

This is our cumulative summary of some of the key legal developments across a range of sectors for the weeks of 24 August and 1 September 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

It's Not a U-Turn, It's a Change in Our Thinking - Government Statement on P2P Legislation

It's only five pages long but it's significant none the less. The Government has published a Statement about what can only be described as a change of direction (or in their words, a change in the way their thinking on the processes to support their objectives has developed) to deal with illegal P2P file sharing. In a recently published consultation on dealing with file sharing (and see the Need to Know of 22 June 2009 for details), the Government said it was considering a mechanism whereby Ofcom would send notifications to subscribers alleged by rights holders to be infringing copyright and monitor the number of notifications each subscriber receives - ISPs would then make this information available on receipt of a court order. The Statement however outlines proposals for the inclusion of the power to suspend a subscriber's account as a last resort, following what the Government described as "strong arguments" from certain stakeholders that the proposed technical measures were insufficient to deal with the problem. The Statement does acknowledge the seriousness of the proposal and notes that a thorough examination will be required in order to ensure that such a measure is fully compliant with both UK and EU legislation - see <http://www.berr.gov.uk/files/file52658.pdf> for details. On this issue, the French Constitutional Court ruled in June that similar proposals (the Hadopi legislation) were unconstitutional as they violated citizens' right to free speech and the presumption of innocence. The court also said the authority which would be established under the legislation to apply with the proposed three strike mechanism (la Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet), failed to possess the requisite legal status to order any disconnections. The law is being reconsidered by the French Parliament and a final vote is expected shortly. (Out of interest, look at the Entertainment Law Review article published just after the BERR consultation on file sharing which illustrates just how things have changed - see " BERR Consultation on legislative options to address illicit P2P file sharing" (2009) Ent LR 20(1), 30 - the article is available via Westlaw).

PhonepayPlus Announce Arrangements to Deal With Non Payment of Fines

PhonepayPlus has announced that it has been experiencing a sharp increase in the number of companies failing to pay fines for breaching its Code as a result of companies' insolvency - particularly in fixed-line services, including 070 cases. It said of 15 recent incidents of non-payment, 11 (representing 97% of the total value of the fines) were caused by insolvency - seven by the liquidation of two networks and four by the liquidation of individual service providers. As a result PhonepayPlus has said it will use existing powers to target certain types of organisation that have a profile of susceptibility to non-payment, by using directions to withhold revenue in Standard Procedure cases which meet specified criteria. With immediate effect it will direct network operators to withhold specified sums payable by them to a service provider using powers available to it under paragraphs 8.5f and 2.5.2d of the Code of Practice at the start of a Standard Procedure investigation and, where appropriate, following an adjudication. (*PhonepayPlus Notice to Industry, 25 August 2009* - see <http://www.phonepayplus.org.uk/output/news/RECOVERY-OF-FINES-AND-CHARGES.aspx> for details).

Validity of Video Recordings Act 1984 in UK Courts

The Trading Standards Institute has announced that the DCMS has advised the DPP that the Video Recordings Act 1984 is no longer enforceable in UK courts as the Government failed to inform the European Commission at the appropriate time of the existence of the legislation (the Act and the Regulations were technical regulations which should have been notified under Technical Standards Directive 83/189/EEC). As a result of the failure to inform, the offences under the Act are unenforceable against individuals. The Government advised the DPP that until the situation is rectified, no new prosecutions should be brought and any existing prosecutions should be discontinued. The Act requires any commercial video recording to be classified by the UK Home Office and the DCMS acknowledged concerns that in this interim period in which new legislation is being prepared, the UK video market could be "flooded" with unclassified DVDs.

Commission Publishes Responses to Consultation on Online Retailing

The European Commission has published the various contributions submitted by interested parties on the Online Commerce Roundtable Report on opportunities and barriers to online retailing. The Commission had invited interested parties to submit comments on this, with a particular focus on licensing solutions, which would foster legal offerings of

music online in Europe - see http://ec.europa.eu/competition/consultations/2009_online_commerce/index.html for access to the individual responses.

Commission Recommendation on Media Literacy in the Digital Environment

The Commission has also published a Recommendation on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society. The Recommendation states that "media literacy is a matter of inclusion and citizenship in today's information society" which is a "fundamental skill not only for young people but also for adults and elderly people" but it also recognises the issues of copyright, privacy and the protection of personal data. The Recommendation lists a number of actions for Member States to take relating to the development of initiatives with the relevant authorities in charge of audiovisual communication and data protection to develop and implement self-regulatory codes of conduct on improving media literacy, particularly in relation to the formation, distribution and management of creative content and also the use of advertising and product placement. The Recommendation also calls on Member States to open debate about the inclusion of media literacy in the compulsory education curriculum and enhance awareness through campaigns and training. The Commission said that it would be monitoring efforts made on media literacy, as specified in the AVMS Directive. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:227:0009:0012:EN:PDF> for details. *(Section 11 of the Communications Act 2003 requires Ofcom to promote media literacy in the UK. Ofcom does this partly by ensuring it is aware of consumer trends in the use of communication devices and understanding any potential media literacy-related issues arising from these - see the Consultations & Reports section, below for details of a recent study commissioned by Ofcom, which looked at the issue of children and young people and access to online content)*

Commission Invites Views on Europeana

The Commission has published a Consultation on proposals for the future development of Europeana (Europe's multi-lingual digital library, which was established in November 2008). The Commission is seeking views on the future direction of the library, its content and the means by which it will continue to be funded and governed - of interest will be the responses on the contentious issue of orphan works as there are currently 4.6 million digital books and other resources available on Europeana, most of which are in the public domain, and no out-of-print or orphan works are included. The Commission has noted that to date, the contribution by the different Member States to Europeana is "unbalanced", in terms of both number of objects and they types of material - some Member States (Poland, Hungary) have contributed mainly books whereas others (Finland, Luxembourg, Estonia) have concentrated their input around newspapers and magazines or (in the case of Romania) images from museums. The selection of content to be digitised and brought into Europeana is determined by the Member States and their cultural institutions, in line with their cultural and/or information policies but the Commission has said that to meet the expectations of users as to what they will find in Europeana, a particular effort may be needed in relation to specific categories of material. The Commission has a set policy target of having 10 million objects accessible through the site in 2010. See http://ec.europa.eu/information_society/activities/digital_libraries/doc/communications/next_steps_2009/questions_en.pdf for details.

Dutch Court Orders Site to Remove Infringing Material of All Commercially Produced Content

The Utrecht District Court has ruled in favour of Stichting Brein, a Dutch anti-piracy organisation, which had accused Pirate Bay rival Mininova of inciting users to violate copyrights and profiting from infringement by running ads on the site. The Utrecht Court found that Mininova was inciting copyright infringement in others and was profiting from that behaviour through ad sales - according to the Court, Mininova must assume that all commercially produced content was copyrighted unless it knew otherwise, and that the site must adopt proactive filtering of such content. It said, "it's generally known that commercially made films, games, music and TV series are copyrighted and that these works are only copyright-free in exceptional cases". Mininova has three months to remove the material or face a substantial fine of up to €5 million. According to reports, the site was already in the process of removing infringing material at the time of the ruling, having started trialling a content recognition system earlier in the year, which would result in the removal of any torrents that were flagged as infringing copyright laws. Mininova has said it is considering an appeal. At the time of writing, the ruling was only available in Dutch.

Enforceability of Contract Terms for Determining Share Valuation in Event of Insolvency

A dispute relating to the basis upon which BBC Worldwide (BBCW) was entitled to acquire Media's shares in a company (2e) owned by itself and Media as a result of the insolvency of Media and/or the Group has been heard by the High Court. The parties had signed a master licence agreement and a joint venture agreement, which contained linked clauses. The joint venture agreement set out the terms upon which BBCW and Media held their shares in 2e and set out detailed arrangements for dealing with an insolvency event and provisions for exercise of the right and determination of the price to be paid in the event that the parties were unable to agree a price. The master licence agreement terminated after the signatories entered administration and the first and third respondents entered into a new temporary licensing agreement. At issue before the court was whether the new agreement extinguished the terms of the original agreement. The court considered the drafting and the law relating to the ascertainment of fair value and the deprivation principle at

length and ruled that the clauses had been extinguished after the parties entered into the new agreement after the automatic termination of the master licence agreement. Although the clauses were found to be void the court noted that the valuation process would still continue. (*Butters & Ors v BBC Worldwide Ltd & Ors* [2009] EWHC 1954 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/1954.html> for the judgment (and note yet another warning of the court that "the situation has come about by a drafting problem" as a result of the parties having failed to consider unintended consequences)).

Passing Off and Misuse of Confidential Database Information by Rival Company

The claimants, who carried on the business of organising conferences, claimed damages against the defendants for misuse of confidential information, breach of database rights and passing off and sought injunctions against them. They claimed that the first defendant, a former employee, had incorporated the second defendant company and provided this company with a lift by transferring to it large amounts of their customer database, details of its sales records and transferred to his name a relevant domain name. The court noted that it was "becoming increasingly common with the computerisation of information for employees who wish to set up their own competing business to help themselves to their employers' confidential information. Some of this material is not necessarily confidential as such and is capable of being found with hard work. However the employees do not wish to go through the hard work and in effect what they do is they seek to take advantage of their employers' time effort and expense in putting together valuable material which provides a tool to an emerging business. Instead of doing their own work using their own brains they simply hijack the employers gathered material. This gives them what is called "a springboard" for their business to be up and running almost immediately at the expense of the former employer". The court found that on the evidence, the claimants had established the entirety of their claims against the defendants - the defendants had misused confidential information and breached the claimants' database rights and had passed off the business as that of the companies. The court granted permanent injunction relief due to the proximity of the conferences in respect of the clearly established passing off and confidential information rights having been established. (*First Conferences Services Ltd & Anor v Bracchi & Ord* [2009] EWHC 2176 (Ch) - see <http://www.bailii.org/ew/cases/EWHC/Ch/2009/2176.html> for the judgment).

Broadcasting

Broadcast Bulletin - Latest Issue

The latest issue of Ofcom's Broadcast Bulletin has been published, with details of adjudications on breaches of Rules 1.14 (no most offensive language pre-watershed), 1.21 (18-rated films must not be broadcast pre-watershed), 2.3 (offensive material must be justified by the context), 2.11 (competitions should be conducted fairly), 4.6 (religious programmes must not exploit audience susceptibilities), 9.4 (sponsors must not influence content of programme), 9.5 (no promotional reference to sponsor in programme), 9.6 (sponsorship must be clearly identified as such), 9.7 (relationship between sponsor and sponsored channel or programme must be transparent), 9.9 (credits must be short branding statements), 9.10 (credits must be cleared for broadcast in the same way as advertisements) 10.3 (products and services must not be promoted in programmes) and 10.4 (no undue prominence to a product in a programme) of the Broadcasting Code; Ofcom also upheld part of complaint about unfair treatment and unwarranted infringement of privacy and a complaint about unwarranted infringement of privacy. Section 1 (advertisements) and Rule 4.6 (central copy clearance) of Section 1 of the BCAP Radio Code were also found to have been breached. See http://www.ofcom.org.uk/tv/obb/prog_cb/obb140/Issue140.pdf for details.

Commission Authorises State Aid for France Télévisions and Opens Funding Investigation

The European Commission has authorised the payment of €450 million of State Aid to France Télévision in 2009 as it has found that it complies with EC Treaty State Aid Rules and, in particular, with the Commission Communication on State Aid for the funding of public service broadcasters. At the same time however the Commission opened a formal investigation to examine whether the funding mechanism for France Télévisions for 2010 and beyond complies with these rules. France Télévision is the largest French broadcasting group - the French authorities informed the Commission in May this year that they intended to set up a multi-annual funding mechanism for France Télévisions consisting of funding from the public service broadcasting contribution (previously the television licence) and an annual subsidy, which together would exceed €2 billion by 2012. The Commission has said it has concerns about concerned about the use made of the taxes introduced by the reform and possible overcompensation for public service costs up to 2011-2012. (*EC Press Release IP/09/1264, 1 September 2009*).

Corporate

HMRC & Companies House Adopt Common Approach to Online Filing

HMRC and Companies House have announced that they will adopt a common approach to filing company accounts and tax returns online in order to reduce the administrative burdens on companies. This approach was recommended by Lord Carter in his Review of HMRC's Online Services. See <http://www.companieshouse.gov.uk/about/pdf/hmrcCommonFiling1.pdf> for details.

Article - Final Steps for Implementing the Companies Act 2006

The latest Company Secretary's Review contains a brief article which sets out some of the practical steps that those who are responsible for administering private companies might want to consider before the final sections of the Companies Act 2006 come into force on 1 October 2009. It considers issues such as public access to data and the new register rules, privacy rights, incorporating new companies, administrative dealings with Companies House and various constitutional issues and shareholder rights concerns. (*"CA 2006: Final Implementation"* (2009) 33 CSR 9, 65 - this article is available via LexisNexis).

Article - Encouraging Company Rescues

In June, the Insolvency Service published a consultation (see http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf for details) on the proposals outlined in the Budget to encourage company rescues. The latest Company Secretary's Review has an article looking at the two main proposals in the consultation - the administration process, which was substantially widened in scope pursuant to the Enterprise Act 2002 and the company voluntary arrangement (CVA), both available under the Insolvency Act 1986. (*"Encouraging Company Rescue"* (2009) 33 CSR 8,62 - this article is available via LexisNexis).

Gambling

Gambling Commission's Annual Report for 2008/09

The Gambling Commission has published its Annual Report for 1 April 2008 to 31 March 2009. The Report provides a summary of the Commission's activities and regulatory focus as well as some useful industry statistics - according to the Report, a total of 520 operating licences were issued during the year (mostly small operator licences or converted lottery licences) of which the majority went to betting operators, gaming machine suppliers and society lotteries. In addition 4,271 personal licences were issued of which 3,116 were personal functional licences relating to the casino industry. The Commission's criminal enforcement work was concentrated largely on illegal activity with the unlawful supply of machines being a priority and some 98 licences were revoked between 1 April 2008 and 31 March 2009, including 67 operating licences, covering 52 different licence holders, and two personal licences revoked due to the non-payment of fees. Of the remainder, the majority related to theft or dishonesty by section 19 certificate holders or personal licence holders. See http://www.gamblingcommission.gov.uk/pdf/Annual_Report_2008_2009.pdf for details.

Revised French Online Gambling Law Reviewed by Commission

According to reports, the European Commission has commented on the French Government's response to its detailed opinion on the draft legislation to proceed with the partial liberalisation of its online gaming market, following amendments to the draft gaming bill by the Finance Committee of the National Assembly. The amendments were made in response to a Reasoned Opinion on the text of the draft bill by the Commission, which had questioned a number of aspects of the proposed law. The Commission will still have to assess the final version of the legislation once it has been adopted by the French Parliament - the French Government has said that it wants the final version adopted by the end of the year.

ASA Find National Lottery Email Ad to Breach Social Responsibility Requirements

The Advertising Standards Authority (ASA) has adjudicated on a complaint against a National Lottery email advertisement, which had been sent to customers who had online accounts - the complaint alleged that the advertisement encouraged irresponsible gambling and suggested that gambling was indispensable. ASA found that the ad breached the social responsibility provisions in CAP Code 2.2 (which states that all marketing communications should be prepared with a sense of responsibility to consumers and to society). While one complaint was not upheld (the ASA said the recipients were unlikely to infer from the ad that gambling was indispensable), the social responsibility complaint was upheld as the ad was found to encourage more playing of the lottery in order to win, thereby encouraging excessive gambling. The ASA said that the ad must not appear in that form again - see http://www.asa.org.uk/asa/adjudications/Public/TF_ADJ_46880.htm for details.

Litigation

50th Update to the Civil Procedure Rules

The 50th Update to the Civil Procedure Rules takes effect from 1 October 2009. The update introduces changes in a large number of areas including Part 35 and PD35 on Experts and Protocol for the Instruction of Experts to give Evidence in Civil Claims, where amendments are made to clarify the definition of an expert and provide guidance to reduce any inconsistency in the appointment of single joint experts and revise the expert's statement of truth and ensure that the

questions posed to experts are proportionate and appropriate; Part 44 and PD supplementing Parts 43 to 48, where measures are introduced requiring parties to notify other parties of the existence of, and information about an After the Event insurance premium; Part 49 and PD49A, B Companies Act 2006, where minor amendments are made consequential on the implementation of the remaining sections of the Companies Act 2006; Part 63 and PD63 Intellectual Property Claims, where amendments are made to update references to legislation and reflect substantive changes including product description and process description and the allocation of claims on specific issues such as plant varieties between the Patent Court and the patents county court are set out and Part 63 of the CPR has been renamed as "Intellectual Property Claims" to reflect these changes; consequential amendments are also made to provide for the creation of the Supreme Court. See http://www.justice.gov.uk/civil/procrules_fin/pdf/preview/cpr_update_50_si_20092092.pdf for the 2009 Order.

New Practice Direction - Defamation Proceedings Costs Management Scheme

A new Practice Direction 51D (Defamation Proceedings Costs Management Scheme), which supplements the Civil Procedure Rules 1998, SI 1998/3132 Parts 29 and 44 comes into force on 1 October 2009. It provides for the Defamation Proceedings Costs Management Scheme to operate from 1 October 2009 to 30 September 2010 in the Royal Court of Justice and the District Registry at Manchester and apply to proceedings in which the claim was started on or after 1 October 2009. The scheme "provides for costs management based on the submission of detailed estimates of future base costs". The stated objective of the scheme is to "manage the litigation so that the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on an equal footing". See http://www.justice.gov.uk/civil/procrules_fin/pdf/preview/cpr_update_50_PD51D_signing_version.pdf for details.

Music

PRS and YouTube Agree Terms

PRS for Music and YouTube have announced a new licensing agreement that covers music contained in videos streamed via the online video platform, which means that premium music videos will be reinstated to YouTube in the UK. The new agreement is backdated to January 2009 and will continue until June 2012. It applies to not only official music videos, but also user-generated content and music played in the background of television shows uploaded to the site. According to reports, the terms of the deal provide for a one-off lump sum payment, rather than a rate per play. (*PRS Press Release, 3 September 2009; The Times, 3 September 2009*).

Technology

Guidelines Agreed for Mobile Phone Payment Transactions

The Home Office has announced that new technology to improve the security of transactions carried out by mobile phones will be trialled in the UK. According to the report, the Government, the mobile phone industry and the banking industry have agreed a set of guidelines, which will protect customers undertaking transactions by means of a contactless payment method. The guidelines include arrangements to ensure that devices which are reported as missing are disabled immediately and require transactions above a specified amount (currently set at £10) to receive verification. (*Home Office Press Release, 28 August 2009 - note that the EU Commissioner for Telecoms and Media in a recent policy speech highlighted the importance of "preparing a safe and consumer friendly European space for mobile payments" - see EC Press Release, Speech/09/336, 9 July 2009*).

Consultations & Reports

Ofcom Consumer Guidance - Additional Charges - <http://www.ofcom.org.uk/advice/guides/addcharges.pdf> (brief guidance for consumers on potential additional charges which may be imposed when changing home phone, broadband or pay TV supplier)

Ofcom Consultation - 2009 Review of Television Access Services - http://www.ofcom.org.uk/consult/condocs/access_services/consultation.pdf (reviews the current arrangements provided in accordance with the Communications Act 2003 requirements on the provision of television access services (subtitling, signing and audio description) in order to determine whether changes to current quotas are required)

Ipsos Mori Report for Ofcom - Children's and Young People's Access to Online Content on Mobile Devices, Games Consoles and Portable Media Players - http://www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/online_access.pdf (report commissioned by Ofcom on the experiences of children and young people accessing online content and issues relating to their experiences)