal aim of this provision is to protect the fundamental right to personal and family privacy and honour in relation to the processing of personal data. In order to make this protection effective, the new Act establishes some requirements that are to be satisfied in order to render the processing of data lawful. These requirements deal with data quality, information to be given to the data subject, the security of data and the recognition of the data subject's rights of access, rectification, erasure or blocking of personal data.

The new Spanish Act also regulates other relevant subjects, such as the transfer of data to third countries; the supervisory authority in this field (the *Agencia de Protección de Datos);* the creation of a Registry for the protection of data; the responsibilities of the Autonomous Communities on this matter; and a system of penalties. ■

***Ley Orgánica 15/1999, de 13 de diciembre de 1999, de protección de datos de carácter personal (B.O.E.* n. 298, of 14 December 1999)**

ES

ES – Amendment of Several Provisions Related to Media Law

Alberto Pérez Gómez
Dirección Audiovisual Comisión del Mercado de las Telecomunicaciones

In December 1999, the Spanish authorities approved several provisions that partially amend some existing norms relating to Media Law.

– Act 52/1999, which amends Act 16/1989, on the Defence of Competition, also amends Act 12/1997, on the liberalization of telecommunications, which creates the *CMT* (*Comisión del Mercado de las Telecomunicaciones*, Telecommunications Market Commission). The main duty of the CMT is to ensure free competition in the telecommunications and audiovisual and interactive services markets. Act 52/1999 clarifies the rules regulating the relationship between the CMT and the national competition authorities (*Tribunal de Defensa de la Competencia* and *Servicio de Defensa de la Competencia*).

– Act 55/1999, on Taxation, Administrative Provisions and Social Affairs (*Ley de Medidas fiscales, administrativas y del orden social*), has introduced slight amendments in several provisions related to Media Law. An Act on taxation, administrative provisions and social affairs (hereinafter referred to as "Special Measures Act") is approved each year, together with the Budget Act. The main object of the Special Measures Act is to introduce amendments in existing provisions, thus acting as a "container" of amendments. For example, this year's Special Measures Act amends more than forty different Acts, including very slight amendments of the Telecommunications Act 11/1998, Private Television Act 10/1988, Telecommunications Act 31/1987, Third TV Channel Act 1983 and the Forty-fourth Additional Provision of the Act 66/1997 on taxation, administrative provisions and social affairs (which is the legal basis for the introduction in Spain of digital TV and radio broadcasting).
Such Special Measures Acts, which have been used since the mid 90's by the socialists and conservative governments alike, have been severely criticised by many experts because of their heterogeneity and lack of transparency and because of the insufficient debate which precedes the approval of these Acts: each year the bill of the Special Measures Act is usually presented in September/October, together with the Budget Bill, and both bills are usually approved before the end of the year.

– The Ministerial Order of 30 December 1999 amends the Ministerial Order (of 9 October 1998) on the approval of the technical aspects and clarifying the conditions upon which Digital Terrestrial TV services must be offered. The Ministerial Order of 30 December 1999 affects the national private concessionaire of Digital Terrestrial Television, *Onda Digital*. According to the concession, this operator will provide pay-TV services through the fourteen programmes that it is allowed to manage. The Ministerial Order of 30 December 1999 authorizes *Onda Digital* to dedicate one of its fourteen programmes to a free-access 24 hour promotional programme. ■

***Disposiciones Adicionales Primera (modificación del art. 1.dos.2.f) de la Ley 12/1997, de liberalización de las telecomunicaciones) y Segunda (modificación del art. 1.dos.2.g) de la Ley 12/1997, de liberalización de las telecomunicaciones) de la Ley 52/1999, de 28 de diciembre, de reforma de la Ley 16/1989, de 17 de julio, de Defensa de la Competencia, B.O.E. n.* 311, 29 December 1999, pp. 45778 y ss.**
***Artículos 66 (modificación de la Ley 11/1998, General de las telecomunicaciones) y 67 (modificación de la Ley 10/1988, de Televisión Privada), y Disposiciones Adicionales Trigésima (modificación de la Disposición Adicional Cuadragésimo Cuarta de la Ley 66/1997, de Medidas fiscales, administrativas y del orden social), Trigésimo Primera (modificación de la Ley 31/1987, de Ordenación de las Telecomunicaciones) y Trigésimo Segunda (modificación de la Ley 46/1983, Reguladora del Tercer Canal de Televisión) de la Ley 55/1999, de 29 de diciembre, de Medidas fiscales, administrativas y del orden social, B.O.E. n.* 312, 30 December 1999, pp. 46095 y ss.**
***Orden de 30 de Diciembre de 1999 por la que se introduce una disposición adicional única en el Reglamento Técnico y de Prestación del Servicio de Televisión Digital Terrenal, aprobado por el Ministerio de Fomento, de 9 de octubre de 1998, autorizando la emisión a las entidades adjudicatarias de las nuevas concesiones otorgadas para la prestación del servicio de televisión con tecnología digital terrenal, en régimen abierto y con carácter promocional, de uno de los programas cuya explotación se les permita, B.O.E. n.* 7, 8 January 2000, pp. 761-762**

ES

FR – Field of Application of the Legal Licence for the Use of Phonograms

On a number of occasions in January 1997, the national television company France 2 broadcast excerpts from two hit records by a well-known pop group as background music for trailers promoting the broadcasting of films it intended to show. The producer of the phonograms considered that use of this kind without special authorisation was unlawful and, after the failure of an attempt to reach a settlement, brought proceedings before the commercial court in Paris. The court delivered its decision on 17 December 1999. The situation is very tense between the various parties

Charlotte Vier
Légipresse

involved, and a number of cases have been brought before the civil or commercial courts over the past few years. The debate centres mainly on whether this kind of use of excerpts falls within the ambit of the legal licence which provides (Article L214-1 of the French Code of Intellectual Property – CPI) that where a phonogram has been published for commercial purposes, its producer cannot oppose its being broadcast; in turn, this gives entitlement to remuneration in favour of the producer. This provision of the Code constitutes an exception to the principle of specific, special authorisation required by Article L213-1 of the CPI.

The commercial court in Paris, before which the present case was brought, has replied most clearly that the partial use of phonograms under such circumstances cannot be assimilated to their ordinary broadcasting, which is indeed covered by the legal licence. Broadcasting as in the present case is not carried out as part of the channels' programmes with a view to presenting the works to the public, but on the contrary to benefit from the power of attraction which previous broadcasting has enabled them to acquire.

The use made of them by France 2 could therefore be considered infringement of copyright, and the prejudice suffered evaluated at FRF 100 000. ■

Commercial court of Paris, 15th chamber, on 17 December 1999, in the case between the company EMI Music et al and the company France 2

FR

IE – Man Jailed for Internet Libel

Marie McGonagle
Faculty of Law, National University of Ireland Galway

In December 1999 a Dublin court handed down a two-and-a-half year prison sentence for criminal libel. The charges arose out of messages sent by a man to Internet bulletin boards and by e-mail, alleging that one of his former teachers was a paedophile. The allegations were investigated by the police and a file submitted to the Director of Public Prosecutions before they were found to be false. The accused man had continued to send such messages while on bail pending trial for criminal libel. He later admitted that he had published the allegations maliciously, knowing them to be false.

In Ireland, defamation or libel is part of the civil law, with monetary compensation as the principal remedy. Use of the criminal law to punish libels, as in the above case, is very rare, although there have been a few convictions of individuals, for making indecent and abusive telephone calls and such like. Originally, the criminal law was confined to situations where the libel was likely to lead to a breach of the peace. However, that is no longer a requirement. Criminal libel in modern times is only invoked when the libel is so serious that the public interest is deemed to require the institution of criminal proceedings. In the case of newspapers and broadcasts, a criminal prosecution for libel cannot be brought without leave of a High Court judge first being obtained (Defamation Act 1961). Applications for leave to bring a prosecution are themselves extremely rare – there have only been three or four in the past thirty years – and they rarely, if ever, succeed. ■

DPP v X, Dublin Circuit Criminal Court, December 1999. The accused man was not named by direction of the judge

US – America Online and Time Warner Announce Merger

Carl Wolf Billek
Communications Media Center, New York Law School

On 10 January 2000, America Online (AOL) and Time Warner announced that AOL would acquire Time Warner for USD 160 billion, the largest merger in United States history. If approved by the companies' shareholders and federal regulators, the merger would unite the United States' largest Internet Service Provider with its second largest cable provider.

The merger has been viewed as serving two primary goals. First, it will provide AOL high-speed access to Time Warner's 13 million cable subscribers. AOL currently has 20 million subscribers. However, as cable television providers have begun to offer high-speed Internet access over cable modems, they have generally prevented Internet Service Providers (ISPs), such as AOL, from gaining "open access" to the cable modem. Absent open access to the cable modem, high-speed Internet users who prefer to retain their traditional ISP would have to pay a fee to their traditional ISP in addition to the fee paid to their cable television operator for the high-speed Internet access. Members of the ISP industry claim that subscribers would choose to use the cable television operator's ISP, thereby harming traditional ISPs' ability to compete for high-speed Internet subscribers. The issue of if and/or how "open access" may be required is currently being litigated in several states. However, the proposed merger ameliorates the concerns raised in the open access debate for AOL by granting it open access to all of Time Warner's cable television subscribers.

The merger is also viewed as a means of providing greater distribution channels for Time Warner's many media products. In addition to being the nation's second largest cable operator, Time Warner publishes 23 magazines which are read by 120 million people worldwide; is the nation's eighth largest book publisher; has produced films grossing one-fifth of the domestic film total for 1999; owns the fifth largest broadcast television network as well as ten cable television channels; and has sold approximately one-sixth of all recorded music in the United States in 1999. The merged company, to be named AOL Time Warner, is expected to use its dominant position in the Internet marketplace to expand means of distribution for traditional forms of media, such as magazines, film and music to the Internet.

Whether the potential impacts of the merger will be fully realized will only be determined over time. However, the announcement of the merger has caused the cable television industry, traditional media industries and the ISP industry to contemplate the need for greater alliances to provide a complete package of cable television, high-speed Internet access and traditional forms of media. ■

IRIS LEGAL OBSERVATIONS
OF THE EUROPEAN AUDIOVISUAL OBSERVATORY

The following contribution is intended to provide you with information on important developments in the field of copyright and related rights. To be able to present this topic adequately, we have decided on the form of a relatively long article, adding four extra pages to this issue of IRIS. We intend to use this format in alternate issues of IRIS to provide you with up-to-date information on topics of international relevance.

Copyright and Related Rights in the Audiovisual Sector

Audiovisual works and artistic performances, including sound and film recordings of them, are protected by specific copyright and related regulations. There are also provisions to protect rights to distribute these works, such as those granted to broadcasters, for example.

Current regulations, however, are in need of updating: since the first international regulations on related rights were adopted in 1960-61, a host of changes, some more radical than others, have been made in the broadcasting sector. Among the most profound of these changes is, of course, the technological development and convergence of existing and new forms of transmission such as cable and satellite technology, and now digital broadcasting. They also include new methods of recording, copying and storing works, performances, original recordings and broadcasts. At the same time, the financial and technical implications of distributing audiovisual works have grown considerably. The extent to which existing related rights provide sufficient protection against the various forms of piracy which have emerged, together with possible ways of strengthening legal measures against them, are currently being considered by the EC, WIPO and the Council of Europe.

Existing and proposed EC and WIPO regulations are described in two separate chapters below: the first deals with the rights of authors, performers and producers, while the second is devoted to broadcasters' rights. Each chapter describes how the EC and WIPO, through new initiatives, intend to bring current provisions on related rights into line with today's technical and economic conditions.

These chapters, which include some comparisons with other international regulations, point out several major shortcomings as well as improvements that have already been made to the copyright system. These are summarised in the conclusion.

Rights of Authors, Artists and Producers

Protection is needed in the audiovisual sector for intellectual property such as operas, novels, radio plays, stage plays and film scripts on the one hand, and the communication and performance of existing works, i.e. related rights, on the other. The importance of related rights is growing in the digital age, with its new forms of exploitation and the inevitable disappearance of national boundaries. An internationally recognised system of effective copyright and related rights is required in order to protect the economic interests of authors, artists, phonogram producers and film producers.

Current provisions for the protection of authors, artists and producers are contained in the Berne Convention for the Protection of Literary and Artistic Works (latest version, 1971),[1] the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention, 1961),[2] the Geneva Convention for the Protection of Producers of Phonograms against unauthorised Duplication of their Phonograms (1971)[3] and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement, 1994).[4] EC law includes three Directives concerning the rights of authors, artists and producers: the Directive on Rental and Lending Rights, the Directive on Satellite and Cable Transmission Rights and the Directive on Terms of Protection.

Rather than describe all these regulations, the following chapter focuses on the most recent attempts to bring existing laws into line with modern technological and economic realities. Firstly, these include two agreements adopted in 1996 by the World Intellectual Property Organisation (WIPO), which are still in the ratification phase. The protection currently afforded under EC law is also described. The chapter also explains the current debate on a WIPO instrument for the protection of audiovisual performances and the amended proposal by the European Commission for a Directive on copyright and related rights.

A. Existing Regulations

1. WIPO

At the WIPO Diplomatic Conference held in Geneva in December 1996, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) were both adopted.

The WCT protects authors' rights in their artistic and literary works. It supplements the Berne Convention for the Protection of Literary and Artistic Works, adapting its provisions to the new requirements of the Information Society. This means firstly that all regulations in the Berne Convention are applicable *mutatis mutandis*. It also means that all WCT Contracting Parties must meet the substantive provisions of the Berne Convention, irrespective of whether they are parties to the Berne Convention itself.

In contrast to the WCT, the WPPT deals with holders of related rights, its purpose being the international harmonisation of protection for performers and phonogram producers in the Information Society. However, it does not apply to audiovisual performances, which are the subject of the Resolution concerning Audiovisual Performances (see below).

1.1 Rightsholders and Subject Matter

The concept of "literary and artistic works", central to the WCT, encompasses all works in the fields of literature, science and art, whatever form they may take.[5]

The WPPT mainly protects the economic interests and personality rights of performers (actors, singers, musicians, etc) in respect of their performances, whether or not they are recorded on phonograms. It also helps persons who, or legal entities which, take the initiative and have the responsibility for the fixation of the sounds. The WPPT grants them economic rights in respect of their phonograms, although these may not form part of an audiovisual work, since these do not fall within the scope of the WPPT.

1.2 Scope of Protection

A statement concerning the WCT[6] explains that the reproduction right set out in Article 9 of the Berne Convention, including a number of exceptions, also applies in the digital sphere. The concept of reproduction includes the storage of a protected work in digital form on an electronic device.

The WCT extends authors' rights in respect of their works by granting them three new exclusive rights, i.e. the right to:

- authorise or prohibit the distribution to the public of original works or copies thereof by sale or otherwise (right of distribution);
- authorise or prohibit the commercial rental of cinematographic works (if such commercial rental has led to widespread copying of such works, materially impairing the exclusive right of reproduction) or works embodied in phonograms (right of rental);
- authorise or prohibit communication to the public of their original works or copies thereof, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (right of communication to the public).

In respect of phonograms and performances within its scope, the WPPT grants rightsholders the exclusive right to:

- authorise or prohibit direct or indirect reproduction of a phonogram (right of reproduction);
- authorise or prohibit the making available to the public of the original or copies of a phonogram by sale or other transfer of ownership (right of distribution);
- authorise or prohibit the commercial rental to the public of the original or copies of a phonogram (right of rental);
- authorise or prohibit the making available to the public, by wire or wireless means, of any performance fixed on a phonogram in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them, e.g. on-demand services (right of making available).

With regard to live performances, i.e. those not fixed on a phonogram, the WPPT also grants performers the exclusive right to authorise:
– broadcasting to the public;
– communication to the public;
– fixation (of sound only).

The WPPT also guarantees the right to claim to be identified as the performer of a work and, on that basis, the right to object to any distortion, mutilation or other modification to or interference with the performance that may be prejudicial to the performer's reputation.

Finally, WPPT Contracting Parties are obliged to guarantee performers and producers of phonograms the right to a single equitable remuneration for the direct or indirect use of phonograms, published for commercial purposes, for broadcasting or for communication to the public. In respect of this rule and the exclusive rights granted under the WPPT, performers and phonogram producers from all Contracting Parties are to be granted equal domestic rights ("national treatment"). However, the right to remuneration may be restricted or even denied if a Contracting Party makes a reservation to the Treaty. If this is the case, other Contracting Parties are permitted to deny, *vis-à-vis* the reserving Contracting Party, national treatment.

1.3 Limitations

WPPT Contracting Parties may only make such reservations as are provided for in their domestic laws on the protection of literary and artistic works. The WPPT and WCT also stipulate that protection may only be restricted in individual cases where this does not conflict with normal exploitation of the work and where authors' economic interests remain protected.

1.4 Term of Protection

The WCT adopts the same regulations as the Berne Convention where terms of protection are concerned, except for the exclusion of photographic works set out in Article 7.4 of the Convention. Copyright therefore expires 50 years after the author's death. In the case of a work of joint authorship, the 50-year term is calculated from the death of the last surviving author. In the case of anonymous or pseudonymous works, the term of protection runs for 50 years after the work is lawfully made available to the public. "Countries of the Union", in the sense of Article 1 of the Berne Convention, may decide that the term of protection for cinematographic works should end 50 years after the work was made available to the public with the author's consent or, if this did not happen within 50 years of the work being produced, 50 years after its production.

The term of protection under the WPPT is at least 50 years. For performers' rights, this period begins when the work is fixed on a phonogram; for phonogram producers it begins when the phonogram is released to the public or, if it is not released within 50 years of fixation, when the phonogram is made.

1.5 Geographical Scope of Application

The WCT and WPPT are open to all WIPO and European Community Member States. Both enter into force only after 30 States have deposited instruments of ratification or accession. The WCT has so far been signed by 50 States and the EC. However, only twelve States have so far ratified or acceded to it (situation as of 24 November 1999). The WPPT has been signed by 49 States and the European Community. Only eleven States have so far ratified or acceded to it (situation as of 24 November 1999).

2. European Community

Directive 92/100/EEC harmonises rental and lending rights and the protection of certain rights related to copyright (hereafter known as the "Directive on Rental and Lending Rights").[7]

2.1 Rightsholders and Subject Matter

The Directive on Rental and Lending Rights protects authors in respect of their works, performers in respect of their performances and phonogram producers and producers of the first fixations of films ("film producers") in respect of their fixations.[8] Unlike the WPPT, the Directive also applies to audiovisual performances and, as discussed in Chapter II, to the rights of broadcasters.

2.2 Scope of Protection

The above-mentioned rightsholders are entitled to authorise or prohibit the rental and lending of their works. When a contract for film production is concluded, individually or collectively, by performers with a film producer, the performer covered by such a contract is presumed, subject to express clauses to the contrary, to have transferred his rental right. The Directive on Rental and Lending Rights allows Member States to make provision for a similar presumption with respect to authors or to the rights included in Chapter II (fixation, reproduction, broadcasting and communication to the public). Alternatively, Member States can provide that film production contracts that provide for remuneration within the sense of the Directive have the effect of authorising rental. When giving up their rental rights, authors and performers retain an unwaivable right to equitable remuneration. Member States are also authorised to derogate from the right to remuneration, provided the author is at least compensated in some other way or if the work is used in particular circumstances.

Chapter II of the Directive on Rental and Lending Rights ("rights related to copyright") grants the following additional rights to performers, phonogram producers and film producers:
– performers may authorise or prohibit (1) the fixation of their performances and (2) the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation (fixation right);
– performers, phonogram producers and film producers have the right to authorise or prohibit the direct or indirect reproduction of protected fixations (reproduction right),[9]
– performers and phonogram producers have a right to shared remuneration for the public broadcasting or communication of a phonogram produced for commercial purposes or a reproduction of such a phonogram (right of communication to the public);
– performers, phonogram producers and film producers are entitled to make available to the public, through sale or otherwise, fixations of their performances, phonograms and the first fixations of films (distribution right).[10]

2.3 Limitations

Member States may provide for limitations of the related rights referred to in Chapter II in respect of private use, the reporting of current events, internal use (ephemeral fixation) or for the purposes of teaching or scientific research. Irrespective of this, they can limit these rights in accordance with the limitations on copyright provided for in respect of literary and artistic works.

2.4 Term of Protection

Under the terms of Directive 93/98/EEC,[11] which harmonises national regulations on the terms of protection of copyright and certain related rights in the European Community, authors' rights expire 70 years after their death. In the case of a work of joint authorship, the 70-year term is calculated from the death of the last surviving author. In the case of anonymous or pseudonymous works, the term of protection runs for 70 years after the work is lawfully made available to the public. The term of protection for cinematographic or audiovisual works expires 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the work.

The rights of performers expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The rights of phonogram producers and film producers are protected for the same periods of time as those of performers.

2.5 Geographical Scope of Application

The Directives apply only in the EC Member States.

B. Proposed Regulations

1. WIPO

The efforts to include "audiovisual" in addition to "audio" performances within the scope of the WPPT, are not reflected in the text itself. However, in the Resolution concerning Audiovisual Performances, adopted at the same 1996 conference at which the WPPT was agreed, the participants undertake to protect "visible", i.e. audiovisual performances under an additional Protocol to the WPPT. This Protocol, which was originally supposed to be ready by 1998, had still to be finalised after the last meeting, held in December 1999. The WIPO Standing Committee on Copyright and Related Rights (SCCR) is preparing a Diplomatic Conference to be held in 2000, at which either a Protocol to the WPPT or a special treaty on audiovisual performances should be concluded, providing consensus can be reached. It is still unclear which of the two options is likely to be chosen, although most proposals favour a Protocol.

1.1 Scope of Protection

Since the WPPT already offers performers a certain amount of protection in respect of their audiovisual performances, attempts to broaden protection are focusing on areas that the WPPT does not cover. For example, the following three problem areas were identified in 1997:

– personality rights in respect of non-fixed (live) audiovisual performances and audiovisual fixations of those performances;
– economic interests in respect of fixations of non-fixed performances;
– economic interests in respect of the use of audiovisual fixations of performances.

The proposed instrument is to be based on the WPPT and will probably adopt most of the definitions contained in that Treaty.

One important theme that remains controversial is the scope of personality rights. Whereas most States are happy to follow the example of the WPPT, some delegations[12] believe that, since the audiovisual sector is unique, performers' personality rights should receive special treatment. For example, it has been proposed that the right to object to modifications of a performance should be withdrawn. Such a right, it is claimed, should only be granted if the modification is seriously prejudicial to the performer's reputation. This would exclude any changes made by producers or their legal successors in the normal exploitation of an audiovisual work over which they have the right of exploitation.

Three other important subjects also feature on the SCCR's agenda: (1) rights relating to broadcasting or communication to the public; (2) transfer of rights; (3) "national treatment".

As far as the first point is concerned, controversy surrounds the question of whether performers should be granted an exclusive right to authorise broadcasting or communication to the public, or whether they should merely be entitled to remuneration (in accordance with Article 15 of the WPPT). Point (2) has given rise to a wide variety of proposals, ranging from the introduction of a legal presumption that rights are transferred, to the idea that the transfer of rights should not be dealt with at all. Ultimately, it is a matter of deciding what should be regulated by the Contracting Parties individually, i.e. at national level, and what should be regulated jointly, i.e. through international consensus. Since it is closely connected with the first two points, the question of national treatment also remains unresolved.

1.2 Outlook

The SCCR and the Member States are set to resume their discussions in March.

2. European Community

The European Commission was involved in the preparation of the WCT and WPPT, both of which it signed, along with the EC Member States, on behalf of the EC. The Commission's amended proposal for a Directive on copyright and related rights in the information society[13] is primarily designed to transpose the most important elements of the two WIPO treaties. Secondly, it should broaden the EC's legal framework in the field of copyright and bring it into line with the latest information society developments. Unlike the WPPT, the new EC legislation builds on existing regulations that already protect audiovisual performances.

2.1 Scope of Protection

According to the proposed Directive, Member States should now grant two additional exclusive rights to authors, performers, phonogram producers and film producers:

Article 2 grants performers the exclusive right to authorise or prohibit, in whole or in part, reproduction of fixations of their performances (reproduction right). This exclusive right also applies to authors in respect of their works, to phonogram producers in respect of their phonograms and to film producers in respect of the original and copies of their films. Article 2 also defines the concept of "reproduction" as "direct or indirect, temporary or permanent reproduction by any means and in any form".

Under Article 3.2, performers have the exclusive right to control "on-demand" access, by wire or wireless means, to fixations of their performances (the so-called "right of making available").[14]

This right also applies *mutatis mutandis* to authors, phonogram producers and film producers.

Authors are also granted the exclusive right:

– to authorise or prohibit any communication to the public of originals and copies of their works (right of communication to the public);
– to any form of distribution to the public of the original of their works or copies thereof, by sale or otherwise (distribution right). This right is exhausted within the Community if the transfer of ownership of that object within the Community is made by the rightsholder or with his consent.

In contrast to the WPPT, the proposed EC legislation does not regulate performers' personality rights. The Commission decided not to seek harmonisation in this area because of the differing provisions already set out in national legislation.

Furthermore, provision is made for the protection of technological measures and rights-management information.

2.2 Limitations

The possible exceptions to the exclusive rights set out in the proposed Directive go beyond those provided for in the WCT and WPPT.

In respect of the aforementioned exclusive rights, it is stipulated that temporary acts of reproduction which are an essential and integral part of a technological process whose sole purpose is to enable use to be made of a work, and which have no independent economic significance, should be allowed. This type of reproduction may include certain "cache" copies arising during transmission over the Internet, for example.

The other exceptions provided for in the proposed Directive are exhaustive. In other words, the Member States can, in principle, maintain existing national limitations, provided these are listed in the Directive itself.[15] In any case, they can select any of the exceptions listed, on condition that they may only be applied to certain specific cases without prejudicing the rightsholders' economic interests.

Exceptions may be granted, for example, in respect of the exclusive right of reproduction and the right of communication to the public. These rights may be limited in the context of use for the purposes of education or scientific research, use for the benefit of disabled people, in connection with the reporting of current events, quotations or for the purposes of public security.

The Commission's original draft Directive was amended in accordance with the views of the European Parliament,[16] which called for greater protection of rightsholders with regard to the exceptions and limitations. Under the amended proposal, rightsholders are entitled to fair compensation for copies made for private use, as illustrations for teaching or for the purposes of scientific research – uses which previously did not give rise to any claim for compensation. In addition, it

is hoped that rightholders will be allowed to control certain private digital copying for personal use by way of appropriate technical means in order to protect their own interests.

2.3 Term of Protection

Directive 93/98/EEC, which harmonises the term of protection of copyright and certain related rights in the European Community, is also applicable. Article 3.2, however, is amended by the proposed Copyright Directive to read as follows: "The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram is lawfully published during this period, the rights shall expire 50 years from the date of the first such publication".

2.4 Geographical Scope of Application

The Directives apply only in the EC Member States.

Rights of those who distribute audiovisual works

Broadcasters, i.e. those who distribute audiovisual works, are subject to a number of specific regulations in the intellectual property field. Whereas copyright applies to a tangible piece of intellectual property, broadcasters' "related rights" cover the considerable organisational, financial and personal investment connected with the distribution of programmes. Therefore, it is not the content of a programme, but the programme itself that is protected by specific related rights. The aim of these rights is to protect broadcasters' investments from certain unfair uses.[17]

Broadcasters are granted related rights by the Council of Europe's European Agreement on the Protection of Television Broadcasts (1960)[18] and the European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (1994),[19] the Rome Convention (1961) and the TRIPS Agreement (1994). We will only discuss these regulations here in order to draw attention to some major shortcomings in the protection they offer.

There are currently three EC Directives which concern related rights in respect of broadcasts: the Directive on Rental and Lending Rights (see A. 2.1), Directive 93/83/EEC on Satellite and Cable Transmission Rights[20] and the Directive on Terms of Protection (see A. 2.4). The related rights granted to broadcasters by these Directives, together with their limitations, are summarised below.

C. Existing regulations

1. WIPO

There are currently no WIPO regulations in this field. The WCT and WPPT are exclusively concerned with the rights of authors, performers and phonogram producers.

2. European Community

The main Community regulations in this field are contained in the EC Directive on Rental and Lending Rights. The Directive on Satellite and Cable Transmission Rights merely explains that the provisions of the Directive on Rental and Lending Rights also apply to satellite broadcasts.

2.1 Rightsholders and Subject Matter

Without defining the concepts in any more detail, the Directive on Rental and Lending Rights protects broadcasters in respect of their "programmes", irrespective of whether they are transmitted by wireless or terrestrial means, by satellite or by cable. The EC regulation thus provides greater protection than other relevant international instruments, which regard broadcasting only as wireless transmission and thus only cover programmes broadcast in that way. The Directive also applies to cable distributors, provided they do not merely retransmit by cable the programmes of other broadcasters.

However, it is unclear whether the Directive also protects programmes transmitted over the Internet ("webcasting") and signals that are either not accessible to everyone (encrypted signals) or not intended for some groups of viewers (programme-carrying signals which, before being broadcast, are exchanged between broadcasters). The Directive on Satellite and Cable Transmission Rights does at least explain that encrypted programmes are protected as long as they are broadcast by satellite after suitable decoders have been made available to the public (although there is no stipulation regarding encrypted terrestrial or cable programmes).

2.2 Scope of Protection

According to the Directive on Rental and Lending Rights, broadcasters and cable distributors enjoy the exclusive right to authorise or prohibit the fixation of their broadcasts and the reproduction of such fixations (reproduction right). In reality, these fixation and reproduction rights involve numerous practical difficulties, such as with regard to their application in the digital sector. For example, it is not clear whether they cover digital copies, sometimes work-related, made within the framework of computer-based transmission procedures.[21]

Broadcasters' fixation and reproduction rights are also strengthened by the distribution right.[22] Here also, the protection provided by the EC goes beyond that of other international regulations, which do not include such a distribution right.

Furthermore, broadcasters can prevent the unauthorised (wireless) retransmission of their programmes by other broadcasters (retransmission right). This right does not apply to unauthorised retransmission of programmes over a cable or telephone network – a clear weakness, with major economic implications, in the protection offered against unauthorised retransmission of programmes via cable or computer networks. Contrary to what its name might suggest, the Directive on Satellite and Cable Transmission Rights does not grant any rights in respect of cable retransmission. It merely sets out certain provisions on the exercise of a right to cable retransmission in Member States where it already exists.[23]

Finally, broadcasters can control the communication of their programmes to the public if this takes place in venues that charge an entrance fee (right of communication to the public). It is debatable, however, whether this rule, which was originally aimed at public television lounges, still popular during the 1960s, remains relevant today.

2.3 Limitations

Broadcasters' rights are subject to the same limitations as those of other rightsholders under this Directive.[24]

2.4 Term of Protection

The Directive on Terms of Protection provides for a term of 50 years (the Directive on Rental and Lending Rights originally stated 20 years) from the moment the programme is first broadcast.

2.5 Geographical Scope of Application

All three Directives apply only in the EC Member States. Outside the European Community, broadcasters are protected by the other international instruments mentioned at the beginning of this chapter. Broadcasters that operate outside the EC must therefore expect to enjoy less comprehensive protection in certain areas (e.g. protection of programmes transmitted by cable, lending and rental rights,[25] distribution right).[26]

D. Proposed Regulations

1. WIPO

The legal protection of broadcasters also featured once again on the SCCR's agenda[27] (broadcasters having been excluded from the two previous WIPO rounds).[28] The subject is thus being considered at global level. At the time of the most recent Committee session in December 1999, a number of concrete proposals for a possible initiative had been drawn up as a basis for discussion. In reality, however, many issues

remain unresolved, some of them fundamental, such as the nature of the instrument, to whom it should be addressed and which rights should be protected.

Apart from the option of a non-binding regulation, such as a recommendation, other possible measures are being considered, in particular a Protocol to the WPPT or even a separate treaty dealing solely with broadcasters' rights.

1.1 Scope of Protection

It is generally agreed that concepts such as "broadcasting" and "broadcasting organisation" need to be precisely defined, while the scope of the proposed regulations must also be determined. There is also a consensus that satellite television and encrypted programmes should be regarded as broadcasting. One area of dispute concerns whether cable channels should be treated in the same way. Although most people think that this should be the case, the practical arrangements are a matter of dispute. The same applies to issues such as legal protection of programme-carrying signals before they are actually broadcast and the treatment of programmes transmitted over the Internet.

Consideration is also being given to whether and to what extent existing rights, particularly the reproduction right and the right of communication to the public, should be revised.

Another important item on the SCCR's agenda is whether and to what extent new, so-called "economic" rights are needed in order to take into account the transformation in economic conditions, particularly the increasing commercialisation of broadcasting. Several rights have already been proposed (some of which are based on the WCT and WPPT). In particular, a new right in respect of cable transmission, an exclusive right to authorise programme encryption, a distribution right and a right to make programmes available to the public "on-demand" have been suggested. It has also been proposed that provisions be drawn up to protect technological measures and so-called rights-management information.

Participating Member States have also repeatedly stressed the need, with any type of regulation, to check whether related rights actually need to be extended and whether sufficient consideration is being given to the need to maintain a balance with the interests of third parties (particularly holders of copyright and related rights, broadcasters of different sizes, the public and individual viewers).

1.2 Outlook

The SCCR did not succeed in reaching any practical conclusions at its December meeting. Rather than set a date for further implementation of these plans, the Committee merely decided to consider the subject again and continue negotiations at its next ordinary meeting.

2. European Community

2.1 Nature of Measure

As mentioned in B.2, the European Commission is currently preparing a draft Copyright Directive. Legal protection of broadcasters forms only a small part of the proposed instrument. Nevertheless, the Directive contains a number of provisions that supplement and modernise existing Community legislation. Under these proposals, broadcasters would be granted the same rights as other holders of related rights.

2.2 Scope of Protection

In other words, the proposed reproduction right would also apply to broadcasters. Following the model of the WIPO treaties, broadcasters would also enjoy the right of making available.[29] Legal protection of technological measures and so-called rights-management information would also therefore include measures to protect programmes from unauthorised acts of exploitation (e.g. encryption mechanisms). However, there are no plans to introduce a general right to cable retransmission, to define (or even extend) the concept of broadcasting or to modernise provisions on the right of communication to the public.

Conclusion

Current attempts by the EC and WIPO to enhance the protection of performers and producers are largely based on existing provisions on "related rights". Whereas the proposed EC Copyright Directive is designed to bring the level of protection of related rights into line with that accorded to copyright, and increases them both at the same time, the WIPO is concentrating solely on the protection of audiovisual performances, which it plans to develop in parallel with the WPPT.

Apart from the general enhancement of existing protection measures, the changes introduced by the EC Directive have little impact on broadcasters' rights. Indeed, the proposed Directive merely makes occasional improvements to existing provisions. However, the WIPO is planning to create a comprehensive legal framework aimed specifically at broadcasters, regardless of other international instruments on related rights already in existence.[30] It is likely, therefore, that the WIPO negotiations will result in a legal instrument aimed solely at broadcasters and which, by its very nature, may be more comprehensive, more detailed and possibly even more far-reaching than the proposed EC Directive.[31]

With the proposed changes, the protection of audiovisual performances and broadcasts offered by the WIPO treaties would catch up with existing EC legislation. In future, it may even go beyond current and possibly future EC law. This would certainly be the case if the new WIPO instrument were to include provisions on performers' personality rights.

It is to be hoped that negotiations within the different organisations will remain in harmony with each other, eventually leading to a well-balanced, consistent and fair international legal framework for the protection of copyright and related rights in the audiovisual sector.

Natali Helberger
(Institute for Information Law, University of Amsterdam)

Francisco Javier Cabrera Blázquez and **Susanne Nikoltchev**
(European Audiovisual Observatory)

1) IRIS Special, International Copyright Instruments, p.5.
2) IRIS Special, *ibid*, p.63.
3) IRIS Special, *ibid*, p.75.
4) OJ L 336/213.
5) Although the WCT also protects computer programs and databases, these are not discussed here.
6) Agreed Statements Concerning the WIPO Copyright Treaty, adopted at the Diplomatic Conference of 20 December 1996.
7) Council Directive 92/100/EEC of 19 November 1992 on Rental and Lending Rights and on Certain Rights Related to Copyright in the Field of Intellectual Property, OJ L 346, 27 November 1992, p.61.
8) The principal director of a film or other audiovisual work is considered to be the "author" or "co-author". Other individuals may be granted "co-author" status in accordance with Member States' domestic laws.
9) The proposed Copyright Directive (see below) would render this Article null and void.
10) The distribution right is exhausted if the object is first sold in the Community by the rightsholder, or with his consent (Article 9.2).
11) Council Directive 93/98/EEC of 29 October 1993 on the Term of Protection of Copyright and Certain Related Rights, OJ L 290, 24 November 1993, p.9.
12) Including the United States and India.
13) Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society, COM (97) 628 final, 10 December 1997, OJ C 108, 7 April 1998, p.6, and COM(99)250 final, 25 May 1999, OJ C 180, 25 June 1999, p.6.
14) I.e. "the exclusive right to authorise or prohibit the making available to the pub-

lic, by wire or wireless means", of protected works, "in such a way that members of public may access them from a place and at a time individually chosen by them" (Article 3.2 of the proposed Copyright Directive).
15) The admissibility of further exceptions in less significant cases is currently being discussed.
16) Opinion of the Parliament, 10 February 1999.
17) The related rights of a programme do not affect any copyright which may arise from the individual elements of that programme, such as copyright in respect of audiovisual works and the rights of film producers, actors, script writers, etc.
18) ETS Nos. 54, 81, 113.
19) IRIS Special, International Copyright Instruments, p.85.
20) Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, OJ L 248, 6 October 1993, p.15.
21) See Article 2 of the proposed Copyright Directive and section B2.2 of this report.
22) Broadcasters' distribution right also covers the first sale of a fixation (the so-called exhaustion principle) in order to prevent broadcasters from controlling cross-border trade in copies without restriction.
23) The Council of Europe's Television Agreement, which has legal force in just six European countries, is currently the only instrument to make provision for such a right in respect of cable transmission.
24) See A.2.3, above.
25) If a broadcaster is the producer of an original fixation of a film, it also enjoys the rights mentioned in A.2.2 (above).
26) However, the European Television Agreement goes even further than EC legislation in some areas (e.g. cable transmission rights, broader rights of communication to the public).
27) The SCCR is also discussing rights in respect of audiovisual performances, see B.1, above.
28) See WCT (1996) and WPPT (1996).
29) See B.2.1, above.
30) It is already clear that it will be some time before a WIPO instrument on the protection of broadcasters is adopted, since it is being discussed alongside proposals to extend the protection of audiovisual performances which, it is hoped, will be concluded first.
31) Similar ideas are being pursued by the Council of Europe, which is currently considering updating the rights of broadcasters. The Group of Specialists on the Protection of Rights Holders in the Media Field (MM-S-PR) has already met several times to draw up an instrument for the protection of broadcasters. However, the nature and scope of this initiative remain unclear.

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AGENDA

Digital Distribution of Music
20-21 March 2000
Organiser: EuroForum
Venue: Crown Plaza London St James
Information & Registration:
Tel.: (0) 800 358 0358 (from UK)
+44 (0) 207 878 6888 (from overseas)
Fax: +44 (0) 207 878 6885

Das Recht der Rundfunkunternehmen in den Reformstaaten
3-5 May 2000
Organiser:
Forschungsinstitut für Mittel- und Osteuropäisches Wirtschaftsrecht/Institut für den Donauraum und Mitteleuropa/ in Kooperation mit dem Institut für Europäisches Medienrecht
Venue: Wien
Information & Registration:
Tel.: +49 681 511 87
Fax: +49 681 517 91
e-mail: emr@emr-sb.de