

This is our summary of some of the key legal developments across a range of sectors for the week of 27 July 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

Guidance on Ads for Video Games and Films

The Committee of Advertising Practice (CAP) and Broadcast Committee of Advertising Practice (BCAP) have published some very useful guidance on the use and placement of advertisements in video games and films. The guidance states that "Advertisers and media owners share a common responsibility for ensuring that ads for video games and films are responsible, taking into account the content of the advertisement and the context in which it is placed" and highlights the relevant requirements in the British Code of Advertising, Sales Promotions and Direct Marketing (the CAP Code), in relation to non-broadcast marketing communications, and BCAP on the interpretation of its Radio Advertising Standards Code and TV Advertising Standards Code, which should be considered when placing an ad. The guidance also contains links to previous adjudications and advice. See <http://www.cap.org.uk/NR/rdonlyres/9AEBC795-6727-4CB3-948B-40E32200FFF3/0/GuidanceonAdsforVideoGamesandFilms.pdf> for the guidance.

DCMS Consults on Extending PLR Scheme to Non-Print Books

The DCMS is consulting on proposals to extend eligibility for Public Lending Right (PLR) to non-print books, in particular audiobooks and e-books and extend PLR to the lending rights holders in respect of these non-print works where they are not currently eligible under the PLR Scheme. The PLR is the right of authors to receive compensatory payment for the loans of their printed books from public libraries in the UK, as established by The PLR Act 1979. The Act gave authors the legal right to receive payment for the free loan of their books by public libraries and PLR entitlement for registered authors continues for 70 years after their death. According to the DCMS, the proposal has been motivated by the increasing demand for the loan of books through public libraries in formats other than printed and bound books, ie CD's digital audio files and e-books. See http://www.culture.gov.uk/images/consultations/PLR_non-printbooks_consultation.pdf for details.

Broadcasting

BBC Executive Provide Further Details About Project Canvas

The BBC Executive have responded to a request from the BBC Trust and published further information about Project Canvas, setting out details about issues such as the Executive's approach to the proposed venture, control of the EPG and enabling access for content and service providers, industry engagement and technical standards, distribution and how the project fits within the BBC's wider digital strategy. See http://www.bbc.co.uk/bbctrust/assets/files/pdf/consult/canvas_additional/ExecSummary.pdf for a summary. Stakeholders now have until 1 September 2009 to offer additional submissions or comments. The Trust will then publish its market impact and public value work alongside its provisional conclusions on the proposals in the Autumn. See http://www.bbc.co.uk/bbctrust/consult/open_consultations/canvas_supporting.html for the additional supporting documents, which expand on the areas outlined in the summary. (*BBC Trust Press Release, 24 July 2009 - note that since the summary documents were published, Channel 5 has announced that it had joined the consortium - see Channel 5 Press Release, 20 July 2009*).

GSM Directive Amendments Approved

The Council of Ministers have approved a proposal from the European Commission to modernise the GSM Directive 87/32/EEC on the use of the radio spectrum for mobile services. The Directive allocated certain radio frequencies (in the 900 MHz band) to GSM services. However, the Directive needed to be amended to allow more advanced, next generation wireless technologies to also use this band of the radio spectrum. In November 2008, the European Commission proposed sharing the spectrum allocated to mobile phones with other more advanced technologies, starting with 3G mobile broadband technology (Universal Mobile Telecommunications System (UMTS)). The amended Directive will be signed by the Presidents of the European Parliament and the Council of Ministers in September and will then be published in the EU's Official Journal. At the same time, the Commission will adopt a Decision, which will enter into force on the same

day as the amended Directive, setting out the technical measures allowing for the co-existence of GSM (2G mobile phones) and UMTS systems (3G phones that add high-speed mobile internet to regular phone services) on GSM frequencies in line with the Directive. (*EC Press Release IP/09/1192, 27 July 2009*).

Court of Appeal Rejects Anti-Competitive Claims Regarding Distribution of Horseracing Broadcasts

The appellants, a group of bookmakers and the organisation representing the interests of bookmakers operating licensed betting offices, appealed a decision that a joint venture entered into by the respondents concerning the distribution of live horse racing pictures did not amount to an illegal cartel under the competition laws of the European Union and of the UK. The establishment of the joint venture had arisen as a result of dissatisfaction on the part of a group of racecourses about the size of the payments that they received from the then sole distributor of live racing broadcasts. Approximately half the racecourses decided to participate in the joint venture to create a new distributor and license their media rights to that new venture. The other racecourses continued to license their media rights to the sole distributor at a reduced price. At first instance it was found that the object of the joint venture had been to increase, rather than reduce, competition in the market and that its effect had been to bring a new distributor into the market, which was a pro-competitive and not an anti-competitive activity. The judge therefore concluded that there had been no infringement of Article 81(1) or section 2 of the Competition Act 1998, and dismissed the claim. The appellants sought to argue that the relevant arrangements had had as their object the prevention, restriction or distortion of competition within the relevant market and that they had indeed had that effect. The respondents accepted that, in many respects, racecourses in general did compete with each other, for example for owners, trainers, jockeys and thus horses, for sponsorship, for spectators, and for events other than racing. The issue was whether they were in competition for the sale of LBO media rights. The Court of Appeal noted, "Article 81 applies if the agreements in question have the object of restricting competition, or if they have that effect. If they have that object, it is unnecessary to consider what effect they have. It is therefore also unnecessary to embark on an examination of what would have been the position but for the agreement, in order to identify what is known as the "counterfactual"". The object of the joint venture had been to establish a second broadcaster, which would be able to act as a rival in the upstream and in the downstream markets. To achieve that, the new broadcaster had had to acquire media rights for a minimum number of racecourses on an exclusive basis. The new entrant had to have been promoted by or in association with a number of racecourses, and had needed protection, at the stage of its establishment, from competition from the incumbent, since otherwise it would never have got off the ground. The court found that the judge had, accordingly, been entitled to reject the claimants' case based on the object of restricting competition. Where an agreement did not have as its object a restriction of competition, the effects of the agreement should be considered and for it to be caught by the prohibition it was necessary to find that those factors were present which showed that competition had in fact been prevented or restricted or distorted to an appreciable extent - the judge was entitled to conclude that the overall effect of the joint venture had been pro-competitive and had not breached Article 81(1). The appeal was therefore dismissed. (*Bookmakers Afternoon Greyhound Services Ltd & Ors v Amalgamated Racing Ltd & Ors* [2009] EWCA Civ 750 - see <http://www.bailii.org/ew/cases/EWCA/Civ/2009/750.html> for the judgment).

Corporate

ICAEW Guidance on Determination of Realised Profits and Losses for Distributions

The Institute of Chartered Accountants in England and Wales (ICAEW), together with its Scottish equivalent, have published detailed Technical Guidance on realised and distributable profits under the Companies Act 2006. The Guidance attempts to identify, interpret and apply the principles relating to the determination of realised profits and losses for the purposes of making distributions under the Act. The Guidance supersedes TECH 01/08, which provided equivalent guidance for the Companies Act 1985. See [here](#) for details - note that although the final sections of the Act do not come into force until 1 October 2009, the Guidance has been written as if the entire Act is already in force.

Consultation on Changes to Dealing with Property of Dissolved Company

The Department of Business Industry and Skills is inviting comment on its proposals for a possible change of approach to the transitional provisions and savings for sections 1012 to 1023 of the Companies Act 2006. These sections make provision for dealing with the property of a dissolved company and property vesting as *bona vacantia* (or ownerless property - in this instance, property which was owned by a company that has been dissolved) and the changes relate to the time period within which this property vests in the Crown. The consultation proposes amending relevant sections on disclaiming *bona vacantia* (which include new time limits and new law about waiver) to apply to the property of companies dissolved before 1 October 2009 if, at 1 October 2009, the Crown representative had neither had notice of the actual vesting of the property in the Crown, nor received an application to consider disclaimer, nor waived the right to disclaim. See <http://www.berr.gov.uk/files/file52393.pdf> for details.

New Legislation - Final Implementation of Companies Act 2006

The final version of the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941 has been published. The Order is in substantially the same form as the previous version (and see the Need

to Know of 22 June 2009 for details). It comes into force on 1 October 2009 and brings all the remaining sections of the Companies Act 2006 into force on that date. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091941_en.pdf for details.

New Legislation - Legislative Reform (Limited Partnerships) Order

The Legislative Reform (Limited Partnerships) Order 2009, SI 2009/1940 comes into force on 1 October 2009. The Order, which is in substantially the same form as the draft published last month, clarifies the process for registration of limited partnerships by the registrar of companies by confirming that 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/pdf/uksi_20091940_en.pdf for details.

Gambling

New Legislation - Personal Licence Fees Amended

The Gambling (Personal Licence Fees) (Amendment) Regulations 2009, SI 2009/1971 come into force on 11 August 2009. The Regulations amend the Gambling (Personal Licence Fees) Regulations 2006 made under the Gambling Act 2005 and increase the cost of an application fee for a personal management licence from £330 to £370. The application fee for a personal functional licence is increased from £165 to £185. The Regulations also increase the cost of maintenance fees. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091971_en.pdf for details.

New Legislation - Amendment to Prize Limits for Category C & D Machines

The Categories of Gaming Machine (Amendment) Regulations 2009, SI 2009/1502 came into force on 10 June 2009. The Regulations amend the Categories of Gaming Machine Regulations 2007, SI 2007/2158 to increase the stake and prize limits for all types of Category C machines and certain Category D machines ("crane grabs" and "penny falls" or "coin pushers" machines). See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20091502_en.pdf for details.

Commission Warns Over Expiry of Permits for AWP's in Non-Gaming Premises

The Gambling Commission has published an open letter to gaming machine suppliers, reminding them that with effect from 31 July 2009, permits issued under section 34 of the Gaming Act 1968 regarding the use of amusement with prizes (AWP) machines in non-gambling premises such as chip shops and taxi offices, will expire. The permits cannot be renewed. Any gaming machine currently sited under a section 34 permit must be removed before 1 August 2009, otherwise the site operator risks committing an offence under the Gambling Act 2005. These types of machines can only be sited in premises where the appropriate licence or permit has been granted. See [http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Letter to machine suppliers re section 34 permits - July 2009.pdf](http://www.gamblingcommission.gov.uk/UploadDocs/publications/Document/Letter%20to%20machine%20suppliers%20re%20section%2034%20permits%20-%20July%202009.pdf) for details.

Support Growing for US Online Gaming Regulation Bill

Reports indicated that support is growing in the US for proposed bill HR 2267, the Internet Gambling Regulation, Consumer Protection and Enforcement Act of 2009, which would legalise and regulate online gambling in the US (and see the Need to Know of 4 May 2009 for details). The bill now has the support of a bi-partisan group of 50 senators as co-sponsors. No further information is available at this stage about when the bill might be put to a vote.

Litigation

Law Lords Hear Final Appeals

The Law Lords have heard their final appeals - on 30 July 2009, the judicial function of the House of Lords and its role as the final appeal court in the UK ended and with effect from 1 October 2009, the Supreme Court of the United Kingdom will assume jurisdiction on points of law for all civil law cases in the UK and all criminal cases in England and Wales and Northern Ireland.

Music

Lords Reinstate Ruling for Organist in Procol Harum Copyright Claim

The final judgments from the Law Lords have been given (see above) and this one is particularly significant. In what was described as an "extremely unusual case" with the striking feature of an "extraordinary delay" in the making of a claim for a share of the musical copyright in the hugely well-known song, A Whiter Shade of Pale, the Law Lords have allowed the appeal and dismissed the respondents' cross appeal and reinstated the declarations of the High Court that the claimant, a

former organist with the band, was entitled to receive 40% of the royalties for the song. The respondents had sought to argue that the claim was unconscionable as a result of the delay - the Law Lords noted however "Delay in itself is no bar to these proceedings. There is no statutory limitation period that applies in English law to claims to copyright, the duration of which has been laid down by section 12 of the Copyright, Designs and Patents Act 1988". They said further "The benefits that flow from intellectual property are the product of this concept [a right or property]. They provide an incentive to innovation and creativity. A person who has a good idea, as Mr Fisher did when he composed the well-known organ solo that did so much to make the song in its final form such a success, is entitled to protect the advantage that he has gained from this and to earn his reward. These are rights which the court must respect and which it will enforce if it is asked to do so". There were no grounds in law for setting aside the High Court ruling and the respondents could show no prejudice from the delay (and even if they could, the benefit they obtained from the delay would outweigh any such prejudice). The respondents' arguments based on equitable principles were all rejected. The applicant will now receive royalties dating back to 2005, when the distribution of income from licensed performances was frozen after the complaint was lodged. (*Fisher (Original Appellant and Cross-Respondent) v Brooker & Ors (Original Respondent and Cross-Appellant)* [2009] UKHL 41 - see <http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090730/fisher.pdf> for the Law Lords' Opinion - the case has already generated significant comment -varying from concerns about the "floodgates" resulting from this decision which will other musicians to "have a go", although as is always the case, each will be determined on their own facts -however, the ruling also was described as one that "should reassure composers that their rights will be acknowledged and upheld by our courts" and this point was also acknowledged by one of the Lords who said that they were "glad that the author of that memorable organ part has at last achieved the recognition he deserves").

Launch of PAYG Free Music Service

Orange, Universal Music and 4Music have launched the first PAYG free music streaming service, which will be made available to Orange pay-as-you-go (PAYG) customers on the basis of different tiers of subscription. The service, Orange Monkey, is aimed at 16 - 24-year-olds and will allow Orange customers free access to streamed playlist-based music from the Universal Music label if they top up their phone to certain minimum levels. The service has been aimed at the core group who are heavy consumers of music but not necessarily willing to pay for it in an attempt to monetise what might otherwise have been accessed illegally.

Publishing

ECHR Rule on Disclosure of Information and Article 10 Rights - Previous Disclosures Weakened Right to Privacy

The applicant, Hachette Filipacchi Associés, published a weekly magazine "Ici Paris", which contained an article about the respondent, well-known singer Johnny Hallyday and which referred to his extravagant taste and financial difficulties in the context of certain performances in the US. The singer brought proceedings against the publishing company, seeking a ruling that it had infringed his right to respect for his private life. His claims were dismissed almost in their entirety by both the Paris Tribunal de Grande Instance and the Paris Court of Appeal, in particular on the ground that the magazine had simply mentioned aspects of the singer's property and financial lifestyle that were common knowledge and had been disclosed by the singer on numerous occasions, not least in his autobiography. The matter then went to Versailles Court of Appeal, which ordered the publishing company to pay €20,000 in damages, together with costs and expenses. The Court of Appeal considered, firstly, that the publication of the photographs had not been consistent with the purpose of advertising for which he had allowed his image to be used and, secondly, that the information provided about the singer's lifestyle breached his right to respect for his private life. The publishing company brought an action before the ECHR and argued that submitted that the ruling against it for invasion of privacy had infringed its right to freedom of expression under Article 10. The ECHR ruled that there had been a violation of the applicant's Article 10 rights - the court attached particular importance to the fact that the photographs published had been derived from advertising material, which set this case apart from cases in which the photographs in issue had been obtained through contentious or undercover methods or had interfered with the privacy of the persons concerned. Further, the previous disclosure by the singer himself (in his autobiography) of the relevant information about the lavish way in which he managed and spent his money was also an essential element of the court's analysis. The singer's disclosures weakened the degree of protection to which he was entitled as regards his private life. The court said the limits attached to the exercise of journalistic freedom in a democratic society had not been overstepped. (*Hachette Filipacchi Associés ("Ici Paris") v France (Application No 12268/03)* - see <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=852905&portal=hbkm&source=externalbydocnum&table=F69A27FD8FB86142BF01C1166DEA398649> for the Press Release summarising the judgment (which was published in French only).

Sport

BBC Responds to Government Consultation on Free-to-Air List

The BBC has published its response to the Government's consultation on Free-to-Air Events, in which it sets out its views on the principle of having a list, the need for such a list and what should be on the list. The BBC said it was "appropriate

that the current criteria for listing should be retained". However it believed there was a "strong case for extending the criteria to acknowledge the reality of the devolved UK" and that this meant extending the criteria to reflect the importance of certain events to the devolved nations. It also noted the widespread expectation among the UK public that the major sporting events will be available on television on a universal, free-to-air basis and specifically referred to events such as the Football World Cup and Wimbledon. It noted that under the current framework, in order to be considered for listing, an event has to pass the "essential criterion test", which means that an event must have "a special national resonance, not just significance to those who ordinarily follow the sport concerned; it is an event which serves to unite the nation, a shared point on the national calendar" but suggested that this be "amended to reflect the importance of particular sporting events in the devolved nations". It argued for a "modest shift" in the current listed events position - adding a number of additional soccer, cricket and rugby games to the A List. It also noted that there was a "clear public value case for re-listing some home test match cricket - for example, the major summer test series (every year) or the Ashes series (every four years)". However, it then said it also recognised that "international cricket and the commercial market for its rights have moved on in recent years" and there has been a "significant increase in the value of the rights to English cricket" with consequential benefits in terms of funding. It said the Panel would need to weigh up the public interest in re-listing cricket with the potential impact on the funding of the sport, particularly at the grass-roots level. See http://www.bbc.co.uk/bbctrust/assets/files/pdf/review_report_research/listed_events/bbc_response.pdf for the Submission.

No Salary Caps in Professional Football - Calls Instead for "Financial Fair Play"

The FIFA President has confirmed that there will be no introduction of any salary caps for professional footballers, despite concerns about the growing disparity between salaries paid to professional footballers. The President said that it would be impossible to "even out" the financial playing field by the introduction of salary caps, and that in Europe, the Commission would, in any event, prohibit such a move. Instead he called for "financial fair play".

New Legislation - Glasgow Commonwealth Games Association Right Order

The Glasgow Commonwealth Games Act 2008 (Games Association Right) Order 2009, SI 2009/1969 has been made and will come into force on 20 January 2010. The Order makes provisions that are deemed necessary and expedient in consequence of the Glasgow Commonwealth Games Act 2008 to ensure that the 2014 Games are protected against ambush marketing across the UK and includes provisions to establish how specific event association rights will be created, assigned and enforced. See http://www.opsi.gov.uk/si/si2009/pdf/ukxi_20091969_en.pdf for details. The Order will cease to have effect six months after the date of the Glasgow Commonwealth Games closing ceremony.

Technology

Commission Statement on Microsoft Proposals for Microsoft Internet Explorer and Interoperability

The European Commission has confirmed that, following extensive discussions between the itself and Microsoft, Microsoft has proposed introducing a consumer ballot screen as a possible remedy to the anti-trust suit (Case No COMP/C-3/39.530, and Case T-201/04 *Microsoft v Commission*), involving the tying of Microsoft Internet Explorer web browser with Windows. The Commission said it welcomed the proposals and will now investigate its practical effectiveness in terms of ensuring "genuine consumer choice". Microsoft said "European consumers who buy a new Windows PC with Internet Explorer set as their default browser would be shown a 'ballot screen' from which they could, if they wished, easily install competing browsers from the Web. If this proposal is ultimately accepted, Microsoft will ship Windows in Europe with the full functionality available in the rest of the world". Microsoft said that the Commitment was made without prejudice to Microsoft's position should the European Commission or any other party conduct proceedings or commence any other legal action against Microsoft. (*EC Press Release Memo/09/352, 24 July 2009; Microsoft Press Release, 24 July 2009 - see <http://www.microsoft.com/presspass/presskits/eu-msft/docs/07-24-09Commitment.doc> for details*).

Consultations & Reports

Ofcom Consultation - Media Ownership Rules Review - <http://www.ofcom.org.uk/consult/condocs/morr/morrcondoc.pdf> (consultation on the impact of the current local ownership rules on the long-term sustainability of local media and Ofcom's proposals to support it by removing local radio service ownership rules and the local and national radio multiplex ownership rules and liberalising the local cross media ownership rules so that the only restriction is on ownership of all three of local newspapers (with 50% plus local market share), a local radio station and a regional Channel 3 licence)

Ofcom Consultation - Radio: The Implications of *Digital Britain* for Localness Regulation - <http://www.ofcom.org.uk/consult/condocs/radio/condoc.pdf> (consultation on Ofcom's proposals to change its regulation of localness on commercial radio by implement a three tier structure)

Ofcom Research Report - UK Broadband Speeds 2009 - Consumers Experience of Fixed-Line Broadband Performance - http://www.ofcom.org.uk/research/telecoms/reports/broadband_speeds/broadband_speeds/broadbandspeeds.pdf

(details the results of Ofcom's research into actual broadband speed, which shows that actual broadband speeds are significantly below the advertised headline speeds and that significant differences exist between the performance of individual ISPs - the report did note that broadband performance depended to a large extent on where consumers were located)

Office of the Adjudicator - Broadcast Transmission Services - Report for the period 1 April 2009 to 30 June 2009 - http://www.adjudicator-bts.org.uk/documents/OTABTS_Report_apr09jun09.pdf (reports on the activities of the Adjudicator of Broadcast Transmission Services over the period in question, including details about the adjudication of disputes and guidance published)