

*This is our summary of some of the key legal developments across a range of sectors for the week of 9 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

### MoJ Consults on Amendment to Civil Penalty for Serious Breaches of DPA

The Ministry of Justice (MoJ) has published details of the Government's proposal for the increasing maximum Civil Monetary Penalty that may be imposed by the Information Commissioner. The Government is proposing that for Monetary Penalties imposed under section 55A of the Data Protection Act 1998 (DPA) for serious breaches of the data protection principles, the maximum amount will be £500,000. The DPA was amended, through section 144 of the Criminal Justice and Immigration Act 2008, to provide the Information Commissioner's Office (ICO) with the power to impose a civil monetary penalty on data controllers in certain circumstances and the MoJ is now inviting comment on whether a penalty of up to £500,000 will provide the ICO with a proportionate sanction in cases of serious breaches of the data protection principles. See <http://www.justice.gov.uk/consultations/docs/civil-monetary-penalties-consultation.pdf> for the consultation.

### EDPS Welcome Changes to Data Protection and ePrivacy from Telecoms Package Adoption

The European Data Protection Supervisor (EDPS) has welcomed the passing of the telecoms package (see last week's Need to Know for details) and the "vital improvements in the protection of the privacy and personal data of all Europeans active in the online environment" that it will bring in respect of notification of security breaches, reinforced protection against interception of users' communications through the use of spyware and cookies stored on a user's computer or other device and substantially strengthened enforcement powers for national data protection authorities. The EDPS said however that it was now "crucially important to broaden the scope of the security breach provisions to all sectors and further define the procedures for notification". The Member States must implement the revised ePrivacy Directive 2002/58/EC within 18 months. See [http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2009/EDPS-2009-13\\_Adoption\\_ePrivacy\\_Directive\\_EN.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2009/EDPS-2009-13_Adoption_ePrivacy_Directive_EN.pdf) for EDPS' statement.

### Breach of F1 Sponsorship Agreement and Claim of Repudiatory Breach

The High Court has heard a dispute between the owner of a F1 racing team and two of its commercial sponsors. The dispute was about monies said to be due under the sponsorship agreement and for damages for its breach. The central question for the court was whether the sponsorship agreement between the team and its sponsors had been validly terminated by the sponsors or whether that purported termination itself amounted to a repudiatory breach of the agreement on the part of the sponsors. The agreement provided that the defendants names would be integrated into the team name; the team would not enter into an arrangement which might conflict with the defendants activities; the defendants would be the exclusive airline associated with the team; the defendants had to pay a performance-related bonus; the team could choose to source another sponsor but the defendants had to then be provided with options including to terminate the agreement. The claimant acquired the team and changes were made to the livery and the team name. The claimant wrote to the defendants about changing the sponsorship fees the defendants responded that it took the email to be notice of the claimant's intention to exercise its right to find an alternative sponsor and the defendants terminated the agreement. The claimant sought damages from the defendants for their alleged repudiatory breach of the sponsorship agreement. The court found, on the facts, that the defendant sponsors were unable to allege that there had been breaches of a sponsorship agreement sufficient to justify their own later repudiation as they had elected, by their words and conduct, to affirm that agreement. The various breaches of contract relied upon had been waived by the defendants or acquiesced in by their conduct over that period after they became aware of the identity and business interests of the new owners of the team. The claimant was entitled to damages for the wrongful termination of the agreement and for the bonus of being penultimate in the championship. The claimant's team gained points in the second and third seasons which, under the agreement, would amount to a point bonus, and so was recoverable. (*Force India Formula One Team Limited v Etihad Airways PJSC* [2009] EWHC 2768 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2768.html> for the judgment).

## Court of Appeal Rules of Retention of Police Evidence for Private Prosecutions

The Court of Appeal has allowed an appeal by the Federation Against Copyright Theft (FACT) and the Chief Constable of Northumbria Police against a ruling that section 22 of the Police and Criminal Evidence Act 1984 (PACE) did not entitle the police to retain property seized under PACE against the wishes of the person otherwise entitled to possession of it once a decision not to prosecute has been taken, so that a private body can consider whether to bring a prosecution, or whilst that private prosecution is being brought, in the absence of a continuing independent justification for retention. This ruling was of significant importance to bodies such as FACT (and the RSPCA, who subsequently intervened) who might wish to bring private prosecutions and rely on police evidence to do so. The court was clear in stating that the judge's interpretation of the section was wrong - it said "the phrase 'anything which has been seized by a constable ... may be retained so long as is necessary in all the circumstances' requires the police to consider each case on its own individual facts, at each stage in the process of investigation and prosecution. If the CPS is prosecuting the case, whatever is required for forensic investigation or the prosecution will obviously be retained but, even then, consideration will have to be given to ensuring that no more than is necessary for the case (either to pursue it or to rebut a potential defence) is kept. If a prosecution is not to be pursued by the CPS but some other public or private body wishes to pursue a private prosecution, the relevant circumstances include (but are not limited to): the identity and motive of the potential prosecutor; the gravity of the allegation along with the reasoning behind the negative decision of the CPS and thus the extent to which, in this case, the public have a legitimate interest in the criminal prosecution of this conduct; the police view of the significance of what has been retained; and any material fact concerning the proposed defendant. All this falls to be considered so that a balanced decision can be reached upon whether retention is necessary 'in all the circumstances'. Such a decision would be capable of challenge on traditional public law grounds". Accordingly, the court ruled that the judge had been wrong in concluding that section 22 precluded the police from retaining the property seized from the respondents (which in this case involved 31 separate items which the respondents had had seized when the police raided their home as part of an investigation into the operation of a website called "SurfTheChannel.com" which was a video search engine website consisting of links to third party websites that hosted videos covering a wide range of categories - the respondents were charged with potential conspiracy to defraud and money laundering offences. FACT's prosecution included offences under section 107(2A) of the Copyright, Designs and Patents Act 1988 for communicating a work knowing that it was infringing copyright - see the Need to Know of 11 May 2009 for details). (*Scopelight Limited & Ors v Chief of Police for Northumbria & Anor* 2009] EWCA Civ 1156 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1156.html> for the judgment).

## ECJ Questions for Preliminary Ruling in M&S Trade Mark Dispute

Earlier this year, the High Court referred to the ECJ a number of questions for a preliminary ruling following an application by Marks and Spencer plc (M&S) to stay the trade mark proceedings that had been brought against it by Interflora. The case concerned M&S' use of "Interflora" as Google AdWords and included infringement claims under Article 5(2) of the Trade Marks Directive 89/104/EEC and Article 9(1)(c) of the CTM Regulation 40/94/EEC, (now replaced by Directive 2009/207/EC). The questions which were to be referred to the ECJ were not settled at the time, giving the parties (among other things) an opportunity to consider the High Court's decision in *L'Oréal SA & Ors v eBay International AG & Ors* [2009] EWHC 1094 (Ch), however the referred questions have now been published - see [http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79908893C19090323&doc=T&ouvert=T&seance=DDP\\_COMM](http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79908893C19090323&doc=T&ouvert=T&seance=DDP_COMM) for the M&S questions and also [http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79908976C19090324&doc=T&ouvert=T&seance=DDP\\_COMM](http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?lang=en&num=79908976C19090324&doc=T&ouvert=T&seance=DDP_COMM) for the *L'Oréal* questions.

## Government to Legislate to Deal with Rogue Entertainment and Modelling Agencies

The BIS has announced that draft regulations will be laid in Parliament in the next few months and will come into force during 2010 to deal with the "ugly face of the modelling and entertainment industry" whereby "rogue" entertainment and modelling agencies exploit models, background artists, extras and walk-ons by taking upfront fees. According to the BIS, the Employment Agency Standards Inspectorate will enforce the new regulations. Agencies that break the law could face prosecution and courts will be able to impose unlimited fines for the most serious offences. Rogue agencies could also be banned from operating for up to ten years. BIS said the new regulations will take effect from October 2010. Equity and BECTU welcomed the proposals. (*BIS Press Release, 13 November 2009*).

## Private Members Bill on Mobile Network Roaming Capabilities

A Private Members Bill to establish a duty on mobile network operators to introduce automatic roaming capabilities between mobile telephone networks in the United Kingdom has had its First Reading in the House of Commons. In introducing the Bill, SNP MP Angus MacNeil said "The Bill would bring about a duty on mobile phone providers to allow roaming between networks within the UK, which is a variation of a system that is currently practised in the

United States and does not need the building of any more costly physical infrastructure. It just needs better use of what is already there". The Bill was ordered to be read a second time, and to be printed.

## Broadcasting

### DCMS Consult on Allowing Product Placement in UK TV Programmes

The DCMS has published its much anticipated consultation paper on allowing product placement in programmes that are made to be shown on UK television. The Government said it is "currently minded to permit product placement on UK television, subject to safeguards" however it also noted that the arguments remain "finely balanced". It said it remains "concerned in particular about the potential health issues associated with the promotion of particular types of goods by means of product placement". Further, the Government noted that if television product placement is to be allowed, then it is likely that Ofcom will need to make provision for it in the Broadcasting Code and that before doing this, Ofcom will need to consult. The consultation also makes it clear that the proposals do not deal with product placement in video-on-demand services and product placement in films and in television programmes acquired from outside the UK and reinforces the Government's statement of 11 March 2009, which said that product placement would be permitted in these areas, subject to the safeguards in the AVMS Directive. See [http://www.culture.gov.uk/images/consultations/Consultation\\_productplacement.pdf](http://www.culture.gov.uk/images/consultations/Consultation_productplacement.pdf) for the consultation, which contains a useful summary of the of the main conclusions on product placement from the 2008 public consultation on the implementation of the AVMS Directive in the UK; see also [http://www.culture.gov.uk/images/consultations/PP\\_IA\\_Nov09.pdf](http://www.culture.gov.uk/images/consultations/PP_IA_Nov09.pdf) for the accompanying Impact Assessment, which summarises the legislative framework and the previous consultations on the question of product placement.

### Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published, with details of adjudications on breaches of Rules 1.11 (violence to be appropriately limited pre-watershed), 1.14 (the most offensive language must not be broadcast pre-watershed), 2.1 (generally accepted standards), 2.3 (material which may cause offence must be justified by the context), 2.4 (programmes must not contain material which is likely to condone or cause anti-social behaviour to be copied), 9.12 (sponsorship credits must be clearly separated from programmes), 10.3 (products and services must not be promoted in programmes) and 10.4 (no undue prominence may be given to any product or service in a programme) of the Broadcasting Code; breaches of Licence Conditions 11 (retention and production of recordings) and 12 (general provision of information to Ofcom) were also recorded. Ofcom also recorded a breach of Rule 4 of COSTA (no more than 12 minutes of advertising or teleshopping in one hour) and Licence Condition 11(2) retention and production of recordings) in respect of a subscription channel which broadcasts mainly in the Middle East but which is licensed by Ofcom. It also recorded a breach of Licence Condition 8 (Part 2 General Conditions) of a restricted service licence. See [http://www.ofcom.org.uk/tv/obb/prog\\_cb/obb145/Issue145.pdf](http://www.ofcom.org.uk/tv/obb/prog_cb/obb145/Issue145.pdf) for details.

### Independent Advisory Panel Report on Free-to-Air Events List

The Independent Advisory Panel charged with responsibility for reviewing the current list of free-to-air events has published its report to the Secretary of State for Culture, Media and Sport. The Panel said they found that 82% of the respondents believed they had an entitlement to watch certain key events free-to-air because they had already paid a licence fee and 76% expected to be able to watch major events on free-to-air TV. The events currently listed were those most often mentioned by respondents as the ones that ought to be protected in the future (the Olympic Games, Wimbledon, the Grand National and major football events figured prominently). However, there was no consensus existed for listing any particular non-sporting events in the UK. The Panel said, "Ending the listed events regime altogether could result in such events no longer being available to the section of the population that does not pay for subscription television". The Panel said it believed there was compelling evidence of a public expectation that the BBC had a responsibility to give a high priority to such events, and that this should be recognised by the BBC in its current review of its size and scope. The Panel noted "the realities of the modern broadcasting environment, compounded by the impact of an economic downturn, has limited competition for existing listed events to such an extent that the BBC currently appears to be the only realistic bidder for most listed events. There can be no guarantee, even with more channels crossing the 95% threshold after digital switchover in 2012, that competition will necessarily increase in practice". On the question of the criteria for listing the Panel recommended that amended criterion be adopted - "The event has a special national resonance and not simply a significance to those who ordinarily follow the sport concerned. Such an event is likely to fall into one or both of the following categories: it is a pre-eminent national or international event in sport; and it involves the national team or national representatives in the sport concerned. It should also be likely to command a large television audience". The Panel also said it remained convinced that, at least for the foreseeable future, despite the enormous changes in the media landscape, most people's first choice of how to view the bigger sporting events would be via what is still identifiably a television set. See

[http://www.culture.gov.uk/reference\\_library/media\\_releases/6436.aspx](http://www.culture.gov.uk/reference_library/media_releases/6436.aspx) for a summary of the report and the Panel's recommendations as to which events should be protected for free-to-air coverage and <http://www.culture.gov.uk/images/publications/independentpanelreport-to-SoS-Free-to-air-Nov2009.pdf> for the Panel's full report. The Government said it welcomed the report and noted that it intends to consult shortly on the recommendations.

## Corporate

### Application for Committal of Company Directors to Prison for Failure to Comply with Undertaking

The defendant in the first claim applied to strike out an application brought by the claimant in that action to commit its directors to prison following its failure to comply with an undertaking relating to the misuse of certain confidential customer information. The claimant had brought a claim against the defendant complaining that it had misused confidential information consisting primarily of a list of the names and addresses of its customers and of prices the customers were being charged. One director had agreed to give details of all the customers that had been contacted however for various reasons it was not possible to give details about who had been contacted and therefore the undertaking could not be complied with. The court ruled that the application for the committal of the directors of a company for its failure to comply with an undertaking should be struck out as an abuse because on the documentary evidence it had no real prospect of success; the undertaking on which it was based was incapable of performance. The court noted that it was now well established, in the light of the new culture introduced by the CPR and with the requirements of proportionality referred to in CPR 1.1(2) as part of the overriding objective, that it was an abuse of process to pursue litigation where the value to the litigant of a successful outcome was so small as to make the exercise pointless, viewed against the expenditure of court time and the parties' time and money engaged by the undertaking. The court said, "Impossibility of performance is plainly a good cause for the release of an undertaking. If the court had known that Undertaking 5 was impossible of performance when it was proffered, it would not have accepted it, nor made an order to the same effect. It must therefore now be released, at least in relation to the obligation to identify customers contacted". (*Sectorguard plc v Diene plc* [2009] EWHC 2693 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/2693.html> for the judgment).

## Film & TV

### WIPO Publishes Mediation and Expedited Arbitration Rules for Film and Media

The World Intellectual Property Organisation (WIPO) Arbitration and Mediation Center has published the WIPO Mediation and Expedited Arbitration Rules for Film and Media, which it says have been specifically tailored to resolve potential disputes in the film and media sectors. According to WIPO, the rules are based on its standard WIPO Mediation Rules and the WIPO Expedited Arbitration Rules but have been modified in order to take account of the particular needs of users in the media and film sectors. See [http://www.wipo.int/export/sites/www/amc/en/film/wipo\\_mediation\\_and\\_expedited\\_arbitration\\_rules\\_for\\_film\\_and\\_media.pdf](http://www.wipo.int/export/sites/www/amc/en/film/wipo_mediation_and_expedited_arbitration_rules_for_film_and_media.pdf) for the Rules, which WIPO suggests should to be used in conjunction with its Recommended Contract Clauses and Submission Agreements. WIPO said they are "particularly appropriate for international film and media transactions where parties require an expedited arbitration process and mediation". The Rules are effective from 11 November 2009.

## Gambling

### ESSA and ISM Sign Co-operation Agreement to Monitor Betting for Olympic Competitions

The European Sports Security Association (ESSA), the bookmaker funded sports integrity watchdog, has announced that it has signed a co-operation agreement with International Sport Monitoring GmbH (ISM), which was established by the International Olympic Committee (IOC) to monitor betting practices linked to Olympic competitions. Under the terms of the agreement, ESSA and the ISM will work together to monitor betting on Olympic events and reporting any suspicious betting behaviour that may reflect untoward influences on Olympic competitions ahead of the 2010 Vancouver Winter Games and the 2012 London Olympics. (*ESSA Press Release, 9 October 2009 - putting the impact of gambling on sport into context is a report by the Remote Gambling Association which said that research carried out on its behalf by the independent consultancy Europe Economics showed that an estimated €3.4 billion is contributed annually to European sport by public and private sector gambling operators*).

### Gambling Commission Updates Guidance on Lotteries

The Gambling Commission has published updated advice on running small lotteries that do not need a licence or registration such as customer lotteries, non-commercial lotteries that are incidental to some other event and three

types of permitted private lottery (private society lottery, work lottery and residents' lottery) and has also updated its advice on promoting society and local authority lotteries which require a licence or registration. Societies that run small society lotteries where no more than £20,000 worth of tickets are put on sale and where the society's aggregate proceeds from lotteries do not exceed £250,000 a year may operate without a Commission licence, provided they register with their licensing authority. See [http://www.gamblingcommission.gov.uk/pdf/Organising\\_small\\_lotteries\\_-\\_November\\_2009.pdf](http://www.gamblingcommission.gov.uk/pdf/Organising_small_lotteries_-_November_2009.pdf) and [http://www.gamblingcommission.gov.uk/pdf/Promoting\\_society\\_and\\_local\\_authority\\_lotteries\\_-\\_November\\_2009.pdf](http://www.gamblingcommission.gov.uk/pdf/Promoting_society_and_local_authority_lotteries_-_November_2009.pdf) respectively for details.

## Litigation

### Application for Interim Injunction to Restrain Broadcast of Film of Applicant

The applicant applied for an interim injunction, before any proceedings had been issued, to restrain the respondents from broadcasting or using in any way film compiled after extensive filming of him had taken place. The filming had been done with a view to broadcasting a documentary film and had taken place with the applicant's full consent. The applicant then denied that consent had given either expressly or by implication and further contended that he had been given editorial control over the content of the film. The respondents said that they had no current plans to broadcast the film, and that this had been made clear to applicant. At issue was whether an injunction should be granted. The court ruled that the application should be refused on the grounds that there was no justification for granting an injunction since there had been no threat or intention to publish and because there would certainly be no reason to grant such an injunction without the commencement of proceedings. (*Martin v Channel Four Television Corporation & Ors* [2009] EWHC 2788 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2788.html> for the judgment).

### Application to Amend Interim Injunction - Balancing ECHR Rights

The claimants applied pursuant to CPR 3.1(7), CPR Part 25 and section 3 of the Protection against Harassment Act 1997, to amend the terms of an interim injunction, which restrained the defendant animal rights activists from pursuing a course of conduct which amounted to harassment of protected persons (as defined in the injunction) contrary to the 1997 Act. The injunction identified premises around which it created exclusion zones in which, subject to strictly limited exceptions, demonstrations were prohibited. The exceptions permitted one annual assembly at the claimant's principal site, provided that the appropriate notice was given to the police and that there was strict compliance with any conditions laid down by the police. The claimants, who were on notice of the assembly, sought amendments to the injunction so as to provide that for the avoidance of doubt, no assemblies or processions whatsoever should take place other than those permitted under the injunction provided that the requisite notice had been given to the police and there was strict compliance with police conditions; at the annual assembly, in order to prevent its employees from being harassed or caused anxiety, alarm or distress, the protestors had not to wear or carry balaclavas, face coverings, masks or blood spattered clothing or costumes; not to carry or exhibit banners, posters or placards alleging that its employees murdered, tortured, abused or otherwise unlawfully killed animals. The claimant contended that the amendments were necessary since the respondents, who they alleged had close links with animal rights terrorist groups, were persons without respect for the law who acted not in pursuit of any political or public interest cause, with the particular sensitivities that involved under article 10 of the European Convention on Human Rights 1950 but in a concerted quasi-terrorist manner to seek to bring down the claimant and harass their employees. The court said the application had to be refused where the balancing of rights of both sides under articles 8, 10 and 11 of the European Convention on Human Rights 1950 came down in favour of refusing the amendments, not least because they would be practically unenforceable by the police and would, in fact, be likely to raise tensions. The court noted however that "The refusal of the great majority of the application is not to be taken as a licence for harassment or other criminal or tortious behaviour by the protestors ... It must be clearly understood that the injunction continues, and still contains significant prohibitions which must be respected, and that a significant part of the reasoning behind the refusal is the indication by the Police of their policy that there should be no tolerance of criminal offending". (*Novartis Pharmaceuticals UK Limited & Anor v STOP HUNTINGDON ANIMAL CRUELTY & Ors* [2009] EWHC 2716 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2716.html> for the judgment).

### Appeal Against CDPA Conviction - What Constitutes Substantial Copying?

The Criminal Division of the Court of Appeal has dismissed the appeal by the defendant against his conviction for a number of offences arising from his commercial dealing in modification computer chips (modchips), which were alleged by the prosecution to be devices, products or components "primarily designed, produced, or adapted for the purpose of enabling or facilitating the circumvention" of effective technological measures within the meaning of section 296ZB of the Copyright, Designs and Patents Act 1988. The modchips to which the charges under the CDPA related were for use in conjunction with Microsoft Xbox, Nintendo GameCube and Sony Playstation2 games consoles and between October 2003 and January 2006, the appellant had operated a business selling components

and devices for such games consoles. The issue on the appeal was whether the playing of a counterfeit DVD involved the substantial copying of a copyright work. The defendant submitted that the judge had wrongly directed the jury as to the meaning of substantial. The defendant contended that a display on a screen could not be a substantial copy of a copyright work. In dismissing the appeal the court said, "The recitals to Directive 2001/29/EC emphasise the importance of protecting copyright and related rights in multimedia products such as computer games, and if devices such as modchips could be sold with impunity, the UK would not be conferring the protection of those rights required by the Directive. Secondly, it seems to us to accord with common sense that a person who plays a counterfeit DVD on his games console, and sees and hears the visions and sounds that are the subject of copyright, does indeed make a copy of at least a substantial part of the game, even though at any one time there is in the RAM and on the screen and audible only a very small part of that work". (*Gilham v R* [2009] EWCA Crim 2293 - see <http://www.bailii.org/ew/cases/EWCA/Crim/2009/2293.html> for the judgment).

### Application for Anti-Suit Injunction - Exclusive Jurisdiction Clause and US Proceedings

The claimant, an Internet telephony company which was domiciled in Luxembourg, claimed that proceedings brought against it in the United States by the defendant software company were in breach of a jurisdiction clause in a licence agreement between them, and sought an anti-suit injunction. The defendant was the owner of the copyright in certain software which was fundamental to the claimant's business - a licence agreement granted the claimant worldwide use of a compiled object code form, but reserved sole control of the source code to the defendant. The defendant alleged this source code had been possessed, used or modified. The licence agreement provided that any claim arising under or relating to the agreement shall be governed by the internal substantive laws of England and Wales and the parties submit to the exclusive jurisdiction of the English courts. The defendant registered its copyright in the source code in the United States, and brought proceedings there against the claimant. The claimant alleged the action was in breach of the jurisdiction and sought an anti-suit injunction. The court granted the application - it noted that the grant of an anti-suit injunction was a discretionary remedy, over which it had real discretion to exercise. It noted that the parties' contractual bargain was the starting point and it said it was no doubt for that reason that the courts have said that a strong reason would be needed before it would exercise its discretion to decline to enforce it by injunction. It said further, "One consideration, however, which continues to play an important part in the exercise of the discretion to enforce (or not to enforce) an exclusive jurisdiction clause by injunction is whether the outcome of the decision (either way) will enable all disputes between the parties to take place in the same forum. Allied to this consideration is the question whether there are other parties (who are not entitled to the benefit of the exclusive jurisdiction clause) who are involved in the same or closely related disputes" - in this case, the English proceedings will continue. "Skype Technologies is entitled to bring them here because of the exclusive jurisdiction clause ... Equally, this court has no jurisdiction to prevent Joltid from bringing proceedings in California against parties who do not have the benefit of the exclusive jurisdiction clause. Accordingly the goal of a single forum cannot be achieved, whichever way I decide this application. It follows therefore that the existence of parallel proceedings and the possibility of inconsistent decisions cannot amount to a strong reason not to enforce the clause by injunction". (*Skype Technologies SA v Joltid Ltd* [2009] EWHC 2783 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/2783.html> for the judgment).

## Music

### Government Announces Changes to Exemptions for Charity and Third Sector Music Licence Requirements

The Intellectual Property Office (IPO) has announced details of changes to the exemptions which currently exist for charitable, not-for-profit and other Third Sector organisations in relation to licences required for the public playing of sound recordings and broadcast music. Currently, section 67 and 72(1B)(a) of the Copyright Designs and Patents Act 1988 (CDPA), and related exemptions in paragraphs 15 and 18(1A)(a) of Schedule 2, exempt charitable groups and not-for-profit organisations from the requirement to obtain a licence for the use of copyright sound recordings and performers' rights when playing recorded music and music contained in broadcasts in public in certain circumstances. Following consultation, the Government has concluded that the exemptions should be repealed and that the Secretary of State should no longer be able to refer PPL licences or licensing schemes to the Copyright Tribunal (in the way provided in section 128A of the CDPA). However, the IPO has said that the current complexity of the legislative framework will be reduced and that a number of initiatives have been agreed with PPL to assist with the implementation of the decision - the Government said that PPL will not charge for certain uses of music, as is already PRS' policy, such as for domestic and family occasions such as weddings, music as part of divine worship and in residential homes and hospices. It noted that PPL will undertake a joint consultation with the Community Sector Law Monitoring Group and said that PPL and PRS will run a new joint and simplified licensing system to agree affordable tariffs based on relevant criteria. The Government will bring forward legislation to amend the CDPA and repeal sections 128A and 128B in February 2010 with a view to implementing the changes by April 2010. See <http://www.ipso.gov.uk/govresponse-musiclicensing.pdf> for details.

### Whether Words Capable of Being Defamatory - Application to Strike Out Libel Claim

The defendant in an action for libel applied for a ruling pursuant to CPR Part 53 Practice Direction paragraph 4.1(2) that the words complained of were not capable of being defamatory of the claimant. The defendant had published an article that referred to a comment allegedly made by the claimant about the vegetarian beliefs of certain well-known celebrity vegetarians. It was said by the claimant that the words natural and ordinary or inferential meaning meant and were understood to mean that she "was disrespectful and dismissive of the McCartneys and Annie Lennox to the point of being willing to disparage them publicly for promoting vegetarianism". The court noted the threshold for the exclusion of meaning was a high one and it was obviously important that a judge should not usurp the proper function of the jury; on the other hand, if he or she was of the view that the words were simply not capable of being defamatory of the claimant and the claimant therefore did not have a viable cause of action in defamation then it was his or her duty to say so. Applying the high threshold to the application, the words complained of were not capable of bearing any meaning defamatory of the claimant. The ordinary reasonable reader would see the sentence complained of in the context in which it was used, as nothing more than the expression of a permissible view about an issue and matters on which some people hold strong opinions. The action would therefore be struck out. (*Ecclestone v Telegraph Media Group Ltd [2009] EWHC 2779 (QB)* - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2779.html> for the judgment).

### Evidence of Substantial Publication in Jurisdiction - Application to Strike Out Libel Claim as Abuse of Process

The High Court has ruled in an action for slander and libel arising out of a dispute between shareholders and managers of the first claimant as to the management and control of that company - the defendant, a non-executive director of AMB Capital (Ireland) Limited, allegedly said at the first claimant's AGM that the second and third claimants had seriously mismanaged the first claimant and had repeatedly paid an inflated price for assets which would not deliver a return. A second publication complained of was alleged to be through the online edition of a South African weekly magazine, the "Financial Mail". Proceedings were served out of the jurisdiction, in South Africa, pursuant to CPR 6.36. The defendant applied for summary judgment under CPR 24, on the ground that the claimants had no real prospect of success in establishing any significant publication with the jurisdiction of the words complained of, and for the proceedings to be struck out under CPR 3.4, as an abuse of the process of the court. The main issue for the court was whether there was any evidence of substantial publication (and therefore damage sustained, or a tort committed) within this jurisdiction. The court noted the prospect for a shareholder at a company meeting of being sued by claimants for expressing opinions or views such as those alleged to be slanders, would inhibit free expression. It would be very much against the public interest. The public interest in relation to company meetings was that there should be a free expression of views and that differences be resolved by the votes cast. If the expression of such views was to give rise to a slander action, there would have to be reasonable grounds for bringing that action. It was the duty of the court to bring to an end proceedings that were not serving the legitimate purpose of defamation proceedings, which was to protect a claimant's reputation. In this instance, there was evidence at best of minimal publication of the words complained of in the libel claim and there was no evidence of any substantial tort having been committed within the jurisdiction. Assuming that there was minimal publication within the jurisdiction, there was no prospect of an award of damages greater than a very modest sum, and no prospect of an injunction being granted. The court ruled that the claimants' claims in the proceedings were totally without merit and ordered the claimants action to be struck out - their application to amend their claim was dismissed. (*Lonzim plc v Sprague [2009] EWHC 2838 (QB)* - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2838.html> for the judgment).

### Application to Strike Out Defence of Fair Comment - Material Misstatement in Passage

The claimant brought an application to strike out the defence of fair comment in a libel action brought by her against the publishers of a review of a book written she had written. The question raised by the application was whether there was a real prospect of success for the defence of fair comment in circumstances where, according to the claimant, the review contained statements of fact rather than comment and those facts were said to constitute misstatements. The court allowed the application - it noted it was "by no means easy to differentiate fact from comment. What might otherwise appear to be a statement or at least an inference of fact might be seen to be factual inference when account was taken of admissible surrounding circumstances" but found that the passage from the Telegraph review selected for complaint (although only a small portion of the review) did contain a clear and material misstatement. A finding to the contrary by a jury would be perverse and for that reason the court said it saw no real prospect of the defence of fair comment succeeding. It said it must follow that the defence of fair comment be struck out. (*Thornton v Telegraph Media Group Ltd [2009] EWHC 2863 (Admin)* - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2863.html> for the judgment).