

This is our summary of some of the key legal developments across a range of sectors for the week of 1 February 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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The claimant was a management company that represented and consulted for music, sporting, film and television talent (although the court described the precise nature of the business as being "rather obscure"). The defendant was a professional football player who, at the time the dispute arose, was contracted to Newcastle. The defendant had also agreed an image rights contract with Newcastle United in relation to the use of his image rights. The claimant gave the defendant a letter relating to "image rights advice" which they claimed to have given him about the exploitation of his image rights, in consideration for which the defendant was to pay the claimant an agreed sum. The defendant signed the agreement letter however, a dispute subsequently arose relating to the payment of an outstanding amount due under the letter - the defendant denied that the contents of the letter reflected reality, and further denied that the letter constituted a valid contract between the parties. The main issue was whether, as a matter of construction, in the light of the background against which the defendant had come to sign it, the defendant had agreed to pay to the claimant the amount of £299,167, plus VAT, in respect of the services which had been provided and were to be provided in the future concerning the defendant's image rights. The court ruled on all the evidence that the agreement letter sued upon was unenforceable for want of consideration. It followed that the defendant had never agreed to pay the claimant a commission of 20% on all sums received by the defendant under his various sponsorship contracts. (*NVA Management Ltd v Martin* [2010] EWHC 80 (QB) - the judgment is available via LexisNexis).

Commission Opens Infringement Proceedings Against French Telecoms Tax

The European Commission has announced that it has opened infringement procedures against France relating to the "telecoms tax" on the turnover of telecommunications operators in connection with their licence to provide telecoms services (including Internet and mobile phone services). The tax was introduced by means of Law No 2009-258 of 5 March 2009 on audiovisual communication and the new public television service - the tax is payable by telecommunications operators which, in accordance with the French Telecoms Law, provide a service in France and have been the subject of a prior declaration to the French telecoms regulatory authority. The Commission said it has taken the view that this tax, which was introduced to offset the ending of advertising on public TV channels, constitutes an administrative charge that is incompatible with European law (Article 12 of the Licensing Directive 2002/20/EC, lays down precise rules relating to the administrative charges that Member States can levy on businesses providing a telecommunications service or network). The French Government has two months to reply to the letter of formal notice. (*EC Press Release IP/10/67, 28 January 2010 - according to reports, France currently raises €400 million in revenue from the levy*).

OFT Market Study to Consider Consumer Contract Issues

The Office of Fair Trading (OFT) has announced that it has begun a market study to "examine when, how and why contracts may cause difficulties for consumers". The OFT has said it wants to update its understanding of why some contracts sometimes do not work well for consumers and will then consider "practical remedies aimed at making markets work better". It will look in detail at the range of difficulties that consumers experience with contracts, the terms, features or types of contract with which consumers have particular difficulties, including exploring problems that arise both in the small print and upfront terms, factors affecting consumers' difficulties with contracts such as the difference between contracts completed face-to-face and online etc and how different organisations use different contracts. The OFT said it expects to complete the study in Winter 2010. (*OFT Press Release 10/10, 4 February 2010*).

Australian Federal Court Rules on ISP Liability for Authorising Infringement of Copyright for Downloading

The Federal Court of Australia has given its ruling on the question whether an Internet Service Provider or ISP authorises the infringement of copyright of its users or subscribers when they download cinematograph films in a manner which infringes copyright (the defendant, iiNet had allegedly allowed 100,000 illegal film, TV and music downloads through BitTorrent to occur during a specified 59 week period). Under the terms of Australian copyright law, a person who authorises the infringement of copyright is treated as if they themselves had infringed copyright directly. The Federal Court said that, as far as it was aware the trial, involving a suit against an ISP and claiming copyright infringement on its part due to its alleged authorisation of the copyright infringement of its users or subscribers, was the first trial of its kind in the world to proceed to hearing and judgment (it was also subject to extensive following and comment on Twitter, a fact which was also acknowledged by the court). The 34 applicants

who instituted the claim constituted the major motion picture studios in both Australia and the United States. They brought proceedings against iiNet, which is the third largest ISP in Australia and the judge summarised the case thus - the "critical issue in this proceeding was whether iiNet, by failing to take any steps to stop infringing conduct, authorised the copyright infringement of certain iiNet users". The first step in making a finding of authorisation was to determine whether certain iiNet users infringed copyright. The court found that they had. The next question was whether iiNet had authorised those infringements. Here the judge said, "While I find that iiNet had knowledge of infringements occurring, and did not act to stop them, such findings do not necessitate a finding of authorisation. I find that iiNet did not authorise the infringements of copyright of the iiNet users" - the specific reasons given for this were first, because the copyright infringements occurred directly as a result of the use of the BitTorrent system, not the use of the internet, and the respondent did not create and does not control the BitTorrent system; second, because the respondent did not have a relevant power to prevent those infringements occurring; and third, because the respondent did not sanction, approve or countenance copyright infringement. Of significance were the comments by the court, recognising that the results of the proceedings will "disappoint" the applicants - it said, "The evidence establishes that copyright infringement of the applicants' films is occurring on a large scale, and I infer that such infringements are occurring worldwide. However, such fact does not necessitate or compel, and can never necessitate or compel, a finding of authorisation, merely because it is felt that 'something must be done' to stop the infringements. An ISP such as iiNet provides a legitimate communication facility which is neither intended nor designed to infringe copyright. It is only by means of the application of the BitTorrent system that copyright infringements are enabled, although it must be recognised that the BitTorrent system can be used for legitimate purposes as well. iiNet is not responsible if an iiNet user chooses to make use of that system to bring about copyright infringement". Commentators are already describing the ruling as a "major victory" for ISPs. (*Roadshow Films Pty Ltd v iiNet Limited (No 3) [2010] FCA 24* - see <http://www.austlii.edu.au/au/cases/cth/FCA/2010/24.html> for the judgment, which is lengthy, detailed and very well organised - it gives detailed consideration to all relevant case law, not just Australian - at the same time the judgment was made, a report by BitTorrent noted that according to a survey conducted at the Princeton Center for Information Technology Policy "Only 1% of files distributed using a popular version of the BitTorrent peer-to-peer file sharing protocol do not infringe copyright" - based on the criteria applied, all 476 television and film files and all 98 music files in the sample were classified as being "likely to infringe rights holders' copyright").

Betting & Gaming

Sports Betting Integrity Panel's Report and Recommendations

The Gambling Commission has welcomed the publication of the report by the Sports Betting Integrity Panel, which had been commissioned by the Minister for Sport to look at a "wide range" of issues relating to sports betting integrity (see the Need to Know of 22 June 2009 for details) with a main focus on "the design and implementation of an integrated strategy to uphold integrity in sports and associated betting". The Report found that in recent years a number of sports (notably horse racing, cricket and tennis) have experienced problems associated with betting. In each case recommended solutions included three key elements - the adoption of robust rules and disciplinary procedures; the implementation of a comprehensive education programme for all participants; and the creation of an integrity unit with the capability to gather and analyse intelligence. One of the principal recommendations of the Panel was the creation of a pan-sports integrity unit, whose role will be to "ensure the efficient handling of intelligence followed by an effective investigation process and, where appropriate, leading to disciplinary action under sports' rules or criminal prosecution" - it was suggested that this unit be established within Gambling Commission, "because it has significant powers of enquiry, it is empowered to prosecute offences of cheating and void bets and betting operators are obliged to report suspicious betting activity to them under their licence conditions". It also suggested that the definition of cheating in the Gambling Act 2005 be reviewed and, if appropriate, given greater clarity. However, the Panel put forward a significant number of other recommendations, which it said should be applied as a co-ordinated package by Government, sporting bodies, the betting industry and the Gambling Commission and other statutory authorities in order to be effective. See http://www.culture.gov.uk/images/publications/reports_sports_betting_integrity_panel.pdf for details. Commentators have already noted that if accepted, the panel's proposals should make it easier for the Gambling Commission to bring prosecutions for betting crime. On a separate note, the European Sports Security Association (ESSA), which is the early-warning system that alerts sport federations about suspicious betting patterns, has announced that following an investigation of all betting activity among its 13 members over the course of 2009, it had identified "unusual betting patterns" in a total of 45 sporting events, of which only one proved to be suspicious. (*ESSA Press Release, 4 February 2010*).

Product Placement Opportunities Reduced to Protect the Public

In November last year, the possibility of increasing the opportunities for broadcasters and producers to feature products and services on programmes shown in the UK was raised when the DCMS consulted, as part of its work on implementing the EU's Audiovisual Media Services Directive, on relaxing the current rules so as to allow for the first time in the UK product placement in programmes made to be shown in the UK. At that stage, the Government said that it was "minded to permit product placement on UK television, subject to safeguards" but warned that it remained "concerned in particular about the potential health issues associated with the promotion of particular types of goods by means of product placement". Gambling services were one of the types of products which was singled out (together with alcohol and HFSS (high in fat, sugar or salt) foods) as being of particular concern, although at that stage the Government was still apparently willing to consider whether restrictions might be appropriate should product placement of these services be permitted. It seems however that the Government was not alone in its concerns - The British Medical Association (BMA) subsequently said it was "deeply concerned about the decision to allow any form of product placement in relation to alcohol, gambling and foods high in fat, sugar or salt as this will reduce the protection of young people from harmful marketing influences and adversely impact on public health" and that the proposals would allow "marketing to be integrated into programmes, blurring the distinction between advertising and editorial". The BMA also said that studies showed that "children are particularly susceptible to embedded brand messages and these operate at a subconscious level". The Secretary of State for Health, Andy Burnham, Secretary of State for Environment, Food and Rural Affairs, Hilary Benn and Secretary of State for Children, Schools and Families, Ed Balls apparently shared similar concerns and according to reports lobbied against "aspects of the proposals" resulting in the latest announcement by the Secretary of State for Culture, Media & Sport that he was proposing to "ban product placement in the following areas: alcoholic drinks, HFSS [high in fat, sugar or salt] food, gambling, smoking accessories, over-the-counter medicines and baby food". It is now likely that product placement will proceed but without the controversial inclusions or "nasties" as they have been described by some commentators.

Appeal Against Dismissal of Claim for Breach of Contract for EPG Services

The appellant television shopping channel provider JML appealed the decision to dismiss its claim for breach of contract against the respondent digital TV service provider Freesat in respect of the EPG services which Freesat provided. JML had applied to have two of its shopping channels included on the Freesat platform from the date of its launch in 2008 and in February 2008 it entered into a contract with Freesat for the provision of specified EPG services in accordance with Freesat's published Listing Policy - the channels were placed in tenth and eleventh positions in the list of shopping channels and neither appeared on the first screen page of the shopping genre listing. That gave rise to a dispute between JML and Freesat over the way in which channels had been allocated their positions. The appellant sought to argue, amongst other things, that Ofcom's Code's requirement, which required EPG providers to comply with an objectively justifiable method of allocating channel numbers, did not allow such a vague criterion as viewer convenience and expectations, and it required Freesat to publish in the listings policy all the factors on which its decision would be based and not to have regard to any other factors. The Court of Appeal started by noting that the claim in this case lay in private, not public law. The task facing the court was to decide what the contract meant and whether it had been broken. The EPG Agreement made it clear that Freesat was entitled to allocate channels at its discretion in accordance with the Listing Policy. The court agreed with the judge that the parties agreed that Freesat should have the right to exercise its own judgment in the matter, subject only to compliance with the Listing Policy and the implied obligation not to act in an arbitrary, irrational or capricious manner. It noted the Code itself imposed only broad constraints, leaving it to the individual platform to decide how to implement its published method of allocation and agreed with the judge, that it allowed Freesat to assess viewer convenience and expectations by any rational method available to it. JML could not establish breach of contract because it could not show that the decision had been affected by an irrational factor and the appeal was dismissed. (*JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2010/34.html> for the judgment).

Ofcom Consents to BBC Exclusive Coverage of Six Nations Tournament

Ofcom has advised that the BBC has applied for consent to broadcast exclusive live coverage of the Six Nations tournament on BBC One and BBC Two in February 2010 "as a consequence of Setanta going into administration". The tournament is a Group B Listed Event. The rights to broadcast highlights of the event had been acquired by Setanta, with the BBC Radio 5 Live providing live commentary. Ofcom noted that in the circumstances, it would have automatically given consent to the BBC to broadcast live TV coverage of the tournament. However, as

Setanta's licence to broadcast highlights of the Six Nations has since been terminated by the rights holder (the rights holder was unable to secure a replacement for Setanta as the category B broadcaster for this event) Ofcom announced that it due to the "exceptional circumstances", and as the BBC is still airing the live event on a free to air basis, it has given its consent to the BBC coverage.

BBC Trust Publishes NAO's Report on Management of Coverage of Major Events

The BBC Trust's Finance and Compliance Committee has published details of the an study it commissioned by the National Audit Office (NAO) into the BBC's management of its coverage of six major sporting and music events which took place in 2008 (in 2008/09, the BBC spent £246 million on procuring rights to broadcast sporting and music events and £111 million on coverage of those events - across the six events the NAO examined the BBC broadcast over 2,000 hours of television and radio coverage, supplemented by online and interactive coverage and between four and 47 million people watched the BBC's coverage of the events). The NAO review looked at the effectiveness of the BBC's management of its coverage the events, once the decision to cover the event had been taken. The report found that five of the six events finished under budget or no more than 1% over budget (with the sixth being 5% over budget). However, the NAO recommended that the BBC improves the way it commissions coverage of events and evaluates them post-broadcast - the Trust said it will now require the BBC Executive to provide a comprehensive action plan outlining how it intends to implement the NAO's recommendations. The Report did note that the events audited only represented part of the BBC's offering in music and sport and the BBC Executive was said to particularly welcome the NAO's recognition of the value that is delivered to audiences from them. See http://www.bbc.co.uk/bbctrust/assets/files/pdf/review_report_research/vfm/major_events.pdf for details.

Corporate

Draft Principles of Best Practice for Proxy Voting and Corporate Governance Advisers

The Pensions Investment Research Consultants (PIRC) has published guidance on the principles of best practice for proxy voting and corporate governance advisers. PIRC said that in response to the financial crisis there has been a much greater focus on the roles and responsibility of institutional shareowners and that these shareholders "are increasingly expected to demonstrate real transparency and accountability in respect of their ownership activity". PIRC's principles of best practice for proxy voting and corporate governance are intended to be a framework of responsible behaviour for voting advisory services and PIRC said they hope they will be the starting point for a debate on the role of proxy voting advisors and the type of openness and accountability they should exhibit. See http://www.pirc.co.uk/publications/Principles_of_Best_Practice.pdf for details.

Music

Live Music Bill - Order of Commitment Discharged

The Live Music Bill, which has been the subject of debate in the House of Lords has now reached the Committee stage with no further amendments being made. The Bill therefore received its Order of Commitment Discharged. The Bill is expected to have its Third Reading before the Lords next week - final amendments can be made at that stage, before it passes to the House of Commons.

Publishing

Lifting of Injunction - Grounds for Injunction and Relevance of Reputation, Private Life and Free Speech

Given the huge amounts of publicity that has resulted in the lifting of the injunction after the ruling in this matter, it might seem a little odd to be going back to the judgment however, the ruling in the application for an interim injunction raised important "issues as to how the court is at the same time to act compatibly with rights under each of Arts 6, 8 and 10 of ECHR, and to give effect to corresponding common law principles, from which those rights are derived". These related to "open justice, to the right to a fair hearing, to the right to private life and to reputation, and to the right to speak freely". The court decided that at "the nub of this application" to renew the earlier injunction prohibiting the publication of information relating to a relationship between the applicant and "another person" (who was named) was "a desire to protect what is in substance reputation". It was accepted that the information sought to be protected was not in the public domain in the sense that there was nothing left to be protected but the court said "the evidence is that there has been wide circulation amongst those involved in the sport in question, including agents and others, and not just amongst those directly engaged in the sport. If the injunction ought otherwise be granted, I would not refuse it on this basis. But the fact that the information has become as widely available to so many people, means that an injunction is less necessary or proportionate than

would otherwise be the case". The court had noted "This claim is essentially a business matter for LNS. That is why the assembling of the evidence has been put into the hands of the business partners and not of the solicitors. My present view is that the real basis for the concern of LNS is likely to be the impact of any adverse publicity upon the business of earning sponsorship and similar income" (the applicant's sponsors include Umbro, Samsung and Nationwide) and acknowledged that "High-profile sponsors are sensitive to the reputation of the sports professionals to whom they pay large sponsorship fees. They may cease to use a famous face if it is associated with behaviour of which the sponsor or the public may -disapprove". The court said "Further, if (as I think likely) the real concern of the applicant in this case is the effect of publication upon the sponsorship business, then damages would be an adequate remedy if LNS succeeds at trial". (*LNS v Persons Unknown* [2010] EWHC 119 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/119.html> for the judgment - the ruling has generated significant comment (not only of the salacious gossip variety) and one report quoted a MoJ spokesman who said that "The government is consulting the media and the judiciary after becoming 'very concerned' that super-injunctions ... are being used too often").

Refusal of Request for Local Paper to be Released from Independent Editorial Board Requirement

The Secretary of State for Business, Innovation and Skills has published details regarding the reasons behind the decision to refuse a request by Northcliffe, a subsidiary of the Daily Mail and General Trust (DMGT) and the owner of the Nottingham Evening Post, to be released from the requirement to have an independent editorial board for the newspaper. This condition had been imposed by the Secretary of State for Trade and Industry following DMGT's acquisition of the newspaper in 1994. The desire to protect the NEP editor's independence reflected a concern that, with Northcliffe already owning a number of other local titles in the East Midlands area, there was a risk that the range of views expressed on local matters might be reduced were those titles to adopt similar editorial positions. The Secretary of State concluded there remained a valid reason for Northcliffe retaining its editorial independence - the point was made that "The interest of ensuring people have access to a sufficiently wide range of views and opinions on both local and national matters and preventing too much influence becoming concentrated in too few hands remain legitimate concerns for the Government". See <http://www.berr.gov.uk/files/file54344.pdf> for details.

Sport

New Legislation - World Cup Spectators Control Order

The Football Spectators (2010 World Cup Control Period) Order 2010, SI 2010/130 comes into force on 22 February 2010. The Order describes the control period under the Football Spectators Act 1989 for the 2010 FIFA World Cup in South Africa, which begins on 1 June 2010 (ten days before the first match in the tournament), and ends when the last match in the tournament is finished or cancelled (the last match is due to be played on 11 July 2010). During the prescribed control period, powers under sections 21A and 21B of the Football Spectators Act 1989 (which provide summary powers to detain and refer to a court with a view to making a banning order) become exercisable and an individual who is the subject of a banning order may be required to surrender his passport. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100130_en.pdf for details.

Consultations & Reports

Ofcom Report - Television Broadcast Licensing Update, January 2010 - <http://www.ofcom.org.uk/tv/ifi/tvlicensing/tvupdates/monthly/201001> (update provides details about the television services licensed, ceased to be licensed (revoked or handed back), transferred or which had their names changed in January 2010).

Ofcom Bulletin - Media Literacy e-Bulletin, January 2010 - http://www.ofcom.org.uk/advice/media_literacy/medlitpub/bulletins/issue29/mlb_issue29.pdf (Ofcom's latest media literacy e-Bulletin includes details about new initiatives, schemes and resources available to support and encourage the development of media literacy and includes details about the BBC's media literacy plans for 2010).