

This is our summary of some of the key legal developments across a range of sectors for the week of 8 June 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

Speculation Rising Over Content of Digital Britain Final Report

The Digital Britain Final Report is due to be published next week but already the contents are generating much speculation and comment. The departing Secretary of State for Culture, Media and Sport gave some clues as to its content in his recent speech at the Making Online Music Pay Conference - in the absence of a Rights Agency, Ofcom will play a much bigger role in helping to stamp out piracy and the point was made that it was "highly likely" that the Final Report would ensure there was a basic requirement for ISPs to notify those who were infringing copyright although there was no suggestion of "draconian measures" such as disconnection being included - the point was also made that for serious offenders there were "technological solutions" available. This does seem to be at odds with the findings from the latest EMR survey, which found that the threat of being disconnected by an ISP after being warned three times against illegal downloading would either definitely or probably deter a 80% of consumers. Further, the Communication Minister has admitted that the interim Digital Britain Report did not go far enough in its initial stages in exploring the options for non-TV organisations in delivering public service content and said that the Final Report would offer some sort of "rebalance" of the approach to providers of public service content to embrace more fully bodies such as museums and art galleries. Whether the report is delayed as a result of the recent political dramas remains to be seen but in the meantime, the cabinet game of musical chairs has seen a new Culture Secretary appointed - the former Minister of State for Health Services. (*Music Week*, 8 June 2009; *Broadcast*, 10 June 2009 - the results from the EMR survey will be discussed in detail in next week's edition).

French Three Strike Law Ruled Unconstitutional

Still on the subject of disconnection, reports indicate that the French Constitutional Council has ruled that the proposed law to create an agency to warn, warn again and then disconnect anyone found downloading content illegally is contrary to the Constitution. The Constitutional Council ruled the Creation et L'Internet Bill was unconstitutional in that it contravenes citizens' right to free speech and the presumption of innocence and that the proposed Hadopi agency does not have the requisite legal authority to effect disconnections. The Council's Decision was published in the Official Journal of the French Republic (in French and only an unofficial translation is available at this stage). The Constitutional Council has the power to block French laws if they are deemed contrary to the country's Constitution but whether this is the end of the proposal remains to be seen (although the possibility of a conflict with the European Commission has been averted for the moment) as comments have indicated that the Bill may be resubmitted, taking into account the Council's comments and transferring the disconnection power from Hadopi to a special court - the Council had said that provisions on cutting users' Internet access could only be performed by a court of justice and not an administrative authority as provided for by the draft Bill. The EU Information Society Commissioner said they "hope this decision will help to close disputes over the telecoms package".

ECJ Clarification Sought on Internet Link Liability for Counterfeits

The UK High Court is to ask the European Court of Justice (ECJ) to clarify whether eBay has infringed L'Oreal's trademarks by advertising counterfeit products through sponsored links appearing on websites. In *L'Oreal & Ors v eBay & Ors* [2009] EWHC 1094 (Ch) (and see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/1094.html> for the judgment), the court said that the answer "depends on a number of questions of interpretation of the Trade Marks Directive". The judgment had acknowledged that it was not entirely clear whether UK law was compliant with Article 11 of the EU Enforcement Directive, which ensures that trademark holders can "apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right". eBay had claimed that they were not liable under Article 14 of the E-Commerce Directive, which moves liability for sites storing third-party information.

Council of Ministers Formally Adopt New Roaming Rules

The EU's Council of Ministers has formally adopted the new EU roaming rules, which were proposed by the European Commission in September 2008 and approved by the European Parliament in April this year. The new roaming rules will lead to further reductions of up to 60% on consumers' roaming bills from 1 July 2009. The President of the European Parliament and the Council Presidency will formally sign the Regulation on 18 June and it will then be published in OJEC. (*EC Press Release IP/09/880*, 8 June 2009).

ICO Guidance on National Security Exemption to Disclosure

The Information Commissioner's Office (ICO) has published guidance for public authorities on the correct application of section 24 of the Freedom of Information Act 2000, which provides an exemption from disclosing information where the exemption is "required for the purpose of safeguarding national security". The guidance notes that it is not sufficient for information to relate to national security matters - a disclosure must pose a real threat to the interests of national security. The application of the exemption is also subject to a public interest test. See http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/s24_national_security_v1_fop098.pdf for details.

Report on Online Advertising - Slowing Growth in Difficult Market

According to details from the recently released Interactive Advertising Bureau Europe (IAB) Annual Study, growth in the online advertising market has slowed significantly in mature markets to under 20% - the IAB said "Overall the picture in Europe is one of growth, but what is clear from these figures ... is that 2008 was a tough year for online advertising". In 2008, the European online advertising market was worth €12.9 billion with a 20% growth rate compared to 2007 of. In the US, online advertising grew 10.6% in 2008 and was worth €16.6 billion (\$23.4 billion). In the UK, growth slowed to 19% from the previous 40% figure. The German market grew by 20% in 2008, compared to 43% in 2007. In Italy, it fell from 37% to 20%, in France from 37% to 18.5% and in Spain from 55% to 26%. In the Netherlands, where online advertising was first introduced, growth dropped to 9% in 2008, compared to 29% in 2007. (IAB News Release, 10 June 2009; EurActiv.com, 10 June 2009).

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published with details of adjudications on breaches of Rules 1.3 (protect children with appropriate scheduling), 1.13 (easily copied dangerous behaviour must not be broadcast pre-watershed), 2.3 (generally accepted standards), 9.1 (news and current affairs must not be sponsored), 9.3 (sponsorship must comply with advertising content and scheduling rules) and 10.4 (no undue prominence to product or service in programme) of the Broadcasting Code; a breach of Licence Condition 11 (retain recordings for 60 days after transmission) was also recorded. Two separate complaints of unfair treatment were not upheld. The Bulletin also included a supplementary note to earlier findings relating to a breach of Rules 2.1 and 2.3 (and see the Need to Know of 11 May 2009 for details). See http://www.ofcom.org.uk/tv/obb/prog_cb/obb135/Issue135.pdf for details.

Television Licensable Content Services and Digital Television Programme Services - New Forms and Guidance Notes

Ofcom has published updated guidance notes and application forms for Television Licensable Content Services and Digital Television Programme Services. These updated guidance notes and application forms reflect the classification of transactional gambling services as "teleshopping", in accordance with Ofcom's Statement on the regulation of transactional TV gambling channels (and see the Need to Know of 25 May 2009 for details). See http://www.ofcom.org.uk/tv/ifi/tvlicensing/guidance_notes_and_apps/ for details about the new licences. See also <http://www.ofcom.org.uk/tv/ifi/guidance/gambling/> for Ofcom's regulatory statement on the position of TV channels and programmes that offer gambling services to viewers, setting out details about the new policy and the terms of its implementation.

Corporate

New Name, New Department ...

Just when you were finally getting used to DBERR it's time to change (again). The Government has announced that the Department for Business, Enterprise and Regulatory Reform has been merged with the Department for Innovation, Universities & Skills (DIUS) to create a new Department for Business, Innovation and Skills (BIS). See <http://www.berr.gov.uk/aboutus/pressroom/page51711.html> for the statement about BIS' responsibilities.

ICSA Report on Boardroom Behaviour

The Institute of Chartered Secretaries and Administrators (ICSA) have published their report on boardroom behaviour, following their investigation into the culture and processes of boardroom behaviour generally. The Report focused on the behavioural aspects of board performances during the financial crisis and the way in which boards behave more generally, irrespective of sector and economic circumstances. It found that "weakness in the application of governance processes lie at the heart of some of the cases of corporate collapse or near collapse" and that even well run companies were capable of making strategic and sometimes "catastrophic" misjudgements. ICSA said a response was required at three separate levels - institutional, organisational and behavioural - and noted that the absence of guidance on appropriate

boardroom behaviour constituted a structural weakness in the current system. It recommended the Combined Code be amended to incorporate provisions relating to appropriate boardroom behaviours, the business case for pursuing best practice corporate governance and directors' duties under the Companies Act 2006 (and in particular the duty to promote the success of the company under section 172). See http://www.icsa.org.uk/assets/files/pdfs/consultations/09.04_ICSA_Policy_Report_6.pdf for the Report.

Draft Legislation - Legislative Reform (Limited Partnerships) Order

The draft Legislative Reform (Limited Partnerships) Order 2009 has been published. The Order is intended to remove or reduce burdens that arise from uncertainties about the application of the Limited Partnerships Act 1907. It will clarify the process for registration of limited partnerships by the registrar of companies - in accordance with the Order, the certificate of registration will now be conclusive evidence of the existence and registration of a limited partnership, which will come into existence on the date of registration. See http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi_9780111480014_en.pdf for details.

Film & TV

DCSF to Review Role of Child Contestants?

Recent press reports indicate that the Department for Children, Schools and Families (DCSF) is to review of the participation of child contestants in television entertainment shows following concerns that existing regulations, which date back 40 years, do not reflect modern entertainment standards. The public consultation will apparently be examining proposals for new safeguards to protect young performers.

Gambling

Commission Questions Legality of French Draft Law on Online Gambling

The European Commission has published its Detailed Opinion questioning the legality of a number of aspects of the French draft law on the opening and regulation of the online gambling market. The French draft law had been notified to the European Commission and the other Member States in March. At the time the European Gaming and Betting Association (EGBA) had highlighted a number of provisions that it said were questionable under EC law, including limiting the opening of the gaming market to the online segment only, limiting the opening of horse betting to pool betting only and limiting the average pay back ratio (percentage of stakes paid back to players) to the same level of those currently applied by historical operators. The EGBA was also concerned that the proposed license system failed to take into account securities and controls already offered by other EU jurisdictions, in conflict with well known jurisprudence of the ECJ and the creation of a "sports betting right" in favour of sports federations which it said could hardly be called a credible means to prevent match fixing, especially when operators already have developed early warning systems to prevent those risks. According to the French Budget Minister, there were two key points of contention highlighted in the Opinion: the first involved a proposed limitation on the maximum proportion of bets paid back to players. The second involved the need to take into account probity measures already assessed by regulators of other licensing jurisdictions of the relevant operator. The Detailed Opinion gives the French authorities a standstill period until 8 July 2009 within which they must formally respond to the Commission's concerns. During this time they authorities cannot proceed with the legislation. If France subsequently decides to adopt this text without taking into account the Commission's objections, the Commission can then immediately proceed with infringement proceedings.

Commission Report on Effect of US Position on Trade in Remote Gambling Services

The European Commission Directorate-General for Trade has published a detailed report following its investigation into alleged discriminatory practices by the United States against regulated European online gaming operators, which was undertaken in response to a complaint by the Remote Gambling Association (RGA) in March of this year. The RGA had complained that certain measures by the US were inconsistent with Articles XVI (Market Access) and XVII (National Treatment) of the General Agreement on Trade in Services (GATS), and were not justified under Article XIV (General Exceptions) of the GATS. In practice it was said that this meant that the trade barriers maintained by the US consisting of legislation imposed a ban on Internet gambling and the measures taken to enforce that legislation were enforced in a discriminatory way. The report said, "The investigation has shown that the US measures under investigation are inconsistent with the WTO agreements. Furthermore, it has concluded that the measures cannot be justified on grounds of public policy concerns given notably the fact that some types of remote supply are allowed in the US, and that alternative measures in the form of strict regulation of the supply of the service are currently being used in the US to address the relevant public policy concerns". Further, "The obstacles to trade can therefore be considered as causing and threatening to cause adverse trade effects, having a material impact on a sector of economic activity and a region of the Community". In conclusion the report said, " In the light of the foregoing, the Commission services conclude that action is necessary in the interests of the Community". See http://www.rga.eu.com/shopping/images/EC_TBR_report.pdf for the report.

High Court Upholds Bingo and Gaming Machine VAT Overpayment Claim

The Rank Group, which operates bingo halls and casinos, has welcomed the decision of the High Court to uphold its reimbursement of VAT, which was overpaid on games of interval bingo and gaming machines. HMRC had appealed a ruling by the VAT Tribunal on the VAT treatment of mechanised cash bingo and whether there were breaches of the principle of fiscal neutrality - the core issue on the appeal was whether the burden lay on Rank to adduce evidence to prove not only that there was a difference in VAT treatment between similar (and apparently competing) products but also that the difference did, as a matter of fact, affect competition. The High Court upheld the original ruling by the VAT Tribunal that the inconsistent application of VAT to interval bingo and gaming machines contravened the European Union's principle of fiscal neutrality. As a result, Rank is entitled to £59.1 million from HMRC in respect of VAT paid on interval bingo between 2003 and 2008, plus interest. HMRC has until the end of June to appeal. (*HMRC v The Rank Group* [2009] EWHC 1244 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/1244.html> for the judgment - note however that the High Court confirmed that the issues under consideration are now of historic interest because of legislative changes both to gaming and to tax law).

Voluntary Funding Arrangement for Treatment of Problem Gambling Announced

The establishment of a new £15 million voluntary funding arrangement for research, education and the treatment of problem gambling over the next three years has been announced in a Written Ministerial Statement by Minister for Sport. The Responsibility in Gambling Trust will continue to raise funds from the gambling industry, which has committed to a minimum of £5 million every year from now until 2012/13. A new body, the Responsible Gambling Fund, has been set up to distribute the money. (*Gambling Commission News Release, 9 June 2009; DCMS Press Release 89/09, 9 June 2009*).

What is Bingo?

The Gambling Commission has published a list of key characteristics for bingo machines, as a result of a number of gaming machine manufacturers developing new machines, which supposedly offer bingo. The Commission has therefore specified the characteristics that must be present in games, whether or not played by machine, to be classed as bingo. Machines that play bingo are exempt from limits on numbers, and stakes and prizes and the Commission had been concerned that some of the so-called bingo machines were "little different from gaming machines". See http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Key_characteristics_of_bingo_-_June_2009.pdf for details. The Bingo Association and BACTA have issued these characteristics to their members as a Code of Practice.

Music

Success for the Pirates!

You can't avoid it at the moment - politics is everywhere and this is worthy of note - following the judgment in the Pirate Bay trial (see the Need to Know of 6 April 2009 for details), reports appeared about the growing interest in The Pirate Party in Sweden (see the Need to Know of 18 May 2009), which had been established in Sweden in January 2006 as a "tie-breaker" for Swedish politics. They have been successful in the recent European Parliament elections and have won one of Sweden's 18 seats, with 7.1% of votes, placing fifth overall. The Pirate Party's stated manifesto is to "fundamentally reform copyright law, get rid of the patent system, and ensure that citizens' rights to privacy are respected" and see http://docs.piratpartiet.se/Principles_3.2.pdf for their Declaration of Principles. The new Pirate Party MEP will take his seat in the autumn.

OFT Refers Ticketmaster/Live Nation Merger to Competition Commission

The Office of Fair Trading (OFT) has referred the proposed merger between Ticketmaster Entertainment Inc and Live Nation Inc to the Competition Commission. Both companies are active in the live music industry in the UK, but in different areas - Ticketmaster as a ticketing agent and Live Nation as a promoter and venue operator for live music events. The OFT is of the view that there is a realistic prospect of a substantial lessening of competition resulting from the proposed merger, because of the prospect that CTS Eventim (CTS), Europe's largest ticketing agent, with whom LiveNation has an agreement, will withdraw from the UK market. The OFT also said the proposed merger also raises a concern about "whether Ticketmaster's key position in the ticketing market could lead to the new company restricting competition in the promotion of live music events, for example through limiting access by rival promoters to ticket agent services". The Commission is expected to report by 24 November 2009. (*OFT Press Release 67/09, 10 June 2009*).

Publishing

Commission Welcomes European Charter on Freedom of the Press

The European Commission has welcomed the signing of the European Charter on Freedom of the Press. The Charter was signed on 25 May 2009 by 48 editors-in-chief and leading journalists from 19 countries. The Charter formulates principles for ensuring the freedom of the press from government interference - in particular for their right to safety from surveillance, electronic eavesdropping and searches of editorial departments and computers, and to unimpeded access for journalists and citizens to all domestic and foreign sources of information. The Commission said "The Charter on Freedom of the Press ... is an important reaffirmation of the basic values, including media pluralism, freedom of expression and information that underpin Europe's democratic traditions and are enshrined in fundamental legal text ... The Charter is therefore an important step towards reinforcing these basic values and rights allowing journalists to invoke them against governments or public authorities whenever they feel the freedom of their work is unjustifiably threatened". (EC Press Release IP/09/891, 9 June 2009 - see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/891&format=HTML&aged=0&language=EN&guiLanguage=en> for details, including the Charter's Articles, which set out the governing principles).

Statement in Open Court - False Allegations Concerning End of Football Career

The claimant, a well-known footballer, brought a libel action against the defendant, the publisher of the Daily Express, following the publication of an article, which alleged that his professional career was finished and he was on the verge of retiring. The defendant accepted that the allegations were without foundation (the claimant had not been given an opportunity to refute them although in a second edition the claimant responded with an article about his career not being over), apologised, undertook never to repeat them and paid substantial undisclosed damages and costs. (*Owen v Express Newspapers Ltd, Unreported, QBD, 3 June 2009*).

Consultations & Reports

Ofcom Notice of Variation - Notice of Licence Variation to Multiplex B, held by BBC Free to View Limited - <http://www.ofcom.org.uk/tv/ifi/tvlicensing/muxlicensees/mb/muxbvar9.pdf> (the notice of licence variation allows for the upgrade and reorganisation of Multiplex B for new services to be broadcast in High Definition on Digital Terrestrial Television)

Ofcom Research Document - Accessing the Internet at Home - A quantitative and qualitative study among people without the Internet at home by Ipsos Mori - <http://www.ofcom.org.uk/research/telecoms/reports/bbresearch/bbathome.pdf> (Ofcom's commissioned and detailed study into the causes of non-participation in the market for broadband and the possible drivers for change - the results showed 20% who are currently without the Internet said they were likely to get connected in the next six months - they are more likely to be younger, regular internet users outside of the home who are working and have children; 42% stated a lack of interest or need as their main reason for not wanting to take up the Internet; and 30% stated that the Internet was too expensive or that they didn't have the knowledge or skills to use it - the research suggests that the prospect of achieving a 100% take up would be "extremely challenging" to achieve in the near future)

Ofcom Research Report - Exploring how Manufacturers, Suppliers and Retailers Address the Needs of Older and Disabled People: What are the Barriers and Drivers? - http://www.ofcom.org.uk/research/usability/older_disabled/research/report.pdf (details the results of Ofcom's Advisory Committee on Older and Disabled People commissioned research into various measures that would encourage industry to develop communications equipment, products and services that better meet the needs of older and disabled people)

Ofcom Report - Television Broadcast Licensing Update, May 2009 - <http://www.ofcom.org.uk/tv/ifi/tvlicensing/tvupdates/monthly/200905> (details about the television services licensed, handed back, revoked, amended or transferred in May 2009)

Ofcom Decision - Provision of Channel 5 High Definition Services on DTT - http://www.ofcom.org.uk/media/news/2009/06/nr_20090611a (details Ofcom's provisional decision to reserve capacity for Channel 5 to provide new high definition (HD) services on Digital Terrestrial Television, meaning that Channel 5 will join the other public services broadcasters in launching four HD services on DTT in total, subject to it resolving certain key criteria relating to its application)

Ofcom Consultation - Review of Procedures for Handling Broadcasting Complaints, Cases and Sanctions - A Consultation on Proposals for New Procedures for the Handling of Standards Cases and Fairness & Privacy Complaints and for the Determination of Broadcasting Statutory Sanctions - <http://www.ofcom.org.uk/consult/condocs/broadcasting/condoc.pdf> (Ofcom's consultation invites views on proposed changes to current procedures for the handling of standards cases and fairness and privacy complaints and for the determination of broadcasting statutory sanctions)

Ofcom Research Document - Converged Communications in Tomorrow's World - Ofcom's Technology Research Programme 2008/09 - <http://www.ofcom.org.uk/research/technology/overview/randd0809/Report0809Final.pdf> (Ofcom's fourth

annual report on its Technology Research Programme, which focuses on policy and regulatory duties in the context of two categories of projects - communications in society and spectrum management)