

This is our summary of some of the key legal developments across a range of sectors for the week of 1 March 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](#).

Speed Read

General

Commission Concerns About ACTA Negotiations and Three-Strike Rule?

Digital Britain Bill - Progress Report

EU Council Adopts Resolution on Enforcing IP Rights

PhonepayPlus Levy Rate Set for 2010/11

Corporate

Transfer of Shares by Mistake - Unfair Prejudice and Remedy

FSA Revises Framework for Setting Financial Penalties

ICSA Consults on Review of Higgs Guidance

Litigation

MoJ Update on Consultation on Controlling Costs in Defamation Proceedings

Publishing

Government Announces Changes to "30 Year Rule" for Public Records

IFJ Report on PCC Phone Tapping Investigation Calls into Question Effectiveness of Self Regulation

Balancing Competing Private Rights with Right to Freedom of Expression

Technology

Commission Welcomes Microsoft's Commitment to Browser Choice

"Bill Shock" Element of Roaming Regulation Comes into Force

Delivering the Commitment to Next Generation Broadband Across the UK

Consultations & Reports

Commission Concerns About ACTA Negotiations and Three-Strike Rule?

Last week's Need to Know referred to the Opinion by the EDSA outlining its concerns about ACTA's compatibility with EU Data Protection Regime and particularly the impact of imposing obligations on Internet Services Providers to adopt three strikes Internet disconnection policies. EDSA is not alone in its concerns - a spokesman for the European Commissioner for Trade has confirmed the Commission's concerns saying "We are not supporting and will not accept that an eventual ACTA agreement creates an obligation to disconnect people from the Internet because of illegal downloads". EuroISPA, which represents over 1,700 European Internet Service Providers, had previously called on the European trade negotiators not to sign any trade deal which threatened the openness of the Internet. ACTA is currently being negotiated by the trade representatives from a number of countries - the seventh round of the negotiations took place in January and involved Australia, Canada, the European Union, Japan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, and the United States and one of the issues discussed was "enforcement in the digital environment" (ie, the Internet). According to reports, the next round will take place in mid April and the parties have agreed tentatively at the next round, to detailed discussions about the Internet, civil, customs and penal measures. It is possible that more details will emerge after the April negotiations as the discussion paper from the January session seemed to indicate that the parties were aware of the concerns regarding the issues discussed in the last two rounds and wanted "to add a rebuttal of the main unjustified rumours circulating about ACTA (control of laptops, iPods at the border; compulsory "three-strike rule" for internet infringers, etc.)". However, the paper said there was no agreement yet on the release of negotiating texts.

Digital Britain Bill - Progress Report

News on the current status of the Digital Britain Bill, which is presently before the House of Lords Committee, indicates that the controversial Clause 17, which would have allowed the Secretary of State to intervene at a future date to ramp up measures against online pirates, has been replaced by a new Clause 17, which proposes inserting a new section into the CDPA to prevent access to specified online locations for the prevention of online copyright infringement. The relevant amendment (Amendment 120A) allows network level blocking and, according to the peer, will still tackle non-P2P infringement but will avoid the "blanket nature" of Clause 17. The new clause permits the High Court to grant an injunction requiring ISPs to block access to sites where there is a "substantial proportion" of the content accessible at or via each specified online location which infringes copyright. The injunction would be granted only where rights holders had first requested ISPs to block access to the site and when they had also requested the site operator to stop providing access to the infringing material. However, reports indicate that the ISPA is concerned that the amendment is weighted in favour of rights holders and would result in ISPs blocking access once they have received notices because they would not want the risk of litigation and other commentators have questioned whether the amendment could follow in the footsteps of the United States' controversial Digital Millennium Copyright Act, which has been accused of encouraging companies to file spurious copyright claims in order to block material. . The Bill goes to the Third Report stage in the Lords on 8 March, prior to its Third Reading and then faces the Commons where further changes may be expected. Given the concerns that have already been raised about this latest amendment it is certainly possible that this clause will be the subject of further debate.

EU Council Adopts Resolution on Enforcing IP Rights

The Council of the European Union has adopted a Resolution on the enforcement of intellectual property rights in the internal market in which they note the importance of public awareness in relation to the impact of counterfeiting and piracy on society and on the economy, in particular the potential danger of counterfeits and pirated products for health and safety as well as for European competitiveness, creation, innovation and jobs and call on Member States to "develop national anti-counterfeiting and anti-piracy strategies and to establish transparent co-ordination structures in this field". The Resolution invites the Commission to analyse the application of Directive 2004/48/EC on the enforcement of IP rights, including an assessment of the effectiveness of the measures taken, and, if necessary, propose appropriate amendments to ensure a better protection of intellectual property rights and asks it to analyse the opportunity of submitting an amended proposal for a Directive on criminal measures aimed at combating counterfeiting and piracy. See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/intm/113098.pdf for details.

PhonepayPlus Levy Rate Set for 2010/11

Following consultation with industry and approval from Ofcom, PhonepayPlus' budget for 2010/11 will be reduced by 3%. As a result of the budget reduction, PhonepayPlus has announced that its levy for 2010/11 will be 0.21%. This levy applies to all outpayments payable by network operators to service providers in respect of revenue generated by premium rate services and is calculated as a proportion of every outpayment to ensure that PhonepayPlus continues to receive adequate funding to carry out its activities, as required by section 121 of the Communications Act 2003. PhonepayPlus said that the levy rate is a substantially down on last year's rate of 0.48% and that this is a result of its success in collecting the fines which have been imposed for breaches of breach of the PhonepayPlus Code of Practice (however, it did note that it did not expect this level of fine income to continue).

Corporate

Transfer of Shares by Mistake - Unfair Prejudice and Remedy

A "sad" case involving successive litigation between feuding brothers has come before the High Court in the form of a petition under the unfair prejudice provision in section 994 of the Companies Act 2006 whereby the petitioner sought an order for the purchase of the petitioner's shares in the third respondent company or alternatively an order that the company be wound up under section 122(1)(g) of the Insolvency Act 1986. In earlier proceedings in 2005 a petition seeking an order for one brother to sell his shares to another brother was dismissed however, the petitioner now sought to argue that he had been excluded from company so as to amount to unfair prejudice and claimed that he had actually transferred the shares to the defendant by mistake or as a result of misrepresentation. At issue for the court was whether the petitioner's interests had been unfairly prejudiced and whether the share transaction had been entered into as a result of a mistake or misrepresentation. The court noted as the family company was a quasi-partnership with characteristics which, on principles of equity, engaged obligations that were common to partnership relations, it had been unjust or unfair to exclude a member from participation in its management without an offer to buy the minority shareholder's shares or make some other fair arrangement. The court found, on the facts, that the petitioner had suffered unfair prejudice within the terms of section 994 and, accordingly, it was appropriate to grant a remedy in terms of a purchase of his shareholding pursuant to section 996 of that Act. (*Shah v Shah [2010] EWHC 313 (Ch)* - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/313.html> for the judgment).

FSA Revises Framework for Setting Financial Penalties

The Financial Services Authority (FSA) has published its new financial penalties policy, which it says establishes a "consistent and more transparent framework for the calculation of financial penalties", and which could result in enforcement fines trebling in size. Under the new framework, fines will be linked more closely to income and be based on up to 20% of a firm's revenue from the product or business area linked to the breach over the relevant period, up to 40% of an individual's salary and benefits (including bonuses) from their job relating to the breach in non-market abuse cases or take a minimum starting point of £100,000 for individuals in serious market abuse cases. The FSA said the new framework was based on the three principles of disgorgement, discipline and deterrence and will be applied as a result of the following process - removal any profits made from the misconduct; setting a figure to reflect the seriousness of the breach; consideration being give to any aggravating and mitigating factors; achievement of the appropriate deterrent effect; and finally, the application any settlement discount. See http://www.fsa.gov.uk/pubs/policy/ps10_04.pdf for details.

ICSA Consults on Review of Higgs Guidance

The Institute of Chartered Secretaries and Administrators (ICSA) has published its consultation on its review of the Higgs Guidance, which is aimed at improving board effectiveness. ICSA said its review of the Higgs Guidance was based on the premise that corporate governance should not be presented as a universal panacea to all cases of corporate collapse or significant value destruction however, that did not mean that there were not compelling commercial reasons for pursuing good governance. ICSA said good governance practice "supports the formulation of a company's strategy, and delivers, through executive management, the conditions for its efficient and effective delivery" and this consultation paper looks at the Higgs Review in order to determine whether it is effective in providing the guidance and support which boards need to implement the Combined Code. See http://www.icsa.org.uk/assets/files/pdfs/consultations/ICSA_Review_of_the_Higgs_Guidance_-_first_consultation.pdf for details - ICSA will consult again in the summer and plans to issue final guidance in the autumn.

Litigation

MoJ Update on Consultation on Controlling Costs in Defamation Proceedings

The Ministry of Justice (MoJ) has published its post-consultation report on its consultation paper for controlling costs in defamation proceedings in which it proposed substantially reducing conditional fee agreement success fees. The consultation period closed on 16 February 2010 and this report summarises the responses and sets out the Government's conclusions and next steps - the report noted that 53% of the respondents agreed that the Conditional Fee Agreements Order 2000 should be amended to reduce the maximum success fee in defamation cases to 10%; it did note that the respondents who had disagreed with the proposal had expressed concern that if a 10% maximum success fee were to be implemented, it would have a "serious impact on access to justice for claimants and allow the media to print defamatory material without the threat of legal challenge". Despite the objections and concerns raised the report confirmed that the Secretary of State for Justice and Lord Chancellor had laid the draft Conditional Fee Agreements (Amendment) Order before Parliament "with a view to having the maximum success fee of 10% in defamation cases in force as soon as possible subject to Parliamentary approval". The MoJ stated that the Order has been amended to make clear that the new requirements will only apply to CFAs entered into after the date on which the Order comes into force. See <http://www.justice.gov.uk/consultations/docs/response-conditional-fees-consultation.pdf> for the report.

Publishing

Government Announces Changes to "30 Year Rule" for Public Records

The Ministry of Justice has announced that changes will be made to the length of time that government documents remain confidential. Under the new rules, which will be brought into force by amendments to the Constitutional Reform and Governance Bill, the vast majority of government information will be released to The National Archives after 20 years, rather than the existing 30 years. Most exemptions in the Freedom of Information (FOI) Act will also be brought into line with this. The Justice Minister said "This decision will result in increased transparency and accountability in government, by allowing the public to access and scrutinise important historical documents much earlier than at present. It's a significant step forward in providing access to information held by public authorities". The changes will apply to all public record bodies subject to the Public Records Act and FOI Act. These changes are in response to the findings of the independent review of the "30-year rule", which governs the point at which records of lasting historical value are normally transferred to The National Archives. The Dacre Review, which had been tasked with reviewing the rules on access to historical records, published its findings in January 2009 and recommended a 15-year rule. See <http://www.justice.gov.uk/publications/docs/government-response-30-year-rule-review.pdf> for the Government's response.

IFJ Report on PCC Phone Tapping Investigation Calls into Question Effectiveness of Self Regulation

A report by Jean-Paul Marthoz on behalf of the International Federation of Journalists (IFJ) on the recent telephone hacking controversy makes the case for the reform of the Press Complaints Commission (PCC). The report was commissioned by the IFJ as part of the IFJ Ethical Journalism Initiative, a global campaign supporting ethical conduct in journalism and calling for credible and transparent forms of self-regulation in the media. The report looked at the actions of the PCC after it carried out two inquiries following claims of illegal tapping of the telephones of celebrities by journalists at The News of the World and further claims led to a second inquiry after The Guardian revealed that News International, the parent company of News of the World, had paid out a substantial amount in an out of court settlement to three people who had been the victim of phone tapping. News of the World had previously stated that the phone tapping problems had been an isolated incident. The PCC conducted an investigation into the two phone hacking incidents and published its report in November 2009, saying that it had found no evidence that it was "materially misled" by the News of the World over the alleged hacking of mobile phones of celebrities, or that the practice was "ongoing". Even at the time of its publication the PCC report was described by some as being "worse than pointless". This latest report now says that the actions of the PCC revealed "major failings in its mandate and its ways of operating" and weakened its credibility. See <http://www.ifj.org/assets/docs/172/085/6bd06ac-f8c3855.pdf> for the report, which will make for uncomfortable reading, particularly when the recently published report of the House of Commons Select Committee on press standards, privacy and libel is recalled (and see the Need to Know of 22 February 2010 for details - in its report the Select Committee said that the results of the PCC's investigation into the phone tapping were "simplistic, surprising and a further failure of self-regulation").

Balancing Competing Private Rights with Right to Freedom of Expression

The High Court has ruled on a question which called for them to "balance between the private rights and welfare of certain adopted children and their adoptive families, and the right to freedom of expression of the children's birth parents and the media". The applicant council had obtained a series of injunctions of indefinite duration, which prohibited the birth parents of three children who had been adopted from discussing certain aspects of the adoption process. The birth parents had disagreed with the adoption process and had spoken to the media during the process. The parents sought to have the injunctions lifted - the father also wished to write a book about their experience. The council then applied for an injunction against the media (although the court noted the media had not actively sought to be involved but participated so as to know the extent to which they might report on matters should they wish to do so). The court considered in detail the rights of the three parties - the birth parents, the children and the media and "very firmly concluded" that on the issue of publishing the name, or an identifiable picture of the birth parents, the welfare and rights of the children under Article 8 of the European Convention of Human Rights clearly outweighed the rights of the birth parents or the media under Article 10 - the court said that "In short, if there is any publication of the birth parents' story it must not include their names or any recognisable or identifiable picture of them". (*The City of Wakefield Metropolitan District Council v The Media & Ors [2010] EWHC 262 (Fam)* - see <http://www.bailii.org/ew/cases/EWHC/Fam/2010/262.html> for the judgment).

Technology

Commission Welcomes Microsoft's Commitment to Browser Choice

The European Commission has formally welcomed the implementation by Microsoft of its commitment to give consumers in the European Union the opportunity to choose from a variety of browsers from 1 March 2010. Internet users in the European Economic Area who receive automatic updates for Windows and have Microsoft's browser set as default will now be invited to choose from several browsers. In addition to Microsoft's web browser, users will be able to choose between 11 additional web browsers - Apple Safari, Google Chrome, Mozilla Firefox and Opera, which will be prominently displayed alongside Internet Explorer, and Avant Browser, Flock, Green Browser, K-Meleon, Maxthon, Sleipnir and Slim Browser, which will be displayed if the user scrolls sideways. The Commission said that it was expected that the browser Choice Screen would be displayed on over 100 million PCs in Europe between now and mid-May. (*EC Press Release IP/10/216, 2 March 2010 - this commitment followed a Statement of Objections being sent to Microsoft in January 2009 outlining the Commission's preliminary view that the company was abusing its dominant position in the market for client PC operating systems through the tying of Internet Explorer to Windows. Under the terms of the decision, Microsoft will report regularly to the Commission on the implementation of the commitments and will make adjustments to the Choice Screen where it is necessary and proportionate to do so upon the Commission's request. A clause in the commitments given by Microsoft also allows the Commission to review the commitments in two years, under certain conditions*).

"Bill Shock" Element of Roaming Regulation Comes into Force

With effect from 1 March 2010 the European Commission's Roaming Regulation 544/2009 now obliges mobile phone operators to adhere to customers' requests to cut them off when their Internet surfing costs reach a pre-set limit. The Regulation also provides that if an amount is not agreed, the operator must not allow the bill to exceed a default €50 each month without warning the customer (the Commission cited a recent example of a German national who had downloaded a TV programme while roaming in France and who received a bill for €46,000 - imagine explaining that on an expenses claim!). Network operators are also limited to charging each other no more than €1 per megabyte for downloading. The amended roaming Regulation will apply until summer 2012. The European Parliament has asked the Commission to report on the functioning of the new rules again by summer 2010. The Commission could then propose further rules, if required, by the end of June 2011. (*EC Press Release IP/10/215, 1 March 2010*).

Delivering the Commitment to Next Generation Broadband Across the UK

Broadband Delivery UK (BDUK), which has been tasked with driving forward the Universal Service Commitment to deliver 2Mbps to every household by 2012 and managing the spend of the £1billion Next Generation Fund to deliver next generation broadband to 90% of the country by 2017, has officially started work according to the Minister for Digital Britain. At the same time, the research paper "An Assessment and practical guidance on next generation access risk in the UK", which was commissioned by Department for Communities and Local Government and the Department for Environment, Food and Rural Affairs and carried out by the Analysys Mason Group, has been published. The paper sets out strategies for public authorities, and partner organisations to provide next-generation networks in those areas that would otherwise not be commercially viable - the Minister for Digital Britain said "This report makes clear that without public intervention, some rural areas and less well off

communities will be left behind and unable to reap the economic, health and education benefits superfast broadband offers". The Minister said the report's research supported the effectiveness of the Government's proposed Next Generation Fund in the form of a 50p monthly levy on all fixed lines in increasing next generation broadband coverage to 90% of the population by 2017 - 20% more than predicted if the development was left to an entirely market-led approach. See <http://www.communities.gov.uk/documents/communities/pdf/1493040.pdf> for the Report.

Consultations & Reports

Ofcom Statement - Reviews of the Financial Terms for the Channel 3 and Channel 5 Licences - http://www.ofcom.org.uk/consult/condocs/review_c3_c5_licences/statement/Statement.pdf (Ofcom's statement sets out the methodology it will use to carry out reviews of the financial terms for the Channel 3 and Channel 5 licences in order to determine a fair and reasonable value for each licence and to set new financial terms according to a fair and objective process which will take into account changes in the market and regulatory environment since the financial terms were last reviewed).

European Commission - Public Consultation for Input in Preparation for the Radio Spectrum Policy Programme - http://ec.europa.eu/information_society/policy/ecomm/radio_spectrum/_document_storage/consultations/2010_rspp/rspp_consultation.pdf (Commission's consultation on the strategic priorities for an EU radio spectrum policy programme for 2011 - 2015 - the responses will assist the Commission in drafting a Radio Spectrum Policy Programme, which is to be presented to the European Parliament and Council by mid 2010).