

This is our summary of some of the key legal developments across a range of sectors for the week of 18 May 2009. It is intended for reference purposes only and does not constitute definitive advice. Links to the original source materials are included where there are no restrictions in terms of access. References may also be made to sources that require separate registration or subscription. A link to a source does not necessarily imply endorsement of the source or the material provided through the link.

For further information on any of the matters discussed in the summary please contact our Professional Support Lawyer, [Sarah Kirkness](#). If you have any comments, queries or suggestions please contact us at [comments](#). All suggestions and comments are most welcome. If you do not wish to receive this summary you can contact us at [unsubscribe](#).

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General

Government Response to Lords' Report on Surveillance Society Britain

The Government has published its response to the House of Lords Select Committee Report on surveillance, citizens and the State (and see the Need to Know for 2 & 9 February 2009 for details about the Report). The Select Committee had highlighted concerns relating to the construction and operation of "one of the most extensive and technologically advanced surveillance systems in the world" in order to meet Government policy objectives and made 44 separate recommendations to protect individuals from invasions of their privacy as a result of surveillance and data collection. The Government's said in response that it would always take a "principled and proportionate view of what needs to be done to protect the public and respect individual privacy", and that they would "flex" their approach where necessary. They said they would "seek to ensure that due consideration" was given to certain key principles - whether robust safeguards were in place to protect information and individual liberties; whether plans and actions were proportionate to the damage and the threat they were seeking to prevent; and whether the proposed action was as transparent as possible and whether citizens were being given the right amount of choice. So that's all right then. See <http://www.parliament.uk/documents/upload/GovernmentResponseSurveillance.pdf> for details.

Commission Publishes Final Report on Content Online Platform

The European Commission has published its Final Report on the Content Online Platform, which was set up as part of its "Creative Content" initiative to debate the key issues. The Report presents the Commission's main findings on a range of issues including new business models, improvement of the availability of online content and legal offers, management of copyright online, piracy, the protection of minors and cultural diversity. The Commission is planning to adopt a Second Communication on Creative Content Online later in the year which will further summarise the findings of the Creative Content Online initiative and the publication of a study on the multi-licensing of audio-visual content is expected in early 2010. See http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf for the Report.

Broadcasting

Ofcom's Sanctions Committee Fines Broadcasters for Explicit Material

Ofcom's Content Sanctions Committee has decided to impose a statutory sanction on RHF Productions Limited (RHF) and Portland Enterprises (CI) Limited (Portland) as a result of the serious (and, in relation to RHF, repeated) failure of both broadcasters to ensure compliance with the Broadcasting Code. On-air references were made by RHF to explicit websites that did not comply with the requirement of the Code (and which could be accessed by under 18s) and material which, although encrypted, was rated R18, which had been shown by Portland. Ofcom had previously said that in "no circumstances may such websites contain unprotected R18-rated equivalent material if they are promoted on a licensed service". The Committee decided that these cases were sufficiently serious, and in relation to RHF repeated, to be considered for a statutory sanction and a fine of £25,000 in respect of the breaches by RHF and £27,500 in respect of the breach by Portland was imposed. See http://www.ofcom.org.uk/tv/obb/ocsc_adjud/rhfportland.pdf for the Decision.

Corporate

Commission Recommendation on Directors' Remuneration

The European Commission has published a Recommendation complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies. The Commission stated that "Whilst the form, structure and level of directors' remuneration continue to be matters primarily falling within the competence of companies, their shareholders and, where applicable, employee representatives, the Commission considers that there is a need for additional principles regarding the structure of directors' remuneration, as set out in a company's remuneration policy and the process of determining remuneration and control on that process". The Recommendation therefore lays down additional principles regarding the structure of directors' remuneration, as set out in a company's remuneration policy and the process of determining remuneration and control on that process. The focus is on establishing a link between the long-term sustainability of the company and directors' remuneration, rather than looking at only short-term returns. The Commission said that it intends to make extended use of different monitoring mechanisms, such as annual scoreboards and mutual evaluation by Member States and also explore the possibilities of

standardising a policy for the disclosure of directors' remuneration. Member States are "invited" to take the necessary measures to promote the application of the Recommendation by 31 December 2009. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:120:0028:0031:EN:PDF> for details.

Former Director Incorporating New Company to Compete with Old Company

The related claimant companies brought an action against a former director, employee and a newly incorporated company for conspiracy, breach of contract and breach of fiduciary duty. The court said the case raised the "much-litigated problem of how far a director may go in the way of making preparation for future competition against a company of which he is a director and how far the company is able to restrain such competition after the resignation of the director in the absence of a restraint covenant". The court ruled that the claimant companies were entitled to damages for breach of fiduciary duty and breach of contract where the former director and employee had, prior to the former director's resignation, failed to alert them to the impending threat of competition from a new company he had incorporated, approached their customers, and retained documents containing information that was confidential to them or useful to the business. The court granted an order for the assessment of damages and continued the springboard injunction until a year after the director's resignation so as to provide the subsidiary company claimant with proper protection against the newly incorporated company's activities. (*G Attwood Holdings Ltd & Anor v G Woodward & Ors* [2009] EWHC 1083 (Ch) - the judgment is available via Lawtel).

New Legislation - Amendment of Companies Act 2006, Schedule 2

The Companies Act 2006 (Amendment of Schedule 2) (No 2) Order 2009, SI 2009/1208 comes into force on 1 July 2009. The Order replaces the current Schedule 2 of the Companies Act 2006 with the Schedule to the Order. Schedule 2 deals with specified persons and descriptions of disclosures for the purposes of section 948; section 948 deals with restrictions on disclosure in relation to takeovers and sets out the list of specified persons and descriptions in respect of whom and which disclosure of information is permitted in the case of a takeover. The amendment is made to include within the Schedule disclosure to specified persons and specified descriptions of disclosure relating to the Isle of Man, Jersey and Guernsey. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091208_en.pdf for details.

Revised Draft of Registrar of Companies and Applications for Striking Off Regulations

The Government has published a revised draft of the Registrar of Companies and Applications for Striking Off Regulations 2009 and its accompanying Explanatory Memorandum. The Regulations supersede the previous draft and were amended to deal with concerns about the improper use of information available about a company's officers and the procedure available to remove from the Companies House register information relating to persons appointed as officers without their knowledge or consent. The Regulations will come into force on 1 October 2009. See http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi_9780111479520_en.pdf for details.

Draft Order to Amend Part 35 of Companies Act

A draft of The Companies Act 2006 (Part 35) (Consequential Amendments, Transitional Provisions and Savings) Order 2009 has also been published. The draft Order amends Part 35 of the Companies Act 2006 - Part 35 is concerned with the registrar of companies, material delivered to the registrar and documents issued by the registrar. The Order amends certain provisions of Part 35 to extend certain administrative and procedural provisions so that they also apply in relation to bodies other than companies or overseas companies or, as appropriate, so that they also apply to documents relating to bodies other than companies or overseas companies. See http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi_9780111479513_en.pdf for details.

Film & TV

Submissions to Lords Select Committee Investigation into UK Film & TV Content

In February this year, the House of Lords Select Committee on Communications announced that it would be undertaking an investigation into UK-originated content in film and television (and see the Need to Know of 2 & 9 February 2009 for details). The deadline for written submissions to the Committee has now passed and the Commission has made available the submissions they have received (and see http://www.parliament.uk/parliamentary_committees/communications/wehlcommunications.cfm for access to the various submissions). For example, PACT have published their detailed submission in which they raise a number of key points about the UK film and TV industry and put forward four key proposals to stimulate UK film production - they ask the Commission to look at requiring an explicit commitment to UK film from Channel 4 (currently there is no requirement imposed on Channel 4 to invest in UK film); they also ask the Commission to support the BBC's continued investment in UK film as part of its Charter Agreement; they raise concerns about the current tax credit system, which excludes the costs of UK cast and crew members working on UK films abroad; and they propose that the UK Film council reviews its commercial deal terms when granting producers production funding from National Lottery funds. See

http://www.pact.co.uk/uploads/file_bank/Lordscontentreview.doc for details. The Committee is now hearing oral evidence and has indicated it is likely to publish its findings towards the end of the year.

Gambling

National Lottery Commission Study into Underage Lottery Play

The National Lottery Commission has commissioned research organisation Ipsos MORI to carry out a study into the extent of underage play of the National Lottery, as well as looking at gambling generally amongst 12 - 15 year-olds. The Commission said it wants to make it "as tough as possible" for young people to access National Lottery products and that this research would help them to understand how well the current preventative measures are working. This latest study will provide a comparison to the previous prevalence study published in 2006 (see http://www.natlotcomm.gov.uk/UploadDocs/Contents/Documents/Under_16s_and_the_National_Lottery_Final_report.pdf for details) and help determine whether there has been a fall in the overall rate of underage gambling. The findings are due to be published later in the year. (*National Lottery Commission Media Release 03/2009, 14 May 2009; on the subject of underage gambling, the Gambling Commission has said that it has written to licensed bookmakers to remind them that they must have effective policies and procedures in place to prevent young people under the age of 18 from gambling or entering a betting shop. This follows a recent "mystery shopping exercise" undertaken by the Commission that revealed a "disturbing" failure rate. The exercise covered all the major betting operators in Great Britain, accounting for around 80% of betting shops, and the initial results show that in 98 of the 100 shops visited a 17 year old was allowed to place a bet at the counter - Gambling Commission Press Release, 11 May 2009*).

Commission Issues Further Warning on House Prize Competitions

The Gambling Commission has issued further advice to people attempting to realise the value of their properties using a house competition scheme, in which they reiterate that they do not advise on or approve individual house competition schemes. The Commission said it does not in any circumstances "approve" prize competitions which remain free of statutory control under the Gambling Act 2005 and that organisers considering running a house competition should read its guidance on prize competitions and free draws and take independent legal advice before proceeding - see http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Press_release_on_house_competitions_advice_note_15_May_2009.pdf for details. The Law Society has previously issued a Practice Note on this subject - it stated, "Under the Gambling Act 2005 lotteries remain the preserve of good causes and therefore cannot be operated for commercial or private gain. Lotteries must be licensed by the Gambling Commission, unless they qualify in one of the exempt categories. Unregistered lotteries are illegal and any funds received from them will be considered the proceeds of crime". See <http://www.lawsociety.org.uk/productsandservices/practicenotes/housecompetitions/1436.article> for the note.

Litigation

Joint Statement in Court - False Allegation in Live Radio Broadcast

The parties made a Joint Statement in court following a libel claim brought by the applicants, the manager and first team coach of West Ham, against the BBC following a live radio broadcast in which the commentator alleged that the claimants had been in discussion with another football team, in breach of their contracts. The defendant accepted that the allegation was without foundation and apologised and agreed to pay damages and legal costs. (*Zola & Anor v The British Broadcasting Corporation, Unreported, QBD, 12 May 2009*).

Appeal Against Injunction to Prevent Publication of Article About Complaint to Law Society

The appellants appealed a ruling preventing the publication of information about the outcome of a complaint made to the Law Society against the appellants by a former client and an Ombudsman's report regarding the Law Society's handling of the complaint. The injunction was sought on grounds of confidentiality. The complaint was a complex one and related to questions of conflict of interest when accepting instructions. The appellants argued that the complainant was under an equitable obligation to treat the outcome of the Law Society investigation as confidential because the procedure that led to it was conducted on a private and confidential basis. They argued that the Law Society scheme for dealing with complaints presupposed that, and was unworkable unless, the entire proceedings and the outcome were treated by the parties and by the Law Society as confidential, and section 44D of the Solicitors Act 1974, which was not in force, presupposed that Law Society investigations had always been confidential, subject to the Law Society's power to refer the matter to a public tribunal. The court dismissed the appeal and held that the judge had been entitled to refuse to grant an injunction preventing the publisher from publishing information about the outcome of a complaint and that there was no duty of confidentiality owed to the solicitor and his firm by the complainant - the complainant was free to pass the information about the outcome of the complaint to the magazine. (*Napier & Anor v Pressdram Limited [2009] EWCA Civ 443 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/443.html> for the judgment*).

Music

Delay for Copyright Term Extension Directive?

Press comment indicates that the Government has conceded that it is now "odds on" that the Copyright Term Extension Directive will not pass through the European Council in its first reading and that it will move to a second reading in 2010 - at least 11 countries' representatives voted against the proposal, which was enough to block the Copyright Term Extension Directive in the Council of Ministers. The Directive proposes extending the current term of copyright protection for performers and sound recordings to 95 years and making additional provision for musicians by establishing a dedicated fund for session musicians and "use it or lose it" clauses which will have to be included in the contracts linking performers to their record companies will allow performers to get their rights back if the record producer does not market the sound recording during the extended period. Interestingly, other press comment has suggested that the UK Government's support for a compromise term (of 70 years) has been partly responsible for the difficulties in getting a majority approval.

Spain on US Piracy Watch List

According to reports, the US Congressional International Anti-Piracy Caucus has put Spain on its 2009 Piracy Watch list of countries as a result of its "alarming" levels of illegal file sharing. Spain is in good company with China, Canada, Mexico and Russia. The Caucus said Internet piracy in Spain has reached an "epidemic" level, and rights holders "lack the necessary tools to enforce their rights on the Internet". Further, peer-to-peer (P2P) piracy in Spain was widely perceived as an "acceptable cultural phenomenon", and the situation was "exacerbated by a government policy that has essentially decriminalised illicit P2P file sharing". See http://schiff.house.gov/antipiracycaucus/pdf/IAPC_2009_Watch_List.pdf for the 2009 List. At the same time however, the trial of Pablo Soto, a self-taught digital technology expert who is president of his own company, MP2P Technologies P2P, has begun in the Madrid Court for Commercial Matters. Majors EMI, Sony, Universal and Warner, together with IFPI affiliate Promusicae, are seeking €13 million in damages, having filed their suit in June 2008. The plaintiffs' claim was based on the fact that the software created by the defendant, which allows people to share files over the Internet, has caused them to lose substantial earnings by providing a platform for Internet users to download and share music for free, a situation they described as "unfair competition". The defendant denied any destructive intentions against the music industry. The judgment will be much anticipated - commentators have already noted that Spanish courts have repeatedly said that no crime is committed if people download music for personal use and no profit is directly generated from any infringement. Further, taxes are already applied on goods such as CDs, DVDs, memory cards and mobile phones to compensate the music industry for supposed losses. *(On a slight tangent, press reports indicate that The Pirate Party, the single-issue Swedish group that campaigns to encourage Internet copyright infringement, is on course to win several seats in the European Parliament at the forthcoming elections. According to a poll ahead of the upcoming European election, the pro-file-sharing party is Sweden's third biggest political group - The Times reports that "The Pirate Party's youth league has 20,300 members which is more than twice as many as the youth league of Prime Minister Fredrik Reinfeldt's Moderate Party").*

Publishing

PCC Upholds Rare Complaint About Payments to Criminals

The complainant was a victim of an arson attack on her home and complained to the Press Complaints Commission (PCC) after the magazine "Take a Break" published an article in which the person convicted of the offence proclaimed their innocence. The magazine acknowledged that it had paid £1,000 to the daughter of the person convicted but said that the person convicted had not personally benefited and that the article sought to highlight a miscarriage of justice. The PCC said the article was in breach of clause 16 of the Code of Practice (Payment to criminals). It said the article did not contain anything of sufficient public interest to justify the payment but amounted to an explanation about why the person had pleaded guilty to the crime, and seemed to try to justify the crime. It was clear that the crime had been exploited for payment in breach of the Code, and there was no public interest to justify it. The PCC noted that the magazine was not prohibited from publishing the story but said the decision to offer payment was misguided and the editor should have recognised that immediately. The complaint under Clause 16 was upheld. See <http://www.pcc.org.uk/cases/adjudicated.html?article=NTczMA==?oxid=6af17ab1f03e337a4fe65795f166bafb> for the adjudication.

Continuing Restriction of Reporting in the Face of the Burst Dam of Publicity - Competing Article 8 & 10 Rights

The Family Division of the High Court have heard an application for the continuation and extension of a reporting restriction order relating to four children (two prospective fathers, one mother and her baby) who had become the subject of "intense" media interest after the parents of one of the prospective fathers had alerted the press (translated as sold the story). The East Sussex County Council applied for an order to make the youngest prospective father, the mother and the baby wards of the court and made an application for a reporting restrictions order in order to prevent further publicity. The story had by that time generated extensive interest and comment. The court refused the application - it considered the competing interests of the parties under Articles 8 and 10 of the European Convention on Human Rights. The decision turned on the fact that information concerning the young family had been widely disseminated throughout the world, largely via the Internet (a Google search on the younger prospective father's name returned 359,000 results).

The court (reluctantly) concluded that granting the application to amend the order by preventing publication of information already in the public domain would represent a disproportionate interference in the Article 10 rights of the press and of the prospective father's rights under Article 8 and Article 10 to correct the erroneous information about him. It said the dam "has indeed burst and in practical terms there is no longer anything which the law can protect; the granting of the injunction at the present juncture would merely be a futile gesture". (*East Sussex County Council & Ors [2009] EWHC 935 (Fam)* - see <http://www.bailii.org/ew/cases/EWHC/Fam/2009/935.html> for the judgment).

PWC Study on Outlook for Newspaper Publishing in the Digital Age

PricewaterhouseCoopers (PWC) has just published its detailed study on the outlook for newspaper publishing in the digital age. The study looked at two key issues in a number of jurisdictions, including the UK and US: the change of consumer behaviour with respect to their consumption of news content, and the response of newspaper publishers, advertisers, advertising agencies and media buyers to these changes. Of comfort to papers is the fact that although there is a huge potential for growth online, the study showed that print remains the largest source of revenue generation for newspaper publishers, and will continue to be so for some time. However, the issues faced by local newspapers presented a mixed picture internationally. The report identified this segment as being at great risk in the UK and the US. The study also showed consumers have a 62% willingness to pay for general online news content compared to 100% for general print news content. The prevalence of free content however, was found to have an impact on demand and supply. Further, while the vast majority of consumers indicated that they were primarily interested in general news, a growing segment was increasingly demanding specialised, targeted and relevant information. The study showed newspaper publishers identified the niche approach as an opportunity for future growth. PWC said both consumers and advertisers demonstrated a willingness to pay more for high value, topic-specific publications than they would for newspapers providing general news only. The majority of consumers used TV and free Internet content as the main media for consuming news and background information, closely followed by radio and paid newspapers. As for delivery methods, the study found that the main reason why respondents selected mobile devices as their last choice was that these were difficult to read, leading to the conclusion that these devices obviously did not serve their purpose. PWC said rather than full newspaper content, there might be a good market for headlines and breaking news on mobile devices, but this was beyond the scope of the current survey. Further, consumers were still currently unwilling to pay for online content on mobile devices. See <http://www.wan-press.org/IMG/pdf/NewsPaperOutlook2009.pdf> for the study.

Technology

Commission Consults on Draft Guidelines for State Aid for Next Generation Broadband

The European Commission is consulting on draft guidelines on the application of EU State Aid rules to public funding of broadband networks. The key issue for discussion involves the public financing of very high speed, so-called "next generation access networks". The Commission said it has already taken an "overwhelmingly favourable view towards state measures for broadband deployment for rural and underserved areas, whilst being more critical for State Aid measures in areas where a broadband infrastructure already exists and competition takes place". The Commission's policy on public funding for broadband networks has been developed as a result of over 40 Commission decisions on individual cases, some of which are considered in the draft. Member States are invited to comment. (*EC Press Release IP/09/813, 19 May 2009* - see http://ec.europa.eu/competition/consultations/2009_broadband_guidelines/guidelines_en.pdf for the draft guidelines).

Consultations & Reports

Office of the Adjudicator - Broadcast Transmissions Services (OTA- BTS) Consultation - Principles for Pricing New Transmission Contracts - <http://www.adjudicator-bts.org.uk/documents/ConsultationPara9.pdf> (consultation on proposed changes to paragraph 9, "Charges for new transmission agreements" of the Undertakings between Arqiva and National Grid Wireless relating to the provision of transmitter sites and associated facilities for terrestrial television and radio broadcasters)