

This is our summary of some of the key legal developments across a range of sectors for the week of 19 April 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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Commission Adopts Revised Competition Regulation for Certain Vertical Agreements

The European Commission has adopted a new Regulation which introduces revised competition rules for vertical agreements (agreements for both supply and distribution) and has published a brief summary of the key issues. The new Regulation makes provision for situations where it has been recognised that certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better co-ordination between the participating undertakings. The Commission said vertical agreements can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels. The Verticals Block Exemption Regulation will enter into force on 1 June 2010 and will be in place for 12 years, during which time the Commission will monitor its effectiveness. See http://ec.europa.eu/competition/antitrust/legislation/regulation_verticals_en.pdf for the Regulation and http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf for the accompanying Guidelines, which set out the principles for the assessment of vertical agreements under Article 101 of the Treaty on the Functioning of the European Union (Article 101 applies to vertical agreements that may affect trade between Member States and that prevent, restrict or distort competition). The Commission stated however that the Guidelines must be applied with "due consideration for the specific circumstances of each case" and that each case must be evaluated in the light of its own facts. See also <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/138&format=HTML&aged=0&language=EN&guiLanguage=en> for the Commission's information sheet about the new Regulation.

Commission Welcomes ACTA Negotiation Text and Reassures on Civil Liberty Concerns

The European Commission has welcomed the decision of the parties involved in the 8th round of negotiations for Anti-Counterfeiting Trade Agreement (ACTA) to publish the negotiation text. The Commission said, "This text shows that the overall objective of ACTA is to address large-scale infringements of intellectual property rights which have a significant economic impact. ACTA will by no means lead to a limitation of civil liberties or to 'harassment' of consumers". It said further "The Anti-Counterfeiting Trade Agreement will be fully in line with current EU legislation. This means that it is limited to the enforcement of intellectual property rights. The agreement will not include provisions which modify substantive intellectual property law, create new rights or change their duration. It will set minimum rules on how innovators and creators can enforce their rights in courts, at borders or over the internet. The negotiation draft shows that specific concerns, raised in particular by the civil society, are unfounded. No party in the ACTA negotiation is proposing that governments should introduce a compulsory "3 strikes " or "gradual response" rule to fight copyright infringements and internet piracy". Previously, the European Parliament had voiced particular concerns about the manner in which the negotiations were being conducted and the potential impact the proposed text might have on individual rights (and see the Need to Know of 8 March 2010 for details). See http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf for the draft and see http://trade.ec.europa.eu/doclib/docs/2009/november/tradoc_145271.pdf for a summary of the issues under discussion. (*EC Press Release IP/10/449, 21 April 2010*).

Power of CAT to Order Correction of Price Controls with Retrospective Effect

In an appeal by four mobile telephone network operators (MNOs) against decisions of the Competition Appeal Tribunal relating to the imposition of price controls by Ofcom pursuant to the Communications Act 2003, the Court of Appeal, Civil Division, has ruled that the Tribunal has no power to direct Ofcom to impose revised price controls in respect of a period that had already elapsed when the revisions had come into effect. The proceedings arose out of a decision by Ofcom, published in the form of a Statement in 2007, relating to the wholesale service of mobile call termination (MCT) - Ofcom had found that the MNOs had "significant market power in the markets for MCT on their respective networks, and imposed price controls on the charges that the MNOs could set for MCT for each of the four years from 1 April 2007 to 31 March 2011". BT appealed that decision to the Tribunal. The Tribunal referred specified price control matters to the Competition Commission. The Commission published a provisional determination indicating that it was minded to find, as BT had argued, that the price controls had been set at too high a level (allowing the MNOs to charge too high a rate for the service). The MNOs brought various challenges relating to the Commission's determination, and in its final judgment, it dismissed the various challenges, upheld BT's appeal to the extent set out in the Commission's determination and directed Ofcom to adopt a price control on the basis put forward by the Commission. Ofcom adopted revisions to the 2007 to 2011 price controls in accordance with the tribunal's directions and the MNOs appealed. All four MNOs and Ofcom argued that the Tribunal had no power to order Ofcom to impose revised price controls in respect of the period that had already elapsed at the date when the revisions came into effect (in broad terms, in respect of years 1 and

2 of the four-year price control set by Ofcom's original decision of 27 March 2007): the price controls could be amended only with prospective, not retrospective, effect. The Court noted the Tribunal had no power to direct Ofcom to impose revised price controls in respect of a period that had already elapsed when the revisions had come into effect (on a retrospective basis). The Tribunal did not have power to direct Ofcom to take action that Ofcom itself would not otherwise have power to take in relation to the decision under appeal. The revisions that had been directed by the Tribunal, and given effect by Ofcom, were truly retrospective in character, purporting to alter the content of past obligations. Therefore price controls could not be corrected with retrospective effect. (*Vodafone Limited & Ors v British Telecommunications plc* [2010] EWCA Civ 391 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2010/391.html> for the judgment).

Italian Court Rejects Claim for Monitoring and Enforcement Action by ISP

The Civil Court in Rome has ruled on the matter brought by Federazione Anti-Pirateria Audiovisiva (FAPAV) against ISP Telecom Italia - FAPAV had brought a claim against Telecom Italia in an attempt to require the ISP to monitor their users and report those who file-share to the relevant authorities, block a number of sites (including The Pirate Bay, 1337x and isoHunt) and collaborate with them in the future to fight piracy. In default, FAPAV sought damages of €10,000 per day. However, the court ruled that internet service providers (ISPs) could not be held responsible for the material carried over their networks and rejected calls for user and site blocking. The demand that fines should be imposed on Telecom Italia for non-compliance was also rejected. However, the court did rule that ISPs should pass on copyright infringement complaints from rightsholders to the local prosecutor, rather than the current position where the rightsholders have to do that themselves. Not surprisingly, reports indicated that the ruling has been welcomed by Italy's other ISPs.

Implementation of the Equality Act and ISS Providers

The Equality Act 2010 received Royal Assent on 8 April 2010. The Act prohibits discrimination, harassment and victimisation by providers of services, goods and facilities (including online providers). Section 206 of the Equality Act gives effect to Schedule 25, which sets out how the provisions which make it unlawful to discriminate against, harass or victimise a person apply to information society services (ISS) providers but also makes it clear that the defences created by the E-Commerce Directive for ISS providers where they act as mere conduits, caches or hosts of information are available for ISS providers. This has been introduced to ensure the UK correctly transposes the E-Commerce Directive. Paragraph 1 provides that where an ISS provider is established in Great Britain, the provisions of the Equality Act apply to anything done by them in providing the ISS in another EEA Member State and paragraph 2 provides that where an ISS provider is established in an EEA Member State other than the UK, the Equality Act does not apply. Various exceptions to the provisions of the Act are provided in respect of intermediary ISPs who carry out activities essential for the operation of the Internet. The draft Explanatory Memorandum to the Bill (see <http://www.publications.parliament.uk/pa/ld200910/ldbills/020/en/2010020en.pdf> for details) gives examples of the types of discrimination that the provisions are intended to deal with in the context of on-line transactions - the final Explanatory Memorandum is still to be published. The main provisions are intended to come into force in October 2010, with the ban on age discrimination in provision of goods, facilities, services and public functions due to come into force in 2012. See http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100015_en.pdf for the Act.

Broadcasting

Foreign Decoding Cards, Football Matches and Referrals to the ECJ

The first claimant, the governing body of European football with members throughout Europe, and the second claimant, which held the broadcast rights to certain football matches, applied to the High Court for permission to refer to the ECJ various questions relating to copyright infringement arising from the use of foreign satellite decoder cards, supplied by the defendant. The defendant imported foreign decoder cards, decoder boxes and related equipment and was aware that customers could use the equipment to view live Champions League and Europa League matches, which would otherwise be unavailable to them unless they had taken out the appropriate subscription. The first claimant claimed that encryption was an effective technological measure which the defendant circumvented by distributing the foreign decoder cards and related equipment and in doing so was unlawfully interfering with its business. An issue arose as to whether to refer to the ECJ a number of questions of interpretation of EU law relating to the use of foreign decoder cards and copyright. The claimants alleged that the defendants had infringed their rights under section 298 of the Copyright Designs and Patents Act 1988, which been enacted to transpose the provisions of Parliament and Council Directive (EC) 98/84 into UK law. The defendants raised defences under section 28A of the 1988 Act and Council Directive (EEC) 93/83 (on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission). The defendant submitted that the answers to a number of questions referred to the ECJ in

Football Association Premier League Ltd v QC Leisure (2008) EWHC 1411 concerning the use of foreign satellite decoder cards would resolve a large part of the first claimant's case and that the proceedings should be stayed until then. The court ruled that in the circumstances it was appropriate to refer certain questions of interpretation of EU law to the ECJ - it noted a national court had discretion to refer a matter to the ECJ as a preliminary issue where it was necessary for the resolution of the dispute before it and it was for the national court to explain why the interpretation was necessary for it to give judgment. Although the matter here was only at a preliminary stage, the request for a reference was not premature and in the exercise of discretion a reference should be made, notwithstanding the questions referred to in the *Premier League* case. A refusal of a reference would deny the first claimant an opportunity of persuading the ECJ that the importation of foreign decoder cards was unlawful. (*Union of European Football Association & Anor v Euroview* [2010] All ER (D) 87 (Apr) - only a digest of the case is available at this stage, via LexisNexis).

Film & TV

PACT Proposes New Business Model for UK Film Producers

A new business model for UK film producers has been proposed by industry body PACT. According to PACT the fundamental concept behind the proposals is that "content creators would retain substantial ownership of intellectual property and have greater access to revenues from the films they create", which would "lead to strong, entrepreneurial businesses than can attract outside finance and become the bedrock for the growth of the sector". This would be achieved by making what PACT describe as a number of "relatively simple adjustments of a few 'levers' of policy" - it suggests that 100% of the recoupment of public investment should accrue to the UK production company, with 70% of such recouped funds being ring-fenced and only available to invest in future development and production; using the Film Depository Receipts system as a "lock box" whereby 70% of monies recouped are placed, on the production company's behalf, in an interest-bearing escrow account with a fiduciary agent such as the National Film Trustee Company (these accumulated funds would be accessed only by the production company and used only for the development and finance of future UK films being produced by that company); treating 100% of the tax credit as producer's equity investment; introducing new Terms of Trade with public service broadcasters; agreeing a pro-forma set of principal legal documents which would apply to all films to reduce legal costs; and supporting the House of Lords Communication Committee's proposal for the tax relief level to be raised to 30% on UK films with a budget of less than £5 million. PACT said the proposals represented a "major shift in the relationships within the film ecology, characterised by greater partnerships all around" and that the interests of the public sector, content creators, private investors and consumers would be "much more closely aligned". See https://www.pact.co.uk/MainWebSite/Resources/Document/UK_Film_Report_2010FINAL.pdf for details.

Litigation

Terms of Injunction Restraining Privacy Infringement Against Third Parties - Whether Extent Justified

The High Court has ruled on the continuation of an injunction to restrain an infringement of privacy - the application for the injunction related to information, including visual images, on a laptop belonging to the applicant, which had been stolen. The original order was based primarily upon claims to be brought to restrain infringement of privacy and possible breaches of copyright and the court made it clear that it was proceeding on the basis that the persons who stole the equipment, who were unidentified, nor any third parties to whom they may choose to pass it on would have any rights to view, use or exploit the stored material. Following the grant of the interim injunction, the applicant applied for an order relating to service of the injunction on third parties - this contained a modification to the wording of CPR 25 APD 9.2 (which deals with injunctions against third parties), in that it provided that the applicant's advisers need only serve documents on the legal advisers of a third party on the provision of a written undertaking to use the documents, and information contained in them, only for the purposes of the proceedings. The publishers of the Daily Mirror, who had been notified of the injunction, argued that the provision of a written undertaking was unnecessary as the applicant would be protected by CPR 31.22 which governs the use of documents disclosed in proceedings and also asked whether the applicant had to give advance notice of an ex parte application for an injunction to all relevant third parties. The court acknowledged the concern - the extent to which it is, or may be, appropriate to give prior notification of an application for an injunction to restrict a defendant or defendants (sometimes as yet unidentified) from communicating information alleged to be private or confidential to any media third party upon whom it is intended to serve any order obtained and said it was "probably appropriate to have in mind the court's objective ... namely, to provide a fair and practical balance between the potentially competing Convention rights of the relevant protagonists". It said "The question, therefore, has to be asked whether it is proportionate to require an applicant for injunctive relief to undertake, always and as a matter of course, the expense, delay and inconvenience of serving all the media organisations who may, theoretically, be affected by the grant of an injunction ... a sensible balance of competing rights would generally be achieved by requiring them only to serve those whom they have reason to believe will

have an interest in the story. They should not be required to speculate or guess, but if there are solid grounds in the light of the available evidence to think that a particular media group has shown an interest in the material, it is right that they should be notified". Further, the court noted that the applicants' advisers had exercised their discretion and concentrated on serving those who are believed to have some interest in publishing the information in respect of which protection is to be sought and said, "the need for prior notification should be addressed according to the facts of each case. I do not think it right that an applicant's lawyers should have to give prior notification to each and every media group - simply on the basis that they might be interested in the story, or in the private information sought to be protected, if they hear about it. Accordingly, the law should only impose an obligation to notify those who are already believed to have shown some interest in publishing". (*TUV v Persons Unknown* [2010] EWHC 853 QB - see <http://www.bailii.org/ew/cases/EWHC/QB/2010/853.html> for the judgment).

Publishing

Statement in Open Court - Erroneous Claims of Terrorist Links

The claimants, who were trustees of a charitable organisation, brought libel proceedings against the defendant, the publisher of the Sunday Express, following the publication of an article which alleged that the charity had links to the "spiritual leader" of a terrorist organisation and connections with a terrorist organisation. The defendant accepted that the defamatory words, which caused the claimants "serious damage", should not have been published. The defendant withdrew the allegations and agreed to pay "a substantial sum in damages", which was donated to the charity. (*Idris Atcha & Ors v Express Newspapers, Unreported, QBD, 15 April 2010*).

Statement in Open Court - Unfounded Allegations Made on Basis of Information Supplied by Hostile Third Parties

The claimants, who were collectively involved in the management of a primary school, brought a libel claim against the defendant following the defendant's making a number of allegations about the manner in which the school was run. The allegations were published on a teachers' union website. The allegations were based in part on information given to the defendant by third parties who "had a record of hostility towards the school and its success". The defendant accepted that the claims could not be reconciled with the facts and withdrew the allegations unreservedly, apologised publicly and agreed to pay the claimants' damages and legal costs. (*McLaughlin & Ors v Newall, Unreported, QBD, 15 April 2010*).

Sport

EU Sports Ministers Agree to Create Structured Dialogue Group for Sport

An informal meeting of EU sports ministers has concluded with the ministers reaching a "unanimous agreement" on the creation of a "structured dialogue" group between all levels of sport. The group will comprise representatives from public authorities, the Council, the Commission, Member States and the European Parliament and various sports representatives. The use of a structured dialogue was described as being the only way for the different interested bodies to make progress and reconcile the competing interests of international federations, international leagues, sportsmen and women, governments and the Commission, etc. The exact number of participants is yet to be decided and the group "will be an ongoing process". The ministers also agreed to set up an informal Council working group on social inclusion and equality. The decision will be formalised during May's sports ministerial meeting. (*EurActiv, 23 April 2010*).

Technology

Commission Establishes "Reflection Group" to Consider Digitisation of European Cultural Works

The European Commission has announced the establishment of a "Reflection Group" which will be tasked with making recommendations on how to speed up the digitisation, online accessibility and preservation of cultural works across Europe. This Reflection Group will "examine the various ongoing initiatives involving both public and private partners (notably the Google Books project) and copyright issues to find ways to boost the digitisation efforts of the complete collections held by libraries, museums and archives in Europe". According to the Commission, the Group will consider issues such as funding digitisation, including the possibilities and conditions for public-private partnerships and will also address copyright issues and licensing practices to facilitate the digitisation of copyrighted material - in particular out-of-print works and the so-called orphan works, which represent a large part of Europe's collections. The Group has been asked to report by the end of the year. (*EC Press Release IP/10/456, 21 April 2010*).

Government's Strategy for Combating Cyber Crime

The Home Office has published a Command Paper outlining its strategy for dealing with cyber crime, which builds on the issues identified in the Government's 2009 UK Cyber Security Strategy. The Strategy called for the development of an integrated approach to tackling the threats from the internet and associated technology - the Paper sets out the Home Office's plan for co-ordinating and delivering a policy which will "counter cyber crime and its impact on UK interests and specifically the citizen". The Paper identifies the various cyber crimes the Government is concerned with such as online fraud, identity theft, child protection issues, terrorism, hate crimes, contempt of court, fraud, data security, IP theft and outlines how the Government will deal with them. The Paper noted, "the Home Office will also consider whether the sentences for crimes committed on the internet fully reflect the seriousness of the crime, and the scale on which they are attempted or perpetrated". The UK Cyber Crime Strategy will be reviewed on a six monthly basis to ensure that it is consistent with the work on the National Security Strategy. In addition, the Paper also referred to the work by the OFT to develop a longer term national strategy for consumer protection on the internet - the OFT is to publish a public consultation document in spring 2010, and a completed e-Consumer Protection Strategy is due to be published by the end of 2010. See <http://www.official-documents.gov.uk/document/cm78/7842/7842.pdf> for the Paper. The Paper recognised that a lack of compatibility of criminal offences and investigative methods across borders makes cyber crime harder to deal with and in this context, the issue of cyber crime is also of concern to the European Commission - the European Commission Vice-President for the Digital Agenda said recently "cyber crimes are rising, and cyber criminals can be hard to catch and penalise. Building trust in this rapidly evolving environment is particularly challenging. It requires closer European co-operation, as well as global co-ordination. The range of concerns we need to tackle here stretches from daily spam that annoy everyone through to national security matters; from daily life to life itself". The Commission will be attempting to deal with this, and other related issues in the forthcoming European Digital Agenda that is to be adopted shortly. (*EC Memo/10/137, 19 April 2010*).

Consultations & Reports

Ofcom Consultation - BBC requests Ofcom consent for Commonwealth Games 2010 coverage - <http://www.ofcom.org.uk/consult/condocs/commonwealth/> (Ofcom is inviting comment on the request from the BBC for consent to broadcast live coverage of the 2010 Commonwealth Games - the Games are a Group B listed event which means that Ofcom's consent is needed for exclusive live coverage).