

This is our summary of some of the key legal developments across a range of sectors for the week of 15 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](#).

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General

Digital Economy Bill - Progress Update

The Digital Economy Bill has now left the House of Lords, passing through the Third Reading stage (which was the final chance for the House to make amendments) and proceeding to the House of Commons. Even at this final stage before the Lords, the Bill continued to generate disagreement - it was said, "this is still a bad Bill. It is bad for the digital rights holders to press their interests in this way [by means of exclusion from digital access], when there are alternatives, and it is bad for the Government to risk alienation of a very significant part of the population by enforcing these measures". Further, the Bill was described as doing "virtually nothing to encourage ways of bringing together the rights holders-the ISPs and lawful file-sharing operators-so that new business models could be developed. It could provide to the punters, and certainly to the casual users who are not making any money out of their copyright infringement, the ability to access cheaply, freely and flexibly through the new business models provided by those systems". In addition, the process of amendment was also the subject of concern - the Government's rejection of the proposed amendment to the controversial Clause 18 and replacement with an as yet unseen alternative before it is debated in the House of Commons means that the Lords were unable to consider it at all, leading one Peer to describe the process as a "complete and absolute abuse of parliamentary process" (by this Government? Surely not) and ask why they bothered to debate proposed laws at all? A very good question really...

Spanish Court's Controversial Ruling on Legality of P2P Linking Sites

Still on the controversial subject of the legality of linking to illegal sites, the Juzgado Mercantil Court No 7 of Barcelona has upheld an earlier ruling that "P2P networks, as a mere transmission of data between Internet users, do not violate, in principle, any right protected by Intellectual Property Law". This ruling was made in the action of Spanish copyright society Sociedad General de Autores y Editores (SGAE) against the ElRincondeJesus.com site, which linked to eDonkey. SGAE had sought an early injunction to shut the site down immediately in advance of a full hearing, which would happen at a later date. The defendant creator of the site argued that the site was legal, carried no advertising and merely provided links in the same way as other search engines. Magistrate Raul N García Orejudo ruled on the key question, which was whether offering links to infringing content was the same as actually making content available and said, "The defendant's conduct is to create an index that supports and guides users to access networks using P2P file sharing system, menus, posters or covers for movies or musical works. But there is no provision in the protection system covered by Intellectual Property Law, and adapted to Community Law, that prohibits sites which encourage, permit or guide users to search for works which will then be traded through P2P networks. Broadly speaking, the linking system is the very basis of the Internet, and a multitude of pages and search engines (like Google) can technically do what precisely what is currently under dispute, namely, to link to so-called P2P networks". He also said, "P2P networks are mere conduits for the transmission of data between

Internet users, and on this basis they do not infringe rights protected by Intellectual Property laws". The ruling also made the point that in ElRincondeJesus.com's case, it was not generating profits from access to the content and so could not be classed as a business benefiting financially from infringement of others' copyrighted works. Commentators have questioned however the element of the ruling regarding P2P networks - one said the judge had used some "paper-thin arguments" to imply that P2P networks were not illegal and that as they were here to stay what was the problem, and that almost nothing taking place in the networks could be enforced. Accordingly, an appeal is considered to be likely. (The ruling is available, but only in Spanish).

IPO's Reminder about New Rules for Copyright Tribunal

The Intellectual Property Office (IPO) has reminded all interested parties that that the simplified and modernised rules of procedure on which collecting societies, industry and consumer groups were consulted in 2009 will come into force with effect from 6 April 2010. The changes are intended to promote the effective resolution of disputes, improve access to the Tribunal for small businesses and individuals by introducing a small applications track for quick and economical resolution of small cases and reduce costs and delays in large-scale litigation. (*IPO Press Release, 15 March 2010*).

New Legislation - Copyright Tribunal Rules 2010

And here they are - The Copyright Tribunal Rules 2010, SI 2010/791 which come into force on 6 April 2010. The Rules introduce new Rules of Procedure for the Copyright Tribunal in order to "streamline" the Tribunal's working practices and "promote more effective resolution of disputes by introducing procedures in line with the Civil Procedure Rules 1988". See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100791_en.pdf for details.

New CAP and BCAP Advertising Codes Launched

The Advertising Standards Association (ASA) has announced the launch of the Twelfth Editions of the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) Advertising Codes. The new Codes will come into effect on 1 September 2010 - the ASA said this will allow advertisers time to familiarise themselves with the changes and ensure that campaigns comply with the new rules and that until that time, the existing Codes will continue to apply. The Codes were last updated in their entirety more than eight years ago - the ASA said that CAP and BCAP undertook a "root and branch review of the Codes to make sure they are evidence based, take account of prevailing standards in society and, where necessary, reflect changes in the law" and said the main changes would make the Codes easier to use, offer enhanced protection for children, provide greater social and environmental responsibility, ensure health claims are not misleading and making general health improvements, introduce improved consumer protection and make a number of sector specific improvements (in areas such as adult material and betting tips). The ASA also said that the new Codes are "simpler, better laid-out and easier to follow, more user-friendly". See <http://bcap.org.uk/The-Codes/New-Advertising-Codes.aspx> for access to the new Codes.

Termination of Interlinked Contracts for Software Package and Interpretation of "Perpetual Licence"

The claimant, a software developer and supplier, applied for summary judgment under CPR Part 24 in relation to two points involving construction of contracts. The defendant had used the claimant's software package in its business - the parties had entered into a licence agreement and a support agreement (required by the licence agreement), which were later amended by a variation agreement stating the licence would be "extended [to a] perpetual licence". The defendant later terminated the support agreement but claimed that the licence agreement continued because the grant of the perpetual licence in the variation agreement meant that relevant termination clauses in the licence agreement were superseded. The issues before the court were whether, on the true construction of three linked agreements, a licence from the claimant for the defendant to use the software had been terminated and whether the defendant was obliged to secure a further licence agreement from the claimant for use of the software. The court ruled the licence and support agreements could not be decoupled and that by terminating the support agreement, the defendant had automatically terminated the licence agreement (as the licence agreement provided). The court said that the word "perpetual" could carry different meanings - "never-ending" (that is, never being brought to an end) or "operating without limit of time" which, in this context, meant to grant a licence of indefinite duration but subject to any terms governing termination of the licence. On the facts and on the construction of the variation agreement, the court favoured the latter interpretation and found for the claimant. (*BMS Computer Solutions Ltd v AB Agri Ltd [2010] EWHC 464 (Ch)* - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/464.html> for the judgment).

Commission Acknowledges Full Harmonisation of Consumer Rights No Longer an Option

Work on a Directive for Consumer Rights, which would for the first time bring together all consumer rights in a single law began two years ago in the European Parliament although the proposal to apply the method of full harmonisation of consumer rights under the proposed Directive has been controversial and has led to political deadlock. The European Commission has now announced that it is prepared to consider abandoning its proposal for full harmonisation in light of the risks that it might pose to consumer rights generally - while the Commission supported the idea on the basis that it would end the fragmentation of the single market, improve legal clarity and guarantee the same level of protection to all consumers and stimulate cross border trade, opposition MEPs have argued that full harmonisation would, in practice, lead to an "unacceptable levelling down of certain consumer rights". According to the Commission, a proposal for an amended version of the first chapter of the Directive, which includes the controversial provisions on harmonisation will be presented next month and before the summer, a full draft report should be submitted to the Internal Market Committee, which is expected to hold its vote in September. The matter could then come before the full Parliament in November. (*European Parliament Press Release, 17 March 2010*).

Betting & Gaming

New Legislation - Gambling Act 2005 (Operating Licence Conditions) (Amendment) Regulations

The Gambling Act 2005 (Operating Licence Conditions) (Amendment) Regulations 2010, SI 2010/774 came into force on 11 March 2010. The Regulations amended the Gambling Act 2005 (Operating Licence Conditions) Regulations 2007, SI 2007/2257 by increasing the maximum participation fee for prize gaming in bingo premises from 50 pence to £1 and increasing the maximum amount of a gaming prize from £50 to £100 in cases where no persons under 18 years of age are permitted on the premises at any time when the game is being played and from £35 to £70 in all other cases. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100774_en.pdf for details.

Broadcasting

New Legislation - Communications (Television Licensing) (Amendment) Regulations

Last week's Need to Know referred to the introduction of legislation to increase the cost of television licences - The Communications (Television Licensing) (Amendment) Regulations 2010, SI 2010/640, which amends the Communications (Television Licensing) Regulations 2004, SI 2004/692 has now been published and comes into force on 1 April 2010. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100640_en.pdf for details.

New Legislation - Authorisation of Frequency Use for the Provision of MSS (EU) Regulations

The Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) Regulations 2010, SI 2010/672 come into force on 31 March 2010. The Regulations implement in the UK Decision 626/2008/EC of the European Parliament and the Council on the authorisation of selected applicants to use radio spectrum within the 2GHz band for the operation of mobile satellite services in the European Union and Decision 2009/449/EC of the Commission, which confirms the two selected applicants of mobile satellite services. The purpose of Decision 626/2008/EC is to facilitate the development of a competitive internal market for mobile satellite services (MSS) across the Community and to ensure gradual coverage in all Member States. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100672_en.pdf for details.

Draft Legislation - Wireless Telegraphy Act 2006 (Directions to Ofcom) Order

The draft Wireless Telegraphy Act 2006 (Directions to Ofcom) Order 2010 has been published. The Order implements Directive 2009/114/EC amending Directive 87/372/EEC on the frequency bands to be reserved for the co-ordinated introduction of public pan-European cellular digital land-based mobile communications in the Community. It specifically deals with directions to Ofcom regarding ensuring the release of additional electromagnetic spectrum for use by providers of next generation wireless mobile broadband, allowing early deployment and maximising the coverage of those services, creating greater investment certainty for operators and implementation of Directive 2009/114/EC and the Decision on the liberalisation of frequencies in the 900MHz and 1800MHz bands. See http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi_9780111495650_en.pdf for details.

EBU Calls for Modernisation of Copyright Clearance for Audiovisual Media

The European Broadcasting Union (EBU) has published a Policy Paper and accompanying White Paper calling for the modernisation of copyright clearance for audiovisual media. The EBU said EU copyright law is in "urgent need of a coherent legal framework for simplified rights clearance for the online world. This means that the existing framework on rights clearance needs to be modernised along the basic principles of a broad and inclusive policy approach derived from the needs of audiovisual media service providers". It said audiovisual copyright policy in the EU should be "based on the concept of communication to the public of linear and non-linear audio and audiovisual media services" and put forward a number of proposals to support this including facilitating EU-wide online licensing through the concept of audiovisual media communication to the public; having rights clearance follow the same collective rights-clearing regime as applied to cable retransmission, irrespective of the platform and the transmission method used (the principle of technological neutrality); avoiding separate rights for the same activity (or "incidental reproduction"); promoting the adoption of extended collective licences as an optional model for clearing rights for audio and audiovisual media services, including the making available of programmes in on-demand services; simplifying music licensing for audiovisual media service providers; using collective licences for unlocking broadcasters' archives; and introducing an EU-wide framework to ensure that collecting societies continue to provide one-stop-shop solutions to users, eg via reciprocal agreements and including all necessary rights. The EBU noted that although the proposals in the White Paper are put forward on behalf of public service broadcasters, it was not suggested that a special copyright regime should apply to such broadcasters but not to those that do not have public service obligations. See http://www.ebu.ch/registration/policy2010/images/EBU_POLICY_Paper_EN_FINAL.pdf for their Policy Paper and http://www.ebu.ch/registration/policy2010/images/EBU_Copyright_WHITE_Paper_EN_FINAL.pdf for the White Paper, which provides a detailed legal analysis of the EBU's proposals.

Corporate

Disqualified Director - Inducement to Contract and Claims of Deceit, Fraud, Conspiracy to Injure

The second claimant was a subsidiary of the first claimant bank. The claimants had entered into an agreement for the provision of credit card processing facilities with XLHL, which was engaged in the secondary marketing of tickets for sport and entertainment events. The first defendant was the registered holder of all but one of the shares issued by XLHL, the second defendant held a single share and the third defendant was, according to the defendants, first a consultant to XLHL and later an employee. XLHL ran into difficulties with the ticketing arrangements and was unable to deliver any tickets - the banks were then responsible for repaying the customers who had bought the tickets. XLHL was unable to repay the claimants, resulting in a liquidator being appointed. The claimants brought claims against the defendants under the tort of deceit, conspiracy to injure by unlawful means and under the Company Director's Disqualification Act 1986 as the third defendant had been disqualified under the Act from acting as a company director on two occasions. At issue was whether the claimants had been induced by the defendants to enter into the agreement for provision of credit card facilities by fraudulent misrepresentations made orally and in writing, whether the defendants were joint tortfeasors, whether the defendants were party to a conspiracy and whether the first and second defendants had acted on the instructions of the third defendant whilst he was disqualified director. The court found on the evidence, that the claim in conspiracy had been made out. In relation to the claim in deceit, it was beyond argument that the claimants had relied on the legitimate and honest representation. They had also relied on the main sponsors representation. They had been concerned to know the risk they had been accepting. In relation to the claim under the Company Director's Disqualification Act, the second and third defendant had been involved in the management of XLHL throughout the period during which the claimants had been providing services to XLHL. Accordingly, judgment was entered against all three defendants. (*Wirecard Bank & Anor v Scott & Ors* [2010] EWHC 451 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/451.html> for the judgment).

BIS Consults on Proposals to Amend Scheme for Registration of Company Charges

The Department for Business, Innovation and Skills (BIS) is consulting on proposals to amend the current scheme for registration of company charges, set out in Part 25 of the Companies Act 2006. The BIS has said that the amendments are needed as that the scheme, which is intended to prevent the concealment by companies of secured credit, has been criticised because the list of registrable charges has not been revised in line with changes in law and commercial practice, the particulars on the public record for a charge may not be an accurate reflection of the charge created and the procedures for registration are "cumbersome". Views are invited on the proposals to amend the requirements as to which charges must be registered, how the charges may be registered (including proposals for the introduction of electronic registration at Companies House) and the consequences of registering or not registering a registrable charge. See <http://www.bis.gov.uk/assets/biscore/business-law/docs/10-697-registration-of-charges-created-by-companies-proposals.pdf> for details.

Draft Legislation - Conditional Fee Agreements (Amendment) Order

The draft Conditional Fee Agreements (Amendment) Order 2010, which proposes amendments to the Conditional Fee Agreements Order 2000, SI 2000/823, has been published. The draft Order purports to give effect to the proposals discussed recently by the Ministry of Justice to reduce the maximum success fee percentage from 100% to 10% for all cases in relation to defamation proceedings providing for such fees. See http://www.opsi.gov.uk/si/si2010/draft/pdf/ukdsi_9780111494912_en.pdf for details. The Government explained the introduction of the amendment in the accompanying draft Explanatory Memorandum saying it "has been concerned about the impact of high legal costs in defamation proceedings for some time, particularly the impact of 100% success fees, which can double the costs to unsuccessful defendants in cases funded under CFAs". It said there was "some evidence to show that many more defamation claims win than justify such a generous success fee" and that this view was supported by Lord Justice Jackson's report, the Review of Civil Litigation Costs: Final Report. It noted also that The Culture Media and Sport Committee (CMS), which published the report of their inquiry into Press Standards, Privacy and Libel in February, concluded that the CFAs costs in defamation cases were too high and suggested that "the recoverability of success fees from the losing party should be limited to 10%, leaving the balance to be agreed between the client and solicitor". The Government also noted that defamation proceedings for the purposes of the Order covers "defamation, malicious falsehood or breach of confidence involving publication to the public at large" and said this was "intended as an interim measure while the Government gives detailed consideration to the recommendations from Lord Justice Jackson (which would require primary legislation) as well as the CMS Committee's proposal for reform". See http://www.opsi.gov.uk/si/si2010/draft/em/ukdsiem_9780111494912_en.pdf for the accompanying Explanatory Memorandum.

House of Lords Merits of Statutory Instruments Committee Report on Draft CFA Order

Still on the subject of CFA's, the House of Lords Merits of Statutory Instruments Committee has published its 14th Report on various pieces of proposed legislation, one of which is the draft Conditional Fee Agreements (Amendment) Order 2010 (see above). The Committee said they asked the Ministry of Justice (MoJ) why the Impact Assessment they provided "only considered the one option and did not compare the costs and benefits of intermediate levels of success fee at ... 25% or 50%". The Report says the MoJ "argued that the majority of respondents to the consultation exercise, even those who were against the reduction to 10%, conceded that the status quo was not sustainable and that change was necessary", however, the Committee said it had received representations showing that other arrangements, such as staggering the success fee according to the amount of work done, were already in voluntary operation. The Committee said they regretted that that insufficient time had been allowed to produce a solution based on more robust evidence or on which there was broad agreement without the potential side effects which were outlined in the evidence it received and suggested that the House may wish to consider "whether a 10% uplift swings the pendulum too far the other way reducing poorer clients' ability to challenge misleading published information". See <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldmerit/94/94.pdf> for the Report, which also contains the evidence submitted to the Committee during its investigation.

Law Commission Report on Illegality Defence and Proposal for Limited Legislative Reform

The Law Commission has published its report on the "illegality defence" having conducted a lengthy investigation into the use of the defence in areas such as contract, unjust enrichment, tort and trusts. The illegality defence "arises when the defendant in a private law action argues that the claimant should not be entitled to their normal rights or remedies because they have been involved in illegal conduct which is linked to the claim. If the courts accept the illegality defence, it often involves granting an unjustified windfall to the defendant, who may be equally implicated in the illegality. However, if the courts refuse, they may be seen to be helping a claimant who has behaved illegally". The Commission acknowledged that while the courts have in the past attempted to set out rules to govern this area, the rules are "complex and confused" because of the breadth of circumstances in which the defence arises. It gave examples of the wide areas of law in which it is applied and the range of behaviour that causes it, before accepting that it was "not possible to lay down strict rules about when the illegality defence should apply". However, despite this pronouncement, the Commission did recommend "limited, targeted reform" in the form of a seven-clause draft Bill to reform the law on illegality in trusts. It said, "The Bill would apply where a trust has been created or continued to conceal the beneficiary's interest for a criminal purpose. These are the circumstances in which it is easiest to abuse the trust mechanism". The Commission said however that it was important that the proposed Bill did not prejudice the powers of the State to confiscate the proceeds of crime and to make sure of that, it contained a minor amendment to the Proceeds of Crime Act 2002 to ensure that even if the

court exercises its discretion to allow a trustee or other party to keep the property, the property could still be recovered by the State. See <http://www.lawcom.gov.uk/docs/lc320.pdf> for the Report.

New Legislation - Magistrates' Courts Fees (Amendment) Order

The Magistrates' Courts Fees (Amendment) Order 2010, SI 2010/731 comes into force on 6 April 2010. The Order amends the Magistrates' Courts Fees Order 2008, SI 2008/1052 to clarify that, in civil or family proceedings, a fee may be charged to access documents that were used in, or result from, criminal proceedings. See http://www.opsi.gov.uk/si/si2010/pdf/uksi_20100731_en.pdf for details.

Publishing

Magistrates Court Imposes Fine for Facebook Message

The Wrexham Magistrates Court has fined a man who admitted posting a brief note that was "grossly offensive or of an indecent, obscene or menacing character" about his former partner on Facebook. The Crown Prosecution Service said the case was so far one of "a handful" that had been brought over offensive social media site remarks however the Magistrates' Association said that it was likely that these disputes would become "more common".

Sport

Competition Commission Formally Clears Sports Direct's Acquisition of JJB Stores

The Competition Commission has published its Final Report into the acquisition by Sports Direct International plc of 31 stores from JJB Sports plc - the stores were transferred over a period of 13 months between November 2007 and December 2008. The Commission stated that the acquisition has not resulted, and may not be expected to result, in a substantial lessening of competition or have any adverse effects for customers in the relevant sports goods market in any market in the UK. This formal clearance is in line with the Commission's Provisional Findings on the acquisition. See http://www.competition-commission.org.uk/rep_pub/reports/2010/fulltext/554final_report_excised.pdf for details.

ECJ Ruling on Freedom of Movement and Restriction on Right of Football Players to Contract

The ECJ has ruled on an application brought by Olympique Lyonnais SASP against a professional football player and Newcastle United FC, concerning the payment of damages for unilateral breach of his obligations under Article 23 of the Charte du Football Professionnel (Professional Football Charter) for the 1997 - 1998 season of the Fédération Française de Football. The national court asked whether the rules according to which a "joueur espoir" (a player aged between 16 and 22 employed as a trainee by a professional club under a fixed-term contract) may be ordered to pay damages if, at the end of his training period, he signed a professional contract, not with the club which provided his training, but with a club in another Member State, constituted a restriction within the meaning of Article 45 of the Treaty on the Functioning of the EU (TFEU) and, if so, whether that restriction was justified by the need to encourage the recruitment and training of young players. The player in question had signed a "joueur espoir" contract with Olympique Lyonnais for three seasons - before that contract was due to expire, the club offered him a professional contract for one year however the player refused to sign that contract and then signed a professional contract with Newcastle United FC. The club sued and a Tribunal ordered him to pay damages. The Conseil de prud'hommes in Lyon considered that the player had terminated his contract unilaterally and ordered him and Newcastle United FC jointly to pay Olympique Lyonnais damages of €22,867.35. The Lyon Cour d'appel quashed that judgment. It said the obligation on a player to sign, at the end of his training, a professional contract with the club which had provided the training also prohibited the player from signing such a contract with a club in another Member State and thus infringed Article 39 EC. The ECJ ruled that Article 45 of the TFEU does not preclude a scheme which, in order to attain the objective of encouraging the recruitment and training of young players, guarantees compensation to the club which provided the training if, at the end of his training period, a young player signs a professional contract with a club in another Member State, provided that the scheme is suitable to ensure the attainment of that objective and does not go beyond what is necessary to attain it. A scheme such as the one at issue here, under which a "joueur espoir" who signs a professional contract with a club in another Member State at the end of his training period is liable to pay damages calculated in a way which is unrelated to the actual costs of the training, is not necessary to ensure the attainment of that objective. In this case, the damages in question were not calculated in relation to the training costs incurred by the club providing that training but in relation to the total loss suffered by the club. Therefore, the French scheme went beyond what was necessary to encourage recruitment and training of young players and to fund those activities. (*Olympique Lyonnais SASP v Olivier Bernard, Newcastle United FC*, C-325/08 - see <http://curia.europa.eu/juris/cgi->

bin/form.pl?lang=en&newform=newform&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&docj=docj&docnoj=docnoj&typeord=ALL&numaff=c-325%2F08&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&dom for the judgment and <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-03/cp100030en.pdf> for the ECJ Press Release summarising the judgment - commenting on the decision, a spokesman for the English Premier League said it was "pleased to see the judge has recognised that a regulated environment for the transfer of young players is desirable").

Application of FIS Rules for Safety in Winter Sports Centres and Local Standards for Duty of Care

The appellant appealed against a decision dismissing her claim for damages for personal injury sustained during a skiing holiday in Bulgaria, which had been organised by the respondent. It was common ground that liability arose under regulation 15(2) of the Package Travel, Package Holidays and Package Tours Regulations 1992 however, an issue arose at trial as to whether the skiing instructor had exercised reasonable care and skill in respect of his instructions to the appellant. The trial judge held that the conduct of the instructor had to be judged against the relevant local standards in Bulgaria and as there was no evidence of the local standards the appellant had failed to establish a claim in negligence. The appellant submitted that the judge should have applied the FIS Rules for Safety in Winter Sports Centres, which imposed, among other things, a duty on ski schools, instructors and guides never to allow pupils to take any risk beyond their capabilities. The Court of Appeal dismissed the appeal and noted that FIS Rules for Safety in Winter Sports were a uniform set of international rules - they contained general requirements and imposed a duty of care to pupils, however, they did not mandate the way in which that duty was to be fulfilled - the trial judge had been entitled to hold that the conduct of the instructor had to be judged against the relevant local standards in Bulgaria, and that, in the absence of such evidence, the appellant had failed to establish negligence. (*Gouldbourn v Balkan Holidays Ltd & Anor*, Unreported, Court of Appeal (Civil Division), 16 March 2010).

Appeal Against Findings of BHA - Additional Arguments Based on New Evidence

The claimant jockey challenged the findings of the defendant regulating body (the BHA) that he had acted in breach of the rules of horseracing. The BHA had conducted an enquiry following allegations that a number of individuals were, by their conduct, in breach of the rules of racing and its disciplinary panel subsequently made adverse findings against all the individuals investigated including the claimant, who was found guilty of deliberately failing to ride a horse on its merits in four races and conspiring with a trainer, a horse owner and various gamblers to commit a corrupt practice by providing inside information to enable the gamblers to place bets against horses ridden by him in eight races in breach of the rules of racing. The claimant was disqualified from riding for four years and appealed the ruling bringing in new arguments which were exculpatory of the claimant and sought to apportion responsibility on the other parties involved. The court noted that while the decisions of a regulatory body such as the BHA were not amenable to judicial review, they were subject to the supervisory jurisdiction of the High Court - the court's role was to determine whether the decisions reached fell within the decision maker's discretionary area of judgment or whether they were perverse or such that no reasonable decision maker could have made them. In this instance although the adverse findings in respect of the claimant's performance in the four races made by the panel and upheld by the appeal board were not perverse, the appeal board ought to have remitted a new argument raised by the claimant on appeal concerning the trainer's credibility, and that matter would be remitted where it might have a limited impact on findings relating to the passing of information and, consequently, on the period of disqualification from racing imposed as a penalty. Accordingly, and exceptionally, the court said that the interests of justice and the requirement of fairness required the matter to be remitted the matter to the panel for the limited purpose of considering the claimant's argument about the trainer's involvement, together with any consequential evidence which it considered appropriate to allow any of the interested parties to adduce and then to reconsider its findings and if still relevant its penalty in the light of it. (*McKeown v British Horseracing Authority* [2010] EWHC 508 - see <http://www.bailii.org/ew/cases/EWHC/Admin/2010/508.html> - *Principal judgment* for the judgment).

Article - The Football Creditor Rule in Context

An article in the latest *The Lawyer* examines the football creditor rule in the wake of the latest financial challenges to face a Premiership club. The article explains briefly the concept of the rule which ensures that football creditors have to be paid in full, irrespective of the position of any other unsecured creditors of the club, before the club is eligible to participate again in league football, "if a club undertakes a formal insolvency procedure (usually administration), its membership or share in the league is suspended. This suspension will not be lifted until certain creditors of the club are settled in full" and its justification, "the integrity of the competition", before considering the recent actions of HMRC. It noted "Since the Enterprise Act, the Revenue has lost its status as a preferential creditor and joined the ranks of unsecured creditors in an insolvency situation. It

believes the rule gives those creditors 'super creditor' or 'pre-preferential' status and that all creditors defined as unsecured creditors under insolvency legislation should get paid the same" and considers how the rule actually benefits the Revenue. (*"Opinion: The ins and outs of the football creditor rule"*, *The Lawyer*, 1 March 2010).

Technology

Competition Commission Approves Acquisition of Friends Reunited by Brightsolid

The Competition Commission has published its Final Report on the acquisition of Friends Reunited Holdings Limited by Brightsolid Group Limited. The Commission said that the acquisition would be unlikely to give rise to any co-ordinated effects and was unlikely to affect competition in the supply of digitisation services, or to result in any market foreclosure by affecting the availability of data to retailers of online genealogy services. The Commission found that the acquisition was not expected to result in a substantial lessening of competition in the market for online genealogy services. This finding is in keeping with their Provisional Findings (and see the Need to Know of 15 February 2010 for details). See http://www.competition-commission.org.uk/rep_pub/reports/2010/fulltext/555final_report_excised.pdf for the Final Report.

House of Lords European Union Committee Report on Threat of Large-Scale Cyber-Attacks

The House of Lords European Union Committee has published report on the importance of protecting Europe against what it describes as "large-scale cyber-attacks". The Committee focused on the role which the EU can play in helping the UK and other Member States to prevent and detect cyber-attacks, to respond to them, mitigate their effects and recover from them and also considered the strategy set out in the Commission Communication on "Protecting Europe from large-scale cyber-attacks and disruptions: enhancing preparedness, security and resilience, and the programme of work it envisages". The Committee noted that the infrastructures of EU Member States are "heavily interdependent", which has led to recent EU legislation to regulate the extent and manner of co-operation between the Member States and said, "the protection of the Member States and their critical infrastructures from large-scale cyber-attacks is a matter of legitimate concern to the EU. We regard the primary role of the EU as being to co-ordinate the activities of the Member States, spread best practices, and bring the slowest Member States up to the speed of the fastest". See <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldecom/68/68.pdf> for details.

Consultations & Reports

Ofcom Determination Notice - Determination under Article 3 of the Television Multiplex Services (Reservation of Digital Capacity) Order 2008 - http://www.ofcom.org.uk/radiocomms/digital/hd_on_dtt/ita/committee/ITA2_Determination_note.pdf (Ofcom's final decision on the reservation of capacity on Multiplex B for an additional High Definition (HD) service on Digital Terrestrial TV, outlining why it decided not to reserve the additional digital capacity on Multiplex B as requested by Channel 5 Broadcasting Ltd and Channel 4 (their second application) - Ofcom had made a previous provisional decision to reserve a HD slot for Channel 5 to provide new services on Freeview from 2010, subject to it resolving certain key criteria by the end of 2009 however, Channel 5 was not able to resolve these outstanding issues. The other applicants, Channel 4 and S4C, were unable to provide Ofcom with confirmation of their ability to launch a service within a defined timescale).

Ofcom Notice - Designation pursuant to Section 368B of the Communications Act 2003 of Functions to the Association for Television On-Demand in relation to the Regulation of On-demand Programme Services - <http://www.ofcom.org.uk/tv/ifi/vod/designation180310.pdf> (Ofcom's Notice designates the Association for Television On Demand (ATVOD) as the appropriate regulatory authority (as defined in section 368R of the Communications Act for editorial content on UK video on demand services that include TV-like programming).