

This is our summary of some of the key legal developments across a range of sectors for the week of 10 August 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 Proposes New Duties for Ofcom to Promote Efficient Investment in Infrastructure

The BIS has published a consultation on proposed new duties for Ofcom, which will require it to promote efficient investment in infrastructure and provide a full assessment of the UK communications infrastructure every two years to the Secretaries of State, which will alert the Secretaries of State to any matters of high concern regarding developments affecting the communications infrastructure. The Government said it is of the view that "over recent years Ofcom's duty when carrying out its functions to further the interests of consumers of communications services where appropriate by promoting competition, has tended to put the emphasis on short term cost reduction rather than longer term investment in future infrastructure". It therefore concluded that as was proposed in the Digital Britain Final Report (see paragraph 67), it should give Ofcom an additional duty to promote efficient investment in communications infrastructure (where appropriate), alongside the promotion of competition, when furthering the interests of consumers. This will take the form of an amendment to section 3(1)(b) of the Communications Act 2003 to include an equivalent provision to that currently relating to competition - the section currently states "It shall be the principal duty of Ofcom, in carrying out their functions - ... to further the interests of consumers in relevant markets, where appropriate by promoting competition". The Government said that while Ofcom already has an obligation to consider the desirability of promoting investment in infrastructure (through the general duty in section 3 and the additional circumstances it must have regard to when performing those duties as set out in section 3(4)), it considers that by "reconfiguring the principal duty to include promotion of efficient investment in communications infrastructure", Ofcom will have the "confidence" that it might not otherwise have had to take regulatory decisions that recognise the need for investment in infrastructure. Comments are invited - see <http://www.berr.gov.uk/files/file52538.pdf> for details.

Intellectual Property Court Users' Committee - Report on Reform of Patents County Court

The Intellectual Property Court Users' Committee have published the Working Group's Final Report on proposals for the reform of the Patents County Court (PCC). The Committee has had long-standing concerns about the high cost of IP litigation in the UK, particularly for small and medium sized-enterprises (SMEs), and the Working Group was tasked with considering how these concerns might be addressed by the reform of the Patents County Court. The Working Group recommended that specific procedural rules should be introduced for the PCC, which are tailor-made to enable affordable litigation of IP disputes by SMEs and the Report contains a number of specific proposals to deal with the issue of costs and case management - it suggested the financial limit of the PCC should be set at a figure of £500,000 and the limit on recoverable costs should be £50,000 for all types of claim, but with a limit of £25,000 for inquiries and accounts; it also suggested guidance should be given in an Intellectual Property County Court Guide as to the content of statements of case and the sorts of cases which are suitable for the PCC and the criteria for transfer between the PCC and the High Court. See http://www.judiciary.gov.uk/docs/pub_media/pcc-report.pdf for the Report (which is part of the ongoing review of civil litigation costs by Lord Justice Jackson; the proposals will be submitted as part of Phase 2 of the review).

Broadcasting

New Legislation - Commencement No 4 Order for Communications Act 2003

The Communications Act 2003 (Commencement No 4) Order 2009, SI 2009/2130 has been made. The Order states that sections 272 and 273 of the Communications Act 2003 will come into force on 31 January 2010. These two sections make new arrangements for licensing must-offer obligations for networks and satellite services. The sections require Ofcom to include in the licences for every licensed public service channel, the public teletext service and every licensed television service added to the list of must-carry services under section 64 conditions which it considers appropriate for securing the three objectives set out in subsections (2) to (4) of section 272 and also include in the licences for every licensed public service channel, the public teletext service and every other licensed television service specified by the Secretary of State conditions which it considers appropriate for securing the three objectives set out at subsections (2) to (4) of section 273. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092130_en.pdf for details.

Corporate

ICSA Guidance on Implementation of Shareholder Rights Directive

The Institute of Chartered Secretaries and Administrators (ICSA) have published guidance on the implementation of the Shareholder Rights Directive 2007/36/EC. The Directive aims to "strengthen shareholders' rights ... through the extension of the rules on transparency, proxy voting rights, the possibility of participating in general meetings via electronic means and ensuring that cross-border voting rights are able to be exercised". The Directive also acknowledges that "effective shareholder control is a prerequisite to sound corporate governance" which should, therefore, be facilitated and encouraged. It was implemented in the UK by the Companies (Shareholders' Rights) Regulations 2009, SI 2009/1632 with effect from 3 August 2009. The ICSA guidance note provides a summary of the key changes, together with practice notes and recommendations. See https://www.icsasoftware.com/dl/Shareholder_Rights_Directive.pdf for details. See also the article in the latest New Law Journal on the Directive, which provides a helpful, if brief, summary of the impact of the changes the Directive makes - see "People Power" (2009) 159 NLJ 1136 (the article is available via LexisNexis).

New Legislation - Fees for Registrar of Companies' Functions

The Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) Regulations 2009, SI 2009/2101 come into force on 1 October 2009. The Regulations set the fees payable to the registrar of companies in respect of his functions relating to the registration of documents, the inspection or provision of copies of documents kept by him and the disclosure of information protected under the Companies Act 2006 relating to companies, overseas companies and limited liability partnerships. Companies, overseas companies and limited liability partnerships must pay the prescribed fees when filing relevant documents for registration at Companies House. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092101_en.pdf for details.

Article - Financial Assistance Under the Companies Act 2006

The latest Tax Journal looks at the issue of the giving of financial assistance to companies under the Companies Act 2006, following the repeal of the general prohibition with effect from 1 October 2008. Although the general prohibition was repealed there are still certain prohibitions in respect of a public company giving assistance for the acquisition of shares in itself or a public holding company, a private company giving assistance for the acquisition of shares in its public holding company and a public company giving assistance for the acquisition of shares in its private holding company. The article therefore considers, in the public company context, whether or not the arrangement amounts to unlawful financial assistance. (*"Financial Assistance Under CA 2006"* (2009) *Tax Journal*, Issue 993, 17 - the article is available via *LexisNexis*).

Gambling

French Government Warns Online Casino Operators About Activities Ahead of Licensing Changes

The Need to Know of 4 May 2009 discussed France's proposals for regulating online gambling. Recently, its Budget Minister reportedly told online gaming operators that the State will take their ongoing activities into consideration when it issues licences, warning that any current illegal activity by operators will not go unnoticed. The Minister said the opening of the market for online gambling will take place in early 2010 and that until that happens, online casino operators must respect current French law regarding the promoting and advertising of what is currently an illegal activity or risk "black marks" when applying for a licence. The Minister's comments were made in the context of a football club's acceptance of sponsorship from an online casino company - the Ligue de Football Professionnel had the support of the Minister when it delivered an ultimatum to the club to remove the sponsorship branding and logo colours from its strip or stop playing.

ASA Upholds Complaint Against Betfair's Odds Posters

The Advertising Standards Authority (ASA) has upheld a complaint against two advertisements by online betting exchange Betfair, which claimed that Betfair's starting price for odds on horse races, the fixed odds calculated at the start of each race, were on average 40% better than those available to gamblers taking the industry starting price. A pressure group queried whether the advertisement was misleading and whether the claim could be substantiated. The ASA said the ads breached CAP Code Clauses 3.1 (Substantiation), 7.1 (Truthfulness) and 19.1 (Other comparisons). It said the advertisements claim of "40% BETTER SP..." would be understood by consumers to be a factual statement of the average difference between the Betfair starting price and industry starting price and that this was not qualified in any way. The ASA said the advertisements must not be run again in their current form. See http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46698.htm for the adjudication.

Litigation

Application for Injunction Prohibiting Use of Confidential Information Obtained Without Authorisation

The High Court has ruled in an application for summary relief, which arose in relation to the taking of certain confidential information from a shared computer system without authorisation and its subsequent misuse. The claimant, a businessman, sought injunctions against the defendants prohibiting them from using three categories of information, which had been taken from shared business premises and used in his divorce proceedings. The claimant applied for summary judgment on the basis that the first defendant's taking of the private and confidential information was clearly unlawful and none of the defendants had any lawful right to retain or use it. The defendants argued that where a claim was based on allegations of breach of confidence and/or infringements of a claimant's privacy rights protected under Article 8 of the European Convention on Human Rights, it was appropriate for the court first to decide, in all the circumstances, whether the claimant had a reasonable expectation of privacy and/or whether the information in question had "the necessary quality of confidence". They said that task, and, if necessary, the "ultimate balancing exercise" in order to see whether there was a countervailing public interest argument, which would justify permitting a necessary and proportionate degree of intrusion, could not be carried out on a summary basis. The court said it was "difficult to understand why the Claimant should not simply be entitled to have this information 'back', or rather to take it out of circulation and to restrain its use or onward transmission by others". That was irrespective of how it was originally obtained and by whom. Any argument the defendants may have had as to public interest or protecting the claimant's wife's Article 6 rights (as at the time of obtaining the information) should not be pre-judged. The court could see no

reason why granting this order would inhibit or impede the family court. (*Imerman v Tchenguiz & Ors* [2009] EWHC 2024 (QB) - see <http://www.bailii.org/ew/cases/EWHC/QB/2009/2024.html> for the judgment - see also the latest *Privacy and Data Protection Journal* which contains an article looking at privacy, data protection, and other legal implications of the use of data in divorce proceedings - see "Privacy and Matrimonial Self-Help" (2009) PDP 9 6 (12) - the article is available via LexisNexis).

New Legislation - Supreme Court Fees Order 2009

The Supreme Court Fees Order 2009, SI 2009/2131 has been published and comes into force on 1 October 2009 (the day the new court becomes operational). Schedule 1 of the Order specifies the fees payable in the Supreme Court; Schedule 2 sets out when a party is entitled to remission or part remission of a fee. Some of the Supreme Court fees are based on the existing fees for cases taken to the Appellate Committee of the House of Lords. These have been increased to reflect the fact that those fees have been unaltered since 2000. See http://www.opsi.gov.uk/si/si2009/pdf/uksi_20092131_en.pdf for details. The accompanying Explanatory Memorandum notes that while it is expected that fees will normally be reviewed every three years, as the Supreme Court is a new institution there will be monitoring of the processes and procedures when it first become operational.

Publishing

PCC Adjudicate Complaints Over Articles About MP's Expenses

The Press Complaints Commission (PCC) has upheld two separate complaints from MPs about stories published concerning their expenses - one complained that a News of the World story breached Clause 1 (Accuracy) of the Editors Code of Practice and another complained that an apology about a The Sunday Times' story which had breached the same clause had not been given sufficient prominence. The complaint about the News of the World story raised a number of additional complaints, including concerns about the publication of a photograph of his home which raised security questions and concerns about the "source" of information in the article, which it was claimed did not come from a "local" source but rather from political opponents. The PCC said that none of the other concerns were relevant to the breach of the Code but it did find that the claims made in the story could not be substantiated. The Sunday Times however accepted that it had made a serious error in the story in identifying the MP and that although it had published an apology, the PCC decided that the apology as published was insufficient, given the prominence of the original front page story and the correction having been published on the paper's "usual" page (page 20). (*Dr Julian Lewis MP v News of the World, Report 79 Adjudication 23 July 2009* - see <http://www.pcc.org.uk/cases/adjudicated.html?article=NTq1Nw==?oxid=7e8e3af3d6a44c3eac7216ce3d240c1a> for details; *Dr Tony Wright MP v The Sunday Times, Report 79 Adjudication 23 July 2009* - see <http://www.pcc.org.uk/cases/adjudicated.html?article=NTq1OA==?> for details).

PCC Start Publishing Monthly Complaints Summary

The PCC has published the first in what will be a regular monthly summary of the complaints it has received, which contains details about the various complaints listing the publication involved, the headline of the article complained about, the Clause or Clauses of the Editors Code of Practice which were invoked and the outcome. See http://www.pcc.org.uk/assets/111/SUMMARY_01_06_09_30_06_09.pdf for details for June 2009.

ASA Censures Paper for "Advertorials"

The Advertising Standards Association has published three adjudications against Express Newspapers for a series of articles that were all found to have breached CAP Code Clauses 3.1 (Substantiation), 7.1 (Truthfulness) and 50.1 (Health & beauty products and therapies). The paper published a number of advertisements for a variety of health and beauty products (weight loss, orthotic care and hormone magnotherapy treatment respectively), which were all accompanied on the same page as the advertisement by an article containing information about a product, including efficacy claims for that product. All of the advertorials in question appeared a number of times. ASA monitoring staff challenged whether the paper or the advertiser controlled the top half of the page and whether there was any evidence to substantiate the various claims being made. The ASA found that in each case, the various clauses of the CAP Code had been breached and ordered the paper ensure that their advertorials were identified as advertisement features in future - the advertisers were also advised to seek CAP Copy Advice before advertising again. See http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46700.htm (relating to weight loss), http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46733.htm (relating to orthotic care) and http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46734.htm (relating to hormone magnotherapy treatment) for the ASA adjudications.

Technology

European Union's Ombudsman Report Criticises Commission for Intel Investigation Practices

The European Union's Ombudsman has issued a report on the Commission's investigation into Intel's operations and its subsequent findings that Intel had abused its market position and imposition of a fine of €1.06 billion - the report is apparently critical of the Commission's failure to record "potentially exculpatory" evidence from a witness as part of its investigation. The report apparently says that in doing so the Commission committed "maladministration" however, the report does not change the Commission's decision. Neither the Commission's decision nor the Ombudsman's report have been made public (although the Ombudsman's report was reviewed and commented on by the Wall Street Journal). Intel had already launched an appeal against the findings (and see the Need to Know of 20 July 2009 for details).

ICANN Working Group Report on Fast-Flux Hosting

The ICANN Working Group has followed up its earlier interim report on "fast-flux hosting" with its final report. Fast-flux hosting refers to several techniques which involve the rapid modification of IP addresses or name servers - ICANN noted that while this process does have legitimate uses, it is widely known as a tactic which cyber criminals use as part of their phishing and pharming activities. The Working Group did not make any recommendations for new consensus policy or suggest changes to existing policy but instead put forward a number of suggestions for consideration, including highlighting which solutions or recommendations could be addressed by policy development, best practices and/or industry solutions, considering whether registration abuse policy provisions could address fast flux by empowering registrars to take down or suspend a domain name involved in malicious or illegal fast flux and exploring the development of a Fast Flux Data Reporting System. The report will now be reviewed and discussed by the GNSO Council, which will decide on the appropriate course of action. (*ICANN Press Release, 7 August 2009 - see <http://www.icann.org/en/announcements/announcement-07aug09-en.htm> for details*).

Consultations & Reports

Ofcom Consultation - Providing Spectrum Information Implementing the Environmental Information Regulations, 2004 - http://www.ofcom.org.uk/consult/condocs/providing_spectrum_information/main.pdf (outlines Ofcom's proposals for the provision of information relating to the radio spectrum and discusses issues surrounding data disclosure in order to comply with the Environmental Information Regulations 2004 requirements to progressively make environmental information available to the public by electronic means)

Ofcom Consultation - Consultation on the Way Forward for the Future Use of the Band 872 - 876 MHz Paired with 917 - 921 MHz - http://www.ofcom.org.uk/consult/condocs/872_876_mhz/872_condoc.pdf (details Ofcom's consultation on proposals to authorise use of the 872/917 MHz bands - either a full licensing approach, under which a single or limited number of licences are awarded or a light regulatory approach, in which individual transmitters are authorised without limitation on their numbers)

Ofcom Television Broadcast Licensing Update - July 2009 - http://www.ofcom.org.uk/tv/ifi/tvlicensing/tvupdates/monthly/200907?bcsi_scan_73C656E2E20A2D6B=N5y4+PaHLgRI2C_zCOBvG1UkAAAClvbgE (details about the television licences which have been granted, ceased to be licensed, transferred and had their service name changed in July 2009)

Ofcom Television Access Services: Second Quarter Report for 2009 - http://www.ofcom.org.uk/tv/ifi/guidance/tv_access_serv/tvaccessrep/q209/?bcsi_scan_73C656E2E20A2D6B=0 (Ofcom's second quarterly report for 2009 on the provision of access services (subtitling, signing and audio description) by broadcasters under the Code on Television Access Services during the first six months of 2009)