

This is our cumulative summary of some of the key legal developments across a range of sectors for the weeks of 19 and 26 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.

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General

Details of Disconnection Proposal Emerge in Evidence Given to Commons Select Committee

The Secretary of State for Culture Media and Sport recently appeared before the House of Commons Culture, Media and Sport Select Committee to present the DCMS' annual reports and accounts. Of interest however is his response to the question "Given the prime minister's leadership on this issue and proposals to temporarily cut people off as a result of accusations of illicit file sharing by some sections of the music industry, do you think that those people deserve to prove their innocence in a court of law?" The Secretary of State said the suspensions would be a very last resort for serial and serious infringement and that they would not just happen on the basis of an accusation. He said any disconnection "would be subject to a strict two-stage process. It would not just happen on the basis of an accusation, as you seem to suggest in your question. Firstly there would need to be court order for any of the technical measures that we are discussing in the consultation document to be implemented. Secondly, there would be a right of appeal to a tier one tribunal. I hope that you would not go away with the impression that innocent teenagers are going to be cut off willy-nilly on the basis of an accusation; that is not our intention or is not the effect of what we will propose when we come to publish the bill". He reiterated the Government's aim of reducing illegal file sharing by 70% - see <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmcmds/uc1047-i/uc104702.htm> for a transcript of his evidence. Since then Business, Innovation and Skills Minister, Lord Mandelson, has said that the measures which will be put before Parliament next month will be proportionate and that it will be made clear to the illegal file sharers that they have been detected, that they are breaking the law and risk prosecution. He said "we will go further and make technical measures available, including account suspension. In this case, there will be a proper route of appeal. But it must become clear that the days of consequence-free, widespread online infringement are over". See <http://nds.coi.gov.uk/content/detail.aspx?NewsArealD=2&ReleaseID=408001&SubjectId=2> for details. Note however that reports indicate that any decision about to introduce temporary disconnection as final measure for file sharers who have already received two warnings has been delayed until spring 2011. At the same time, a

compromise appears to have been reached in the European Parliament regarding the controversial disconnection element of the telecoms package which is still being debated. Recent reports indicate that the wording of the controversial amendment (Amendment 138) relating to the disconnection of users who have illegally downloaded material has been changed again - Amendment 138 established the need to obtain a "prior ruling by the judicial authorities" before taking any measures against users however, the new text states "any measures may only be adopted as a result of a prior, fair and impartial procedure". Spot the key missing word. Conciliation to agree a final version starts in early November and needs to be completed by the end of December.

IPO Confirm Extension of Artists' Resale Rights Derogation

The Intellectual Property Office (IPO) has confirmed that the Government has written to the European Commissioner for Internal Market and Services to confirm that it will be extending the derogation from Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art for a further two years. The Government referred to the challenging circumstances currently facing the UK art market with falling sales volumes and reduced prices and the risk that not continuing the derogation would drive sales out of the market in justifying its decision. Artist's resale right came into force in the UK in February 2006, implementing the requirements of the Directive. The right entitles authors of original works of art (paintings, engravings, sculpture, ceramics) to a royalty each time one of their works is resold in a sale involving an art market professional. The right only applies to sales for €1,000 or more and is calculated on a sliding scale. The maximum royalty payable on any single sale is €12,500. A derogation to artist's resale right for works by deceased artists was available to countries that did not have resale right when the Directive entered into force. It could only be used until January 2010 with an extension period which could continue to 1 January 2012, provided certain procedures were followed - after consultation, that additional extension period will now be applied in the UK. See <http://www.ipo.gov.uk/press-release-20081219-letter.pdf> for the IPO's letter. The Artist's Resale Right (Amendment) Regulations 2009, SI 2009/2792, which will give effect to the derogation extension will come into force on 1 December 2009 and amend the Artist's Resale Right Regulations 2006 accordingly. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092792_en.pdf for the Regulations.

Commission Communication on Copyright in the Knowledge Economy

The European Commission has published a Communication on Copyright in the Knowledge Economy in which they outline the results of their recent consultation on the Green Paper on Copyright in the Knowledge Economy. The Communication "announces a series of preparatory actions which will be a solid basis for concrete follow up initiatives as part of an ambitious and comprehensive intellectual property strategy to be presented by the next Commission". This is part of ongoing work to ensure that Europe remains competitive in the digital frontier, particularly in respect of mass-scale digitisation and the dissemination of books, in particular of European library collections. According to the Communication, two divergent views emerged during the consultation - libraries, archives and universities favoured the "public interest" by advocating a more permissive copyright system while publishers, collecting societies and other right holders considered that an equally satisfactory result could be achieved by contracts, often tailor-made to cater to new technologies. The Communication stated, "The dawn of the online culture of sharing and swapping, data mining and interactive learning, has exposed a difference of views between those who wish to move toward a more permissive system of copyright and those who wish to preserve the status quo. The challenge is to reconcile these interests". The Communication then outlined proposals to deal with digital preservation and dissemination of scholarly, cultural and educational material, the use of orphan works, access to knowledge for the persons with disabilities and user-created content. It also detailed the next steps that the Commission intends to take in order to find suitable solutions to the problems that were identified in the consultation process. (EC Press Release IP/09/1544, 19 October 2009; see [http://www.ipex.eu/ipex/webdav/site/myjahiasite/groups/CentralSupport/public/2009/COM_2009_0532/COM_COM\(2009\)0532_EN.doc](http://www.ipex.eu/ipex/webdav/site/myjahiasite/groups/CentralSupport/public/2009/COM_2009_0532/COM_COM(2009)0532_EN.doc) for the Communication).

Commission's Reflection Document on Creative Content Online

At the same time, the Commission also published a "Reflection Document" which was co-authored by DG Infso and DG Markt on creative content in a European digital single market and the challenges facing the three key groups, rightholders, consumers and commercial users, in the context of the evolving technological and commercial changes in the music, publishing, audiovisual and video gaming sectors. It dealt with the different challenges facing each of the three key groups and then gave details about possible EU actions which would take different forms, depending on their individual needs and particular issues. Interested parties are invited to comment on the ideas raised in the document. The EU Commissioner for Information Society and Media said "It will be my key priority over the next years to work, in co-operation with other Commissioners, on a simple, consumer-friendly legal framework for making digital content available across borders in the EU, while ensuring at the same time a

robust protection of copyright and a fair remuneration of creators". See http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf for details.

Commission Study Reveals Flaws in Cross Border e-Commerce

An independent study commissioned by the European Commission has revealed significant problems with cross border consumer e-commerce. A significant percentage of consumers surveyed who had attempted to purchase various common goods on-line from Member States where they were not resident were not able to do so. According to the Commission, nearly 11,000 test orders were carried out and the results showed that 60% of cross border transactions could not be completed because the trader did not ship the product to the country where the consumer was resident or did not offer adequate means for making a cross border payment. On average in the EU, in only 39% of cases was it theoretically possible to place an order with an online shop that was not located in the same country as the consumer (Romania, Bulgaria, Latvia, Belgium and Malta experienced the highest failure rates) and 70% of all cross border e-commerce turnover was concentrated in three key markets (the UK, Germany, and France). The Commission said further urgent work was needed to ensure that all barriers to cross border e-commerce were removed. See <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/475&format=HTML&aged=0&language=EN&guiLanguage=en> for details.

Commission Decision on Practical Arrangements for the Exchange of Information by Electronic Means

The European Commission has published its Decision on the practical arrangements for the exchange of information by electronic means between Member States under Chapter VI of Directive 2006/123/EC on services in the internal market. The Internal Market Information (IMI) System, which was established pursuant to Decision 2004/387/EC allows the secure and structured exchange of information between competent authorities by electronic means and since it also enables competent authorities to identify easily the relevant interlocutor in other Member States and to communicate with each other in a fast and efficient way, the Commission has said that it is appropriate to use the IMI for the exchange of information for the purposes of Directive 2006/123/EC. The Decision sets out the practical arrangements which will enable Member States to do so. It also makes provision for the protection of personal data when using the IMI. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:263:0032:0034:EN:PDF> for details.

Information Tribunal and Retention of Information on Database - Application of Data Protection Act

The Court of Appeal has ruled on the issue of whether, by virtue of the Data Protection Act 1998, the police are required to delete certain old convictions from the Police National Computer (PNC). The claimant Chief Constables had been ordered by the Information Tribunal to delete the convictions of five individuals, who had old, minor convictions which had been disclosed pursuant to a request by the Criminal Records Bureau. The Tribunal found that the purposes for which the convictions were held were for core police purposes, but that those convictions did not have value for those core police purposes and that the processing of data required holding criminal intelligence on the PNC for so long as necessary for the police's core purposes. It went on to find that the claimants were not required, under their statutory obligations, to hold data they no longer required for core purposes, and that they were only required to provide data that they held at the time of the request for access. Accordingly, the Tribunal held that the retention of the five convictions would infringe the principles of the 1998 Act, and that therefore the convictions should be deleted. The claimants submitted that to confine "purposes" to "core" police purposes found no support from the provisions of the 1998 Act and was too narrow a view and accordingly, there could be no question of retention being either excessive or held for longer than necessary. By a majority decision the Court of Appeal ruled that the Tribunal had erred in holding that the retention of the convictions would infringe the principles of the Data Protection Act 1998. It noted there was no statutory constraint on any individual or company as to the purposes for which he or it was entitled to retain data. Those purposes had to be lawful in order to comply with the requirement that data be processed fairly. The data controller had to specify the purpose for which data was retained, and had to identify the purpose or purposes in the public register so that people knew what the data was being retained for, and so that the Commissioner and data subjects could test the principles under the 1998 Act by reference to the purposes identified. If the police said rationally and reasonably that convictions, however old or minor, had a value in the work they did, that should be the end of the matter. Here, one of the purposes for which the police had retained the data on the PNC was to be able to supply accurate records of convictions to the Crown Prosecution Service, the courts and the Criminal Records Bureau. The Commissioner's reliance on "core purposes" meant that the Tribunal had got "off on the wrong foot" and that its treatment of the main issues had been materially flawed. (*Chief Constable of Humberside Police & Ors v Information Commissioner (Secretary of State for the Home Department intervening)* [2009] EWCA Civ 1079 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1079.html> for the judgment).

Commission Sends UK Reasoned Opinion Over Failure to Implement Privacy and Data Protection Requirements

The European Commission has moved to the second phase of an infringement proceeding over the UK's failure to provide its citizens with the full protection of EU rules on privacy and personal data protection when using electronic communications in breach of the requirements of Directive 2002/58/EC on e-Privacy and Directive 95/46/EC on data protection. The Commission has said that it has concerns that the UK is failing to comply with EU rules protecting the confidentiality of electronic communications such as email or surfing the Internet, as required by the Directives and has identified three areas of non-compliance - the lack of an independent national authority to supervise interception of communications; the fact that the current UK legislation authorising interception does not comply with EU rules defining consent as freely given specific and informed indication of a person's wishes; and the fact that the Regulation of Investigatory Powers Act 2000 provisions prohibiting and providing sanctions in case of unlawful interception are limited to "intentional" interception only, whereas the EU law requires Member States to prohibit and to ensure sanctions against any unlawful interception regardless of whether committed intentionally or not. The UK has two months to reply to the Reasoned Opinion; if the Commission receives no reply, or if it is of the opinion that the UK's response is not satisfactory, then it may refer the matter to the ECJ. (*EC Press Release IP/09/1626, 29 October 2009*).

New Legislation - Bermuda and Copyright

The Copyright (Bermuda) Revocation Order 2009, SI 2009/2749 comes into force on 12 November 2009. The Order revokes the Copyright (Bermuda) Order 2003, SI 2003/1517, which extended the copyright provisions in Part 1 of the CDPA to Bermuda - Bermuda has introduced its own copyright legislation which will provide for protection of UK works and performances. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092749_en.pdf for details. At the same time, The Copyright and Performances (Application to Other Countries) (Amendment) Order 2009, SI 2009/2745, which also comes into force on 12 November 2009, amends the Copyright and Performances (Application to Other Countries) Order 2008, SI 2008/677 and applies copyright protection under Part I of the CDPA to works originating from Bermuda and confers on Bermuda reciprocal protection under Part 2 of the Act which confers rights on performers and persons having recording rights in relation to a performance. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092745_en.pdf for details.

Broadcasting

Commission Proposals for Digital Dividend Published

The European Commission has adopted a Recommendation and a Communication, which propose measures to deal with the significant amount of spectrum that will become available once the switch from analogue to digital has been completed. The Commission has said it wants a "co-ordinated distribution of spectrum that encourages investment and competition in these potential new services". It noted that if the allocation of the newly freed airwaves to new services is co-ordinated across Europe it could give the economy a boost of between €20 and €50 billion. The Communication contains proposals for urgent action such as achieving complete switch-off of analogue TV by 2012 and providing a template for the coherent opening of the 790 - 862 MHz sub-band for electronic communications services by adopting harmonised technical conditions of use. On this point it said, "It is essential that Member States support regulatory efforts towards harmonised conditions of use of the 790 - 862 MHz sub-band and refrain from any action that would hinder the application of the technical harmonisation measure being planned at EU level". The Communication also outlined more strategic proposals, such as adopting a common EU position with a view to more effective cross-border co-ordination with non-EU countries, particularly in relation to the future use of the UHF band in third countries bordering the EU, achieving the EU-wide opening of the 790 - 862 MHz sub-band to electronic communications services and applying a minimum level of spectrum efficiency regarding future uses of the digital dividend. The EU Commissioner for Information Society and Media said "I call on EU countries to speed up the move to digital TV and to make it happen by 1 January 2012. I also urge national authorities to use the digital dividend in a pro-competitive way to open up the market for new operators and new services". Finland, Germany, Luxemburg, the Netherlands and Sweden have already completed the switchover; the UK is working towards a deadline of the end of 2012. See http://ec.europa.eu/information_society/policy/ecomms/radio_spectrum/document_storage/other_docs/en_rec8287_dd.pdf for the Recommendation and http://ec.europa.eu/information_society/policy/ecomms/radio_spectrum/document_storage/other_docs/en_com586_dd.pdf for the Communication.

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published with details of adjudications on breaches of Rules 1.2 (broadcasters must take reasonable steps to protect the under 18s), 1.3 (children must be protected from harm by appropriate scheduling), 2.1 (generally accepted standards), 2.3 (material which may cause offence must be justified by the context) and 10.3 (products and services must not be promoted in programmes - Ofcom also published a note to broadcasters regarding the application of Rule 10.3, reminding them of the need to comply with the current rules while the Government is in the process of considering changes to its approach to product placement) of the Broadcasting Code; a complaint of unwarranted infringement of privacy in breach of Rule 8.1 was also upheld. A breach of Licence Condition 11 (retention and production of recordings) was also adjudicated and Licence Conditions 2(1) and 2(4) in Part 2 of the Schedule to the Southampton and Winchester commercial radio licences were found to have been breached as a result of changes being made to broadcast content. See http://www.ofcom.org.uk/tv/obb/prog_cb/obb144/Issue144.pdf for details.

Corporate

Twelfth Company Law Directive on Single Member Private Limited Companies Codified

The European Commission has published a codified version of Directive 2009/102/EC in the area of company law on single-member private limited liability companies in OJEC. This Directive is a codification of Twelfth Council Company Law Directive 89/667 on single-member private limited liability companies, which is accordingly repealed. The Directive entered into force on 21 October 2009. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:258:0020:0025:EN:PDF> for details. Directives are codified when there have been a number of changes and amendments over time - the intention behind codification is to make the Community law clear and transparent. The new directive supersedes the various directives incorporated in it; their content is fully preserved, and they are brought together with only such formal amendments as are required by the codification exercise itself.

New Directive on Reporting and Documentation Requirements in Mergers and Divisions

The European Commission has also published Directive 2009/109/EC amending Directives 77/91/EEC, 78/855/EEC and 82/891/EEC and Directive 2005/56/EC as regards reporting and documentation requirements in the case of mergers and divisions. The amendments in the Directive have the stated objective of the objective of reducing administrative burdens, relating in particular to publication and documentation obligations of public limited liability companies within the Community. They will allow Member States to designate company websites or other websites as an alternative to publication via the companies registers; they provide that the extensive reporting or information requirements relating to the merger or division of companies need not be complied with if all the shareholders of the companies involved in the merger or division agree to that; they dispense with the requirement to draw up an accounting statement where an issuer whose securities are admitted to trading on a regulated market publishes half-yearly financial reports in accordance with Directive 2004/109; and they reduce the reporting requirements in respect of mergers between parent companies and their subsidiaries. The Directive entered into force on 22 October 2009 and must be implemented by Member States by 30 June 2011. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:259:0014:0021:EN:PDF> for details.

Film & TV

Commission Consults on Digital Challenges to EU Film Industry

The European Commission is seeking the views of the EU's audiovisual industry on how best to deal with the issues facing the EU film industry as a result of the challenges of the "digital revolution". The EU Commissioner for Information Society and Media said "Convergence between traditional content and digital technology radically changes the way films are produced, distributed and watched" and as a result, the Commission wants views on the impact digitisation which it says is crucial for the future of European cinema but which has associated issues of cost and which could impact on the competitiveness and circulation of European works and the pluralism and linguistic and cultural diversity of cinematic works. The consultation states "A wide range of operators (distributors and exhibitors) must be maintained to ensure the circulation of European works and the diversity of European cinema available to viewers. Many are however in danger of being left by the wayside because of the entry barrier represented by the high costs of digital equipment. Access to digital equipment and to digital masters will soon become crucial to remain competitive in a rapidly evolving market". The Commission is specifically inviting the views of exhibitors, distributors, producers and sales agents and film agencies and the responses will help the Commission to finalise a Communication on Opportunities and Challenges for European Cinema in the Digital Era,

which is due to be published early next year, as well as a new MEDIA support scheme for the digitisation of cinemas offering substantial European programming. The Commission is considering applying a US model, Virtual Print Fee (VPF), which envisages that part of the money that is saved by distributors in shipping digital content rather than traditional 35mm print is paid to a third party, which invests it in financing the conversion to digital cinema. For the Commission, the question is why existing investors and European distributors have so far not been able to sign such agreements. See http://ec.europa.eu/information_society/media/overview/consultations/docs/intro_consultation_digi_cinema_en.pdf for the overview consultation and http://ec.europa.eu/information_society/media/overview/consultations/docs/background_digital_cinema_en.pdf for the background technical document.

Gambling

RGSB Report on Research, Education and Treatment Priorities for National Responsible Gambling Strategy

The Responsible Gambling Strategy Board (RGSB) has published, as formal advice to the Gambling Commission, its report setting out its initial strategic priorities for research, education and the prevention of and treatment of problem gambling. The report also highlights areas where there are still questions that need to be answered in order to support a national responsible gambling strategy. Once the Commission has responded to the recommendations, the RGSB will pass a strategic remit to the Responsible Gambling Fund (RGF), the body responsible for distribution of the funds raised by the gambling industry for RET purposes. RGF will then develop and fund programmes that reflect the RGSB's priorities. See http://www.gamblingcommission.gov.uk/pdf/RGSB_initial_strategy_and_priorities_-_October_2009.pdf for the report. The national responsible gambling strategy is co-ordinated through three bodies - the Responsible Gambling Strategy Board which advises on the research, education and treatment components of the national responsible gambling strategy, a single purpose fundraising body (The GREaT Foundation) and a distribution body (the Responsible Gambling Fund - RGF).

ASA Finds "Free Bets" Offer in Breach of CAP Code

The Advertising Standards Authority (ASA) has ruled on two press advertisements for Bet365.com, which featured a promotion that £200 in free bets was available to new customers. It was questioned whether the advertisements were misleading because they did not make clear that new customers could only claim the £200 of free bets if they staked a substantial amount of their own money first (in order to obtain the full £200 of free bets, customers were required to spend £900). The ASA found that the minimum spend, the minimum number of bets and the incremental nature of the awards were significant conditions likely to influence consumers' understanding of the offer and concluded that, because this information was omitted, they were likely to mislead. The advertisements therefore breached Clauses 7.1 and 7.2 (truthfulness) and 32.5 (free offers and free trials) of the CAP Code. The ASA ordered them not to appear in their current form again. See http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_47164.htm for the ruling.

Litigation

Application for Further Information in Libel Proceedings - Whether Request Should be Granted

The claimant, a professional tennis player, complained about an article published by the defendant which referred to his victory in one game after a very long losing streak and called him the "worst professional tennis player in the world". The defendant denied the words complained of were defamatory and also disputed the pleaded meaning. The court noted the claim was confined to defamation and no reliance was placed on the tort of injurious falsehood. It said the object of any libel action was to restore reputation and that it was difficult to see what the claimant hoped to gain from the litigation. However, at issue was a request by the defendant for further information about certain questions the claimant had declined to answer which went to the issue of whether the claimant's losses had been in tournaments on the "international professional circuit" and whether the claimant admitted that a particular national tournament was not part of the "international professional circuit" and/or "world circuit" and/or "the circuit". The court said there was no reason why the claimant should not offer further clarification on those matters. It had not been suggested that he was unable to do so. It was important to place as many cards as possible on the table at the instant stage. There was nothing to be gained from arguments about whether a request for further information was the right mechanism to adopt. The questions were to be answered constructively, rather than merely by way of non-admission, so that the defendant could know the full extent of the real dispute. (*Dee v Telegraph Media Group Ltd [2009] EWHC 2546 (QB)* - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2546.html> for the judgment).

Immunity of State and Enforcement of Seizure Order for Domain Name

The claimant, a provider of online gaming services under the domain name fulltitlpoker.com, applied for summary judgment in default of acknowledgment of service by the second defendant, the Commonwealth of Kentucky in the US. The first defendant was an English company, contractually responsible for "pointing" the domain name at the correct domain name servers to the order of the claimants. A dispute had arisen when the Kentucky obtained a seizure order in 2008 pursuant to its public laws to enforce that State's criminal law against first defendant in respect of domain name and sought a penal forfeiture of the domain name on the grounds that the name had been used in the commission of multiple crimes within Kentucky. The first defendant refused to give the claimant an undertaking not to surrender domain name and the claimant brought an action for declaration that seizure order was unenforceable in the UK. The claimant's entitlement to summary judgment depended on whether Kentucky was entitled to state immunity in respect of the seizure order. The court held that the seizure order made by Kentucky could not be enforced as Kentucky did not enjoy immunity under the State Immunity Act 1978. The court said in the case of penal and public laws the basis of non-enforceability was identified as being that one state did not recognise within its own jurisdiction the penal or public acts of another sovereign state. Although Kentucky was not a sovereign state, the penal and public acts in question had been undertaken by a government which was a constituent part of a sovereign state. If a sovereign state's penal and public acts were not enforceable, the non-enforceability of the penal and public acts of the government of a constituent part of the sovereign state also had to be the case. Accordingly Kentucky's proceedings were not enforceable in English law as they were penal and governmental in nature. (*Pocket Kings Ltd v Safenames Ltd & Anor* [2009] EWHC 2529 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/2529.html> for the judgment).

Use of Archive Websites and Breach of Copyright - Usage Contemplated at Time of Licence

The claimant, a professional freelance photographer, sought an application in the High Court to commit the officers of the first defendant, MGN Limited or for orders of sequestration against the assets of MGN, on the grounds that the company committed breaches of an undertaking to the court not to infringe his copyright in various photographs which he had taken and supplied to MGN between 1981 and early 1997. The claimant did not dispute that MGN had been granted and had retained a licence to store full copies of back numbers of the Daily Mirror in electronic form - his issue was that at the time when he was supplying photographs to MGN, no-one had in mind the possibility of the Daily Mirror being able to market back editions through a website. The High Court held that MGN Limited's use of its websites containing back editions of the Daily Mirror newspaper was an infringement of the claimant's copyright and in breach of an earlier undertaking not to infringe his copyright. It noted that "exploitation through the back numbers websites seems to me to be a different kind of operation which was not contemplated at the time when the licence was granted and cannot be said to have been necessary to regulate the rights of the parties at that time". For these reasons it took the view that the claimant's copyright in his photographs had been or would be infringed by the operation of the back number websites. However, it went on to say that the claimant's right could be adequately protected by a declaration to that effect - this was not a case where MGN had deliberately or consciously not complied with the consent order. The court also made the point that disputes like this one should not be resolved by means of committal proceedings. (*Alan Grisbrook v MGN Limited & Ors* [2009] EWHC 2520 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/2520.html> for the judgment).

Reasonableness of Recovery of Losses - Failure to Serve Libel Proceedings Out of Jurisdiction

The claimant, an Icelandic businessman living in the UK, brought an action against the defendant, the Foreign and Commonwealth Office, for negligence over their failed attempt to serve libel proceedings in Iceland, in September 2004, in accordance with Icelandic requirements. The claimant alleged that he had been seriously libelled in material published on a website, in 2004, by a professor of political science at the University of Iceland. The claimant commenced proceedings in the English court. The claim form was issued on 4 August 2004 and the claimant was entitled to serve the proceedings out of the jurisdiction in Iceland under CPR 6.19(1) because Iceland was a party to the Lugano Convention however, the papers were never served. Liability was admitted however there were issues relating to the quantification of the claimant's loss, including loss of judgment awarded and costs wasted in attempting to enforce the judgment in Iceland. At issue was whether the claimant had acted unreasonably in seeking to recover his loss rather than attempting to mitigate his loss by obtaining a second judgment in default in England and taking steps to enforce it in Iceland. The court ruled that in the circumstances, the claimant had not acted unreasonably in seeking to recover his loss and, in particular, in respect of the judgment and costs awarded. He should not be required to undertake uncertain litigation against a third party with a view to enforcement in Iceland - especially having been refused an indemnity by the defendant. On the evidence, such proceedings were likely to fail. (*Olafsson v Foreign and Commonwealth Office* [2009] EWHC 2608 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2608.html> for the judgment).

Copyright Tribunal's Interim Decision in PPL Tariff Dispute Over Background Sound Recordings

The Copyright Tribunal has published its interim decision in the long standing dispute between Phonographic Performance Limited (PPL) and the British Hospitality Association, supported by various other interested parties, regarding the tariffs applied by PPL to public houses, restaurants and cafes, shops and stores and factories and offices. The matter was referred to the Tribunal under sections 128A and 128B of the CDPA. The key issue between the parties was the amount of the annual fees sought by PPL under the New Tariffs, which came fully into force in January 2006 - the structure of the New Tariffs was opposed, and particularly the bandings and there was also a dispute about the definition of what constituted an "audible area" in a pub for the purpose of the one of the tariffs (110) and whether there should be a surcharge imposed on those who played sound recordings without first having obtained a PPL licence. The Tribunal ruled that the "very substantial increases" in the New Tariffs over the Previous Tariffs were "unreasonable and unjustifiable". It said the level of the increase could not be justified as a payment for the new broadcasting right but that PPL had sought to use this as the impetus for a very substantial upward increase. On the banding issue the Tribunal said there was no reason to introduce the new structure as the previous tariffs were already divided with increasing charges - the Tribunal said it was not reasonable to replace that structure. It was appropriate therefore to keep the fee structure from the Previous Tariffs but to apply a 10% increase to each set of fees in order to take account of the new broadcast right in sound recordings. The PPL said the Tribunal's "one-size-fits-all" approach, which was proposed by the hospitality industry, was "particularly unfair to small pubs and shops that in future would pay exactly the same as much larger businesses". Not surprisingly, the various interested parties welcomed the ruling however, PPL have said they will be appealing the decision, "on many grounds". See <http://www.ipo.gov.uk/ct-2009-10-19.pdf> for the decision.

Fourth Meeting of Roundtable on the Online Distribution of Music - Consumers to Benefit

The fourth meeting of the Roundtable on the Online Distribution of Music, chaired by European Commissioner for Competition, has taken place and the Commission has announced that a joint statement setting out general principles that would underpin the online distribution of music in the future and so lead to improved online music opportunities for European consumers has been signed. The participants, Amazon, BEUC, EMI, iTunes, Nokia, PRS for Music, SACEM, STIM and Universal, said they recognised that there were "legal and other barriers to the online distribution of music which hinder consumers' access to legitimate online music offers and limit business opportunities". They said they supported the development of further legitimate music services online and recognised that online piracy was a corrosive factor which needs to be tackled by all relevant actors. Further, they said they realised that extensive fragmentation of rights and the lack of effective rights' clearance mechanisms created challenges to efficient and transparent music licensing. They recognised that such mechanisms facilitated the emergence of new business models and the deployment of multi-territorial online music services. An open, fair and transparent licensing process that secures an appropriate level of royalties for right holders and authors was in the interest of all players and therefore of cultural diversity in Europe. The participants agreed to consider appropriate measures so that open, transparent and non-discriminatory access to the rights identification data that are needed for efficient pan-European licensing purposes become a reality and agreed that objective, transparent and non-discriminatory criteria for the selection of entities entrusted to license online rights on a multi-territorial basis should be followed. Although the agreement is still subject to further negotiation, the Commission said the steps and commitments should result in improved access of European consumers to music online. (*EC Press Release IP/09/1548, 20 October 2009 - see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1548&format=HTML&aged=0&language=EN&language=en> for details and see http://ec.europa.eu/competition/sectors/media/joint_statement_1.pdf for the Statement*).

Libellous Article and Reliance on Defence of Qualified Privilege - Whether Defence Available

The claimant, a Detective Sergeant with the Metropolitan Police Service Extradition Unit, brought a libel action against the defendant publisher, following the publication of an article in The Times newspaper and on its website which alleged that he had been taking bribes from Russian criminals; a subsequent investigation was unable to find any evidence of any wrongdoing and no recommendation for disciplinary action was made. The defendant sought to justify the allegations by reference to the meaning that the claimant had been the subject of internal police investigation and that there were grounds that justified such an investigation. The defendant admitted that the article was defamatory but did not publish the outcome of the investigation. The court said the real issue in relation to the print publication came down to whether the journalism was responsible in the sense of whether the publication of the article, as and when it was published, was fair to the claimant and whether it was a

proportionate interference with his right to reputation given the legitimate aim in pursuit of which the publication was made. It concluded that the publication on in The Times newspaper 2 June 2006 was a proportionate interference with the claimant's right to his reputation, given the legitimate aim in pursuit of which the publication was made. It upheld the defence of qualified privilege in respect of the publication of 2 June 2006. It said, "The story was about a police investigation into an allegation that an officer in the extradition unit had been corrupted by a former police officer now working on behalf of very wealthy and controversial Russians living in England. That was a story of high public interest. The purpose of publishing the story was to ensure that that investigation was carried out promptly. That too was a matter of public interest". However, once the publisher knew that no evidence had been found of the alleged wrongdoing, its failure to remove the article from its website, or add a qualification, was contrary to the public interest and meant that it could not rely on qualified privilege after the date of such knowledge. (*Flood v Times Newspapers Limited* [2009] EWHC 2375 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2375.html> for the judgment).

Open Letter from One News Aggregator to UK Newspapers

NewsNow Publishing Limited has published an open letter to the UK's national, regional and local newspapers, including The Times, The Sun, The Guardian, Daily Mail, Daily Mirror, The Daily Telegraph, The Independent and the Daily Express, in which it attempts to allay the concerns of newspapers about the role that content aggregators play - they said "we don't do anything that detracts from the value of your content. We don't redistribute your web pages to anyone. We operate within the law, and we don't do you any harm". On the reasons for the decline in the uptake of the printed form of the newspapers it was very clear and said that it was the "growth of the Internet itself - not link aggregation - that has undermined your businesses by destroying the virtual monopoly that you once held over the mass distribution of written news. If you are seeking to blame something for your current predicament, we suggest you start there". It called on the newspapers to end their legal threats and recognise the place and value of legitimate news aggregation websites in today's news ecosystem, commit to upholding the freedom to link and support those of their readers who wish to find links to their websites and confirmed that it wanted to work with the newspapers to ensure the existence of a continued publishing industry.

Article - Defamation and Blogging

The European Intellectual Property Review has an interesting article about defamation and blogging and the risks that are posed to the bloggers, editors, publishers and broadcasters of a blog by the practice of allowing the posting of comments. The article takes a practical approach and looks at the various practices and methods that bloggers can adopt to minimise risk in the light of relevant case law. (*Defamation - The Dilemma for Bloggers and their Commentators* [2009] EIPR 505 - the article is available from Westlaw).

Lords Propose Amendment to Coroners and Justice Bill to Abolish "Arcane" Libel Offences

The House of Lords are currently debating amendments to the Coroners and Justice Bill. In a recent debate concerning certain proposed amendments they confirmed that a number of specific offences would be abolished - the offences of sedition and seditious libel; the offence of defamatory libel; and the offence of obscene libel. The comment was made that these were "arcane offences which have largely fallen into disuse". It was said that "They stem from a bygone age when freedom of expression was not seen as the right that it is today. As we heard in Committee, taking the initiative to abolish them will be a positive step in helping our country, the United Kingdom, to take a lead in challenging similar laws in other countries where they are used to suppress free speech" (and reference was made to certain Commonwealth countries in Asia and Africa where these laws are used to suppress political dissent and criticism). The Lords noted that blasphemous libel was abolished in England and Wales by section 79 of the Criminal Justice and Immigration Act 2008 and the publication of obscene material is now covered by the Obscene Publications Acts 1959 and 1964, so the common law offence of obscene libel was effectively obsolete. See <http://www.publications.parliament.uk/pa/ld200809/ldhansrd/text/91028-0003.htm> - 09102836000091 for access to the Hansard record of the debate.

Technology

The Internet of the Future - What Will it do for You?

The European Commission has outlined the brave new world of the Internet of the Future, detailing the wide-ranging benefits it could bring, including less congested roads, better and more efficient energy delivery or state of the art medical treatment being managed at home in its latest Communication - A public-private partnership on the Future Internet. The Communication notes that the changes the Internet has made to economies and societies will be even more evident in the future, driven by the progress of Information and Communication Technologies and by the blossoming of novel business and societal applications. It also notes that anticipated technological

developments of the Future Internet and the trends towards smart infrastructures (eg, in energy, mobility, health, work, the environment, etc) provide Europe with an opportunity to progress towards a sustainable economy but that to achieve this, efforts will be required to capitalise on the steps taken at EU level to push the frontiers of internet technology forward, consolidate the short to medium-term approach, re-emphasising key aspects and encouraging new initiatives to help give Europe a leading edge in the Future Internet and prepare for the launch of a Public-Private Partnership (PPP) initiative on the Future Internet, as also encouraged by Member States and industry. The intention is, according to the Commission, to make Europe a leader in the research and roll out of the technologies needed to "smarten up" infrastructures in areas affecting daily life like healthcare, transport, and energy. See http://ec.europa.eu/information_society/activities/foi/library/fi-communication_en.pdf for details.

Article 29 Data Protection Working Party Writes to Search Operators Over Data Protection and Privacy Issues

The Article 29 Data Protection Working Party, which was set up under the EC Data Protection Directive 95/46/EC to act as an independent European advisory body on data protection and privacy issues, has written to search engine operators Google, Microsoft and Yahoo! following the hearing it had with them in February this year. The hearing focused on three topics: the retention period for personal data related to searches, including search terms, IP addresses and cookies, the method of deletion or anonymisation of personal data upon expiry of the justified retention period and the applicability of European data protection law to non-EU based operators. The Working Party's individual letters to the search operators summarised the issues from the hearing and requested clarification about a number of specific areas where each search operator has further work to do to ensure that their commercial operations are compliant with relevant legislation. The parties have three months to respond - see http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/wpdocs/2009-others_en.htm for access to the letters.

Consultations & Reports

BIS Consultation - A Consultation on a Direction to Ofcom to Implement the Wireless Radio Spectrum Modernisation Programme - <http://www.berr.gov.uk/files/file53061.pdf> (the consultation follows the report of the Independent Spectrum Broker and the proposals for the release of spectrum and the achievement of the Government's goals of supporting the delivery of next generation of mobile telecommunications services as outlined in the subsequent Digital Britain report - in order to achieve their aims, the Secretary of State for Business Innovation and Skills therefore intends to issue a Direction to Ofcom, under section 5 of the Wireless Telegraphy Act 2006 to ensure that the radio spectrum is managed in the appropriate manner and is consulting on the details for the Direction (the specifics of which are contained in Annex 1)).

Ofcom Statement - The Spectrum Plan for the London 2012 Games - <http://www.ofcom.org.uk/consult/condocs/london2012/statement/statement.pdf> (Ofcom is responsible for organising a full spectrum plan for the London 2012 Games - this Statement sets out its spectrum plan for wireless communications at the London 2012 Games and includes details about its high-level approaches to licensing (authorisation) and interference management).

Ofcom Statement - The PRS Scope Review - An Analytical Framework for Assessing the Risk of Consumer Harm, and Steps to improve PRS Regulation - http://www.ofcom.org.uk/consult/condocs/prs_scope/prs_statement/prs.pdf (the Statement establishes an analytical framework that will help inform future Ofcom considerations on whether the scope of Premium Rate Services regulation should be widened or narrowed and will help determine whether a particular service or service category carries sufficient risks of consumer harm to require inclusion in the regulatory regime. It also recommends a number of initiatives, including introducing a mandatory registration scheme for the PRS industry, having PhonepayPlus consult on strengthening PRS advertising requirements to align with its approach to the use of PRS in TV programmes and having PhonepayPlus consider creating minimum standards for complaints handling across the PRS industry).

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 (the Statement outlines Ofcom's proposals to vary the licences held by radio licensees in order to make the licensees directly responsible for communication with the public where the mechanism of communication features in their 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).