Dutch regulatory authorities coordinate supervision of online platforms

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EDITORIAL

Three years ago, the Observatory published an IRIS Special titled “Artificial intelligence in the audiovisual sector”. This was a prospective study about the impact that the nascent AI technologies could have in the audiovisual sector. At the time, I wrote in my foreword that AI was *likely to herald a paradigm shift, as it can transform the entire value chain* but that it could also *contribute to the proliferation of “fake news”, and it raises issues regarding users’ right to information, media diversity and pluralism, and data protection, to name but a few.*

Three years have elapsed, and so-called generative AI has made the trick of rendering our publication already obsolete from a technological point of view while proving it completely right. As you surely know, services such as ChatGPT are so powerful that they have raised all sorts of fears and concerns, and some of them are reflected in the present newsletter. We cover the investigations currently taking place in three countries (Italy, France and Spain) concerning data protection issues around ChatGPT. Beyond that, two further articles discuss copyright issues around AI in Poland and the US, where the Copyright Office has launched an AI initiative.

Needless to say, beyond our monthly reporting on the IRIS newsletter, AI is such an important issue for the audiovisual industry that we will be working on it in the next months/years to come.

Having said all that, please rest assured, this editorial was not generated by any AI chatbot :-)

Have a nice read!

Maja Cappello, Editor

European Audiovisual Observatory

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INTERNATIONAL

COUNCIL OF EUROPE

BULGARIA

European Court of Human Rights: Boris Antonov Mitov and others v. Bulgaria

Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

A decision of 28 February 2023 of the European Court of Human Rights (ECtHR) dealt with an interesting claim made by a group of Bulgarian journalists in order to achieve Internet access to all non-anonymised judgments of the Supreme Administrative court, including all scanned documents. The journalists based their claim on the right to freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). By a majority decision, the ECtHR declared the application inadmissible on the grounds that it was not for the ECtHR to make abstract pronouncements on how, and how quickly, a national court should provide access to the documents in its case files and to anonymise its judgments and decisions when publishing them on the Internet.

The applicants were eight journalists from various Bulgarian media outlets specialising in reporting on matters relating to the judiciary. They were also members of an association whose work focused on optimising the work of the judiciary and the administration, and protecting human and civil rights. In 2016, they sought judicial review against a set of internal rules for the redaction of personal data in documents published on the Supreme Administrative Court's online database. The journalists were in particular aggrieved that the September 2016 rules for anonymisation of personal data in the online documents of the court had, in their view, been defined too broadly, and that the rules excluded all scanned documents from online publication on the Supreme Administrative Court's website. In May 2018, the Supreme Administrative Court found that the rules did not affect the journalists' rights or legal interests. They did not hamper the applicants from reporting on matters of public interest. The rules were only meant to protect personal data, and could not be seen as being in breach of the constitutional rights to freedom of expression and to seek, receive and disseminate information. In June 2018, the president of the Supreme Administrative Court confirmed and fine-tuned some of the anonymisation rules. The hearing records, judgments and decisions published on the court's website would be redacted and some personal data would be anonymised. Some types of data, such as the names of public authorities, legal entities, political parties, associations, notaries and the media, would not be redacted. And since scanned

case material could not be redacted, it would not be made available online. In the meantime, in 2017, an amendment to the Judiciary Act came into force, introducing an exception to the requirement for immediate publication of judgments. The amendment stated that judicial decisions in criminal cases which convicted and sentenced someone or which finally upheld convictions and sentences would only be published online after the prosecuting authorities had informed the relevant court that steps had been taken to enforce them.

The journalists lodged an application with the ECtHR, complaining under Article 10 ECHR about (a) the anonymisation rules laid down by the President of the Supreme Administrative Court and (b) the legislative amendment introducing a deferred-publication rule for certain criminal judgments. They argued that the anonymisation rules had limited their freedom of expression since they obstructed free access to information about cases and thus reporting on matters of public interest, while that information – in particular that featuring in the scanned case material – could not be obtained from other sources. They also clarified that they often reported on high-profile criminal cases and that the deferred-publication rule impeded them from doing so properly.

The ECtHR refered to its Grand Chamber case law Magyar Helsinki Bizottság v. Hungary of 8 November 2016 (IRIS 2017-1/1) in which it recognised that if access to information is instrumental for the exercise of the right to freedom of expression of the person seeking to obtain that information, Article 10 ECtHR may confer a right to access information held by the authorities or oblige them to impart such information. The relevant criteria in such cases are (a) the purpose of the information request; (b) the nature of the information sought; (c) the particular role of the seeker of the information in “receiving and imparting” it to the public; and (d) whether the information is ready and available. Those points are to be assessed in the light of the particular circumstances of each case.

The ECtHR was of the opinion that in the applicants' case, however, there were no particular circumstances, as the complaint did not concern a specific piece of information or even a defined category of information held by a public authority. The journalists were aggrieved by the impossibility of accessing on the Internet all scanned case material available in the database of the Bulgarian Supreme Administrative Court and the anonymised parts of all of that court’s judgments and decisions. Although the ECtHR found that the applicants’ role as “public watchdogs” reporting on issues of public interest was not in doubt, it considered their claims as “entirely abstract”. Furthermore, it could not be said that all judicial review and other cases heard by the Bulgarian Supreme Administrative Court concerned matters of public interest, and that all information relating to those cases related, without distinction, to such matters. The ECtHR also observed that if the documents and information in question were to be made freely available on the Internet, they would inevitably be available not only to the journalists, but also to any member of the public. The ECtHR concluded that it was not in a position to find that the information to which the journalists claimed not to have access was instrumental for the exercise of their right to freedom of expression, and that it was not for the ECtHR to make abstract pronouncements

on how a national court should provide access to the documents in its case files and anonymise its judgments and decisions when publishing them on the Internet. The ECtHR also found that it was not within its competence to make abstract pronouncements on how quickly national courts should publish their judgments on the Internet.

For these reasons the ECtHR found that Article 10 ECHR did not apply in this case and that the complaint of the eight Bulgarian journalists was to be rejected as being incompatible *ratione materiae* with the provisions of the ECHR. Therefore it declared the application inadmissible.

Decision by the European Court of Human Rights, Third Section, in the case of Boris Antonov Mitov and others v. Bulgaria, Application no. 80857/17, 28 February 2023 (notified on 23 March 2023)

https://hudoc.echr.coe.int/eng?i=001-223828

UKRAINE

Council of Europe Opinion on Ukrainian new media law

Andrei Richter
Comenius University (Bratislava)

Following the adoption of the draft Law "On the Media" by the Ukrainian Parliament on 13 December 2022 (see IRIS 2023-1/6), the Directorate General of Human Rights and Rule of Law of the Council of Europe (CoE) published an Opinion (based on the expertise of two CoE experts) on the correspondence of the new Law with the EU 2018/1808 Audiovisual Media Services Directive (AVMSD) as well as with CoE standards. The Opinion was prepared within the CoE Project "Safeguarding Freedom of Expression and Freedom of Media in Ukraine", aimed at supporting the Ukrainian media community in addressing needs under the situation of the current war.

The Directorate General's Opinion states that "[t]o the extent that the Law covers the topics contained in AVMSD, it largely aligns with the Directive, and the same applies regarding its compliance with Council of Europe standards." Still, it points out certain problematic elements and recommends they are addressed by the Parliament.

In relation to the media regulator, the National Council, the Opinion notes that the conflict of interest provisions "do not go far enough and should be extended to ensure" that its members and their close relatives "do not have *any* direct financial interest in a licensee or registered entity in the media sector."

According to the Opinion, the new Law provides "severe restrictions on freedom of expression" as to the possibilities of dissemination of media content if owned and/or managed by subjects affiliated with a state acknowledged by the Parliament as an aggressor state, both for the period decided by the Parliament and for five years after Parliament has revoked that status.

The Opinion reiterated the concerns of the Director General of Human Rights and Rule of Law of the Council of Europe "about violations of the right to freedom of expression" and his earlier remarks "that what may be justifiable under human rights law in emergency situations, including war, may be considered disproportionate looking at the longer term." The Opinion recommends that after the end of the armed aggression, the Parliament examines the likelihood of threats to national security, territorial integrity or public safety from the former aggressor state, or the extent to which the relevant restrictions act to prevent disorder or crime. It suggests a more nuanced approach, rather than blanket prohibitions at that time, in which instance the National Council may need to be given greater discretion to assess the risks on a case-by-case basis.

The Opinion also refers to an existing practice where registration of foreign linear media is refused by the national media regulator for violations of the European Convention on Transfrontier Television (ECTT). It concludes that “[t]his solution is not inconsistent with the ECTT, according to which States are to guarantee freedom of reception and should not restrict the retransmission on their territories of any programmes originating from parties to the Convention which comply with the terms of the Convention.”

Council of Europe, Opinion of the Directorate General Human Rights and Rule of Law, Information Society and Action against Crime Directorate, Information Society Department, prepared on the basis of the expertise by Council of Europe experts: Eve Salomon and Tanja Kerševan on the Law “On Media” of Ukraine. DGI (2023)03, Strasbourg, 24 February 2023.

https://rm.coe.int/dgi-2023-03-ukraine-tp-law-on-media-2751-9297-4855-1-2753-6081-2551-1/1680aa72df

EUROPEAN UNION

High-Level Group for the Digital Markets Act

Ronan Ó Fathaigh
Institute for Information Law (IViR)

On 23 March 2023, the European Commission adopted a Decision on setting up a High-Level Group for the Digital Markets Act (DMA) (see IRIS 2022-5/12). The purpose of the High-Level Group is to provide the Commission with advice and expertise to ensure that the DMA and other sectoral regulations are implemented in a coherent and complementary manner. The DMA will apply from 2 May 2023, and lays down harmonised rules designed to ensure contestable and fair markets in the digital sector where "gatekeepers" are present, which are large digital platforms acting as important gateways between business users and consumers.

Importantly, under Article 40 DMA, the Commission is required to establish the High-Level Group, which will be composed of 30 representatives nominated from the Body of the European Regulators for Electronic Communications (BEREC), the European Data Protection Supervisor (EDPS) and European Data Protection Board, the European Competition Network (ECN), the Consumer Protection Cooperation Network (CPC Network), and the European Regulatory Group of Audiovisual Media Regulators (ERGA). Under Article 2 of the Commission Decision, the High-Level Group will provide the Commission upon its request, with advice and expertise in the areas falling within the competences of its members, including (a) advice and recommendations on any general matter of implementation or enforcement of the DMA; (b) advice and expertise promoting a consistent regulatory approach across different regulatory instruments; (c) expertise in the context of market investigations into new services and new practices on the need to amend, add or remove rules in the DMA, in order to ensure that digital markets across the EU are contestable and fair; and (d) expertise on the current and potential interactions between the DMA and the sector-specific rules applied by the national authorities composing the High-Level Group, and submitting an annual report to the Commission presenting such assessment and identifying potential trans-regulatory issues.

Finally, the Commission Decision sets out specific rules on the operation of the High-Level Group, including the establishment of sub-groups, the invitation of experts, and rules of procedure. Notably, the High-Level Group will be chaired by the European Commission's Directors-General of the Directorate-General for Communications Networks, Content and Technology, and the Directorate-General for Competition.

Commission Decision on setting up the High-Level Group for the Digital Markets Act, C(2023) 1833 final, 23 March 2023

https://competition-policy.ec.europa.eu/system/files/2023-03/High_Level_Group_on_the_DMA_0.pdf

Global regulators sign joint statement on future regulation of the online sector

Dr. Jörg Ukrow
Institute of European Media Law (EMR), Saarbrücken/Brussels

On the final day of the UNESCO “Internet for Trust” Global Conference held from 21 to 23 February 2023, the chairpersons of the African Communication Regulation Authorities Network (ACRAN), the European Regulators Group for Audiovisual Media Services (ERGA), the Global Online Safety Regulators Network (GOSRN), the Mediterranean Network of Regulatory Authorities (MNRA), the Platform of Ibero-American Audiovisual Regulators (PRAI) and the Francophone Network of Media Regulators (REFRAM) presented a joint statement outlining key elements of the future regulation of the online sector.

Referring to UNESCO’s global mandate to promote the free flow of ideas by words and images, as well as Articles 19 and 20 of the International Covenant on Civil and Political Rights, they acknowledged the preponderance of digital platforms in societies, and the resulting issues and challenges to the protection of fundamental rights. This applied particularly to freedom of expression, the right to reliable and quality information, and the right to be protected from hateful content and discrimination. They subscribed to the objectives pursued by UNESCO in the digital environment, aiming to support freedom of expression and to secure information as a public good, while dealing with content that damages or potentially damages human rights and democracy, particularly content that conveys hatred, incitement to violence, harassment and discrimination against women, minorities and other vulnerable groups, and mis- or disinformation.

The networks of media regulators shared the will to develop coherent regulation systems across regions in order to better meet these objectives while minimising Internet fragmentation. They welcomed the commitment to promote independent online content regulatory systems, acting within the framework of the law and subject to the supervision of the judiciary and respecting fundamental rights, including the rights to privacy and freedom of expression. They supported the ambition of imposing obligations of due diligence and transparency on digital platforms, especially in terms of online content management for user safety. The statement’s signatories agreed on the importance of a risk assessment process and other measures applying to digital platforms, aiming *inter alia* to protect election integrity as well as to respond to major crises such as conflicts, wars, natural disasters, health emergencies or sudden world events. They strongly supported the will to develop media and online information literacy through digital platforms, and to open access to the data necessary to undertake research or regulation, while fully guaranteeing the protection of personal data. They shared the will, which meets the fundamental objective of linguistic diversity, to make digital platforms more accessible to all users, particularly through an extension of the languages that can be used to contact them.

The chairpersons of the regulators' networks affirmed the availability of their respective networks to contribute to the creation of and investment in a global, common and multi-stakeholder space for debate and sharing of best practices regarding the regulation of digital platforms. Finally, they solemnly reiterated their own commitments to protect and promote fundamental rights, particularly freedom of expression, in their work.

Erklärung der Netzwerke der Regulierungsbehörden für Medien und Online-Sicherheit Aus Anlass der globalen UNESCO Konferenz "Internet für Vertrauen"

Statement of the networks of media and online safety regulators on the occasion of the UNESCO Internet for Trust Global Conference

https://www.haca.ma/sites/default/files/upload/Statement%20UNESCO%20Global%20Conference%20%28en%29.pdf

DSA: first set of Very Large Online Platforms and Search Engines designated by the European Commission

Amélie Lacourt
European Audiovisual Observatory

On 25th April 2023, the European Commission adopted its first designation decision under the Digital Services Act (DSA), which entered into force in November 2022. Based on the user data platforms had to publish by 17 February 2023, the Commission designated 17 Very Large Online Platforms (VLOPs) and 2 Very Large Online Search Engines (VLOSEs) that reach at least 45 million monthly active users.

The regulation aims at empowering and protecting users online, including minors, by requiring the designated services to assess and mitigate their systemic risks and to provide robust content moderation tools. Under the DSA, obligations match the role, the size and the impact of platforms on the online ecosystem. In other words, the greater the size, the greater the responsibility. Obligations toward VLOPs and VLOSEs therefore include more user empowerment, strong protection of minors, more diligent content moderation and less disinformation, and more transparency and accountability. Such a designation therefore requires the said platforms and search engines to comply with the set of additional obligations under Section 5 of the DSA within four months.

The designated platforms will need to report to the Commission their first annual risk assessment, as provided under Article 34 DSA. VLOPs and VLOSEs will have to identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services. Mitigation measures will consequently be put in place in response to the previous assessment, paying particular consideration to the impacts of such measures on fundamental rights (Article 35 DSA). The risk mitigation plans of designated platforms and search engines will be subject to an independent audit and oversight (Article 37 DSA).

On the same day, the Commission also launched a call for evidence on the DSA provisions related to, among others, data access for researchers (Article 40 DSA). Vetted researchers will indeed have the possibility to access the data of any VLOP or VLOSE, including to conduct research on systemic risks in the EU. The Commission is working on the design of efficient, easy, practical and clear data access mechanisms, with the view of increasing transparency and allowing for a better understanding of VLOPs and VLOSEs. The Commission will include those mechanisms in a delegated act, which will ensure that a coherent procedure for data access is implemented across Member States. The consultation will end on 23rd May.

The list of Very Large Online Platforms includes:

Alibaba AliExpress, Amazon Store, Apple AppStore, Booking.com, Facebook, Google Play, Google Maps, Google Shopping, Instagram, LinkedIn, Pinterest, Snapchat, TikTok, Twitter, Wikipedia, YouTube, Zalando

The list of Very Large Online Search Engines includes:

Bing, Google Search

DSA: Very large online platforms and search engines

https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops

REGULATION (EU) 2022/2065 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act)

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022R2065#d1e3569-1-1

EMFA: a quick recap of the ongoing legislative process

Justine Radel-Cormann
European Audiovisual Observatory

On 16 September 2022, the European Commission presented a proposal for a regulation establishing a common framework for media services in the internal market (Media Freedom Act — EMFA) (see IRIS 2022-9/3, and the European Audiovisual Observatory note on the proposal for a European media Freedom Act published on 10th January 2023).

Since then, the European institutions have started their work with the Audiovisual and Media Working Party (AUDIO) for the Council of the European Union and the Committee on Culture and Education (CULT) for the European Parliament (EP).

Looking a bit closer at each of the institutions:

- The AUDIO working party prepares the work of EU ministers for audiovisual affairs and is made up of counsellors, each attached to the various permanent representations based in Brussels. The working party recently met on 28 March and 17 April and will resume on 22 May. During these meetings, parts of the EMFA proposal are discussed in order for the Council to later adopt and present its General Approach, forming the Council's position for future discussions with the other EU institutions when the interinstitutional negotiations will kick off.

- The CULT committee is responsible for this file, for which MEP Sabine Verheyen is the rapporteur. The Committee on Internal Market and Consumer Protection (IMCO) and the Committee on Civil Liberties, Justice and Home Affairs (LIBE) are associated committees in this process, with shared competencies on the text, and are tasked with giving their opinion on the matter. For instance, LIBE will look at the proposed articles dealing with journalists' protection. Each opinion will be added to the final report of the CULT Committee. Once adopted in plenary session, the report and the opinons will together represent the EP's position with a view to the adoption of the EMFA, to be used during the interinstitutional negotiations.

What has been published so far?

- the CULT draft opinion, led by MEP Sabine Verheyen, presenting 117 amendments, dated 31 March 2023, published on 20 April 2023. The deadline for amendments is 5 May 2023.

- the IMCO draft opinion, led by MEP Geoffroy Didier, presenting 172 amendments, dated 3 March 2023, as well as the tabled amendments to the draft opinion, totaling 700 amendments altogether .

- the LIBE draft opinion, led by MEP Ramona Strugariu, presenting 124 amendments, dated 16 April 2023, published on 18 April 2023. The deadline for amendments is set to 8 May 2023.

Each committee will discuss its draft report and tabled amendments to later agree on a final version.

What's in there?

While information on the work of the AUDIO working party is not yet publicly available, MEP Sabine Verheyen's draft report has been published. Here are some examples of what the MEP suggests:

- Guaranteeing the independence of the future Board, by revising the proposed recital 24 (amendment 14), requesting for instance the establishment of an independent Secretariat.

- Giving the possibility to a regulatory authority (which is not competent to take actions) to ask the competent national authority to take measures against a media service provider when having a prejudicial behaviour (by amending the proposed Article 16, see amendment 78).

- Giving the possibility to media service providers to ask the relevant national authority to provide a clarification when first declined by the very large online platform (amending the proposed Article 17, see amendment 80).

- Asking VLOPs to respect the freedom of expression and freedom of the media, ensuring a fair and non discriminatory distribution on their platform of services provided by media service providers (amending the proposed Article 17, see amendment 81).

Expected procedure:

If LIBE and IMCO can adopt their positions by the end of June 2023, the assembled EP report could be presented and voted on during a plenary session in September 2023. This way, interinstitutional negotiations could start in October 2023.

This timeline is suggested by MEP Verheyen in her draft report.

MEP Verheyen's Draft Report on the proposal for EMFA

https://www.europarl.europa.eu/doceo/document/CULT-PR-746655_EN.html

AUDIO Working Party dedicated webpage

https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/audiovisual-working-party/

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common framework for media services in the

internal market (European Media Freedom Act) and amending Directive 2010/13/EU

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457

LIBE Draft Opinion on EMFA

https://www.europarl.europa.eu/doceo/document/LIBE-PA-746757_EN.pdf

IMCO Draft Opnion on EMFA

https://www.europarl.europa.eu/doceo/document/IMCO-PA-742456_EN.pdf

Tabled amendments to IMCO Draft Opinion (AMs 173-421)

https://www.europarl.europa.eu/doceo/document/IMCO-AM-746660_EN.pdf

Tabled amendments to IMCO Draft Opinion (AMs 422-700)

https://www.europarl.europa.eu/doceo/document/IMCO-AM-746721_EN.pdf

NATIONAL

BULGARIA

[BG] Draft amendments to the criminal code concerning intellectual property crimes

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Dimitrov, Petrov & Co., Law Firm

On 2 March 2023, the *Проект на Закон за изменение и допълнение на Наказателния кодекс* (draft Act for amendment and supplement to the Criminal Code) was published on the *Портала за обществени консултации* (Public Consultations Portal). The deadline for public discussion (submission of statements by interested parties) was 3 April 2023.

The newly proposed provisions would allow for the prosecution of individuals who create conditions for online piracy. This includes individuals who develop and maintain torrent tracker sites, web platforms, chat groups in applications for online exchange of pirated content, and other similar activities.

The proposed amendments aim to address the difficulties in investigating and detecting criminal infringements against multiple protected objects of copyright or related rights. Currently, each object or tangible medium must be individualised, which complicates investigations and hinders their progress. The new amendments aim to help simplify the process and make it easier to prosecute individuals who engage in online piracy.

It is important to note that the proposed amendments do not target individual users of pirated works. Instead, they focus on those who create the conditions for piracy to occur. The mere fact of developing or maintaining an information system or offering an information society service with criminal intent shall constitute a criminal offence and shall entail criminal liability.

In addition to the proposed amendments to the Criminal Code, changes to the Criminal Procedure Code and the Special Intelligence Means Act are also being proposed. These changes would allow the use of special intelligence means in cases of intellectual property offences under Article 172a and Article 172b of the Criminal Code. The competence of the investigators of the National Investigation Service would also be extended.

The proposed amendments are a response to criticisms directed towards Bulgaria under Section 301 of the US Trade Act. This section focuses on the protection of intellectual property, particularly in the area of online piracy.

Проект на Закон за изменение и допълнение на Наказателния кодекс

https://www.strategy.bg/PublicConsultations/View.aspx?lang=bg-BG&Id=7461

Draft Act for amendment and supplement to the Criminal Code

GERMANY

[DE] Radio Bremen Broadcasting Council welcomes ARD reforms and offers suggestions for the future of public broadcasting in Germany

Dr. Jörg Ukrow
Institute of European Media Law (EMR), Saarbrücken/Brussels

The *Rundrunkrat* (Broadcasting Council) of *Radio Bremen*, the smallest of the nine public service broadcasters that make up the *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (German Association of Public Service Broadcasters – ARD), adopted a resolution on the further development of public service broadcasting at its meeting on 16 March 2023. Like *Saarländische Rundfunk* (Saarland broadcasting corporation), *Radio Bremen* has been the subject of numerous merger-related discussions and demands.

The *Rundfunkrat* believes it has a duty and obligation to publish a preliminary summary of its observations and conclusions as part of the debate on the future of public service broadcasting. It thinks the decision to restructure the ARD as a "content network" of radio and television channels, with a strong media and audio library, was both correct and necessary. This reorganisation process, which is already under way, means developing new things and adapting the old, keeping both in balance for a number of years and providing all licence fee payers with a compelling offering across as many of the media channels, that they use, as possible. In view of the latest technical advances and changing media consumer behaviour, such restructuring is indispensable. How and with what objectives it should be carried out must be openly discussed by the *Landesrundfunkanstalten* (state media authorities) and their supervisory boards, the *Landtage* (state parliaments), *Landesregierungen* (state governments) and interested, informed members of the public. The *Rundfunkrat* therefore hopes the so-called *Zukunftsrat* (Future Council), appointed by the *Rundfunkkommission* (Broadcasting Commission) of the *Länder,* will reach a new and viable social consensus on the remit and structure of public service broadcasting.

The *Rundfunkrat* firmly opposes any form of political interference in the setting of the licence fee and, in particular, the arbitrary freezing of the fee, reiterating that the repeated proposals that *Radio Bremen* become part of *Norddeutsche Rundfunk* (NDR) are totally inappropriate. Indeed, the ARD's regional integration in society and politics is its main source of strength.

The *Rundfunkrat* strongly favours the creation of a common technical infrastructure within the ARD and beyond, with *Zweites Deutsches Fernsehen* (ZDF) and *Deutschlandradio*. This includes, in particular, the development of a shared platform open to the content of other public service institutions such as universities and museums.

The *Rundfunkrat* supports the ARD's plans to strengthen collaboration and cooperation between the state media authorities in relation to all media (television, radio and Internet), especially through the creation of content-related centres of expertise.

The *Rundfunkrat* also subscribes, in principle, to the current procedure for appointing broadcasting council members in accordance with the pluralism principle. It proposes finding ways of increasing the number of members with specialist knowledge in certain fields and can call on outside experts independently in accordance with Article 9(5) of the *Radio-Bremen-Gesetz* (Radio Bremen Act – RBG).

The *Rundfunkrat* urges all its members to encourage debate on the reform and future of the ARD within the relevant bodies of organisations and to invite their directors and board members to take part. These organisations represent the public, their voices must be heard in the current debate on ARD reforms, and they must play a part in the future development of public service broadcasting.

Entschließung des Rundfunkrates von Radio Bremen zur Weiterentwicklung des öffentlich-rechtlichen Rundfunks, 16 März 2023

https://www.radiobremen.de/ueber-uns/gremien/entschliessung-weiterentwicklung-oeffentlich-rechtlicher-rundfunk-100~download.pdf

Resolution of the Radio Bremen Broadcasting Council on the further development of public service broadcasting, 16 March 2023

[DE] Broadcasting Commission criticises federal ministry's proposed ban on high-sugar food advertising

Dr. Jörg Ukrow
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 27 February 2023, the *Bundesministerium für Ernährung und Landwirtschaft* (Federal Ministry of Food and Agriculture – BMEL) presented the key elements of a proposed bill prohibiting the advertising of foods with high sugar, fat or salt content. The BMEL's initiative follows the discovery that food advertising aimed at children very often promotes highly processed foods that contain excessive levels of these ingredients. Excessive consumption of such foods contributes to diet-related diseases (e.g. obesity, diabetes) that have high societal costs. Food advertising has a lasting impact on the eating habits of children under 14 years of age, who are particularly receptive to advertising. Parents have little opportunity to protect their children from advertising and lifelong nutritional behaviour is decisively shaped during childhood.

In order to protect children, take the pressure off parents in everyday life and contribute to a better nutritional environment, advertising in all relevant media for foods with a high sugar, fat or salt content should, according to the BMEL, no longer be aimed at children. Previous voluntary commitments and industry rules have not been able to effectively protect children from negative advertising influences.

Under the BMEL's initiative, advertising aimed at children under 14 for foods high in sugar, fat or salt will no longer be allowed. The advertising ban will cover all media relevant to children, including influencer marketing. Based on the advertising environment or other context, advertising of such food will also be prohibited (1) if it is broadcast on television and radio between 6 a.m. and 11 p.m. and it is therefore consciously accepted that it will be regularly seen or able to be seen by children, and (2) if it is broadcast in the context of content aimed at children. Sponsorship of such products aimed at children will also be prohibited. The assessment of high sugar, fat or salt content will be based on the requirements of the World Health Organization's nutrient profile model.

In a resolution dated 8 March 2023, the *Rundfunkkommission* (Broadcasting Commission) of the *Länder* stated that the BMEL's proposals concerned media regulation issues that fell under the legislative and supervisory remit of the *Länder*. In view of current legislative responsibilities, rules at national and European levels, including Article 6(7) of the *Jugendmedienschutz-Staatsvertrag* (state treaty on the protection of young people in the media), adopted by the *Länder* to implement Articles 9(4) and 28b(2) of the EU's Audiovisual Media Services Directive, and existing monitoring and self-regulatory structures, the Broadcasting Commission urged the BMEL to seek dialogue with it before taking any further action.

Pressemitteilung des BMEL vom 27. Februar 2023

https://www.bmel.de/DE/themen/ernaehrung/gesunde-ernaehrung/kita-und-schule/lebensmittelwerbung-kinder.html

BMEL press release, 27 February 2023

Beschluss der Rundfunkkommission vom 8. März 2023

https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Beschluesse_der_Rundfunkkommission/2023-03-08_Beschluss_RFK_TOP_5_BMEL_Suessigkeitenwerbung.pdf

Broadcasting Commission decision of 8 March 2023

[DE] Draft fourth state media treaty adopted, resulting in new public service broadcasting reforms

Dr. Jörg Ukrow
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On 16 March 2023, the heads of government of the German *Länder* adopted the draft *Vierte Medienänderungsstaatsvertrag* (fourth state treaty amending the state media treaty), which includes provisions designed to strengthen compliance, transparency and supervision in public service broadcasting. The proposed amendment of the state media treaty contains standard rules in these areas that will apply to the state broadcasters that comprise the ARD, as well as ZDF and Deutschlandradio.

The draft treaty will now be submitted to the state parliaments for preliminary consultation before being signed by the heads of government of the *Länder,* via circular procedure by 17 May 2023. The new provisions will enter into force at the start of 2024.

The public service broadcasters are funded by society as a whole. The *Länder* therefore believe they should be subject to specific transparency and supervision requirements. They hope that the proposed provisions will create a common set of high standards in the fields of transparency, compliance and supervision for all public service broadcasters in Germany. The *Vierte Medienänderungsstaatsvertrag* is also the first response from the *Länder* to the events involving RBB and other broadcasters that came to light last summer. By acting fast, the *Länder* want to demonstrate that they attach great importance to such issues and are capable of acting.

The *Vierte Medienänderungsstaatsvertrag* forms part of a wider set of public service broadcasting reforms in Germany. The *Dritte Medienänderungsstaatsvertrag* (third state treaty amending the state media treaty), which is currently undergoing ratification by the individual state parliaments, also contains amendments to the remit of public broadcasters. The new provisions, which clarify the role of public service broadcasting and take into account changing media usage, are expected to enter into force in July 2023. In January 2023, the *Rundfunkkommission* (Broadcasting Commission), which provides the *Länder* with a permanent forum for the discussion of issues relating to media policy and legislation, agreed some key elements of the public service broadcasting reforms in Germany, which will be worked on in the coming months.

On 8 March 2023, the *Rundfunkkommission* created the *Zukunftsrat* (Future Council), a temporary body tasked with developing a long-term vision for the future of public service broadcasting and its acceptance beyond the current decade. A multidisciplinary advisory body, the Future Council will prepare a report containing recommendations on the future of public service broadcasting, its future usage and its acceptance. It will also note the impact of its

recommendations on the broadcasting licence fee and its acceptance. The fixing of the licence fee and the mechanism for determining financial requirements remain the responsibility of the *Kommission zur Ermittlung des Finanzbedarfes der Rundfunkanstalten* (Commission for Determining the Financial Requirements of Broadcasters – KEF).

The Future Council's report will focus on the following questions:

a) How, in quantitative and qualitative terms, should public service media be structured and distributed as part of the dual media system, so they reach all sections of society with attractive, diverse and high-quality content that is universally used and accepted?

b) How can public service media content display regional diversity in a digital media world? The changes, opportunities and challenges created by greater cooperation between public broadcasters will be examined.

c) How will media markets and media usage evolve in the future and how should public service media be structured and organised so they can effectively fulfil their specific remit in the dual media system? Good governance principles and the possibilities and opportunities, resulting from the digital transformation and a joint public service platform, will be given particular consideration.

d) What basic mechanisms (e.g. performance indicators) and supervisory and monitoring structures can be used to stabilise the expenditure of public service media?

In parallel with the Future Council's work, the *Rundfunkreferenten* (broadcasting advisors) of the *Länder* will devise short- and medium-term proposals for the revision of the legal framework in the three key areas of reform, i.e. "Shaping digital transformation and increasing quality", "Enhancing public service broadcasting structures and cooperation and ensuring licence fee stability" and "Further improving good governance".

Vierter Staatsvertrag zur Änderung medienrechtlicher Staatsverträge (Entwurf), 16. März 2023

https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Anhoerung_Compliance_und_Transparenz/4_MAEStV_MPK-Beschlussfassung.pdf

Fourth state treaty amending the state media treaty (draft), 16 March 2023

Beschluss der Rundfunkkommission zur Einsetzung des Zukunftsrates vom 8. März 2023

https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Beschluesse_der_Rundfunkkommission/2023-03-08_BEschluss_RFK_TOP_1_Reform_OERR_Zukunftsrat.pdf

Decision of the Broadcasting Commission creating the Future Council, 8 March 2023

SPAIN

[ES] Spain initiates pre-investigative proceedings against OpenAI, owner of ChatGPT

Azahara Cañedo & Marta Rodriguez Castro

On 13 April 2023, the *Agencia Española de Protección de Datos* (Spanish Data Protection Agency – AEPD) announced the initiation of a pre-investigation procedure against the American company Open AI, owner of the artificial intelligence chatbot prototype ChatGPT. In the view of the national supervisory authority for data protection in Spain, the ChatGPT service could have an impact on the rights of individuals.

The announcement is part of an action initiated by the AEPD at the beginning of April. The AEPD had called on the European Data Protection Board (EDPB) to include Chat GPT as a priority topic for joint European action. This has as a background the limiting measures imposed in March by the Italian Data Protection Authority which, in response to a data breach complaint involving ChatGPT user conversations, has imposed an immediate temporary limitation of the chatbot's activity, as well as conditions on OpenAI's processing of Italian user data.

Suspicions that the famous chatbot is using personal user data to train artificial intelligence have led to the creation of a specialised task force within the EPDB. The aim is for the different European bodies to share information and act in a coordinated manner with a view to implementing possible regulatory measures on the actions of ChatGPT.

Official Statement from the Spanish Data Protection Agency

EDPB resolves dispute on transfers by Meta and creates task force on Chat GPT

https://edpb.europa.eu/news/news/2023/edpb-resolves-dispute-transfers-meta-and-creates-task-force-chat-gpt_en

Artificial intelligence: Garante blocks ChatGPT. Illegal collection of personal data. Lack of systems to verify the age of minors

[ES] The Spanish Congress launches the parliamentary processing of the new Cinema and Audiovisual Culture Law

Azahara Cañedo & Marta Rodriguez Castro

The Spanish Congress of Deputies has given the green light to the processing of the new Cinema and Audiovisual Culture Law on 16 March 2023. This draft law, approved by the Council of Ministers in December 2022, moves forward in the parliamentary process towards its approval after overcoming the overall amendment presented by the far-right party, Vox. Only the deputies of Vox voted in favor of this motion to reject the bill. The deputies of the liberal party Ciudadanos abstained in the vote and the rest of the parliamentary groups supported the continuance of the draft law.

This new law (Boletín Oficial de las Cortes Generales, 2023) repeals Law 55/2007, of 28 December, on Cinema (Ley 55/2007) to update the regulatory framework for the promotion and safeguard of cinema. Meanwhile, it expands the very object of the law that is regulated beyond cinematographic work, including television production under the umbrella term Audiovisual Culture (TV films and TV series). The draft also introduces changes in the regulation of the Spanish Historical Heritage (Ley 16/1985), by strengthening the protection of Film and Audiovisual Heritage.

The main changes undertaken with this new draft law aim at updating the current framework to better fit the transformation that the audiovisual industry has experienced during the past 15 years. As argued by Miquel Iceta, the Spanish Minister of Culture and Sports, the 2007 Cinema Law is no longer meeting the needs of the audiovisual sector, and this new proposal can strengthen a rich, complex, diverse and constantly changing industry. In this regard, the draft of the Cinema and Audiovisual Culture Law is built around five principles (Congreso de los Diputados, 2023): 1) the support to the audiovisual industry throughout the entire value chain, 2) the support to authors and creators in the exercise of their intellectual property rights, 3) the adaptation to new technologies, consumption habits and media formats, 4) the promotion of competition in the audiovisual market, and 5) the value of the audiovisual heritage.

Under this new framework, some changes will be introduced in the granting of state aid to the audiovisual industry, that will not only target audiovisual production, but also exhibition, internationalization, project development, the digitalization of cinemas, the support to independent or rural cinemas and heritage protection. Moreover, the allocation of such grants will be subject to several diversity and sustainability criteria in order to promote gender equality (at least 35% of the funding to production will be for audiovisual content directed by women), reduce environmental impact and advance universal accessibility. Public funding will also be transferred to the Autonomous Communities so that they can support audiovisual production in co-official languages other than Spanish.

Further developments introduced into the draft law also include the establishment of a new advisory body, the *Consejo Estatal de la Cinematografía y la Cultura Audiovisual* (State Council of Cinematography and Audiovisual Culture). This body will promote public-private collaboration through the dialogue between the industry and the different levels of the public administration (national, regional and local). The State Council will be composed of representatives of the regions and by agents from the film and audiovisual industries.

The demands of the audiovisual sector have been integrated in the draft law in disparate ways. The controversy around the definition of independent production companies, that exploded with the approval of the Audiovisual Services Media Law (Ley 13/2022), is reconciled in this new Cinema and Audiovisual Culture Law by considering the previous definition, as demanded by the sector. On the other hand, while the draft law lowers from 25% to 20% the quota of European productions to be screened in movie theatres and includes within this percentage Ibero-American productions, the exhibitors, represented by the *Federación de Cines de España* (Federation of Spanish Cinemas, FECE), are still advocating for the suppression of the quotas for European film productions. FECE is also pushing for the protection of the exhibition window through the establishment of a period of exclusivity of 100 days for movie theatres, but this has not been considered in the draft law yet.

Official Gazette of the Parliament (January 27 2023). 121/000137 Draft Law on Cinema and Audiovisual Culture

Congress of Deputies (2023). Draft Law on Cinema and Audiovisual Culture [121/000137]. Dossier. Legislative Series. Nº 74. February 2023.

Law 55/2007, of 28 July, on Cinema

Law 16/1985, of 15 June, on Spanish Historical Heritage

Law 13/2022, of 7 July, on Audiovisual Communication

FECE (2023). Stance.

FINLAND

[FI] National measures for the transposition of the DSM Directive in force early April

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The Finnish Parliament approved amendments to the Finnish Copyright Act (404/1961, CA) late February 2023, based on the DSM Directive (EU) 2019/790. The amendments entered into force on 3 April 2023.

The process was a lengthy one, including a round of critical statements from various stakeholders regarding the draft Government proposal and a renewed preparation subject to complaints about partiality. The Constitutional Law Committee was also consulted during the legislative process and a supplementary Government proposal was drafted. The process exceeded the transposition deadline which also attracted the attention of the European Commission.

The original Government proposal was amended based on constitutional remarks regarding, in particular, the provisions on text and data mining (DSMD Article 3) as well as provisions on filtering practices by content sharing platforms (DSMD Article 17). Thereby, the national provisions on text and data mining for scientific purposes (CA § 13 b.2) came to enable use of copies for further research. Moreover, the provisions concerning lawful use of copyrighted content on platforms (CA § 55 f) came to include a prohibition on general monitoring based on freedom of expression, while the Constitutional Law Committee emphasized that the provisions are applied between private parties in the first place. Both solutions took the letter of the national law closer to the that of the DSM Directive. (PeVL 58/2022 vp and PeVL 85/2022 vp)

The so called “parody exemption” was also added to the Finnish Copyright Act in connection with the amendments, covering not only Article 17 DSMD but also more general use for parody, pastiche, and caricature (§ 23 a). This type of explicit exemption has not been included in the Finnish Copyright Act, based on the voluntary list of exceptions and limitations in the InfoSoc Directive (29/2001/EC). Following the Education and Culture Committee’s proposal, the requirement of “good practice” was removed from the final provision (SiVM 22/2022 vp).

Chapter 3 of the Finnish Copyright Act includes provisions on the transfer of copyright, some of which were also amended due the requirements of the DSM Directive. These amendments include, for example, listing the provisions which are mandatory (CA § 27). Regarding the principle of appropriate and proportionate remuneration, as set out in Article 18 of the DSM Directive, the starting point is fair remuneration. The directive also includes provisions on contract adjustment

mechanisms (Article 20). A new provision (§ 28 a) on appropriate and proportionate remuneration was added to the Copyright Act, while the Government proposal emphasizes freedom of contract and negotiation as well as keeping the door open for different types of remuneration. The adjustment rules in Section 29 of the Copyright Act (see IRIS 2015-7:14) were in principle seen to fulfill the requirements of Article 20 DSM Directive: according to Section 29.1 CA, a term in a contract on transfer of copyright, concluded by the original author, may be adjusted or set aside if it is unreasonable or the application thereof would result in an unreasonable outcome. Factors to be considered came to include the author's contribution to the overall creative work as well as the commercial value and use of the work alongside the entire content of the contract, positions of the parties, underlying and subsequent circumstances (§ 29.2 CA). (HE 43/2022 vp)

The Finnish Copyright Act will later be revised based on national needs.

The European Commission decides to refer 11 Member States to the Court of Justice of the European Union for failing to fully transpose EU copyright rules into national law. Press release 15.2.2023, Brussels.

https://ec.europa.eu/commission/presscorner/detail/en/ip_23_704

Act on Amending the Copyright Act (263/2023)

Government proposal on amending the Copyright Act and Electronic Communications Services Act

Government proposal supplementing the Government proposal on amending the Copyright Act and Electronic Communications Services Act

Statement of the Constitutional Law Committee on the Government proposal supplementing the Government proposal on amending the Copyright Act and Electronic Communications Services Act

Statement of the Constitutional Law Committee on the Government proposal on amending the Copyright Act and Electronic Communications Services Act

Report of the Education and Culture Committee on Government proposal on amending the Copyright Act and Electronic Communications Services Act as well as the Government proposal supplementing the Government proposal on amending the Copyright Act and Electronic Communications Services Act

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market

and amending Directives 96/9/EC and 2001/29/EC

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=FI

FRANCE

[FR] ARCOM warns three pornographic websites to improve age verification mechanisms

Amélie Blocman
Légipresse

While a system for checking the age of users of public online communication services that provide access to pornographic content is currently being trialled in France, the *Autorité de régulation de la communication audiovisuelle et numérique* (French audiovisual regulator – ARCOM) noted on 3 April 2023 that the websites Heureporno and xHamsterLive simply required users to state that they were adults with a single click in order to access such content, while no age checks at all were carried out by the website Folieporno. The regulator pointed out that simply requiring users to state that they were adults did not prevent minors from accessing pornographic content on the sites concerned, as provided in the final paragraph of Article 227-24 of the Penal Code, according to which "the manufacture, transport, distribution by whatever means and however supported, of a message bearing a pornographic (…) character (…), or the trafficking in such a message, is punished by three years' imprisonment and a fine of €75,000, where the message may be seen or perceived by a minor (…). The offences mentioned in this article are committed if a minor can access the messages described in the first paragraph by simply declaring that they are aged 18 years or over."

Pursuant to Article 23 of the Law of 30 July 2020, since the pornographic content of the three sites could be accessed by minors, the ARCOM president, on 6 April 2023, sent a formal notice to the sites' operators, ordering them to take all possible steps to comply with Article 227-24 of the Penal Code within 15 days. The recipients had 15 days in which to present their observations. If they failed to respond in time, ARCOM would be able to refer the matter to the president of the Paris judicial court with the request that, under the accelerated procedure, it should order Internet access providers to block access to the services concerned. It took this step in July 2022 with regard to the Pornhub, Tukif, Xhamster, Xnxx and Xvideos websites. The procedure is pending.

Rejecting a question regarding the constitutionality of the relevant law, the Court of Cassation recently ruled that the use of a system to verify the age of someone accessing online pornographic content that requires more than a simple age declaration conforms with the Constitution (Court of Cassation (1st civil chamber), 5 January 2023). Meanwhile, the *Conseil d'Etat* (Council of State) declared itself powerless to annul such a formal notice sent by ARCOM to the provider of a pornographic website asking it to make its content inaccessible to minors (Council of State, 29 November 2022, no. 463163, Société MG Freesites Ltd).

Décision n° 2023-P-04 du 6 avril 2023 mettant en demeure la société Techpump Solutions S.L. en ce qui concerne le service de communication au public en ligne « Heureporno »

https://www.legifrance.gouv.fr/download/pdf?id=EO8F3naMvkC4MEBDMjnuwo6UDiemeBPdGRbm-zc6GpM=

Decision no. 2023-P-04 of 6 April 2023 to issue a formal notice to Techpump Solutions S.L. regarding the "Heureporno" online public communication service

Décision n° 2023-P-05 du 6 avril 2023 mettant en demeure la société Techpump Solutions S.L. en ce qui concerne le service de communication au public en ligne « Folieporno »

https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047428959

Decision no. 2023-P-05 of 6 April 2023 to issue a formal notice to Techpump Solutions S.L. regarding the "Folieporno" online public communication service

Decision no. 2023-P-06 of 6 April 2023 to issue a formal notice to Technius Ltd regarding the "xHamsterLive" online public communication service

[FR] Bruno Lasserre report recommends relaunching legal tools and rethinking film industry regulation

Amélie Blocman
Légipresse

Commissioned in September 2022 to draft some proposals for modernising regulatory tools in the film industry, Bruno Lasserre, former president of the French Competition Authority, submitted his report to the Ministries of the Economy and Culture on 3 April following numerous meetings with representatives from across the industry. The report follows the framework set out in the letter of assignment, focusing on issues linked to the relationship between cinema operators and distributors, and therefore does not cover the funding of film-making or media chronology.

The health crisis and its consequences had a devastating impact on a buoyant cinema industry: shrinking ticket sales, changes to audience distribution and film screenings (especially art-house and experimental films), competition from VOD platforms, reduced number of American films detrimental to potential audience sizes, etc. Among these causes, the author believes that only the changes to viewer behaviour are new, and directly linked to the consequences of the pandemic. Without underestimating these difficulties and legitimate points of concern, Mr Lasserre is therefore “optimistic about the potential of the French film industry…which has everything it needs to bounce back successfully without sacrificing the diversity that makes it strong today”.

In this context, the role of regulation is being debated within the industry, and one of the key challenges identified is the need to ensure a balanced commercial relationship between cinema operators and film distributors. In this regard, the report recommends simplifying the rules governing unlimited cinema passes (the main two examples of which are sold by UGC and Pathé). These passes are currently subject to approval by the *Centre national du cinéma et de l'image animée* (National Centre for Cinema and the Moving Image – CNC), which also governs their retail price. However, the concerns that were expressed when these passes first appeared on the market 20 years ago now appear to have disappeared. The report therefore proposes that this approval requirement be abolished, while retaining the two main guarantees set out in law, i.e. the right of independent cinemas to take part in the scheme and the fixing of a ‘reference price’ (fictional price of a single ticket) to form the basis for the remuneration of rightsholders and distributors. At the same time, it seems necessary to improve the transparency and dynamism of the reference price by recalculating it (it has hardly changed since 2000). Several scenarios are proposed for this.

The second challenge facing the public authorities is the need to safeguard the diversity of works and their distribution throughout the country. Programming commitments are the main regulatory tool for achieving this. These commitments are obligations concerning cinema programmes, which are proposed by the operators and approved by the CNC. Originally designed as a tool for economic

and competition regulation, they have gradually become a cultural policy instrument. Although they are meant to be renewed on a regular basis, this has not happened for any operator since 2019. According to the report, public subsidies could be made conditional on compliance with these commitments, the content of which must be determined through dialogue between the operators and the CNC.

The CNC president could therefore determine the cinema groups' programming commitments if they fail to submit their own proposals or if their proposals are unsatisfactory. At the same time, it is proposed that the introduction of distribution commitments for distributors be allowed, based on that adopted in 2016, in order to enable operators and the public to access art-house and experimental films in particular throughout the country. As regards financial incentives for film distribution, it seems appropriate to develop the system whereby cinemas receive subsidies based on the percentage of art-house and experimental films that they show.

The final emerging issue identified in the report concerns the safeguarding of French and European cultural assets in a context of concern about the possibility of predatory purchases by non-European companies of film catalogues and cinemas that are mainly publicly funded and that contribute to French culture. The report therefore recommends adjusting the catalogue protection measures introduced in 2021 in order to ensure the continued exploitation of works by increasing the consequences of a failure to report, while at the same time accelerating and simplifying the process for the stakeholders concerned.

Cinéma et régulation, rapport de Bruno Lasserre, remis le 3 avril à B. Le Maire et R. Abdul-Malak

https://www.cnc.fr/cinema/etudes-et-rapports/rapport/rapport-de-bruno-lasserre---le-cinema-a-la-recherche-de-nouveaux-equilibres---relancer-des-outils-repenser-la-regulation_1928729

Cinema and regulation, report by Bruno Lasserre, submitted to B. Le Maire and R. Abdul-Malak on 3 April 2023

[FR] ChatGPT scrutinised by data protection agencies

Amélie Blocman
Légipresse

On 13 April, the *Commission Nationale de l'Informatique et des Libertés* (French data protection authority – CNIL) announced that it had opened a "review procedure" to investigate five complaints concerning the artificial intelligence chatbot ChatGPT, including one lodged by MP Eric Bothorel alleging possible breaches of the General Data Protection Regulation (GDPR). Meanwhile, Jean-Noël Barrot, France's digital minister, called for a more moderate approach, saying that blocking ChatGPT was not the answer and that it would be better "to regulate innovation to ensure it conforms to the principles we hold dear".

On the same day, the Spanish Agency for Data Protection (AEPD) announced that it had "opened, on its own initiative, an investigation into the American company OpenAI for a possible breach of the regulations" on data protection.

Italy's data privacy regulator went a step further, announcing on 12 April that the company risked court action unless it complied with a series of demands by 30 April, including the creation of a mechanism for requesting personal data rectification, an age verification system capable of blocking access to children under 13 and minors without parental consent, a review of the legal basis for processing users' personal data to feed algorithms, and an indication that the use of personal data was conditional on the user's consent or a legitimate interest.

At the same time, the European Data Protection Board (EDPB) announced that it had created a task force "to foster cooperation and to exchange information on possible enforcement actions conducted by data protection authorities". This decision could be a first step towards a common policy on setting privacy rules on artificial intelligence pending future Europe-wide regulation of AI.

Règlement général sur la protection des données

https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX:32016R0679

General Data Protection Regulation

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679

[FR] National Assembly adopts bill defining and regulating influencer marketing

Amélie Blocman
Légipresse

Tabled by MPs Arthur Delaporte (Socialist Party) and Stéphane Vojetta (Renaissance Party), the bill "to regulate influencer marketing and combat abuses by influencers on social networks" was adopted at first reading by the National Assembly on 30 March 2023. The text contains amendments proposed by the Ministry of the Economy based on the conclusions of a report on the regulation of the influencer marketing sector published on 24 March. A code of conduct for influencers and content creators, explaining influencers' rights and fiscal, social and regulatory obligations, has already been published following this consultation. It focuses on the protection of influencers under the age of 16 in particular.

Section I of the bill defines influencer marketing and the obligations that go with it. Influencers are defined as "natural or legal persons who use their fame to digitally communicate to the public content aimed at directly or indirectly promoting goods, services or any kind of cause in return for financial remuneration or a benefit in kind". Article 2C states that any promotion run by an influencer must explicitly carry a "clear, legible and identifiable label on the image or video, in all its formats, throughout the promotion". It also points out that legislative and regulatory provisions prohibiting the advertising and promotion of certain goods and services (alcohol, tobacco, vapes) or requiring information to be displayed (health warnings) apply to commercial influencers. A *Conseil d'Etat* (Council of State) decree will set out the detailed rules for implementing these provisions. The bill prohibits influencers from promoting gambling and games of chance on platforms that do not limit access to minors. The direct or indirect promotion of cosmetic surgery, various financial services and counterfeit products is prohibited, subject to a six-month prison sentence and a EUR 300,000 fine. Offenders can also be banned indefinitely or temporarily from carrying out any online influencer marketing activity.

Children aged under 16 will not be allowed to promote beverages and foods with excessive fat, salt or sugar content. This also applies to advertisers who use product placement in audiovisual programmes broadcast on video-sharing platforms whose main character is aged under 16. Children under 16 who work as influencers are subject to the Law of 19 October 2020, which governs the commercial exploitation of the image of children under 16 on social networks.

The label "edited image" should be clearly displayed throughout the video if content edited, created and broadcast by influencers is designed to enhance or widen a person's silhouette or alter their facial appearance. Failure to do this carries a EUR 4,500 fine and a year in prison.

The profession of “influencer agent”, i.e. someone who puts influencers in contact with brands, is also defined and regulated in the bill. The parties are required to sign a written contract if the financial sums involved exceed a certain threshold laid down by decree. The contract must state that it is subject to French law, the Consumer Code and the Intellectual Property Code.

Section II of the bill concerns the regulation of content published by influencers in accordance with the Digital Services Act (requirement for online platform operators to provide mechanisms for reporting illicit content; information about content moderation, etc.). It also makes provision for campaigns to raise public awareness of influencer-generated content. Social networks will also be obliged to cooperate with the state to regulate the influencer marketing sector.

The bill will be examined by the Senate from 9 May.

Proposition de loi visant à encadrer l’influence commerciale et à lutter contre la dérive des influenceurs sur les réseaux sociaux

https://www.senat.fr/dossier-legislatif/ppl22-489.html

Bill to regulate influencer marketing and combat abuses by influencers on social networks

UNITED KINGDOM

[GB] A first look into the UK's draft Media Bill

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On 29 March 2023, the Department for Culture, Media, and Sport (DCMS) published a draft Media Bill that reforms the regulatory framework for public service broadcasters (PSBs) in the UK. The Bill aims to level the playing field with streaming services and modernise longstanding broadcast legislation to reflect changes in the global media ecology. The Bill is introduced against the background of a "fierce battle to attract and retain audiences" in the broadcast market, with changes to content consumption habits that have put traditional broadcasters "under unprecedented pressure", as Culture Secretary Lucy Frazer said.

PSBs

The Draft Bill introduces more flexible rules on what TV programmes PSBs are required to show and how they deliver on their obligations in the digital age. The new rules will enable PSBs (i.e., the BBC, ITV, Channel 4, Channel 5, STV and S4C) to better compete with streaming giants by adapting to the changing viewing habits of consumers, who increasingly watch TV on digital services instead of traditional 'linear' television. If the Bill is passed, online programming will count towards meeting PSBs' public service remit, rather than just linear programming as it stands today. Ofcom (the UK's independent communications regulator) will also be equipped with new powers to require PSBs (where appropriate) to provide more of a particular type of programming if audiences are being underserved.

The Media Bill also provides that Channel 4 (which will continue to remain publicly owned) will be permitted to produce its own content and be given a new legal duty to ensure its long-term financial sustainability and assess its own public service remit (previously assessed by Ofcom). The delivery of this duty will be evidenced via Channel 4's increased financial reporting and by annual reporting to the DCMS Secretary of State. These changes reflect the position previously adopted in the government's January 2023 announcement on Channel 4.

Video-on-demand programming

The Bill's provisions aim to increase the accountability of VOD services and narrow the gap between the regulation of traditional broadcasters and VOD providers. According to Ofcom, younger adults watch almost seven times less broadcast TV than those aged 65 and over. And, 1 in 5 UK households is signed up to all three of the most popular streaming platforms, including Netflix, Amazon Prime Video and Disney+. However, most VOD services are not covered by Ofcom's Broadcasting Code, which sets content standards for accuracy as well as

harmful and offensive material on television. Some services are not regulated in the UK at all.

The Bill will bring mainstream UK-focused VOD services under rules similar to those already applying to linear TV in order to protect audiences (including children) more consistently from a wider range of harmful material, e.g., misleading health claims. VOD viewers will be able to formally complain to Ofcom, the duties of which will be strengthened to assess audience protection measures on VOD and take action to enforce standards through fines, where necessary and appropriate. The new Ofcom powers will apply to "Tier 1" VOD services (i.e., expected to be the larger, high-reach and high-risk services), which are those provided by PSBs (other than the BBC) as well as those designated as Tier 1 by the Secretary of State (these may or may not be UK services).

The Draft Bill also brings changes to the Listed Events regime. This regime helps ensure that events of national interest (which are listed by the Culture Secretary and include, for example, major sporting events like the Wimbledon finals and the Olympic Games) are available to view live and for free by the widest possible audience. The current framework applies to PSBs (given that only PSBs largely satisfy the thresholds required to make content available to a large enough audience). However, the increased availability of broadband and connected devices means that a non-PSB service could achieve the required thresholds to make available such events. So, the Draft Bill brings VOD services into the Listed Event regime, but such services will only be able to broadcast Listed Events where a PSB is also broadcasting that event or Ofcom consents.

Radio

Commercial radio stations will likewise benefit from increased flexibility, as radio transitions from an analogue past to a digital future. The Bill will relax content and format licence-based obligations (developed in the 1980s) which require them to broadcast certain music genres or to particular age groups. The reforms will replace these with new requirements for commercial stations to provide national and local news as well as relevant local information (traffic and travel) to reflect the importance and value of these services to the public. The Bill will also empower stations to amend or adapt their services without needing Ofcom's approval, thereby reducing costs for the industry.

The Bill also aims to preserve the number of UK radio listeners, given the increasing use of competing larger internet-based platforms that drive audiences elsewhere. To this end, the Bill guarantees access to UK radio on smart speakers. The Bill introduces, in particular, reforms to protect the position of UK radio on voice-activated connected audio devices by requiring all smart speaker platforms (like Amazon and Google) to provide access to all licenced national and community UK radio stations in response to listeners' voice commands. Under the Bill, the platforms are prohibited from charging these stations a hosting fee for the provision of their live services and from overlaying their own advertising content on top of those stations' programmes.

Prominence and accessibility rules, and press regulation

Under the Media Bill, major online TV platforms such as smart TVs, set-top boxes, and streaming sticks will be required to prominently feature designated PSB services (like BBC iPlayer, ITVX, All4, My5, S4C's Clic and STV Player) and enable viewers to easily discover them. It thus appears that the Bill mandates a "must offer and must carry" and a prominence regime for PSBs' on-demand services, as viewing increasingly shifts online.

Moreover, the Bill brings forward new rules to make VOD content more accessible to those with visual and hearing impairments. Streaming services will be required to provide subtitles, audio description and signed interpretation to support people with disabilities. Subtitles are currently carried on the majority of VOD programming, but this can be inconsistent across services, while audio description and signing are rarer.

Finally, the Bill contains miscellaneous provisions, including the repeal of section 40 of the Crime and Courts Act 2013 which would have forced news publishers (had it been commenced) to pay the costs of any court case if they were not a member of the approved regulator, regardless of the outcome of the judgement (for background and details on section 40, see IRIS 2018-5/19).

Next steps

The Media Bill (which was formally announced in the Queen's Speech on 10 May 2022) follows the publication of the government's White Paper setting out its vision for the broadcasting sector. It generally tracks against most of the proposals laid out in it with no major surprises. It is anticipated the Bill will now move through the legislative process, but no timings have been confirmed yet. The government has also stated it will continue to engage with the industry to ensure that the reforms in the Bill fulfil its intentions and deliver better quality services for audiences.

Draft Media Bill (CP 822), Explanatory Notes, and Memorandum from the DCMS for the Delegated Powers and Regulatory Reform Committee

https://www.gov.uk/government/publications/draft-media-bill

DCMS, Up next - the government's vision for the broadcasting sector (CP 671)

https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector/up-next-the-governments-vision-for-the-broadcasting-sector

DCMS, Channel 4 to remain publicly owned with reforms to boost its sustainability and commercial freedom

https://www.gov.uk/government/news/channel-4-to-remain-publicly-owned-with-reforms-to-boost-its-sustainability-and-commercial-freedom

[GB] Ofcom issues new terms for the BBC's operating licence to reflect changing habits of viewers and listeners

Julian Wilkins
Wordley Partnership and Q Chambers

Ofcom has introduced the BBC's new operating licence which came into effect on 1 April 2023. The new licence will hold the BBC responsible for delivering its remit, and takes account of innovative ways of distributing content. The licence reflects the changing habits of listeners and viewers, who depend less on linear programme scheduling.

Ofcom became the first independent regulator of the BBC under the current BBC Charter and Agreement, which began on 1 January 2017 and will end on 31 December 2027. Ofcom's power to regulate the BBC is derived from Section 192 of the Communications Act 2003.

Under the BBC Charter and Agreement, strategic and editorial decisions are a matter for the BBC, whilst the operating licence issued by Ofcom is designed to ensure that it effectively fulfils its mission and promotes its Public Purposes: to provide impartial news and information; to support learning; to show creative, high-quality and distinctive output; and to reflect, represent and serve the UK's diverse communities and support the creative economy across the UK.

For the first time, the licence sets comprehensive new requirements on the BBC's online services, or platforms, including BBC iPlayer, BBC Sounds and the BBC website. Licence conditions safeguard important content on the BBC's broadcast TV and radio services, including the use of quotas to ensure the broadcaster delivers a minimum volume of news and current affairs, and original UK programme content.

The updated licence imposes transparency criteria to counter concerns that there was insufficient clarity about how the BBC planned changes to its programmes and services. The BBC will have to explain in more detail how it is fulfilling its obligations for audiences. This includes publishing in advance its plans before making a significant change to services.

The new operating licence gives the BBC flexibility to determine content to reflect changing audience behaviours. However, this flexibility is subject to stringent reporting conditions and other safeguards. The licence criteria balances online audiences' expectations for high-quality content, but maintain standards for broadcast or linear TV and radio.

The licence requires the BBC to ensure important content availability for online audiences, including for the nations and regions and at-risk programming such as arts, children's, comedy, music, religion, and specialist factual content. Content should be easy to find online. The BBC is required to identify in its Annual Plan the

number of hours it will provide for important content on its services. Ofcom specifies in detail the information to be provided in the Annual Plan and Annual Report.

If the BBC plans significant changes during the course of the year, outside the Annual Plan process, it must report to Ofcom on these changes as soon as reasonably practicable.

The licence retains strict regulatory safeguards to maintain high-quality news and current affairs; to preserve the distinctiveness of the BBC's radio services with quotas on music and sports and to protect original UK programmes. Quotas also ensure that the BBC commissions a minimum amount of content outside London and in Wales, Scotland and Northern Ireland. There are about 70 quotas listed in the operating licence.

The operation of the licence requirements will be overseen by Ofcom throughout the year including extensive research about available content and services, audience viewing and listening choices, as well as assessing their satisfaction. Ofcom will remain receptive to any concerns from other broadcasters and industry organisations about the BBC's annual plans.

Ofcom will react quickly if there are concerns about the BBC's audience delivery and, if necessary, impose additional licence requirements. In serious cases of non-compliance, Ofcom can take enforcement action.

As part of its digital-first strategy, the BBC has made several changes to BBC News and local radio in response to Ofcom's concerns. The operating licence stipulates that BBC News must provide high quality local, regional, national, UK and international news to UK audiences. The BBC must also ensure that it meets its commitments on local radio in England relating to news and travel, breaking news and major incidents, and its contribution to local democracy. During the breakfast peak on local radio in England the BBC is to retain a quota that only speech content is broadcast.

Ofcom's Modernising the BBC's Operating Licence

https://www.ofcom.org.uk/__data/assets/pdf_file/0033/255786/statement-modernising-the-bbc-operating-licence.pdf

ITALY

[IT] AGCOM launches the public consultation on video-sharing platforms: more protections for platforms' Italian users

Francesco Di Giorgi
Autorità per le garanzie nelle comunicazioni (AGCOM)

With Resolution no. 76/23/CONS of 16 March 2023, the Italian Communications Authority launched a public consultation on the draft regulation for the implementation of Article 41, paragraph 9, of the legislative decree of 8 November 2021, no. 208 (so-called TUSMA). The regulation will apply to programmes, user-generated videos and audiovisual commercial communications addressed to the Italian public and conveyed by a platform whose supplier is established in another Member State. The consultation will last 30 days from 19 April 2023.

In particular, the regulation provides for the removal of audiovisual content broadcast on a video-sharing platform (so-called video-sharing platform) for the following purposes: the protection of minors; the fight against incitement to racial, sexual, religious or ethnic hatred, as well as against the violation of human dignity; and consumer protection, including investors (see IRIS 2019-4/25, 2022-2/3 and 2023-4/21).

Such protection brought by the regulation is in addition to that ensured by the provisions of Articles 14 to 17 of the Legislative Decree. no. 70/03.

In the case of significant and imminent impacts, AGCOM may directly order the platform provider to promptly remove the harmful content. Otherwise, i.e. if there is no urgency, AGCOM may still ask the Authority of the member state in which the video-sharing platform provider is established to adopt measures to remove the content.

The Italian legislator, by the TUSMA (national law on audiovisual media services) transposing Directive 2018/1808, has granted AGCOM with the power to issue this regulation with the aim of ensuring effective and high level protection of fundamental rights of users towards video-sharing platform providers established in another member state, but which target the Italian public (such as, for example, Google's *YouTube*, Meta's *Facebook* and *Instagram*, ByteDance's *Tik-Tok* and Amazon's *Twitch*).

In order to make the protection effective, the text in consultation grants anyone with an interest with the right to report to AGCOM, through a specific electronic form, content considered against the aforementioned purposes (although this procedure is anchored to a series of conditions to discourage unfounded initiatives). In addition, AGCOM could, in any case, act *ex officio*, also with the

support of the core of the Finance Police and the Postal Police.

The regulation was also notified to the European Commission pursuant to Directive 2015/1535 as it concerns an Italian technical regulation project concerning information society services.

Delibera n. 76/23/CONS Avvio della consultazione pubblica sullo schema di regolamento recante attuazione dell'art. 41, comma 9, del decreto legislativo 8 novembre 2021, n. 208 in materia di programmi, video generati dagli utenti ovvero comunicazioni commerciali audiovisive diretti al pubblico italiano e veicolati da una piattaforma per la condivisione di video il cui fornitore è stabilito in un altro stato membro

https://www.agcom.it/documentazione/documento?p_p_auth=fLw7zRht&p_p_id=101_INSTANCE_FnOw5lVOIXoE&p_p_lifecycle=0&p_p_col_id=column-1&p_p_col_count=1&_101_INSTANCE_FnOw5lVOIXoE_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_FnOw5lVOIXoE_assetEntryId=30213061&_101_INSTANCE_FnOw5lVOIXoE_type=document

Resolution No. 76/23/CONS Launch of the public consultation on the draft regulation implementing Article 41(9) of Legislative Decree No 208 of 8 November 2021 concerning programmes, user-generated videos or audiovisual commercial communications directed at Italian audiences and conveyed by a video-sharing platform whose provider is established in another member state

Dettaglio della notifica

https://ec.europa.eu/growth/tools-databases/tris/it/search/?trisaction=search.detail&year=2023&num=208

Notification Detail

https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2023&num=208

[IT] The Italian Data Protection Authority orders the temporary limitation of the processing activities undertaken by OpenAI LLC in relation to its ChatGPT services in the Italian territory

Laura Liguori & Eugenio Foco
Portolano Cavallo

Through Decision No. 112 of 30 March 2023 ("the Decision") the *Garante per la Protezione dei Dati Personali* (Italian Data Protection Authority — "the Authority") ordered the temporary limitation of the data processing activities carried out in relation to ChatGPT services. The Decision was rendered against U.S. based company OpenAI LLC ("OpenAI") in its capacity as data controller of the personal data processed through its ChatGPT services.

In particular, following vast media coverage of the ChatGPT service over the last few months, and the recent data breach involving users' personal data and chat queries, the Authority initiated an urgent *ex officio* investigation and found that:

i. OpenAI was failing to provide information notices to users and data subjects whose personal data was being collected and processed through ChatGPT services;

ii. there was no proper legal basis in relation to the collection of personal data and its processing for the purpose of training the algorithms underlying the functioning of ChatGPT services;

iii. the processing of personal data of data subjects was inaccurate because the information provided through ChatGPT services did not always match actual data;

iv. there was an absence of any age-verification mechanism with reference to ChatGPT services which, according to the terms and conditions published by OpenAI, should be reserved only to users who were at least 13 years old. To that end, according to the Authority, the absence of filters for children under the age of 13 exposed them to responses that were totally inappropriate for their degree of development and self-awareness.

According to the Authority, its findings amounted to infringements of Article 5 (principles relating to processing of personal data), Article 6 (lawfulness of processing), Article 8 (conditions applicable to child's consent in relation to information society services), Article13 (information to be provided where personal data are collected from the data subject) and Article 25 (data protection by design and by default) of the GDPR.

For that reason, the Authority ordered, on an urgent basis, and as a temporary measure pending the completion of the investigation, the temporary limitation of all processing activities undertaken through ChatGPT services concerning data subjects established in the Italian territory under Article 58(2)(f) GDPR. Such

limitation was effective as of the moment the US based company, OpenAI, received the Decision.

The Authority also requested OpenAI to provide, within 20 days from when it received the Decision, any information concerning the steps it had undertaken to comply with the prescriptions set out in the Decision as well as to provide any other useful information justifying the contested infringements.

As a result of the temporary limitation, OpenAI has blocked access to Chat GPT services to users in Italy and has formally confirmed to the Authority its immediate willingness to cooperate in order to comply with the GDPR and to find a shared solution to address the alleged violations.

Provvedimento del 30 marzo 2023 [9870832]

https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9870832

Decision of 30 March 2023 [9870832]

LATVIA

[LV] Amendments to the Copyright Law enter into force in Latvia

Ieva Andersone, Krišjānis Knodze& Sabīne Stirniņa Sorainen

On 5 April 2023, amendments to the Copyright Law came into force. With the amendments, the Directive on Copyright in the Digital Single Market (DSM Directive) was transposed into Latvian law, providing for significant changes in copyright regulation, affecting both authors and performers, as well as users of works.

Transposition of the DSM Directive

Appropriate and proportionate remuneration:

One of the most significant changes is the introduction of the principle of appropriate and proportionate remuneration. Namely, it will be necessary to determine a fair remuneration to the author for the alienation of economic rights or for rights of the use of work. This principle is applicable both to agreements by which the author completely or partially alienates his property rights, as well as to license agreements.

To ensure fair remuneration, the obligation of transparency is introduced. It requires successors and licensees to provide the author with up-to-date and comprehensive information about the use of the work at least once a year, including the type of use, earned income and remuneration. The amendments also provide for the author's rights in case of disputes. Namely, the author is entitled to ask the successor or licensee to amend the contract, setting a fair remuneration, and to pay the difference in remuneration. The author also has the right to demand additional remuneration if the remuneration specified in the contract will be disproportionately small compared to all the revenues obtained directly as a result of the use of the right or work after the conclusion of the contract.

The right to terminate the contract if the use of the work or performance has not yet begun within two years:

To prevent situations where the authors' works are not used, the author can now unilaterally withdraw from the contract if the successor or licensee has not started using the work within two years from the conclusion of the contract or the transfer of the work to the client, if it happened after the conclusion of the contract. This right cannot be used if the author could have prevented the circumstances that prevented the use.

Related rights for press publishers regarding online use of press releases by information service providers:

Since publications available online are often republished for revenue, the amendments establish related rights for press publishers in relation to the published press releases online, which will be valid for two years from the moment of publication.

Publishers are now able to allow or prohibit the copying and posting of press releases online. Therefore, online service providers need to obtain permission to use such releases. At the same time, publishers will be entitled to a proportionate share of the revenue for the online use of press releases. The Copyright Law also defines cases when a permit will not need to be obtained:

- if the press release is used by an individual user for personal needs or for non-commercial purposes;

- for inserting a hyperlink;

- for the use of individual words or very short fragments.

However, even in the cases of exceptions, it is necessary to consider various factors, such as the copyright, which the author may have already obtained due to his contribution.

Content-sharing service providers' responsibility for the materials uploaded by users:

Content-sharing service platforms make it possible for their users to upload content that is protected by copyright and related rights, often without obtaining consent from the rightsholders. Consequently, platforms that play a significant role in the online content market are responsible for obtaining permission from copyright and related rights subjects.

In cases where the content-sharing service provider has not obtained permission from the copyright subjects, it will be liable for the violation of rights, unless three conditions are met that exempt the content-sharing service provider from liability:

- it has made best efforts to obtain an authorisation;

- it has made the best efforts to ensure the unavailability of specific works for the public; and in any event

- acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable access to, or to remove from their websites, the notified works, and made best efforts to prevent their future uploads.

Other changes in Copyright Law unrelated to the DSM Directive

The employer's right to obtain the right to use the work:

Taking into account the employer's investment in the creation of the work, the amendments provide for the employer's legal right to use the employee's work for the purposes for which it was created. In this way, the employer will receive the right to use the work even in cases where such rights have not been contractually agreed with the employee. However, the basic principle remains intact – the copyright to a work created within the framework of the employment relationship remains with the employee, unless the property rights have been transferred to the employer by the employment contract.

The inability to prohibit modification and addition of a computer programme:

Important changes were introduced regarding the author's personal rights to computer programmes. Considering that the exercise of personal rights of authors may interfere with the normal process of updating and developing computer programmes, they have been limited. Authors are no longer able, on the basis of their personal rights, to prohibit the modification and addition of computer programmes. The only exception is the violation of the author's honour or reputation.

Copyright Law

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market

https://eur-lex.europa.eu/eli/dir/2019/790/oj?locale=en

NETHERLANDS

[NL] Competition Authority prohibits acquisition of Talpa by RTL

Ronan Ó Fathaigh
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On 3 March 2023, the *Autoriteit Consument en Markt* (Netherlands Authority for Consumer and Markets — ACM) announced a significant decision, prohibiting RTL's proposed acquisition of Talpa (see IRIS 2022-3/18). RTL Nederland is a television broadcaster, content producer, and provider of video on-demand services; while Talpa Network is a radio and television broadcaster, operator of various online platforms, and publisher of magazines and games. The ACM decided to prohibit the acquisition, because otherwise "too powerful a party would arise in the Dutch media landscape". According to the ACM, it would lead to higher prices for television advertisements and for the transfer of channels via telecommunications companies; and in the end, "those higher prices end up with the consumer".

The proposed acquisition of Talpa by RTL has been under preliminary examination since 14 October 2021, when the companies officially notified the ACM of their plans to merge. In its decision in March 2023, the ACM made a number of findings. First, the ACM stated that if RTL and Talpa merged, advertisers would have few other options for advertising on television channels. That would mean RTL/Talpa could raise prices, and higher advertising prices would ultimately lead to higher prices for consumers. Further, the ACM noted that advertisers and media agencies had indicated that they still saw large differences between online ads and advertisements on television; and that advertising on television was crucial to marketing products for consumers. According to the ACM, that meant "if television ad prices rise, advertisers won't be able to move to online ads". The prices of online advertisements "therefore do not contain the prices of television advertisements, at least at the moment and in the coming years". As a result, the RTL/Talpa merger could increase prices for television advertising. Second, the ACM also stated that "companies are spending more and more money on online advertising", but that "usually doesn't come at the expense of their advertising budgets for radio or television". As such, the ACM expects that television advertising will continue to be an important and independent market in the Netherlands in the coming years.

Finally, the ACM noted that telecom providers such as KPN or VodafoneZiggo, include commercial TV channels in their channel offerings, and they "would not be able to ignore RTL/Talpa after the acquisition". And not including RTL or Talpa in the channel offer would mean that consumers would go to another telecom provider. Thus, if the acquisition occurred, the negotiating position of telecom providers would deteriorate. RTL/Talpa could therefore charge higher prices after the acquisition, which would mean consumers would pay more for a television

subscription.

Autoriteit Consument en Markt, ACM verbiedt overname Talpa door RTL definitief, 3 maart 2023,

https://www.acm.nl/nl/publicaties/acm-verbiedt-overname-talpa-door-rtl-definitief

Netherlands Authority for Consumer and Markets, ACM definitively bans acquisition of Talpa by RTL, 3 March 2023

[NL] Dutch regulatory authorities coordinate supervision of online platforms

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On 27 March 2023, the *Samenwerkingsplatform Digitale Toezichthouders* (Digital Supervisory Cooperation Platform — SDT), which is comprised of four major Dutch regulatory authorities, published its first regulatory guidance principles, in relation to online child marketing, and on ensuring effective online transparency. The SDT also announced that it had established a new regulatory Chamber to coordinate supervision under the EU's recently enacted Digital Services Act. The SDT is an important regulatory cooperation platform established by the *Autoriteit Consument & Markt* (Netherlands Authority for Consumers & Markets — ACM), the *Autoriteit Financiële Markten* (Netherlands Authority for the Financial Markets — AFM), the *Autoriteit Persoonsgegevens* (Dutch Data Protection Authority — AP), and the *Commissariaat voor de Media* (Dutch Media Authority — CvdM) to coordinate enforcement in the digital sector and to pool knowledge and experience in this area.

First, in relation to online child marketing, the SDT stated that it had drawn up principles for online child marketing, to ensure it is clear "how we interpret the legal standards to protect children as supervisors." There are four main regulatory principles: (1) advertising and marketing techniques should not inappropriately affect children and should not exploit children's specific vulnerabilities; (2) information about the commercial purpose of an advertisement, about commercial aspects of a "vlog" or service and about the sharing of personal data in a "vlog" or service must be indicated in such a way that it is suitable and clear to children; (3) organisations should refrain from profiling children for advertising and marketing purposes; and (4) SDT regulators call on organisations that develop and use advertising or marketing techniques likely to be seen by children to organise their processes in such a way as to prevent unfair data processing, deception and inappropriate influence on children. Second, in relation to effective transparency, the SDT stated it had formulated principles to ensure "organisations take into account the effectiveness of the information provided in the design of their information." Again, there are four main principles: (1) providing information only contributes to transparency if people know how to find and understand the information; (2) applying "behavioural and communication insights" is necessary to design discoverable and understandable information; (3) whether people find and understand information can only be determined through good research; and (4) organisation should also consider using other tools in addition to providing information, for example target group segmentation.

Finally, the SDT also announced that it will establish two new Chambers - the DSA Chamber (which will cover digital services, such as online platforms) and an Algorithm & AI Chamber, in which other supervisors will also be involved.

Dutch Media Authority, SDT regulators expand collaboration in digital oversight, 27 March 2023

POLAND

[PL] AI as a "creator" under the Polish legal framework

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Czyżewscy Law Firm

The development of artificial intelligence (in particular, the recently released fourth instalment of the popular ChatGPT) provokes more and more questions related to the copyright protection of "works" for the creation of which AI is responsible, or in the creation of which AI had a significant contribution.

In the context of almost open access to generators of images, animations, texts and sometimes music, a number of questions arise, one of which comes to the fore: can AI be considered a creator or co-creator from the perspective of Polish legal regulations?

According to Polish law, a "work" is considered to be any manifestation of creative activity of an individual character, established in any form, regardless of value, purpose and manner of expression. Copyright protection is vested in the creator (Article 1 point 4 of the Law on Copyright and Related Rights). In accordance with Article 8 of the Law on Copyright and Related Rights, only humans can be considered as a creator. This means, therefore, that artificial intelligence will not be recognised as a creator; and the effects of its work - will not constitute a work. However, taking into account the current regulations, a situation may arise in which AI will be a quasi "co-creator," behaving in principle like software supporting the creative work of a human being. Does that mean that AI's contribution to the creation of a work will entail granting it legal rights and protection?

On 16 March 2023, the U.S. Copyright Office (USCO) published a statement regarding the rules related to the registration of works containing artificial intelligence-generated elements. The issue raised by the USCO concerned the use of so-called generative AI, responsible for creating content based on guidelines/instructions given by a human (a so-called prompt).

Notwithstanding the fact that the abovementioned scenario has been analysed by foreign authorities, the general approach to AI contributions to the creative process should also be adopted in the Polish legal system.

From the USCO's position, the following guidelines can be drawn in relation to created or co-created works:

1. Only the result of creative work of a human being can be considered as a work.

2. In the case of the use of AI's generative functionality, human intervention is basically limited only to the preparation of general instructions on what the

human wants to obtain as a result of the AI's "work." The human (author) has no influence on the way the means are selected and the "creative" elements of AI's operation, hence work created in this way will not enjoy copyright protection.

3. Creators have always used auxiliary tools in their work (such as guitar effects that modulate the sounds of an instrument, synthesizers or graphic programmes used by photographers to properly process and prepare photos). In this case, on the other hand, AI is only a tool whose principles of operation are solely influenced by a human. Therefore, in the case where a human directly influences the actions of AI or ultimately modifies the generative work of AI, the effect of the aforementioned activities may be subject to the copyright protection.

Taking into account the above assumptions, under Polish law too only a human person can be considered a creator. Moreover, bearing in mind numerous opinions of specialists, a human being should have a decisive influence on its creation/work (giving it characteristics that make it creative and individual in nature), in consideration to the use of AI in any context - from simple prose to multi-layered works such as a film or TV series.

Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych

https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=wdu19940240083

Law on Copyright and Related Rights dated 4th February 1994 (Journals of Law 2022, position 2509, unified text)

Copyright Office Launches New Artificial Intelligence Initiative

https://copyright.gov/newsnet/2023/1004.html

UNITED STATES OF AMERICA

[US] Copyright Office launches new artificial intelligence initiative

Amélie Lacourt
European Audiovisual Observatory

The Copyright Office is the Federal agency tasked with administering the copyright registration system since 1870, as well as advising Congress, other agencies, and the Federal judiciary on copyright and related matters.

Following the recent developments in the Artificial Intelligence (AI) sphere, including the advances in generative AI (a type of AI system capable of generating text, images, or other media in response to prompts), the US Copyright Office received requests from both Congress and members of the public to examine issues raised by copyright in relation to AI. The Office has in particular received applications for the registration of works, including AI generated content.

In response, the Copyright Office launched, on 16 March 2023, a new initiative consisting in the examination of the copyright law, and consequently of policy issues raised by AI technology. The major concerns revolve around copyrightability and registration.

Recent developments indeed raise a number of fundamental questions, including whether material produced by AI tools can be protected by copyright, whether works consisting of both human-authored and AI-generated material can be registered, and what information should be provided to the Copyright Office by applicants seeking to register them.

In a decision dated 14 February 2022 and currently being challenged, the Office had held that a visual work which the applicant described as ‘‘autonomously created by a computer algorithm running on a machine’’ could not be registered because it was made ‘‘without any creative contribution from a human actor.’’ In another decision from February 2023, the Office concluded that a graphic novel comprised of human-authored text combined with images generated by the AI service Midjourney constituted a copyrightable work, but that the individual images themselves could not be protected by copyright. In *Burrow-Giles Lithographic Co. v. Sarony*, a landmark case from 1884, the Court repeatedly referred to ‘‘authors’’ as human, describing authors as a class of ‘‘persons’’ and a copyright as ‘‘the exclusive right of a man to the production of his own genius or intellect.’’

Therefore, in response to the numerous questions raised by the recent developments, the Office has issued new registration guidance, requiring copyright applicants to disclose the inclusion of AI-generated content in works submitted for registration and to provide a brief explanation of the human

author’s contributions to the work.

During the first half of the year, the Copyright office convened public listening session with artists, creative industries, AI developers and researchers, and lawyers working on these issues to gather information about current technologies and their impact. The next sessions will be held on 17th May 2023 (audiovisual works) and 31st May 2023 (music and sound recordings). Visual arts and literary works, including software, have already been discussed during past listening sessions.

The Office foresees to publish a notice of inquiry in the Federal Register later this year.

Copyright Office Launches New Artificial Intelligence Initiative - Issue No. 1004 - March 16, 2023

https://www.copyright.gov/newsnet/2023/1004.html

Library of Congress, Copyright Office, 37 CFR Part 202 - Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence

https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf

Copyright Law of the United States

https://www.copyright.gov/title17/

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