

*This is our cumulative summary of some of the key legal developments across a range of sectors for the weeks of 6 April to 27 April 2009. It is intended for reference purposes only and does not constitute definitive advice. Links to the original source materials are included where there are no restrictions in terms of access. References may also be made to sources that require separate registration or subscription. A link to a source does not necessarily imply endorsement of the source or the material provided through the link.*

*For further information on any of the matters discussed in the summary please contact our Professional Support Lawyer, [Sarah Kirkness](#). If you have any comments, queries or suggestions please contact us at [comments](#). All suggestions and comments are most welcome. If you do not wish to receive this summary you can contact us at [unsubscribe](#).*

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#### General

#### Pirate Bay Judgment - Appeal Likely?

The Stockholm District Court hearing the charges of assisting in the violation of the Copyright Protection Act (1960:729) against the four Pirate Bay operators has issued its judgment and found defendants guilty. The charges related to the file sharing of 20 songs, nine films, and four computer games. The defendants' legal team had argued that, since the site did not contain any copyrighted material, it could not be held responsible for what its users downloaded from other sites. The court partly had agreed with this and the prosecutor downgraded charges to assisting copyright infringement. However, the defendants were sentenced to one years imprisonment and ordered to them to pay a fine totalling SEK 30

million (€2.7 million). The court said "By providing a website with ... well-developed search functions, easy uploading and storage possibilities, and with a tracker linked to the website, the accused have incited the crimes that the filesharers have committed". Immediately after the judgment was delivered the defendants were discussing an appeal. Following the judgment, the IFPI demanded that Swedish Internet Service Providers block The Pirate Bay, but the ISPs refused to do this, with some noting that it was not their responsibility to censor sites for their customers. However, while commentators described the verdict as a rare victory for the entertainment industry, questions were immediately raised over whether the ruling would have any impact on illegal downloading. In answer, although thousands of protestors apparently took to the streets after the judgment was delivered, a number of torrent-trackers stopped tracking torrent files (one citing the decision directly as the reason).

#### **New Legislation - Data Retention (EC Directive) Regulations**

The Data Retention (EC Directive) Regulations 2009, SI 2009/859 came into force on 6 April 2009. The Regulations implement the Data Retention Directive 2006/24/EC in relation to the retention of communications data relating to Internet access, Internet telephony and Internet e-mail, effectively finalising the implementation of the Directive into law in the UK. They impose a requirement on public communications providers (providers), as defined, to retain the categories of communications data specified in the Schedule to the Regulations for a period of 12 months. The data must be stored in accordance with the Regulations and can only be accessed in accordance with the terms of the Regulations. See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20090859\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090859_en.pdf) for the Regulations and [http://www.opsi.gov.uk/si/si2009/em/uksiem\\_20090859\\_en.pdf](http://www.opsi.gov.uk/si/si2009/em/uksiem_20090859_en.pdf) for the accompanying Explanatory Memorandum.

#### **IPO Invites Industry Comments on Copyright Tribunal Consultation**

The Intellectual Property Office (IPO) is consulting on changes to the Copyright Tribunal Rules 1989, SI 1989/1129, which are intended to make the Tribunal quicker and cheaper to use, particularly for individuals and small businesses. Views are invited on the proposals, which are intended to promote the effective resolution of disputes, improve access to the Tribunal and reduce costs and delays in large-scale litigation. See <http://www.ipo.gov.uk/consult-ctribrules.pdf> for details.

#### **ICSA Comments on Consumers International Survey of IP Laws**

The Institute of Chartered Secretaries and Administrators (ICSA) has published details from the recent inaugural edition of the Consumers International (CI) IP Watch List survey, which examined the intellectual property (IP) laws and enforcement practices of a number of countries from the perspective of the consumers. The survey assessed how well the copyright laws and enforcement policies of the surveyed countries supported the interests of consumers, by allowing them fair access to the results of their society's culture and science. The report said, "The survey finds that what is more important than a strict copyright system, is a fair copyright system; one that balances the economic interests of rights holders with the compelling economic, social and cultural interests of consumers. As will be seen, such systems can be found in countries that one might not expect". And that was certainly true - the UK was the worst rated country, scoring the lowest F rating (abject failure) in five of the eleven categories investigated (India came out as the best rated country). The UK was criticised for having outdated copyright laws that failed to "take advantage of all of the flexibilities that international law allows them to benefit local consumers". CI said the results "show that a country's level of development is not a major factor in determining how well its copyright regime supports the interests of consumers". See <http://a2knetwork.org/sites/default/files/ip-watchlist09.pdf> for details.

#### **Commission Announces Reduces Costs for Roaming Texts, Calls and Data Services**

The European Commission has announced that from 1 July 2009, the cost of roaming texts, calls and data services within the EU will fall substantially. New EU roaming rules endorsed by the European Parliament will cap the price that consumers can be charged for sending a text message while abroad at €0.11, substantially reduce data roaming charges (the cost of surfing the web or downloading movies with a mobile phone while abroad) by introducing a wholesale cap of €1 per megabyte downloaded, protect consumers from "bill shocks" by allowing customers to choose a cut-off mechanism once the bill reaches €50, unless the consumer opts for a higher limit, further reduce price caps for mobile roaming calls to €0.39 for calls made and €0.15 for calls received on 1 July 2010 and then to €0.35 and €0.11 by 1 July 2011 (all prices per minute, excluding VAT) and introduce the principle of per-second billing after the first 30 seconds for roamed calls made and from the first second for calls received while abroad. See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/620&format=HTML&aged=0&language=EN&guiLanguage=en> for details.

#### **OFT Clears HMV Acquisition of Zavvi Stores**

The Office of Fair Trading (OFT) has cleared the proposed acquisition of 15 former Zavvi stores by HMV plc. Zavvi sells a range of discount music, DVDs, games, electronic goods etc. The OFT decided that a reference to the Competition Commission is not necessary as the "failing firm defence" had been met. A merger based on a "failing firm" claim can be allowed by the OFT if the evidence shows that, without it, a business would have exited the market completely, and

that no realistic alternative to the merger was available. The rationale for accepting such claims is that any harm to competition would result even without the merger, and so should not be attributed to it. The full merger decision is not available at this stage however see <http://www.ofcom.gov.uk/news/press/2009/47-09> for details.

### Deliberate Personal Repudiatory Breach - Whether Covered by Exemption Clause

The first claimant company was in the business of constructing and providing interactive Internet television platforms and was owned by an entrepreneur with hedge fund and electronic media experience. The defendant company was a US corporation, which provided information and services to hedge funds and arranged conferences for the hedge fund industry. The parties entered into contract for the broadcast of the defendant company's material on an Internet television channel provided by first claimant company. The contract contained an exemption clause limiting the liability of either party. The defendant subsequently repudiated the contract and sought to rely on the exemption clause to exempt it from liability in respect of loss of profit. At issue was whether the exemption clause covered the defendant's repudiatory breach. The court ruled that the defendant could not rely on an exemption clause in the contract on the basis that it did not cover what had been a deliberate personal repudiatory breach. (*Internet Broadcasting Corporation Ltd (t/a NETTV) & Anor v MAR LLC (t/a as MARHedge)* [2009] EWHC 844 (Ch) - the judgment is available via LexisNexis).

### Article - Best Endeavours Clauses In Entertainment Industry Contracts

That perennial favourite - the best endeavours clauses - is considered in the context of entertainment industry contracts (for example, music and film agreements), in the latest Entertainment Law Review. Although the article takes an industry-specific focus, it considers the usual drafting and commercial issues associated with these clauses in detail and offers a wide selection of new case law to consider. Recommended reading! ("*Best Endeavours*" Clauses in Entertainment Industry Contracts" (2009) Ent LR 134 - the article is available via Westlaw).

## Broadcasting

### Select Committee Publish Report on BBC Commercial Operations

The much-anticipated House of Commons Culture, Media and Sport Committee report on the commercial operations of the BBC has finally been published. After taking extensive evidence the Committee stated that although there are "major benefits from the BBC undertaking commercial activities", the manner in which some of the BBC's commercial revenue was generated, and the governance arrangements within which the BBC's commercial arm (BBC Worldwide) operated, caused them (and others) "increasing concern". Accordingly, they recommended that the commercial criteria and fair trading guidelines should be returned to the pre-2007 position, whereby all commercial activity must have a clear link with core BBC programming. The Committee also said the £50 million threshold at which a commercial transaction is referred to the Trust was too high (they pointed out that this meant that in theory, a commercial transaction equivalent in value to almost half of Worldwide's net assets or its shareholders' funds could escape the need for the Trust's approval) and recommended instead a threshold of £30 million. The Committee also dealt with concerns about disclosure and a lack of transparency and called for a response from the Trust on these matters. In relation to the use of IP the Committee said it was right that the BBC should exploit its IP but that it must take due care not to distort the market, and it should not buy new brands (as it did with Lonely Planet) to enter new markets. It said there was little justification for BBC Worldwide to launch commercial websites in markets that were already well served by commercial competitors, or where a clear link to BBC programming was absent. It recommended "extreme caution" on the part of the BBC before it launched any further commercial websites. On the question of the future of Channel 4 the Committee said that it recognised that it was "essential to retain plurality in the provision of UK-produced public service content", while a partnership with may assist with funding issues it was "sceptical as to whether a wide-ranging partnership or even merger with BBC Worldwide would be the best solution for Channel 4, for the licence fee payer, or for the media industry as a whole". It suggested making a portion of the licence fee available to Channel 4 as an alternative. The Committee also said that the BBC could gain a better return for the licence fee payer if it sold more of its rights on the open market rather than offering them exclusively to Worldwide. It said it was in the interests of the UK's creative economy as a whole that BBC Worldwide was "reined back". See <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcomeds/24/24.pdf> for the Report, which includes all the evidence and written reports submitted to the Committee during its investigation. The Secretary of State for Culture, Media and Sport has 12 weeks in which to respond.

### Lords Select Committee Report on Public Service Broadcasting

The House of Lords Select Committee on Communications have also published their report on public service broadcasting. Following a lengthy investigation, the Committee started by noting that there were a "plethora of definitions and descriptions of public service Broadcasting". It recommended that policy should concentrate on the provision of certain types of content, with core elements such as national and regional news, current affairs programmes, the arts, children's programming, and programmes dealing with religion and other beliefs as well as supporting programmes with UK content. It said there was a "continuing need for public service alternatives to the BBC" and that there would be dangers if the BBC were to become an even more dominant provider of public service programming. Accordingly, it said intervention was

justified to ensure sufficient public service provision that the market will not provide free for the public. On the question of the future of Channel 4 the Committee said there was a need for an independent review of its financial position and noted that a partnership between Channel 4 and BBC Worldwide would be a "quicker and less disruptive way of making extra resources available to Channel 4 than a full-scale merger" (contrast with the Select Committee's suggestion, above). The Committee suggested that an element of "contestable funding" should be introduced to fill some of the gaps that might otherwise arise in public service broadcasting. This would "entail the setting up of a limited fund to which broadcasters and programme makers could apply" - the funding for this "should come not from further demands on the taxpayer but from (a) the underspend on the digital switchover programme (b) the continuance of funding from the licence fee after 2012 when the digital switchover programme ends and (c) the use of at least part of analogue spectrum revenue after 2012". Finally, they said there was no longer a need for the Royal Charter but instead called on the Government to substitute a "more democratic process" instead. See <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcomuni/61/61.pdf> for the Report and the evidence and written reports presented to the Committee during their investigation.

### Ofcom's Broadcast Bulletin - Latest Issues

The latest issues of Ofcom's Broadcast Bulletin has been published, with details of adjudications on breaches of Rules 1.14 (no most offensive language before watershed), 2.11 (competitions should be conducted fairly), 10.3 (products and services must not be promoted in programmes) and 10.4 (undue prominence) of the Broadcasting Code; Ofcom also upheld a complaint of unfair treatment. Ofcom also adjudicated on breaches of a Short-term Restricted Service Licence Conditions 8 Part 2 (retention and production of recordings) and 9 (failure to supply adequate recordings). The Bulletin also detailed Ofcom's findings in relation to the complaints about the last series of Big Brother, in which Channel 4 was found not to be in breach of the Code - Ofcom said that it recognised that the "unique statutory remit" of Channel 4 meant that material which may be harmful or offensive in circumstances may be broadcast if its inclusion was justified by the context and it was done with adequate protection for the public. Ofcom also found that there had been no breach of the Code regarding the use of PRS for in the Big Brother voting arrangements. A statement was also issued regarding the voting and judging mechanisms in programmes and the application of an appropriate system for providing viewers with refunds where errors have been made. See [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb132/issue132.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb132/issue132.pdf) for Issue 132. The previous issue contained the notices of sanction in respect of breaches of Rules 2.1 (generally accepted standards), 2.3 (offensive material justified by context) and 8.1 (privacy infringement must be warranted) by the Russell Brand Show and breaches of Rules 1,23 (adult sex material), 2.1 (generally accepted standards) and 2.3 (offensive material justified by context) by Playboy TV UK/Benelux Ltd. Ofcom separately adjudicated on a breach of radio licences for failure to deliver the agreed formats and resolved an advertising schedule issue in relation to broadcasting in excess of the Code on the Scheduling of Television Advertising. See [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb131/issue131.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb131/issue131.pdf) for Issue 131.

### BTSR to Co-regulate with Ofcom for Equal Opportunity Arrangements

Ofcom has announced that with effect from 1 April 2009, the Broadcast Training and Skills Regulator (BTSR) has taken on co-regulatory responsibilities for its equal opportunities arrangements. Ofcom has a duty under section 27 of the Communications Act 2003 to promote equal opportunities in employment in broadcasting and section 337 obliges Ofcom to include conditions in radio and television licences that require broadcasters to make arrangements to promote equal opportunities in employment on the basis of gender, race and disability. Ofcom has said that it believes that BTSR will be able to provide guidance and support to broadcasters and help ensure that "real progress" is made.

### DCMS Consults on Review of Free-to-Air Events

The DCMS has published its consultation inviting views on each of the three issues that the Secretary of State has asked the Advisory Panel to address in relation to the inclusion of certain events on the current list of free-to-air events. These are whether the listing should continue; whether the current criteria remain appropriate or are in need of revision; and, whether there should be any changes to the events currently listed (this includes whether the distinction between free live and delayed coverage should continue). There is no obligation under EC law to list events (although nine Member States, including the UK have done so) and the listed events are not necessarily restricted to sporting events (although that is the case in the UK). See [http://www.culture.gov.uk/freetoair/Consultation/documents/free\\_to\\_air\\_consultation.pdf](http://www.culture.gov.uk/freetoair/Consultation/documents/free_to_air_consultation.pdf) for the Consultation, which includes an overview of the EU and UK legislative framework.

### Commission Consults on Revised Rules for State Funding for Broadcasting

The European Commission is consulting again on the revised draft for a new Communication laying down the rules that it intends to apply to state funding of public service broadcasting. The Commission has said that it intends to adopt a modernised Broadcasting Communication later this year. Main changes compared to the previous draft relate to clarifications on the principles of technology neutrality and editorial independence, an increased focus on the key principles with enhanced flexibility for implementation at Member State level and more clarity on holding public service reserves. See [http://ec.europa.eu/competition/consultations/2009\\_broadcasting\\_review/broadcasting\\_review\\_en.pdf](http://ec.europa.eu/competition/consultations/2009_broadcasting_review/broadcasting_review_en.pdf)

for the Consultation and <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/564&format=HTML&aged=0&language=EN&guiLanguage=en> for the EC Press Release, which includes links to the earlier drafts.

#### Commission Announces Codification of AVMS Directive

The European Commission has published a Proposal for a Directive on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), which will codify the amendments to the Directive in order to make it more easily understood. Since 1987, the Commission has applied a requirement that all legislation be codified after ten amendments (but does suggest that the codification be done more frequently for the purposes of clarity). The new Directive will supersede the various acts incorporated in it - see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0185:FIN:EN:PDF> for details.

#### ASA Rule Programme Styled Ad in Breach of BCAP Code

The Advertising Standards Authority (ASA) has found that DM Digital Television Limited's broadcast of a 30-minute programme-styled advertisement for property was in breach of the Broadcast Committee of Advertising Practice (BCAP) Television Code on a number of counts, including confusing viewers over whether the broadcast was a programme or an advertisement. The ASA said it was concerned that DM Digital TV did not realise that a teleshopping presentation was an advertisement and found that it breached a number of sections of the BCAP Code, including rules 2.1 (separation of advertisements and programmes), 5.1 (misleading advertising), 5.2.1 (evidence), 5.3.1 (accurate pricing), 5.4.2 (superimposed text) and 9.5(c) (unacceptable categories). The ASA ruled that the ad must not be shown in that form again. See [http://www.asa.org.uk/asa/adjudications/Public/TF\\_ADJ\\_46146.htm](http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46146.htm) for the adjudication.

### Corporate

#### First Prosecution Under Corporate Manslaughter and Corporate Homicide Act

The first prosecution the first to be brought under the Corporate Manslaughter and Corporate Homicide Act 2007 has been commenced against a geotechnical firm, Cotswold Geotechnical Holdings, following the death of an employee who was killed whilst taking soil samples from a site. The company director was also charged with the common law offence of gross negligence manslaughter. If convicted, the firm faces an unlimited fine and the director could face life imprisonment. They both also face health and safety charges.

#### Second Reading for Private Members Bill on Companies' Remuneration Reports

The Private Members Companies' Remuneration Reports Bill has had its second reading in the House of Lords. The Bill proposes making provision about remuneration reports in public quoted company accounts and reports - it was described in the debate as being a "very modest bill" having a single purpose - "to draw attention to the growing gap between the highest and lowest paid in our public companies". Following the debate, the Bill was read a second time and committed to a Committee of the whole House. (*House of Lords Hansard, 24 April 2009, Column 1704 - see <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/90424-0003.htm> - 09042430000350 for the debate, which makes interesting reading, particularly in the current economic situation*).

#### Article - First Major Amendment of Companies Act 2006

The latest edition of the Journal of International Banking and Financial Law has an interesting article considering the implications of the changes being proposed by the EU Shareholder Rights Directive, which it describes as "more extensive than expected". The Directive, which is intended to improve corporate governance in EU companies traded on regulated markets by enabling shareholders to exercise their voting rights and rights to information across borders, is required to be implemented in the UK by 3 August 2009. The article notes that the amending Regulations do not relate only to companies traded on regulated markets - changes such as voting on a show of hands, the proxy and corporate representative provisions, the percentage of shareholders who may convene a general meeting, advance voting on a poll and the facilitation of electronic voting and meetings apply to all companies. (*"EU Shareholder Rights Directive: First Major Amendment of Companies Act 2006" (2009) 3 JIBFL 140 - the article is available via LexisNexis; for details see <http://www.berr.gov.uk/files/file48662.pdf> for the consultation document, which contains the draft regulations*).

### Gambling

#### PartyGaming and US Attorneys Office Agree Non-Prosecution Agreement

PartyGaming Plc have published details of the non-prosecution agreement they have reached with the US Attorney's Office for the Southern District of New York. Under the terms of the agreement, and in return for payment, by eight

instalments totalling US\$105 million over the next three years, the company and its subsidiaries will not be prosecuted for providing Internet gambling services to customers in the US prior to the enactment of the Unlawful Internet Gambling Act on 13 October 2006. The company had offered Internet gambling services to customers in the US since 1997 but had voluntarily exited the market when the Act was introduced. (*PartyGaming Plc Press Release, 7 April 2009 - the widely anticipated settlement has generated significant industry comment, particularly about the implications this has for an online gambling market in the US and whether there is now a greater chance of gaming legislation being introduced - the introduction of legislation to repeal the Act has been delayed although reports indicate that it may be expected in early May, at which time the contents of the proposed Bill will be revealed*).

#### Danish and Swiss Governments Announce Partial Liberalisation of Gaming Market

The Danish Government has announced that it has decided to implement a regulated, partial liberalisation of the Danish gaming market in order to afford better protection to players and to guarantee future revenue for social causes. According to reports, the liberalisation of the market will apply to online poker, sports betting and land-based casinos, however lottery games will stay in the hands of Danske Spil, the government-owned gaming company. Further details are unavailable at this stage however, reports indicate that the necessary legislation will be placed before the Parliament in the next session, meaning that the liberalisation will not take place until 2010. At the same time, the Swiss Federal Government has said that it also intends to relax current restrictions on online gaming by introducing a limited number of licenses for online gaming operators, enabling them to legally offer a variety of games of chance via the Internet. Under existing Swiss law, only certain lotteries and betting may be offered online.

#### Budget 2009 - Changes to VAT Exemptions for Participation and Other Measures

The recent budget introduced changes in respect of VAT exemptions for participation fees for playing bingo and other games of chance and made a number of other changes. BN73 provided that, with effect from 27 April 2009, the rate of bingo duty was increased to 22%, and VAT will no longer be due on participation fees for playing bingo and other games of chance. The gross gaming yield bandings for each gaming duty band was increased in line with inflation from 1 April 2009. With effect from 1 June 2009, the monetary prize limit for exemption from bingo duty in respect of small-scale amusements provided at family entertainment centres or adult gaming centres will be increased from £50 to £70. With effect from 1 July 2009, "remote bingo" will be made subject to remote gaming duty rather than bingo duty. Finally, the excise definitions of "gaming" and "gaming machine" will be clarified with effect from Royal Assent. See <http://www.hmrc.gov.uk/budget2009/bn73.pdf> for details.

#### 49<sup>th</sup> Levy Scheme Agreed for 2010/2011

The Horserace Betting Levy Board and the Bookmakers' Committee have agreed the details for the 49<sup>th</sup> Levy Scheme (which will apply from 1 April 2010 to 31 March 2011). The Board agreed to the Bookmakers' Committee's recommendation of a further roll-over of 10% of gross profits for the 49<sup>th</sup> Levy Scheme, with the annual variation being the RPI changes expressed as at 31 July. The Levy is collected from bookmakers as a percentage of their gross profits on British horserace betting business - the majority of the levy income is spent directly supporting horseracing. (*Horserace Betting Levy Board News Release, 28 April 2009; in the event that agreement on the Scheme cannot be reached by 31 October, the Scheme is automatically referred to the Secretary of State for Culture, Media and Sport for determination, and their decision is imposed - in this instance however, the parties agreed the levy six months ahead of the deadline*).

#### DCMS and Gambling Commission to Consult on Level Playing Field and Consumer Protection

The DCMS has announced that it will be working with the Gambling Commission on a number of issues, including securing fair contributions from overseas licensed operators towards the costs of regulation, the treatment of problem gambling and the Horserace Betting Levy. The DCMS will also look at the existing controls that apply to operators licensed overseas to ensure the rigorous consumer protections introduced by the Gambling Act continue to be upheld. This is in response to what the Minister for Sport described as the "rapid technological advances in online gambling, as well as the changing international regulatory landscape". The stated intention is to ensure a fair deal for UK operators and continue to maintain high levels of consumer protection. (*DCMS Media Release 066/09, 30 April 2009*).

#### ASA Criticise Poker Ad Claims

The Advertising Standards Authority (ASA) have adjudicated on a complaint about a magazine ad for the Party Poker online website, which made the claim that players on that site won more. The complainant challenged whether the claims were misleading and could be substantiated. The ASA upheld the complaint and ruled that the ad breached clauses 3.1 (substantiation), 7.1 (truthfulness) and 19.1 (other comparisons) of the CAP Code as, although a survey had been conducted and the ads had been based on the responses to that survey, the ads claims could not be substantiated on the evidence from the survey and could therefore be misleading. The ASA ruled that the ad must not appear again in that form. See [http://www.asa.org.uk/asa/adjudications/Public/TF\\_ADJ\\_46102.htm](http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46102.htm) for the ruling.

## Action for Malicious Falsehood - Whether Words Bore Meaning Complained Of

The claimant was one of a number of companies that manufactured and supplied the artificial sweetener, aspartame. The defendant owned a large number of supermarkets in the UK. The claimant sought an order for the trial of a preliminary issue as to the statement(s) of fact contained in or conveyed by the words complained of which were in a press release put out by the defendant. The press release mentioned that none of the supermarkets' own brands would contain "hidden nasties". The court ruled that it was satisfied that the issue whether the words complained of would be understood to bear the natural and ordinary meaning pleaded. It noted that the claim could easily have been brought as a defamation claim and that it was for the party's legal advisors to decide how best to proceed - whilst CPR 53 was confined in its application to defamation actions, it could not be said that the approach of the court to an application for the trial of a preliminary issue in a malicious falsehood action should be materially different. CPR 3, which included the power to direct the separate trial of an issue, applied to both causes of action. Whilst it might be that the "case-breaking" potential of a preliminary issue in a malicious falsehood action might not always be as great as it was in the case of many defamation actions, that was not a reason to refuse an application for the trial. (*Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2009] EWHC 781 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/781.html> for the judgment).

## Music

### French Parliament Again Refuses Bill for Three-Strike Approach

The French National Assembly has (perhaps surprisingly?) refused to pass the Creation and Internet Bill to introduce the controversial three-strike approach to dealing with illegal downloading activity (note that of the 577 members of the house, only 36 were present to vote on it and it was defeated, 21 to 15). The Senate had previously passed the bill and the Assembly had already passed sections of it. According to commentators, the reason for the defeat was an amendment in the final version that "third-strike" users continue to pay ISPs after being cut off. Ministers have reportedly said that an amended version of the bill would go before Parliament "in the next few weeks". Contrast this however with the approach now in force in New Zealand - they have introduced a "three-strike" approach via the implementation of the Copyright (New Technologies) Amendment Act 2008, which amends the Copyright Act 1994 and requires Internet Service Providers to have a policy for terminating accounts of repeat infringers - the latest Entertainment Law Review has an interesting article about the introduction of the legislation and notes that it has been subjected to extensive criticism. (*"The New "Three Strikes" Regime for Copyright Enforcement in New Zealand - Requiring ISPs to Step Up to the Fight"* (2009) Ent LR 146 - the article is available via Westlaw).

### European Parliament Endorses Extension of Copyright Term

The European Commission has welcomed the European Parliament's endorsement of a proposal to extend term of copyright protection for performers and record producers from 50 to 70 years. In addition to the term extension, the proposal includes a new claim for session players amounting to 20% of record labels' offline and online sales revenue, a "use-it-or-lose-it" provision that allows performers to recover their rights after 50 years, should the producer fail to market the sound recording and a so-called "clean slate", which prevents record producers from making deductions to the royalties they pay to featured performers. Member States have been given two years to introduce the legislation to their own legal systems and the European Parliament has asked the Commission to review the rules after three years to judge its impact, particular on the digital market. The Parliament also repeated its request that the Commission launch an inquiry into copyright relating to audio and visual content by January 2010, with the aim of passing similar extension legislation. (*EC Press Release IP/09/627, 23 April 2009; European Parliament Press Release, 23 April 2009*).

## Publishing

### Statement in Open Court - False Allegations in Published Book

The claimant, a supporter of women's interests, brought a libel action against the author and publisher of a book (*A History of Modern Britain*). The book alleged that the claimant had been a supporter of a radical political group that supported and used violent methods to achieve its aims. The publisher made a Statement in open court explaining that the reference was intended to compliment the claimant for departing radical politics but accepted that it could easily be misinterpreted. The defendants apologised and agreed to recall all unsold copies, remove the allegations from future editions and pay significant damages and costs. (*Pizzey v Macmillan Publishers & Anor, Unreported, QBD, 1 April 2009*).

### Statement in Open Court - Article Erroneously Alleged Abuse by Claimant

The claimant, an actor, brought proceedings against the defendant publisher of the Independent on Sunday paper, following the publication of an article which alleged that he had been abusive towards his partner following a domestic dispute. The claimant accepted there had been a dispute but the defendant accepted that there had been no violence or abuse. The defendant apologised and offered to pay a sum in damages and towards the claimant's legal costs. (*Mohammed Michael George v Independent News and Media Limited, Unreported, QBD*).

## Statement in Open Court - False Allegation in Published Article

The claimant, an academic and activist, brought proceedings against the defendant following the publication of an article, which alleged that he had been discovered harbouring suicide bombers in the days before they had blown up a bar in Tel Aviv. In fact the claimant had met the bombers briefly and by chance at a memorial service for a volunteer in the organisation with which he was involved. The defendant accepted that the allegations were false and should never have been published. It apologised and published a full and prominent apology in the paper in question and undertook never to publish similar allegations of this kind again. It also paid a substantial sum in damages and the claimant's legal costs. (*Raphael Cohen v Jewish Chronicle Newspaper Limited, Unreported, QBD*).

## Statement in Court - False Allegations Regarding Religious Beliefs

The claimant, the chairman of the Muslim Educational Centre of Oxford, brought libel proceedings against the defendants, a Muslim newspaper and its editor, following the publication of an article which alleged that he was a non-Muslim and was seeking to conceal that fact and had been dismissed from his teaching post as a result of his beliefs. The defendants accepted that the allegations about the claimant's beliefs were false and should never have been published. They apologised and paid substantial damages and the claimant's legal costs. (*Dr Taj Hargey v Muslim Media Limited & Anor, Unreported, QBD, 8 April 2009*).

## New Legislation - Amendment of Family Proceedings Rules 1991 to Allow Media Reporting

The Family Proceedings (Amendment) (No 2) Rules 2009, SI 2009/857 and the Family Proceedings Courts (Miscellaneous Amendments) Rules 2009, SI 2009/858 came into force on 27 April 2009. The Rules amended the Family Proceedings Rules 1991 in relation to the attendance of persons, in particular representatives of the media, during family proceedings heard in private and the communication of information regarding proceedings relating to children. The amendments reflect the policy changes which arose out of the Ministry of Justice consultation, "Confidence and Confidentiality: Openness in Family Courts - A New Approach" (Cm 7131) and which were outlined in the response to consultation "Family Justice in View" (Cm 7502). See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20090857\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090857_en.pdf) and [http://www.opsi.gov.uk/si/si2009/em/uksiem\\_20090857\\_en.pdf](http://www.opsi.gov.uk/si/si2009/em/uksiem_20090857_en.pdf) for the Rules and [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20090858\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090858_en.pdf) for the accompanying Explanatory Memorandum. The MoJ noted that media representatives who attend must be accredited through the existing UK Press Card scheme.

## Newspaper Distribution Arrangements Reformed

The DBERR has announced that the Secretary of State for Business, Enterprise and Regulatory Reform has agreed with a recommendation by the Office of Fair Trading that newspaper wholesalers will no longer have to conform to a statutory code of practice requiring them to supply all new retail outlets. The decision was taken following a review carried out by the OFT and an open consultation by the Department. Wholesalers had been obliged to operate in accordance with an agreed code of practice governing distribution of national newspapers in England and Wales. However, changes in circumstances in the market meant the problem the code of practice was designed to address - refusal to supply new retail outlets - was no longer a concern and was not likely to re-emerge. There will now be a six-month period for businesses in the industry to review and amend contractual agreements before the undertakings are released with effect from 20 October 2009. See <http://www.berr.gov.uk/files/file51049.pdf> for the Secretary of State's decision. The OFT welcomed the decision. (*DBERR Press Release, 20 April 2009; note that the OFT has announced that it is currently consulting on its proposed decision not to refer the newspaper and magazine distribution sector to the Competition Commission and has invited views - the OFT is expected to reach a final decision in the autumn - see http://www.offt.gov.uk/shared\_offt/reports/comp\_policy/oft1027.pdf for details*).

## Private Members Bill - Protection of Children (Publicity) Bill

A Private Members Bill, The Protection of Children (Publicity) Bill, has been presented in the House of Commons. The stated intention of the Bill is to ensure that vulnerable children are not exploited "by amending the Children and Young Persons Act 1933, so that anybody who has responsibility for any child or young person and causes the publication of any information in respect of the child, including photographs or digital images, that is likely to cause significant harm to the child should be guilty of an offence and liable on summary conviction to a fine and/or imprisonment of up to two years". The Bill defines a child or young person as someone under 18 years old and includes both physical and psychological harm in "significant harm". The Bill was read a First time and ordered to be read a Second time on 26 June 2009 and to be printed. (*Hansard, 28 April 2009, Column 717 - see http://www.parliament.the-stationery-office.co.uk/pa/cm200809/cmhansrd/cm090428/debtext/90428-0006.htm - 09042838000002 for details*).

## Sport

### WADA Concerns About Article 29 Working Group Opinion on Privacy and Data Protection

The World Anti Doping Agency (WADA) has responded to the recent Opinion by the Article 29 Working Group on Data Protection, which examined the International Standard for the Protection of Privacy and Personal Information. WADA said it was pleased that the Working Group had recognised the proportionality and legitimacy of the current whereabouts regime (under the terms of which a limited number of top athletes included in the registered testing pools of an International Federation or National Anti-Doping Organization must indicate where they will be for one hour each day, 365 days a year, to ensure they can be tested at a specified location). However, WADA noted that it had a number of concerns with the Opinion - it said the Working Party went "beyond its mandate to review the Standard in order to engage in a sweeping and uninformed critique of certain well-established and long-accepted anti-doping rules and practices that anti-doping organisations worldwide, including those based in Europe, have applied for years ... By challenging rules arising under the World Anti-Doping Code, which has been endorsed by European sports organisations and governments, the Working Party threatens to undermine a critical pillar in the global strategy for combating anti-doping in sport". See <http://www.wada-ama.org/en/newsarticle.ch2?articleId=3115788> for details.

## Technology

### Commission Begins Infringement Proceedings Against UK Over Phorm Concerns

The European Commission has opened infringement proceedings against the UK after a series of complaints by UK Internet users, and extensive communication of the Commission with UK authorities, about the use of the "Phorm" behavioural advertising technology, by Internet Service Providers. Phorm works by analysing customers' web surfing activities to determine their interests and then deliver targeted advertising to those users when they visit certain websites. In April 2008, BT admitted that it had tested Phorm in 2006 and 2007 without informing customers involved in the trial. The Commission said it has written several letters to the UK authorities since July 2008, asking how they have implemented relevant EU laws as they apply to Phorm. Following an analysis of the answers received the Commission said that it has concerns that there are structural problems in the way the UK has implemented EU rules ensuring the confidentiality of communications. The UK Government has two months to reply to the letter of formal notice. Phorm said, in response to the notice, that the technology was fully compliant with UK legislation and relevant EU Directives and that this had been confirmed by BERR and by the UK regulatory authorities. (*EC Press Release IP/09/570, 14 April 2009; Phorm Inc Press Release, 14 April 2009*).

### Commission Welcomes Success of .eu Domain Names

The European Commission has welcomed the success of the .eu domain name, which it says has consolidated its place among the ten largest top-level domains in the world, such as .com, .net and .org. Registrations for .eu domains have grown every year since it was introduced three years ago and as of March 2009 there are now more than three million registered names. Management of the .eu registry (the database holding all .eu registrations) is entrusted to EURid, an independent, not-for-profit organisation. (*EC Press Release IP/09/356, 3 April 2009*).

### The Commission and Nanotechnology - Calls for Risk Assessment

The European Commission has announced that it will be consulting on risks associated with nanotechnology, ahead of a one-day forum on nanotechnology and risk assessment that will be taking place later this year. The Commission is inviting comment in three areas - identification of any possible topics which have not been covered in the opinions from the relevant EU Risk Assessment Committees and Bodies, identification of what are, according to current scientific knowledge, the main potential risks that could emerge from the use of nanomaterials in the future and identification of the issues to be discussed at the hearing including provision of background information and comments on those issues. At the same time, European MEPs have supported what has been described as a "controversial" report by a Swedish Green MEP which urges the European Commission to revise its stance on nanomaterials - the report said all nanomaterials should be considered as new substances and that existing legislation does not take into account the risks associated with nanotechnology. MEPs called for the provision of information to consumers on the use of nanomaterials in consumer products: all ingredients present in the form of nanomaterials in substances, mixtures or articles should be clearly indicated in the labelling of the product. The Commission has yet to formally respond to criticism contained in the non-binding opinion. (*European Parliament Press Release, 24 April 2009*).

### Telecoms Commissioner Warns Mobile Operators on Access to Adult Content

The EU Telecoms Commissioner has warned the 12 mobile phone operators who still provide adult content without any access control to "fix this situation". The Commissioner said that the right to come back to this situation in September this year to see whether further action needs to be taken was being reserved. In 2007, 26 mobile operators signed a voluntary code of conduct, "European Framework for Safer Mobile Use by Younger Teenagers and Children". This was a self-regulatory initiative of the European mobile industry, which put forward recommendations designed to ensure that children could safely access content on their mobile phones by highlighting approaches that had been previously implemented in some EU Member States. A report just published by the GSM Association (see [http://www.gsmeurope.org/documents/PwC\\_Implementation\\_Report.pdf](http://www.gsmeurope.org/documents/PwC_Implementation_Report.pdf) for access) shows that national self-regulatory codes based on the framework agreement exist in 22 Member States; 90% of them are in line with the 2007 agreement

and 80% of operators have put in place measures to control child access to adult content. However Cyprus, Estonia, Finland, and Luxembourg still have to agree national codes for access. (*EC Press Release IP/09/596, 20 April 2009*).

## Budget 2009 - Support for Technology

The Budget Report confirmed the UK Government's stated aim that every household should have a basic download speed of two megabites per second, which is capable of supporting a wide range of applications. It intends to finance part of its plans through an estimated underspend on the scheme to help the elderly in the switchover to digital television. It has also announced a review of Ofcom's powers and duties to ensure that it can strike the right balance between supporting competition and encouraging investment in the communications infrastructure.

## Consultations & Reports

Ofcom Report - The Communications Market: Digital Progress Report - Digital TV, Q4 2008 - [http://www.ofcom.org.uk/research/tv/reports/dtv/dtu\\_2008\\_04/q42008.pdf](http://www.ofcom.org.uk/research/tv/reports/dtv/dtu_2008_04/q42008.pdf) (the 21<sup>st</sup> Digital Progress Report covering developments in multichannel television, including quarterly take-up figures, subscriber figures and device sales data)

Ofcom Report - Television Broadcast Licensing Update, March 2009 - <http://www.ofcom.org.uk/tv/ifi/tvlicensing/tvupdates/monthly/200903> (details television licences granted, handed back or revoked and the name changes made in March 2009)

Ofcom Report - Radio Broadcast Update April 2009 - <http://www.ofcom.org.uk/radio/ifi/rbl/rbupdates/update0409/> (details the radio licences issued, handed back or revoked, extended or renewed, format changes approved and change of control reviews considered in April 2009)

Ofcom Submission to Government - Radio in Digital Britain - [http://www.ofcom.org.uk/radio/ifi/radio\\_digitalbritain/digitalbrit.pdf](http://www.ofcom.org.uk/radio/ifi/radio_digitalbritain/digitalbrit.pdf) (Ofcom's response to the Government's Digital Britain report focusing on the role of radio in a digital world and the impact of the legislative proposals on analogue and digital radio in order to secure the future of commercial and community radio - proposals include allowing smaller radio stations to merge and sharing programming)

Office of the Adjudicator - Broadcast Transmission Services - Report for the Period 1 January 2009 to 31 March 2009 - [http://www.adjudicator-bts.org.uk/documents/OTABTS\\_jan09march09.pdf](http://www.adjudicator-bts.org.uk/documents/OTABTS_jan09march09.pdf) (the main role of the Adjudicator is to determine disputes relating to the Undertakings given in respect of the merger between transmission companies Arqiva and National Grid Wireless - the report details any guidance issued, disputes determined, views of the Adjudicator on the operation of the Undertakings and compliance of the parties with the Undertakings in the relevant reporting period)