

This is our summary of some of the key legal developments across a range of sectors for the week of 14 December 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 Ratifies WIPO "Internet Treaties"

The European Commission has announced that the European Union and its Member States have ratified the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty - the Internal Market Commissioner said the two treaties "brought protection up to speed with modern technologies" and the ratification demonstrated the EU's attachment to the international system of protection of copyright and related rights. (*EC Press Release IP/09/1916, 14 December 2009*).

New Legislation - Variation of Rate for Public Lending Right Scheme

The Public Lending Right Scheme 1982 (Commencement of Variation) Order 2009, SI 2009/3259 comes into force on 4 January 2010. The Order gives effect to a variation to the Public Lending Right Scheme 1982 made by the Secretary of State on 8 December 2009 to increase the rate per loan as set out in article 46(1)(a) of the Scheme from 5.98p to 6.29p - the Public Lending Right Scheme provides for payments to be made to authors based on the number of times their books are lent out by public libraries. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20093259_en.pdf for details.

Proposed Legislation to Repeal and Revive Provisions of the Video Recordings Act 1984

The Department for Culture, Media and Sport (DCMS) has announced that fast track legislation to restore public protections around the supply and classification of age-rated films and video games has been published. The DCMS says the Video Recordings Bill is designed to correct an anomaly, which was identified in August this year (and see the Need to Know of 24 August & 1 September 2009 for details), which meant that the Video Recordings Act 1984 is not currently enforceable in UK courts as a result of there having been a failure to make a necessary technical notification to the European Commission before the 1984 Act became law. The Bill has had its First Reading in the House of Commons and is to have its Second Reading on 6 January 2010 - see <http://www.publications.parliament.uk/pa/cm200910/cmbills/014/10014.i-i.html> for the text of the Bill as introduced. The Government said it was necessary to fast-track the Bill in order to restore the protection provided to the public by the 1984 Act as quickly as possible after the end of the waiting period under the Technical Standards Directive. Prosecutions under the 1984 Act have been suspended pending the repeal and revival of the provisions of the 1984 Act.

Law Commissions Report on Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation

The Law Commission and the Scottish Law Commission have published their joint paper on consumer insurance law and pre-contract disclosures and misrepresentation - this report is part of their ongoing joint review of insurance contract law. The Report "recommends a new consumer statute to address the issue of what a consumer must tell an insurer before taking out insurance" - the proposed bill would replace the duty to volunteer information with a duty on consumers to take reasonable care to answer the insurer's questions fully and accurately. The existing law, as set out in the Marine Insurance Act 1906, requires a consumer to volunteer information to insurers however the Report notes that "it is now generally accepted that insurers should ask consumers for the information they want to know. The law needs to be updated to correspond to the realities of a mass consumer market". See <http://www.lawcom.gov.uk/docs/lc319.pdf> for the Commissions' Report and http://www.lawcom.gov.uk/docs/lc319_bill-without-notes.pdf for the proposed Consumer Insurance (Disclosure and Representations) Bill. The Commissions said that they do not consider the content of the draft Bill to be controversial and make the point that "The draft Bill applies only to consumers, not to businesses. Furthermore, it only deals with pre-contract information, not other issues such as the effect of warranties or conditions precedent".

Implementing the Gowers Review Proposals for Copyright Exemptions

The UK IPO has published the second stage of its consultation on taking forward the Gowers Review proposals for dealing with copyright exemptions. Following the responses to the first consultation, the Government developed what it described as "detailed legislative proposals designed to achieve a fair balance between rights holder's interests and users needs", which it is now presenting for comment. Under consideration are exemptions for extending the current provisions to facilitate distance learning and enabling the use of interactive whiteboards, applying the extension for research and private study only to genuine students or researchers that are linked to an accredited educational establishment and are undertaking a course of study or research at that establishment, and exemptions to allow copying by librarians or archivists of parts of published sound recordings and films or unpublished sound recordings and films and for the purposes of preserving or replacing copies of works. However, the noticeable missing exceptions are parody and format shifting - on the question of an exemption for parody the Government said "we do not believe that there is sufficient justification to introduce a new exception for parody in the UK now. There is scope for further debate within an EU context about the potential for a non-commercial use exception which if implemented could cover some parody". On the question of format shifting it said it "does not ... currently consider it appropriate to introduce a narrow UK-only format shifting exception" and that it would "encourage the EU to look at options that benefit consumers, including the possibility of a broad exception to copyright for non-commercial use". See <http://www.ipa.gov.uk/consult-gowers2.pdf> for details, including the proposed draft legislation to amend the CDPA.

Establishment of National CCTV Oversight Body and Appointment of Interim CCTV Regulator Announced

The Minister for the Home Department has announced the establishment of a National CCTV Oversight Body and the appointment of an Interim CCTV Regulator to monitor progress on the implementation of the National CCTV strategy, which was published in 2007. The Interim CCTV Regulator will, over the next 12 months, review the CCTV landscape and draft recommendations to Ministers on how the regulation of CCTV should be developed. The Interim CCTV Regulator will also set national standards for agencies with responsibility for the operation of CCTV, whether public or private, for suitable and open processes for handling complaints and concerns from members of the public. The Minister said "The focus of the Interim Regulator will be on dealing with complaints around standards but another active task will be to help explain to the public how they can complain about intrusive or ineffective CCTV placement or usage". He also said that the Interim CCTV Regulator would advise Ministers on the need for such a framework and how such a structure might look, including the need for a permanent CCTV Regulator. See http://www.crimereduction.homeoffice.gov.uk/cctv/cctv_oversight_body_b.pdf for details.

Court of Appeal Refers Questions on Provision of Universal Service to ECJ

The Court of Appeal has referred to the ECJ questions concerning the power afforded to Member States under Article 8 of Directive 2002/22 to impose specific obligations on designated providers to guarantee the provision of universal services to consumers in relation to directory enquiry services. BT and Ofcom had appealed a Competition Appeal Tribunal decision which had allowed an appeal by the respondent directory enquiries service providers against Ofcom's determination in their dispute with BT. The dispute related to the price charged by BT for the supply of the contents of its database of subscribers and whether it complied with the regulatory obligations under "universal service condition 7", imposed by Ofcom's predecessor. The condition imposed an obligation on BT to provide to other communications providers the contents of its database at a regulated price. Ofcom had concluded that the condition was unlawful as it failed to properly implement Directive 2002/22 by not

imposing an obligation on BT to guarantee that a comprehensive directory enquiries service was provided to all consumers. Article 3(1) of the Directive set out the obligation imposed on Member States to ensure end-users had access to the universal service at an affordable price. BT and Ofcom argued that the Directive was concerned with ensuring that end-users had access to the minimum set of services prescribed at an affordable price and that it neither envisaged nor empowered Member States to impose obligations on service providers which regulated the supply of data to third parties. (*British Telecommunications Plc & Anor v The Number (UK) Limited [2009] EWCA Civ 1360* - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1360.html> for the judgment).

Foreign Copyright Protection in "Sculpture" - Defence to Claims of Infringement and Justiciability

The claimant companies appealed decisions of the judge rejecting their copyright infringement claims under UK law against the defendants and refusing to enforce a default judgment they had obtained against the first defendant in the US. The first defendant cross-appealed against the judge's decisions to enforce the claimants' US copyright in the UK and denying that he enjoyed any rights in the nature of copyright arising from his work in countries other than the UK. The dispute concerned the rights in a number of works created in the course of making the Star Wars films - the first defendant had been asked to produce a final version of the works in plastic based on a model which had been developed by other parties' works and did so, incorporating his own improvements. In doing so he used what the court said could fairly be called "sculpting" techniques. The first defendant later made and sold copies of the various characters' helmets and armour. The court said, "As far as the position under US law is concerned, it is now accepted that US law regards what Mr Ainsworth did as an infringement of various US copyrights. Lucasfilm claims that the English court should itself enforce US copyright law against Mr Ainsworth". The first defendant claimed that if the work he did in producing the helmet amounted to the creation of a work of sculpture, he was the owner of the copyright in it. No appeal was pursued in respect of passing off, breach of confidence or the claim that the prototype helmets were works of artistic craftsmanship. What Lucasfilm did appeal were the findings that the prototypes were not "sculptures" and the findings that there was a defence under section 51 or 52 of the CDPA. It also appealed the decision not to enforce the US default judgment. The Court of Appeal said the judge had rightly found that armour and helmets were not "sculpture", and that the defendant was thereby provided with a defence to a claim of copyright infringement in the UK under sections 51 and 52. However, as English law regarded claims for infringement of foreign, non-EU copyrights as non-justiciable, the judge did not have jurisdiction to enforce the claimants' US copyright in the UK. Lucasfilm's appeal therefore failed. The court said, "There was no copyright in any sculpture. Nor could it enforce its US judgment. Mr Ainsworth's cross-appeal, on the other hand, partly succeeds and partly fails. It succeeds to the extent that we reject the judge's direct enforcement of US copyright. In the circumstances, there is no financial remedy for Lucasfilm to compensate it for the modicum of selling which Mr Ainsworth has managed to achieve into the US: but Mr Ainsworth is aware that were he to seek any further selling into the US, he would be in breach of its copyright laws". (*Lucasfilm Limited & Ors v Ainsworth & Anor [2009] EWCA Civ 1328* - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1328.html> for the judgment).

Criminal Prosecution of ISP Executives in Italy for UGC Breaching Defamation and Privacy Laws

The city-state of Milan is currently prosecuting Google's chief privacy counsel, its senior vice president and chief legal officer, a former chief financial officer and a marketing officer for defamation and breach of privacy after a video showing a boy with Downs Syndrome being harassed by bullies was posted on the search engine's Italian Language Google Video site. A decision in the matter is expected next month - Google said in a statement that they had done all that was required of them under national and European law and were relying on the defences available to them under the provisions of the e-Commerce Directive 2000/31/EC, which is implemented into national law by Italian Legislative Decree of April 9, 2003, n.70. Article 15 of the Directive and Article 17 of the Italian Legislative Decree provide that there is no general obligation to monitor the information which providers transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. The video in question had been posted on Google Video in 2006. According to reports, it ranked among the site's most popular content and had the highest amount of downloads. The Italian police told Google to take the video off its website and Google complied within hours - the bullies involved were later identified and prosecuted. However, the prosecutors said that Google was negligent because it had allowed the video remain on the site for two months. Google and the prosecutors agreed that the video was uploaded on 8 September 2006 and then subsequently removed on 7 November 2006. However, the prosecutors presented evidence showing that in early October, one month before the video's removal, there comments had been posted saying that it should be taken down, one of which read, "This is shameful! This should be taken down immediately".

Breach of Terms of Bond Issue and Events of Default

The claimant was a US bank with a London branch. The defendant was an Indian film company based in Chennai. In 2006, the defendant issued two bonds to the bondholders, in respect of which the bank was trustee. Each bond was subject to English choice of law and jurisdiction and the terms of the trust deeds both contained a provision for accelerated payment of the bonds on the occurrence of specified events of default. The bank made an application for summary judgment against GV Films in respect of the bond issues, which were accelerated after alleged events of default. The defendant commenced proceedings in the High Court of Judicature at Madras for sanction of a scheme of arrangement proposing a de-merger of its business, which involved part of its assets and liabilities being transferred to two new companies. Neither the bank nor the bondholders were notified of the application. The bank opposed the de-merger, intervened and incurred costs in doing so - the defendant refused to pay the sums on demand. The bank sought accelerated payment on the basis that certain events of default had occurred. When the bonds were not repaid, the bank issued proceedings for the accelerated payment of the bonds and issued an application for summary judgment shortly afterwards. It was accepted that the bank had only to establish one event of default for its application for summary judgment to succeed. After the issue of proceedings, the bank said that the amounts due under the bonds in any case fell due under certain mandatory redemption provisions and an application for permission to amend was made together with a further application for summary judgment in relation to the amended claim. The court held that the claimant bank was entitled to summary judgment on its claim for accelerated payment of the bonds on the basis that the defendant had committed acts of default. It noted an obligation imposed on the issuer to pay legal costs incurred by the trustee was an important one. When necessary, the trustee of a bond issue had to be able to take appropriate legal advice with confidence that the costs would be reimbursed in accordance with the provision of the trust deed. The extent of the obligation depended on the correct construction of the contractual term in question, and whether there had been a breach of the obligation depended upon the facts - in this case, a failure to meet the bank's legal costs as required by the trust deed was a breach of obligation and was therefore capable of giving rise to an event of default. Further, the defendant's obligation as issuer to repay the bonds was capable of being affected by a scheme of arrangement which would transfer assets away to newly formed companies. In terms of the wording of the provisions, by its petition, the defendant had taken proceedings for a readjustment of its obligations without approval of the trustee or bondholders. The petition also constituted an event of default. (*Bank of New York Mellon v GV Films Limited* [2009] EWHC 3315 (Comm) - see <http://www.bailii.org/ew/cases/EWHC/Comm/2009/3315.html> for the judgment).

Broadcasting

Ofcom Announces Revision of Broadcasting Code and Guidance

Ofcom has announced that it has published its revised 2009 Broadcasting Code and new internal procedures for handling standards and licence-related cases, fairness and privacy complaints and statutory sanctions in broadcasting. Ofcom said the main changes involved a clarification of parts of the Code to help broadcasters avoid compliance failures, particularly in relation to audience competitions and voting and the broadcast of sexual material and also incorporated the requirements of the European Audiovisual Media Services (AVMS) Directive, which must be implemented by 19 December 2009. Ofcom also reminded broadcasters that it would not be issuing changes at this stage to those sections of the Code relating to commercial references in programmes but instead, it would extend this part of its Code review to take account of any Government decision on product placement (the Government consultation on product placement closes next month - see the Need to Know of 9 November 2009 for details). Ofcom said all licensees should, until further notice, continue to comply with all of the existing rules in Sections Nine and Ten of the Broadcasting Code. Aside from any future potential changes to product placement rules in the Code, the AVMS Directive prohibits product placement in all children's programmes produced after 19 December 2009 and a note to this effect has been added to the new Rule 10.5. The new Code takes effect from 16 December 2009. See <http://www.ofcom.org.uk/tv/ifi/guidance/standards/standards.pdf> for the Guidance on the procedures for handling broadcasting standards and other licence-related cases and <http://www.ofcom.org.uk/tv/ifi/guidance/fairness/fairness.pdf> for the guidance on the fairness and privacy cases.

Ofcom Guidance Notes and Applications Forms and the AVMS Directive

Ofcom has advised all interested parties that with the coming into force in the UK of the AVMS Directive on 19 December 2009, updated guidance notes and application forms for Television Licensable Content Service Licences, Digital Television Programme Services Licences and Digital Television Additional Service Licences which take into account of the changes that the AVMS Directive makes, such as the fact that television services broadcast over the internet are now licensable and changes in the technical criteria for establishing relevant jurisdiction for broadcasters are now available. The new application forms are to be used with effect from 18 December 2009.

See http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance_notes_and_apps/tlcs/ for access to the revised guidance notes and application forms. The regulation of on-demand services takes effect from 19 December 2009 when the Audiovisual Media Services (AVMS) Directive is implemented in the UK and the new provisions that have been inserted into the Communications Act 2003 come into force - see the Need to Know of 16 November 2009 for details.

Draft Legislation - Disclosing Information Between Co-Regulatory Bodies for On-Demand Services

The draft Communications Act 2003 (Disclosure of Information) Order 2010 has been published. The Audiovisual Media Services Directive requires EU Member States to ensure that on-demand services which provide television-like content (video-on-demand services) are subject to regulation so as to ensure that their programme and advertising content meets certain minimum standards. After consultation, the Government decided to provide for a co-regulatory system, in which formal regulatory powers are conferred on Ofcom, which may then designate other bodies to carry out some of the regulatory functions. This draft Order specifies that an appropriate regulatory authority within the meaning of section 368B of the Communications Act 2003 is a "relevant person" for the purposes of section 393(3) of that Act. Section 368B deals with "the appropriate regulatory authority" for the purposes of on-demand programme services. Section 393 imposes general restrictions on the disclosure of information so legislation is required to bring bodies designated by Ofcom as co-regulatory bodies for on-demand programme services within the scope of section 393 of the Communications Act 2003. This will permit the disclosure of information between Ofcom and the co-regulatory bodies as well as between the co-regulatory bodies - see http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi_9780111489086_en.pdf for details.

Corporate

Proposed Amendments to AIM Rules - Directors' Remuneration and Electronic Communications

The London Stock Exchange has published AIM Notice 35, which details the proposed amendments to the AIM Rules relating to the disclosure of the remuneration received by directors and the electronic communication to shareholders of annual reports and accounts and admission documents on a reverse take-over. The proposed amendment to AIM Rule 19 will require an AIM company to provide disclosure of directors' remuneration in its annual audited accounts and the proposed amendments to the guidance notes to AIM Rules 14 and 19 will provide all AIM companies with the option to use electronic communications to send accounts and admission documents to shareholders. See <http://www.londonstockexchange.com/companies-and-advisors/aim/advisers/aim-notices/aimnotice35.pdf> for the Notice. The LSE is proposing that the disclosure requirement be implemented by AIM companies with a financial year-end of 31 March 2010, or thereafter.

Guidelines Monitoring Group's Second Report on Compliance with Walker Guidelines

The Guidelines Monitoring Group, which was established in March 2008 to monitor conformity with the Walker Guidelines for Disclosure and Transparency in Private Equity and make recommendations to the BVCA for changes to the Guidelines, if required, has published its second report on disclosure and transparency in the private equity industry. The report provides a summary of the private equity industry's conformity with the Guidelines following their introduction in November 2007. The report notes that 34 private equity firms meet the criteria for compliance and all have conformed; further, 60 portfolio companies are covered by the Guidelines this year, of whom 45 have strictly met the criteria set out in the Guidelines and 15 have complied on a voluntary basis. The report considered conformity in three areas: specific requirements from the Guidelines to provide information about the private equity firm, the composition of the board and to include a financial review; Companies Act requirements to provide business review information about the financial position, financial risks and principle risks and uncertainties; and enhanced business review information in respect of social and community issues, environmental matters and essential contractual arrangements. The report noted "There continues to be a high level of commitment to the Guidelines from the private equity industry. In particular, the disclosures made by the private equity firms themselves have improved significantly and all private equity firms covered by the Guidelines have met all the requirements without exception". See http://walker-gmg.co.uk/sites/10051/files/walker_guidelines_36pp-dec09-aw.pdf for details.

More Companies House Guidance on Details in Statements of Capital

Companies House have again amended their FAQs on the Companies Act relating to Capital (Section 13) - they have added further details about the types of additional information about acceptable prescribed particulars/voting rights information which should be included in a statement of capital. See <http://www.companieshouse.gov.uk/companiesAct/faq.shtml> for details.

Film & TV

Government Announces Review of Regulations Governing Children's Performances

The Secretary State for Children, Schools and Families and the Secretary of State for Culture, Media and Sport have jointly announced the start of the long-anticipated review of the system which currently regulates children's performances. In announcing the terms of reference the Government said "The 1968 regulations and guidance that govern child performance were established under the Children and Young Persons Act 1963. Their aim was certainly not to stop children from taking part in plays, shows and broadcasting but to ensure that their health, safety and well-being were protected when they did so". It noted "the 1960s regulatory regime applies when children take part in an incredibly wide range of performance activities, from local drama society productions and talent shows, to prime time television programmes and blockbuster films" and said it recognised that the "legislation also predates the creation of Ofcom as the broadcasting regulator as a result of the Communications Act 2003, with its statutory duty to ensure that people under eighteen are protected in relation to broadcast media. This duty is implemented through detailed rules in the Broadcasting Code and accompanying guidance that makes clear how broadcasters are to ensure children's physical and emotional welfare is protected". As a result of the changes which have taken place in the industry since the legislation was originally implemented, "Questions have therefore arisen about how far the 1960's approach is still fit for purpose today. These have been prompted in part by concerns about children's participation in some recent 'factual television' programmes and by queries about how the framework applies to these broadcasts, if it does at all. There are also broader questions about the appropriateness of this regime, since it was developed before the exponential development in mass communications and at a time when broadcasting's place in our culture, our economy and our society was less significant than it is today". The Child Performance review will engage and work with all those with an interest in this area, including organisations representing children and parents, broadcasters, film makers, producers, theatre organisations, representatives of local arts and drama organisations, and local authorities, among others. A report to Ministers will be made by the end of February 2010. Once the report has been made, the Government will then decide what the appropriate arrangements should be for regulating children's performances. (DCSF News Release, 14 December 2009 - see http://www.dcsf.gov.uk/news/content.cfm?landing=childrens_plan_two_years_on_next_steps_to_achieve_outstanding_childrens_services&type=1 for details, including links to the terms of the review and a written Ministerial Statement on the Government's "Children's Plan" and progress to date - the review of regulating children's performances is part of that Plan).

Gambling

Commission Publishes Updated Guidance on Prize Draws and Competitions

The Gambling Commission has published updated guidance about prize draws and competitions under the Gambling Act 2005. The Commission said the point of the guidance was to inform those organising competitions and draws about where the boundaries lie between them and lotteries and make them aware of what the Commission thinks needs to be done in order to avoid breaches of the Act. The Commission reminded organisers that even if their event is outside the remit of the Gambling Act there are other regulations that need to be considered when developing and running schemes, such as unfair trading and consumer protection laws and tax implications. The guidance also sets out the circumstances in which the Commission will intervene in promotions and when it will institute criminal proceedings, and makes clear that it will not give clearance for schemes. See [http://www.gamblingcommission.gov.uk/pdf/Prize_competitions_and_free_draws - The requirements of the Gambling Act 2005 - December 2009.pdf](http://www.gamblingcommission.gov.uk/pdf/Prize_competitions_and_free_draws_-_The_requirements_of_the_Gambling_Act_2005_-_December_2009.pdf) for details.

Draft Legislation to Increase Fees and Prizes for Bingo

The draft Gambling Act 2005 (Operating Licence Conditions) (Amendment) Regulations 2010 have been published. The Regulations will amend the Gambling Act 2005 (Operating Licence Conditions) Regulations 2007, SI 2007/2257 so as to increase the maximum participation fee and money prize levels in bingo premises from 50 p to £1. In addition, where a prize for which a game is played is money, the maximum amount of the prize will be increased from £50 to £100. The Government has said there was no reason for not bringing the prize limits in bingo halls into line with those for prize gaming generally. See http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi_9780111489772_en.pdf for details. The Regulations will come into force on the day after the day on which they are made (still to be specified).

Litigation

Libel Proceedings - Application for Summary Judgment & Application to Amend Pleadings to Add Publishers

The claimant was employed by the second defendant, British Airways, in a senior cabin crew position - following a police search after a flight which resulted in him being found to be in possession of a quantity of alcohol which had not been paid for, a series of emails were sent by the first defendant to other employees of the second defendant about the police search and the consequences for the claimant. The claimant brought proceedings for libel regarding the content of the emails and the defendants then applied for summary judgment in accordance with the provisions of CPR Part 24. The defendants sought to argue that the claim was bound to fail because the claimant had been unable to formulate a plea of malice against the first defendant, which had any realistic prospect of success. The court refused the application - it said what mattered in this case was not so much to pin any particular motive upon the first defendant, but to concentrate on the charge that he said something which he must have known to be untrue. It said it would exceed its function if it were to hold that a fact-finding tribunal would be perverse to come to the conclusion that the first defendant made an allegation about the claimant which he knew to be false (ie, to the effect that he had admitted dishonesty). It said it may well transpire, if the matter comes to trial, that the first defendant was "merely careless in his use of language and that a jury would thus conclude, in effect, that he was in no way abusing the occasion of privilege". Nevertheless, it did not consider it appropriate to shut out the claimant from exploring the matter at a full hearing in due course - if matters went that far. Further, the claimant's application to amend his pleadings in order to add further publishers of the defamatory allegations was also refused. The court said where there was an intention to add publishers, the appropriate course was to plead individuals and, where necessary, to add the circumstances from which it was to be inferred that the additional publication took place. The burden obviously rested upon the claimant. It said "There was no presumption of publication merely because information was posted on a website or had become accessible to someone if he or she chose to go to it. All that has emerged is that the terms of the offending email are being retained electronically until such time as this litigation is concluded. It could thus be accessed by certain individuals if they chose to take that step. The proposed amendments in the reply appear to jump the gun". (*Hughes v Risbridger & Anor* [2009] EWHC 3244 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/3244.html> for the judgment).

Publishing

PCC's Remit Extended to Apply to Online-Only Publications

The Press Complaints Commission (PCC) has announced that The Press Standards Board of Finance Ltd has said that following industry-wide consultation it has agreed to extend the remit of the Commission to include online-only publications. The extension has been agreed on the basis that such publications are recognisable as UK based newspapers or magazines which, if in printed form, would come within the jurisdiction of the PCC, the publisher and editor subscribes to the Editors' Code of Practice and the publisher agrees to pay registration fees to the Board of Finance. The PCC said that in practice, the extension of their remit will relate mainly to online magazines - online versions of newspapers and magazines available in printed form are already within their remit. (*PCC Press Release, 14 December 2009*).

ECHR Rules on Breach of Article 10 in Requiring Disclosure of Journalists' Sources

The European Court of Human Rights (ECHR) has given its judgment in the application by four newspapers and a news agency, Financial Times Ltd, Independent News & Media Ltd, Guardian Newspapers Ltd, Times Newspapers Ltd and Reuters Group plc, against the UK under Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning a 2001 decision of the High Court which ordered them to deliver up a leaked document. The applicants argued that this order violated their right to freedom of expression and their right to respect for their home and correspondence. The document had been leaked to the various news media organisations during a possible takeover bid by Interbrew of a competitor brewing company and Interbrew sought to identify the source of the document - the High Court granted Interbrew's Norwich Pharmacal application and ordered delivery of the requested documents - the court's ruling was appealed to the Court of Appeal and then the House of Lords. The applicants still refused to comply. Interbrew had received notice, prior to publication of the initial FT article, that a copy of the leaked document had been obtained and that there was an intention to publish the information it contained. However, Interbrew did not seek an injunction to prevent publication of the allegedly confidential and sensitive commercial information - the ECHR said while "the applicants in the present case were not required to disclose documents which would directly result in the identification of the source but only to disclose documents which might, upon examination, lead to such identification", they did not consider this

distinction to be crucial. They said "In this regard, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources" and after considering the relevant domestic law and practices (Norwich Pharmacal Orders and CPR) and the relevant Council of Europe material (Recommendation (No R (2000) 7) on the right of journalists not to disclose their sources of information), the ECHR said that Interbrew's interests in eliminating the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists' sources. Accordingly, the ECHR found that there had been a breach of Article 10. (*Financial Times & Ors v The United Kingdom*, Application No 821/03 - see

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=18&portal=hbkm&action=html&highlight=&sessionid=40594475&skin=hudoc-en> for the judgment).

News Clipping Service Refers NLA to Copyright Tribunal

Online and print news clippings service Meltwater has issued a statement confirming that it has referred the Newspaper Licensing Agency to the Copyright Tribunal in relation to concerns about the Agency's new rules, which will come into force on 1 January 2009. The company said it decided to "challenge the legal basis of the NLA's licensing scheme, and in particular the NLA's claim to be able to license hyperlinking", which it believes has no basis in English law. A number of news aggregators (including Meltwater) had criticised the NLA's new regime when it was announced, describing the new online content licensing regime as "an attempt to tax the Internet". The NLA said at the time that monitoring companies created their services by copying newspaper content into a database to find relevant articles. It described this as a commercial use of publishers' intellectual property, which was against the terms of use for every newspaper and said that by licensing this activity, it would "legitimise this industry". Under the terms of the new licence introduced, clients of media monitoring agencies have the option to choose between two tariff options - fixed and variable - depending on their requirements. (*Meltwater Group Statement*, 16 December 2009).

Technology

Offer of Public Remedies in Sun/Oracle Acquisition Investigation

In November, the European Commission issued a statement of objections to Oracle's planned acquisition of Sun Microsystems, arguing that the group was already a dominant database distributor and that its potential ownership of MySQL would distort competition in the relevant database market. Oracle has now offered the EU's antitrust regulator a set of new terms however commentators have said that Oracle's "public remedies" are unlikely to satisfy the EU's original objections to the deal. Although the Commission said that the "announcement by Oracle of a series of undertakings to customers, developers and users of MySQL is an important new element to be taken into account in the ongoing proceedings", it remains to be seen whether the proposed public remedies will be accepted. The Commission has until 27 January 2010 to make a final decision about the transaction. The US Department of Justice approved the Oracle deal in August, having said that it was satisfied that there were enough, albeit smaller, competitors on the market and a large community of open source developers - in opening the investigation, the Commission said that databases were a key element of company IT systems and that it had an obligation to ensure that customers would not face reduced choice or higher prices as a result of this takeover. See the Need to Know of 7 September 2009 for the background to the Commission's investigation.

EC Accepts Microsoft's Commitments to Choice for Web Browsers

The European Commission has approved Microsoft's offer to allow rival browsers to be used on its operating software, addressing industry concerns that the company had an unfair stranglehold on the software market as a result of its practice of its web browser Internet Explorer to the Windows PC operating system - Microsoft's commitments to allow interoperability between third party products and various Microsoft products including Windows, Windows Server, Office, Exchange, and SharePoint become legally binding from 16 December 2009 however, the Commissioner for Competition Policy said that as Microsoft would need some time to implement the "Choice Screen" which gives users a choice between the 12 most widely-used web browsers that run on Windows, it would therefore be available from mid-March 2010. Norwegian browser maker Opera, which brought its complaint against Microsoft tying Internet Explorer to Windows to the EC in December 2007, welcomed the announcement saying the decision was a "celebration of open web standards", as these shared guidelines were the "necessary ingredients for innovation on the web". See

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/582&format=HTML&aged=0&language=EN&uiLanguage=en> for the Commissioner's statement. Further details about the interoperability package are available from Microsoft. Microsoft will report within six months, and thereafter report annually to the Commission on its implementation of the commitments. However, the Commission has said that it would be carefully monitoring the

impact of Microsoft's proposals on the market and take its findings into account in its assessment of the pending antitrust investigation regarding interoperability. There are still three "serious and ongoing antitrust complaints" against Microsoft for the Commission to deal with in 2010.

Consultations & Reports

Ofcom Statement - The Regulation of Video on Demand - <http://www.ofcom.org.uk/consult/condocs/vod/statement/vodstatement.pdf> (Ofcom's Statement on the regulation of VOD outlines how VOD services such as BBC iPlayer, 4OD, ITV Player and Demand Five, are to be regulated from 19 December 2009 in accordance with the implementation of the requirements of the AVMS Directive - the Government made clear its intention to limit the scope of UK regulation to the narrow range of VOD services falling within the scope of the AVMS Directive, rather than extending regulation more broadly than the AVMS Directive requires and only to those services that include programmes similar to those available on television broadcast services. It is proposing a co-regulatory approach to the regulation of VOD editorial content and is still in discussion with the Association for Television on Demand (ATVOD) (the AVMS Directive requires that the UK regulates VOD editorial content and VOD advertising either directly, or, at a minimum, through a co-regulatory system for VOD editorial content and VOD advertising) and therefore after 19 December 2009, editorial content and advertising included in VOD services that are "television-like" and come within the meaning of an "on-demand programme service" (ODPS), as defined in the Regulations, will be subject to statutory regulation. The Government is expected to make a second set of regulations to implement some remaining aspects of the new proposed regulatory regime for VOD services, such as fees and notification requirements and enforcement requirements in early 2010 and bring them into force in March 2010; see also <http://www.ofcom.org.uk/research/tv/reports/vodresearch/vod.pdf> for the accompanying research report on consumer views on what makes audiovisual services "television-like", which was carried out ahead of the implementation of the AVMS in order to investigate what consumers consider to be "television-like" material and what their expectations are in terms of the key characteristics of such material).

Ofcom Consultation - Consultation on a New Specimen Performance Bond for the Purposes of Regulation 16 of the Electronic Communications Code (Conditions and Restrictions) Regulations 2003 - Explanatory Statement and Draft Specimen Performance Bond - http://www.ofcom.org.uk/consult/condocs/specimen_performance_bond/main.pdf (Ofcom is inviting views on amendments proposed to the specimen bond it will provide in relation to the funds that The Electronic Communications Code, set out in Schedule 2 to the Telecommunications Act 1984, requires operators to have in place to meet specified liabilities arising from their exercise of Code powers - the Code sets out the powers that can be given to providers of electronic communications networks (ECNs) and providers of conduit systems available for use by providers of ECNs to enable them to install and maintain electronic communications apparatus. The amendments relate to definition of Appropriate Authorities as beneficiaries of the bond, making it clear that the bond requires execution as a deed and arrangements to ensure that payments to Appropriate Authorities are available on demand).

HM Treasury, HMRC & BIS Joint Consultation - Implementing a Landline Duty: Consultation on Draft Legislation and Impacts - http://www.hm-treasury.gov.uk/d/consult_landlineduty.pdf (the joint consultation concerns the practicalities of the draft legislation (see Annex B for details) and the predicted impacts of the new Landline Duty which is being proposed to help fund the roll-out of Next Generation Access to 90% of Britain by 2017 - the duty will be charged at the rate of 50 pence per month or each part of a month per local loop made available for use. Local loops are lines that connect an end-user's premises to the wider communications network; "made available for use" means that the line is either provided to an end user or leased to a retailer. The duty will be payable on both broadband and telephony services and the duty will apply regardless of the service that is being provided over the local loop - the Government said that the principle reason for applying the duty applying to each local loop was one of "simplicity" and that if the duty regime was more complex it "would become more difficult and expensive for industry and HMRC to deliver and administer").

Ofcom Report - The International Communications Market 2009 - <http://www.ofcom.org.uk/research/cm/icmr09/ICMRcharts.pdf> (2009 charts); <http://www.ofcom.org.uk/research/cm/icmr09/stats.pdf> (2009 statistics) and <http://www.ofcom.org.uk/research/cm/icmr09/cip09.pdf> (comparative international pricing) - (the Report provides an in-depth analysis of how the UK's communications sector compares with those in various other countries (France, Italy, Germany, USA, Canada, Japan, Poland, Spain, Netherlands, Sweden, Ireland, Brazil, Russia, India and China).