

*This is our summary of some of the key legal developments across a range of sectors for the week of 2 November 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

#### EU Finalises Agreement on Telecoms Package

The Council of the European Union, the European Parliament and the European Commission have jointly announced that final agreement has been reached on the telecoms package. The EU's current President said, "This agreement strengthens the competitiveness among enterprises and enhances the consumer protection in Europe, which will lead to ... better and less expensive broadband services and substantially stronger protection for all Internet users". For the telecoms package to enter into force, the Council of the European Union and the European Parliament must formally adopt the agreement, which is expected to take place at the end of November. See <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/491&format=HTML&aged=0&language=EN&guiLanguage=en> for the Commission's statement about the agreement, which helpfully summarises the 12 key reforms of the package, including protecting citizens' rights relating to Internet access with a new internet freedom provision, which explicitly states that "any measures taken by Member States regarding access to or use of services and applications through telecoms networks must respect the fundamental rights and freedoms of citizens, as they are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and in general principles of EU law. Such measures must also be appropriate, proportionate and necessary within a democratic society. In particular, they must respect the presumption of innocence and the right to privacy. With regard to any measures of Member States taken on their Internet access (eg to fight child pornography or other illegal activities), citizens in the EU are entitled to a prior fair and impartial procedure, including the right to be heard, and they have a right to an effective and timely judicial review".

#### US Passes Bill to Protect Journalists' Sources

The US Congress has passed without amendment HR 985, The Free Flow of Information Act of 2009, which seeks to "maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media". The Act prohibits a federal entity from compelling a covered person to provide testimony or produce any document related to information obtained or created by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard. The Act defined a "covered person" as "a person who regularly gathers, photographs, records, writes, edits, reports, or publishes information concerning matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or substantial financial gain, including a supervisor, employer, parent, subsidiary, or affiliate of such a person". It excludes from that definition foreign powers and their agents and certain terrorist organizations and individuals. The negotiated compromise to produce the text that was passed was described as creating a "fair standard to protect the public interest, journalists, the news media, bloggers, prosecutors and litigants", having achieved a fair balance between national security interests and the need to protect a journalist's sources.

#### OFT Refers Friends Reunited Acquisition to Competition Commission

The Office of Fair Trading (OFT) has referred the proposed acquisition of Friends Reunited Holdings Limited by Brightsolid Group Limited to the Competition Commission for further investigation. The OFT said "The proposed acquisition would see the three main providers of online genealogy services reduced to two, and we are concerned this could lead to a reduction in choice or service for consumers. We are therefore referring the merger to the Competition Commission for a fuller inquiry". Brightsolid, which runs websites FindMyPast.com and 1911Census.com, and Friends Reunited, which owns GenesReunited.com, are two of the three largest suppliers of online genealogy services in the UK. The Competition Commission is expected to report by 16 April 2010 and has invited interested parties to comment. (*OFT Press Release 129/09, 2 November 2009; Competition Commission News Release 50/09, 3 November 2009*).

## Law Commissions' Report on Consumer Remedies for Faulty Goods

The Law Commission and the Scottish Law Commission have published their joint report on the remedies which are available to consumers when they buy goods which do not conform to contract. The report starts with the premise that "the law is complicated. There are effectively two legal regimes which co-exist: the traditional UK remedies; and the European remedies, based on the 1999 Consumer Sales Directive (CSD)". The central issue for the Law Commissions' was the question of when should consumers be entitled to return faulty goods and receive a refund (the "right to reject"), rather than being required to accept a repair or replacement? Under the current legislation, consumers have the right to reject goods provided that they exercise the right within "a reasonable time" however, uncertainty exists as this term is not defined. The report contains a list of recommendations in light of the European Commission's proposal for a new consumer rights directive, which would (amongst other things), reform the law on consumer remedies. The Commissions note that it "may be possible to implement some of our recommended reforms in the UK only, provided that the proposed directive (or relevant parts) is adopted as a measure of "minimum harmonisation"". They recommend that the right to reject should be retained in the UK - if the proposed directive were adopted as published, on the face of it, the UK would have to repeal the right to reject. See <http://www.lawcom.gov.uk/docs/lc317.pdf> for their report.

## ASA's Statement of Objectives for 2010

The Advertising Standards Authority, Committee of Advertising Practice and Broadcast Committee of Advertising Practice have published their 2009 - 2010 Annual Statement. The Statement sets out their objectives for the coming year, which includes launching and promoting the new advertising codes that are currently under review. Of interest is the statement in the objectives for 2010, which refers to the launch and promotion of the new Advertising Codes which are due to be published in the first quarter of 2010, and the statement that they "will apply the Codes both to any digital marketing communications newly considered to be in remit and to video on-demand advertising". See <http://www.asa.org.uk/NR/rdonlyres/8E17D08A-1EA3-4851-9133-A70EAADDE9BC/0/Annualstatement200910.pdf> for details.

## Interpretation of Licensing Agreement for Sale of Sports Wear - Whether Agreement Breached

The claimant was a small US company that specialised in the manufacture and marketing of branded sports apparel. The defendant was an English company with an international licensing business based principally on soccer and the owner of the Umbro brand. The defendant granted two separate licences, one to a major retail company, and the other to the claimant, to sell "off-field" soccer-based clothes to be worn by fans at a game or at home. Neither the major retailer nor the claimant were intended to be licensed to supply "teamwear" or "on-field" soccer kits provided to competitive teams. The claimant issued proceedings complaining that the defendant had breached its exclusive licence by permitting the major retailer to market certain items in breach of its exclusive licence which had hindered it from exploiting their "off-field" licence, in breach of an implied duty of co-operation claimed to be owed by the defendant to it. The court noted its task on a question of construction was not to determine the subjective intention of the parties when negotiating the terms, but to determine objectively what a reasonable person, having regard to all the background knowledge that would have been available to the parties, would have understood them to be using the language of the contract. In the licence agreement, the "field of play" meant the actual field of play in a game of soccer, including informal and practice games, so that clothes specifically intended for that kind of use were the clothes excluded from the claimant's licence. The intended use of the clothing had to be determined by objective factors and the intention had to be of a hypothetical supplier or buyer. On the evidence, by permitting certain products to be marketed by the major retailer, the defendant had breached the claimant's exclusive licence. However, on the facts, the "pocketless soccer basics" were not "off-field" wear and the parties' agreement did not authorise the claimant to market those products. (*Hudson Bay Apparel Brands LLC v Umbro International Ltd* [2009] All ER (D) 52 (Nov) - only a digest of the case is available, from LexisNexis).

## Article - Enforcing Agreements to Negotiate

The latest New Law Journal looks at the issue of the enforceability of agreements to negotiate and considers whether agreements to conduct negotiations in good faith have been held to be analogous to agreements to use best endeavours, and consequently are enforceable. The article considers recent UK case law and notes that it is now clear that, in appropriate circumstances, good faith negotiation clauses can be upheld. It states "The courts are reluctant to be seen as "destroyers of bargains", particularly those made by commercial men in contracts drafted by experienced lawyers. They cannot enforce bare agreements to negotiate" however case law shows that agreements to negotiate in good faith can be enforced where they form a part of an express, concluded, and legally effective agreement, and there is no other reason why the agreement should not be workable. ("*Enforcing Agreements*" (2009) 159 NLJ 1511 - the article is available via LexisNexis).

### Provision for Service of Deadlock Procedure Arrangements "At Any Time" - Specific Performance

The claimant applied for summary judgment of its claim for specific performance that the defendant purchase its shareholding in the JV company owned equally between the parties, and to dismiss the defendant's counterclaim for alleged breach of contract. The parties had been negotiating about the refinancing of the JV and finding a third party to acquire the claimant's shares. The claimant served a letter of its intention to implement the "deadlock" procedure under the shareholders' agreement between the parties - the deadlock procedure provided that if no alternative agreement could be reached by the end of the notice period, the receiving party would be required to purchase the shareholding of the serving party unless the receiving party elected otherwise before the end of the notice period. The defendant failed to make any election within the time limit and refused to purchase the claimant's shareholding. The claimant said this was a clear breach of the deadlock procedure and that it was entitled to have its shareholding purchased at the specified price. The defendant counterclaimed on the grounds that the JV directors that were appointed by the claimant had breached their fiduciary and contractual obligations to the JV, causing financial loss. The court said the shareholders' agreement clearly stated that either shareholder could serve a notice that it intended to implement the deadlock procedure "at any time", and there was no basis for refusing to give that expression its ordinary meaning. The fact that the clause called it a "deadlock procedure" could not be sufficient to impose a requirement that it could be implemented only in a situation of deadlock. The defendant's interpretation would not only fail to give the words "at any time" their ordinary meaning, but would also give rise to commercial uncertainty. The claimant was entitled to summary judgment of its claim for specific performance where it had been entitled to serve the notice in question and where it was well established that an obligation to transfer shares in an unquoted company was an obligation for breach of which damages were generally not an adequate remedy. (*Gaetano Ltd v Obertor Ltd [2009] EWHC 2653 (Ch)* - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/2653.html> for the judgment).

### Commission Consults on Interconnection of Business Registers

The European Commission is consulting on the interconnection of business registers (such as the UK's Companies House) across the EU. The core services provided by business registers is to register, examine and store company information, such as information on the company's legal form, its seat, capital and legal representatives, and to make this information available to the public. According to the Commission, the cross-border co-operation of business registers is "indispensable to ensure that reliable information is available electronically on companies all over Europe". The Internal Market and Services Commissioner said "Business registers play an important role in ensuring transparency and legal certainty in Europe" and the consultation is intended to improve access to business information and to increase legal certainty surrounding cross-border operations in the EU. It takes the form of a Green Paper ([http://ec.europa.eu/internal\\_market/consultations/docs/2009/interconnection\\_of\\_business\\_registers/green\\_paper\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2009/interconnection_of_business_registers/green_paper_en.pdf)), which considers possible ways forward and asks whether an improved network of the business registers of the Member States is seen to be necessary and an accompanying Progress Report ([http://ec.europa.eu/internal\\_market/consultations/docs/2009/interconnection\\_of\\_business\\_registers/working\\_document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2009/interconnection_of_business_registers/working_document_en.pdf)), which describes the current legal regime and the practical aspects of the access to information and co-operation between the various business registers. (*EC Press Release, IP/09/1677, 5 November 2009*).

### DCMS Consults on Re-classification of Production Companies' Status

The DCMS has published a consultation paper proposing a re-classification of the production arms of production companies owned by Channel 3 licence holders. This followed the recommendation in the Digital Britain White Paper that in order to boost sustainable content production base in the Nations, a change in status for production companies owned by regional Channel 3 licence holders outside ITV plc, which includes the STV Group plc in Scotland, Ulster TV Ltd and Channel Television Ltd, be considered. Although the quota for European independent production under UK legislation is 25% in the case of BBC, C4, ITV plc and five, under the terms of the AVMS Directive, European broadcasters (including those in the UK) are required to meet an independent production quota of 10% from European production companies which are independent of broadcasters. "To qualify as an independent producer under the current national legislation, in essence a producer must not have a shareholding greater than 25% in a broadcaster or be more than 25% owned by a broadcaster. An amendment to the current national legislation which re-classified production companies that are wholly owned by relevant Channel 3 licence holders as independent producers would enable such production companies to qualify for the relevant independent production quotas (this definition would include production companies in which a Channel 3 licence holder owns any share between 25% and 100% and not just wholly owned production companies). This re-classification could be

achieved through a revocation and replacement of the Broadcasting (Independent Productions) Order 1991". The consultation states that the intention is to "give independent production status to production arms of relevant Channel 3 licence holders in relation to the domestic commissioning quotas. These quotas are over and above the AVMS 10% quota and apply to BBC, ITV plc, C4 and five only. Broadcasters are responsible for ensuring that they comply with both the AVMS and domestic commissioning quotas, but in relation to the latter they will now be able to commission from production arms of relevant Channel 3 licence holders as well. This proposal will give production arms of relevant Channel 3 licence holders access to significantly larger market than they are currently able to enter". The DCMS also noted "A further benefit for a Channel 3 licence holder would be that it would have greater power to expand through acquisition. This power is currently restricted, since if a licence holder acquires more than a 25% shareholding in any independent producer, that company would immediately lose its independent status". See [http://www.culture.gov.uk/images/publications/independentproduction\\_consultationpaper.pdf](http://www.culture.gov.uk/images/publications/independentproduction_consultationpaper.pdf) for details.

### UK and Morocco Agree Film Co-Production Agreement

The Foreign and Commonwealth Office has published the Film Co-Production Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco. The Agreement recognises the "potential for the film industries of each country to work together on account of shared or complementary characteristics that include the structure of each film industry, the film culture of each country and the extent of the availability in each country of film-making facilities, a suitably skilled workforce and locations for filming" and sets out the arrangements for the granting of co-production status to films produced by the parties. However, the Agreement will only enter into force once the parties have notified each other, in writing through diplomatic channels, of the completion of their respective constitutional procedures. See <http://www.official-documents.gov.uk/document/cm76/7670/7670.pdf> for details.

## Gambling

### BetOnSports Founder Sentenced to Prison by US Authorities

BetOnSports founder Gary Kaplan has been sentenced by the Eastern Missouri District Court to more than four years imprisonment and has been ordered to forfeit \$43.7 million of criminal proceeds from his online gambling business. Kaplan had pleaded guilty to charges of conspiracy to violate the RICO (Racketeer Influenced and Corrupt Organizations) statute, conspiring to violate the Wire Wager Act and violating the Wire Wager Act, which prohibits businesses from running gambling operations over communications networks. The US Department of Justice said the case should "serve as a warning to others who might choose to defy the laws of the United States on such a grand scale". BetOnSports had advertised "heavily" to solicit US residents to place sports wagers by telephone and over the Internet through toll-free telephone numbers and Web sites, including BetOnSports.com.

## Litigation

### Application for Permission to Make Statement in Open Court After Accepting Part 36 Offer in Libel Proceedings

The claimant brought an application in her libel proceedings for permission to read a unilateral statement in open court in accordance with the provisions of CPR 53PD 6.1. This provides that an application to read such a statement may be made "where a party wishes to accept a Part 36 offer or other offer of settlement in relation to a claim for ... libel". The claimant had earlier accepted an offer of amends made in accordance with the regime governed by sections 2 - 4 of the Defamation Act 1996 relating to an article about her exercise regime. The defendant opposed the application on the basis that the claimant was not entitled to a statement upon acceptance of an offer of amends. Following the claimant's acceptance of the money offered to settle the action (£25,000), the defendant newspaper published an apology, which the claimant and her advisers thought was inadequate. The court noted the use of a statement in open court had long been seen as part of the settlement process or as an "incident" of it, and parties who settled an action could be expected to be allowed to read a statement in open court unless there was some sufficient reason causing the court to refuse to approve that course. The court said that it "has the power to order a statement in open court in the context of a settlement under the offer of amends regime". Furthermore, on the facts of this case, it saw "no injustice to the defendant in permitting the claimant to make the statement ... in an attempt to draw the defendant's apology to the attention of rather more of the original readers of the article than would be achieved by the modest announcement made in the Daily Mail". (*Kate Winslet v Associated Newspapers Limited* [2009] EWHC 2735 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2735.html> for the judgment).

## Music

### Live Nation Confirms Venue Sales

Live Nation has confirmed the sale of 16 British venues to the Ambassador Theatre Group, two West End theatres, the Lyceum and Apollo Victoria, and 14 regional theatres. This follows the sale of its one-third interest in the Dominion Theatre in London to the Nederlander Group, which completed last month. Live Nation said "The proceeds generated from this sale allow us to continue our goal to de-lever our balance sheet by selling off assets that are not core to our live music strategy". Earlier, on 8 October 2009, the Competition Commission had issued its provisional findings on the proposed merger of Live Nation with Ticketmaster; one of the possible remedies the Commission suggested as a means of mitigating any adverse results of the merger was for Live Nation to divest itself of "part of the UK business operations ... and, in particular, the divestment of the business relating to live music promotions and/or live music venues".

## Publishing

### New Legislation - Defamation Act 1996 in Northern Ireland

The Defamation Act 1996 (Commencement No 4) Order 2009, SI 2009/2858 was made on 25 October 2009. The Order brings all the provisions of the Defamation Act 1996 which apply in Northern Ireland and which have not so far been brought into force into force on 6 January 2010. The Order also makes transitional arrangements in respect of offers of amends in cases of unintentional defamation and provides that the relevant section of the Defamation Act (Northern Ireland) 1955 shall continue to apply as if it had not been repealed to any offer of amends made before 6 January 2010 and to any legal proceedings relating to that offer. See [http://www.opsi.gov.uk/si/si2009/pdf/uksi\\_20092858\\_en.pdf](http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092858_en.pdf) for details.

### Statement in Open Court - False Allegations of Involvement in Smear Campaign and Denial of Involvement

The claimant, a MP, brought proceedings against the defendant, the publisher of The Sun, following the publication of two separate articles which claimed that he had been an active participant in a smear campaign against the Conservative party. The defendant accepted that the allegations in the articles were untrue and that the claimant had not been involved - it also accepted that the claimant had not lied when he denied his involvement in such activities. The defendant apologised, undertook not to repeat the allegations and paid the claimant "substantial damages" and his legal costs. (*Tom Watson MP v News Group Newspapers Limited, Unreported, QBD, 29 October 2009*).

## Sport

### Role of the EU in Sport

One of the less controversial elements of the recently approved Lisbon Treaty is perhaps Article 165, which calls on the European Union to "contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function", particularly by "developing the European dimension in sport, by promoting fairness and openness in sporting competitions and co-operation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen". The head of the European Commission's sports unit has said expectations regarding the legal certainty and specific nature of sport, for example, are "too high, sometimes," particularly within the sports movement itself but also from governments and other stakeholders, and thus "need to be managed". The Commission is expected to consult Member States and stakeholders regarding the implementation of Lisbon Treaty's sport provisions in the first half of 2010 and a Commission communication on the impact of the Lisbon Treaty on sport is expected after that. In this context, the results of the detailed online questionnaire on sport, organised by the European Non-Governmental Sports Organisation's project EU:Sport:Future, are of interest - the results "showed great and broad support over age groups, nationalities and gender for sport issues such as health, volunteering, education employment and society". It noted that the role of the EU was "seen in these fields primarily as a facilitator than a genuine actor, as the participants identify the Member State as the main agent in the field of sport. Nevertheless, the participants deem an enhanced co-operation between the European Union and sport organisations as very necessary and fruitful for the development of sport at European level". See [http://www.eusportfuture.eu/docs/analysis\\_paper\\_draft\\_online.pdf](http://www.eusportfuture.eu/docs/analysis_paper_draft_online.pdf) for the draft report.

## New Legislation - Glasgow Commonwealth Games Act 2008

The Glasgow Commonwealth Games Act 2008 (Commencement No 2) Order 2009, SSI 2009/377 was made on 27 October 2009. The Order brings specified provisions of the Glasgow Commonwealth Games Act 2008, relating to matters such as trading, advertising, ticketing and transport into force on 13 November 2009. See [http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi\\_20090377\\_en.pdf](http://www.opsi.gov.uk/legislation/scotland/ssi2009/pdf/ssi_20090377_en.pdf) for details.

### Consultations & Reports

Ofcom Regulatory Statement and Further Consultation - Participation TV - Rules on the Promotion of Premium Rate Services - <http://www.ofcom.org.uk/consult/condocs/participationtv3/ptv3.pdf> (Ofcom's final regulatory statement on changes to the Broadcasting Code rules on Premium Rate Services (Rules 10.9 and 10.10), and a further consultation on proposals for changes to relevant Television Advertising Standards Code rules following earlier consultations which proposed revised rules the Broadcasting Code to make the distinction between content considered to be editorial material and content considered to be advertising clearer when broadcasters promote Premium Rate Services - Ofcom is of the view that changes need to be made to the Broadcasting Code to make it clear that the promotion of PRS may only be considered editorial in nature where there is clear editorial justification for doing so and the Broadcasting Code will therefore be amended with a new rule added to make clear how PRS can be used to form part of the programme so that the content remains editorial, thus making the boundary with advertising clear).

Ofcom Update - Television Broadcast Licensing Update, October 2009 - <http://www.ofcom.org.uk/tv/ifi/tvlicensing/tvupdates/monthly/200910> (details the television services licensed, ceasing to be licensed (revoked or handed back) and transferred and the services which had their names changed in October 2009).