

This is our summary of some of the key legal developments across a range of sectors for the week of 26 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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High Court Considers Whether Football Fixtures Lists Subject to Copyright and Database Protection

In a trial of preliminary issues relating to copyright and database right infringement actions, the High Court has ruled on the question of whether any and if so what rights subsist in the annual fixture lists produced and published for the purposes of the English and Scottish Premier Leagues and football leagues. The claimants, who were involved in various capacities in the organisation of football matches, brought the actions against the defendants, who were alleged to have been using the fixture lists without a licence. The court ruled that the fixture lists were protected by database copyright, but not by sui generis database right or any other copyright. At the outset the court stated that "the process of preparing the Fixture Lists, whether in England or in Scotland remains one which involves very significant labour and skill in satisfying the multitude of often competing requirements of those involved". *Football League Limited v Littlewoods Pools* [1959] 1 Ch 637 established that copyright subsisted in football fixture lists as a literary work (which under the Copyright Act 1956 specifically included a compilation) and the Database Directive, which was introduced to harmonise the approach to databases, subsequently provided two separate forms of intellectual property protection for databases. The court said the Directive sought to harmonise protection for "systematically arranged, individually accessible collections of independent works, data or other materials" and noted that the approach adopted under the Directive in the UK is that, to be original, "the work must not be a mere copy of a pre-existing work: it must originate with the author rather than anyone else". The court said, "the author must have exercised judgment, taste or discretion (good, bad or indifferent) in selecting or arranging the contents of the database. Laddie, Prescott & Vitoria give examples of databases which would not attract copyright protection: a list of all Acts of Parliament in the last 100 years for example. The rote application of rules such as this is not enough. On the other hand a collection of the author's 1000 favourite poems would plainly pass both the quantitative and qualitative test". It then noted that the ECJ has not yet considered what it means for databases "by reason of the selection or arrangement of their contents, [to] constitute the author's own intellectual creation". The court said the quantum of relevant work involved in producing the lists for any of the Leagues was "significant" and "made more complex by the fact that no two fixtures can be freely interchanged without affecting others" and on that basis, found that the lists were the subject of database copyright. (*Football Dataco Limited & Ors v Britten's Pools Limited & Ors* [2010] EWHC 841 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/841.html> for the judgment).

OFT Issues First Short-form Opinion on Competition Issues

The Office of Fair Trading (OFT) has issued its first advice under the Short-form Opinion process, which it can apply in order to "provide guidance, within a prompt timetable, to businesses seeking clarity on how the law applies to prospective collaboration agreements between competitors which raise novel or unresolved competition issues". The advice was issued following a request for clarification on the competition implications of a proposed joint purchasing agreement in the grocery wholesaler market. The OFT said "The process involves parties submitting a statement of facts agreed between themselves. The OFT does not verify these for accuracy or completeness or carry out any market testing and bases its opinion on these 'assumed facts'. The OFT will consider requests from companies and will publish Short-form Opinions in order to provide wider guidance to a range of businesses or sectors. The Opinions will only be available for a limited number of cases per year, and the OFT will choose these cases by applying its usual prioritisation principles". The Short-form Opinion will provide guidance to requesting parties to facilitate their self-assessment of the compatibility of the proposed agreement with the relevant provisions of the Competition Act 1998 and/or Article 101 of Treaty of the Functioning of the European Union. The OFT also reminded interested parties that it was in their interests to provide a statement of facts that was accurate, complete and not misleading in order to maximise the relevance of the guidance given in the Short-form Opinion to carrying out their self-assessment exercise. (*OFT Press Release 44/10, 27 April 2010* - see http://www.offt.gov.uk/shared_offt/press_release_attachments/SFO.pdf for details on when the OFT will apply the Short-form Opinion process).

Law Commissions to Investigate Misrepresentation and Unfair Commercial Practices

The Law Commission and the Scottish Law Commission have been asked by BIS to undertake a joint project on consumer law to advise on a possible restatement and simplification of the law of misrepresentation to make it more transparent and easier for businesses and consumers to understand and to remove any unnecessary differences between the civil law and the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which came into force on 26 May 2008, implementing the Unfair Commercial Practices Directive 2005/29/EC in the UK. The CPRs outline two categories of prohibited commercial practices - those which are unfair if they would cause the average consumer to make a transactional decision they would otherwise not have made (misleading practices, misleading omissions and practices which are contrary to professional diligence) and those which are unfair in all circumstances (a blacklist of 31 banned practices). The Commissions will also consider the law of duress in order

to clarify whether aggressive commercial practices under the CPRs should be automatically classed as a form of illegitimate pressure and following consultation will consider whether there is any justification for the introduction of a private right of redress where there is clear evidence that consumers have suffered loss as a result of an unfair commercial practice and no private right currently exists. See http://www.lawcom.gov.uk/docs/misrepresentation_short.pdf for the summary of the position under current English law.

Broadcasting

BSkyB Seek Interim Relief from Tribunal Pending Appeal Against Ofcom Decision

BSkyB has filed an application for interim relief with the Competition Appeal Tribunal. The application was made in support of an appeal which Sky intends to bring under section 317(6) of the Communications Act 2003 in respect of the decision published by Ofcom on 31 March 2010 (and see http://www.ofcom.org.uk/consult/condocs/third_paytv/statement/paytv_statement.pdf for details). BSkyB said that it would be "severely and irreversibly prejudiced if it is required to comply with the Conditions before its Appeal against the Decision is determined" - it said "The Conditions represent a far-reaching intervention into Sky's business which by its nature will be difficult fully to reverse and which is likely to cause damage for which Sky will not be compensated in the event that it is successful in its Appeal". Accordingly, Sky asked for the Decision to be suspended pending the Tribunal's determination of its appeal. See http://www.catribunal.org.uk/files/1052_Sky_Notice_160410.pdf for the Notice. The Tribunal subsequently made orders regarding the establishment of a confidentiality ring between the relevant parties - see http://www.catribunal.org.uk/files/1152_BSkyB_Order_210410.pdf for details. The hearing was set for 23 April 2010, however no details of the Tribunal's findings were available at the time of writing.

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published with details of adjudications on breaches of Rules 2.1 (generally accepted standards), 2.3 (offensive material must be justified by context), 2.11 (competitions should be conducted fairly), 2.15 (rules for competitions must be clear and appropriately made known), 9.3 (sponsorship on radio must comply with advertising content rules), 9.5 (no promotional references to sponsor), 10.3 (products and services must not be promoted in programmes) and 10.4 (no undue prominence may be given to a product or service) of the Broadcasting Code. In addition, Ofcom upheld a complaint of unwarranted infringement of privacy in respect of a programme as broadcast. A breach of Section 2, Rule 3(b) of the BCAP Code (misleading impressions) and two breaches of licence condition 8(2)(b) in Part 2 of local commercial radio licences (retention and production of recordings) were also recorded. See http://www.ofcom.gov.uk/tv/obb/prog_cb/obb156/Issue156.pdf for details.

Corporate

Winding Up of Insolvent Film Company - Wrongful Trading, Lies and Forgery

The High Court has held that company director, who had entered into a Production Services Agreement with another company for the production of a film, knowing that his company had insufficient funding to discharge its obligations under the Agreement and had knowing that there was no reasonable prospect that his company could avoid going into insolvent liquidation, was guilty of wrongful trading under section 214 of the Insolvency Act 1986. The liquidator had brought an action seeking an order for wrongful trading against the first respondent, who was the director of the company which was wound up and seeking declarations that certain alleged agreements were of no effect or were void or should be set aside under section 423 of the Insolvency Act 1986. In addition, a declaration was also sought that the insolvent company was entitled to an enquiry as to damages for copyright infringement. The court said the director had taken a casual approach to his duty as director to look to the best interests of the company and, if the company did not have assets to pay creditors, the duty that he owed to those creditors to minimise their losses. By committing the company to its obligations under the Agreement without being able to procure the necessary finance or the participation of the principal actor, he knew or ought to have known that there was no reasonable prospect that the company could avoid going into insolvent liquidation. The court noted there was no reasonable prospect of the director having been satisfied that the lead actor being considered for the role would sign and no reasonable prospect of his having been satisfied that the company would secure the necessary finance to honour its obligations under the Agreement. In addition, the court commented on the "clearly forged documents", which had been created in order to permit the company to produce the film - it noted that all the participants involved in the preparation of the false documents had done so to create a false title trail which would be shown to backers of the second respondent to show that the company had no rights because the license had been terminated pursuant to contractual rights. It was therefore an attempt to defraud

the backers of the second respondent and deprive the creditors of the company of a valuable asset. The court said however that there was no need to make any declaratory relief in respect of the false documents because it was not suggested that any of them were of any effect. (*Singla v Hedman & Ors* [2010] EWHC 902 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2010/902.html> for the judgment).

Gambling & Betting

FASB Accounting Standards Update on Accruals for Casino Jackpot Liabilities

The Financial Accounting Standards Board (FASB) has published an Update on accruals for casino jackpot liabilities. The Update addresses the different approaches in practice to the accounting for casino base jackpot liabilities and specifically, "diversity in practices regarding whether an entity accrues liabilities for a base jackpot before it is won if the entity is not required to award the base jackpot". The Update makes amendments to the FASB Accounting Standards Codification and makes it clear that "an entity should not accrue jackpot liabilities (or portions thereof) before a jackpot is won if the entity can avoid paying that jackpot. Jackpots should be accrued and charged to revenue when an entity has the obligation to pay the jackpot". The amendments are effective for fiscal years, and interim periods within those years, beginning on or after 15 December 2010, with an earlier application being permitted. (The FASB Accounting Standards Codification is described by the FASB as the "source of authoritative generally accepted accounting principles (GAAP), recognised by the FASB to be applied by nongovernmental entities" - Accounting Standards Updates are not authoritative but are intended to communicate how the Accounting Standards Codification is being amended).

Gambling Commission Announces Suspension of Operating Licence

The Gambling Commission has announced that it has commenced a review under section 116 of the Gambling Act 2005 and, under section 118 of the Act, has decided to suspend the Combined Operating Licence of ATL Amusements / ATL Hire relating to an adult gaming centre and machine supply, whilst the review takes place. The Commission said the suspension is an "interim measure", the need for which will be kept under consideration during the review. Section 118 permits the Commission to suspend an operating licence if, following a review under section 116, the Commission thinks that any of the conditions specified in section 120(1) applies - the conditions referred to in section 120(1) are where the Commission thinks that a licensed activity is being or has been carried on in a manner which is inconsistent with the licensing objectives, that a condition of the licence has been breached, that the licensee has failed to co-operate with a review under section 116(1) or (2), or that the licensee is unsuitable to carry on the licensed activities. No further details have been given. (*Gambling Commission News Item, 27 April 2010*).

Litigation

Application for Summary Judgment in Libel Claim by "World's Worst Tennis Pro"

The defendant, the publisher of the Daily Telegraph newspaper, brought an application for summary judgment under CPR Part 24, in relation to an action for libel brought against it by the claimant following the publication of an article published on the front page of the Daily Telegraph entitled "World's worst tennis pro wins at last". The defendant denied the article was defamatory and said in the alternative that the words complained of should be read in their proper context (in this case, the 54 consecutive losses that the claimant had suffered). The court said it had "no trouble in concluding that the words complained of when read in their context ... are capable of bearing a meaning defamatory of the claimant: for example, that he lacks insight into his own lack of talent, and unreasonably persists in pursuing a career to which he is not suited; or - as it was put in the letter of claim but not in the Particulars of Claim - that he unreasonably and unrealistically persists in a career as a professional tennis player which is an expensive waste of money and doomed to failure. That meaning says something about him and his character; and people might think the less of him, if that is what the words complained of did mean. But this is not the meaning of which the claimant complains ... The meaning complained of is a narrow one, confined on the face of it to highlighting what the claimant alleges is a purely factual error (i.e. that he had lost 54 professional matches on the trot (and these were the only professional matches he had played) rather than 54 professional matches on the trot when playing on the international tennis circuit)". The court said its conclusions on the first issue on meaning and on the facts removed the central plank of the claimant's case. In light of those conclusions there was nothing, as a matter of reality, of which the claimant actually complained that could not be justified and the facts were sufficient to justify any defamatory meaning the words complained of were capable of bearing. It said there could be no rational conclusion other than that the claim of justification must succeed. Further, it said it was not immediately apparent how the claim would be likely to restore or enhance the claimant's reputation and as there was no other compelling reason why the claim should be tried, the defendant was entitled to summary judgment. (*Dee v Telegraph Media Group Limited* [2010] EWHC 924 (QB) - see

<http://www.bailii.org/ew/cases/EWHC/QB/2010/924.html> for the judgment - after winning the match referred to in the article, the claimant then lost in the next round... - it is also worth noting that the Daily Telegraph was the only paper which defended the claim - according to reports, 30 other news outlets which had also run similar stories had "capitulated").

Music

IFPI's Annual Report on State of the Recording Industry

The IFPI have published a summary of their annual report on the state of the recording industry for 2010 - the summary highlights a decline in global music sales of 7% but also notes that there were "significant improvements" in music sales in specific markets such as the UK, Sweden and Brazil. Sales in other areas however reflected the impact of peer-to-peer file sharing with falls of 14.3% in Spain and 7.4% in Canada - the IFPI made the point that these jurisdictions had some of the world's weakest legal defences against piracy and said the findings showed that on average, some 20% of global Internet traffic is related to peer-to-peer distribution of unauthorised content. However, there are now some 12 million tracks available from over 400 legal music services worldwide and digital music sales in certain markets showed "encouraging" growth. (IFPI Press Release, 28 April 2010 - see http://www.ifpi.org/content/section_news/20100428.html for the report summary).

Publishing

Assessment of Damages Where Libel Quickly Withdrawn and Unqualified Offer of Amends Made

The court was required to determine the amount of compensation to be paid to the claimant actor in respect of distress caused to him by a defamatory article published by the defendant on its website about him, suggesting that he had been romantically involved with an actress. The claimant complained that the article was untrue and that he was in a serious relationship with another person. The article was removed from the defendant's website almost immediately, having remained on there for some 27 hours and the defendant published an apology soon after. Prior to the issue of proceedings, the defendant had made an unqualified offer of amends pursuant to sections 2 to 4 of the Defamation Act 1996, which the claimant accepted. The court noted that when determining appropriate compensation it had to adopt a two-stage process: firstly, to determine the figure which would have been awarded after trial and secondly, to decide to what extent that figure should be discounted to give effect to any mitigation. It noted that in the circumstances, the libel amounted to "a bit of celebrity gossip" and that it was at the "less serious end of the scale". The libel was short lived and the claimant's reputation had not actually suffered. The court went so far as to question whether the claimant was perhaps being "overly sensitive" and "lacking a sense of proportion" in alleging that his distress was still continuing. The appropriate starting figure would be £8,500 however that then had to be discounted to recognise the deflationary or mitigating effect of the defendant's conduct, in particular its early resort to the offer of amends procedure, which would have signalled to the claimant that he had effectively "won" from that moment onwards and his stress and anxiety should have been correspondingly reduced. Because of the early apology, the willingness to remove the offending words immediately and the very prompt offer of amends, the award should be reduced by 50% to £4,250. (*Bowman v MGN Limited* [2010] EWHC 895 (QB) - see <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2010/895.html&query=Bowman&method=boolean> for the judgment).

Technology

PWC Report on Information Security Breaches and Cyber Crime

Last week's Need to Know discussed the Government's strategy for combating cyber crime - this week, PWC have published the findings of a report on cyber crime, which had been commissioned by Infosecurity Europe to look at information security breaches. The report stated, "The changing business environment is creating new vulnerabilities. Criminals are adapting their techniques exploiting the vulnerabilities; as a result cyber crime is becoming more common. After falling for the last few years, the number and cost of security breaches appears to be rising fast". It found that 92% of all the respondents had had some sort of security "incident" in the past year and attacks by unauthorised outsiders had also increased markedly for all sizes of organisation. It found that 63% of large respondents had been attacked in the last year, compared with only 39% two years ago. Physical theft of computers remained the most common type of incident however while computer fraud (or theft using computer systems) was still relatively rare, it had risen "significantly" since 2008. Confidentiality and data protection breaches, while still less common than staff misuse of the web or email, had also increased dramatically. (PWC Press Release, 28 April 2010 - the report is available from PWC).

EU Ministers Call for Action on Cyber Crime

Still on the subject of cyber crime, EU ministers have asked the European Commission to "assess the feasibility" of setting up a single centre on cyber crime to pool Member States' efforts and resources to fight Internet crime". While the EU's anti-cyber crime activities currently focus on four separate but related approaches - legislative, law enforcement co-operation, public-private co-operation and international activities and co-operation - it has no centralised agency and some EU Member States, including the UK, have still to ratify the Convention on Cybercrime, which was adopted in 2001. A member of the Cabinet for Justice confirmed that the Commission is shortly going to propose a new directive for attacks against information systems and in October 2010, the EU Executive will present an EU Internal Security Strategy, a major component of which will be cyber security. The European Commission has said that the cost of cyber crime in the EU is €750 billion annually. (*EurActiv*, 28 April 2010).

Consultations & Reports

PhonepayPlus Consultation - The New PhonepayPlus Code of Practice - <http://www.phonepayplus.org.uk/upload/New-Code-consultation-Final.pdf> (PhonepayPlus is consulting on its forthcoming 12th Edition of the Code of Practice. PhonepayPlus said "In reviewing the 11th edition of the Code and building a new one, we believed it was right to build on the 'pre-empt; prevent; protect' strategy. To do this, we would need to make a more significant departure from the status quo of previous Codes, and increase the scope we have to regulate flexibly and proactively wherever it is appropriate that we do so". In parallel with PhonepayPlus' consultation, Ofcom will also be consulting on whether to approve, under section 121 of the Communications Act 2003, the new edition of the Code of Practice for regulating Premium Rate Services - see <http://www.ofcom.org.uk/consult/condocs/ppp/pppcondoc.pdf> for the Ofcom Consultation).