

This is our summary of some of the key legal developments across a range of sectors for the week of 12 October 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

KPMG Report on Online Media Expenditure

KPMG have published the details of their recent survey, the Media and Entertainment Barometer, which they say "illustrates the impact of structural change on the media sector, brought about by reducing spend on traditional forms of media". The survey showed that while 49% visited social networking or blogging sites in the past month, 37% accessed online news feeds, 29% played games online and 22% downloaded music, only 11% said that they currently spend anything on online media - of those that had spent on online media, 21% spent on online TV, 19% on on-demand film and 17% on music. Only 7% of the respondents said they currently pay for online newspapers or magazines. KPMG said "The highest mean spend on online media was on downloaded music - £5 a month. Among those who had engaged with each of the types of media content surveyed, the mean spend over the past month tended to be much lower for new media (typically below £2) compared with traditional media (typically between £5 and £20)". The report will be published every six months.

MoJ Consults on Proposals to Introduce Custodial Sentences for Misuse of Personal Data

The Ministry of Justice (MoJ) has published a consultation on the possibility of introducing custodial sentences for those persons convicted of offences under section 55 of the Data Protection Act 1998, which creates the offence of selling or offering to sell personal data that has been unlawfully obtained. In addition, because the Government acknowledged that it "has no intention of curtailing legitimate and responsible journalism" it is also consulting on a proposal to commence simultaneously a new defence under section 55 relating to the obtaining, disclosing or procuring the disclosure to another person of personal data, or the information contained in personal data, without the consent of the data controller provided for by section 78 of the Criminal Justice and Immigration Act 2008 for anyone who can show that he acted for the purposes of journalism, artistic purposes, and literary purposes) with a view to the publication by any person of any journalistic, literary or artistic material and in the reasonable belief that in the particular circumstances the obtaining, disclosing or procuring was justified as being in the public interest. The MoJ said "It is appropriate that the DPA should enable the courts to have access to the same sanctions for the misuse of personal data as they would have for other similar offences. The Government therefore proposes to set the maximum penalty at the upper limit of that available under section 77 of the CJIA, ie twelve months' imprisonment on summary conviction and/or a fine of up to £5,000; and two years' imprisonment on indictment and/or an unlimited fine". See <http://www.justice.gov.uk/consultations/docs/data-misuse-increased-penalties.pdf> for details. A summary of the responses to this consultation is due to be published in early 2010.

OFT Announces Market Studies into Advertising and Pricing

The Office of Fair Trading (OFT) has launched two separate market studies into advertising and pricing - the first study will look at online targeting of advertising and prices and will cover behavioural advertising and customised pricing, where prices are individually tailored using information collected about a consumer's internet use; the second study will look at the advertising of prices and how various pricing practices which may potentially mislead consumers, particularly online. The OFT said one of the main motivations for the studies is the increased use of the Internet, which has introduced new pricing and advertising practices and may also have changed the scope for harm from existing practices. They said they also want to clarify their application of the Consumer Protection from Unfair Trading Regulations, including how they and other existing consumer law such as the Unfair Terms in Consumer Contracts Regulations (UTCCRS), apply to Internet transactions. Both studies are expected to be completed by the middle of next year. (OFT Press Release 126/09, 15 October 2009 - see http://www.offt.gov.uk/shared_offt/business_leaflets/659703/Statement-of-Scope.pdf for the Statement of Scope, which provides further details about the studies).

Rome I Application in Time Article Amended to Correct Error

An important correction to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) has been published by the Council of the European Union. Article 28 has been amended so as to make it clear that the Regulation shall apply to contracts concluded as *from* 17 December 2009, rather than *after* 17 December 2009.

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published with details of adjudications on breaches of Rules 2.3 (generally accepted standards), 2.11 (competitions should be conducted fairly and prizes described accurately) and 10.4 (no undue prominence in programme to product or service) of the Broadcasting Code. See http://www.ofcom.org.uk/tv/obb/prog_cb/obb143/Issue143.pdf for details.

Corporate

ICAEW Report on Risk Governance in Non-Financial Service Companies

The ICAEW Foundation has published the report it commissioned from Independent Audit Limited on risk governance in non-financial services companies and specifically, whether some or all of the recommendations contained in the Walker Review, published in July 2009, should be extended to companies which are not primarily engaged in financial services and whether there was any evidence supporting the need for changes to the Combined Code in relation to risk governance. The report concluded that risk governance in corporate entities was significantly different from that in financial services organisations and that structural or process solutions that were thought to be appropriate for financial services organisations, such as making board risk committees mandatory and requiring the appointment of a chief risk officer, should not be presumed to be suitable for corporate entities. In an acknowledgment of common sense and practicality it also noted that effective risk governance rested on human behaviour and said that, "New rules, or even new principles, are not what is needed to make risk governance more effective. What is needed is for people to make a good job of living up to those we already have". See http://www.icaew.com/index.cfm/route/168247/icaew_ga/Home/About_us/Latest_news/Getting_it_right_Latest_news_ICAEW/pdf for the report, which will be submitted to the FRC as part of its current review of the Combined Code (the report noted that the Code's principles regarding risk governance remained valid).

FRC Guidance on Going Concern and Liquidity Risks

The Financial Reporting Council (FRC) have published Guidance which brings together the requirements of company law, accounting standards and the Listing Rules on going concern and liquidity risk for small, medium and large UK companies. The FRC said the going concern concept is a "fundamental accounting concept that underlies the preparation of financial statements of all UK companies. Under the going concern concept it is assumed that a company will continue in operation and that there is neither the intention nor the need either to liquidate it or to cease trading". The Guidance provides a framework to assist directors, audit committees and finance teams in determining whether it is appropriate to adopt the going concern basis for preparing financial statements and in making balanced, proportionate and clear disclosures. Its three principles call on directors to make and document a rigorous assessment of whether the company is a going concern when preparing annual and half-yearly financial statements, consider all available information about the future when concluding whether the company is a going concern at the date they approve the financial statements and make balanced, proportionate and clear disclosures about going concern for the financial statements to give a true and fair view of the state of the company. See http://www.frc.org.uk/images/uploaded/documents/Going_concern_and_liquidity_risk_-_guidance_for_directors_of_uk_companies_093.pdf for details. The Guidance applies to accounting periods ending on or after 31 December 2009.

Fraudulent Misrepresentations and Inducement to Contract - Warranties in SPA

The Chancery Division has held that the defendants had made fraudulent misrepresentations which became warranties in a Sale and Purchase Agreement between the parties in relation to the acquisition of another company. The claimant (Invertec) made a number of claims arising out of the sale by the first defendant (DMH) to Invertec of the entire issue share capital in Volante Public Transportation Interior Systems Limited and said it had been induced to enter into the transaction by a number of fraudulent misrepresentations by DMH and the second defendant, a director of DMH, which later became warranties in the SPA. These misrepresentations concerned Volante's management accounts, its solvency, its corporation tax liability with regard to the year ended June 2004

and a contract with one of Volante's customers. At issue was whether the alleged fraudulent misrepresentations made by the defendants had induced the claimant to enter into the SPA and whether the second defendant was personally liable for the alleged misrepresentations. The court found the first defendant had breached the warranties contained in the SPA. In addition, the first defendant's representations prior to and in the SPA had been false and dishonestly made; further, the second defendant had known that the representations had been false and he made, or authorised them to be made, dishonestly. It followed that the second defendant was personally liable for the damages awarded as a result of his fraudulent misrepresentations. The claimant company was entitled to be put into the position it would have been in had those representations not been made, and to recover damages accordingly. (*Invertec Ltd v De Mol Holding BV & Anor* [2009] EWHC 2471 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/2471.html> for the judgment).

Gambling

Gambling Commission Restates Regulatory Principles

The Gambling Commission has published four documents, a revised Statement of Principles for Licensing and Regulation, a revised Licensing, Compliance and Enforcement Policy Statement, a revised Statement of Principles for Determining Financial Penalties and a new document entitled Licensing and Regulatory Decisions: Procedures and Guidance, which together restate the principles that guide its regulatory approach. The documents replace the previous versions, which were published in 2007. See http://www.gamblingcommission.gov.uk/pdf/Statement_of_principles_for_licensing_and_regulation_-_September_2009.pdf, http://www.gamblingcommission.gov.uk/pdf/Licensing_compliance_and_enforcement_policy_statement_-_September_2009.pdf, http://www.gamblingcommission.gov.uk/pdf/Statement_of_principles_for_determining_financial_penalties_-_September_2009.pdf and <http://www.gamblingcommission.gov.uk/pdf/Licensing%20and%20regulatory%20decisions%20procedure%20and%20guidance%20-%20September%202009.pdf> respectively for details.

French Assembly Passes Online Gambling Bill

The French National Assembly has voted in favour of adopting the draft bill to liberalise and regulate the national online gaming market. The bill passed by a majority of 96 votes with 302 in favour and 206 against and now passes on to the Senate for further debate. If passed, the bill will end the domination of online gambling by France's two state monopolies: Pari-Mutuel Urbain (PMU) for horse racing, and Francais des Jeux for lotteries and other games, and allow privately owned websites to offer online poker and betting on sports and horse racing. However, the bill has been subject to considerable criticism about the difficulties that potential operators could still face in entering into the French market as a result of the requirements in the bill for applying for a licence and establishing the necessary IT platforms. The European Gaming and Betting Association (EGBA) has said that the bill would have the effect of "worsening the conditions of market opening".

Litigation

Security for Costs in Libel Proceedings - Whether Costs Should be Ordered

The claimants brought proceedings against the defendant for libel against defendant in respect of defamatory allegations published by defendant in six articles and on various websites over a number of months. The defendant applied for security for costs. At issue for the court was whether security for costs should be ordered. The court noted that generally, it would be reluctant to order security where the claim appeared to be one that was highly likely to succeed. Where there were serious allegations of fraud and dishonesty, and conflicting assertions of fact that were unlikely to be resolved without disclosure, witness statements and cross-examination, it would be most unlikely that the court would find itself in a position to predict the probable outcome to a sufficient degree. It also said it would also be reluctant to grant an order for security for costs where the consequence of that would be to stifle a claim. It noted that the first, second and fourth claimants were to be treated as outside the jurisdiction and not resident in a Brussels contracting state, a Lugano contracting state or a regulation state as defined by section 1(3) of the Civil Jurisdiction and Judgments Act 1982 - the basic requirement of CPR 25.13(2)(a) was fulfilled. Further, in relation to the third claimant, reliance was placed on CPR 25.13(2)(c) on the basis that there was reason to believe it would be unable to pay the defendant's costs if ordered and the defendant also applied this argument in relation to the fourth claimant. Further, the court said it could not possibly conclude that the claimants had demonstrated a high probability of success. There were "many factual issues in dispute" and it was likely that there would be "significant conflicts of evidence". Against that background the court said it was appropriate to exercise its discretion and make an order for security for costs. (*Kahangi & Ors v Nourizadeh* [2009] EWHC 2451 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2451.html> for the judgment).

Interim Injunction to Prevent Disclosure of Confidential Information

The claimant sought an interim injunction to restrain the defendant from disclosing confidential information concerning or relating to a relationship between the claimant and the defendant. The parties had been involved in a relationship (which involved payment) - according to the court, some two years after these encounters, the lady took an opportunity to "remind him" of their previous encounters. As a result of this reminder, an agreement was reached for consideration. The agreement specified "This arrangement is made in confidence and neither this letter nor its terms should be disclosed by you to anybody else". Obviously, the agreement didn't work. The court noted the established law in *Bonnard v Perryman* [1891] 2 Ch 269 in relation to claims in defamation was that no interlocutory injunction would be granted where the defendant was proposing to publish material that may be defamatory but which the defendant was alleging to be true. The issue of principle was whether or not the rule applied to the present case, even though it was not advanced in defamation, but in confidence or privacy. The court was concerned as to whether the claim in this case was properly to be regarded as a claim to protect the applicant's privacy, or whether it was a claim brought to protect his reputation. Subject to that concern it was satisfied that the application came within section 12(3) of the Human Rights Act. It was also submitted that if the principle in *Bonnard v Perryman* did otherwise apply, it would be overridden by the agreement signed by the applicant and the lady. In all the circumstances however, the court said it was appropriate to grant the interim injunction. (*RST v UVW* [2009] EWHC B24 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/B24.html> for the judgment - it was said by the claimant's counsel that the present case was a genuine claim to protect privacy, and not to protect reputation. The judge said however "At some point, the court will have to grapple again with the question of where the principle of *Bonnard v Perryman* applies, and where it does not, when an application is made on the basis of privacy, but it is an application to restrain publication of material which is arguably defamatory. The court will have to decide how the rule in *Bonnard v Perryman* is to be applied in the light of such authorities as are then available as to the status of reputation as an Article 8 right and, if it is an Article 8 right, how the exercise of the ultimate balancing test referred to in *Re S* is to be applied on an interlocutory application).

Publishing

Statement in Open Court - Wholly Untrue Allegations About Demands for Increased Maintenance

The claimant, the former wife of a "troubled" ex-England football player, brought libel proceedings against the defendant following the publication of series of articles which alleged that her demands for increased maintenance payments had caused her former husband to relapse into alcoholism. The defendant accepted that the allegations were wholly untrue and apologised and agreed to pay her damages and costs. (*Sheryl Gascoigne v Express Newspapers, Unreported, QBD, 9 October 2009*).

Statement in Open Court - Untrue Allegations About Fidelity in Relationship

The claimant, a French actor and model, brought libel proceedings against the defendant, the publisher of The Sun, following the publication of an article which alleged he had been unfaithful to a former girlfriend. The defendant accepted that the allegations were untrue (having been denied by the parties involved) and accepted that they were defamatory and should not have been published. The defendant apologised and agreed to pay the claimant damages and costs. (*Oliver Martinez v News Group Newspapers Limited, Unreported, QBD, 9 October 2009*).

Statement in Open Court - Breach of Privacy and Infringement of Copyright for Purloined Photographs

The claimant, an international pop star, brought proceedings against the defendants for breach of privacy and infringement of copyright following the publication of private photographs of her wedding to her former husband - the photographs had been purloined from her home and then obtained by the second defendant and then sold to and published by the first defendant in the Mail on Sunday without warning. The photographs had never before been published. The first defendant admitted liability for breach of privacy and infringement of copyright and apologised to the claimant and agreed to pay damages and costs. The first defendant also agreed to destroy all copies of the infringing photographs in its possession. (*Madonna Ciccone v Associated Newspapers Limited, Unreported, QBD, 9 October 2009*).

PCC Confirm Report of Arrest is Not a Private Matter

The Press Complaints Commission (PCC) has rejected a complaint of privacy under Clause 3 of the Code against the Herald (Plymouth) after the newspaper reported on the arrest of the complainant during a police raid. The newspaper said that there was nothing private about the incident, which had involved 60 officers and had been

witnessed by the complainant's neighbours and members of the public and said the lack of any charges did not entitle the complainant to anonymity. The PCC said that it had previously warned editors to be careful about publishing images taken during police raids however, this related to the use of photographs taken inside properties. In this case, no photographs of the interior of the complainant's property had been published (although details about the property and his lifestyle were included in the report). The PCC said that the complainant's local standing and apparently privileged lifestyle would inevitably give rise to an additional degree of scrutiny but it did not consider that an arrest was a private matter. Reporting on police action was, in any case, inherently in the public interest and part of an open society unless there were formal reporting restrictions in place, which was not the case here. Accordingly, the PCC found there had been no breach. (*Mr Luke Dann v The Herald (Plymouth)*, Report 79 Adjudication issued 24/09/09 - see <http://www.pcc.org.uk/cases/adjudicated.html?article=NTk30A==> for details).

Sport

UKAD Commencement Date Announced

The Minister for Sport has announced that UK Anti-Doping (UKAD), the UK's first stand-alone anti-doping body, will officially commence operations on 14 December 2009. UKAD is responsible for ensuring sports bodies in the UK are compliant with the World Anti-Doping Code through implementation and management of the UK's National Anti-Doping Policy. (*DCMS Press Release 135/09, 15 October 2009*).

Technology

ApComms Report and Recommendations on Regulating the Internet

The All Party Parliamentary Communications (ApComms) group have published their report on the Internet - the group had been tasked with looking at Internet traffic to assess regulation of ISPs and consider a range of Internet traffic issues from types of Internet traffic and usage, behavioural advertising and privacy to child abuse images and Internet neutrality. The report helpfully summarises the views of a wide range of interested parties on five key issues - the circumstances when ISPs should be forced to act to deal with some type of "bad traffic", whether the Government be intervening into behavioural advertising services, whether there is a need for new initiatives to deal with online privacy and if so what they should be, whether the current global approach to dealing with child sexual abuse images is working effectively and if not what should be done and who should be paying for the transmission of Internet traffic. The group put forward a detailed list of recommendations, which include calling for a revision the law to enable ISPs to take proactive steps to detect and remove inappropriate content from their services without completely losing important legal immunities which fit with their third party role in hosting and distributing content; on the current disconnection for illegal file sharing activities they said they do not "believe that disconnecting end users is in the slightest bit consistent with policies that attempt to promote eGovernment", and recommend that this approach to dealing with illegal file-sharing should not be further considered. They said that the Government, in consultation with the EU Commission, should establish whether the Internet Watch Foundation (IWF) should extend its 'notice and take-down' mechanisms to the whole world, and if not, work to establish such a global system and recommended that Ofcom keep the issue of network neutrality under review and include a section in each annual report that indicates whether there are any signs of change. They also recommended that the Government bring forward a Green Paper on Privacy, "with a view to bringing forward a Privacy Bill in the next Parliament that sets out simply expressed, but far-reaching, protection for everyone's privacy, in both the offline and online worlds". See http://www.apcomms.org.uk/uploads/apComms_Final_Report.pdf for details.

New Legislation - Safeguarding Vulnerable Groups Act

The Safeguarding Vulnerable Groups Act 2006 (Commencement No 6, Transitional Provisions and Savings) Order 2009, SI 2009/2611 has been published. The Order brings various sections of the Safeguarding Vulnerable Groups Act 2006 into force - the Act implements a new system for vetting people who work with children, and bars them from doing so if they do not fit prescribed criteria. This includes "moderating a public interactive communication service which is likely to be used wholly or mainly by children". Under section 9 of the Act, which is brought into force by the Order, a person who permits an individual to engage in a regulated activity from which he is barred commits an offence, provided that he knew that the individual was barred from that activity and the individual did in fact engage in that activity. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092611_en.pdf for details.

Consultations & Reports

Ofcom Document - Ofcom's Single Equality Scheme - http://www.ofcom.org.uk/consult/condocs/promoting_equality_diversity/ses/ses.pdf (sets out details of Ofcom's scheme to promote equality of opportunity in the three areas of disability, gender and race).

Ofcom Consultation - Reviews of the Financial Terms for the Channel 3 and Channel 5 Licences - http://www.ofcom.org.uk/consult/condocs/review_c3_c5_licences/main.pdf (as a result of the coming into force of The Communications Act 2003 (Commencement No 4) Order 2009, SI 2009/2130 in July this year, the holders of Channel 3 and Channel 5 licences may apply for a review of the financial terms attached to their digital replacement licences - Ofcom is therefore consulting on the proposed approach to undertaking any reviews that the licensees may request before the end of this calendar year. The effect of the Order was to bring sections 272 and 273 of the Communications Act 2003 into force (the "must offer" obligations), which secures that each relevant public service channel is offered as available in digital form on every network including every satellite service, is broadcast or distributed on those networks without charge and is available for reception by as many members of its intended audience as practicable).

Ofcom Statement - Access and Inclusion - Digital Communications for All - http://www.ofcom.org.uk/consult/condocs/access/ai_statement/ai_statement.pdf (Ofcom's progress update and summary of its next steps on "Access and Inclusion" to ensure that all citizens, irrespective of their age, income, location, education or disability can access and use digital communications services).

Ofcom Statement - Audience Participation in Radio Programming - The Use of Premium Rate Services in Radio: Improving Consumer Protection - http://www.ofcom.org.uk/consult/condocs/audience_participation/statement/statement.pdf (Ofcom advises that following consultation, licences held by radio licensees should be varied to make licensees directly responsible for communication with the public where the mechanism of communication features in programming. This will mean that radio licensees will assume responsibility for the management of all communications with the public, where these are publicised in programmes - it advises therefore that certain categories of radio licences will be varied accordingly).