

*This is our summary of some of the key legal developments across a range of sectors for the week of 4 January 2010. 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

#### Digital Economy Bill Passes to Committee Stage

The draft Digital Economy Bill has now passed to the Committee Stage of the House of Lords for detailed scrutiny. The Committee stage is expected to take up to one week with some 300 proposed amendments being considered. (*Music Week*, 5 January 2010).

#### IPReg Board Now Fully Operational

The Intellectual Property Regulation Board (IPReg) became fully operational on 1 January 2010 as a result of the Legal Services Board formally granting the remainder of its regulatory powers under the Legal Services Act 2007. The IPReg was set up jointly by the Chartered Institute of Patent Agents (CIPA) and the Institute of Trade Mark Attorneys (ITMA) as an independent body, with responsibility to the Legal Services Board, to regulate the two professions of patent and trade mark attorneys under the Act in order to create a new system for dealing with legal complaints and an ombudsman scheme to deal with consumer complaints about legal services. According to the Institute of Trade Mark Attorneys, "The new regulatory framework has been enacted by Parliament to create a new focus for consumers in the delivery of legal services, with new oversight of regulators, greater choice for consumers and more effective redress". See <http://www.ipreg.org.uk/> for details.

#### Discussions on Modernising Private Copying Levies Fail

Talks aimed at modernising the current system of private copy levies in Europe have reportedly broken down. The discussions have been ongoing since July 2008 in the context of a Stakeholder Platform including Collecting Societies, industry representatives and consumer organisations, facilitated by the European Commission. Digital Europe, which has been calling for increased transparency and legal certainty through the application of objective European criteria said it was bitterly disappointed and highlighted the "enormous and unjustifiable variation" which confronts European consumers - the levy on the same type of MP3 player is €15.00 in Austria, €25.00 in France, and €3.15 in Spain, with no levy in other countries such as the Netherlands. Digital Europe said "Artists and performers must of course be fairly compensated for their creative work, but the principles behind the private copy levies and the systems currently implemented were developed back in the 1960s in an analogue era and are out of date in today's digital age". See [http://www.digitaleurope.org/index.php?id=32&id\\_article=404](http://www.digitaleurope.org/index.php?id=32&id_article=404) for their Statement. However, GESAC, which represents 34 of the main European collecting societies, said it was surprised by the sudden breakdown in talks, because stakeholders were reportedly close to agreement on a number of issues regarding levies in a European single market. It said "The reason given by Digital Europe to abandon the dialogue - the alleged lack of an Internal Market approach to the exercise - is also hard to understand. In fact, many of the recommendations included in the text under discussion were specifically intended to improve the free movement of goods subject to levies within the Internal Market". See [http://www.gesac.org/ENG/NEWS/COMMUNIQUESDREPRESSE/download/COMMUNIQUESEN\\_20100107\\_Private\\_copying\\_levies.pdf](http://www.gesac.org/ENG/NEWS/COMMUNIQUESDREPRESSE/download/COMMUNIQUESEN_20100107_Private_copying_levies.pdf) for details. The current EU copyright rules (Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society) do not provide guidelines on which products are subject to levies and how much is charged, and as a consequence levies vary from country to country - see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> for details.

#### Application for Judicial Review of Decision to Redact Information in Papers Before Competition Commission

The applicant company applied for judicial review of a decision of the respondent Competition Commission to redact certain information from working papers relating to its investigation into the claimant's acquisition of retail sports stores. The aim of the Commission's investigation was to determine whether the purchase of 31 stores from a competitor had created a relevant merger situation and, if so, whether it had resulted in the substantial lessening of competition within any market for goods and services in the UK. The investigation was in its first stage and a non-adversarial hearing was due to be held in private to enable the parties to answer questions, followed by

the issue of the Commission's provisional findings. The Commission had decided that certain information should be redacted and that therefore Sports Direct should not be provided with un-redacted versions of those working papers, at least at that stage of its investigation - at issue was whether it took this decision lawfully. The Tribunal noted that in the context of merger control, judicial review under section 120 of the Enterprise Act 2002 could lie against a preliminary decision which did not affect legal rights but which could lead to final decisions which did but that relevant provisions of the Act did not compel the result that the applicant should have to wait for the publication of the provisional findings, and the principles of administrative law did not prevent a challenge to the decision if the error was such that it was unfair to allow the proceedings to continue in the manner envisaged. The primary concern was whether what had happened had resulted in real injustice. The Tribunal ruled that the claimant had not acted prematurely in seeking judicial review of the decision of the Commission to redact the information from the working papers prior to making any formal findings. The applicant was adversely affected by the conclusions in the working papers and the decision to withhold information could have resulted in real injustice. (*Sports Direct International PLC v Competition Commission; OFT & JJB Sports PLC, Interveners [2009] CAT 32* - see [http://www.catribunal.org.uk/files/1116\\_Sports\\_Direct\\_Judgment\\_14.12.09.pdf](http://www.catribunal.org.uk/files/1116_Sports_Direct_Judgment_14.12.09.pdf) for the judgment).

### Fast Track Procedure Applied to Reinstate Video Recordings Act

The Video Recordings Bill, the bill being proposed to remedy the problems with enforcing the provisions of the Video Recordings Act 1984, had its First, Second and Third Readings in the House of Commons and was debated under the fast track procedure (an Act of Parliament being made in one day) and was passed. The procedure was used to deal with the fact that the various offences provided for in the Act were made unenforceable because of a failure to notify the offences and other provisions of the 1984 Act in draft to the European Commission in accordance with the technical standards directive. Until the Video Recordings Act is repealed and revived, no new prosecutions can be made under the Act. Members debating the bill were informed that because of the current hiatus, "law enforcement officials in Milton Keynes have had to return 550 seized unrated DVDs to a seller who is now free to supply them until the Act becomes enforceable again. To be clear, unrated means beyond the R18-potentially very unpleasant material. In Bournemouth, trading standards officers were unable to prevent a newsagent selling R18 and unrated hard-core sex videos, while in Conwy, law enforcement officers were unable to deal with seven cases of supplying 18-rated videos to children". Members were also reminded "the Video Recordings Bill provides a classic example of why fast-track legislation still has a role to play. There is a real problem that needs to be dealt with quickly in order to restore important public protections. The Bill does not introduce any new provisions beyond those with which we are all familiar and that have been successfully enforced for 25 years". The Bill then went to the House of Lords the following day - the first time the Lords has had to deal with a Bill in this manner. There the statement was made that "The Bill consists of only two clauses and one schedule. Clause 1 repeals the provisions of the 1984 Act and immediately revives them. Clause 2 relates only to the Short Title, commencement and extent of the Bill. The schedule sets out transitional provisions to ensure that the repeal and revival of the provisions of the 1984 Act do not change their effect or the effect of other enactments, instruments and documents that refer to them, thereby making the classification system under the Act seamless following the passage of the Bill. I am sure that the House will share the Government's desire that these public prosecutions be reinstated as soon as possible".

## Broadcasting

### ASA Clears Horror Film Radio Ad - No Breach of CAP Code

The Advertising Standards Authority has adjudicated on a complaint about an advertisement by Blockbuster Entertainment Ltd for a forthcoming horror film, which a listener said was unsuitable for broadcast on radio when children could be listening. The ASA investigated the complaint under CAP (Broadcast) Radio Advertising Standards Code, Section 2, rules 8 (Scheduling) and 11 (Children and young listeners) but did not find it to be in breach. The ASA said, "it was clear that the ad was for a film and the tone and style of the voice-over removed any potential for horror". See [http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2010/1/Blockbuster-Entertainment-Ltd/TF\\_ADJ\\_47890.aspx](http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2010/1/Blockbuster-Entertainment-Ltd/TF_ADJ_47890.aspx) for details.

### ASA Clears Horror Film TV Ad - No Breach of CAP Code

The ASA has also adjudicated on a similar complaint, this time for a television ad for another forthcoming horror film. The complainants objected that the violence in the ad was too offensive to be shown on TV, the Nazi imagery in the ad was offensive and that it was inappropriately scheduled (although it had been broadcast after the watershed). The ASA investigated the ad under CAP (Broadcast) TV Advertising Standards Code rule 6.1 (Offence), CAP (Broadcast) TV Advertising Standards Code rule 7.4.7 (Children - Use of scheduling restrictions) and CAP (Broadcast) Rules on the Scheduling of TV Advertisements 4.2.3 (Particular separation of advertisements and programmes - Treatments unsuitable for children) but did not find it to be in breach on any of the areas of complaint. It said the ad "was recognisably for a fictitious horror film, did not display levels of violence explicit

enough to render it too offensive to be shown on TV, and that it was unlikely to cause serious or widespread offence to viewers after 9 pm". See [http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/12/E1-Entertainment-UK-Ltd/TF\\_ADJ\\_47843.aspx](http://www.asa.org.uk/Complaints-and-ASA-action/Adjudications/2009/12/E1-Entertainment-UK-Ltd/TF_ADJ_47843.aspx) for details.

## Corporate

### ICAEW & ICAS' Draft Guidance on Determination of Realised and Distributable Profits

The Institute of Chartered Accountants in England and Wales (ICAEW) and the Institute of Chartered Accountants of Scotland (ICAS) have published for comment draft additional guidance on the determination of realised profits and losses in the context of distributions under the Companies Act 2006. See [http://www.icaew.com/index.cfm/route/169615/icaew\\_ga/Technical\\_and\\_Business\\_Topics/Technical\\_releases/Tech/Tech\\_03\\_09\\_Guidance\\_on\\_realised\\_and\\_distributable\\_profits\\_under\\_the\\_Companies\\_Act\\_2006\\_ICAEW/pdf](http://www.icaew.com/index.cfm/route/169615/icaew_ga/Technical_and_Business_Topics/Technical_releases/Tech/Tech_03_09_Guidance_on_realised_and_distributable_profits_under_the_Companies_Act_2006_ICAEW/pdf) for details.

### Subsidiary Company and Impact of Holding Company's Charging Subsidiary Company Shares

Remember the facts of The Wagon Mound case? Spilt oil and fire and damage to ships? Well a recent Court of Appeal case has considered similar facts however this time in the context of whether a company that is a subsidiary of another company (holding company) by virtue of section 1159(1)(b) or (c) of the Companies Act 2006 or section 736(1)(b) or (c) of the Companies Act 1985 will remain a subsidiary of its holding company if the holding company charges its shares in the subsidiary by way of legal mortgage (or pledge in Scottish law) (as opposed to questions relating to causation). Overturning the High Court's decision, the Court of Appeal held that, as a result of the holding company's pledge of shares in its subsidiary and the registration of the shares in the name of the bank's nominee by way of security (the security being governed by Scottish law), the subsidiary company was no longer a subsidiary of the holding company within the meaning of sections 736 and 736A of the Companies Act 1985. (*Enviroco Ltd v Farstad Supply A/S* [2009] EWCA Civ 1399 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1399.html> for the judgment).

## Film & TV

### Article - Tax Implications of *Micro Fusion* Decision for Film Investors

The latest edition of the Entertainment Law Review looks at the implications of the High Court's decision in *HMRCC v Micro Fusion 2004-1 LLP* [2009] EWHC 1082, in which it effectively removed the tax efficient status of the partnership behind the 2005 film "Mrs Henderson Presents" and considers the repercussions for the high net worth individuals who have invested in films with a similar structure to the one which the court was concerned with - the High Court ruled that Micro Fusion was not carrying on the trade or business which consisted of or included the exploitation of films, which meant that the tax reduction was not available and preferential treatment will no longer apply to such partnerships. This is likely to result in a claw-back of taxes that had previously been avoided but which will now be due. The article notes that although the decision in the *Micro Fusion* case was a result of certain flaws in the set up, the implications are still "substantial". ("*Mrs Henderson Presents - a major tax headache for film production partnerships*" (2010) *Ent LR* 21(1), 10 - the article is available via Westlaw - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/1082.html> for the judgment).

## Gambling

### Government to Review Current System of Remote Gambling Regulation

The Minister for Sport has announced in a Written Ministerial Statement that the Government will be undertaking a review of the current system of remote gambling regulation so as to ensure that overseas operators contribute towards regulation, problem gambling treatment and the Horserace Betting Levy. Specifically, the Government wishes to "consult on changing the existing system of remote gambling regulation in Britain so that all operators who want to target British consumers must be licensed by the Commission". According to the DCMS, under the plans, all online gambling firms active in the British market will have an obligation to share information about suspicious betting patterns with the UK's sports governing bodies as well as the Gambling Commission. They will also have to comply with British licence requirements including the protection of children and vulnerable people, and will have to demonstrate how they will contribute to the research, education and treatment of problem gambling in Britain. The Minister acknowledged "These proposals would require legislative change to implement and there remain many complex issues to be considered; for example, how we can actively police an extended licensing system and keep burdens on industry to a minimum. We must also be mindful of wider issues of importance to the industry, such as taxation". See [http://www.culture.gov.uk/reference\\_library/minister\\_speeches/6560.aspx](http://www.culture.gov.uk/reference_library/minister_speeches/6560.aspx) for the Statement.

## New Legislation - National Lottery Commencement No 5 Order

The National Lottery Act 2006 (Commencement No 5) Order 2010, SI 2010/2 came into force on 6 January 2010. The purpose of the Order is to provide the powers necessary for a new annual licensing fee regime for the National Lottery operator, Camelot. It brings into force section 5 of the National Lottery Act 2006, which inserts into the National Lottery etc. Act 1993 a new section 7A (Annual Fee), a provision for the charging of annual licence fees, and a provision for a licence to be revoked for failure to pay an annual fee. See [http://www.opsi.gov.uk/si/si2010/pdf/uksi\\_20100002\\_en.pdf](http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100002_en.pdf) for details.

## Litigation

### Music, Marmite, Copyright Infringement and CPR Rule 38.6 - Discontinuing Action and Costs

The court has ruled on an application by a company which had commenced proceedings for copyright infringement but later decided to discontinue the claim that the claimant had not established any valid reasons for departing from the usual costs rule under CPR Rule 38.6 which rendered it liable for the costs which the other party incurred on or before the date on which notice of discontinuance was served. The claimant company, which owned the rights in a particular sound recording, had applied to be relieved from the usual consequence in costs of discontinuing an action for infringement of copyright and deliberate concealment of the infringement against the fourth defendant, a music production company which had been commissioned by the third defendant to produce a short cartoon with music (the rights in which were owned by the claimant) to pitch for a contract to create advertising to sell Marmite, which was made by the first defendant. The first defendant did not authorise the obtaining of any permission from the claimant to use the music in the television commercials which were eventually broadcast. The burden of establishing a valid reason for departing from the usual rule was on the claimant. The court noted that claim was "highly unlikely to succeed because there was no significant evidence to support them" and although the claimant asserted that there had been disreputable conduct it decided that it was not worth pursuing (the court accepted here the comment that the fourth defendant could do nothing to vindicate itself). Astonishingly (said the court) the claimant sought an order that the fourth defendant pay its costs and said there was no proper basis for ordering the fourth defendant to pay the claimant's costs in an action which it had decided to give up. It further noted that the proceedings were "unduly protracted" and the claimant's "grossly excessive demands and unreasonable refusal to negotiate sensibly" made an earlier settlement impossible. In this instance, indemnity costs were appropriate. (*Far Out Productions Inc v Unilever UK & CN Holdings Limited & Ors* [2009] EWHC B42 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/B42.html> for the judgment).

## Music

### DCMS Consults on Small Live Music Event Licensing Exemption

The DCMS is consulting on proposals to exempt small live music events for audiences of not more than 100 people from the requirements of the Licensing Act 2003 relating to the licensing of live music as regulated entertainment under the Act. The Government said this "will primarily benefit many small venues that wish to hold live music events, but are deterred by the licensing requirements and costs. It will also benefit musicians who may find more opportunities to perform". The Government is proposing to introduce these exemptions by means of a Legislative Reform Order (LRO) under section 1 of the Legislative and Regulatory Reform Act 2006 - the draft of the proposed Order is included in the consultation - see [http://www.culture.gov.uk/images/consultations/condoc\\_exempts\\_small\\_livemusic\\_events.pdf](http://www.culture.gov.uk/images/consultations/condoc_exempts_small_livemusic_events.pdf) for details.

### Second Reading for Live Music Bill

Still on the subject of live music, the Live Music Bill, the Private Members Bill, which proposes amending the Licensing Act 2003 with respect to the performance of live music entertainment, is to go for its Second Reading in the House of Commons on 15 January 2010. At this stage it will be subjected to general debate and reports have indicated that the Bill may well hope to receive cross-party support as a means of supporting the live music sector, particularly as the Government's consultation on amendments to the Licensing Act (see above) has only just opened.

### France's Three Strikes Law Delayed Again...

According to reports, the implementation of the controversial French Creation and Internet Bill, which was due to come into effect on New Year's Day, has been delayed as a result of intervention from France's National Commission on Informatics and Liberties (CNIL). CNIL has refused to issue an opinion on the implementing decree authorising the creation of a file containing the co-ordinates of surfers and their offences as they wish to consider another decree relating to the procedure penalty for hackers (Hadopi 2). In doing so, the CNIL has blocked the

process of publication of the decree and implementation of web laws. Reports have said that any law that impacts on citizens' personal data in France requires CNIL's full feedback and permission, which has, so far, not been granted.

### BPI's Snapshot of 2009 Music Sales

The BPI's review of music sales in 2009 showed combined albums market sales of 128.9 million, which represented a decline of 3.5% during 2009 contrasted with 16.1 million (legal) downloads in 2009, up 56.1% on the previous year. There was an increase in UK singles sales by 32.7%, with more than 152 million singles being sold, as compared to 115.1 million sales in 2008. During 2009, 98% of all singles, some 149.7 million single tracks and bundles, were sold in digital formats. (*BPI Press Release, 7 January 2010*).

## Publishing

### PCC Upholds Complaint by Transsexual Over Pejorative Article

The Press Complaints Commission (PCC) has given its ruling in a complaint by a transsexual about an article published in Sunday Life, which referred to her employment at a rape centre. The article referred to the complainant as a "tranny", both in the headline and the main text, in addition to describing her as "strapping" and "burly". The complainant said the term "tranny" was "deeply insulting". In particular, the complainant said that the coverage had "outed" her as a transsexual, included a photograph of her in a private place, and generally represented an unjustified intrusion into her private life in breach of Clause 3 (Privacy). She further argued that publication of the articles breached Clause 4 (Harassment) of the Code. The PCC said while the newspaper was entitled to publish a story about people's concerns over the suitability of the complainant's employment, her gender identity should not have been open to ridicule. Taking into account the full context of the piece, the Commission considered that the use of the word "tranny", which was a needless abbreviation, held by many to be offensive, was pejorative and the complaint was upheld in this respect. The other heads were not upheld. (*Ms Keira McCormack v Sunday Life, Report 80, Adjudication issued 04/01/10 - see <http://www.pcc.org.uk/cases/adjudicated.html?article=NjEyNw==?oxid=4162f06b402f6bf1b7bfb3ec88671b03> for details*).

### Statement in Open Court - False Allegations of Responsibility for Personal Injury from Dumped Waste

The claimant, the UK subsidiary of a group concerned with the trading, supply and distribution of petroleum-related products brought libel proceedings against the defendant broadcaster following the broadcast a news item concerning the claimant's dumping of gasoline waste and subsequent response to the dumping. The defendant and also published a related article on its website. Separate legal proceedings were brought by a large group of Ivorians who claimed to have been affected by the actions of the claimant however a joint statement was made in that action to the effect that experts were unable to identify a link between the dumping and the Ivorian's various complaints. The defendant accepted the conclusions of the experts in the action by the Ivorians and withdrew the allegations and agreed to broadcast an apology for the allegations on Newsnight and publish the same on its website. (*Trafigura Limited v British Broadcasting Corporation, Unreported, QBD, 17 December 2009*).

### Statement in Open Court - False Allegations About Wrongfully Convicted Man's Guilt

The claimant, who had been wrongfully convicted and imprisoned for a murder he did not commit, brought libel proceedings against the defendant publisher for a series of articles which implied that despite the claimant's conviction being overturned there were still grounds to suspect him and that he was also stalking various women at the time the murder took place. The defendant accepted that there were no grounds for making the allegations and withdrew them, apologised to the claimant and agreed to pay him substantial damages and his legal costs. (*Barry George v News Group Newspapers Limited, Unreported, QBD, 16 December 2009*).

## Consultations & Reports

Government Response to the Consultation on the Proposed New Duties for Ofcom on Resilience: Secondary Information - <http://www.berr.gov.uk/files/file54105.pdf> (the Government's Consultation on legislative changes to Ofcom's duties, published on 15 September 2009, proposed additional powers for Ofcom to facilitate their assessment of resilience in the UK communications infrastructure. These proposals would help Ofcom to report on the UK communications infrastructure to Government every two years, building on commitments set out in the Digital Britain White Paper. The majority of the respondents were "broadly supportive of one or both of the proposed changes and acknowledged the value of electronic communication operators providing information on their risk assessments and emergency planning". The Government said its "intention is to take forward measures on enhancing the resilience of UK telecoms as part of the full package of security and resilience measures set out in

the Framework Directive of the Electronic Communications Framework Review. For that reason, the Digital Economy Bill does not contain requirements reflecting the issues proposed in the consultation. Deferring decisions in this area will provide more time to establish a system that strikes the right balance between the interests of UK and the interests of individual communication network providers. The Government believes that Ofcom can obtain sufficient information to make reasonable assessments of the resilience of UK networks and services in the intervening period before the implementation of the Framework legislation").

Government Consultation on Proposals for a Next Generation Fund - <http://www.berr.gov.uk/files/file54154.pdf> (following the Government's decision to create a Next Generation Fund funded through a landline duty of 50p per month on all fixed lines, the draft legislation for which was published following the Pre-Budget Report, it is now consulting on proposals to deploy the Next Generation Fund which would make available the necessary funds to roll-out next generation superfast broadband to at least 90% of UK homes and businesses by 2017 - it is now looking at issues such as whether this should be a National (UK-Wide) project, Regional or even sub-Regional? Which approach should be taken to the intervention? Which approach to deployment should be used - should Government intervene on the fringes of the market deployment and work out towards the areas that are virtually certain not to be served by the market in a reasonable period of time, or should deployment work inwards?).