

This is our summary of some of the key legal developments across a range of sectors for the week of 22 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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Newsflash!

Content Owners Secure Victory in UK & EU Online Piracy Battle

The High Court has today set an important precedent to protect content owners from piracy. Until today, the many websites and online operators in the UK that "facilitate" infringement have argued that since they did not themselves host infringing content, but only provided a gateway to it, they were not liable for copyright infringement. Today's judgment addresses this issue head on. The Motion Picture Association co-ordinated the proceedings on behalf of a consortium of the leading film studios against Newzbin Limited, a £1 million turnover company operating a website under the domain name www.newzbin.com - the site searched for and categorised content posted to Usenet service providers. Newzbin claimed it was the Google of Usenet and that it indiscriminately searched for and indexed copyright content posted to Usenet to make that content accessible. Newzbin also provided an "NZB" button on its website. When a user identified content indexed on Newzbin's site that the user wanted, they clicked the button and the NZB file that sits on Newzbin's website would tell the user's computer where to retrieve the hundreds, perhaps thousands, of components of the file from Usenet. The file then came to the user's computer from Usenet service providers. The High Court judgment is significant in that it confirmed that Newzbin *does* authorise infringement of copyright; that it *does* procure or engage in a common design to infringe copyright; that it *does* "make available" copyright content; and that intermediaries (a term that includes both website operators and ISPs) are often in the best position to bring infringing activities to an end and rights owners are entitled to apply for injunctions to require intermediaries to take action. In doing so the High Court has shown that it is willing to apply the law to the Internet so as to give protection to content owners. Websites that have a close connection with users, that focus on infringing content, that can control what content their users can obtain and that can take active steps to prevent infringement are likely to be regarded as infringers. The High Court has also recognised that when UK law was changed to implement the IP Harmonisation Directive and to enable content owners to control whether their works were "made available" to the public, this was not a change focused only on sites or servers that actually transmit content but also a provision that focused on those that actively make content available, even if that content was stored elsewhere. This is a very significant decision from a legal perspective and also, practically speaking, for the future. This is the first decision in the UK to focus on these issues and it's clearly in favour of rights owners. The current progress of the Digital Economy Bill suggests that content owners may be given legislation that clarifies the conditions under which content owners will be able to secure injunctions requiring UK ISPs to block websites based overseas. The fact that the court has seen a clear path to identifying where such sites are liable for infringement of copyright under English law should enable the courts to apply relevant legislation quickly and effectively. (*Twentieth Century Fox Film Corporation & Ors v Newzbin Limited [2010] EWHC 608 (Ch)* - *Wiggin represented the claimants in this action*).

General

Progress Update - Digital Economy Bill

The Second Reading of the Digital Economy Bill in the House of Commons has now been confirmed as taking place on 6 April 2010. However, given the time left before Parliament is dissolved ahead of the forthcoming General Election, the Bill is widely expected to move through the "wash up" procedure, whereby it will be passed as a

result of negotiation, as opposed to debate. For those who are interested in what this procedure actually entails see <http://www.parliament.uk/commons/lib/research/briefings/snpc-05398.pdf> for details.

EDPS Adopt Opinion on Promoting Trust in the Information Society by Fostering Data Protection and Privacy

The European Data Protection Supervisor (EDPS) has adopted an opinion on "Promoting trust in the information society by fostering data protection and privacy". The Opinion discusses the measures that could be either undertaken or promoted by the EU to guarantee individuals' privacy and data protection rights when making use of information and communication technologies (ICTs) such as Radio Frequency Identification (RFID) technology, social networks, eHealth and eTransport, etc. The Opinion also emphasises that as ICT in an integral part of "virtually every aspect of our lives", trust is a core issue in the emergence and successful deployment of ICTs. The Opinion discusses the range of measures that could be either applied by the EU in order to "guarantee individuals' privacy and data protection in a globalised world that will remain technologically driven". See http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2010/10-03-19_Trust_Information_Society_EN.pdf for the Opinion.

ECJ Rules in Louis Vuitton Dispute over Google AdWords Service

The ECJ has delivered its ruling in the dispute between Louis Vuitton Malletier SA and Google concerning Google's AdWords service and whether it breaches the trade mark rights of brand owners. Community law on trade marks entitles the proprietors of trade marks, subject to certain conditions, to prohibit third parties from using signs which are identical with, or similar to, their trade marks for goods or services equivalent to those for which those trade marks are registered. At issue was Google's paid referencing service "AdWords", which enabled any economic operator, by means of the reservation of one or more keywords, to obtain the placing, in the event of a correspondence between one or more of those words and that/those entered as a request in the search engine by an internet user, of an advertising link to its site, accompanied by a commercial message. In 2003, Vuitton became aware that the entry, by internet users, of terms constituting its trade marks into Google's search engine triggered the display, under the heading "sponsored links", of links to sites offering copies of Vuitton's products. It was also established that Google offered advertisers the possibility of selecting not only keywords which correspond to Vuitton's trade marks, but also those keywords in combination with expressions indicating imitation, such as "imitation" and "copy". Vuitton brought proceeding against Google with a view to obtaining a declaration that Google had infringed its trade marks. At first instance the Paris Regional Court found Google guilty of infringing Vuitton's trade marks and subsequently, on appeal, by judgment of Paris Court of Appeal. Google then appealed on a point of law and the French Court of Cassation referred questions to the ECJ on whether it was lawful to use, as keywords in the context of an internet referencing service, signs which correspond to trade marks, where consent had not been given by the proprietors of those trade marks. The ECJ said the AdWords service does not infringe the trade mark rights of the brand owners because Google's sale of its AdWords service did not amount to use of third party trade marks in the course of trade but merely created the technical conditions necessary for advertisers to use the marks - it said "The fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign". The situation was different however for advertisers - where an advertiser sponsored a keyword which was identical to a registered trade mark and the advertisement resulting from the entry of the keyword as a search term appeared immediately afterwards and in close proximity to the point where the search term was entered, the display of the advertisement was liable to create the impression that there was a material link between the advertiser's goods or services and the trade mark owner. This would amount to trade mark infringement - the ECJ said "the Court has already held that the use by an advertiser, in a comparative advertisement, of a sign identical with, or similar to, the mark of a competitor for the purposes of identifying the goods and services offered by the latter and to compare its own goods or services therewith, is use 'in relation to goods or services' for the purposes of Article 5(1) of Directive 89/104". The ECJ noted the question whether that function of the trade mark was adversely affected when internet users are shown, on the basis of a keyword identical with a mark, a third party's ad, such as that of a competitor of the proprietor of that mark, depends in particular on the manner in which that ad is presented and that it was for the national courts to assess this on a case-by-case basis. While Google could not itself be liable for trade mark infringement, the ECJ did look at whether, in a situation where Google might under national rules be considered to be jointly liable with an advertiser - it noted the exemption in Article 14 of the E-Commerce Directive 2000/31/EC would only apply where the provider's role was merely "neutral in the sense that its conduct is merely technical, automatic and passive" such that it had "not played an active role of such a kind as to give it knowledge of, or control over", the keyword data that it stored from the advertiser. Once the provider knew of the infringing nature of the stored data or the advertiser's activities, it would need to act "expeditiously" to remove or disable access to the data in order to avoid liability. (*Google France SARL, Google Inc v Louis Vuitton Malletier SA, Case C-236/08* - see <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-03/cp100032en.pdf> for the ECJ Press Release and <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-236/08> for the judgment, which comprised two other similar cases, also involving sponsored links and trade marks).

Broadcast Bulletin - Latest Issue

The latest edition of Ofcom's Broadcast Bulletin has been published with details of adjudications on breaches of Rules 9.13 (sponsorship must be clearly separate from advertising), 10.2 (advertising and programme elements of a service must be kept separate), 10.3 (products and services must not be promoted in programmes) and 10.4 (no undue prominence may be given in any programme to a product or service) of the Broadcasting Code. Ofcom also upheld a complaint of unwarranted infringement of privacy and a breach of Rule 4 of the Code on the Scheduling of Television Advertising (COSTA) was also recorded (no more than 12 minutes of advertising in one hour of broadcasting). Ofcom also published a formal Notice of Direction to Bang Channels Limited and Bang Media (London) Limited pursuant to Condition 17(1) of their TLCS Licences requiring them to comply with the Broadcasting Code and their Licences and refrain from broadcasting certain material, retain recordings of material broadcast and comply with Ofcom's previous guidance to broadcasters and stop broadcasting material which was materially similar to that which had already been found in breach of the Code and confirm the same to Ofcom. See http://www.ofcom.org.uk/tv/obb/prog_cb/obb154/Issue154.pdf for details.

New Legislation - Audiovisual Media Services (Product Placement) Regulations

The Audiovisual Media Services (Product Placement) Regulations 2010, SI 2010/831 come into force on 16 April 2010. The Regulations amend the Communications Act 2003 provisions permitting and regulating the practice of product placement in television programmes provided by television service providers under the jurisdiction of the UK for the purposes of the EU Audiovisual Media Services (AVMS) Directive 2007/65/EC. Amongst other things, Regulation 4 amends section 324 of the Act so that Ofcom's duty under that section to consult on the draft code required by that section extends to proposed standards for product placement. Regulation 5 amends section 325 of the 2003 Act so that the conditions of a licence granted by Ofcom for a television programme service must secure compliance with the requirements of their standards code, or which go beyond that code, so far as it relates to product placement and Regulation 6 inserts a definition of product placement into the Act. Further, Regulation 9 inserts a new Schedule 11A into the Act, which contains detailed provision about product placement. See http://www.opsi.gov.uk/si/si2010/pdf/ukSI_20100831_en.pdf for details.

OFT Invites Comments on Project Canvas

The Office of Fair Trading (OFT) has issued an Invitation to Comment on Project Canvas, described by the OFT as "a joint venture between British Broadcasting Corporation, British Telecommunications plc, Channel Four Television Corporation, Channel 5 Broadcasting Limited, ITV Broadcasting Limited, Talk Talk Telecom Limited and Arqiva Limited to create and promote a standards-based open environment for internet-connected digital terrestrial and digital satellite television devices". According to reports, the OFT has said that it would study whether the plans of the venture's members could amount to a merger and whether that would mean less competition. If necessary, the project could then be referred to the Competition Commission. A Project Canvas spokesman said, "The Canvas partners are clear that the joint venture does not qualify as a merger and we welcome the opportunity to clarify this position formally". Interested parties have until 7 April 2010 to comment. (*OFT Invitation to Comment, 22 March 2010*).

Budget Progress Report on Digital Britain White Paper

The recent Budget contained a progress report on the Digital Britain White Paper which follows on from the update contained in the 2009 Pre-Budget Report. The Budget update stated that "Since the 2009 Pre-Budget Report, the Government has: consulted on the draft legislation and impacts of the new Landline Duty and is publishing a response alongside this Budget; announced the creation of 'Broadband Delivery UK', which will implement the USC and NGA projects ... ; consulted on relaxing restrictions on deployment of new overhead telecommunication lines, which will reduce the costs of rollout of broadband in rural areas ... ; and laid before Parliament a direction to Ofcom which aims to unblock the release of valuable radio spectrum for use in wireless communications and to facilitate the early deployment of next generation mobile networks". At the same time, the joint report by the Treasury, HMRC and the Department for Business, Innovation and Skills (BIS) on the proposal to implement a landline duty was also published - the joint report confirms the Government's intention to implement the landline duty with effect from 1 October 2010 and deals with some of the specific issues which were raised during the consultation process. (*HM Treasury Budget 2010 Report - see http://www.hm-treasury.gov.uk/d/budget2010_chapter4.pdf for details (at para 4.51 et seq); see also http://www.hm-treasury.gov.uk/d/budget2010_landlineduty_responses.pdf for the joint report*).

Computer Gaming

Budget Proposes Tax Relief for UK Video Games Industry

The recent Budget proposed changes which will benefit the UK's video-games industry as a result of the introduction of a tax relief, subject to obtaining State Aid approval from the European Commission. No further details were provided in the Budget however commentators have already suggested that the new relief may follow structure of the UK tax relief for film production companies introduced by the Finance Act 2006, which permits a percentage relief on qualifying expenditure for productions that satisfy a cultural test for being a British film. The Secretary of State for Culture, Media and Sport welcomed the proposal and acknowledged the economic importance of the video-games industry - the announcement was also welcomed by TIGA and ELSPA, who have been lobbying for Government support for some time. See <http://www.tiga.org/News/How-Will-Games-Tax-Relief-Work-In-Practice.aspx> for TIGA's analysis of how the games tax relief may work in practice (note - it is not the purpose of this briefing to speculate on the implications that the forthcoming election may have on such pronouncements).

Corporate

Commission Consults on Operation of European Company Statute

The European Commission has opened a consultation on the effectiveness of the European Company Statute Regulation 2157/2001, which provides for the creation of European Companies (also known as Societas Europaea or SEs). The Regulation was adopted on 8 October 2001 and has been used since 8 October 2004 and gives companies operating in more than one Member State the option of being established as a single company under Community law and so be able to operate throughout the EU with one set of rules and a unified management and reporting system rather than in accordance with the different national laws of each Member State where they have subsidiaries. Under the Regulation, the Commission is required to report on its practical application five years after its entry into force and to put forward amendments where appropriate. Accompanying the consultation is a report by Ernst & Young (running to around 1,500 pages, including appendices and fact sheets), which includes recommendations for possible amendments to the SE Regulation - this report found that 431 SEs were registered as at 10 September 2009. The two most important reasons cited by companies for setting up an SE were the possibility of transferring the registered office and the "European image" associated with being an SE. Currently SEs are present in 20 out of 30 EU/EEA Member States, with the vast majority (around 65%) being registered in the Czech Republic (170 SEs) and Germany (109 SEs). The dominant field of activities for SEs is services (financial and insurance activities). (*EC Press Release IP/10/338, 23 March 2010; EC Press Release Memo/10/97, 23 March 2010 - see http://ec.europa.eu/internal_market/consultations/docs/2010/se/questionnaireSE_en.pdf for the consultation*).

Managing Director - Liability in Deceit for Fraudulent Misrepresentations and Corporate Veil

The claimant, a professional investment adviser with Credit Agricole Cheuvreux, brought a claim for damages for deceit against the defendant, the managing director and majority shareholder of a company engaged in currency conversion. Under the company's standard terms and conditions, money which was paid to it by clients was held on trust pending the purchase of the relevant foreign currency. The company began to experience financial difficulties and was unable to pay its debts. Nevertheless, the defendant accepted instructions from the claimant to conduct three transactions in June 2008 and two transactions in September 2008 to convert sterling to euros - the money was not converted but used to pay other creditors. The claimant submitted that he had been induced to enter into the September transactions by the defendant's fraudulent misrepresentations and argued that the misrepresentations could be implied from emails sent to him. The defendant maintained that he had been unaware that the company was insolvent and argued that he had a defence under section 6 of the Statute of Frauds Amendment Act 1828. The court noted the tort of deceit contained four elements - the defendant must have made a representation of fact which could be clearly identified; the representation was false; it was made dishonestly; and the statement was intended to be relied upon and was in fact relied upon. It was well-established that a representation, including a fraudulent misrepresentation, could be implied from words or conduct but whether the court would imply a representation depended upon all the circumstances. On the facts, the defendant was aware of the company's financial position and when he accepted the claimant's orders he knew that, because of the parlous financial state of the company, the sums would not be held in trust until the equivalent euros were purchased but would be used in an illegitimate manner to pay other clients. The court found that the defendant was personally liable in deceit for the fraudulent misrepresentations which he had made to the claimant and which had induced the claimant into entering into transactions, causing a substantial loss. The court said that given that the claim in deceit had succeeded, it was not strictly necessary to decide whether this is an appropriate case in

which to pierce the corporate veil and permit a claim which should otherwise be pursued against the company to be pursued against the defendant (although it noted in this instance that it would have been inappropriate to do so). (*Lindsay v O'Loughane* [2010] EWHC 529 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/529.html> for the judgment).

Film & TV

Court of Appeal Rules on "Exploitation of Films" for Purpose of Deduction of Costs from Profits

The appellant taxpayer appealed the High Court's ruling on the deduction of film production costs. In its tax return for the year ended 5 April 2005, the appellant had sought to deduct from the profits or gains of its trade or business costs incurred in the production of a film, under section 42 of the Finance (No 2) Act 1992 and section 48 of the Finance (No 2) Act 1997. The respondent Commissioners rejected the appellant's claim by closure notices on the grounds that its trade or business did not consist of or include "the exploitation of films" for the purposes of section 42 of the 1992 Act, and that, even if it did, the film in question constituted "trading stock" as defined in section 100(2) of the Income and Corporation Taxes Act 1988, of that trade or business. The Commissioners submitted that the concept of "films" in section 42 of the 1992 Act comprised only the physical record on or in which the sequence of images was embodied and that the substance and effect of the distribution and commissioning agreement entered into by the appellant was that it had sold the master negative of the film for at least a 21 year period with the result that it was not exploiting the film. The Court of Appeal allowed the appeal - it said the word "film" in section 42 of the 1992 Act was to be construed in accordance with the definition in the Films Act 1985, Schedule 1, para 1. The word "film" was not confined to the master disc, negative or tape and included the intellectual property rights. Further, it was self-evident that the value in a film susceptible of exploitation lay in the copyright, not the physical embodiment of the sequence of images. It was not the case that the intellectual property rights could only be exploited through ownership of the original physical record. The word "film" for the purposes of section 42 was a "compendious" word not confined to or requiring the inclusion of ownership of the original physical record. Furthermore, the appellant had exploited the film under the Distribution and Commissioning Agreement (DCA). The film was not trading stock because, on the true interpretation of the word "film" and of the DCA, the appellant had not sold the film but retained copyright in the film. The only disposals were a 21-year licence under the copyright and an option to buy it at the expiration of the term of the licence. Therefore section 42(8) of the 1992 Act did not operate so as to preclude the deduction of expenditure falling within section 42(2) or section 42(3) from the profits of the trade or business of the appellant within section 42(1). (*Micro Fusion 2004-1 LLP v The Commissioners for Her Majesty's Revenue & Customs* [2010] EWCA 260 - the judgment is available from Lawtel).

Court of Appeal Rules on Effect and Meaning of Section 101 and Relief for Small British Films

The Court of Appeal has also heard an appeal by the Commissioners on the meaning and effect of section 101 of the Finance Act 2002 in the context of the dismissal of the claim for relief by the respondents - section 101 deals with the restriction of relief under section 48 for successive acquisitions of the same film (counteracting double dipping). The respondents acquired feature films from film distributors and leased them back. In its tax return for the year to 5 April 2004, it claimed a loss of some £14 million, which principally comprised a deduction of £12.18 million under section 42 of the Finance (No 2) Act 1992 representing relief on the respondent's expenditure in the tax year on the acquisition of three films. The Commissioners disallowed the claim to section 42 relief in its entirety - the issue on appeal was whether, on the facts, section 101 precluded the respondent from claiming any relief. The Court of Appeal dismissed this appeal - it ruled that expenditure on the acquisition of films, which would have fallen within section 48 of the Finance (No 2) Act 1997, but for the provisions of section 101 of the Finance Act 2002, could still qualify for relief under section 42 of the Finance (No 2) Act 1992. The Court noted that HMRC's approach to section 101 produced a "disparity between the treatment of small films and other films for which there is no discernable policy reason" - the Court noted section 48 was intended to give effect to the policy of promoting small British films over other and above British films in general and under the HMRC's interpretation, for small films there would be no relief under section 42 for small films at all. (*The Commissioners for Her Majesty's Revenue & Customs v Halcyon Films LLP* [2010] EWCA Civ 261 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2010/261.html> for the judgment; note that this appeal was heard in conjunction with the *Micro Fusion* appeal above, as both cases involved issues of principle as to the availability of relief under section 42).

DCSF Welcomes Independent Review Child Performance Regulations

The Department for Children, Schools and Families (DCSF) has published the results of an independent review into child performance regulations to update licensing arrangements. The review, which was instigated in December last year, was carried out in order to consider what changes are needed to update the current legislative framework governing children taking part in broadcast performances which is now over 40 years old. The Children and Young Persons Act 1963, and the 1968 Regulations made under it, require a licence to be obtained from the

local authority for a child to participate in a public performance. This regulatory regime applies across a "huge range" of performance activities, from local dramatics and talent shows to major West End stage productions, to popular television programmes and films. The legislation was described as "highly complex", "inconsistently interpreted in different places" and hard to apply to contemporary broadcasting. Further, concerns arose as to the meaning of "performance" in the primary legislation, given the changing nature of certain television programming, notably types of factual entertainment and the current legal restrictions on the participation of children aged under 14. The report called for an "urgent and radical overhaul and re-balancing" of the system of licensing child performance and the development of a system of inspection and enforcement by local authorities that is targeted and proportionate to risk, that operates to agreed criteria and encourages best practice among employers. The report also looked at other issues such as the role of chaperones, the need for good quality education to be provided (and enforced through licensing) and the importance of ensuring that a definition of "performance" is included in the legislation and will then be capable of future amendment, as required. The Report has been welcomed by the industry for its "common sense" approach. See <http://www.dcsf.gov.uk/everychildmatters/safeguardingandsocialcare/safeguardingchildren/childperformers/childperformers/> for access to the Review.

Commission Approves State Aid for Promoting Catalan Language in Spanish Film Industry

The European Commission has announced that it has approved a scheme notified by the Spanish Government to promote the use of the Catalan language, particularly in the film industry. The Commission has approved the €12 million scheme which will support the dubbing and subtitling of films in Catalan. The scheme is in line with EU rules that allow state subsidies for cultural objectives and, in the case at stake, for the promotion of multilingualism and cultural diversity. According to the Commission, approximately 800 films released in Spain every year are dubbed in Spanish while only 20-25 films are dubbed in Catalan. A further 10-15 are subtitled in Catalan. (*EC Press Release IP/10/356, 24 March 2010*).

Gambling & Betting

DCMS Consults on Extending Remit of the Tote

The DCMS is consulting on proposals to extend the Tote commercial freedoms of pool betting to other sports under section 1(a)(ii) of the Horserace Totalisator and Betting Levy Boards Act 1972. At the heart of the proposal is the need to ensure that the Tote "remains competitive" and presents the best value to the taxpayer on its eventual investment - in order to do this the Tote needs to compete in the betting and gaming market on as wide a platform as possible. The Tote has said it believes that it would "add considerable scope to its pool betting business if it were allowed to take pool bets on other sports beyond horseracing". The Tote submitted a formal request for authorisation from the Secretary of State for Culture, Media and Sport to extend its pool betting activities to any other sport, excluding dog racing (for which there are exclusive rights under the Gambling Act 2005 until 2012) and it is this proposal which forms the basis of the consultation. The DCMS noted the current proposal does not include other events, beyond sports, of the type currently gambled upon (such as X-factor, Strictly Come Dancing etc), however, they said they welcome views on whether the Secretary of State's approval should be widened to include all events (excluding the outcome of the National Lottery). See http://www.culture.gov.uk/images/consultations/Tote_poolbetting_consultation.pdf for details.

Budget Proposes Changes to Bingo Duty, Amusement Machine Licence Duty and Gaming Duty

The recent budget proposed changes to bingo duty, amusement machine licence duty and gaming duty. It has been suggested that legislation will be introduced in Finance Bill 2010 to reduce the rate of bingo duty from 22% to 20%; increase the amounts of amusement machine licence duty (AML) in line with inflation; and raise the gross gaming yield (GGY) bandings for gaming duty in line with inflation. See <http://www.hmrc.gov.uk/budget2010/bn63.pdf> for details (note - it is not the purpose of this briefing to speculate on the implications that the forthcoming election may have on such pronouncements).

Litigation

Appeal Against Refusal to Grant Disclosure Order - Grounds for Ordering Disclosure

The appellant appealed against the refusal of his application for a specific disclosure order against the first respondent television company in a libel action. The libel action concerned a documentary programme about Tito Jackson and his family. The appellant had sought to inspect the third respondent's laptop in order to check details about alterations which had been made in respect of a diary however this was refused by the court. The appellant said certain deleted emails might reveal significant and relevant information, in particular in relation to an allegation of malice against the third defendant. The third defendant initially stated that she had deleted emails because the email account had become full, but later said that she had not sent any emails during the relevant

period. The respondents accepted that if the emails had not been deleted they would have been searched for the purpose of disclosure, but resisted the application on the basis that it was unnecessary and inappropriate. The judge noted that while the libel action was relatively complex, the number of emails that might be retrieved would be several hundred and the technical costs of the retrieval would be up to £10,000 in a case that had already cost £1 million at that stage. He concluded that there was no sufficient likelihood of finding any emails that were of significance and relevance. The Court of Appeal said the extent of discovery had to be assessed on a case by case basis and a judge should consider the features of the case with a view to making an order tailored to achieving a just outcome, which included limiting costs as far as possible. In this case, the judge was correct in considering the various factors relevant to the decision on whether to order the defendant in a libel action to search back-up tapes of computer records in order to retrieve deleted emails, and he had been entitled to conclude that there was no sufficient likelihood of retrieving emails that were significant and relevant to the action. (*Fiddes v Channel 4 Television Corporation & Ors, Unreported, CA (Civ Div), 24 March 2010 - a summary of the judgment is available via Lawtel*).

Striking Out Libel Claim - Archived Articles and Disproportionate Interference with Freedom of Expression

The claimant sued the BBC for libel in respect of three articles contained on the web in the BBC's archive, and a Google entry which related to the decision of the local police force to withdraw a job offer previously made to the claimant in the light of subsequent discoveries as to the legality of his immigration status. The articles were archived shortly after publication and since then had only been available (or published) to those who conducted an archive search. Four years later, the claimant sued for libel in respect of the archived articles and a Google entry or "snippet", which was part of what appeared on a Google page when a particular search term was entered. The BBC issued an application, with a number of inter-related strands, to strike the action out pursuant to CPR 3.4(2), and/or for summary judgment pursuant to CPR 24.2. Central to the BBC's attack on the meanings attributed by the claimant to the first article was the principle that because of the way the articles were archived and were accessible if the first article was accessed and read at all it would only have been read and understood to refer to the claimant by those who had already read the second and/or the third article and that the case to the contrary was fanciful and had no realistic prospect of success. The court ruled that the libel claim should be struck out. It said the claimant had no realistic prospect of successfully establishing that there existed even one reader who, having read the first article on its own, would have understood it to refer to him. The first article had, therefore, to be read through the prism of the second or third articles or both. If the articles were read together, the first article was not capable of bearing the "reasonable grounds to suspect" meaning proposed. Since the second article was incapable of bearing a defamatory meaning, it followed that the BBC could not be liable, even arguably, for its "republishing" on Google. Further, where it was known that archive material was or might be defamatory, the attachment of an appropriate notice warning against treating it as the truth would normally remove any sting from the material - the BBC had done this by attaching a notice to the articles and it would be a disproportionate interference with a party's right to freedom of expression under the Article 10 to bring a claim for libel after a significant period of time had elapsed. In these circumstances, permitting the action to continue would constitute a disproportionate interference with the BBC's rights and would be an abuse of process. (*Budu v The British Broadcasting Corporation [2010] EWHC 616 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/616.html> for the judgment*).

Publishing

Secretary of State for Justice Announces Libel Reforms

The Lord Chancellor and Secretary of State for Justice has announced that reforms of the law on libel will be taken forward in the next Parliament following the publication of the Libel Working Group's report - the Group had been asked to consider whether the law of libel, including the law relating to "libel tourism", in England and Wales was in need of reform and, if so, to make recommendations as to solutions. On the question of libel tourism the Group said it had "considered available evidence of 'libel tourism'" and that its members had widely varying views as to how widespread a problem this was. It said, "To the extent that there was a view that there was a problem to be addressed, it was considered that tightening and more rigorous application of the rules/practice relating to service out of the jurisdiction would be appropriate. The critical issue is enabling courts at an early stage to identify cases which constitute an abuse and where no real and substantial tort has been committed within the jurisdiction". A variety of options were suggested in order to deal with the causes. On the question of the multiple publication rule, the Group said it recognised that, while the problems raised by the MPR may not be widespread, difficulties do arise in practice and that the majority of the Group considered that it would be appropriate to move to a SPR (with an appropriate discretion) in circumstances involving the republication of the allegedly defamatory material by the same publisher. On the question of the introduction of a statutory public interest defence the Group said there was the "potential for a statutory responsible journalism defence to protect serious, investigative journalism and the important work undertaken by NGOs" and they recommended that the Government launch a detailed consultation over potentially putting such a defence, currently available in common law, on a statutory footing. The Group also looked at a range of procedural and case management issues relating to the conduct of libel

litigation and put forward a range of suggestions. See <http://www.justice.gov.uk/publications/docs/libel-working-group-report.pdf> for the Libel Working Group's report. The Lord Chancellor and Secretary of State for Justice said the "reforms will build on the work of the Libel Working Group" as the current balance of libel law is "tilted too far" in favour of allowing people to protect their reputations from defamatory allegations. He also said that "Replacing the multiple publication rule will ensure that people cannot take court action every time the same article is downloaded, preventing costly and unnecessary legal actions and the uncertainty for publishers of open-ended liability" and that the Government was "considering whether a statutory public interest defence would help journalists and other groups who investigate matters of public importance, who are sometimes prevented from making their findings known because of the threat of legal action". (*Ministry of Justice News Release, 23 March 2010* - see <http://www.justice.gov.uk/news/newsrelease230310b.htm> for details).

MoJ Announces Single Publication Rule to be Introduced

At the same time, the Ministry of Justice (MoJ) has published the Government's response to the consultation on the multiple publication rule, in accordance with which each publication of defamatory material can form the basis of a new defamation claim, and its effects in relation to online archives. The consultation paper considered the arguments for and against the rule and the alternatives of a single publication rule and as a result of the responses, the Government has announced that it considers "on balance that it is appropriate in principle to introduce a single publication rule (with discretion to the court to extend the period as necessary)". It said that further consideration will need to be given to the detailed provisions to govern the operation of the single publication rule - there was "general consensus" among the respondents that should any change to the law in this area be considered appropriate then it should apply to all forms of publication and not just to online archives and 81% of the respondents (that answered the relevant question) agreed that should the multiple publication rule be retained the limitation period should remain unchanged as one year from the date of publication (with discretion to extend). Some 77% of the respondents also agreed that even if a single publication rule were to be introduced, the limitation period should remain as one year from the date of publication (with discretion to extend), on the basis that the discretion to extend would ensure that claimants' rights were protected. See <http://www.justice.gov.uk/about/docs/defamation-internet-response-web.pdf> for details.

Children's Commissioner's Study on Views of Children and Young People on Media Access to Family Courts

The Children's Commissioner for England has published a report which sets out the views of children and young people on the question of the media's access to and reporting on proceedings before the family courts. Perhaps not surprisingly, the study found that 79% of children and young people who had had experience of public law proceedings, (rising to 91% who had had experience of private law proceedings), were opposed to the decision to permit reporters into family court hearings. The report said the major reason for this was "because the children and young people said that court hearings address issues that are 'private'. They concern events that are painful, embarrassing and humiliating for children and an overwhelming majority said this detail was not the business of newspapers or the general public". Of real concern were the findings that almost all the children and young people interviewed (96%) said once children were told a reporter might be in court they would be unwilling or less willing to talk to a clinician about ill-treatment or disputes about their care, or about their wishes and feelings (leading to consequential concerns about whether a determination has been made on all the facts). Further, the respondents were unconvinced that formal rules prohibiting publication of identifying information would automatically protect them. The report said "They do not trust reporters and felt information would get out, allowing them to be identified, shamed and bullied" and the children and young people said the press "sensationalise information, or construct bold headlines that do not reflect the content of cases, and will 'cherry pick' bits of information. They are mostly doubtful that the press will print a truthful story and are doubtful - some cynical - about an educational function". In light of the findings the Commissioner called for an independent review of the rules on media access to children's hearings. See http://www.11million.org.uk/content/publications/content_397 for access to the Report.

OFT's Ruling on Acquisition of The Independent and The Independent on Sunday by LHL

The Office of Fair Trading (OFT) has published its decision on the anticipated acquisition by Lebedev Holdings Limited (LHL) of The Independent and The Independent on Sunday newspapers, which was notified by the parties in late February. The OFT said it has decided that the anticipated acquisition of the target business by LHL does not qualify for investigation under the mergers provisions of the Enterprise Act 2002. It said as a result of this transaction the target business and LHL will cease to be distinct - the parties' "best estimates" for their shares of supply for such London wide distribution is based on UK news trade sales for December 2009 and ABC circulation data for free newspapers for December 2009 gave the parties an estimated combined share, based on circulation, of the supply of all daily newspapers in Greater London of [15-20]% and the OFT said since neither the UK turnover test nor the share of supply test in section 23 of the Act had been met, it had concluded that a relevant merger situation had not been created. See http://www.offt.gov.uk/shared_offt/mergers_ea02/678502/Lebedev.pdf for details.

PCC Upholds Complaint About Publication of Photographs of Child After Serious Accident

The Press Complaints Commission (PCC) has upheld two separate complaints against the Nottingham Evening Post and the Leicester Mercury under Clause 6 (Children) of the Editors' Code of Practice. The complainant was the mother of a primary school child who had been involved in a serious road traffic accident - photographs of the complainant's daughter in the aftermath of the accident were subsequently published by both papers, which further distressed the complainant's daughter. Both newspapers said that they had considered whether or not to publish the photograph very carefully, but that ultimately, they believed it to be justified in the public interest. The Commission said newspapers were entitled to publish stories and pictures of serious road accidents which take place in public and often have wide-reaching consequences. In this case, the bus crash, which involved more than 50 schoolchildren, was a serious incident which raised important questions about public health and safety. The Commission said it did not wish to interfere unnecessarily with the newspaper's right to report the matter, which it generally had done in a sensitive manner however, it was clear that the complainant had not given her consent for the newspaper to either take or publish the photograph which showed her daughter in a state of distress. It was also not disputed that the image had been taken and published without parental consent. As a result, there was a breach of the Code and, while "there may be occasions where the scale and gravity of the circumstances can mean that [such material] can be published in the public interest without consent", on this occasion, the Commission judged the newspapers to be "just the wrong side of the line". (*A woman v Nottingham Evening Post*, 18 March 2010 - see <http://www.pcc.org.uk/cases/adjudicated.html?article=NjMwNQ==?oxid=dfgs3h044jdb2iln4mpt7drho4>; *A woman v Leicester Mercury*, 18 March 2010 - see <http://www.pcc.org.uk/cases/adjudicated.html?article=NjMwNg==?>).

Consultations & Reports

Ofcom and ATVOD Joint Consultation - Proposals for the setting of regulatory fees for video on demand services for the period up to 31 March 2011 - Joint consultation by Ofcom and the Association for Television on Demand (ATVOD) - http://www.ofcom.org.uk/consult/condocs/vod_proposals/vod_proposal.pdf (Ofcom and ATVOD's joint consultation on the options for the setting of regulatory fees to be paid by providers of video on demand (VOD) services that come within the definition of an "on-demand programme service" (ODPS) under section 368A of the Communications Act 2003).

Ofcom Statement - Accessibility of Electronic Programme Guides - Report on Providers' 2009 Statements - http://www.ofcom.org.uk/tv/ifi/codes/accessibility_epg/Report_on_EPG_accessibility.pdf (the Report summarises the service providers 2009 statements about their provisions of access features currently provided on EPGs, and the features that providers hope to develop in the near future).

Ofcom Research Document - UK Children's Media Literacy - http://www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/ukchildrensml/ukchildrensml.pdf

(Ofcom's third annual Children's Media Literacy Audit provides an overview of media literacy among children and young people aged 5 - 15 and their parents and carers (with it must be said some rather shocking results - for example, 49% of all 5 - 7s, 67% of 8 - 11s and 77% of 12 - 15s have a television in their bedroom and one in eight children aged 8 - 11 (12%) and three in ten 12 - 15s (31%) have Internet access in their bedroom).