

This is our summary of some of the key legal developments across a range of sectors for the week of 11 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

Spanish Government Approves New Anti-Piracy Measures

The Spanish Cabinet has reportedly approved a new anti-piracy law which empowers judges to ban websites that offer unauthorised downloads of movies, music and other forms of entertainment as part of a Sustainable Economy Law currently being drawn up by the Government. A draft version of the proposal was initially proposed in November 2009, but had to be revised after protests by Internet users and bloggers argued that the proposed law could be used to censor content on websites - under the proposed law, a newly formed Intellectual Property Commission will file complaints with a judge, who will then have to decide within four days whether or not a site should be pulled offline. The revised draft, however, needs approval from the Parliament before it can be brought into effect and there are reports that there are likely to be further protests about the current draft.

Digital Britain Bill Amendments

Proposed amendments to The Digital Britain Bill are currently being debated by the House of Lords and the amendments are already generating of interest and comment - of note is one amendment suggesting a new clause for the Copyright, Designs and Patents Act 1988 to protect search engines from liability for copyright infringement. It proposes that "Every provider of a publicly accessible website shall be presumed to give a standing and non-exclusive license to providers of search engine services to make a copy of some or all of the content of that website, for the purpose only of providing said search engine services ... A provider of search engine services who acts in accordance with this section shall not be liable for any breach of copyright ... ". In addition, a new clause is proposed for the Electronic Commerce (EC Directive) Regulations 2002, which relieves liability for hyperlinking so that where an information society service is provided which consists of the provision, creation or truncation of a hyperlink to content or activities provided by a recipient of the service, the service provider shall not be liable for damages of for any other pecuniary compensation or for any criminal sanction as a result of that storage where the service provider does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and the recipient of the service was not acting under the authority or control of the service provider. See <http://www.publications.parliament.uk/pa/ld200910/ldbills/001/amend/ml001-ii.htm> for the full list of current amendments to be moved in committee.

Support for Proposals to Introduce Maximum Civil Monetary Penalty for Data Protection Breaches

In November 2009, the Ministry of Justice (MoJ) opened a consultation on proposals to introduce a maximum civil monetary penalty of £500,000 for serious breaches of the Data Protection Act 1998. The Government said it believed that this amount would provide an effective deterrent for the large majority of data controllers. At the same time, the ICO consulted on its draft guidance, which addresses the circumstances in which the Commissioner would consider it appropriate to issue a monetary penalty notice and how he would determine the amount of the monetary penalty. There was "considerable support" from the majority of the respondents to give the Information Commissioner the power to impose a civil monetary penalty on data controllers who commit serious contraventions of the data protection principles as described in section 55A of the Act. The MoJ said "Most responses recognised the importance of personal data, the need to keep it secure, and the harm that could be caused to individuals if it is not adequately protected. Of the 52 responses, 27 supported the proposal that a penalty of up to £500,000 provides the Information Commissioner with a proportionate sanction for serious contraventions of the data protection principles. Of the remaining 25 responses, 8 considered that the proposed penalty was too low, and 9 considered that the maximum penalty was too high". See <http://www.justice.gov.uk/consultations/docs/civil-monetary-penalties-consultation-response.pdf> for details. The Government acted quickly to take the proposals forward by bringing forward the regulations to give the ICO the power to impose the penalties - the changes will come into force on 6 April 2010 - see http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100031_en.pdf for The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010, SI 2010/31 for details. (As a

means of highlighting the need to ensure that firms take their data protection responsibilities seriously, the Information Commissioner's Office (ICO) recently announced that it has found Bellgrange Mortgages and Insurance Services Ltd to be in breach of the Data Protection Act after clients' details were found in two waste bins intended for use by local residents. According to the ICO, the material included mortgage application forms, client bank account details and copies of documents used to verify client identity. A small number of the documents also contained medical information).

Tribunals System Reform Process - Information Tribunal and Gambling Appeals Tribunals Moved

A reminder that Part 1 of the Tribunals, Courts and Enforcement Act 2007, which established a new tribunal structure comprising the First-tier Tribunal and the Upper Tribunal will see the appeal functions of a number of existing tribunals, including the Information Tribunal in relation to the Data Protection Act 1998 and the Freedom of Information Act 2000 and the Gambling Appeals Tribunal, which hears claims against decisions made by the Gambling Commission, transferred and assigned to chambers within the new tribunals structure with effect from 18 January 2010. See http://www.tribunals.gov.uk/tribunals/Documents/Releases/PN_0210.pdf for the statement from the Tribunal Service and The Transfer of Tribunal Functions Order 2010, SI 2010/22, which effects the transfer to the new structure of various tribunal functions - http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100022_en.pdf.

Betting & Gaming

New Legislation - Annual Licence Fees for National Lottery

The National Lottery (Annual Licence Fees) Regulations 2010, SI 2020/17 come into force on 28 January 2010. The Regulations prescribe the sums payable as annual fees by the holder of a licence under sections 5 or 6 of the National Lottery etc Act 1993 (Camelot), to the National Lottery Commission. Fees are payable to the regulator, (the National Lottery Commission) and are held in the Consolidated Fund - Camelot will pay a first annual fee of £35,000, followed by an annual fee of £3,900. The purpose of charging licence fees is to recoup, in some measure, the costs incurred by the regulator in exercise of its functions under Part 1 of the 1993 Act, which relates to the authorisation and regulation of the National Lottery. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100017_en.pdf for details.

Law Commission Consults on Repeal of Private Lotteries Acts

Heard of the Million Lottery Tickets Act, Macklin's Lottery Act, the Pigot and Fisher Diamond Lottery Act, the Boydell's Lottery Act or the Bowyer's Lottery Act? Thought not. Given the fact that these local Acts are now spent as the purposes for which they were enacted (to enable specific lotteries to be undertaken so as to realise the value of art works or gem stones) were effected between 1711 and 1807, the Law Commission is consulting on their repeal - candidates for repeal are selected on the basis that they are no longer of "practical utility", usually because they no longer have any legal effect on technical grounds or because they are spent, unnecessary or obsolete. The Commission is also consulting on the repeal of the Pool Competitions Act 1971, which remained in force until 1987 with a limited remit, and escaped the repeal net of the Gambling Act 2005. See <http://www.lawcom.gov.uk/docs/lotteries.pdf> for details - the Consultation includes a discussion of the historical development of State-run and private lotteries, which began in England in 1567 and the background to the five lotteries which are the subject of the proposed repeals.

OFT Issues Proceedings For Unfair Practices in Scratch Card Promotions

The Office of Fair Trading (OFT) has issued High Court proceedings against a number of companies and individuals responsible for UK prize draw promotions in an attempt to prevent mailings and the distribution of scratch-cards which, the OFT says are misleading. The proceedings seek an injunction preventing unfair practices by the businesses, which promote various premium-rate prize draw scratch-cards that are distributed through inserts in magazines and newspapers, as well as direct mailings. The action is being taken under the Enterprise Act 2002 for breaches of the Consumer Protection from Unfair Trading Regulations 2008. According to the OFT, the promotions are legally unfair because they create the impression that the recipient has won a prize, which in fact cannot be claimed without incurring a cost, deceive consumers into believing they have been particularly fortunate to have been selected or to have won a prize and deceive consumers that a prize is of a high value and omit information, or provide ambiguous information, about the chances of winning, costs of claiming, and terms and conditions of the prize draw. (OFT Press Release 2/10, 11 January 2010 - see <http://www.oft.gov.uk/news/press/2010/02-10> for details).

ECJ Rules on Legality of Promotional Campaign for Lottery

The ECJ has ruled on a reference from the Bundesgerichtshof (The German Federal Court of Justice) for a preliminary ruling concerning the interpretation of Article 5(2) of Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market in the context of proceedings between the Zentrale zur Bekämpfung unlauteren Wettbewerbs eV, a German association founded to combat unfair competition and Plus Warenhandelsgesellschaft mbH, a German retail undertaking. The action related to the commercial practices of Plus, which were considered by Wettbewerbszentrale to be unfair. Plus had launched a promotional campaign in which the public was invited to purchase goods sold in its shops in order to collect points. By collecting 20 points, customers could take part, free of charge, in the draws held by the Deutscher Lottoblock (the national association of 16 lottery undertakings). The Wettbewerbszentrale applied for an injunction ordering Plus to put an end to that practice and the courts at first and second instance found against Plus, which then appealed on a point of law to the Bundesgerichtshof. The Bundesgerichtshof expressed doubts regarding the compatibility of Germany's national provisions with Directive 2005/29, in so far as those provisions provided for a general prohibition of combining a prize competition and lottery with the obligation to purchase goods. The ECJ ruled that the Directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a prohibition in principle, without taking account of the specific circumstances of individual cases, of commercial practices under which the participation of consumers in a prize competition or lottery is made conditional on the purchase of goods or the use of services. Promotional campaigns which enable consumers to take part free of charge in a lottery subject to their purchasing a certain quantity of goods or services constituted commercial acts which clearly formed part of an operator's commercial strategy and related directly to the promotion thereof and to its sales development. It followed therefore that they did constitute commercial practices within the meaning of the Directive 2005/29 and, consequently, came within its scope. (*Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*, Case C-304/08 - see <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&docj=docj&docnoj=docnoj&typeord=ALL&numaff=c-304%2F08&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&dom> for the judgment of the Court (First Chamber)).

Broadcasting

Commission Invites Comments on BBC Worldwide's Acquisition of Tower Productions GmbH

The European Commission has published in OJEC details about a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004, which will see BBC Worldwide Limited (United Kingdom), controlled by the British Broadcasting Corporation and All3Media Deutschland GmbH (Germany), controlled by Permira Holdings Limited, acquire joint control of the newly created company Tower Productions GmbH (Germany) by way of purchase of shares. Tower Productions is involved in the development, production and adaptation of programmes based among others on BBC Worldwide television formats for the German-speaking public. The Commission has invited interested third parties to submit their possible observations on the proposed operation to the Commission. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:005:0026:0026:EN:PDF> for the notice.

Policy Exchange Report Calls for "Radical Reform" of Public Service Broadcasting

The publication of the latest report by the Policy Exchange makes the case for the "radical reform" of public service broadcasting in the UK. The report opens with the acknowledgement that "the current UK broadcasting system which was set up in the 1950s is struggling to keep up with the extraordinary changes of the digital age" and that a "dramatic rethink" is required if public service broadcasting is to continue to deliver its stated benefits in an entirely new age. It notes that while the BBC has done well recently out of PSB, the commercial PSB channels have not fared so well - the pressure on the main commercial PSB networks has led to a 17% reduction in their spending on originated UK programming from 2006 to 2009 (a 25% reduction in real terms). The report gives four key reasons as to why the public value test framework is not working - at no stage are non BBC providers allowed to make proposals as to what they could do with similar levels of funding, nor are rival BBC departmental proposals assessed against each other by the Trust for their comparative impact on public value; the fact that the BBC Trust has ended up making joint submissions and responses to Government with BBC management when combined with the lack of contestability on decisions about new BBC services and funds allocation means that there is little effective testing of the BBC's ability to maximise public value in between licence fee settlements; the fact that the BBC is "an organisation that tries to maximise reach first and quality/distinctiveness second", undertaking value for money exercises which often focus on cost per viewer or listener hour rather than comparing cost with quality and distinctiveness delivered; and the lack of independent Market Impact Assessment in key areas such as new platform/delivery plans. The solutions, according to the report are to have the BBC focus its assessment of new and existing services on quality and differentiation rather than reach, abolish the BBC Trust and replace it with a

BBC Joint Board, introduce a level of contestability to BBC resource allocation, establish a Public Service Content Trust to promote PSB across all TV, radio and broadband and shift the responsibility for promoting universal access distribution and high levels of discoverability in the web 2.0 age to the regulatory body overseeing the BBC and commercial PSB (the PSC Trust) which would execute these duties through a special division - the Public Access Division (PAD). In addition, the report acknowledges that "across all of the commercial networks is increasingly unsustainable and unenforceable" and suggests the establishment of a more focused system, which would concentrate access privileges mainly on one of the commercial network operators and provide financial support to specific programming areas where either an alternative to the BBC is needed or where the commercial operator is perhaps better placed to achieve reach and impact than the BBC. It suggests permitting ITV1 and Five to opt out of the PSB system after 2012, relaxing the ownership and competition constraints in return for programme investment commitments and allowing Channel 4 to be privatised whilst at the same time retaining its PSB status, but with more access privileges. See http://www.policyexchange.org.uk/images/publications/pdfs/PSB_-_changing_channel_-_Publication.pdf for further details.

Broadcast Bulletin - Latest Issue

The latest edition of Ofcom's Broadcast Bulletin has been published, with details of adjudications on breaches of Rules 1.3 (children should be protected from unsuitable material by appropriate scheduling), 1.14 (the most offensive language must not be broadcast pre-watershed), 1.24 (adult-sex materials), 2.1 (generally accepted standards), 2.3 (material that may cause offence must be justified by the context), 9.9 (credits must be short branding statements), 10.2 (advertising and programming elements of services must be kept separate), 10.3 (products and services must not be promoted in programmes) and 10.4 (no undue prominence in programme to any product or service) of the Broadcasting Code; Ofcom also recorded a breach of Licence Condition 11 (retention and production of recordings). See http://www.ofcom.org.uk/tv/obb/prog_cb/obb149/Issue149.pdf for details.

Article - Marketing Broadcasting Rights to Italian Football Matches and Abuse of Dominant Position

The latest Entertainment Law Review has published an interesting article, which looks at the Italian Competition Authority's pending investigation into alleged abuse of dominant position by the football governing body, Lega Calcio in connection with the collective marketing of broadcasting rights to football matches. The article noted that the main concern, reflected at European Commission level, was that "the collective sale of audiovisual rights to sporting events reduces or excludes competition in the television market, as the right to transmit such content plays a vital role in competition between broadcasters, in terms of both advertising revenue and the sale of pay-television services". (*"Abuse of dominance in sale of audiovisual football rights?" (2010) 21(1) Ent LR 73 - the article is available via Westlaw*).

Corporate

Commission's Study on Member States' Monitoring and Enforcement Practices in Corporate Governance

The European Commission has published the results of the independent study it commissioned into the monitoring and enforcement practices in corporate governance in the EU Member States. The study provides an overview of the various monitoring and enforcement mechanisms in the Member States concerning corporate governance rules that are laid down in codes of corporate governance. It assessed the level of compliance of companies with the provisions of their corporate governance codes and examined the availability and quality of explanations for deviations from these codes. It concluded that there is "overwhelming support" among regulators, companies and investors for the "comply or explain" approach to corporate governance principles (and in particular noted the Commission's preference for this approach through its adoption in Commission Directive (EC) 2006/46, which mandated the application of corporate governance codes by way of "comply or explain"). Although Directive 2006/46/EC has been transposed in the majority of EU Member States (the exceptions being Belgium, Greece, and Malta) the study noted that as the Member States have used different legal instruments (law, securities regulation, codes) to implement the requirement to publish a corporate governance statement, this in itself can be a source of difficulty in the case of cross-border listing situations, whereby a company might find itself bound to comply either with several different codes or with none at all. It noted that although the comply-or-explain approach is considered to be an appropriate and efficient regulatory tool by a large majority of market actors and regulators, there is also wide consensus that the mechanism does not function perfectly and it made a number of recommendations to improve its application. See http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf for details.

Litigation

Lord Justice Jackson's Review of Civil Litigation Costs Published

The much-anticipated (and lengthy) report by the Right Honourable Lord Justice Jackson on civil litigation costs has been published. The report is wide-ranging in its review of the rules and principles governing the costs of civil litigation the recommendations it makes in order to promote access to justice at proportionate cost. Of particular interest are its "major recommendations" in respect of access for defamation and libel. Here, the report opens with an acknowledgment that "There is currently much debate in progress about the substantive law of libel and whether the law strikes the right balance between free speech and reputation", which was not relevant to the issue of access and cost. Jackson recommended that, "success fees and after-the-event (ATE) insurance premiums should cease to be recoverable" but said further that if this step is taken, "other measures" must be put in place in order to ensure that claimants have access to justice. These measures include increasing the ceiling for the level of damages for defamation and breaches of privacy by 10% as from the date when CFA success fees cease to be recoverable (the recommendation was also made that general damages for personal injuries should be increased by 10%) and that success fees should continue to be a proportion of base costs, but should be borne by the claimant and the level of success fee should be a matter for negotiation between the claimant and his lawyers at the start of the case (the point was made that claimants in these cases (unlike personal injury claimants) do not need to devote any part of their damages to future care. Their main remedy is vindication by the judgment of the court or the statement in court after settlement and Jackson said he saw no reason why such claimants should not be prepared to pay a "substantial proportion" of the damages to their lawyers as success fees). The report then said, "a regime of qualified one way costs shifting would be a better and less expensive means of achieving the intended social objective" and proposed the same regime for defamation and breach of privacy cases as was proposed for personal injury and judicial review cases, namely one that is modelled upon section 11(1) of the Access to Justice Act 1999, which would require a new provision in the CPR to provide that "Costs ordered against the claimant in any claim for defamation or breach of privacy shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including: (a) the financial resources of all the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate". This proposed amendment does acknowledge, "One important issue in defamation and breach of privacy claims is the seriousness of the subject matter. Some libellous statements (eg a false allegation of paedophilia) are more serious than others. Some invasions of privacy (eg as in the Mosley case) are more distressing than others. These matters fall within the phrase "all the circumstances"". On the question of the effectiveness of the Pre-Action Protocol, Jackson said that it was "generally beneficial" and tended to produce early settlements however he recommended that it be amended to ensure that the language should be strengthened to require the claimant to state in the Letter of Claim the meaning(s) being attributed to the words complained of. The point was made that if the claimant is not required to do this, much of the benefit of the (expensive) protocol procedures is lost. Finally, Jackson said "If costs are now regarded as a serious impediment to access to justice in the field of defamation, then there is an argument for saying that all trials should be by judge alone. At this stage I do not go that far. Instead, I recommend that, after proper consultation, the question whether to retain trial by jury in defamation cases be reconsidered". See http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf for the report.

Music

Oink's Creator Cleared of Conspiracy to Defraud in Jury Trial

Alan Ellis, the creator of Oink, the first person in the UK to be charged with illegal file sharing, has been acquitted of conspiracy to defraud the music industry following a jury trial at the Teesside Crown Court. Ellis had denied running a music piracy site, helping its private members to share free, sometimes pre-release, music illegally over the Internet. Ellis said that he had launched the site in 2004 during his software engineering degree to further his IT skills and job prospects. Oink held no music itself but allowed users to find each other and share music files. At the time of its closure, the website had about 200,000 members, users had downloaded 21 million files and paid US\$288,545 to the site's creator in donations. The invitation-only site had been closed in 2007, following a joint investigation by British and Dutch police, working in collaboration with the BPI and IFPI. While four prolific users of the community were previously successfully prosecuted for simple copyright crimes, Ellis was tried for the more serious offence of conspiracy to defraud. The prosecution had sought to argue that Ellis' actions constituted a criminal conspiracy to operate a pirate music-sharing website that facilitated the sharing of copyrighted music and that the website was specifically designed for that purpose - the jury disagreed. Commentators have already questioned the decision of the prosecution to try the accused for conspiracy to defraud rather than authorising copyright infringement.

Publishing

Reminder - Offences of Sedition, Seditious Libel, Obscene Libel and Defamatory Libel No Longer Exist

With the coming into force on 12 January 2010 of section 73 of the Coroners and Justice 2009, the old common law offences of sedition, seditious libel, obscene libel and defamatory libel no longer exist. Sedition and seditious and defamatory libel were described as "arcane offences from a bygone era when freedom of expression wasn't seen as the right it is today" by the Justice Minister and criminal libel, which had originally covered four distinct categories of libel (obscene, blasphemous, defamatory and seditious) now sees obscene material being dealt with by the Obscene Publications Acts of 1959 and 1964 while blasphemous libel was abolished in England and Wales by section 79 of the Criminal Justice and Immigration Act 2008.

PCC Dismisses Clause 3 Complaints and Restates Public Interest Justification Grounds

The Press Complaints Commission (PCC) has rejected two separate privacy complaints under Clause 3 (Privacy) of the Editors' Code of Practice on the grounds that there was sufficient public interest in each case to justify the articles publication. The PCC said while individual privacy rights remain of paramount importance, these cases demonstrated that in some circumstances, a strong public interest can justify publication - in the first case, which involved a complaint by a local radio presenter who had been suspended after sending "suggestive" emails to a female listener, the PCC said that the "allegations about inappropriate behaviour" in this sort of professional context could be justified in the public interest; in the second case, which involved an article about the dismissal of a local official, the PCC said there was justification for the details the article had included about the complainant's substantial termination payment and health. (*Mr Mark Thorburn v Sunday Sun*, Report 80, Adjudication issued 18/12/09 - see <http://www.pcc.org.uk/cases/adjudicated.html?article=NjE0OA==?oxid=721247d602a040f745e3efc0dbc8186b> and *Sean Little v Darlington & Stockton Times*, Report 80, Adjudication issued 18/12/09 - see <http://www.pcc.org.uk/cases/adjudicated.html?article=NjE0OQ==?>).

Consultations & Reports

Ofcom Report - The Communications Market: Digital Progress Report - Digital TV, Q3 2009 - http://www.ofcom.org.uk/research/tv/reports/dtv/dtv_2009_q3/dtv_2009_q3.pdf (Ofcom's 24th Digital Progress Report covers developments in multi-channel television, including quarterly take-up figures derived from consumer research, subscriber figures reported by platform operators and device sales data).

Ofcom Report - Media Literacy e-Bulletin, December 2009 - http://www.ofcom.org.uk/advice/media_literacy/medlitpub/bulletins/issue28/mlb_issue28.pdf (Ofcom's monthly bulletin summarising the latest news and developments in media literacy).

Ofcom Report - Television Broadcast Licensing Update, December 2009 - <http://www.ofcom.org.uk/tv/ifi/tvlicensing/tvupdates/monthly/200912> (details about the television services that have been licensed, ceased to be licensed (handed back or revoked) or transferred and service name changes in December 2009).